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Rt-1923-II-58 - The Supreme Court of Norway

Authority	Supreme Court of Norway
Date	1923-09-25
Published	Rt-1923-II-58
Keywords	Collision between vessels (the Irma-Mignon-case)
Summary	Shipowner's liability for collision between two Norwegian vessels in foreign territorial waters must be judged according to Norwegian law - not that of the collision site. - Shipowner deemed liable for errors made by a foreign compulsory pilot. - Valuation of the wrecked vessel will be based on Norwegian prices, taking into consideration that the vessel was in England at the time of the accident.
Proceedings	L.nr. 19/2 s.
Parties	A/S Cornelius Røe & Co. (attorney Ferdinand Schjelderup) vs Det Bergenske Damskipsselskab (attorney Kristen Johanssen) and Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskap (attorney Hummel Johansen) vs Det Bergenske Damskibsselskab.
Author	The Justices Einar Hanssen, Bade, Lie, Motzfeldt, Hambro, City Court Judge Gjessing, Chief Justice Scheel

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Extraordinary justice Einar Hanssen: With regards to the subject of this matter and the circumstances in more detail, I refer to Bergen maritime court's judgment dated 19 November 1920. In this judgment, the following was decreed: "Det Bergenske Damskibsselskap should, in relation to Bergen Sjøforsikringsselskap A/S, A/S Wikborgs Assuranceselskap and A/S Cornelius Røe & Co. be free of charge in this matter. Litigation costs are set aside."

The maritime court's judgment has been appealed to the Supreme Court by A/S Cornelius Røe & Co., by writ dated 19 January 1921 and by Bergen Sjøforsikringsselskap A/S and A/S Wikborg Assuranceselskap by writ dated 26 February 1921.

A/S Cornelius Røe & Co. has hereby submitted such statement claim: "That the maritime court's judgment be set aside; that Det Bergenske Dampskibsselskab is ordered to pay A/S Cornelius Røe & Co. compensation a) for the loss of vessel of NOK 90 620 b) for lost freight of NOK 16 000 – and c) for loss of provisions and supplies of NOK 4 646.70, alternatively for items b) and c) compensation as assessed by the court, at the defendants' expense and such that the appellant as regards item b) is not bound by the above stated estimated compensation

amount of NOK 16 000, d) for the crew's personal effects NOK 3 268.25 and statutory interest on the awarded amounts from 15 July 1916 until payment is made – and that Det Bergenske Dampskibsselskab is ordered to compensate A/S Cornelius Røe & Co.'s costs of litigation for the maritime court and the Supreme Court."

Bergens Sjøforsikringsaktieselskab A/S and A/S Wikborgs Assuranceselskap have jointly submitted the following statement of claim: "That the maritime court judgment is set aside, that the defendant is ordered to pay to: 1. Bergen Sjøforsikringsaktieselskab NOK 51 938.11 with 5 per cent interest of NOK 20 000 from 30 September 1916, of NOK 31 402.26 from 23 December 1916 and NOK 535.86 from 28 September 1916 to 21 June 1921 and with 6 per cent interest from that day and until payment is made, and litigation costs for the maritime court and the Supreme Court. 2. A/S Wikborgs Assuranceselskap NOK 15 000 with 5 per cent interest on the amount from 30 September 1916 to 21 June 1921, and by 6 per cent interest from that day and until payment is made, as well as the litigation costs for the maritime court and the Supreme Court."

The defendant, Det Bergenske Damskipsselskab, has submitted the following statement of claim: "Principally: The maritime court's judgment is upheld and the defendant is awarded litigation costs for the Supreme Court from the claimants in solidum. Alternatively: That the defendant is acquitted against payment of: a) the insurance amount of the cargo with statutory interest, b) the crew's personal effects with statutory interest, c) compensation as assessed by the court for damage to the vessel, including provisions and supplies and freight with statutory interest. As compensation for the vessel is believed to reach the level of the insurance amount for comprehensive insurance, no objection is made to item c being divided into the comprehensive insurance amount, for which judgment in kind may be made, and in discretionary compensation in so far and as long as the vessel's value is believed to exceed the insurance amount.

A number of new documents have been submitted before the Supreme Court, which I shall return to later to the extent that they in my opinion may be of relevance to deciding the matter.

The dispute points are in some respects somewhat reduced, as the appellant has not before this court upheld its submission that "Irma's" shipowners were responsible for the pilot's error also under English law, while on the other hand, Det Bergenske Damskibsselskab has not upheld its objection to "Mignon" being considered a total loss.

I have come to a different conclusion than the maritime court. As regards the question of liability for damages itself, it is clear that the collision in this matter was solely caused by errors on "Irma's" side, and that it was "Irma's" compulsory pilot E. C. Burn who was directly responsible for this error.

However, it is disputed whether also "Irma's" shipmaster and lookout were co-responsible for the error. Moreover, it is disputed whether the issue of "Irma's" shipowners' liability for the damage caused by the collision shall be judged under English law or under Norwegian law. And finally, it is disputed whether the shipowners are liable under Norwegian law for errors committed by the compulsory pilot.

I find it reasonable to first deal with the issue of whether English or Norwegian law is applicable to the matter. The Norwegian legislation contains no provision on which country's law shall be applied in determining liability for damage caused by collision. Nor is there, as far as I am aware, any decision by the Supreme Court on this question, in respect of a case like the present.

In the Supreme Court judgment reproduced in RT-1906-165 it was indeed assumed that the question of whether the owner of a Norwegian vessel was liable for damage caused by a collision in the Kiel Canal which was caused by an error of the vessel's German compulsory pilot, should be adjudicated under German law. But this opinion was founded by the majority on specific circumstances of the then present case, and in any case that case stood apart from the current matter, in that the damaged vessel was not Norwegian.

The appellant argues that art. 12, subsection 2, no. 2 of the International Convention of 23 September 1910 on Collisions, also ratified by Norway, directly determines that Norwegian law must be applied, as it specifies that a court in a matter of collision shall apply the domestic substantive maritime provisions when all interested parties come from the same State as the court. Even apart from the fact that a convention under Norwegian law does nzot have direct force of law, I believe, however, that the view put forward by the appellant is incorrect. The term "national law" used in the Convention's art. 12 is in itself neutral, as the applicable international private law rules in a country are as much a part of national legislation as the country's substantive civil law rules. On the other hand the fact that the national laws are set against the Convention in this situation could certainly indicate that it refers to the national substantive maritime law rules. However, in my opinion one cannot attach any decisive importance to this comparison. After all, article 12, subsection 2, appears to be a limitation of the scope of the Convention, and it then seems to be outside the natural purpose of this provision if art. 12, subsection 2 no. 2 were to oblige a state to let its courts apply its own substantive maritime law rules on the particular situation covered by the provision. And on my part, I am utterly unable to understand what sensible reason one might have in this convention, which in general does not set out international private law rules (in the prevailing sense of the term), to expressly prohibit a state from allowing its courts to apply foreign substantive maritime law in a matter which must be assumed not to affect any other state's interest. I therefore believe that the provision must naturally be understood so that it does not impose any restrictions on the Contracting States with regard to the question of which country's law should be applied in the situation that the provision has exempted from the scope of the Convention.

In deciding which state's rules shall apply, one must then, as far as I understand, essentially resort to building on general legal principles and the nature of the matter in question. What principles one should set for the solution of international private law issues in general has been the subject of much difference of opinion. For my part, however, I find it natural to start with the view that a matter should preferably be judged by the law of the country to which it has its strongest connection, or to which it belongs most closely. It is of course not possible to generally solve all international private law issues from this general consideration, but it nonetheless seems to me, that it is sufficient to provide a solution for the present case. After all, the issue concerns a Norwegian shipowner's liability to another Norwegian shipowner for damages caused by the first owner's vessel colliding with the other owner's vessel. And I think these circumstances must be said to be most strongly tied to Norway, irrespective of the collision taking place in another state's territorial waters. In my opinion, it is natural to regard the Norwegian Maritime Code such that its provisions for shipowners and also for shipowners' liability are primarily provided with Norwegian vessels in mind and for that matter, it must be considered in accordance with the intention behind the Code that these rules as far as possible apply to the adjudication of matters relating to Norwegian vessels. Furthermore, these are generally the rules which Norwegian shipowners know best and normally comply with. It is surely so that the Maritime Code must be assumed to be based on the presumption that the scope of its provisions are limited by general

international private law rules and that international considerations may lead to a limitation of the provisions' applicability to matters relating to Norwegian vessels. In the present case, where both vessels are Norwegian and likewise all the people whose interests are directly affected by the collision, I, however, do not think one might easily invoke any international consideration against allowing the application of Norwegian law. In support of this view, I believe I may also invoke the abovementioned article 12, subsection 2, no. 2 of the International Convention on Collisions. I namely assume that this provision must at least be given the effect that, based on international considerations there is no objection to a state allowing its courts to apply its domestic law in a case relating to a collision when all the interested parties belong to this state, regardless of where the collision has taken place.

I am aware that the result I have reached, namely that Norwegian law should be applied here, hardly corresponds with our conventional wisdom. As far as I know, those legal authors who have discussed the issue at all, have stated the opinion that a shipowner's liability in respect of a collision shall be assessed according to the law at the site of the collision, without exception being made for the situation that both vessels are domiciled in one and the same foreign state. This doctrine has, however, also been contradicted in Norway, and in foreign literature and case law there are differing opinions on the issue. For my part, I have not been able to find that the reasons generally cited for allowing the collision site's law to apply are decisive in a case like the present.

I shall in this regard point out that what the dispute in the present case is about is solely the issue of shipowner's liability. Regarding the question of under which country's law the issue of whether fault lies with one or the other vessel should be determined, there is no dispute. Which is reasonably associated with the fact that in the present case it is indifferent whether the matter is judged under Norwegian or English law.

As already mentioned, there is also disagreement between the parties about the contents of the applicable Norwegian law for this matter, insofar as it concerns the question of a shipowner's liability for errors committed by a compulsory pilot. However, in my view it can be read from, the Maritime Code, section 8, at the end of the first subsection, that a shipowner is also liable for the compulsory pilot's faults. I suppose that although the compulsory pilot is not taken on voluntarily by the shipowner (or the shipmaster), but obliged by law, it must be said that the work he performs on board is a work in the vessel's interest and in its service. As far as I know, it has also always been considered applicable law with us that the shipowner is responsible for the errors of the compulsory pilot. And this point of view has in fact likewise been taken as a basis for the Norwegian side during the negotiations about the International Convention on Collisions.

As it is clear, as mentioned, that the collision was due to errors from "Irma's" compulsory pilot either alone or in combination with mistakes made by the shipmaster and lookout, it is in accordance with the opinion that I have stated above that "Irma's" shipowners are obliged to pay compensation for the damages caused by the collision without needing to answer the question of whether any blame can be placed on the shipmaster or the lookout.

With regards to the size of the damage suffered, however, there is some dispute as far as the relationship between "Irma's" shipowners and "Mignon's" shipowners are concerned. Of the particular amounts, as set out in A/S Cornelius Røe & Co.'s statement of claim, it is only the compensation mentioned under (d) for the crews effects which Det Bergenske Damskipsselskap has not objected to. Conversely, the company has denied the accuracy of the other amounts and

claimed that the compensation in those cases should be determined by judicial assessment. As regards the first item in the claim, it was obtained by A/S Cornelius Røe & Co. entering the vessel's value at a price of NOK 220.00 per tonne with NOK 125,620.00 and deducting the received insurance sum, totalling NOK 35,000.00. In support of this calculation, A/S Cornelius Røe & Co has before the Supreme Court submitted three statements from a shipowner and two ship brokers regarding vessel prices in the summer of 1916 and a letter from the War Insurance that, in July 1916, according to its tariffs, it could have taken over up to NOK 61,000 on the bark "Mignon". For my part, I cannot find that these statements sufficiently demonstrate that the vessel was as valuable as A/S Cornelius Røe & Co. have calculated. Nor can I find that sufficient justification has been obtained for the compensation amounts mentioned under b) and c). The NOK 16,000 listed as lost freight has, as far as I understand, been calculated by making a totally random deduction from the gross freight of NOK 21,125.15. And there is no evidence of the correctness of the amount listed for provisions and supplies.

Therefore, the determination of the compensation must, in my opinion, in so far as these three items are concerned, be referred to judicial assessment, under which both the vessel itself, the freight and the provisions and supplies will be taken into consideration. As there has been some procedure regarding the question of the principles for valuing the vessel, I find that I should comment that the valuation must be made while taking into account the prices that applied in Norway, however, also considering the fact that the vessel was in Tyne, insofar as this may have a bearing on the value. As far as the freight is concerned, as far as I understand, there is an agreement between the parties that what may be required compensated is the gross freight less the likely costs of the voyage and a discretionary amount corresponding to the risk that the vessel would not arrive at its destination and as a consequence not earn the freight.

As for the interest claim submitted by A/S Cornelius Red & Co., I find that there is no opportunity to apply interest from an earlier date than the institution of legal proceedings. On the other hand, I think there is reason, in accordance with a request made during the oral arguments, to raise the interest rate to 6 per cent from 16 July 1921 in accordance with the law of the same day.

As stated in the claim from the Bergenske Dampskibsselskap, there has been no objection to it, in the event it is found to be liable for damages, is required to pay to the insurance companies those sums that these have paid. And, as far as I understand, the company has made no real objections to the payment of NOK 535.86 which Bergenske Sjøforsikringsselskap has paid for legal assistance in England. The claim made by Bergenske Sjøforsikringsselskap and Wikborgs Assuranceselskap will therefore be accepted.

As for the interest claim, there is also as regards the insurance companies presumed to be no reason to apply interest from an earlier date than the institution of legal proceedings, just as the interest rate cannot be set higher than 4 per cent for the time up to 16 July 1921. From this day, on the other hand, it is deemed reasonable to raise the interest rate in accordance with the companies' claims.

I find that Bergenske Damskipsselskap should be charged the costs for the legal proceedings for both courts. For the maritime court, the cost amount will be considered as one for all three Claimants, while costs for the Supreme Court case must be separately attributed to A/S Cornelius Røe & Co. on the one hand and the two insurance companies on the other.

Conclusion:

Det Bergenske Damskibsselskap A/S should pay: 1) to Bergens Sjøforsikringsselskab A/S NOK 51,938.11, 2) to A/S Wikborgs Assuranceselskab NOK 15,000, 3) to A/S Cornelius Røe & Co. NOK 3,268.25 and the amount by which compensation for the shipowner's additional suffered loss from "Irma's" collision with "Mignon" on July 5, 1916, as determined by a maritime judicial assessment made at the expense of Det Bergenske Dampskibsselskap, may exceed NOK 35,000 – all with annual interest 4 of a hundred from 31 May 1917 to 16 July 1921 and 6 of a hundred from that day until payment is made.

Det Bergenske Damskibsselskab will pay in litigation costs incurred before the maritime court to A/S Cornelius Røe & Co., Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskab NOK 1,500, and litigation costs incurred before the Supreme Court to A/S Cornelius Røe & Co. NOK 2,500 and to Bergens Sjøfartsforsikringsselskab A/S and A/S Wikborgs Assuranceselskab NOK 800.

Extraordinary assessor Bade: I agree in the essentials and in the result with the first voting justice.

Assessor Lie and extraordinary assessor Motzfeldt: Likewise.

Extraordinary assessor, previously assessor Hambro: Likewise. I find that the Supreme Court ruling in Rt 1906-165 et seq., mentioned by the first-voting justice, cannot be assumed to be decisive for a case such as the present, where both the injurious and the injured vessel are Norwegian and the case is settled by a Norwegian court. I agree with him that the rules of Norwegian law should apply in such cases and that those rules as laid out by the first-voting justice, lead to the result adopted by him. How the question will be resolved by a Norwegian court, if both vessels are of the same foreign nationality and the collision takes place in a third country's territorial waters, is beyond the decision made in the present case.

Extraordinary assessor city court judge Gjessing: Agree in the essentials and in the result with the first voting justice.

Chief justice Scheel: Likewise.

From the Maritime Court's judgment:
The night between 4 and 5 July 1916 – a little over midnight – on the river Tyne in England there was a collision between the vessels "Irma" and "Mignon".

"Irma" had from Newcastle an English pilot on board, namely Edward C. Burn. - - -

Finally, it should be noted with regard to the pilot that by the provisions laid down on 1 October 1915, by brigadier general A. J. Kelly, according to the law of the state's defense (passed in connection with the war at that time - it is set out, inter alia - after repealing previous provisions of 29 November 1914 - that "an authorized pilot must be taken on board any vessel which loaded or unloaded leaves the port" (Tyne) and that the pilot shall not leave the vessel "until the vessel is outside the docks of the Tyne". This applies, it further says, "to the river Tyne's pilot section no. 1". - - - By this I consider it proven that pilot Burn was aboard the "Irma" in accordance to positive orders from competent English authorities.

I must therefore assume that it was right that the pilot was in command of "Irma". - - -

The pilot is consequently solely to blame for the collision. Thus raising the question: Are the shipowners responsible for the compulsory pilot?

I assume it must be necessary to decide whether English or Norwegian law is to be applied before answering the question, as I cannot take as given, that at time in question the same rules applied in this area in both of the two legal systems and thus the result would in any case be the same. The issue in this case is, after all: there has been a collision between two Norwegian vessels in English territorial waters and the arising dispute has been brought before the Norwegian court, but there is disagreement between the parties as to which country's laws apply to the question of shipowner's liability, which does not have to follow the same rule as for the guilty party's own liability. The question is not resolved in Norwegian law and there is also no known Supreme Court ruling in any similar case. In theory, it is discussed by Platou, who in his Maritime Law, page 29 speaks in favour of lex loci. He says: "If a Norwegian vessel with an English compulsory pilot collides, the Norwegian shipowner should, even if he is sued before a Norwegian court, not be deemed liable for the mistake of the pilot." Platou assumes that the shipowner is liable for the compulsory pilot under Norwegian law, but not pursuant to English law. Further, Møller, in Vessel collisions II page 26 et seq and 61 et seq, and Klæstad in Shipowner's liability page 297 et seq have spoken in favour of lex loci. On the other hand, Jantzen appears in the N. D. S. 1905 page 329 to maintain flag state law.

In accordance with what is the general opinion of theorists, especially the following reasoning seems applicable: It is desirable that the same rules of law apply to the territorial waters of a country as for the country itself, both for almost idealistic reasons such as in the interests of the relevant country's full sovereignty which for national reasons, but also for practical reasons such as for the sake of unity of law and law enforcement within one and the same state area and therefore for the sake of the rule of law. This is among other things recognized for police and customs regulations. But it is hard to understand how it could be defensible to claim another rule when it comes to damage caused by collision. In this case, it may, at least for the assessment of fault for a collision, be necessary to investigate whether any rules for avoiding collision have been complied with and that in such cases the rules must be those of the relevant country must surely be commonly agreed. I therefore come to the conclusion that shipowners' liability in this case must be determined according to English law. - - -

I therefore find that the shipowners can invoke the old English provisions of freedom from liability for a compulsory pilot. - - -

ND-1956 175 - The Supreme Court of Sweden

Authority	The Supreme Court of Sweden
Date	25 April 1956
Published	ND 1956 175
Parties	**The Mälaren insurance company** **1 Johann Carsten Koeser, shipowner** **2 Lübeck Linie Aktiengesellschaft**

While the "M/S Pagensand" was lying alongside a loading port, the second engineer removed the cover from a sounding pipe and then neglected to replace the cover properly. During the voyage, the cargo was damaged by water, which had poured in through the sounding pipe. This omission was regarded as having caused a defect, which involved an inherent unseaworthiness. Koeser, as the shipowner, and Lübeck Linie, as the time charterer and the party chartering out the vessel for the voyage, were obliged to pay compensation for the damage.

The question as to whether there was an obligation to pay was, in accordance with the parties' agreement, adjudicated under Swedish law. German law was considered applicable with regard to the legal limitation of the shipowner's liability. Affirmation of the judgement issued by the Svea Court of Appeal dated 28 July 1954, ND 1954, p. 550 and Stockholm magistrates' court, ND 1953, p. 585.

Koeser and Lübeck Linie applied for a review of the judgement issued by the court of appeal, each claiming that His Royal Majesty, in reversing said judgement, had to affirm the magistrates' court's judgement.

Mälaren requested confirmation of the court of appeal's judgement, though waiving the claim for maritime lien.

The Supreme Court (Messrs. *Ljunggren, Sjöwall, Hagbergh, Digman and Nordström*) issued the following opinion: Mälaren and Lübeck Linie have agreed that the question of whether Lübeck Linie is liable for the damage which occurred, will be decided in accordance with Swedish law and that therefore the provisions of the Act relating to Sweden's joining the bill of lading convention will apply.

Investigation shows that, while the "Pagensand" lay at port in Stockholm during the period from 30 October to 1 November 1951 to load the cargo of paper in question, for which a bill of lading was issued on 31 October, the vessel's second engineer removed the cover to the port sounding pipe and then neglected to replace the cover properly, *that*, from the time the vessel left Stockholm on 1 November until she entered the Baltic Sea on 6 November, water had poured into the open sounding pipe, and that this was not discovered until the 8 November, or the same day on which the vessel put into a port of refuge.

The negligence in respect of sealing the sounding pipe caused a defect, which amounted to the "Pagensand" being inherently unseaworthy, unless it had been likely that the defect would have been remedied before there had been any risk of damage. Since, as the court of appeal has found, the facts presented in the case justify the conclusion that regular sounding through the sounding pipe was not conducted onboard the "Pagensand", it is considered unlikely that the defect would have been rectified before there was any risk of damage.

Since the damage to the paper cargo had, therefore, been caused by inherent unseaworthiness and Lübeck Linie has not substantiated that reasonable care had been taken in respect of the "Pagensand's" seaworthiness at the start of the voyage, Lübeck Linie must, pursuant to applicable statutory provisions and the provisions of the bill of lading, be held liable for the damage.

His Royal Majesty finds that the question as to whether Koeser is liable for the damage should have been decided under German law. However, Koeser has declared his liability to be equal to that of Lübeck Linie, and so, on those grounds alone, he is jointly liable with Lübeck Linie to pay compensation to Mälaren.

With regard to the question as to which country's law should be applied in terms of the legal limitation of the shipowner's liability, the fact, cited by Koeser and Lübeck Linie, that Mälaren's claim is being heard by a Swedish court, does not provide any decisive grounds for applying Swedish legal principles in this respect; the same applies to the fact that, as a result of the agreement between Mälaren and Lübeck Linie, Swedish law was applied as far as the question of whether Lübeck Linie is liable for the damage which occurred. With regard in particular to the fact that the "Pagensand's" port of registry was in Germany, and German law was therefore the law of the flag – reference to which was, incidentally, made in the bill of lading – and that Koeser was domiciled in Germany and Lübeck Linie was a German company, his Royal Majesty finds that German law shall be applied with regard to the legal limitation of liability.

In accordance with the above stated assumption, Koeser and Lübeck Linie have paid the amounts claimed in the case, without comment. As a result, compensatory damages shall be fixed at these sums.

On the basis of what has thus been stated, his Royal Majesty justly affirms the court of appeal's judgement in the main case; however, since Mälaren has waived its claim for maritime lien before his Royal Majesty, the order relating thereto is vacated.

ND-1961-325 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	1961-12-16
Published	ND-1961-325
Keywords	Charter. Damaged and lost cargo, bill of lading.
Summary	The shipowners of the "Vestkyst I", who were required to pay compensation to the cargo receivers on the basis of the Hague Rules for a shortage in a cargo of aluminium bars, claim recourse against the charterers pursuant to Clause 2 of the Gencon charterparty. Oslo City Court, whose judgement is referred to from p. 114 above, held (one judge dissenting) that the agreement contained in the charter-party meant that the shipowner should be free of liability, and that this had to be maintained, even if the charterers transfer the bill of lading with the effect that the shipowner is primarily liable to pay compen-sation for the shortage to the receivers. The Supreme Court agrees with the dissenting opinion in the City Court and does not find that Clause 9 of the Gencon charterparty together with Clause 2 reserve a right of recourse against the charterers for increased liability of the shipowner which may arise as a result of negotiation of the bill of lading in accordance with the mandatory provisions of the Act on Bills of Lading. Judgement (on p. 329).
Proceedings	The Norwegian Supreme Court, 16 December 1961.
Parties	Mosjøen Aluminium A/S (Attorney Jan Frøystein Halvorsen – under examination) vs Johan Aronsen (Supreme Court Attorney Alex. Rein)
Author	The justices

I have come to the same conclusion as the dissenting City Court judge and agree with the essentials of his reasoning.

According to the facts of the case as agreed by the parties, a shortage arose in the cargo during transport on board the vessel. In accordance with the Hague Rules and Section 118 of the Norwegian Maritime Code, the shipowner would have been liable for such loss. However, the parties agree that pursuant to Clause 2 of the Gencon charterparty the shipowner is to be indemnified in respect of losses of the present nature. The parties are similarly agreed that when the shipowner has been found liable and required to pay compensation for the loss, it is as a result of the fact that a bill of lading has been issued and transferred to the purchaser of the cargo,

with the result that the shipowner has incurred liability under the bill of lading pursuant to the mandatory provisions of the Act on Bills of Lading. The parties are in full agreement as to the amount of the compensation and the facts of the case.

The question in this case is exclusively whether the shipowner may seek recourse from the charterer for the compensation he has paid to the cargo receiver. The respondent is of the opinion that both the provisions of the Gencon charterparty governing liability as well as the provisions of Section 95 sub-section 3 of the Norwegian Maritime Code provide grounds for this recourse claim.

There is no doubt that Clause 2 of the Gencon charterparty, which extensively limits the liability of the shipowner for loss of or damage to cargo, does not contain any specific provision to the effect that the shipowner shall have a right of recourse against the charterer if he is required by a third party, a cargo receiver, to pay compensation for loss or damage of a type for which the owner is exempt from liability.

Nor can I see that Clause 9 of the Gencon charterparty, held together with Clause 2, reserves a right for the shipowner to claim indemnification from the charterer in the event the issuance of a bill of lading has led to increased liability for the shipowner compared to what follows from the liability provisions of the charterparty. It is only in the event that the bill of lading contains a lower rate than that of the charterparty that Clause 9 contains a clear reservation, as payment of the difference in the rates may in such instance be claimed on signing the bill of lading.

Although I therefore cannot see that the charterparty contains any reservation for recourse in a case such as this, I nevertheless find that it is admittedly natural that the shipowner can claim indemnification from the charterer when he has been required to pay compensation to the cargo receiver for a loss for which, according to the charterparty, he should not have been liable. If the shipowner cannot claim recourse, the limitation of liability will to a great extent have no effect. Since it is common practice to issue a bill of lading which is then sent to the cargo receiver, this situation will arise regularly.

Further support for the view that the charterparty must allow for recourse may be found in the fact that, pursuant to Clause 9 of the charterparty and Section 95 of the Norwegian Maritime Code, the ship's master is obliged to issue a bill of lading. The charterer has the option to transfer this obligation to third parties and thereby impose on the shipowner liability under the bill of lading pursuant to the mandatory provisions of the Act on Bills of Lading, thereby increasing the ship-owner's liability far in excess of the liability it has pursuant to the provisions of the charterparty.

When I nevertheless assume that the charterparty cannot be considered to allow for recourse, it is because the charterparty does not contain any clear reservation of a right of recourse. The limitation of liability in Clause 2 is very extensive and results in a severe limitation of the liability which the shipowner would otherwise have pursuant to the Hague Rules and the Norwegian Maritime Code. It is natural to interpret such a limitation of liability strictly, and not interpret into its passive exemption from liability a positive right of recourse in the absence of definite support for this in the wording.

In this respect I also give weight to the fact that Gencon is an old form of charterparty used extensively the world over. It has been stated that it dates from 1915 but was revised following adoption of the Hague Rules. Situations of this type, where the shipowner incurs liability

under the bill of lading which exceeds the liability provisions of the charterparty, must have occurred frequently. It would therefore be reasonable that the charterparty had to contain a clear reservation, if it had been the intention that it should allow the shipowner to claim recourse against the charterer.

A further reason to require a clear reservation of a right of recourse is that, as submitted by the appellant, legal theory points out that a right of recourse is not automatic, but rather must be specifically agreed.

Nor has it been shown that it is the practice in this country or any other to construe the Gencon charterparty to the effect that it provides the shipowner with a right of recourse against the charterer in cases such as the present case, despite the fact that such instances must arise regularly.

My interpretation of the reservation is therefore that even in cases where a Gencon charterparty has been signed, every shipowner must consider that bills of lading will be issued and negotiated which impose upon him a liability exceeding that set out in the charterparty. The shipowner is aware of this and his third party liability insurance cover also covers this liability. On the other hand, the position of the charterer is that when, as in the present case, he has shipped the cargo and sent the bill of lading, he regards his involvement to be at an end. The liability the charterer would incur if obliged to indemnify the shipowner would not be covered by the cargo insurers, which would normally be the first to compensate the loss and thereafter claim reimbursement from the shipowner or its insurers. The charterer would not normally be insured against such course claim from the shipowner.

Nor does Section 95 sub-section 3 of the Norwegian Maritime Code provide a legal basis for a shipowner to claim recourse from the charterer in this case. The wording of that provision provides legal basis for a claim of indemnification by the shipowner if bills of lading are issued on terms which differ from those set out in the contract of affreightment, if this increases the liability of the shipowner. In this case, it is clear that it is not the terms of the bill of lading that have resulted in the increased liability, but rather the mandatory liability provisions of the Act on Bills of Lading.

In and of itself it may seem reasonable to liken the situation that the issuance and negotiation of the bill of lading increases the liability of the shipowner due to the liability provisions of the Act on Bills of Lading, with the situation dealt with directly in Section 95 sub-section 3, i.e. that the terms of the bill of lading deviate from the terms of the charterparty. The situations are however not entirely analogous. The liability for bills of lading pursuant to the Act on Bills of Lading is well known. As stated above, I assume that the shipowner normally allows for the issuance and transfer of bills of lading. The issue of terms in the bill of lading that deviate from the charterparty is however a different matter. They may be unknown to the shipowner. In such a case it is natural to ensure indemnification of the shipowner.

The determining factor for the conclusion that Section 95 sub-section 3 cannot be applied in cases such as the present case must be the fact that the report of the Maritime Commission of 1936 at page 41, contains an express statement that the provision is not intended for cases such as this, where the bill of lading is subject to the Act on Bills of Lading. This is also strongly emphasised in Jantzen “Godsbefordring til sjøs”, second edition, page 152, where he states:

> "The Act implementing the Hague Rules has the effect that the shipowner can to a large degree incur greater liability to the acquirer of the bill of lading than what follows from the charterparty; however, although this arises by way of an arbitrary and unilateral act of the charterer, namely the transfer of the bill of lading, there is no question of recourse in this situation unless this is specifically agreed ..."

Nor has it been shown that the legislation has in practice been understood to provide a right of recourse in such cases despite the fact that, as has been said, it is normal practice for bills of lading to be issued, with the resultant liability which exceeds the liability provisions of the charterparty.

I find therefore for the charterer.

Neither party claims costs since the case has been brought by the insurance companies involved for the purpose of resolving a question of principle.

I vote for:

JUDGMENT:

In favour of Mosjøen Aluminium A/S.
Justice *Hiorthøy:* I concur in all essentials and as regards the conclusion with the first-voting justice.
Justice *Thrap:* Likewise.
Justice *Eckhoff:* Likewise.
Justice *Berger:* Likewise.
On a vote, the Supreme Court found in favour of Mosjøen Aluminium A/S.

ND-1989-282 - Norwegian arbitration award

Authority	Norwegian arbitration award
Date	1989-10-24
Published	ND-1989-282
Keywords	(89-37) Escalation clause in catering and housekeeping contract for the Polycastle drilling platform – increase in costs due to reduction in work hours in 1987. Costs.
Summary	A catering and housekeeping contract includes a provision for the half-yearly adjustment of the rates based on changes in the wholesale price index and pay scales. The contractor was of the view that the reduction in work hours in 1987, which involved a 7.14% increase in salary costs, entitled the contractor to a rate increase and, if this was not the case, that the escalation clause had to be modified pursuant to Section 36 of the Norwegian Contracts Act. The profit margin under the catering and housekeeping contract was very modest. The shipowner, which had chartered the rig to Statoil, referred to the fact that Statoil had rejected the claim to adjust the rig rates due to the reduction in work hours. – The Arbitral Tribunal finds in favour of the shipowner. The expression "pay scale" must be understood as being the pay and working conditions that, on a general basis, have specific financial consequences for employers. However, nothing general could be stated about the effects of the reduction in work hours, which could vary considerably for individual companies. The escalation clause was not linked to actual cost increases, but to standardised criteria. A cost increase of 7.14% did not provide grounds for modifying the escalation clause pursuant to Section 36 of the Norwegian Contracts Act. – Costs are awarded. In disputes concerning commercial contracts, the exemption rule in Section 172, paragraph two of the Norwegian Civil Procedure Act must be applied with care.
Proceedings	Norwegian arbitration award of 24 October 1989.
Parties	SAS Service Partner (Attorney Ole Borge Jr.) versus K/S Rasmusen Offshore A/S (Supreme Court Attorney Georg Scheel)
Author	Sole arbitrator: Supreme Court Justice Tore Schei

Subject matter of the dispute: Claim for adjustment of payment in catering and housekeeping contract for the accommodation platform "POLYCASTLE".

K/S Rasmussen Offshore A/S (hereafter referred to as Rasmussen) and SAS Service Partner (hereafter referred to as SSP), entered into an agreement on 17 March 1986 for catering and housekeeping services on board the accommodation platform "POLYCASTLE". SSP agreed to provide all catering and housekeeping services etc. for all persons, including both those stationed there and visitors, on board the accommodation platform in return for a specified payment from Rasmussen. During the contract period, "POLYCASTLE" was in operation for a group of oil companies, of which Statoil was Rasmussen's contracting party. It has been reported that this assignment commenced on 29 June 1986 and provisionally ended on 29 June 1988.

Annex C of the contract of 17 March 1986 stipulates detailed rules for the payment SSP was to receive for its services. Clause 9 of this annex stipulates rules for the adjustment of rates. The provision has the following wording:

"Adjustment of rates.
All rates referred to in clauses 1, 2, 3 and 4 in this Annex C are fixed until 1 April 1986. Thereafter, these rates shall be adjusted every six months with effect from 1 April and 1 October each year, and for the first time on 1 April 1986, in accordance with the following formula:

New price = Previous price (0.32 Mn/Mo + 0.68 Ln/Lo)

The basis for adjustment will be as follows:

Previous price = Prices pursuant to the Contract.

Mo = Statistics Norway's wholesale price index for Food Group B for January 1986.

Mn = The above-mentioned index for the month prior to adjustment.

Lo = Pay scales for the respective groups of the Contractor's personnel in accordance with agreements between the Norwegian Employers' Confederation (NAF) and the Norwegian Oil and Petrochemical Workers Union (NOPEF)/Catering Workers' Federation (CAF) as of 1 October 1985 are considered equal to 100.

Ln = 100 +/- average percentage change in the pay scales for the respective groups of the contractor's personnel in accordance with the collective agreement between NAF and NOPEF/CAF as of 1 April and 1 October each year, compared with the corresponding pay scales as of 1 October 1985."

In the collective pay settlement in 1986 it was agreed to reduce the standard work hours effective from 1 January 1987. Among other things, this resulted in SSP's employees on board "POLYCASTLE" having their work hours reduced from 36 to 33.6 per week.

A dispute arose between SSP and Rasmussen about whether SSP could claim compensation for increased costs resulting from the reduction in work hours. There was also disagreement between the parties about whether, and if so to what extent, the reduction in work hours resulted in increased costs for SSP.

SSP's position was that the adjustment clause in clause 9 of annex C in the contract authorised compensation for the increase in costs that resulted from the reduction in work hours. Rasmussen's position, in light of what Statoil asserted to Rasmussen, was that the reduction in work hours did not entail any change to the "pay scale" and that there were therefore no contractual grounds for claiming compensation.

The parties failed to arrive at any solution to the dispute and agreed that the dispute should be decided by arbitration. The parties have jointly appointed Supreme Court Judge Tore Schei as arbitrator. One oral hearing has been held for the case which was attended by the arbitrator and counsels. Pleadings were also exchanged. Both parties have declared that they consider the preparatory proceedings to have concluded and that they understand that the case shall be decided based on how it now stands, without further oral hearings.

The plaintiff, SAS Service Partner Offshore and Industrial Catering A/S, has principally asserted the following to the Arbitral Tribunal:

The intentions of the central organisations when they entered into the agreement to reduce work hours was that this would be implemented with the least possible cost to the companies through increased productivity etc. However, it was clear to everyone that, other than for a small minority, most companies would not be able to compensate for the additional costs from shorter work hours through increased productivity. Together with CAF and NOPEF, SSP attempted to reduce staffing levels on "POLYCASTLE", however was unable to do so. Therefore, for this platform, the reduction in work hours alone resulted in an increase in labour costs of 7.14%, due to the fact that the full time equivalent for each employee was reduced by 7.14%.

The plaintiff agrees that when assessing the claim for compensation, clause 9 in annex C of the agreement of 17 March 1986 must be used as a basis. One of the two elements that are part of the adjustment formula is the "pay scale". It is of vital importance that reference is made to the "pay scale" and not the salary table. Consideration must not only be made to additional krone amounts, but also other collective changes that have financial consequences. Among other things, this is confirmed in calculations by the Norwegian Employers' Association for Operating Companies (NOAF) of costs in connection with the wage settlement. NOAF calculated the cost increases in connection with a number of changes to the collective agreement which did not apply to the salary table. There has never been any doubt that these types of changes must also be applicable pursuant to clause 9 in annex C. Disagreement has only arisen due to the reduction in work hours. There are no grounds in the contract for any such differentiation between the financial effects of the revision of the work hour provision compared with the financial effects of changes to other parts of the system of agreements

If the "pay scale" is defined more restrictively to what the plaintiff considers correct, the assumption must therefore be that comparable pay scales are being used. When the new annual salary tables for the employees stipulate the salary for 7.14% less work than the previous collective agreement, the new tables cannot be used as a basis in the calculation of SSP's claim without compensation being given for precisely the difference in the basis for the table. Anything else would be to assign the risk for the consequences of the reduced work hours to SSP and that would not be in accordance with what must have been the preconditions of the parties when the agreement was entered into.

It was correctly claimed by the defendant that SSP bears the risk of, for example, an increase in the employer's national insurance contribution. However, this is a risk that can be predicted and therefore factored in to a certain extent. However, it cannot be the same as SSP having the risk of a cost increase the company had no reason to believe it would have passed on to it.

The fact that it cannot have been assumed by the parties that SSP would have this risk is also confirmed by Rasmussen's position originally having been that SSP should receive coverage for its additional costs. If was only when Statoil entered the picture that Rasmussen found they had to take a different position. However, it is clear that the subsequent actions of both parties confirm that SSP's understanding of the contract is correct.

"Industry practice" is asserted as independent grounds for compensation. SSP has submitted a number of examples of cost increases due to reduced work hours being compensated for in catering and housekeeping contracts. If these adjustment clauses were somewhat different to the clause in the contract in the present case, this must be of limited importance in this context. The massive amount of documentation that has been presented shows clear encouragement for increased salary costs to be compensated, including when the increased salary costs can be traced back to the fact that less work is provided for the same price. The defendant has not presented a single example of compensation having been denied.

Provided that the defendant's understanding of the contract is fundamentally correct, there must be grounds for revising the contract pursuant to Section 36 of the Norwegian Contract Act. An unforeseen and significant change in the contractual assumptions has occurred. In reality, an increase in labour costs of 7.14% is very significant, not least when taking into consideration the extremely small profit margins in the agreement. Also of key importance in the assessment pursuant to Section 36 of the Norwegian Contracts Act must be that all reasonable assumptions would argue for compensation. For SSP it makes no difference whether more has to be paid per hour of work performed or whether less work is performed for the amount that was previously paid in salary.

As mentioned, SSP's contractual party, Rasmussen, found the claim for compensation to be reasonable. The fact that Rasmussen has not paid such compensation is due to Statoil. However, Statoil is a member of the relevant employer organisations in connection with operations on the Norwegian continental shelf. These organisations have made statements that the companies will, of course, have increased costs due to the reduction in work hours since a reduction in staffing has not been possible due to increased productivity. Questions can be asked about whether or not Statoil is bound by the employer organisations in connection with this. In any event, it says something about the logic of this reasoning when Statoil acts contrary to its organisations.

The defendant's claim that SSP has not suffered any loss as a result of the reduced work hours is a logical fallacy. SSP has had to increase staffing levels that fully compensate for the reduction in work hours. In connection with this, it is sufficient to refer to the fact that, in the negotiations with the organisations, SSP was not granted the right to reduce the number of personnel on "POLYCASTLE". SSP's claim for an adjustment must also apply irrespective of the company's specific additional costs.

Clause 9 in annex C lists 1 October and 1 April as being the adjustment dates. However, the dates were selected based on the relevant dates for the review of collective agreements. In this case,

the changes occurred from 1 January 1987 and, based precisely on the reasons for selecting the adjustment dates, it must be correct to pay compensation already from 1 January 1987.
In addition, taking into consideration the choice of adjustment date, reference can also be made to the grounds that have been asserted for being able to claim coverage for the increase in costs.

The plaintiff has submitted the following prayer for relief:

"1. K/S Rasmussen Offshore A/S is ordered to pay SAS Service Partner Offshore and Industrial Catering A/S NOK 2,076,485, in addition to statutory interest on overdue payments, from the due date for the individual elements of the claim until payment takes place, as well as compound interest on the principal amount and interest balance as of 31 December 1987 and 1988 in accordance with the statutory interest, until payment takes place.

2. SSP is awarded full costs.

3. Rasmussen is ordered to pay all costs relating to the arbitration."

The defendant, K/S Rasmussen Offshore A/S, has principally asserted the following:
The agreement between the parties is a fixed price contract and is not based on a "Cost+" principle. The extent to which the payment may be adjusted is precisely stipulated in clause 9 of annex C to the contract.

The adjustment clause is a technical provision. It was formulated with the intention that there would not be any discussion about the right to or size of an adjustment in the payment.

Adjustment of the payment is directly linked to two indexes, the wholesale price index for foodstuffs in group B and the pay scales for the respective groups of the contractor's personnel in accordance with agreements between NAF and NOPEF/CAF. The adjustment clause is based on average considerations. The cost of ingredients for foodstuffs was weighed up against labour costs. The consequence of the wording of the adjustment clause is that if, for example, food prices increase, this will result in an increase to the rates in annex C, without consideration to whether the individual rates are "food intensive" or "wage intensive".

Since the adjustment clause is directly linked to these two indexes, SSP can incur increased costs that compensation cannot be claimed for. Practical examples can be mentioned, such as an increase in the employer's national insurance contributions, change in sick leave arrangement etc. Such cost increases, which are not applicable to the adjustment clause, are something SSP carries the risk for. This is precisely the system in the contract. Cost increases that come under the adjustment clause are a risk borne by Rasmussen as long as the clause authorises coverage. Cost increases that fully or partly fall outside of this are a risk borne by SSP. When SSP claims in this case that it has "assumed the risk for" the cost increase associated with the reduction in work hours, this is an attempt to distance themselves from the principal point in the adjustment arrangement that was selected.

The reduction in work hours resulted in no changes to the pay scales, which are the basis for the adjustment. There is not only a formal reason, but also a very real reason for why the reduction in work hours was not included as a cost element in the pay scale. The intention of the organisations in connection with the reduction in work hours was that this would not, insofar as possible, result

in increased costs for the employers, and would be balanced out through increased productivity. For some employers, the costs associated with the reduction in work hours could be minor, while for others it would perhaps not be possible to achieve any increase in productivity. However, in terms of this contract, it is not increases in SSP's actual salary expenses that are grounds for making adjustments, but increases in the general pay scale. The clause is linked to the general and objective considerations, and is made independent of the actual expenses of the contractual parties.

The plaintiff has asserted that the contract presupposed that the "pay scales" were comparable. There may be some substance in this argument, but if it was to be relevant in this instance there had to have been major changes in the fundamental conditions for the salary calculation. This is not the case in this instance.

The defendant has invoked Rasmussen's position concerning an adjustment and made a point out of the fact that it is Statoil that has opposed adjusting the payment. To this it is noted that Rasmussen's position on this matter cannot be assigned weight. Pursuant to the contractual arrangement with Statoil, Rasmussen could have passed any additional costs onto this company. Therefore, Rasmussen did not in fact have any independent interest in opposing the adjustment.

There is no industry practice whereby the reduction in work hours granted the right to increase the payment for the catering and housekeeping contract. The defendant has submitted some examples of such an increase. However, the content of the different contracts varies and also differs from the present contract. It also appears to be the case that in some instances there has been partial compensation for additional costs and some of the adjustments also appear to have occurred based on ex gratia positions.

Section 36 of the Norwegian Contracts Act cannot constitute grounds for revising the contract. In this instance, the maximum cost increase is 7.14%. The defendant has not submitted any accounting documentation or other documentation that shows the earnings situation before and after the reduction in work hours.

SSP has not documented that the company has suffered any loss. For certain periods the company had lower staffing levels on "POLYCASTLE" than it was obligated to provide in the agreement with Rasmussen. Rasmussen has not wanted to do anything about this. In reality, SSP has adapted to the reduction in work hours by reducing staffing levels.

If the Arbitral Tribunal should find in favour of SSP's claim for compensation, the company cannot be granted compensation from prior to 1 April 1987. The parties selected the specific adjustment dates with their eyes open and this must be decisive.

The defendant has submitted the following claim for relief:

"1. The Arbitral Tribunal finds in favour of and awards costs to K/S Rasmussen Offshore A.S.

2. SAS Service Partner Offshore and Industrial Catering A.S. shall pay the fees and expenses of the Arbitral Tribunal."

The Arbitral Tribunal has found that it cannot find in favour of SSP's claim for compensation for additional costs due to the reduction in work hours.

Pursuant to clause 9 in annex C of the contract, changes in the "pay scale" provide grounds for adjusting the contractual payment. The Tribunal considers the "pay scale" to be salary and employment conditions that, on a general basis, have specific financial consequences for the employers. As examples of such changes in the "pay scale", reference is made to the letter of 9 December 1987 from NOAF, cf. exhibit 25 to the writ of summons. Cost calculations have been carried out for a number of changes in the collective agreement, the financial effects of which can be quantified. With regard to the reduction in work hours, NOAF wrote the following to a number of companies, including SSP, on 27 February 1987:

> "The intentions of the central organisations, cf. section F of the work hour supplement, are that the reduction in work hours shall be implemented with the least possible costs. Among other things, it presupposes initiatives in the individual companies for maintaining production, improving productivity and efficiently utilising work hours.
>
> Therefore, the cost effect for the individual companies as a result of the reduction in work hours will depend on the effect of the above-mentioned initiatives and the extent to which the reduction in work hours will require increased manpower. The costs may therefore vary from company to company and possibly also within a company's different contractual areas. NOAF can therefore not specifically comment on the cost aspect for each company.
>
> Section B of the work hour supplement includes provisions for providing compensation in the hourly pay rates for employees who are employed on hourly wages. This compensation provides full compensation for each employee for the reduction in work hours and can, in isolation, express the companies' costs if staffing is increased to exactly the same extent as the reduction in work hours.
>
> However, we are aware that various initiatives have been implemented in the companies that will influence the final costs associated with the reduction in work hours."

It states here that nothing general can be said about the financial consequences of the reduction in work hours. These could be relatively minor if that the company achieves improvements in productivity, but the effects may also be greater, up to 7.14%. When the consequences are so variable, it is difficult to determine that there has been any change in the "pay scale". It is in itself support for this result that the employer organisations have not been able to quantify the change as a cost increase in the collective arrangement. In addition to this is the fact that the "pay scale" has clearly focussed on the employer organisations' quantifying of the financial consequences of the operational changes. Based on how the adjustment clause is worded, it is clearly not SSP's actual expenses, but the general, collective wage costs that will form the basis for adjusting the payment.

To support its position, SSP has asserted the parties' preconditions, or what the parties can be assumed to bear the risk for. The Tribunal considers it probable that the parties selected an adjustment clause that would reasonably reflect the principal cost elements. However, on the other hand, a system has been selected (and this must have been done intentionally) for making adjustments that shall be independent of SSP's specific, actual costs. The Tribunal therefore cannot see that a potential requirement for SSP to be able to achieve coverage for the significant cost increases

through the adjustment clause can warrant an increase in the contractual payment that has no coverage in the adjustment clause other than being based on a natural interpretation of this.

The plaintiff has asserted industry practice and, in connection with this, has made reference to several contractual arrangements in which, at least in part, compensation was paid for cost increases due to a reduction in work hours. The Tribunal notes that the asserted industry practice cannot in itself be legally binding. These cannot be considered customs or habits developed over a longer period that express the perception in the industry that existed when the contract was entered into. The asserted practice originates from the period when the current dispute was relevant.

However, the asserted practice could be of importance from a different viewpoint. The Tribunal understands the documented practice such that there must have been reasonably widespread encouragement in the industry for full or partial compensation for cost increases resulting from the reduction in work hours. It is correct that the adjustment clauses vary in the different contracts and none are worded in the same manner as in the present contract. However, the Tribunal considers it doubtful that the different linguistic formulations of these clauses can provide the explanation that SSP and also Christiania Dampkjøkken have achieved adjustments in these instances. The attitude in the industry that is expressed through this practice supports the defendant's assertions of what the parties' preconditions have been. However, the Tribunal finds that this cannot be decisive. As has been stated, the contract was worded such that adjustment must occur based on objective criteria and not based on SSP's actual expenses. It appears that it is precisely coverage of such actual expenses that has been accepted in the examples presented. However, it is difficult to consider this as being anything other than contrary to the actual system for adjustment that was selected. It is also difficult to disregard the fact that adjustment could, at least partly, have occurred based on reasonableness considerations.

It is the plaintiff's opinion that if the "pay scale" is to be interpreted as stated above it must be a contractual requirement that the "pay scale" is comparable. The Tribunal understands this reasoning such that if, when calculating the payment, this must be based on the difference between the previous and new pay scales, the assumption must be that the benefits achieved in accordance with the new pay scale are the same as for the previous pay scale. The Tribunal does not rule out that the basis for a pay scale may be changed to such an extent that this reasoning must be accepted. However, even though the reduction in work hours was not inconsiderable, the change is not greater than that an interpretation of the adjustment clause based on a natural linguistic understanding of this having to be decisive, without it being possible to include the type of reservation such as requirements that the basis for the pay scales has remained unchanged.

Section 36 of the Norwegian Contracts Act has been asserted. These grounds cannot be accepted. Firstly, a cost increase of 7.14% (if this is the actual cost increase for SSP) cannot in itself provide grounds for any revision of the agreement. The Tribunal makes reference to the fact that this is an agreement in a commercial arrangement. The Tribunal also finds that it does not have an accounting basis for being able to assess the relative effect the cost increase has had for, among other things, SSP's earnings from the agreement.

In the writ of summons, the plaintiff asserted that Statoil, whose position has been the deciding factor in Rasmussen's dismissal of the claim, is a member of "the relevant employer organisations". The Tribunal is in some doubt about what is behind this assertion. However, the Tribunal would note that it cannot see that the employer organisations have provided any statements that would

indicate that the plaintiff's interpretation of the contract is correct. The employer organisations would also not be able to bind member company Statoil to a non-collective agreement such as the agreement between SSP and Rasmussen. It was asserted in the writ of summons that there would unlikely be any discussion of a rate adjustment if a "Gro day"[1] was introduced and that this supports the defendant's understanding of the contract. The Tribunal doubts whether the assertion has been maintained, but will note that it does not assist in finding a solution to this dispute to speculate about the consequences of other forms of reductions in work hours. The Tribunal cannot see that any practice exists in connection with the introduction of a "Gro day" that would be of significance to the interpretation of the present agreement.

In accordance with this, the Tribunal finds that it must rule in favour of the defendant. It is not necessary for the Tribunal to address the loss SSP has suffered as a result of the reduction in work hours. It is also not necessary for the Tribunal to address the question of the dates from which compensation could have been claimed if there were grounds for increasing the payment.

With regard to costs and expenses to the Arbitral Tribunal, the following is noted:

The legal solution to the present dispute has included some doubt. The element that has principally created this doubt is the fact that, to a large extent, compensation appears to have been paid for the cost increases that the reduction in work hours entailed for the fulfilment of catering and housekeeping contracts. Among other things, this meant that it was reasonable that SSP wanted to have a legal examination of its claim.

In isolation, the doubt that has existed argues for applying the exemption provision in Section 172, paragraph two of the Norwegian Civil Procedure Act, to order each of the parties to cover their own costs. However, the Tribunal has found that, in addition to its own costs, the plaintiff must cover the costs for the defendant, as well as the expenses of the Arbitral Tribunal. The Tribunal has placed emphasis on the fact that in disputes between commercial parties, restraint should be exhibited when applying the exemption provision in Section 172, paragraph two of the Norwegian Civil Procedure Act. The clear starting point should be that when a party asserts a contractual interpretation that the Tribunal does not agree with, this party must bear the financial consequences of having commenced the dispute. The other party's costs are a natural part of this financial risk. The Tribunal has placed further emphasis on the fact that the present agreement was entered into as late as 17 March 1986, in other words on a date when it was a well-known fact that the labour organisations would demand that standard work hours be reduced in the collective wage agreement in 1986. In the view of the Tribunal, the plaintiff had particular reason to ensure that the contract stated that a reduction in work hours also provided grounds for adjusting the payment if this was SSP's precondition when entering into the agreement.

In accordance with this, the Arbitral Tribunal has found that the plaintiff must pay the defendant's costs, including the expenses of the arbitrator, expenses for writing etc. in connection with the arbitration award, and any other expenses for the Arbitral Tribunal.

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[1]"Gro" refers to the former Norwegian Prime Minister Gro Harlem Brundtland.
A "Gro day" is a commonly used expression to describe work days sandwiched between public holidays and weekends that many people take off (e.g. the Friday after Ascension Day).

The defendant submitted a statement of costs in the pleading of 14 September 1989. The statement of costs amounted to NOK 65,000. The defendant later submitted an additional pleading and the Court assumes that coverage of the costs of this pleading is also claimed. Based on this, costs for the defendant are set at NOK 67,000. Expenses for the Arbitral Tribunal, which thus must be covered by the plaintiff, are specified in a separate letter.

The arbitration award shall be sent to Oslo District Court for archiving, cf. Section 465, paragraph two of the Norwegian Civil Procedure Act. With regard to the selection of Oslo District Court and not Kristiansand District Court, reference is made to the fact that the parties agreed that the case shall be heard and decided in Oslo, cf. Section 36 of the Norwegian Civil Procedure Act.

Conclusion of ruling:

1. The Arbitral Tribunal finds in favour of K/S Rasmussen Offshore A/S.

2. SAS Service Partner Offshore and Industrial Catering A/S shall pay K/S Rasmussen Offshore A/S costs for the Arbitral Tribunal of NOK 67,000 within 2 weeks from the pronouncement of this arbitration award.

3. SAS Service Partner Offshore and Industrial Catering A/S shall pay the expenses for the Arbitral Tribunal in accordance with a separate statement.

ND-1989-225 - Norwegian arbitration award

Authority Norwegian arbitration award

Date 1989-12-01

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Keywords (89-34) Transport liability (Sections 118 and 168 of the Norwegian Maritime Code, cf. Section 36 of the Norwegian Contracts Act) – cargo loaded on the deck of a pontoon – full disclaimer of liability for deck cargo – the tug's features.

Summary A shipowner agreed to transport two specially manufactured container cranes from Finland to Saudi Arabia as deck cargo on its own barge (Giant 14) and engaged a tug (Eduard) from another shipowner to execute the tow. The tug and tow capsized in rough weather while in the English Channel. The tug sank and the cranes were a total loss after the barge ran aground. The contract of carriage stipulates any risk to deck cargo is borne by the charterer and "the carrier not being liable for any loss or damage of whatever nature and by whomsoever caused." The owner of the cargo has claimed compensation for its loss and asserts that the disclaimer of liability must be disregarded and that the accident was the result of the tug having inadequate bollard pull and other deficiencies. – The Arbitral Tribunal finds in favour of the shipowner. An Agreement for towing cargo on barges is deemed to be a freight agreement that is subject to the rules pertaining to the carriage of goods in the Norwegian Maritime Code. Section 168, paragraph two of the Norwegian Maritime Code permits the disclaimer of liability for deck cargo and there are no grounds in either the general contract rules or Section 36 of the Norwegian Contracts Act for disregarding the disclaimer of liability when there was no intent or gross negligence on the part of senior employees at the shipowner or the company that owned the tug that was assigned to execute the transport. It was a clear precondition that the charterer would take out transport insurance. – The Arbitral Tribunal finds that the accident was caused due to Eduard having insufficient bollard pull. However, there was no breach of the guarantee that the vessel had "at least 41 tons bollard pull" because this statement must be interpreted as a reference to "maximum bollard pull" achieved at a certain amount of engine overload over brief periods. The accident was also not caused due to the tug having other defects and a clause that a tug with "sufficient horsepower" was to be used was of no consequence when the agreement presupposed that Eduard was to be used with its existing features.

Proceedings	Norwegian arbitration award of 1 December 1989.
Parties	1. Omsesidiga Försäkringsbolaget Sampo and 2. Kone, OY (Attorney Haakon Stang Lund) versus Harms Bergung GmbH (Attorney Gunnar Sørlie) with intervener, J. Johannsen & Sohn (Attorney Jan-Fr. Rafen)
Author	Members of the Arbitral Tribunal: Professor of Law Sjur Brækhus, Supreme Court Justice Jan F. Halvorsen and Supreme Court Attorney and Master of Law Ole Lund

1. Introduction. The proceedings

Pursuant to the contract of 19 December 1982, plaintiff no. 2, the Finnish industrial company Kone OY ("Kone"), constructed two large container cranes at its workshop in Hangö for the port authorities in Giza, Saudi Arabia. The cranes were to be delivered carriage paid to Gizan, and Kone was therefore responsible for organising and paying for transport and thus carried the transport risk in relation to the buyer.

In an "Agreement" of 13/19 December 1983 (the "contract of carriage"), the defendant, Harms Bergung GmbH, Hamburg ("Harms") agreed to execute the above-mentioned transport with its seagoing pontoon, GIANT 14, towed by the tug EDUARD, which was owned by the intervener, J. Johannsen & Sohn, Lübeck ("Johannsen"). The arrangement between Harms and Johannsen was regulated in a Towage Contract dated 3 January 1984.

The tug and tow departed Hangö on 30 January 1984. After having called in at Kristiansand on 8–10 February and Vlissingen on 4–16 February, on 20 February the tug was located at the western part of the English Channel. The weather was rough, with storms and high seas. At approximately 02:10 on 21 February, EDUARD began to heel strongly and this increased until the vessel was dragged under by the tow. The captain and 5 other members of a total crew of 10 died in the accident. GIANT 14 and the cranes drifted towards the French coast and ran aground there at 11:40 on 22 February after a failed salvage attempt. After a period of time, GIANT 14 sprang a leak, took in water and capsized, resulting in the loosening and total loss of the cranes.

As the freight insurer, plaintiff no. 1, Ömsesidiga Försäkringsbolaget Sampo, Helsinki ("Sampo"), has compensated Kone's loss of the cranes with an amount of approximately FIM 41 million. In addition to this, Kone suffered a loss of approximately FIM 1.4 million as a result of the accident. Sampo and Kone have claimed compensation from Harms for these amounts. However, Harms has rejected any liability and the dispute has therefore been referred for a decision by arbitration in accordance with the "Addendum" to clause 18 of the contract of carriage which states the following:

> "General average and arbitration to be settled in Oslo and Norwegian law to apply."

As arbitrators, the parties have jointly appointed the undersigned Professor of Law Sjur Brækhus, Supreme Court Justice Jan Frøystein Halvorsen and Supreme Court Attorney and Master of Law Ole Lund, with the first-mentioned being the chairman of the Arbitral Tribunal.

The capsizing of EDUARD was the subject of an extensive investigation ("Untersuchung") by Seeamt Lübeck. Public court hearings were held from 13 to 19 June 1984, with the questioning of a number of witnesses and experts, including four of the crew who had survived the accident. Seeamt's report, a 90 page document, was released on 20 September 1984. The overview of the facts in section 2 below is largely based on the factual information in this Seeamt report without special reference to sources.

2. Facts of the case

2.1. The contract of 19 December 1982 between Kone and the port authorities in Gizan concerned the manufacture, delivery and installation of two "multi-purpose" cranes with accessories and reserve parts, in return for payment of 24 million riyals, equivalent to FIM 42 million. Kone also agreed to provide "operation maintenance and training services" for 3 years in return for a separate payment of 1,080,000 riyals. The delivery date, which was originally set at 450 days calculated from "the date of the contractor's receipt of the authorisation to supply as per the delivery schedule", was extended by 45 days to 19 April 1984 in "Variation order no. l" to the contract, dated 13 June 1984.

The cranes were listed as each weighing 613 tons, with a total height of 68 metres and a centre of gravity height of 21.4 metres. In addition to this were 2 silos, each weighing 45 tons, with a total height of 13 metres and a centre of gravity height of 9.5 metres.

2.2. The negotiations for the contract of carriage
Kone obtained tenders for the transport of the cranes from several firms. Harms did not receive a request, however expressed interest, and in a telex of 26 April 1983 offered to carry out the transport with its pontoon GIANT 14 "together with a suitable tug of our choice", in return for a lump sum payment of DEM 950.000, excluding Suez Canal expenses (estimated at DEM 333.000). In its reply of 27 April 1983, Kone stated that GIANT 14 "may be ok", but asked for the pontoon's "rolling/period" which had to be more than 12 seconds. Kone also requested "a total price Suez included". The following was also stated:

"inform us also about the tug you have in mind, (bollar pull and length) in which class is the barge and what is allowed deckpressure."

In a telex of 29 April 1983, Harms responded as follows:

"1. as the transport has to be carried out during the winter period we have of course to expect bad weather conditions during the passage. Therefore, we cannot guarantee that rolling periods might not be less than 12 sec. (demurrage for such delays to be agreed upon). However, if weather/sea conditions are deteriorating, towage convoy would have to change course (keeping head to sea) in order to improve rolling conditions. Under most unfavourable conditions we expect rolling period of abt 7 sec. and consequently transversal acceleration of abt 2.0 Bq/g at mentioned height of centre of gravity.

2. type of tug which will be used: 2.200 ihp with cort nozzle 27 tons bollard pull, bunker capacity 72 tons 223 grt estimated duration of voyage hanko/gizan = 32 days

3. regarding expenses for suez canal would have to make further investigation with canal authority if total basic price including canal dues of lumpsum dm 1.300.000,– is furthermore of interest."

The vessel described under point 2 was AXEL, another of Johannsen's tugs. Kone clearly did not consider this strong enough, because in a telex to Kone of 18 August 1983, Harms made the following offer:

> "referring to our telephone conversation we offer transport with a more powerfull tug of 41 to. bollard pull. 220.000 litres bunker capacity at additional expenses of dm 110.000,–."

After further exchanges of technical data, including about the cranes' "wind area" (Kone's telex of 19 August), the parties agreed to a meeting in Hangö on 5 September 1983, cf. Harms' telex confirming this of 13 September 1989.

2.3. Contract of carriage of 12/19 December 1983.

Harms' standard printed template was used for the "Agreement", with certain omissions, and with an "Addendum" with 18 machine written clauses. The following provisions are of interest in this dispute:

According to clause 1 of the "Agreement," the transport was to be carried out with "seagoing pontoon GIANT 14" and with "tug 'EDUARD': dimensions as per specification ab. 41 t bollard pull". In the "Addendum", which, according to the introductory paragraph takes precedence to the provisions in the "Agreement', a somewhat different description is provided of the tug, cf. clause 1, which states:

> "The tug has at least 41 tons bollard pull or more, towing-winch with rope over 600 meter and spearerope all with accepted certificates according to bollard pull and class. ..."

The freight, including expenses for the Suez Canal, was set at DEM 1,390,000, of which 50% was to be paid "non-returnable" "upon signing B/L", and the remaining 50% was to be paid "on passing Suez Canal" and "is earned in proportion to distance covered between loadport and discharging port", cf., clause 5 of the "Agreement" and clauses 3 and 13 of the "Addendum".

With regard to transport liability, the following was stated in Harms' offer in the telex of 13 September 1983:

> "- b/l will be signed and other conditions as per b/l (hague rules) will be applicable if not contrary to our special agreement with deck remark: "carried on deck without owner's liability howsoever caused, cargo will be insured at your risk and expenses by you".

The contract is regulated somewhat differently. The "Agreement" contains the following liability clauses:

"14. CARGO and other LIABILITIES

Cargo to be shipped on deck of the pontoon at company's risk, the carrier not being liable for any loss or damage of whatever nature howsoever and by whomsoever caused.

If the pontoon is provided with a cargo-hold, the carrier only to be liable for loss of/or damage to cargo or part thereof carried under deck in the pontoon's cargo-hold, if such loss or damage has been caused by the carrier's personal want of due diligence to make the pontoon seaworthy and fit for the voyage at its inception or by any other personal act or mission or default of the carrier. The carrier not to be liable for any other damage to or loss of such under deck cargo or part thereof, whatsoever, howsoever and by whomsoever caused.

Any liability of the carrier under this contract shall be limited to and shall in no circumstances exceed, the amount of freight payable or paid to it under this contract.

15. The carrier shall not in any circumstances be liable for any loss of or any damage to any equipment or materials or other property of the company, its servants, agents or of third parties when loaded, stowed or carried in or on, or discharged from or present in the vicinity of the pontoon, howsoever and by whomsoever such loss or damage be caused.

The company shall indemnify the carrier against any claim by servants, agents or third parties arising as a result of loss of or damage to such equipment or materials.

16. No liability shall attach to the carrier for any damage or loss of whatever nature (including death and injury) caused to the company, servants, agents, subcontractors or others acting on the company's behalf (including their servants and agents), whether or not on board the pontoon and/or tug, howsoever, and by whomsoever such damage or loss be caused. The company ensures and undertakes that no claim for such damage or loss shall be made against the carrier by such person or party, and the company shall hold the carrier harmless and indemnify the carrier against any such claims or against any liability if made or pretended by such person or party despite the provisions of this clause."

2.4. The barge and tug

GIANT 14 was a steel barge without its own propulsion machinery that had been constructed in 1969. It was 76 metres long, 24 metres wide and had a depth of 3.58 metres, was classified 100 A4 by Germanischer Lloyd (GL) and had a speed certificate for "Grosse Fahrt" provided there was a tug with sufficient power. Prior to departure to Hangö, rails were welded onto the pontoon to enable the container cranes to be driven on board.

The tug, EDUARD, was constructed in 1961 for Unterweser Reederei, and sailed for this company under the name ROTESAND until it was purchased by Harms in 1971 and given the name SALUS. In 1973, Harms sold the vessel to Reederei Petersen & Alpers, who renamed the vessel HANSEAT and made various conversions in 1974. Among other things, a new and stronger capstan for the tow lines was installed, and the hull was extended by 3 metres. The tug was then purchased by Johannsen in 1982 (delivery in 1983) who renamed it EDUARD. EDUARD was equipped with two Deutz-Marine diesel engines, which together provided engine thrust of 2,400 BHP and had a capstan with two drums for tow lines, located on the aft deck. One line was 950 metres in length, while the other was 1,200 metres. The capstan drums were

connected to an electrical motor by a gear. The line that was in use during the tow was moved forward from the drum to a wheel arrangement on the aft side of the superstructure and from there towards the aft side over two transverse braces and out over the stern. The ability of the tow line to shift athwartships over the stern could be restricted in a number of ways: Using bollards located on the stern on each side of the line with a gog wire, i.e. a wire attached to the tow line aft of the drums and passed down to a separate "gog winch" and/or through two slings "Beistopper", attached to the tow line and attached to each side of the deck.

While under tow, there were two different methods of preventing the tow line from unwinding, and a combination of both these methods could also potentially be used: Firstly, using band brakes that worked directly with the relevant wire drum. These brakes had to be engaged and released mechanically by hand. Secondly, by engaging the gear. Provided that the brakes were not applied, by engaging the gear the tow line could be slackened or tightened while the vessel was moving, something that can be necessary when manoeuvring a towage convoy in narrow waters. However, engaging the gear would not provide any definite braking effect. If the strain on the tug line is strong enough, the line can pull the electrical motor with it. In extreme instances, the entire line can unwind with the risk of the electrical motor being destroyed.

Many tugs are equipped with so-called "quick release, i.e. a device that is manoeuvred from the bridge and which enables the immediate release of the tow line, such that, in a critical situation, the tug can be released from the drag the tow may be causing. EDUARD was not equipped with such a device. The tug line could only be released by a member of the crew going out onto the aft deck and releasing the drum brakes and/or disconnecting the gear.

From July until September 1983, EDUARD was at the Flender shipyard in Lübeck for class work and to have the class renewed. A new propeller with a fixed Kort-nozzle was also installed which was supplied by the company Schaffran Propeller Lehne & Co. ("Schaffran").

In December 1983, EDUARD made a voyage from Kiel to Norfolk, Virginia and from there sailed with two Victory ships in a tandem tug to Avilés in Spain. There were no problems of note during this voyage. After returning to Germany, EDUARD was sent to the workshop for various maintenance work etc. Among other things, the 4 spindles that were used when adding the band brakes were shortened by approximately 10–15 cm, while a distance piece was also inserted.

2.5. EDUARD's bollard pull

Prior to its conversion in 1983, EDUARD's bollard pull was listed at 28 tons. The purpose of installing a Kort-nozzle was to improve the efficiency of the propeller and thereby the tug's bollard pull. According to Schaffran, this type of nozzle can increase the bollard pull by 30 to 50%. For EDUARD, the company had "theoretisch ... einen Propeller-Düsen-Schub von 41.3 t, bei 10% überleistung errechnet", cf. the company's letter of 10 April 1984, presented to Seeamt Lübeck. Since it was already stated in the telex of 18 August 1983 that Harms could offer Kone a tug with 41 tons of bollard pull, Harms had to use this calculation as a basis.

"Bollard pull" is not an unambiguous term, cf. letter of 22 October 1985 from Norwegian Underwriters Agency in Rotterdam to attorney Stang Lund. Among other things, "Bollard pull" may mean:

(l) "Maximum static pull" ("peak value"), the peak value that can be achieved over a reasonably short period at engine overload, possibly in combination with manoeuvring the helm.

(2) "Maximum bollard pull" measured at engine overload over a certain period. According to Lloyd's Register of Shipping ("Lloyd's"), this is at least 1 minute.

(3) "Steady bollard pull", used by Lloyd's, equivalent to the maximum bollard pull measured over a period of 5 minutes.

(4) "Continuous bollard pull", used by Det Norske Veritas ("DnV"), equivalent to a maximum bollard pull measured over a period of 10 minutes.

(5) "Effective bollard pull", equivalent to the bollard pull the vessel can achieve over a long period in the open sea.

The bollard pull values determined as mentioned under (3) and (5) have to be lower, sometimes significantly lower, than the values referred to under (1) and (2). This is primarily due to the fact that overloading the engines will very quickly result in acceptably high exhaust gas temperatures. At Johannsen's request, EDUARD's bollard pull following the conversion in 1983 was measured in a test at Trave on 21 September 1983 at a depth of approximately 6 metres. The manometer that was made available to the Flender shipyard and which was adjusted by the people at the shipyard was placed on a pontoon at a distance of approximately 250 metres from EDUARD. The manometer was read by a Mr Held from Johannsen, and Flender's operations engineer Wolter was also on the pontoon. In EDUARD's engine room, the engine performance was read by a technician from the engine supplier Deutz. Engineer Wittzen from Schaffran was located partly on the pontoon (but did not himself take any readings from the manometer) and partly in EDUARD's engine room. GL's surveyor, Wohlfeil, was located on EDUARD's deck and received notifications of the observed bollard pull and engine performance from the pontoon and engine room. On 22 September, Wohlfeil presented the following "survey report" on behalf of GL:

"Auf Antrag des Eigners wurde nach Einbau einer starren Kortdüse bei der Flender Werft A.G., Lübeck, der Trossenzug (Pfahlzug) erneut getestet u. mit 41.2 ton festgestellt. Der Zug erfolgte über die Schleppwinde.
Keine Beanstandungen."

Additional information about the test was provided in the "survey report" presented by GL on 23 September that concerned the class work and installation of the Kort-nozzle. This report had the following conclusion:

> "Während der Phahlzugprobe wurde längere Zeit 100% u. kurzzeitig 110% Leistung ausgefahren."

2.6. The towage convoy's journey: Kiel-Hangö-Kristiansand

On 16 January 1984, EDUARD towed GIANT 14 from Kiel and arrived in Hangö on the 20th of the same month. EDUARD's captain was Jürgen Fock and on the date of the accident the vessel had a total crew of ten. GIANT 14 was unmanned.

In a "Conveyance Certificate" issued in Hamburg on 19 January, GL confirmed that "from a technical point of view ... and after reviewing the documents submitted for approval", the classification society had no "objection to the crane transport:

PROVIDED THAT:

1) the changes, amendments and reinforcements resulting from G's review and scrutiny of the documents presented have been observed and effected to the surveyor's satisfaction,

2) conveyance is effected in tow of a sufficiently strong tug,

3) the individual parts of the voyage are started only under good local weather conditions and a favourable meteorological situation according to forecasts (the master of the tug who is in charge of the conveyance in responsible for determining the time of starting the towage),

4) In case of worsening weather conditions course and speed are changed accordingly and/or a sheltered place is resorted to if possible,

5) if during transport rolling and/or pitching of the barge increases to such a degree that acceleration exceeds the maximum permissible value indicated by the acceleration measuring device the course and/or speed are changed to decrease the rolling or pitching of the barge and/or a sheltered place is resorted to,

6) functioning and reliability of the measuring and recording system provided will be checked regularly,

7) weather and seaway forecasts are obtained and evaluated continuously,

8) the barge, cranes, and lashings are inspected by the riding crew regularly, (i.e. at least every second day provided weather condition and circumstances permit transportation of the riding crew), in any case before starting for an individual part of the voyage and after critical situations or when requested by GERMANISCHER LLOYD Head Office.

   In the event of any damages being found GERMANISCHER LLOYD Head Office has to be contacted immediately, and advice regarding further procedures to be followed is to be awaited,

9) all openings through which water might intrude into the interior of the barge are closed watertight,

10) all components and objects stored on board are fastened and lashed seaworthily,

11) the navigation lights are arranged such as to comply with the international regulations,

12) prior to commencement of the voyage, a conveyance survey is conducted by our surveyors,

13) during the conveyance no changes become necessary to conveyance conditions confirmed by the undesigned surveyor,

14) GERMANISCHER LLOYD Head Office will be informed every second day of the position, seastate and weather conditions."

In Hangö, the cranes and the associated equipment were mounted and fastened on board GIANT 14 by Kone's employees under the supervision of GL's surveyor who, in an endorsement dated 29 January, confirmed in the"Conveyance Certificate" that the "Conveyance Survey" had been "effected with satisfactory result", cf. the certificate's proviso no. 13.

In order to comply with proviso no. 7, Harms had entered into an agreement with "Seewetteramt" in Hamburg for EDUARD to report its position to Wetteramt at 10am each day, after which Wetteramt would, at 13:30 on the same day, send the ship a weather port for the next 24 hours, including weather forecasts for a period of up to 144 hours. This took place from and including 30 January when the towage convoy departed from Hangö.

A minor accident occurred while sailing through the Baltic Sea. The electronic autopilot failed, causing EDUARD to lose control and heel 15–20°. After manual control was activated, the vessel quickly righted itself. However, Johannsen made sure that the system was monitored by specialists who came on board from Copenhagen. No further faults with the autopilot occurred during the rest of the voyage.

Another minor accident occurred on 7 February, when the towage convoy was in Kattegat. Some containers belonging to Harms and that were loaded on GIANT 14 suffered wave damage. In consultation with Harms, Captain Fock decided to call in at Kristiansand, and the towage convoy arrived there on 8 February. Here, arrangements were made after the container accident. In addition, the towage convoy was inspected by a GL surveyor who examined the barge and fastening of the cranes etc.

At Harms' request and occasioned by the freight insurance this company wanted to take out, GL made extensive calculations to determine whether EDUARD was strong enough to execute the planned tow. The result of the calculations appears in the "Seaworthiness Certificate (Fitness to be Towed)" for EDUARD, issued by GL, Hamburg, on 10 February with the following conclusion:

> "From our point of view, the above mentioned tug is sufficiently strong for the intended voyage."

2.7. The towage convoy's voyage from Kristiansand to Vlissingen

The towage convoy departed Kristiansand on 10 February. On 11 February, when the vessels were approximately 60 nautical miles west of Esbjerg, another accident occurred. For unknown reasons, the wire that was used for the tow (port side drum) fully unwound resulting in the loss of the connection between the tug and the pontoon. The crew from EDUARD, who were placed on board the pontoon, tried unsuccessfully to pull up the unwound tow line and this therefore had to be cut. A new tow connection was then established using the wire on the starboard side drum and the voyage continued on 12 February after the gear on the drum had been engaged at the orders of the shipmaster.

The towage convoy arrived in Vlissingen in the Netherlands on 14 February. GIANT 14 with the cranes was anchored, with Johannsen's barge AXEL as "stand by". EDUARD went into port, where the following work was carried out in consultation with Fehling from Johannsen and

Bronisch from Harms, both of whom had travelled to Vlissingen: A new 1,200 metre tow line was inserted in the port side drum and this was closely examined in the hope of determining the cause of the line unwinding on 11 February. However, Fehling and Bronisch were unable to find any explanation for the accident. The brake bands on the drum were shown to be undamaged and were therefore not replaced. It was considered sufficient to replace 4 bolts that connected the upper knee joint of the brakes with the structure on deck since these bolts had received some minor scratches. In addition, the electrical motor for the gog winch received a thorough overhaul. Finally, a minor repair was made to GIANT 14 while at anchor. A welding seam that had opened up when EDUARD struck the pontoon during the work to re-establish the tow connection, was welded shut.

GL was not summoned in connection with this work in Vlissingen.

2.8. The voyage from Vlissingen. The accident

On 16 February, EDUARD departed Vlissingen with GIANT 14 in tow in the starboard side tow line and with the drum gear engaged. The voyage proceeded without any major problems until 20 February. The towage convoy had an average speed of 5 knots and on the morning of 20 February was located at 49° 16' N, 5° 24' W, i.e. in the middle of the western outlet of the English Channel. The weather situation deteriorated as the day progressed. "Ein zustzlicher und ausserordentlicher Wetterbericht" at 20:29 gave the following warning:

"Schweres Sturmtief, 975 westlich Irlands, langsam ostziend, Trog südwestlich Irland ostschwenkend. Vorhersage für West ausgang Kanal:
Südwest bis West 8, nachts vörübergehend zunemend 10, rechtdrehend, morgen West bis Nordwest 8–9."

At 00:00 on 21 February, Captain Fock was relieved from his watch by second mate Mainka. The vessel was being steered manually. The wind had increased to a strong SW-W 8–9, with heavy storms. The wind caused a wave height of 4 metres with a period of 6–7 seconds. In addition to this was a westerly swell with a wave height of 2.5 metres with a period of 10 seconds. This resulted in a wave height of 5 metres, but some waves were twice this size. Under these weather conditions, the towage convoy had practically no forward speed. Captain Fock therefore ordered Mainka to ride out the storm and to ensure that the tug's bow was held up against the wind and sea at all times.

The accident occurred at 02:10. According to Mainka's testimony, the tug was hit by a massive wave on the starboard side, resulting in the vessel listing more than 30° towards the port side. When the vessel failed to right itself, Mainka triggered the general alarm. The machine alarm sounded immediately thereafter. The listing only increased and the revolution indicator showed that revolutions per minute were heading towards zero. The helmsman confirmed that the vessel no longer responded to the helm. Fock came rushing up to the bridge and attempted to increase speed by using the speed lever. The propeller made 60–80 revolutions for a brief period, but then stopped entirely. The cause of this was in the vessel's hydraulic system. The suction pumps were on the starboard side of the oil tank. In the event of a not so brief listing towards the port side of more than 20–30°, the oil would flow away from the pumps and the oil pressure would then fall, resulting in the multi-brake clutch between the engines and propeller being released. A stand-by pump would immediately come into action, but this would only be able to maintain the necessary pressure for a short period – something that explains why the propeller restarted for a short period after Fock entered the bridge.

The list increased to almost 90°. Fock fired some emergency flares and Mainka attempted to send mayday signals over the radio, but the transmitter had no power. However, no attempts were made to release EDUARD from the tow line. Two life rafts were prepared. Mainka and three other crew members were able to climb on board one of these and escape from the capsizing vessel.

Approximately 10–15 minutes after the vessel had started to list, EDUARD sank, dragged down from astern by the pontoon. Captain Fock and 5 other crew members were taken by the sea.

2.9. The salvage attempt. The issue of removing the wreck
For a period after it was dragged down, EDUARD must have hung on the tow line and acted as an anchor for GIANT 14. However, after the line snapped, the pontoon drifted rapidly in an easterly direction. Approximately 16 hours after the vessel capsized, it was sighted by a Greek freighter at 18:00 on 21 February which reported this and the barge's position to a French coast guard station. The message was intercepted by Radiostation Smith-Rotterdam and from there was passed on to Harms and Johannsen. Several salvage vessels that had also heard the message set a course for the position that was given. At the request of Harms and Johannsen, Hamburg-based shipping company "Bugsier"'s PACIFIC, which was berthed in Falmouth, was engaged in the search for EDUARD and GIANT 14.

At 02:00 on 22 February, planes from the French and English navies also took part in the search. GIANT 14 was observed at 05:00. PACIFIC arrived at the location of the barge shortly thereafter. The life raft with the four seamen from EDUARD was observed at approximately 08:30 and these men were taken on board French naval vessels approximately 90 minutes later.

PACIFIC was not able to get a hold of GIANT 14's emergency tow line which had become tangled. Chief Officer Ebert and another man were therefore placed on board the barge, however they were unable to arrange a tow connection in time. The barge drifted at a speed of 3–4 knots towards the French coast and the two crewmen from PACIFIC had to be evacuated by helicopter. GIANT 14 ran aground at approximately 11:40. The barge sprang a leak and filled with water causing it to capsize. The cranes were ripped away when the vessel capsized.

GIANT 14 was later salvaged and repaired. The French authorities initially demanded that the cranes should also be removed, and Kone therefore engaged assistance to search for these. However, after locating the cranes, the authorities withdrew the demand for removal. The cranes were not worth salvaging and were therefore left on the seabed.

3. Claims and assertions on the part of the plaintiffs

3.1. The accident case

3.10. Overview
There are three alternative reasons for why EDUARD sank:

(1) There may have been a gradual intrusion of water into the tug's hull such that stability was reduced and eventually lost. If this was the case, water must have intruded through leaks in the hull, openings in the weather deck, or similar.

This alternative must be immediately be dismissed because it is based on pure speculation. Water intrusion of such a magnitude that it would impact on stability would have to have been discovered at an earlier stage. The ship would have had a longer roll period, which is something that would have been notice on the bridge. The build-up of water would also have triggered the alarm in the engine room at an earlier stage.

(2) Water may have intruded into EDUARD's hull due to a giant wave having smashed parts of the superstructure. This alternative can be dismissed even faster than the previous alternative. Mainka, who was on watch on the bridge until the accident occurred, and who has provided testimony about the sequence of events, would have observed such extensive damage.

(3) EDUARD must have been dragged down by the tow. This conclusion is a prominent part of Seeamt's statements, see in particular pages 81–82 of the report, and, in the view of the plaintiffs, is the correct and only possible alternative:

EDUARD had excellent stability which had not been reduced by the vessel having had a Kort-nozzle installed. If, under normal circumstances, EDUARD had been knocked over onto its side by rough seas, it would have eventually righted itself again. However, in this instance the tug was held down by the drag on the tow line. When the accident occurred, the tug and tow must have been drifting uncontrollably astern. The tow led and was towing the tug, which therefore could not manoeuvre itself freely. The tow line must have been pulled over to the side by EDUARD, thus causing a sideways drag that prevented the tug from righting itself. In this type of situation, the only possibility of rescue would be the immediate release of the tow line from the tug. Since this was not possible, EDUARD was fated to sink.

The explanation for the accident stated here does not in itself provide a basis for assessing Harms' liability for the loss that was caused. It is necessary to go back through the causal chain and to ask the following questions: Why were EDUARD and its tow unable to withstand the wind and weather? And why was it not possible to release the tow line when the situation became acute? These questions lead to new issues: Did EDUARD have inadequate bollard pull? See 3.11. Were there any faults in the drum brakes and was this the reason that the drum gear was engaged? See 3.12. Could the barge have been saved if EDUARD had had a quick release mechanism? See 3.13. Did the gog wire system fail? See 3.14. Or were the weather conditions too difficult? See 3.15. Finally: Was there any fault in GIANT 14's emergency tow line system and, if so, was this fault what resulted in the failure to salvage the barge with the cranes? See 3.16.

3.11. EDUARD's bollard pull

When, in a contract of carriage such as this, it is asserted without further specification that a tug must have a certain minimum "bollard pull", this must be understood as being an assertion of "continuous bollard pull". This assignment involved a tow during the winter period, through long stretches of sea with harsh weather, where lengthy periods of bad weather had to be expected and where it was of vital importance that the tug was strong enough to hold itself and the tow up against the wind and sea, such that it could maintain control of the tow, even during possible "drifting". "Maximum bollard pull" or "peak value", which can only be maintained during a relatively brief period, are of no interest in this context. If the tow is to be kept under control during a storm, the necessary bollard pull must be possible at all times.

GL's survey report of 22 September 1983 regarding the bollard pull test on 21 September also provides no information about how long the drag of 41.2 tons was maintained nor how heavily the engines were strained, nor the exhaust gas temperatures that this caused

However, in the statements that were provided to Seeamt by Wohlfeil, Held and Wolter it was stated that 41.2 tons was achieved from a 10% overloading of the engines with 160–165 revolutions per minute for the propeller. Vidnene also claimed that the stated drag was maintained for 10 minutes (see pages 40–43 of the Report). However, the later-mentioned information does not correlate well with the information provided by EDUARD's second engineer Jankowski. Revolutions per minute could not exceed 145 if the exhaust gas temperature was to be held at a maximum of 370°. "Jede Steigerung der Wellenumdrehungen habe bereits nach wenigen Minuten zu Abgastemperaturen von 400° geführt, so dass die Maschine wieder hätte heruntergefahren werden müssen." (Page 33 of the Report), cf. including GL's survey report of 23 September 1983 which makes reference to a "kurzzeitige 110% Leistung".

Based on what is asserted here, the certified bollard pull of 41.2 tons is a peak value, achieved during a shorter period at 10% engine overload.

According to expert witness Witjen (see pages 43–44 of the Seeamt Report), 41.2 tons at 110% engine load is equivalent to 37.6 tons at 100% load. However, he added that: "Im praktischen Schleppbetrieb könne von einer Dauerleistung von nur 90% entsprechende 36.9 t ausgegangen werden". If one also took into consideration that revolutions per minute could not exceed 145 due to the exhaust gas temperature, a 14% reduction in the bollard pull to approximately 31.7 tons had to be expected.

Based on this, the plaintiffs claim that EDUARD's continuous bollard pull was approximately 30 tons, i.e. 10 tons less than what was guaranteed in the contract, and that this was the most important reason for the accident.

It was assumed that the test of 21 September had determined a peak value for EDUARD's bollard pull of 41.2 tons. However, the plaintiffs have strong doubts about the accuracy of the test and even suggest the possibility of direct falsification. It is extremely regrettable that GL did not have specific rules for the process when conducting bollard pull tests and the reports that are to be prepared for the tests. The process that was selected was very unfortunate. The measuring instrument used was less accurate than the instruments used by, for example, DnV, and often gives excessively high readings. GL's representative, Wohlfeil, was located on EDUARD's aft deck during the test and therefore could not verify the readings taken from the manometer on the pontoon or the RPM shown in the engine room and therefore could also not verify how long the maximum drag that was achieved had been maintained. He was completely dependent on the notifications he received from the other people who participated in the test, people who must have had a certain interest in the test confirming that EDUARD had the bollard pull that was predicted by Schaffran and which Harms had reported to Kone during negotiations for the contract of carriage. The certificate ("Survey report") which GL issued after the test is a flawed document which, as mentioned above, lacks vital data about the test, including how long the bollard pull of 41.2 tons was maintained and the corresponding engine load and exhaust gas temperature.

3.12. The tow winch

The tow winch was installed in 1974 and must have been dimensioned while taking into account the tug's bollard pull at that time, which was stated as 28 tons. When the bollard pull was significantly increased in 1983 due to the installation of a Kort-nozzle, the brakes on the tow drums should have been strengthened accordingly. However, this did not occur, with the result that EDUARD sailed with drum brakes that were not strong enough. With a braking force of 2 x 42 tons and a bollard pull of 28 tons, the safety factor was originally 84:28 = 3.00, while this was reduced to 84:41.2 = 2.04 following the conversion. DnV's standard requires a minimum safety factor of 2.50, cf. DnV's "Study" of 30 March 1987. The fact that the braking power was inadequate explains why the port side tow line unwound west of Esbjerg on 10 February 1984 and that for the remaining part of the voyage, Captain Fock did not trust the brakes and therefore sailed with the drum gear engaged. This was contrary to standard practice for tows in open waters and was a contributory cause of the accident. In a highly dangerous situation, such as that which arose for EDUARD on 21 February, it would have been possible to release the drum brakes. However, releasing the drum gear would be completely out of the question. Before this could occur, the drag on the tow line and therefore the strain on the drum would have to be reduced. However, this was impossible in a situation when the tug, which was experiencing uncontrolled drifting, was dragged aft by the tow.

3.13. "Quick release"

If EDUARD had been equipped with "quick release", the tug would have been able to free itself from the tug during the critical situation that arose at 02:10 on 21 February and thereby have avoided being dragged down by GIANT 14. It is correct that the barge would have drifted uncontrolled in an easterly direction. However, with EDUARD intact, assistance could have been summoned immediately. However, 16 hours passed before the outside world was alerted and salvage attempts initiated. If PACIFIC had had these extra 16 hours available, there is every reason to believe that GIANT 14 and the cranes would have been salvaged.

If EDUARD had been classified by DnV, it would have had to install a system for the quick release of the tow line that was controlled from the bridge. GL introduced equivalent rules in 1977, but only for tugs launched after the rules had entered into force. However, the fact that GL did not require that EDUARD be equipped with quick release did not of course prevent the owner of the tug from voluntarily complying with the new rules out of consideration to the safety of the vessel and the crew.

3.14. The gog wire

In the view of the plaintiffs, the gog wire must have snapped at some point before the accident, which resulted in the tow line's focal point being moved from the stern to a point at the aft edge of the superstructure. This in turn must have resulted in the drag on the tow line moving at an angle with the direction of the tug, something that would rapidly push the tug over and down. One must disregard the witness statement from second officer Mainka that, after EDUARD had been pulled over on its side, he observed that the "beistopperne" used to hold the tow line amidships were in place. Such an observation was not possible in the situation that arose when EDUARD listed.

3.15. The weather conditions

It is clear that the weather conditions were a contributory cause of EDUARD capsizing. If the wind speed had been lower and the sea not as rough, the tug could have tolerated the strain.

However, this is of no significance to the question of liability. The tow was to take place at a time of year and through waters where it had to be expected that there would be storms of the type the tow encountered on 20–21 February 1984.

On the contrary, the fact that the towage convoy was exposed to a storm with wind speeds of up to 10 Beaufort can be particular grounds for holding Harms liable. Provisos 3, 4 and 5 in the Conveyance Certificate set specific requirements with regard to the weather conditions, requirements that Harms was obliged to respect. Since GL was not more active, Harms should have intervened to prevent EDUARD and its tow from encountering a storm. Even with a continuous bollard pull of 41.2 tons, EDUARD would not have been strong enough to keep the tow steady in the face of weather with this wind speed and in heavy seas. This is shown in the calculations made by GL's expert, Dieter Mix, prior to when GL's "Seaworthiness Certificate (Fitness to be Towed)" was issued on 10 February 1984. Mix based his calculations on the "Bescheinigung" which his colleague Wohlfeil had given from the bollard pull test on 21 September 1983 and assumed that the stated bollard pull of 41.2 tons was achieved from "maximaler Dauerleistung", and that this was therefore a "continuous bollard pull". With this starting point, his calculations gave the result: "dass der Schlepper bei Seegängen bei Windstärken bis auf Bft 9 in relativ geschützten Gewässern bzw. Bft 8 in freien Gewässern geeignet sei". See page 58 of the Seeamt Report. It its "Study on towing causalty M/V EDUARD" of 30 March 1987, DnV set an even stricter restriction. In point 1 of "Conclusions" it states that:

> "The necessary bollard pull for the tug should, according to VMO's recommendations for unrestricted operation, be 67 tons. For a bollard pull of 41 tons, VMO would limit the actual towage to take place only in weather conditions of Beaufort 6 or better."

3.16. GIANT 14's emergency tow line.
GIANT 14 was equipped with an emergency tow line that had previously been attached to a crowfoot and which from there was passed aft along the side of the barge. Attached to the end of the line was a 50 metre "messenger line" which passed over a thinner 15 metre "pick-up line" with a "pick-up buoy" at the far end. While being towed, these lines were supposed to float in the sea behind the barge such that another vessel, for example, a salvage vessel, would be able to pull up the messenger line and wind in the emergency tow line and thereby establish a tow connection.

However, this system failed when PACIFIC attempted to salvage GIANT 14 on the morning of 22 February. The buoy had become attached to the side of the barge and the lines were tangled. This delayed the salvage operation. Crew from PACIFIC had to be placed on board the barge, where they faced such major problems preparing the emergency tow line that they ran out of time. These people had to be evacuated from the barge by helicopter before they were able to establish a tow connection. The result was that the barge ran aground and the container cranes were lost.

3.2. Grounds for liability

3.21. Liability for negligence
Harms was the expert party when concerning sea-going tows.

Kone was proud of its know-how and technology in connection with manufacturing large container cranes and moving these onto pontoons and securing them for transport across the sea.

The later-mentioned work was inspected and approved by GL on assignment from Kone and was shown to be completely satisfactory.

However, contrary to what Harms has claimed, Kone did not have any knowledge about towing barges with cranes on board. It is correct that Kone had once owned a tug (KONE, now KRAFT). However, this was not suited for sea-going transport and was sold in 1979. This also resulted in the loss of the tug expertise that Kone may have possessed. Therefore, when concerning the need for expert guidance, Kone had to be considered as being in the same position as Harms' other customers. Unlike Kone, Harms specialised in sea-going tows of large barges. In connection with this, Kone placed a great deal of emphasis on the fact that Harms was a subsidiary of Smit in Rotterdam, a company that administers the largest and best equipped tow and salvage vessels in the world and has the foremost towing expertise available.

Based on this, it was clear that the transport contract imposed a duty on Harms to ensure that the towage of the barge with the cranes was executed in a satisfactory manner. Of vital importance in this context was that Harms had to use a well-equipped and sufficiently strong tug, cf. provision no. 2 in the Conveyance Certificate. GL's approval was conditional upon the transport being "effected in tow of a sufficiently strong tug". Harms (represented by Bronisch) and Johannsen (represented by Fehling, who Harms must be fully liable for) breached this obligation in a manner that must be characterised as grossly negligent and that clearly entails liability. This criticism particularly applies to the following:

(1) It was a gross miscalculation on the part of Harms to use a tug that was as weak as EDUARD for the transport. Kone had made it clear that this was an extremely demanding assignment, cf. in particular, Kone's telex of 19 August 1983 with the statement of the cranes' wind area. After having received this assignment, Harms should have immediately made calculations of the power that would be necessary to enable the tug and barge to withstand wind of a specific strength. It would then have been clear that EDUARD would not be strong enough for the winds that would have to be expected on the planned voyage and Harms would therefore have offered a stronger tug. However, no such calculations were made before the tow had commenced. The calculations that GL carried out and which resulted in the "Fitness to be Towed" certificate of 10 February 1984, were based on the incorrect assumption that EDUARD had a continuous bollard pull of 41.2 tons. However, this is not stated in the certificate and the certificate also says nothing about the assumptions it is based on in terms of wind speed. A specialist towing enterprise such as Harms cannot "hide behind" this certificate.

    Since they had knowledge of the manner in which the bollard pull test of 21 September 1983 was carried out, Harms and Johannsen (Bronisch and Fehling) must have also understood that EDUARD did not have a "continuous bollard pull" of 41.2 tons.

(2) Johannsen (Fehling) must have understood that EDUARD's drum brakes had become too weak after the bollard pull had been increased significantly through the installation of a Kort-nozzle, but without there being a corresponding increase in the braking power. In any event, the accident that occurred on 11 February, when the port side tow line was lost, must have made Johannsen aware of the situation. However, GL was not notified of this and was also not summoned to inspect the tow winch in Vlissingen on 14–16 February. Criticism for failure to provide a warning also applies to Harms (Bronisch), cf. proviso 8 of

the Conveyance Certificate: "In the event of any damages being found" GL's head office must be contacted "immediately and advice regarding further procedure to be followed is to be awaited."

(3) It was also a fault entailing liability that EDUARD was not equipped with "quick release". The fact that there was no requirement from the authorities or the class for this cannot be a decisive factor. This was an extremely demanding tow assignment in the middle of winter in rough waters, and it must be considered a major failure that a professional towage company used a tug for this type of assignment without ensuring that the vessel had the vital safety system that quick release provides.

(4) As noted under 3.13 above, Harms should have actively intervened to prevent EDUARD from continuing the voyage under the extreme weather conditions that arose. Liability cannot be avoided by delegating all authority to the captain of the tug, particularly when the captain has not been informed about the wind areas of the cranes and the applicable forces.

(5) The fact that GIANT 14's emergency tow line system was defective, something that proved to be fateful, was a fault that Harms must have been aware of.

3.22. Liability for the guarantee that EDUARD's bollard pull was at least 41 tons

When it states in clause 1 of the Addendum that "The tug has at least 41 tons bollard pull", a so-called guarantee exists pursuant to contract law. It is a certain rule of law that the relevant contractual party has an objective responsibility for such a guarantee being correct. As noted under 3.11 above, "in this context, bollard pull means 'continuous bollard pull'". It is now clear than EDUARD's "continuous bollard pull" was only approximately 30 tons. There was therefore a shortfall of approximately 25%. If the tug had had the guaranteed bollard pull, the chances of the tug having ridden out the storm would have been significantly better. The fact that the tug lacked the guaranteed feature is therefore a contributory cause of the accident and the loss of the cranes and, on this basis, Harms must be held liable for the loss – without it being necessary to discuss the question of culpability.

3.3. The scope of the loss

Sampo claims compensation for the payments the company has made under the insurance policy for the container cranes, FIM 41,493,740 in total.

Kone claims compensation for the expenses the company incurred in locating the cranes after the accident when ordered to do so by the French authorities. Compensation for these expenses, which amount to FIM 1,431,116, cannot be claimed under Kone's insurance for the cranes with Sampo.

In addition, interest is claimed on these amounts of 15% from 1 July 1985 until 1 February 1986 and 18% p.a. from 1 February 1986 until payment takes place.

3.4. Limitation of liability pursuant to clause 14 of the Agreement

As a universal disclaimer, clause 14 must be interpreted restrictively. The reason that a carrier wishes to be exempt from liability for damage to deck cargo is the special risks that the cargo is exposed to when being transported on deck. Based on this, it is natural to interpret the disclaimer as only applying to damage that can be said to be the result of these particular risks. In that case, the disclaimer cannot be asserted in this instance. The fact that the cranes were loaded onto the

deck of the barge was of absolutely no significance to the sequence of events. The reason for the loss was that EDUARD lost control of the tow and was dragged down. The deck cargo, i.e. the cranes, withstood everything and was not lost until GIANT 14 ran aground and capsized.

In the alternative, it is asserted that the disclaimer must be disregarded pursuant to the mandatory rule of law. It is a clear rule of law that a contracting party cannot validly disclaim liability for loss caused by the said contracting party's own intentional or grossly negligent actions. As referred to under 3.21 above, such gross negligence was exhibited by Harms'/Johannsen's management (Bronisch/Fehling) in connection with the towing assignment. Harms' liability for its subcontractor, Johannsen, means that there is also identification between Harms and Johannsen when concerning gross culpability that prevents the limitation of liability.

The plaintiffs also assert that the disclaimer must be disregarded pursuant to Section 36 of the Norwegian Contracts Act. It would "appear unreasonable" if Harms should completely evade liability when negligence displayed by people in leading positions results in total loss as in this case.

The objective liability due to a bollard pull of 41.2 tons having been guaranteed, cannot be limited in any instance and in this case the special justification for liability must take precedence to the general disclaimer.

3.5. Global limitation

The applicable Norwegian rules pertaining to global limitation (Section 234–243A of the Norwegian Maritime Code) entered into force on 1 April 1985, i.e. after EDUARD capsized. Potential global limitation must therefore apply in accordance with the older rules (Act no. 13 of 7 April 1972). Pursuant to these rules, limitation is excluded for "liability due to errors or omissions on the part of the shipowner itself". Simple negligence exhibited by the management of the responsible company is therefore sufficient to preclude the right to limit liability. There is no doubt that such negligence was exhibited by Bronisch and Fehling, who in this instance must be deemed to represent the management on the carrier side.

3.6. Costs

The plaintiffs have claimed costs from Harms and that Harms be ordered to pay the costs of the Arbitral Tribunal. In a letter of 14 November 1986 from Supreme Court Attorney Stang Lund, the plaintiffs' costs were stated as NOK 1,070,197.20, plus NGL 146,525, plus DEM 118,239, plus FIM 115,087.97. Based on the current exchange rates, the total amount is equivalent to approximately NOK 2,184,000.

3.7. Claim for relief

The plaintiffs have submitted the following claim for relief:

1. Harms Bergung GmbH is ordered to pay Ömsesidiga Försäkringsbolaget Sampo FIM 41,493,740.00 and Kone Oy FIM 1,431,116.00, with the addition of interest of 15% p.a. from 1 July 1985 until 1 February 1986 and 18% p.a. from 1 February 1986 until payment takes place.

2. Harms Bergung GmbH is ordered to pay the costs of the same parties, including the fees and expenses of the Arbitral Tribunal.

4. Assertions and claims on the part of the defendant and intervener

4.1. Grounds for liability

4.11. The bollard pull

In the arrangement with Harms, Kone also had to be considered a professional party when concerning the towing of cranes on barges. Kone had owned both barges and tugs and had also arranged transport with its own barges and hired tugs, including the transport of cranes with a large wind area to Qatar with the barge CHARLOTTE WESSELS. It is difficult to understand that Kone's expertise in this area disappeared upon the sale of the barge KONE. For example, Kone's Lars Mannström was an expert in tow transports. Among other things, Mannström had a good knowledge of Harms' barges.

During the negotiations for the contract of carriage, little interest was given to the issues regarding wind area and bollard pull. Kone therefore provided no information about the wind area when AXEL was proposed as the tug to be used. The assertions regarding "wind area" in Kone's telex to Harms of 19 August 1983 more closely resemble the provision of information. Kone themselves had calculated that a bollard pull of 35–40 tons was required "to keep the tow in a wind of 20–25 m/s". The relevant paragraph of the telex ended as follows: "we hope that insurance company accept 41 tons, we are controlling it". No clarification was provided by Kone's insurer, most likely because it was uncertain at this time as to which insurance company would insure the cranes. Sampo, which took over coverage in a policy dated 23 January 1984, does not appear to have been interested in the tug's capabilities. Sampo was sent GL's "Conveyance Certificate" on 30 January 1984 with the survey endorsement of 29 January. This endorsement satisfied proviso no. 12 in the certificate, but not proviso no. 2. There does not appear to have been any contact between Kone and Sampo regarding the issue of whether EDUARD was a "sufficiently strong tug". GL's "Seaworthiness Certificate" of 10 February 1984, which answered the question, was issued at Harms' request and out of consideration to this company's freight insurance. It does not appear that Sampo was informed of the certificate.

Harms agrees that the statement in clause 1 of the Addendum that "The tug has at least 41 tons bollard pull or more" constitutes a guarantee. However, the question is what "bollard pull" means in this context. Mannström and Bronisch did not touch upon this. One must then refer back to what was the standard commercial expression for bollard pull at that time.

Practices regarding statements of a tug's performance have changed somewhat over time. Previously, it was standard to express engine performance in the form of horse power. Use of tow force or bollard pull became standard in connection with assignments for the offshore industry. In lieu of standardised methods for measurement, it was natural to use the method that gave the greatest bollard pull, i.e. measuring the bollard pull at engine overload and possibly when manoeuvring the rudder. It is correct that a "peak value", which is only achieved for an instant, is of no interest. One is left with "maximum bollard pull", i.e. the bollard pull that can be maintained over a certain period when the engines are overloaded. The fact that this was the value that was most commonly used when describing tugs was confirmed by Even Skraastad, SCUA Rotterdam, who wrote the following in a letter of 22 October 1985 to attorney Stang Lund:

> "When quoting bollard pull the practice has often been to adopt the maximum static pull."

The alternative "effective bollard pull" can be immediately disregarded. In addition, without evidence based on what was agreed to, one also cannot include the special bollard pull definitions set by Lloyd's ("Steady bollard pull") or DnV ("Continuous bollard pull").

In Harms' view, EDUARD satisfied the requirement of a bollard pull of at least 41 tons, defined as the "maximum bollard pull". The decisive evidence is the bollard pull test of 21 September 1983, which was performed by GL and confirmed in the "survey report" of 22 September. Harms refutes the criticism of the manner in which the test was carried out. Wohlfeil had to be able to use assistants to record the necessary readings on the pontoon and in the engine room. DnV is also no a stranger to the idea of being able to trust people. A bollard pull of 41 tons also correlates with Schaffran's calculations. Reference is also made to calculations performed by Dr. Østergaard. In the view of the defendant, Harms had no obligation to assess whether a stronger tug than EDUARD should have been used or possibly make a proposal regarding this to Kone. The agreement concerned an individually specified tug with a guaranteed bollard pull. Kone could not demand anything else. GL's "Conveyance certificate" of 19 January 1984 is not part of the contract of carriage. It was issued at Kone's request in connection with the insurance of the cranes and is only relevant in the arrangement between Kone and Sampo. Harms was not bound by this and therefore had no obligation pursuant to proviso no. 2 to ensure that the transport was "effected in tow of a sufficiently strong tug".

The issue regarding the strength of the tug also has a price related aspect. The use of EDUARD instead of the originally proposed AXEL resulted in a significant, additional freight charge. Kone was aware that a bollard pull of 41 tons would not be sufficient to keep the tow moving under extreme weather conditions, cf. Kone's telex of 19 August 1983 to Harms, which states that a bollard pull of 35–40 tons was calculated for being able to "keep the tow in a wind of 20–25 m/s". 20–25 m/s is equivalent to Beaufort 9, "strong gale". For the planned voyage, even stronger winds had to be expected at times. In that case, Kone's requirement therefore must have been that the towage convoy should be able to tolerate controlled drifting.

In the alternative: A potential obligation for Harms to ensure that the tow was executed with a "sufficiently strong tug" would only impose a duty of care on Harms. The choice of EDUARD cannot be said to have been negligent. In any event, it must be in Harms favour that the expert body, GL, confirmed in its "Seaworthiness Certificate" of 10 February 1984 that EDUARD was "sufficiently strong for the intended voyage". Harms was unaware that the certificate had been issued based on an incorrect assumption of what GL's bollard pull test of 21 September 1983 involved.

4.12. The tow winch

The uncontrolled deployment of 500 metres of tow line from the port side drum on 10 February 1984 is a mystery. Mainka has stated that the drum brakes became increasingly more tensioned and that those on board did not notice that the line had unwound. The drag on the wire under the prevailing weather conditions must have been moderate. A subsequent inspection of the drum in Vlissingen could not detect any damage to the brake bands. The theory that the brake bands were replaced at sea must be ruled out. Could the explanation be that there had been a miscalculation of the distance to the tow and such a large amount of tow line was deployed that the line was on the inner layer of the drum?

The fact that the winch was later inspected does not mean that there was something wrong with the winch, it simply demonstrates the shipping company's high level of maintenance.

The replacement of bolts that took place in Vlissingen was probably unnecessary, but confirms that the shipping company did everything to keep the winch in a first class condition.

The winch was not subject to GL's supervision and there was therefore no reason to summon the classification society for an inspection in Vlissingen, something that was confirmed by witness Oppermann from SCUA, Hamburg.

Each of the brakes on the tow drum had braking power of 42 tons. This gave a combined braking power of about double the maximum bollard pull of 41.2 tons, which was completely adequate. The criticism of the tow winch must therefore be refuted.

It was EDUARD's shipmaster, Captain Fock, who decided to continue the voyage from Vlissingen with the drum gear engaged. This matter was not discussed with any representative from Harms or Johannsen, and these companies were not aware that the gear had been used until after the accident. Engaging the gear made it possible to regulate the length of the tow line by using the winch's electrical motor without prior operation of the gear. When towing in busy and narrow waters such as the English Channel it is not unusual to sail with the gear engaged. It was also fully possible to release the tow with the gear engaged by using the winch motor. However, in order to do so the band brakes had to be loosened before the line could be deployed and it was therefore the operation of the brakes that determined the ability to jettison the tow.

In accordance with this, the criticism relating to EDUARD having sailed with the drum gear engaged must also be dismissed.

4.13. "Quick release"

With regard to the requirements for a tug's features, the flag state's standard must be decisive, despite the contract of carriage being governed by Norwegian law. Neither the German maritime authorities nor GL have stipulated rules that require tugs constructed before 1977 to install a remote controlled emergency release of the tow line ("quick release"). The consideration behind these rules must be decisive when a standard of care is set in this area. The duty of care does not entail that one must be at the very top level in terms of safety at all times. In addition, a party that satisfies the somewhat more modest requirements from the authorities and the classification society must be considered to be on the safe side. A "bonus pater familias" does not have to be the "cleverest boy in the class". In his witness testimony, Sven Mortensson stated that in 1983–84 several of Röda Bolaget's tugs sailed without quick release and that the company still has one such boat.

There is a price element associated with quick release. If Kone wanted to have a tug equipped with this type of device, the company would have had to expect to pay a higher freight charge.

4.14. The gog wire

The gog wire winch was not used on the voyage from Vlissingen. Therefore, only the fixed "Beistopper" are of interest. These consisted of 44 mm of steel wire with a rupture strength of 125 tons and there is no reason to believe that these failed.

4.15. The weather conditions

No criticism can be directed at the manner in which the weather forecast service was organised. The decision on whether to delay departure or to cancel a voyage that has commenced due to

weather warnings, had to be made by the tug's shipmaster. In the situation that the towage convoy found itself in at 20:29 on 20 February 1983 when it received the extraordinary weather forecast with the storm warning, it was also not possible to call off the voyage. The towage convoy was so far from land that attempting to reach an emergency port in time was ruled out.

That a towage convoy may experience a storm is also something that one must be prepared for in connection with this type of towing assignment. One must therefore set a course towards the wind. If, after a period, it is not possible to maintain a certain speed through the water, one then switches over to "controlled drift". The engine power is reduced, but kept at a high enough level to prevent reverse drift (prior to capsizing, EDUARD was moving at a reduced speed, equivalent to 125°/min.). Using the helm, attempts are made to keep the tug up against the wind. The tow line moves a little to the side, which causes a slight heel. As long is the vessel is in open sea, drifting is harmless. A dangerous situation will only arise if the reverse drift becomes so strong that the rudder effect is lost and the tug is dragged aft with the tow line controlling the direction.

Based on what is stated here, neither the shipmaster nor the shipowner can be criticised for EDUARD experiencing wind and seas of such a magnitude that the towage convoy sometimes had to drift.

4.16. The emergency tow line on GIANT 14

The witness statements that were provided by Mainka and Ebert were largely the same. The emergency tow line was arranged in an adequate manner. However, this arrangement was damaged by the sea in the period after the tug capsized when GIANT 14 was out of control. Harms cannot be held liable for this situation.

4.2. Causation

Seeamt was not able to determine the cause of EDUARD's sinking and the cause of the accident can also not be said to have been clarified at a later stage. Of the three alternatives that have been suggested, cf. section 3.1 above, the defendant agrees with alternative 2: sudden intrusion of water into the tug, with the resulting loss of stability and the tug then capsizing.

In any event, the accident cannot be said to be the result of EDUARD having had less bollard pull than what was stipulated in the contract of carriage, cf. the statement regarding controlled drifting under 4.11 above. If the towage convoy was to maintain a specific speed going forward, even during extreme wind conditions, the guaranteed 41.2 tons would also not have been sufficient, even if this had represented a "continuous bollard pull". In its "Study" of 30 March 1987, DnV stated that EDUARD should have had a minimum bollard pull of 67 tons if the towage convoy was to have been given permission to sail without "strong operational limitations".

Possible deficiencies in the tow winch could not have been a contributory cause of the accident. The chances of salvaging the barge with the cranes would most likely have increased somewhat if the tow line had been detached when EDUARD heeled. However, it must also be taken into consideration that in the initial period following the accident, EDUARD acted as a drag anchor for the barge and thereby slowed down its drift towards land. Under all circumstances, the decisive factor is that during the accident it would have been impossible to remove the tow line even if EDUARD had sailed without the drum gear engaged. The brakes on the drum would still have had to be released. It was also impossible to do this in the very brief period of time available, with the furious weather, major heel, and the sea well above the aft deck where the brakes had to be manoeuvred.

4.3. Limitations of liability

Clause 14.1 of the Agreement is clear, and the restrictive interpretation proposed by the plaintiffs is inconsistent with the wording. This form of total disclaimer for deck cargo is not unusual. It involves a rational sharing of the risk between the parties. Kone had to insure the cranes and bear the cost of the premiums. If Harms also had to cover the risk of loss and corresponding cost of premiums, this would have been of significance when determining the amount Kone had to pay for the transport.

However, Harms understands that it cannot assert the disclaimer if the plaintiffs are found to have established that the loss was the result of intent or gross negligence on the part of Harms' management. Errors that may have been made at the management level of Johannsen's organisation are of no significance in this context. There is even less reason to take into consideration errors made by GL's management.

The disclaimer in clause 14.1 must also preclude Harms from being held liable for the "guarantee" that EDUARD had a bollard pull of 41.2 tons. The requirement for such liability is that the Arbitral Tribunal accepts the plaintiffs' interpretation of the expression "bollard pull", i.e. that the hidden dissent that existed on this point is resolved in favour of the plaintiffs. Under no circumstances can the fact that Harms did not understand what Kone meant by bollard pull be grounds for blaming the shipowner of gross negligence.

In the alternative, Harms asserts the limitation of liability in clause 14.3, i.e. limitation to an amount equal to the "freight payable or paid", calculated at DEM 875,700.

There can be no question of invalidating clause 14 pursuant to Section 36 of the Norwegian Contracts Act. Clause 14 establishes the sharing of risk, which is standard in towing arrangements and which forms the basis for rational insurance coverage for the transport risk.

Further in the alternative, global limitation is asserted pursuant to Chapter 10 of the Norwegian Maritime Code. Harms has not exhibited sufficient negligence to have lost the right to limit liability. It is accepted that the limitation amount, calculated based on the tonnage of the barge and tug, is SDR 190,000.

4.4. The extent of the loss

Harms claims that interest on Kone's claim can only be imposed from 4 April 1986, i.e. from one month after the case was commenced, cf. Section 2.1 of the Norwegian Delayed Payments Act. Harms has otherwise made no particular objections to the plaintiffs' calculation of loss.

4.5. Costs

Harms has claimed payment of costs and that the plaintiffs, relative to the defendant, are ordered to pay the fees and expenses of the Arbitral Tribunal. According to attorney Sørlie's letter of 19 October 1989, Harms' costs amount to NOK 613,513.10, plus DEM 36,485.00, which, based on the present exchange rate, is a total of approximately NOK 750,460.

With regard to the plaintiffs' calculation of costs, Harms asserts that expenses totalling approximately NOK 1.2 million for expert assistance are higher than necessary for the adequate preparation and implementation of the case. Coverage of expenses associated with Seeamt's work cannot necessarily be claimed.

4.6. Harms has submitted the following prayer for relief:

1. The Arbitral Tribunal finds in favour of Harms Bergung GmbH.

2. Ömsesidiga Försäkringsbolaget Sampo and Kone OY are jointly ordered to pay Harms Bergung GmbH's costs, and, in the internal arrangement, to pay the fees and expenses of the arbitral tribunal in their entirety.

4.7. The intervener
Johannsen has fully acceded to the claims asserted by Harms and has submitted the following claim for relief:

1. Johannsen & Sohn accedes to point 1 of Harms Bergung GmbH's claim for relief.
2. Ömsesidiga Försäkringsbolaget Sampo and Kone Oy are jointly ordered to pay J. Johannsen & Sohn's costs.

According to attorney Rafen's statement of 23 October 1989, Johannsen's costs amount to NOK 334,488.5, plus DEM 90,228.60, which, converted according to the present exchange rate, amounts to a total of approximately NOK 673,600.

5. The Arbitral Tribunal's remarks

5.1. The accident case. Overview
The documentation submitted and witness testimony provided during the arbitration case have not provided complete clarity about the causes of EDUARD capsizing on 21 February 1984. However, after a thorough assessment of all information that has emerged, the Arbitral Tribunal finds that the explanation provided by Seeamt Lübeck and DnV is the most probable. See pages 76–82 of the Seeamt Report and DnV's "Study on the towing casualty M/V EDUARD", dated 30 March 1987. In section 5.2 in the latter-mentioned report it states that:

> "The towage was according to VMO's estimates not able to make any forward advances, and was most probably drifting backwards at a velocity in the order of 2–4 knots. It is reasonable that this drifting situation was difficult to control taking tug size and delivered bollard pull into consideration. (32–38 tons bollard pull and a length between perpendiculars of 33.5 meter.).
>
> It is reasonable to assume that an angle did arise between the tug's heading angle and the towline prior to the casualty, either due to a failure of the gog wire arrangements or the tug being hit by a heavy wave and heeled. The towline pull component resulted in increased heeling as described in the following section."

The following was stated in section 5.3 regarding "the increased heeling":

> "Hence, the conclusions from Germanischer Lloyd are found reasonable, stating that the rolling of the tug in heavy seas played an important part in the capsizing. After the initial heeling due to a heavy wave, or a failure of the gog wire arrangements, the tow line was immediately tensioned up due to the large windage area of the barge, thus preventing the

> tug from righting itself; the next wave will cause a new rolling; the towline will be further tensioned up, following further build up of tow line tension for each rolling of the tug, until a position of 70–90 degrees is reached. In this position, only the buoyancy of the superstructure prevented the tug from capsizing; and as the hull was flooded through windows and doors in the wheelhouse, the tug inevitably capsized and sank."

The following assessment of the question of liability is based on this explanation, which for Harms and Johannsen must appear to be the least favourable alternative.

Seeamt and DnV's explanation does not in itself provide any basis for deciding on the question of liability. Within the framework of this explanation, the Arbitral Tribunal must review the acts and omissions on the part of Harms and Johannsen that may have had a negative impact on the sequence of events and which therefore may entail liability. This review is undertaken in sections 5.3 to 5.7 below.

However, before the Arbitral Tribunal addresses these individual elements relating to the question of liability, it considers it appropriate to first assess the general requirements for Harms to be held liable, first and foremost, the interpretation of the disclaimer in clause 14 of the contract of carriage and the validity of this clause, cf. section 5.2 below. The solutions that the Arbitral Tribunal arrives at when concerning these issues will thus entail a considerable simplification of the subsequent assessment of each of the possible grounds for liability.

5.2. Grounds for liability – general considerations

5.21. The legal rules pertaining to transport liability when transporting by barge

An agreement for transporting goods by sea on a barge that is being towed is – unlike the agreement between tug and tow – a freight agreement by law and therefore governed by the rules in Chapter 5 of Norwegian Maritime Code 1893, cf. Brækhus in Marius no. 1 (1975) 8, Grönfors: Sjölagens bestemmelser om godsbefordran (1982) 21 and Philip and Bredholt: Søloven, 2. ed. (1986) 111–112. Since in this instance, the transport commenced in Finland, which is a signatory to the 1924 Bills of Lading Convention which was amended by the 1968 Protocol and the so-called Hague-Visby rules, it is, as a starting point, the mandatory Finnish rules relating to transport liability that are decisive, cf. Section 169, subsection 2 of the Norwegian Maritime Code. However, Section 169, subsection 5 of the Norwegian Maritime Code permits the parties to enter into a valid agreement for the transport to be governed by the Hague-Visby rules of a different state to that which is stipulated in Section 169, subsection 2. The provision in clause 18 of the Addendum that "Norwegian law to apply" is therefore valid, including for the mandatory rules of law regarding transport liability.

The general rule regarding transport liability is found in Section 118, subsection 1 of the Norwegian Maritime Code: The carrier, in this case Harms, is liable "for losses resulting from the goods being lost, damaged or delayed while in the custody of the carrier on board or ashore, unless the carrier establishes that the loss was not due to fault or neglect on the part of the carrier or any party the carrier is responsible for." Among those the carrier is responsible for in this instance include the leadership and crew of the tug that was used for the transport, cf. Brækhus: Rederens husbondsansvar (1954) 30 note 58.

Certain exceptions to the general rule are authorised in Section 118, subsection 2. The most important provision here is Section 118, subsection 2a, which exempts the carrier from liability for loss "resulting from fault or neglect in the navigation or management of the ship" exhibited by any party the carrier is responsible for. Therefore, pursuant to the rules in the Norwegian Maritime Code, Harms will not be liable for the errors EDUARD's crew may have made in the navigation or handling of the tow and tug. However, Section 118, subsection 3 sets an important restriction for applying Section 118, subsection 2a: The carrier is always liable for losses resulting from the ship not being seaworthy at the commencement of the voyage if the carrier or a party the carrier is responsible for, failed to exercise proper care.

In principle, the liability rules in Section 118 are mandatory and cannot be deviated from by an agreement to the detriment of the cargo owner, cf. Section 168, subsection 1. However, there are certain exceptions to the mandatory rules in Section 168, subsection 2. What is of interest in this context is that Section 168, subsection 1 does not prevent that "a restriction in the carrier's liability for loss or damage may be agreed. . when transporting ... goods that are stipulated in the freight agreement as deck cargo and carried on deck".

The legal policy background to the deck cargo rule is obviously the exposed position of the deck cargo, i.e. the risk of surface water damage and being washed overboard etc., together with evidence related problems that assert themselves in this context. The contractual freedom pursuant to Section 168, subsection 2 enables the carrier to protect itself from these special risks. A clause that "reverses" the burden of proof pursuant to Section 118, subsection 1 may be sufficient, i.e. the carrier only accepts liability for damage or loss of deck cargo if evidence is presented that the damage or loss was due negligence on the part of the carrier. A disclaimer of liability for damage and loss caused by the typical risks associated with deck cargo extends somewhat further and would therefore have been avoided if the cargo had been placed in the hold. However, Section 168, subsection 2 does not set the limit here. The law is worded in such a way that full disclaimer of liability for deck cargo is permitted, however the general restrictions that are set for contractual freedom when concerning disclaimers must also apply for disclaimers in freight agreements, cf. sections 5.23 and 5.24 below.

The liability rules in Section 118 can clearly be deviated from to the benefit of the cargo owner. For example, this may occur by the carrier "guaranteeing" that the ship has certain features that are of importance to the cargo's safety. See section 5.32 below.

5.22. The disclaimer in clause 14 of the "Agreement"

Kone's cranes etc. were carried as deck cargo on GIANT 14 in full compliance with the agreement between the parties, cf. the introduction in clause 14: "Cargo to be shipped on deck of the pontoon ...". The requirements in Section 168, subsection 2 of the Norwegian Maritime Code for the valid disclaimer of liability are therefore satisfied.

The actual disclaimer in clause 14.1 is clear and unequivocal: The cargo was to be transported "at company's (Kone's) risk, the carrier not being liable for any loss or damage of whatever nature whosoever and by whomsoever caused".

The plaintiffs' claim that the clause must be interpreted restrictively, such that it only exempts the carrier from liability for the consequences of the typical risks associated with deck cargo. The Arbitral Tribunal cannot agree with this. Neither the wording of the clause, the negotiations

that resulted in the contract of carriage nor other relevant background information provide any grounds for such an interpretation. The proposed restriction of the scope of the clause would entail censoring of the clause and should, in this instance, be done openly, cf. 5.23 and 5.24 below.

5.23. Liability for deliberate or grossly negligent actions on the part of people at management level of a contracting party's organisation

It is established Norwegian law that a contracting party cannot validly disclaim liability for damage caused to the other contracting party due to intent or grossly negligent actions that are in violation of the contract, cf. Krüger: Norsk kontraktsrett (1989) 784 with further references. Equated with errors by the contracting party's personnel are errors committed at the management level of the contracting party's company. When, as in this case, the contracting part is a company, there will only be issues regarding errors made at management level. Harms' procurist, Bronisch, was clearly at this level. The disagreement between the parties, and the doubt, first manifests itself when it is asked whether errors at management level at Johannsen must be equated with errors at management level at Harms, i.e. whether the identification of Harms' subcontractor Johannsen shall also apply when concerning invalidating a disclaimer due to serious errors at management level.

The Arbitral Tribunal is not aware of case law that sheds light on this issue and can also not see that this has been discussed in legal doctrine. The solution must therefore be sought in actual considerations. The rule that liability for serious errors at management level cannot be validly waived can be said to protect the other contracting party from the complete dilution of contractual liability. There must be a party with a certain minimum liability behind any contractual obligation. A contracting party often has a broad right to involve independent assistants that, in relation to the relevant contracting party, agree to carry out larger or smaller parts of the contractual obligation. In that case, part of the management function is transferred to the assistants. If serious errors by the assistants at management level were not equated with serious errors by the contracting party's own management, the management liability, and thereby the actual contractual liability, could be greatly diminished. At any rate, there should be identification at management level when a contracting party has used an independent assistant to fulfil important parts of the contract, parts that most contractual parties will be responsible for themselves.

Applied in this situation, this viewpoint leads to identification at management level between Harms and Johannsen. A carrier must not only provide space for the goods that are to be transported, it must also ensure that the goods are transported from the port where they are loaded on board to their port of destination, and for this engine power is required. Propulsion machinery will normally be an integrated part of the transporting vessel and serious management errors in connection with the machinery will therefore entail liability. When concerning transport by barge, the propulsion function was assigned to an independent assistant, the tugboat company. If the minimum protection the cargo owner has for normal sea transport is not to be significantly reduced when the cargo is towed, serious errors on the part of the tugboat company's management must result in liability, irrespective of the disclaimers. Therefore, the Arbitral Tribunal's conclusion on this point is that Harms must be responsible for damage caused by possible negligent actions committed by Johannsen's procurist, Fehling.

The plaintiffs have claimed that GL's "Fitness to be Towed" certificate cannot exempt Harms from liability for providing a sufficiently strong tug. Harms cannot "hide behind" the classification society. The Arbitral Tribunal does not understand this as being an assertion that Harms must be responsible for errors committed by GL and that there must also be identification for errors at

management level at GL. Such an assertion would also not be successful. A carrier does not have general liability for subcontractors for employees of the classification society, cf. among others, Brækhus: Rederens husbondsansvar (1954) 32. There is therefore no reason to set mandatory, and therefore more stringent identification, at management level.

5.24. Censoring the agreement pursuant to Section 36 of the Norwegian Contracts Act?
Section 36 of the Norwegian Contracts Act, as it is presently worded, was adopted and entered into force on 4 March 1983 and therefore applies for the contract of carriage of 12/19 December 1983. This section permits the Arbitral Tribunal to partly or fully disregard the disclaimer in clause 14 "to the extent that it would be unreasonable or contrary to sound business practice to assert this". The later-mentioned alternative can be disregarded. It has not been demonstrated that there is any established "business practice" when concerning the regulation of liability in contracts of carriage as in this instance. The question will be whether censoring should occur in accordance with the unreasonableness alternative. It is not necessary to assess and possibly invalidate clause 14 in purely general terms. The question must be put forward specifically: Would it be unreasonable for Harms to evade any liability for the two expensive container cranes and their accessories that were a total loss during the transport that Harms had undertaken to provide?

The answer must undoubtedly be in the affirmative when concerning liability for the consequences of intentional or grossly negligent actions on the part of Harms' management that were in violation of the contract. However, liability for such actions can be based directly on an older and well-established mandatory rule of liability. On the other hand, invalidating the disclaimer cannot deprive the carrier of the protection against liability that is stipulated in Section 118, subsection 2a of the Norwegian Maritime Code. Censoring the agreement pursuant to Section 36 of the Norwegian Contracts Act can therefore only be relevant for liability for loss due to simple negligence at management level or deliberate or negligent error or omission committed outside the nautical area of any of the assistants Harms had liability qua employer for.

In the doctrine, criticism has been directed at extensive disclaimers for transport liability for deck cargo. In Gram: Fraktavtaler, 4th edition. (1977) 137, the following is stated about the deck cargo clauses:

> "The clauses for utilising contractual freedom on this point have varied. There are clauses that firmly disclaim any liability for this. This is unreasonable and, at the very least, the shipowner should be liable for seaworthiness in relation to the ship's safety. If the ship capsizes because the captain has not taken on enough bunkers, there is no reason that the shipowner should evade having to pay for the deck cargo. Normal damage from unloading is also not linked to the cargo having been carried on deck. However, scratches on the paintwork of unpackaged motor vehicles are."

This was written before Section 36 of the Norwegian Contracts Act was adopted and it is unlikely that Gram used the term "unreasonable" to suggest that the mentioned disclaimers must be invalid. On the contrary, the intention was to provide the shipowners with an indication of the extent to which they should utilise the freedom the Hague-Visby rules give them to disclaim liability. In addition, Gram's statement applies to liability under liner bills of lading, i.e. in a sector where the carrier, the liner shipping company, often has a strong and sometimes monopolistic position in relation to the many shippers and when consumer law viewpoints are applicable.

The transport arrangement in this case was of a completely different character. This was a special transport with a considerable degree of difficulty and with clear and particular elements of risk which have no parallels with cargo transport using conventional vessels. It also involved two contractual parties that both had considerable business experience and insight. In terms of negotiations, they also must be considered to have been equals. Neither of them had a dominant financial position or market position that made it possible for them to force through contractual provisions against the wishes of the other party. For such a relationship, one should be very reluctant to censor the agreement pursuant to Section 36 of the Norwegian Contracts Act.

In addition, the regulation of liability pursuant to Clause 14 cannot simply be characterised as arbitrary. With the large amounts that were at stake and the dangers that threatened this special form of transport, it was clear that the transport risk had to be covered by insurance. Transport insurance (property insurance) for the cranes could have been taken out with either the owner Kone or the carrier Harms as the insured. The insurer would then only be able to exercise the right of recourse against Harms in the event of gross culpability. However, an almost identical result is achieved when the owner alone takes out transport insurance, but also accepts a disclaimer from the carrier. As long as it is valid, such a disclaimer will also bind the insurer in the event of possible recourse against the carrier and thereby reduce or completely remove the need for independent insurance (liability insurance) for the carrier. The idea of such a rational sharing of risk appears to have been the intention when, in its telex of 13 September, Kone added the following immediately after the proviso regarding exemption of liability for deck cargo: "cargo will be insured at your risk and expenses by you".

Based on what is stated here, the Arbitral Tribunal finds that it cannot disregard Clause 14 beyond what is asserted under section 5.23 below.

5.3. EDUARD's bollard pull

5.31. The risk of capsizing would have been reduced with a stronger tug
Based on the hypothesis concerning the accident which the Arbitral Tribunal has accepted, cf. section 5.1 above, and based on the calculations that are now available for the necessary bollard pull at different wind speeds, it appears clear that the risk of an accident of the type that occurred could have been reduced and perhaps completely avoided if GIANT 14 had been towed by a stronger tug than EDUARD. The towage convoy could then perhaps have held up against the wind and the drifting in an aft direction could at least have been limited to such an extent that the tug would have maintained control and guidance of the tow. The question is then whether Harms can be held liable for EDUARD proving to have lacked sufficient strength for the assignment.

5:32. Liability pursuant to clause 1 in the "Addendum": "The tug has at least 41 tons bollard pull or more"?
The parties agree that the quoted statement in the contract constitutes a "guarantee" pursuant to contract law, and that, regardless of fault, Harms is responsible for the assertion being correct. However, the parties disagree about how the guarantee should be understood. Does it apply to "continuous bollard pull" as asserted by the plaintiffs, or does it apply to "maximum bollard pull" achieved from a certain overloading of the engines as asserted by the defendant?

This question does not appear to have been addressed during the contract negotiations. The parties appear to have understood "bollard pull" as being a specific, unambiguous term. The many

different tug-related terms that have now been presented, cf. section 2.5 above, were only first brought into the discussion after the dispute between the parties had arisen. Kone, and thereby also Sampo, were entitled to be presented with "accepted certificates according to bollard pull", cf. clause 1 of the "Addendum". However, it does not appear as if the plaintiffs asked for any such certificate nor were they sent GL's "survey report" of 22 September 1983.

Based on this, it must be correct to accept the meaning of "bollard pull" that was standard for towing arrangements of this type when the contract was entered into. This means that "bollard pull" in clause 1 must be interpreted as the "maximum bollard pull" achieved over a period of time at engine overload. The expert institution, GL, clearly used this definition as a basis in its "Pfahlzug" test of 21 September 1983 and when issuing the "certificate", i.e "Survey" report of 22 September. The statement from the plaintiffs' expert witness, Even Skraastad from SCUA, Rotterdam, in a letter of 22 October 1985 to the plaintiffs' attorney clearly indicates the same:

> "When quoting bollard pull the practice has often been to adopt the maximum static pull".

On the other side of the argument, no instances have been documented in which an unqualified statement of "bollard pull" has been deemed to apply to "continuous bollard pull".

In accordance with this, the question is whether EDUARD actually had a "maximum bollard pull" of at least 41 tons. The Arbitral Tribunal finds, with reservations, that the answer has to be in the affirmative and refers to GL's bollard pull test. To a certain extent, the Arbitral Tribunal can follow the criticism the plaintiffs have made about the manner in which the test was conducted, particularly the compilation of the accompanying "survey report". However, there must equally be a strong presumption that the measurement result was correct. The information available about EDUARD's original bollard pull and the importance the installation of a Kort-nozzle has for the bollard pull provide no decisive grounds for disregarding the measurement. Based on the evidence available, there are no grounds for the plaintiffs' insinuation of direct falsification in connection with the test.

The fact that the guarantee of 41 tons of bollard pull in clause 1 is directly linked to the carrier's duty to present "accepted certificates according to bollard pull" can be understood to mean that the carrier is free from liability if it presents an acceptable certificate that covers the guarantee, i.e. that the carrier, provided it has acted in good faith, is not liable for the accuracy of the certificate. However, the Arbitral Tribunal does not need to address this issue, because it has accepted the certificate (the "survey" report) as evidence of the relevant bollard pull.

5.33. Did Harms have an obligation – irrespective of the "guarantee" in clause 1 – to ensure that the transport was executed with the assistance of a sufficiently strong tug?
The Arbitral Tribunal is inclined to answer this question in the negative. It is true that the following appears in the printed text of clause 2 of the "Agreement":

> "After loading of the goods on the pontoon the pontoon will be towed/pushed to the final destination by sufficient horsepower, to be provided by the carrier."

However, immediately above this clause the following was written by typewriter:

> "tug 'EDUARD': dimensions as per specification abt. 41 t. bollard pull."

It is obvious to interpret this to mean that the general obligation pursuant to clause 2 has been specified as an obligation to execute the transport using an individually determined and named tug with a guaranteed bollard pull and that this tug is approved by the charterer. If the charterer had wanted a guarantee that the approved tug was strong enough to adequately execute the tug, possibly combined with a duty for Harms to, if necessary, replace EDUARD with a stronger tug, this must have been stated in the agreement.

The negotiations prior to the conclusion of the agreement support this understanding of the agreement. Kone initially proposed (telex of 29 April 1983) executing the transport with a tug (AXEL) that had a bollard pull of 27 tons. This was rejected by Kone, who wanted a stronger tug. Harms then offered (telex of 28 August) "transport with a more powerfull tug of 41 to. bollard pull" (EDUARD), in return for an increase of DEM 110,000 on the previously quoted freight price. Kone did not accept this offer immediately. In the reply on the 19th of the same month, certain information was first provided about the cranes' "wind area", with calculations of the force a wind speed of 25m/sec would create. Kone then added that:

> "this gives us that to keep the tow in a wind of 20–25 m/sec. 35–40 tons bollard pull. ... we hope insurance company accept 41 tons. We are controlling it."

This means that, based on its own assessments, Kone was willing to accept 41 tons, but the proviso for this was approval from the insurer that was to insure the cranes during the transport. Such approval must have subsequent been given since at the meeting on 5 September the parties agreed to terms that presupposed the use of EDUARD.

Sampo does not appear to have set any special requirements for the tug that was to be used. In the insurance policy dated 23 January 1984 it states rather briefly that the cranes etc. shall be "Sent by Tug 'EDVARD'/pontoon 'GIANT XIV'". Kone did not send Sampo GL's "Conveyance Certificate" of 19 January until the 30th of that month. Among other things, the certificate sets the following proviso:

> "THAT ...: 2) Conveyance is effected in tow of a sufficiently strong tug".

It has not been reported that Sampo or Kone attempted to have the provisions in this Conveyance Certificate accepted as part of the agreement between Kone and Harms. Sampo also did nothing to ensure that proviso no. 2 was complied with. GL was not requested to provide any declaration that EDUARD was "sufficiently strong". It is correct that such a certificate, "Seaworthiness Certificate (Fitness to be Towed)", was issued by GL on 10 February, but this was at Harms' request and out of consideration to the freight insurance that Harms was to take out. Kone does not even appear to have known about this certificate until the accident occurred.

The Arbitral Tribunal does not need to take a definitive position regarding the question of whether Harms had an independent duty to ensure that there was a sufficiently strong tug. Based on what is asserted under 5.22 to 5.24 above, potential dereliction of duty on this point could only result in liability if the dereliction of duty can be characterised as a deliberate or grossly negligent act or omission on the part of Harms' management.

When one considers that Kone itself calculated the necessary bollard pull at 35–40 tons and that GL had confirmed, in its "Seathworthiness Certificate" of 10 February 1984 that EDUARD was

"sufficiently strong for the intended voyage", Harms would have had to assume that the necessary assurance was in place. In any case, the fact that Harms did not have a sufficiently critical approach to what was presumed to be an expert classification society cannot be characterised as gross negligence. Harms was not aware that the calculations that formed the basis for GL's certificate were based on an incorrect understanding of the bollard pull tests that another division of GL had carried out.

All of those involved must have been clear that the safety of a tow can be improved by increasing the installed bollard pull. However, the issue also has a cost aspect. As mentioned, when the originally proposed tug, AXEL, with 28 tons of bollard pull, was replaced with EDUARD, Harms' original price increased from DEM 1,300,000 to DEM 1,410,000. A requirement for an even stronger tug would obviously have resulted in a further increase in the tow price. Like anywhere else, there must be a trade-off between cost and safety requirements. The tow experts who provided statements during the main hearing appeared to agree that a towage convoy does not need to be equipped with such strong bollard pull that it could be moved forward through the water even under extreme weather conditions. Within certain limits, drifting is a normal and harmless occurrence. After an objective ex post consideration, what is stated here cannot of course entail that it can be said to have been correct to accept EDUARD's bollard pull in this instance. However, it provides an important basis on which to assess whether Harms should have questioned Kone and GL's assessment of the necessary bollard pull.

5.4. The tow winch

The Arbitral Tribunal can largely agree with the criticism the plaintiff has directed against Harms and Johannsen when concerning EDUARD's tow winch. It is surprising that the inspection in Vlissingen on 14–16 February 1984 failed to establish the cause of the port side tow line having unwound and been lost on 11 February. Bronisch and Fehling should have notified GL of the inspection. Even though, as a classification institution, GL was not responsible for inspecting the tow line, the company was so heavily involved in the towing operation through the issuing of the certificates of 19 January and 10 February 1984 that it should have been given the opportunity to re-evaluate its position regarding EDUARD's "fitness to tow".

The information that is available indicates that the drum brakes were not strong enough. By installing a Kort-nozzle, the bollard pull was increased from 28 to 41 tons, i.e. by almost 50%, without the drum brakes being strengthened. Inadequate braking power could also explain the uncontrolled deployment on 11 February, however, the fact that this occurred under comparatively calm weather conditions and apparently without damage to the brake bands makes this somewhat doubtful. Finally, the fact that Captain Fock chose to continue the voyage with the drum gear engaged indicates that he did not trust the brakes.

Therefore, the question is whether Harms and Johannsen's (Bronisch and Fehling's) actions can, in this context, be said to have been grossly negligent. The Arbitral Tribunal finds, with reservations, that the question has to be answered in the negative.

In their statements to the Arbitral Tribunal, Bronisch and Fehling stated that the question of whether to engage or disconnect the drum gear was something that was decided by the tug's shipmaster and was therefore not something they involved themselves with. However, they must have been fully aware that the uncontrolled deployment of the tow line could be prevented by engaging the gear and that there would therefore be no risk of EDUARD losing its tow even if

the brakes on the tow drums were of the weaker variety. That they refrained from summoning GL on this basis can hardly be characterised as gross negligence.

In any case, liability on this basis must be disregarded because there no necessary causal link exists between Bronisch and Fehling's actions and the subsequent accident.

To begin with, there is no reason to believe that a surveyor from GL who had been summoned would have stopped the towage convoy and demanded that EDUARD be replaced by another tug. This type of intervention would have resulted in a significant delay in the transport and therefore have been contrary to Kone's interests. Considering the recommendation GL had already made for the towing enterprise, it is most likely that the surveyor would have allowed the tow to continue, trusting that the tow line could be secured by applying the brakes plus engaging the gear.

The fact that the gear was engaged during the voyage from Vlissingen can also not be said to have caused the accident. The accident occurred in such a way that it would have been impossible to detach the tow line in time, even if the drum brakes could be trusted and the tow had therefore sailed without the gear being engaged. During the extreme weather and with a significant heel, it would not have been possible in the very small amount of time available for any of the crew to go out onto the aft deck and release the drum brakes before EDUARD was dragged down by the tow.

5.5. "Quick release"

The only thing that could have saved EDUARD in the situation that arose at 02:10 on 2 February was a quick release device, i.e. a device remotely controlled from the bridge that enabled the immediate release of EDUARD from the tow line and the tow. If EDUARD had managed to free itself in this manner, it is probable that it would have managed to stay afloat and that Captain Fock would have immediately sent out an alarm that GIANT 14 was drifting. This would, in turn, have significantly increased the chances of salvaging the barge and the cranes.

Therefore, the question is whether it was a relevant defect that EDUARD was not equipped with quick release and whether this can be considered gross negligence on the part of Harms and/or Johannsen.

The first question raises a problem regarding the choice of law. Should the provision in clause 8 of the "Addendum" that "Norwegian law to apply", be accepted, including with regard to the chartered ship's general standard, i.e. the features, crew and equipment etc. that the charterer can require that the ship must have in lieu of a separate agreement? The answer must obviously be no. When an agreement is entered into and the charterer is aware of the ship's flag and class, it must – for purely practical reasons – be the system of rules in the flag state and the classification society that is decisive. This is also a condition in clause 1 of the "Addendum" relating to "accepted certificates according to ...class" and clause 15 which states:

> "Carrier to guarantee that the vessel's condition and certificates are in conformity with the rules and the laws in respective country ..."

In this instance, neither GL nor the German maritime authorities had rules that dictated that EDUARD should be equipped with quick release. This was not a consequence of the system of rules having lapsed or that the problem had been overlooked. The issue must have been assessed

in 1977 when GL introduced the quick release requirement, but only for new tugs. Therefore, pursuant to the relevant background law, it is difficult to claim that it was a defect that EDUARD was not equipped with quick release. A requirement of this type could of course have been set by Kone during the contract negotiations. However, there is nothing that indicates that Kone or Sampo demonstrated any interest in this matter at that time.

In accordance with this, the question of whether Harms can be said to have acted with gross negligence in this context is not applicable.

5.6. The gog wire

The information provided during the course of the arbitration case regarding EDUARD's gog wire arrangement has been somewhat confusing. In the pleadings that were exchanged it was assumed that the tow line was held in place using the wire that was connected to the gog winch and it was discussed whether the gog winch was strong enough, cf. among other things, section 9 of the plaintiffs' pleading of 29 April 1987 and sections 14 and 19 of the defendant's pleading of 29 March 1989. However, during the main hearing it was reported that the gog winch and gog wire had not been in use. To prevent the tow line from moving thwartships and over the stern, two strong and fixed slings had been attached to the line and to the deck on either side. The fact that the Seeamt Report states that "die Beistopper waren dichtgeholt" increases the confusion. The gog wire could be tightened, but not the two slings, which were fixed. On the other hand, Seeamt refers to "Beistopper" in the plural form, something which points towards the slings. Finally: Why were the gog winch and its motor given an extensive overhaul in Vlissingen when it was not the intention to use the winch for this voyage?

Despite this, the Arbitral Tribunal finds that it has to accept Mainka's statement about the use of "Beistopper" and the dimensions and location of these. However, the Tribunal is somewhat confused about Mainka's statement that when the accident occurred and after EDUARD had listed, he observed that the "beistopper" arrangement was intact.

On the other hand, there is no evidence that the system failed and that this was a contributory cause of the accident. The sequence of events referred to in section 5.1 above could still be possible without such a failure. In any case, there are no grounds for holding Harms liable for the accident, at least when concerning this particular issue.

5.7. The weather conditions

In the view of the Arbitral Tribunal, neither Harms nor Johannsen can be criticised for the manner in which the weather report service was arranged. The storm on 20–21 February 1984 was sudden and was therefore reported at a rather late stage. However, considering the position of the towage convoy at that time, it would not have been possible, with even an earlier warning, to move the tow into safe waters in time.

It was and always had to be EDUARD's shipmaster who assessed the impact of the weather conditions on the execution of the tow. Possible miscalculations in connection with this could not have resulted in liability on the part of Harms. This is stipulated in Section 118, subsection 2a of the Norwegian Maritime Code relating to nautical errors. Harms and Johannsen could not use their judgement in relation to the ship's captain in an attempt to navigate the tow from land. In addition, when it had first entered the open sea, the towage convoy was advised to attempt to continue, regardless of the weather conditions. The fact that the prospects of this succeeding

would have been better if the tug had had greater bollard pull is another matter and the issues of liability this gives rise to are discussed under 5.3 above.

5.8. The emergency tow line on GIANT 14

No evidence has been presented that the emergency tow line system for GIANT 14 was defective or unsuitable. The fact that it had become tangled when PACIFIC made its salvage attempt on the morning of 22 February 1984 could have been due to the sea and wind during the 27 hours in which the barge was drifting uncontrollably. This factor cannot provide any grounds for holding Harms or Johannsen liable for the accident.

5.9. Conclusion. Costs. Conclusion of ruling

As stated above, the Arbitral Tribunal has not found any grounds to hold Harms liable for the loss of the container cranes. The Arbitral Tribunal must therefore find in favour of the defendant and, pursuant to Section 172, paragraph two of the Norwegian Civil Procedure Act, the plaintiffs must be ordered to pay the defendant's costs. Costs must also be awarded to the intervener, Johannsen. The plaintiffs have made no objections to the statement of costs that the defendant and intervener have submitted and these are therefore accepted.

The ruling is unanimous.

Conclusion of ruling:

1. The Arbitral Tribunal finds in favour of the defendant, Harms Bergung GmbH.

2. The plaintiffs, Ömsesidiga Försäkringsbolaget Sampo and Kone OY, are jointly ordered to pay the following amounts as compensation for costs: a. NOK 613,513.10, plus DEM 36,485.00 to Harms Bergung GmbH, b. NOK 334,488.50, plus DEM 90,228.60 to Johannsen & Sohn.

3. The date for compliance with the obligations referred to under point 2 is 21 days, calculated from the pronouncement of this ruling.

4. The plaintiffs, defendant and intervener are jointly liable for the fees and expenses of the Arbitral Tribunal. In the internal arrangement, these amounts shall be determined in full by the plaintiffs.

ND-1996-238 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	18 June 1996
Published	HR-2004-2061-A - Rt-2004-1909
Keywords	(42) "Danger" as a condition for salvage, cf. section 224 of the Norwegian Maritime Code of 1893 and section 441 of the Norwegian Maritime Code of 1994 – the question of whether the "danger" must be objective.
Summary	While fishing near Shetland, the fishing vessel "Loran" developed engine trouble. Following a radio call requesting assistance, the fishing vessel "Viknafisk" reached the "Loran" and commenced towage; the tugboat, "Mega Mammut", later assumed towage. It was subsequently established that the engine of the "Loran" had sufficient remaining power for the vessel to make it to harbour without assistance, and the owners therefore claimed that the "danger" condition for salvage was not satisfied. The Norwegian Supreme Court concluded, with a majority of four against one dissenting opinion, that only vessels in objective danger can be subject to salvage. Salvage could therefore not be awarded, only remuneration amounting to NOK 100 000 for assistance.
Parties	The owners of M/S Loran, K/S A/S Loran (attorney Erik Blaker) vs. Per Ola Valø for the owners of M/S Viknafisk (attorney Erling Kr. Engelsen – test case for admission as Supreme Court Attorney)
Author	Members of the Court: Supreme Court justices Gjølstad, Bugge, Schei, Gussgard and Sinding-Larsen.

Justice Gjølstad: The matter concerns the conditions for salvage, the interpretation of the criterion "vessel which is … in danger" in the Norwegian Maritime Code's salvage provisions.

On the night between 20 and 21 February 1993, the fishing vessel "Loran", owned by K/S A/S Loran, developed difficulties with her main engine on her way home to Norway after fishing near Shetland. The rpm dropped, the exhaust temperature rose and engine efficiency was reduced. The vessel was approximately 10 nautical miles north-west of Shetland, and a strong gale was blowing from the north-west.

Several Norwegian fishing vessels were returning home at the same time, including the "Viknafisk", which was called over the radio and asked to render assistance. In addition, contact was made with the dealer's workshop of the main engine in Langevåg, and the tugboat "Mega Mammut" was called from Norway. The "Viknafisk" reached the "Loran" after a couple of hours and towage was established. The "Mega Mammut" later took over and towed the "Loran" to Måløy.

A disagreement arose regarding the compensation the "Viknafisk" was to receive for the towage. The owner of the fishing vessel, Per Ola Valø, brought proceedings against the owners of the "Loran" before the Sunnmøre District Court on 3 December 1993, claiming a salvage award in the maximum amount of NOK 700 000. It was claimed that the situation was extremely dangerous for the "Loran" when towage was established. The owners of the "Loran" disputed this and made a claim for acquittal in return for payment of normal remuneration for the assistance, amounting to NOK 100 000.

The District Court – which included expert associate judges – rendered judgment on 21 June 1994, with the following conclusion:

"1. Per Ola Valø on behalf of the owners of the M/S "Viknafisk" shall be awarded salvage in the amount of NOK 300 000, with the addition of 18 per cent interest per annum, from 4 June 1993 to the end of the year, and 12 per cent interest per annum, from 1 January 1994 until such time as payment is effected.

2. The owners of the M/S "Loran" shall pay legal costs for Attorney Erling Kr. Engelsen, acting for Per Ola Valø and the owners of the M/S "Viknafisk", in the amount of NOK 84 044, plus court fees and other court costs in the total amount of NOK 12 166.

3. Payment of the amounts falls due within 2 weeks of the service of this judgment."

The District Court stated that if, in objective terms, it was true that the "Loran" could have continued the voyage under her own steam, the vessel was not in danger and the conditions for salvage were not satisfied. Following a concrete assessment, however, the District Court found that the vessel was on the verge of total engine failure – and in danger – when towage was established.

Following an appeal by the owners of the "Loran", the Frostating Court of Appeal – which also included expert associate judges – rendered judgment on 7 November 1994, with the following conclusion:

"1. K/S A/S Loran, represented by the Chairman of its Board, shall pay Per Ola Valø, 7900 Rørvik, NOK 200 000, with the addition of 18 per cent interest per annum, from 4 June 1993 to 31 December 1993, and 12 per cent interest per annum from 1 January 1994 until such time as payment is effected.

2. Point 2 of the District Court ruling shall be upheld.

3. K/S A/S Loran shall pay Attorney Erling Kr. Engelsen, 6001 Ålesund, acting for Per Ola Valø, legal costs for the Court of Appeal amounting to NOK 65 097, in addition to half the Court of Appeal's costs for expert associate judges.

4. The deadline for payment is 2 weeks from the service of this judgment.

The judgment was issued with dissent from one law judge and one associate judge.

The Court of Appeal's majority noted, among other things:

"It is correct, as pointed out by K/S A/S Loran, that an objective assessment shall be made, although not in the form of a direct reading of how the people onboard the "Loran" actually perceived the situation then and there, but of how generally competent people should reasonably have perceived the situation.

In retrospect, based on the expert reports and testimony submitted to the Court of Appeal, it seems rather evident that the "Loran" would have managed to continue the voyage alone. The engine performance was reduced, as one of the turbo injectors was damaged and one of the cylinders was not functioning. The motor would, however, have held long enough for the "Loran" to make her way, under her own steam but at a reduced speed, to safe harbour, even all the way to Norway, without repairs.
……
If the "Loran" had broken down completely, there seems to be agreement between the parties that there was a risk that the "Loran" would drift aground and be wrecked. The Court agrees with this. The wind was blowing strong to gale force from the north-west, and land lay approximately 10 nautical miles to the south-east, increasing the danger of shipwreck. A possibility for anchorage could not be expected.

When the crew onboard did not know what was wrong with the engine, but registered the aforementioned symptoms and contacted supposedly knowledgeable people without receiving any clarification, it would have been irresponsible under the circumstances not to accept assistance from the "Viknafisk" in the form of towage. …"

The minority found that the assistance rendered by the "Viknafisk" to the "Loran" did not fall under the Norwegian Maritime Code's salvage provisions.

……[The summary of the appeal process and the party's appeal submissions and claims have not been translated]…

I find that the appeal must succeed.

The arrangement of salvage awards is a distinctive, statutory institution in maritime law. The purpose of the arrangement is to encourage salvage and thereby to safeguard assets. A salvage award is meant to be a reward and is not set according to the ordinary principles for remuneration of work performed. Another distinctive trait is that salvage may only be awarded if the salvage operation is successful. A salvage award claim is secured by maritime lien.

The conditions for a salvage award – what can be the subject of salvage – were regulated by section 224 of the Norwegian Maritime Code of 1893, which applies to this case. The provision has now been replaced by section 441 of the Norwegian Maritime Code of 1994. The current provision has the same content as the former. The provisions are based on the Brussels Convention on Salvage of 1910. A new International Convention on Salvage was passed in 1989, but has not yet been ratified by Norway. The new convention contains no provisions relevant to the questions in this case.

Pursuant to section 224 of the former Maritime Code and similarly in the new section 441, anyone who "salvages a vessel which has been wrecked or is in danger" is entitled to a salvage award.

The part of the Court of Appeal's description of the facts of the matter which the statutory interpretation must be assessed against is that the "Loran's" engine, despite suffering reduced performance, would have held long enough for the vessel to reach safe harbour, without repairs or assistance. In objective terms, therefore, there was no danger. The legal question is whether it is decisive to the right to a salvage award that danger was present in objective terms or whether – as found by the Court of Appeal – it is sufficient that generally competent people would then and there have reasonably perceived the situation to be dangerous.

In my view, the wording of the law indicates that objective danger must exist and in my opinion the preparatory works also support this view. In the Maritime Code Commission's draft from 1890, in the comments to section 224 on pages 285-286, it is stated that the requirement is "that an emergency situation is in fact imminent" and furthermore, that salvage may only be awarded "when the vessel in distress is not able to save itself from that danger by its own means". The criterion in section 224 of the Code of 1893 was originally "in distress" before this was replaced by "in danger" in 1964, which entails a somewhat lower degree of danger. The amendment in 1964 was based on Recommendation II from the Maritime Code Commission, where similar views to those I referred to above in the Maritime Code Commission's draft from 1890 are expressed on pages 13 –14.

In both Norwegian and foreign maritime legal theory one can find statements to the effect that that the danger must have been real and shall be judged objectively, but the issues arising from a factual situation such as in the present case do not appear to have been dealt with directly in Norwegian theory. The Appellant has made reference to a statement in a foreign commentary edition, which states that pursuant to the Brussels Convention, there must be an objective danger, as evaluated retrospectively, based on all the information available after the fact, see Enrico Vincenzini, International Regulation of Salvage at Sea, p. 54-55.

The comments in legal theory and case law to which the Respondent has referred, partially apply to the concrete assessment of evidence. The comments also partially appear to apply to a situation where there is uncertainty – both at the time and in retrospect – with respect to risk factors that could develop in one way or another. There may then have been a real danger, even though it did not materialise.

The Respondent has also made reference to policy considerations. In my view, policy considerations could be argued in support of both interpretations. Excepting clear cases of salvage, I assume that at the time of assistance there will often be uncertainty as to whether the conditions for salvage exist. I would also point out that both parties have expressed that this case is special in factual terms, as there is a clear "answer" in retrospect.

Accordingly, I find that the Code must be interpreted to mean that a vessel that is not in objective danger cannot be the subject of salvage. As I understand the provision, the institution of salvage thus only applies to vessels that are wrecked or in real danger. I therefore find that K/S A/S Loran shall be acquitted on the condition that they pay NOK 100 000, which has been offered as normal remuneration for such assistance. There has been no submission of evidence to the Supreme Court in connection with the remuneration amount and thus there are no grounds to set any other amount than that which has been offered.

The appeal has been successful, however, the case has raised a question of principle in the interpretation of the Code, and under the circumstances I find that each of the parties should pay their own legal costs for all courts.

I vote in favour of the following

JUDGMENT:

1. K/S A/S Loran shall be acquitted in return for the payment to Per Ola Valø, on behalf of the owners of the M/S "Viknafisk", of NOK 100 000, with the addition of 18 per cent interest per annum from 4 June 1993 to 31 December 1993, and 12 per cent interest per annum from 1 January 1994 until such time as payment is effected. The deadline for payment is 2 weeks following the service of the Supreme Court judgment.

2. Legal costs shall not be awarded for any instances.

Justice Bugge: I concur in all essentials and as regards the conclusion with the first-voting justice.
Justice Schei: Likewise.

Justice Gussgard: Likewise.

Justice Sinding-Larsen: I have reached a different conclusion than the first-voting justice.

It is a condition for a salvage award that the vessel that has received assistance has been wrecked or "in danger". The question raised by this case is whether the judgment as to whether the vessel was "in danger" shall be based on the information available at the time when assistance was provided, or whether decisive weight should be given to information that was not available at the time of assistance. The fact that in the event of disagreement the decision as to whether there is a basis for a salvage award must be made by the courts at a later time cannot be decisive in this regard. The question is which information should form the basis of the courts' decision.

I cannot see that the wording of the Code or the preparatory works provides any guidance in this matter. The word "danger" as used in the Code, must be understood to mean a certain probability that an undesirable event will occur, cf. Brækus: Berging, p. 8. Uncertainty as to whether a vessel will cope on its own is in itself an indication of danger, Brækus, p. 12.

In the Maritime Code Commission's recommendation of 1890, it is stated that salvage may only be awarded when the vessel in distress "is not able to save itself from that danger by its own means". This can be interpreted to mean that salvage shall not be awarded if it can subsequently be proven that the vessel would have managed without assistance. This would, however, also be the situation in cases where there has been be no doubt that salvage shall be awarded. It must therefore have been absolutely clear that a salvage award was due even if the storm that threatened to drive the vessel aground later subsided. Danger will therefore largely have to be judged – despite the wording in the preparatory works – on the basis of the situation as it appeared at the time of assistance. The Appellant does not dispute this, but submits that a line must be drawn between cases where one must, even in retrospect, acknowledge that there existed an uncertainty – as is typically the case for wind and weather – and cases where it is impossible to clarify the real situation at the time of assistance, but where subsequent investigation shows that no danger was

present. I cannot see that such a distinction can be derived from the preparatory works, which do not deal with the question at all.

In my view, the question as to whether the conditions for salvage are present should be assessed based on the information available to the masters of the vessels involved. It is on the basis of this information that they have to decide which measures to take. There must, of course, as also highlighted by the Court of Appeal, be an objective assessment of these conditions. But if the conclusion is that, based on the information available at the time in question, danger existed, the conditions for salvage should be considered satisfied.

It would, in my opinion, introduce an unnecessary element of uncertainty if, when it can be confirmed that there was good reason to fear engine failure and ensuing shipwreck at the time of assistance, a salvage award is denied because a subsequent investigation in the workshop shows that the engine problems were not as serious as one had good reason to believe at the time that assistance was rendered and received.

That it is the situation as it presented itself there and then which should be decisive, has some support in Helge Klæstad: Om bergning av skib, p. 16, and Kristian Thorbjørnsen: No cure - no pay, p. 38. I am, however, in agreement with the first-voting judge in that legal theory as a whole cannot be taken to support a specific solution.

I find that point 1 of the Court of Appeal's conclusion should be upheld.

Like the first-voting justice, I find that legal costs should not be awarded for any instances.

Following the vote, the Supreme Court rendered judgment in accordance with the conclusion of the first-voting justice.

(……)

ND-2004-383 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	2004-12-14
Published	HR-2004-2061-A - Rt-2004-1909
Keywords	Transportation law. Maritime Law. Salvage.
Summary	A tanker developed engine problems and called for assistance from a nearby vessel. A hawser was fastened and the tanker with the engine problems was towed for two hours and forty-five minutes while the defect was rectified. No salvage agreement was entered into between the parties. The Supreme Court concluded that no right to salvage award could be asserted, since the vessel was not in danger under section 441 (1) (a) of the Maritime Code.
Proceedings	Haugesund City Court 01-00103 A - Gulating Court of Appeal LG-2003-2864 – The Supreme Court HR-2004-2061-A, (case no. 2004/951), civil proceedings, appeal.
Parties	Troms Fylkes Dampskibsselskap ASA (lawyer Geir Gustavsson – test trial) v. Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS (lawyer Erik Blaker).
Author	The justices Bruzelius, Tjomsland, Coward, Mitsem, Gjølstad.

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(1) Justice Bruzelius: The case concerns a claim for a salvage award for the salvage of a vessel. The central issue is whether M/T "Norsk Viking", on 4 April 2000 in Hjeltefjorden, was "in danger", so that the owners of the vessel and its cargo are obligated to pay salvage to M/T "Senja".

(2) "Norsk Viking" is a coastal tanker of 2 596 dwt owned by Sira Tank KS, Haugesund. The vessel, which had taken aboard petrol and kerosene at Mongstad, was sailing southwards through Hjeltefjorden when the engine problems started. "Senja" is a coastal tanker of 1 950 dwt owned by Troms Fylkes Dampskibsselskap ASA. This vessel was heading north through Hjeltefjorden after having taken aboard gas oil in Skålevik outside Bergen.

(3) The vessels passed each other at around 8:25 a.m. outside Bukkhillaren in Hjeltefjorden. "Norsk Viking" called "Senja" before the passing, gave information that the vessel had engine problems and said that "Senja" could pass ahead. "Norsk Viking" was then positioned on the port side of the passage. "Senja" offered to assist, but this was turned down as unnecessary since the situation with the engine was not yet clarified at the time.

(4) At 8:30 a.m., the engineer on board "Norsk Viking" told the bridge to reduce the speed entirely due to an oil leak on the gear, upon which the main engine was stopped at 8:35 a.m. At 8:40, the bridge was informed that the damage had been located.

(5) "Senja" was called at 8:40 a.m. with a request for assistance. The vessel turned and reached the side of "Norsk Viking" at around 9:00 a.m. "Norsk Viking" had then started drifting towards the shore. Two hawsers were launched and fastened on board "Senja". The vessels drifted further towards the shore as the tow tightened. "Norsk Viking" was then towed north through Hjeltefjorden. The leak was repaired around an hour later, and the main engine was started at 10:55 a.m. "Senja" released the tow at 11:45 a.m. upon which "Norsk Viking" sailed to Ågotnes under its own power, but with a summoned towboat on standby.

(6) "Senja"'s owner immediately submitted a claim for a salvage award to "Norsk Viking"'s owner and Norske Shell AS – who owned the cargo on board – stipulated at nine percent to the value of the salvaged cargo. The claim was disputed, but a fair remuneration was offered for the assistance. On 22 January 2001, Troms Fylkes Dampskibsselskap ASA filed suit against Sira Tank KS, If Skadeforsikring NUF – who was the vessel's hull insurer and who had guaranteed the correct payment of the vessel's share of any potential salvage award – and Norske Shell AS, claiming a salvage award limited upwards to NOK 1 800 000 and NOK 1 800 000 respectively with the addition of late payment interest. The claims were later adjusted to NOK 1 634 400 and NOK 426 806.66 respectively. An alternative claim for remuneration of NOK 100 000 for the assistance was submitted in the complaint, which the counterparties accepted.

(7) Haugesund City Court – with expert associate judges – passed the following judgment on 10 October 2001:

> "1. Sira Tank KS and If Skadeforsikring NUF are jointly and severally ordered to pay salvage to Troms Fylkes Dampskibsselskap ASA in the amount of NOK 275 000 - twohundredandseventyfivethousandkroner 00/100 – with the addition of statutory late payment interest from 22 July 2000 until payment is made.
>
> 2. Norske Shell AS is ordered to pay salvage to Troms Fylkes Dampskibsselskap ASA in the amount of 75 000 - seventyfivethousandkroner 00/100 – with the addition of statutory late payment interest from 22 July 2000 until payment is made.
>
> 3. Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS are jointly and severally ordered to pay legal costs incurred by Troms Fylkes Dampskibsselskap ASA in the amount of NOK 249 615 – twohundredandfourtyninethousandsixhundredandfifteenkroner 00/100.
>
> 4. The deadline for payment for all amounts is 2 – two – weeks from service of the judgment."

(8) The City Court found that the right to a salvage award must be assessed based on "how the situation appeared to the persons involved there and then, and not assessed

retrospectively following exact calculations … on how long the engine could have been operated without causing damage to the gear", and on that basis concluded that "Norsk Viking" had been in danger.

(9) Sira Tank KS, If Skadeforsikringsselskap NUF and Norske Shell AS appealed the judgment to Gulating Court of Appeal. Troms Fylkes Dampskibsselskap ASA filed a conditional cross-appeal with respect to the size of the salvage award. The Court of Appeal – with expert associate judges – rendered the following judgment on 22 April 2004 (LG-2003-2864):

> "1. Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS shall be acquitted against payment within 2 - two – weeks from service of the judgment of NOK 100 000 – onehundredthousandkroner – to Troms Fylkes Dampskibsselskap ASA for assistance on 4 April 2000.
>
> 2. Within 2 - two – weeks from service of the judgment, Troms Fylkes Dampskibsselskap shall pay to Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS legal costs incurred in the City Court and the Court of Appeal of NOK 355 196 – threehundredandfiftyfivethousandonehundredandninetysixkroner - with the addition of interest pursuant to section 3, first paragraph, first sentence of the Late payment Interest Act from the due date until payment is made."

(10) The Court of Appeal found that the question of whether danger was present must be assessed objectively, and that the perception of the persons involved at the time of salvage must be counted as one element of the evidentiary assessment, and not as the decisive topic of assessment in relation to the question of danger. In the court's view, "Norsk Viking" was not, objectively speaking, in any danger. The court pointed out that no evidence had been submitted to show that the crew on board "Norsk Viking" believed the vessel to be in danger, although those on board "Senja" perceived the situation to be dramatic.

(11) Troms Fylkes Dampskibsselskap ASA has appealed the Court of Appeal's judgment to the Supreme Court. The appeal brief states that both the Court of Appeal's application of the law and its assessment of evidence are under appeal. During the appeal proceedings, this was specified to concern the court's application of the law to the facts and its assessment of evidence.

(12) In the Supreme Court, seven witnesses and one party representative have given statements. Two of the witnesses have given statements at a court deposition, and one at a private deposition. The others have submitted written statements. They all also gave statements in the Court of Appeal.

(13) Some new material has been presented to the Supreme Court, but the case remains in all material respects the same as in the previous instances.

(14) *The appellant, Troms Fylkes Dampskibsselskap ASA*, has in summary submitted the following:

(15) The Court of Appeal's assessments are based on wrong facts in terms of how close to the shore the vessels were when the towing began, and how long "Norsk Viking" could sail without the leak being fixed. The Court of Appeal has also applied too narrow perspective when assessing the question of danger.

(16) Although the Court of Appeal's presentation of the conditions for the right to a salvage award is correct, the court's application of the law to the facts is erroneous, and the objective danger requirement applied is too strict. When assessing the danger, decisive weight must be given to how the situation appeared to the parties involved at the time. The Court of Appeal has given undue weight to the fact that it subsequently became clear that there were other options than salvage, without simultaneously considering the significance of the fact that "Norsk Viking" actually chose to ask "Senja" for assistance.

(17) At 8.30 a.m. a so-called level alarm was triggered on board "Norsk Viking" due to a low oil level in the gearbox. The damage was not located when "Senja" was called to assist, and it is uncertain whether it was located before towage was established. When the line became tight and towage started, "Norsk Viking" was only 0.15 nautical miles from the shore, approximately 10-15 minutes from running aground. There was a strong breeze to gale from the north. The vessel was in danger in the sense of the salvage rules, which is confirmed by the choice of the salvage option.

(18) "Senja" was fully loaded with oil, and a taking on a towage assignment would be a violation of the charter party. This shows that this was about salvage, which must be regarded as essentially agreed.

(19) The situation appeared to be dramatic to the people on board "Senja", and this must be seen to reflect how the situation was perceived by the crew on board "Norsk Viking". The fact that the owner called a towboat – and did not cancel the operation when the leak was fixed – confirms that the danger was real.

(20) Possible alternative actions can only be given weight if the crew knew about them, and they must have existed when the shipmaster called for assistance, i.e. at 8:40 a.m. It was not a viable option for "Norsk Viking" to sail under its own steam to Ågotnes. Even if it had been possible to start up the main engine, it was uncertain how much oil was left in the gearbox, and how long the vessel could sail without wrecking the gear completely. Calculations made by the supplier of the gear show that the main engine could have worked for only 7 – 8 minutes. In that case the vessel could not have reached Ågotnes without filling up with oil, which would have been hazardous.

(21) It would have been hard to limit the leak with the engine running, at the same time as a running engine was a requirement for finding the leak.

(22) The Supreme Court's decision in Rt-1996-907 is not decisive in our case. There, one knew the answer – that the vessel had not been in danger – when the case was resolved by the Supreme Court. Rt-1999-74 gives a correct presentation of the topic of assessment. The decision has been supported by legal theory.

(23) Policy considerations, especially the encouragement consideration, also support a finding that the conditions for salvage are met. The rescuer must be given the benefit of the doubt as to whether there is danger present. The nature and level of danger are now included in the list of circumstances to be considered in determining the salvage award, see. section 446.

(24) It is standard procedure that the rescuer is awarded legal costs.

(25) If the vessel was not in danger, NOK 100 000 will be accepted as suitable consideration for the assistance. Appellant claims late payment interest on the amount. Moreover, the assisting party should not be required to pay the counterparty's legal costs. The exemption in section 172 second paragraph of the Dispute Act should apply.

(26) Troms Fylkes Dampskibsselskap ASA has submitted the following claim:

"Principally:

Versus Sira Tank KS repr. by Sira Tank AS and If Skadeforsikring NUF:
1. Sira Tank KS and If Skadeforsikring NUF are ordered jointly to pay to Troms Fylkes Dampskibsselskap ASA an amount fixed by the court limited upwards to NOK 1 634 400 within 2 – two – weeks from service of the judgment plus interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made.

2. Sira Tank KS and If Skadeforsikring NUF is ordered to compensate Troms Fylkes Dampskibsselskap ASA's legal costs incurred in the City Court, the Court of Appeal and in the Supreme Court within 2 – two weeks – from service of the judgment plus interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made.

Versus Norske Shell AS:
1. Norske Shell AS is ordered to pay to Troms Fylkes Dampskibsselskap ASA an amount fixed by the court limited upwards to NOK 424 800 within 2 – two – weeks after service of the judgment plus interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made.

Versus all respondents:
1. Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS are ordered to compensate Troms Fylkes Dampskibsselskap ASA's legal costs incurred in the City Court, the Court of Appeal and in the Supreme Court within 2 – two – weeks from service of the judgment plus interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made.

Alternatively:
1. Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS shall be acquitted against payment within 2 – two – weeks from service of the judgment of NOK 100 000 – onehundredthousandkroner – to Troms Fylkes Dampskibsselskap ASA for assistance on 4 April 2000 with the addition of

interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made.

2. Each of the parties carries its own costs incurred in the City Court, the Court of Appeal and the Supreme Court."

(27) *The respondents, Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS*, have in summary submitted the following:

(28) The Court of Appeal's interpretation of the law is correct, and its assessment of the evidence in the case is supported by the respondent. The Court of Appeal, like the City Court, used expert associate judges, and in both instances, the conclusion was that "Norsk Viking" was not objectively in danger. The Supreme Court should be reluctant to review the assessment of evidence, see Rt-1986-105, especially when the case, in terms of evidence, is in the same position as in the Court of Appeal. The Court of Appeal was familiar with the type of vessel, the load of the vessels and how close to the shore "Norsk Viking" was when towage began.

(29) "Norsk Viking" had a problem with the gear, not with the main engine. The stopping of the latter was controlled, and the engine could be restarted at any time, like it was in order to locate the leak. The vessel could have continued to Ågotnes under its own steam. Calculations made by the respondents confirm that there was enough oil in the gearbox for the vessel to be able to reach Ågotnes without difficulty. The calculations presented by the appellant are based on erroneous assumptions. The Court of Appeal's statement that the vessel could sail for 50-100 hours is, however, not correct.

(30) The leak was easily reachable, and the vessel's experienced professionals with access to a complete workshop on board had no difficulties replacing the pipe. The oil leak could have been limited by the use of a cloth or similar. Later, it has been found that the pipe could have been removed without damaging the gear.

(31) The leak was located when "Senja" arrived at 9:00 a.m. In a somewhat unclear situation, "Norsk Viking" chose, for safety reasons, to accept assistance in order to replace the damaged pipe before starting the engine. The Court of Appeal has correctly assumed that the crew on board "Norsk Viking" did not believe that the vessel was in danger, at any time.

(32) The fact that the crew on board "Senja" found the situation dramatic and misunderstood the information given, does not mean that "Norsk Viking" was in danger, objectively speaking.

(33) No salvage agreement was entered into, and the right to a salvage award must be determined based on the provisions of the Maritime Code. The Supreme Court's decision in Rt-1996-907 is a binding precedent. The statements in Rt-1999-74 regarding the assessment of evidence do not change the legal norm established in 1996. This decision was made after a thorough review of foreign case law, Norwegian and foreign literature and policy considerations. For maritime safety purposes, it is desirable to establish that ships can ask for assistance without the risk of incurring a salvage award.

(34) If the Supreme Court finds that "Norsk Viking" was in danger, the salvage award determined by the City Court is accepted. There is no support in case law for a higher amount.

(35) Payment of interest on the amount offered for assistance is accepted.

(36) Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS have submitted the following claim:

> "1. The conclusion of the Court of Appeal is upheld.
>
> 2. Troms Fylkes Dampskibsselskap ASA is ordered to pay to Sira Tank KS, IF Skadeforsikring NUF and Norske Shell AS costs incurred in the Supreme Court plus interest pursuant to section 3 first paragraph first sentence of the Late payment Interest Act until payment is made."

(37) **My view on the matter:**

(38) I have come to the same conclusion as the Court of Appeal, and can essentially endorse the reasoning provided by the Court of Appeal.

(39) First, I note that no salvage agreement has been entered into between the parties, and that the question of whether there is a right to a salvage award must therefore be determined under section 441 a of the Maritime Code of 1994, where salvage is defined as "any act the purpose of which is to render assistance to a ship or other object which has been wrecked or is in danger in any waters". The question in our case is whether "Norsk Viking" was in danger in the sense of this provision.

(40) After an amendment in 1964, there was also a condition under the Maritime Code of 1893 that the vessel had to be "wrecked or in danger" for there to be a right to a salvage award. The purpose of the 1964 amendment was to ensure that the Norwegian rules on salvage were in accordance with the Brussels Convention on Salvage of 1910 which Norway had submitted to at the time, see the account of the background for the amendment in Rt-1999-74 on page 79. Norway has later ratified the Brussels Convention on Salvage of 1989, which, however, does not the change the conditions for the right to a salvage award, and the implementation Act of 2 August 1996 no. 61 has no particular interest in our context. The condition that the vessel must have been "wrecked or in danger" for there to be a right to salvage, is thus unchanged in Norwegian law since the amendment in 1964.

(41) The Supreme Court has considered the question of the presence of "danger" in the sense of the salvage rules in two recent decisions. In Rt-1996-907, the question was whether it is decisive to the right of salvage if danger was present in objective terms, or whether it is sufficient that generally competent people should then and there have reasonably perceived the situation to be dangerous. The majority of the Supreme Court concluded that a vessel that is not objectively in danger is not subject to salvage. The question was raised again in Rt-1999-74, but that case primarily concerned the assessment of evidence. The fist-voting judge confirms that the assessment of danger must be objective, and

emphasises that it is not sufficient that the crew or the people carrying out the salvage believe that danger is present. The following is stated:

> "Although the assessment of danger is objective, the question whether danger is present must, however, be assessed based on the situation as it appeared at the time of salvage. First, this entails that if a risk existing at the time subsequently turns out not to materialise, this does not preclude the existence of salvage situation. Second, the question whether there is danger present must be assessed based on the competence and skills of the crew on board. In addition, when assessing the evidence, one must among other things give weight to how the crew on board and the persons carrying out the salvage actually assessed the situation."

(42) Like the first-voting judge in the cases from 1996 and 1999, I assume that only vessels that are objectively in danger can be subject to salvage. The passage I have quoted from the first-voting judge's vote in the case from 1999, is to me a specification and elaboration of the evidential topic in the assessment whether the danger was real, and not a change of the legal norm. The Court of Appeal has also based its conclusion on this, and the appellant has not taken issue with the Court of Appeal's general interpretation of the law.

(43) The appellant has asserted that the Court of Appeal has based its decision on a too-narrow evidential assessment, and I will therefore move on to discussing the situation for "Norsk Viking" when "Senja" arrived at the vessel and towage was established. There was a near gale from the north. When the leak was discovered, the vessel was about 2.5 nautical miles from the harbour of Ågotnes – the assumed sailing time was 15 minutes.

(45) The following is noted in the vessel's machine log:

> "Alarm on Volda Gear – oil leak - hvm st [main engine stopped] approx. 08:35 a.m. Filled about 170 litres of oil in the gearbox and searched for the leak. Did not find it until Hvm [main engine] was restarted. A copper pipeline had been rubbing against another making a hole. New pipeline installed and tested – OK – Changed oil filter. Hvm ig [main engine started] at 10:55"

(46) The deck log contains the following:

> "Hydraulic leak in the vessel's gearbox.
> 08:30 a.m.: Message from engine [room] to reduce the speed entirely due to oil leak in the gearbox. Called "Senja" approaching from south, with info on the vessel's problem, and that they could pass in front of the vessel. The vessel was turned to port against the wind and for a better position in the passage. M/T "Senja" asked if the vessel needed its assistance. The response was that it was not necessary at the moment since the situation in the engine was not yet clarified.
> 08:35 a.m.: the engine was stopped. This based on an assessment that the problem would be solved in a short time.
> 08:40 a.m.: Bridge informed that the damage was located, but the repair time was uncertain. Called "Senja" for assistance. (. .) Wind N 6-7 Sea 3-4. This based on the fact that M/T "Senja" had already offered to assist, strong wind from the north made the vessel drift south-west towards land and the vessel was in a favourable

position for receiving assistance, and that the problem in the engine could be repaired within reasonable time. The alternative was to sail under own steam at reduced speed to Ågotnes for anchoring, in that case with the risk factor that the gear could handle this strain.
09:00 a.m.: M/T "Senja" arrived along the side (...)
09:05 a.m.: Two hawsers fastened on "Senja". Started towing the vessel out in the passage in a northerly direction."

(47) The notes in "Senja"'s deck log confirm this information in terms of the times of calling for assistance, when the vessel arrived at "Norsk Viking", and when towage was established. It appears that the distance from shore was 0.15 nautical miles when the tow was tightened, that it was stable at 09:15 a.m., and that one then started to tow north. It is further noted that when "Norsk Viking" called for assistance at 08:40 a.m., the request was for "rapid assistance, are fully loaded".

(48) As mentioned, "Norsk Viking"'s deck log shows that the bridge was informed at 08:40 a.m. that the damage was located. The appellant has submitted that the only implication of this was that the leak was located in the gearbox, but that one did not know then where the hole was at the time. – I mention that there was an alarm warning of low oil level on the gear. It was also clear there was a leak, as a fine oil mist was spraying out and there was a thin film of oil on the floor. At 08:30 a.m., the engineer requested the bridge to reduce the speed to reduce the pressure on the gear, after which the engine was stopped at 08:35 a.m. However, it was impossible to locate the damage, and oil was therefore filled up in the gearbox to see if the leak could be located. Since this did not help finding the leak either, the main engine was restarted. The leak was then located at a copper pipe between an electric front pump and the gearbox. As mentioned, it was noted in the deck log that the damage was located as early as 08:40 a.m., while nothing similar is stated in the engine log. In my view, the information in the deck log suggests that the damage was already located at 8:40 a.m., and under any circumstances the point of damage had been located when "Senja" arrived at "Norsk Viking". It cannot have taken long for experienced engineers to find the hole, even when considering the filling up of oil. In this respect, I refer to the fact that there is no mention in "Senja"'s deck log that "Norsk Viking"'s main engine was restarted after the arrival of "Senja".

(49) After having heard the statements of those directly involved, the Court of Appeal concluded that "Norsk Viking" was not in any objective danger. Much suggests that this was also the view of the City Court. At the same time, the Court of Appeal points out that to the crew on board "Senja", the situation appeared to be dramatic. However, pursuant to Rt-1996-907, the objective situation for "Norsk Viking" is decisive. I noted that in this respect, our case is more similar to Rt-1996-907 than Rt-1999-74. Nor can I see that in the assessment of whether "Norsk Viking" was in objective danger, any weight can be given to the fact that "Senja", which was loaded with oil, was not permitted under the charter party to provide assistance by carrying out ordinary towage.

(50) I add that ships, especially in narrow waters, must in the interests of safety at sea be allowed to call for assistance without entitling the assisting vessel to a salvage award.

(51) I agree with the appellant that the Court of Appeal is incorrect in stating that "Norsk Viking" could sail with the leak for "as long as 50-100 hours without any kind of repair". On the other hand, I cannot see that this has affected the Court of Appeal's assessment that the vessel could have continued under its own steam to Ågotnes without difficulty.

(52) The appellant has presented technical calculations – made by the gear supplier – of remaining oil volume and sailing time without taking action. Similar calculations have been presented by the respondents. With the support of its calculations, the appellant has asserted that "Norsk Viking" could not have continued for more than 7-8 minutes without taking action, while the respondent, with the support of its calculations, has asserted that the vessel even without further action could have reached Ågotnes without difficulty. I find it difficult to lend the calculations much weight, as it seems clear to me that "Norsk Viking", if necessary, would have started the main engine, and that one then would have taken steps to reduce the leak by the use of a cloth or similar.

(53) Consequently, the appeal has failed. It is agreed that the respondents, as established by the Court of Appeal, shall pay a remuneration of NOK 100 000 to the appellants for their assistance. The appellant has submitted a claim for late payment interest on the amount. The interest accrues from 22 July 2000.

(54) I agree with the Court of Appeal's decision regarding the legal costs, and I find that the respondents must also be awarded legal costs incurred before the Supreme Court, pursuant to section 180 first paragraph of the Civil Procedure Act. The legal costs are set – in accordance with the submitted statement of costs – at NOK 150 480, of which NOK 125 000 are legal fees.

(55) I vote in favour of this judgment:

1. The Court of Appeal's judgment is upheld; however, so that statutory late payment interest pursuant to section 3 first paragraph first sentence of the Late Payment Interest Act shall be paid on the amount in the judgment's point 1 from 22 July 2000 until payment is made.

2. For legal costs incurred before the Supreme Court, Troms Fylkes Dampskibs-selskap ASA shall pay to Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS a total of NOK 150 480 – onehundredandfiftythousandfourhundredandeighty – kroner with the addition of statutory late payment interest pursuant to section 3 first paragraph first sentence of the Late Payment Interest Act from the due date until payment is made.

3. The deadline for payment is 2 – two – weeks from the service of this judgment.

(56) Justice Tjomsland: I concur in all essentials and as regards the conclusion with the first-voting justice.

(57) Justice Coward: Likewise.

(58) Justice Mitsem: Likewise.

(59) Justice Gjølstad: Likewise.

(60) After the voting, the Supreme Court passed the following

JUDGMENT:

1. *The Court of Appeal's judgment is upheld; however, so that statutory late payment interest pursuant to section 3 first paragraph first sentence of the Late Payment Interest Act shall be paid on the amount in the judgment's point 1 from 22 July 2000 until payment is made.*

2. *For legal costs incurred before the Supreme Court, Troms Fylkes Dampskibsselskap ASA shall pay to Sira Tank KS, If Skadeforsikring NUF and Norske Shell AS a total of NOK 150,480 – onehundredandfiftythousandfourhundredandeighty – kroner with the addition of statutory late payment interest pursuant to section 3 first paragraph first sentence of the Late Payment Interest Act from the due date until payment is made.*

3. *The deadline for payment is 2 – two – weeks from the service of this judgment.*

ND-2011-260 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	2011-09-26
Published	ND-2011-260 – HR-2011-1797-A
Keywords	(22) Unseaworthy. Grounding. Compensation. The Norwegian Maritime Code Section 275, Section 276, Section 347.
Summary	The cargo vessel MV Sunna grounded after the First Officer had fallen asleep. The Master had in conflict with the current regulations brought in a practice by which the First Officer was alone on night watch. The cargo was damaged due to the grounding and the insurance company claimed compensation. The Supreme Court found that the ship, due to the Master's practice of keeping only one officer on night watch, was not seaworthy at the commencement of the voyage. The Transporter could therefore not be released from liability due to the exemption for nautical errors in the Norwegian Maritime Code section 276, first paragraph. Oslo District Court's judgment of 6 June 2009, printed in ND 2009, p. 260. Borgarting Court of Appeal's judgment of 15 November 2010, printed in ND 2010, p. 227.
Proceedings	The Supreme Court of Norway 26 September 2011.
Parties	NEMI Forsikring AS (a Norwegian limited company engaging in insurance) and (Attorney Jon Andersen – On probation) Sjova-Almennar Tryggingar HF (an Icelandic limited company engaging in insurance) versus Nes Hf (an Icelandic limited company engaging in shipping) (Attorney Oddbjørn Slinning – On probation)
Author	The justices: Kallerud, Falkanger, Stabel, Tønder and Tjomsland

(1) Justice **Kallerud**: This matter concerns a claim for compensation from the goods insurer following grounding and raises questions about the understanding and application of the liability clauses in the Norwegian Maritime Code, NMC (*Sjøloven*), section 347, confer section 275 and section 276.

(2) The cargo vessel MV Sunna, chartered to the Icelandic Shipping Company *Nes Hf* under a "bareboat charter", ran aground on the night before 2nd January 2007 in the Pentland Firth between Scotland and the Orkney Islands. The ship was *en route* from Iceland with 1900 metric tonnes of ferrosilicium from Icelandic Alloys Ltd to Elkem AS in England. *Motor Vessel* Sunna was registered in Oslo in the Norwegian International Ship Register (NIS).

(3) It followed from the regulations in force when the ship ran aground that, when sailing in the dark, there was to be a lookout on the bridge in addition to the duty officer, see Regulations for Watch Duty on Passenger and Cargo Ships, section 7, subsection 2.3, promulgated in pursuance of the then applicable section 506 of the NMC. The same was apparent from the contractual documents that regulated the transport. It is clear that the First Officer (*styrmann*) despite this, in compliance with a practice stipulated by the Master, was consistently alone on his regular watch from 2400 hours to 0600 hours.

(4) The lack of a lookout, combined with certain other mistakes, was cited in a Port State Control in the Netherlands on 2nd November 2006. The defects were raised in a telephone call that same day between the Master and a representative of the Shipping Company. After the ship returned to Iceland on 24th November that year, a meeting was held in which the Technical Director of the Shipping Company, the Master and the First Officer all took part. The Shipping Company issued a Non-Conformity and Finding Note where the lack of a lookout after dark was cited. The Master signed the document, which was also distributed to the Shipping Company's other ships.

(5) It has been acknowledged that the Master and First Officer, following the Port State Control in the Netherlands, incorrectly wrote in the Ship's Log Book that there was a separate lookout in place during the First Officer's night watches. It is not clear whether or not the Log Book was also forged before the Port State Control in November.

(6) The direct circumstance leading up to the grounding was that the First Officer, some time after 0300 hours at night, fell asleep. As was the custom, he was alone on the bridge. While the First Officer slept – presumably about one hour – the current nudged the ship off the course he had set on the ship's automatic pilot. There were no alarms on the bridge that could have warned of the course discrepancy, and indeed this was not a requirement. At about 0430 hours the ship was about 2.5 international nautical miles off course and ran aground near the island of Swona.

(7) A salvage vessel was called and the ship was assisted into Lyness on the Orkneys. The damage was too extensive for the transport assignment to be completed and the cargo had to be transferred to another ship.

(8) The cargo forwarder had subscribed insurance with *Sjova-Almennar Tryggingar HF*. The cargo recipient had insurance cover with NEMI Forsikring AS. Both policies were in force when the ship ran aground. The companies have reimbursed the losses to the cargo owners, to a total of NOK 4,279,888 (Norwegian kroner), paying half each.

(9) The insurance companies filed a suit against the Shipping Company, claiming compensation for the monies disbursed. The Shipping Company raised a counterclaim, demanding coverage of the residual amount following a joint average settlement of NOK 865,577. The parties concur regarding the amount. They also concur that if the insurance companies succeed, then the Shipping Company's counterclaim will lapse, and that the insurance companies' claims will lapse if the Shipping Company succeeds.

(10) The Oslo District Court delivered judgement on 6th June 2009, finding in favour of the insurance companies. The District Court found that the Shipping Company had defaulted

on its obligations by not implementing sufficient measures to prevent the grounding. The Shipping Company was therefore held liable for its own faults and negligence under the principal rule in the NMC, section 275, and it was not, therefore, in the District Court's view, appropriate to release it from liability under section 276.

(11) The District Court Judgement concludes as follows:

> "1. Nes Hf is ordered to pay compensation to NEMI Forsikring ASA in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.
>
> 2. Nes Hf is ordered to pay compensation to Sjova-Almennar Tryggingar HF in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.
>
> 3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.
>
> 4. Nes Hf is ordered to pay legal costs to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF in the amount NOK 312,625 – three-hundred-and-twelve-thousand, six-hundred-and-twenty-five – Norwegian kroner within two weeks of service of the judgement."

(12) The Shipping Company appealed the District Court's judgement to the Borgarting Court of Appeal, which found that the Shipping Company could not be blamed for the loss. The Master's and First Officer's error lay, the Appeal Court found, within the exemptions from the Transporter's liability for errors and negligence in navigation, and the ship, in the Appeal Court's opinion, was seaworthy at the commencement of the voyage, see NMC, section 276.

(13) The Appeal Court's judgement of 15th November 2010 concludes as follows:

> "1. Nes HF is released
>
> 2. NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 865,577.86 – eight-hundred-and-sixty-five-thousand, five-hundred-and-seventy-seven – Norwegian kroner, 86 cents – plus interest under the Overdue Payments Act, section 3, first paragraph, first sentence, from 12th March 2008.
>
> 3. In legal costs before the District Court NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 170,149 – one-hundred-and-seventy-thousand, one-hundred-and-forty-nine – Norwegian kroner.

4. In legal costs before the Court of Appeal NEMI Forsikring AS and Sjova-Almennar Tryggingar HF shall pay – all for one and one for all – to Nes Hf the sum of NOK 253,220 – two-hundred-and-fifty-three-thousand, two-hundred-and-twenty – Norwegian kroner.

5. The fulfilment date for counts 2, 3 and 4 above shall be two (2) weeks from service of judgement."

(14) NEMI Forsikring AS and Sjova-Almennar Tryggingar HF declared that they would appeal the Court of Appeal's judgement in both the primary action and the counteraction. The appeal concerns the application of the law, and to some extent the adjudication of the evidence.

(15) The appeal was granted a hearing by the Appeal Committee of the Supreme Court in a decision of 31st March 2011.

(16) Two new written testimonies and a few new documents have been added before the Supreme Court. The matter stands essentially at the same point as before the earlier courts.

(17) The Appeal Plaintiffs – NEMI Forsikring AS and Sjova-Almennar Tryggingar HF – have briefly argued as follows:

(18) Although the direct cause of the accident was a navigational error that comes under the exemption rules in the NMC, section 276, first paragraph, no. 1, the Shipping Company is nonetheless liable for the loss, because the ship was not seaworthy at the commencement of the voyage, see NMC, section 276, second paragraph. The ship was unseaworthy when it left Iceland because the Master had previously decided that there would be no special lookout when sailing in the dark. It was not likely that this error would be corrected en route. The entire voyage must be considered as a unit. Therefore the crucial thing is not that the ship – seen in isolation – was seaworthy during the daytime. The Shipping Company is responsible for the Master and must bear the responsibility for his error, see NMC, section 276, second paragraph.

(19) The liability also follows directly from the principal rule in the NMC, section 275, since the loss was due to the Shipping Company's own errors and negligence. The Shipping Company, which must here be identified with its Technical Director, acted negligently when they failed to ensure that the serious faults that were revealed during the Port State Control in the Netherlands were rectified. There is a causal connection between the Shipping Company's lack of follow-up and the grounding.

(20) NEMI Forsikring AS and Sjova-Almennar Tryggingar HF have filed the following Statement of Claim:

"1. Nes Hf is ordered to pay compensation to NEMI Forsikring ASA in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

2. Nes Hf is ordered to pay compensation to Sjova-Almennar Tryggingar HF in the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.

4. Nes Hf is ordered to pay legal costs to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF before the District Court, the Court of Appeal and the Supreme Court."

(21) The Appeal Defendant – Nes Hf – has briefly argued as follows:

(22) Both the direct error that led to the grounding – the First Officer falling asleep – and the Master's decision to not always assign a special lookout when sailing in the dark – are nautical errors for which the Shipping Company is not responsible, see NMC, section 276, first paragraph, no. 1. Even though the Master might have decided to set aside the rule for a special lookout when sailing after dark even before the ship left the dock, it is just as much a part of his nautical leadership of the ship, which falls outside commercial errors for which the Transporter is responsible.

(23) The rules in the NMC, section 276, second paragraph, which impose a responsibility on the Transporter for seaworthiness at the commencement of the voyage, do not apply here. The same circumstances cannot simultaneously constitute a nautical error under section 276, first paragraph, and constitute original unseaworthiness. If so, a different, contributory cause must be argued for the accident. It would lead to a hollowing out of the exemption for nautical errors if the same error, committed by the same person, could also lead to liability under the rule regarding original unseaworthiness.

(24) It was in any case no fault in the ship that made it unseaworthy. MV Sunna had modern navigation equipment, was in good technical shape and all papers were in order. There was one crew member more than required on board, and the crew were well qualified both formally and in real terms.

(25) If the ship despite the above – due to the watchkeeping – is deemed unseaworthy at the commencement of the voyage, then this could easily be corrected *en route*.

(26) Any possible unseaworthiness was due not to the Transporter displaying a lack of diligence. The Shipping Company's rules for watchkeeping on board were in line with the current regulations, and the Shipping Company's representative took the steps that could reasonably be expected after the Port State Control revealed that the Master did not follow the rules. The Shipping Company here is not identical with the Master.

(27) The Shipping Company has not acted negligently, and there is therefore no basis for liability under the NMC, section 275. Nor is there any causal link between any possible own fault committed by the Shipping Company and the loss following from the grounding.

(28) Nes Hf has entered the following claim:

> "1. The appeal is dismissed.
>
> 2. NEMI Forsikring AS and Sjova-Almennar Tryggingar HF are ordered, all for one and one for all, to pay to Nes Hf its legal costs before the Supreme Court."

(29) My view of the case:

(30) The parties have agreed that Norwegian law shall apply, and they agree that the Shipping Company Nes Hf's responsibility as a Transporter is regulated by the NMC, section 347, compare section 275 and section 276.

(31) The principle rule concerning the responsibilities of the Transporter are given by NMC, section 275:

> "The Transporter is responsible for losses that follow from the loss or damage to cargo while in the Transporter's custody onboard or ashore, unless the Transporter can show that the loss was not due to a fault or an omission by the Transporter himself or anyone for whom he is responsible."

(32) The NMC, section 276, stipulates the following limitation of liability:

> "The Transporter shall not be liable if the Transporter can show that the loss is a consequence of:
>
> 1) Error or neglect in navigation or manoeuvring of the ship made by its master, crew, pilot or tugboat or other person who performs work in the service of the ship; or
>
> 2) Fire that is not due to fault or neglect by the Transporter himself.
>
> The Transporter shall nonetheless be liable for losses due to unseaworthiness due to the Transporter himself or anyone for whom he is responsible not displaying due diligence by making sure that the ship was seaworthy at the commencement of the voyage. The burden of proof that due diligence was displayed rests with the Transporter."

(33) The provisions are aligned with the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924, as amended by the Brussels Protocol of 1968, the so-called Hague-Visby Rules.

(34) The principal rule in section 275 stipulates an ordinary negligence and employer's responsibility, but with the opposite burden of proof. The liability limitations in section 276 are special to maritime transport in foreign trade. They were incorporated as a counterbalance because the Transporters during the negotiations for the Hague-Visby Rules had to accept the burden of proof rule in section 275, see *Norsk Lovkommentar – Sjøloven* (Norwegian Legal Commentary – NMC), note 500.

(35) It is clear that section 275 both embraces loss as a result of the Transporter's own faults and faults committed by someone the Transporter is responsible for, for instance the Master and First Officer on the Shipping Company's ship. It is also clear that section 275 has a wider remit than section 276, first paragraph. The principal rule covers all types of negligent acts or omissions that lead to loss as indicated in the provision, whilst the exemption clause only applies to nautical errors and fire.

(36) The exemptions in section 276, first paragraph, apply exclusively to nautical errors and fire *that is not due to the Transporter's own fault*. In the rule about fire, this follows directly from the wording, see also *Rettstidende*, Rt (the Norwegian Journal of Supreme Court Decisions) 1976, page 1002 (*Høegh Heron*). The same must apply for nautical errors, see Thor Falkanger and Hans Jacob Bull: *Sjørett* (Maritime Law), seventh edition, pages 262, 267 and 270; and Fredrik Sejersted: *Haagreglene* (The Hague Rules) (International Convention. relating to Bills of Lading), third edition, page 64.

(37) Under section 276, second paragraph, the Transporter is nonetheless liable for losses due to unseaworthiness at the commencement of the voyage. The remit of the provision may be somewhat uncertain. However, it is certainly clear that it constitutes an "exemption from the exemption", since the Transporter is held liable for the original unseaworthiness, even though nautical errors were committed that come under the first paragraph.

(38) I now move on to the adjudication of our present case.

(39) There can be no doubt that Nes Hf initially answers for the Master and First Officer, and that the Shipping Company can be held liable for losses due to their errors and omissions under the principal rule of section 275. Both these two employees have been guilty of serious errors and omissions: The First Officer by not staying awake on watch, the Master by organising the watchkeeping onboard in violation of rules designed to protect the safety of the ship, the crew and the surroundings.

(40) The first issue that arises is whether the Transporter can nonetheless be released from liability due to the exemption for *nautical errors* in section 276, first paragraph, no. 1.

(41) The immediate precursor to the grounding – that the First Officer fell asleep on watch – must undoubtedly be characterised as such an error. On the other hand, one can raise doubts about whether the Master's rule-breaking decision that the First Officer should consistently do his fixed nightly watches alone, can be deemed a "fault or omission in navigation or manoeuvring of the ship". The way I judge this case, it is not necessary for us to decide on this issue, since the ship – as I will revert to later – due to the Master's arrangements, in my opinion, was not seaworthy when the voyage started.

(42) Regardless of whether there was a nautical error, the Transporter answers for errors committed by anyone for whom the Transporter is responsible, and who has caused the *unseaworthiness* at the commencement of the voyage, see section 276, second paragraph, see Thor Falkanger and Hans Jacob Bull: *Sjørett* (Maritime Law), seventh edition, page 262. I choose – like the parties – to relate my further discussion to this issue.

(43) In my opinion there is no doubt that the Shipping Company cannot be held liable for the First Officer's error under the rule of original unseaworthiness, and indeed this was not argued.

(44) The assessment of unseaworthiness due to the ship, as a consistent arrangement, was sailing without sufficient crew on the bridge, is rather more problematic.

(45) The term "unseaworthiness" is not further defined in the law in question. Whether a ship is seaworthy must be decided after a specific judgement which is not swayed by every little mistake, see *Rt 1975*, *page 61 (Sunny Lady)*. It is clear that faults linked to the ship itself and its condition are not the only aspects worthy of consideration. Also failures of the crew can lead to the ship being unseaworthy, see *Rt 1993, page 965 (Faste Jarl)*, where the Shipping Company was held liable because the ship was unseaworthy due to the First Officer's intoxication. Regarding the central issue for consideration the judgement says:

> "The crew must be able to carry out the voyage without the ship or the cargo being exposed to greater risk than the risk one must anticipate when transporting cargo by sea."

(46) Both parties have expressed the view that the *MV Sunna* was not seaworthy on the nights that the First Officer was on the watch alone. I concur with this view. There can be no doubt that the cargo was then subject to a significantly higher risk than the owners had reason to anticipate.

(47) The question then becomes if this is a matter of an *original* unseaworthiness.

(48) According to the NMC, section 131, the Master must, before the voyage commences, ensure that the ship is in seaworthy condition, and *en route* he must do whatever is in his power to maintain this condition. When beforehand – due to the Master's arrangements for the crew – it is clear that the ship will consistently be unseaworthy during the nights, then there also exists – in my judgement – original unseaworthiness. The voyage in such a case must be assessed as a unit, and it makes no difference that there was no fault in the crewing of the bridge at the moment the ship left the dock. A reasonable ship-owner would – if he had known of the circumstance – not have permitted the ship to commence the voyage with a watchkeeping arrangement that exposed the cargo to a significantly heightened risk.

(49) We have not been told of anything to make it likely that the Master during the voyage would alter his practice. The theoretical chance that he would reorganise his crew *en route* so that the ship became seaworthy is something I do not credit here.

(50) Following all this I must conclude that the *MV Sunna* was not seaworthy upon departure from Iceland.

(51) The liability for the original unseaworthiness would lapse if the Transporter itself, and the persons for whom the Transporter is responsible, had shown *due diligence* by ensuring that the ship was seaworthy.

(52) It is clear without further ado that the Master has not displayed due diligence for the ship's seaworthiness. Here, too, Nes Hf is identified with their Master, so that his faults are reckoned as the Shipping Company's faults, see Thor Falkanger and Hans Jacob Bull: Sjørett, seventh edition, page 266 and following; and see *Rt 1993, page 965 (Faste Jarl)*. Given that the Master's arrangements led to the ship being unseaworthy when it commenced the voyage, then – as we already noted – it makes no difference that his circumstances could also be deemed a nautical error that falls under the remit of section 276, first paragraph. Following this I find that clearly the Shipping Company cannot escape liability on this basis.

(53) Since the Transporter must answer for the Master's error, there is no need to decide whether the Shipping Company has itself committed any errors that result in compensation liability.

(54) In my view, then, there is a clear causal link between the Master's negligence and the loss suffered when the ship ran aground.

(55) Accordingly I have come to believe that Nes Hf must be held liable for the insurance companies' losses. The Parties, as already mentioned, have agreed on the size and interest payments on the compensation amount. The Shipping Company's counterclaim lapses now that the Appeal Plaintiffs have succeeded in the main claim.

(56) The Appeal Plaintiffs have succeeded completely and should be awarded legal costs before all instances in line with the general rule in the Civil Procedures Act, section 20-2. Costs totalling NOK 926,250 have been claimed, including value added taxes. I rely on this cost schedule. Additionally there is the standard hearing fee before the Supreme Court, twice over, of NOK 46,440, see *Rt 2008, page 1056*.

(57) I vote for this

JUDGEMENT:

"1 Nes Hf is ordered to pay to NEMI Forsikring AS the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

2. Nes Hf is ordered to pay to Sjova-Almennar Tryggingar HF the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

3. NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF are released of the claim from Nes Hf.

4. In legal costs before the District Court, the Court of Appeal and the Supreme Court, Nes Hf is ordered to pay to NEMI Forsikring ASA and Sjova-Almennar Tryggingar HF, jointly, the amount NOK 972,690 – nine-hundred-and-seventy-two-thousand, six-hundred-and-ninety – Norwegian kroner within two weeks of service of this judgement."

(58) Justice Falkanger: I concur with the First Voting Justice in all essentials and in the result.

(59) Justice Stabel: I agree.

(60) Justice Tønder: I agree.

(61) Justice Tjomsland: I agree.

(62) Following voting the Supreme Court delivered the following:

JUDGEMENT:

"1. Nes Hf is ordered to pay to NEMI Forsikring AS the amount NOK 2,139,944 – two-million, one-hundred-and-thirty-nine thousand, nine-hundred-and-forty-four Norwegian kroner, plus the legal overdue payments interest from 18th November 2007 until payment is rendered.

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ND-2012-274 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	2012-12-20
Published	ND-2012-274
Keywords	(23) Norwegian courts' jurisdiction. The Lugano Convention.
Summary	A Singaporean company brought proceedings before a Norwegian court regarding settlement pursuant to a broker contract entered into in Singapore. The case did not have any connection to Norway except that the defendant's legal domicile was here. The majority of the Supreme Court – three judges – held that it does not follow from the Lugano Convention that a plaintiff from a third country is automatically entitled to institute proceedings in Norway. The issue was unresolved by international sources of law. It also had to be assumed that Norwegian law provides satisfactory arrangements, which do not conflict with the rules of the Convention. It was pointed out that pursuant to Norwegian law, it would be out of the ordinary that a Norwegian company which has legal domicile in Norway, could not be sued in Norway. The ruling of the Court of Appeal, in which it was held that the Convention permitted the case to proceed in Norway, was set aside. Dissent 3-2.
Proceedings	Supreme Court of Norway 20 December 2012.
Parties	Parties Trico Subsea AS (attorney Frithjof Herlofsen) against Raffles Shipping Projects Pte. Ltd. (attorney Egil André Berglund – test case)
Author	Dissenting: The justices Normann, Stabel. Majority: The justices Kallerud, Noer, Matheson

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(1) Justice **Normann**: This matter concerns the question of whether Norwegian courts have jurisdiction in an international dispute regarding broker commission. In particular, it raises the question of whether the Lugano Convention of 2007 applies when the plaintiff is domiciled outside the Convention area, and the facts of the case are not linked to at least one state that is bound by the Convention.

(2) Raffles Shipping Projects Pte. Ltd. (Raffles) is a company with its main office in Singapore. The company brought proceedings against Trico Subsea AS (Trico Subsea) in Haugaland District Court on 14 April 2011 with a claim for payment of broker commission of up to USD 523 000 in connection with the sale of two vessels owned by Trico Subsea.

(3) Trico Subsea is a Norwegian private limited company with its main office in Haugesund. The company is part of an international group, and is indirectly owned by Trico Marine Services Inc., registered in Delaware, USA. Trico Subsea submitted its statement of defence on 18 May 2011, and claimed that the case should be dismissed.

(4) Haugaland District Court passed a ruling with the following conclusion:

> 1. The claim for dismissal of case no 11-065630TVI-HAUG is rejected. The case will proceed.
>
> 2. Raffles Shipping Projects Pte Ltd is ordered to provide NOK 300 000 – three hundred thousand – as security for a possible liability for legal costs related to case no 11-065630TVI-HAUG by 29 August 2011.
>
> 3. A decision regarding legal costs is postponed pursuant to the section 20-8, third subsection of the Dispute Act.

(5) Whether the Lugano Convention applies to the dispute was not considered by the District Court, which based its decision on the section 4-3 of the Dispute Act.

(6) Trico Subsea appealed to Gulating Court of Appeal, which issued a ruling on 18 November 2011 with the following conclusion:

> 1. The case is dismissed.
>
> 2. Raffles Shipping Projects Pte Ltd shall pay to Trico Subsea AS legal costs for the Court of Appeal in the amount of NOK 14 825 – fourteen thousand eight hundred and twenty-five – within 2 – two – weeks from the service of this ruling.
>
> 3. Raffles Shipping Projects Pte Ltd shall pay to Trico Subsea AS legal costs for the District Court in the amount of NOK 15 000 – fifteen thousand – within 2 – two – weeks from the service of this ruling.

(7) The Court of Appeal also resolved the matter based on an interpretation of section 4-3 of the Dispute Act.

(8) Raffles appealed to the Supreme Court Appeals Selection Committee, which set aside the Court of Appeal's ruling on 19 January 2012 (HR-2012-152-U). The following ruling was handed down:

> 1. The Court of Appeal's ruling is set aside.

(9) The Appeals Selection Committee started by pointing out that the Court of Appeal had solely considered section 4-3 of the Dispute Act. The Committee further held:

> (18) It is, however, clear that in cases that fall under the Lugano Convention, the rules of this Convention are decisive for the question of jurisdiction,

see section 4-8 of the Dispute Act. The Convention prevails as lex specialis over the provisions of the Dispute Act regarding international jurisdiction, see Ot.prp. no 89 (2008–2009) page 12, Schei et al page 191 and Skoghøy, Tvisteløsning (2010) page 53 et seq. Section 4-3 of the Dispute Act is only applicable if the case falls outside the scope of the Lugano Convention. The Court of Appeal has not considered whether the dispute falls under the Convention.

(19) Thus, the Court of Appeal has defined the subject of its legal assessment too narrowly by only considering the question of jurisdiction pursuant to the section 4-3 of the Dispute Act.

(10) The case was then referred back to the Court of Appeal, whose ruling of 14 March 2012 (LG-2012-15009) dismissed the appeal from Trico Subsea. The decision of the District Court to bring the case forward was upheld. The Court of Appeal passed the following ruling:

1. The appeal is to be dismissed.

2. Trico Subsea AS shall pay legal costs for the Court of Appeal in the amount of NOK 9 000 – nine thousand – to Raffles Shipping Projects Pte. Ltd. within 2 – two – weeks from the service of this ruling.

3. Trico Subsea AS shall pay legal costs for the District Court in the amount of NOK 53 000 – fifty-three thousand – to Raffles Shipping Projects Pte Ltd within 2 – two – weeks from the service of this ruling.

(11) Trico Subsea has appealed to the Supreme Court. The Supreme Court Appeals Selection Committee decided on 1 June 2012 that all aspects of the appealed case were to be decided by the Supreme Court in a panel of five judges, see section 5 first paragraph second sentence of the Courts Act.

(12) The appellant – *Trico Subsea AS* – has in summary made the following submissions:

(13) The Court of Appeal has erred in its approach by adjudicating the matter based on an interpretation of the Lugano Convention without first considering whether the Convention is applicable at all where the plaintiff, as in this case, is domiciled outside the Convention area, and the facts of the case do not have a connection to at least one state bound by the Convention.

(14) Decisions from the ECJ shall be taken into consideration and be given considerable weight, but they are not automatically decisive. The Lugano Convention is an international treaty, while the Brussels Regime is supranational. The distinction is plays a part in determining the weight of the ECJ's decisions.

(15) The Lugano Convention must be interpreted in accordance with Article 34 of the Vienna Convention, which expresses a general principle of international law. It follows from these principles that an agreement under international law does not establish obligations or rights for third states without their consent. Legal entities that are not domiciled in a state

bound by the Convention will thus, as a general rule, not be able to invoke the Lugano Convention.

(16) The Lugano Convention concerns international legal relations, and the purpose is to strengthen the legal protection in its territory for persons who reside there. The Convention also aims to provide a judicial framework for the EEA collaboration, see Ot.prp.no. 89 (2008–2009) page 6. The purpose of the Convention does not indicate that the scope should be interpreted so widely that it also covers cases that do not have a connection to the Convention area.

(17) The decision of the Court of Appeal, will lead to hollowing out the scope of section 4-3 of the Dispute Act.

(18) The Court of Appeal draws more extensive conclusions from the ECJ's decision in case C-281/02 Owusu than there is a basis for. The ECJ's decisions in case C-412/98 Group Josi and case C-281/02 Owusu apply to other situations, and decisive significance cannot be attributed to them. The English Court of Appeal concluded in a judgment of 16 December 2009, Lucasfilm v. Ainsworth, that a matter where neither the plaintiff nor the facts of the matter had a connection to a country covered by the Brussels Regime, could be rejected by English courts. The same reasoning is relevant for the matter at hand.

(19) In legal theory the fundamental assumption is that if the plaintiff is not domiciled in a state bound by the Convention, it must be a condition for the Convention to be applied that the matter has such a connection to a state bound by the Convention that it is reasonable that the Convention's provisions apply.

(20) Trico Subsea AS has made the following claim:

1. The ruling of 14 March 2012 by Gulating Court of Appeal in case 12-015009ASK-GUL/AVD1 is set aside.

2. Raffles Shipping Projects Pte Ltd is ordered to compensate Trico Subsea AS for its legal costs for the District Court, the Court of Appeal and the Supreme Court.

(21) The respondent – *Raffles Shipping Projects Pte Ltd* – has in summary made the following submissions:

(22) The Court of Appeal's interpretation of the Lugano Convention is correct. It follows from Article 2 that the Convention applies. The Convention sets no further requirements for connection to the Convention area beyond the requirements of scope, international element and connecting factor. A defendant having its domicile in a state bound by the Convention is a sufficient connecting factor.

(23) The interpretation of the Brussels Convention, the Brussels Regime and the Lugano Convention shall be harmonized. ECJ case law is therefore of decisive importance. This is set out in the preamble to the Lugano Convention 2007 and Protocol no 2 to the Convention.

Case law from the Supreme Court also applies a fundamental rule that ECJ case law shall be given considerable weight.

(24) The scope of the Lugano Convention is defined in Article 1. It is not disputed that an international connection requirement can be deduced from the preamble. Besides this, the Convention operates with different forms of connecting factors, where the most central is the defendant's domicile, see Article 2.

(25) Article 2 must be interpreted literally, and the article does not open for a discretionary connection requirement. Exceptions may be made from the requirement regarding the defendant's domicile, but this must follow explicitly from Article 22, 23 or 27. Clarity and predictability considerations indicate that there is no room for discretionary assessment.

(26) The presumption in Rt-1995-1244 is that the Convention is applicable also when the plaintiff is domiciled in a third country. The decision predates the Lugano Convention of 2007. Today, general due process considerations have been given even greater weight.

(27) In the ECJ's decisions in case C-412/98 Group Josi and in case C-281/02 Owusu, the court concludes clearly that there is no room for discretionary connection criteria, and that the Convention also applies when the plaintiff is domiciled outside the Convention area.

(28) The English Court of Appeal's decision in the Lucasfilm case is not final and legally binding and furthermore concerned a dispute which is regulated by Article 22 of the Lugano Convention. The decision is irrelevant to our case. International legal theory is unified in dismissing a discretionary connection requirement. Nor does Nordic legal theory, with the exception of Skoghøy, Tvisteløsning (2010) and Schei et al, Tvisteloven (2007), support this notion.

(29) Raffles Shipping Projects Pte Ltd has made the following claim:

1. The appeal is dismissed.

2. Trico Subsea AS is ordered to compensate Raffles Shipping Project Pte Ltd.'s for its legal costs for the District Court, the Court of Appeal and the Supreme Court.

(30) **My conclusion** is that the appeal must be dismissed.

(31) The appeal is a second-tier appeal of a ruling, wherein the competence of the Supreme Court is limited to considering the Court of Appeal's procedure and the general interpretation of a written r legal rule, see section 30-6, b) and c) of the Dispute Act. It follows from firm case law that the expression "written legal rule" includes international conventions, see i.a. Rt-2012-1486, paragraph 25. The Supreme Court may after therefore consider whether the Court of Appeal has interpreted the Lugano Convention correctly.

(32) First, I have some comments on the sources of law.

(33) The Lugano Convention of 1988 was from 1 January 2010 replaced by the Lugano Convention of 2007, but the rules governing the questions raised in this matter have not been changed. Thus, case law prior to 2010 will still be of interest. The Lugano Convention applies as Norwegian law, see section 4-8 of the of the Dispute Act, and as lex specialis, takes precedence over conflicting national rules, see The Supreme Court Appeals Selection Committee's ruling of 19 January 2012 with reference to i.a. Ot.prp.no. 89 (2008–2009) page 12. As far as the Lugano Convention 1988 was concerned, the principle of precedence is also expressed in Rt-2011-897 section 33 and Ot.prp no. 51 (2004–2005) page 163.

(34) The Lugano Convention modelled on the Brussels Convention 1968, and EU Regulation 44/2001 – The Brussels Regime – applicable to Member States of the EU. The following is stated regarding the relationship between the Brussels Convention 1968 and the Lugano Convention 1988 in Rt-2004-981 section 22:

> The Lugano Convention is in all essentials a parallel to the Brussels Convention, which was entered into on 27 September 1968 between the EEC countries. The ECJ has jurisdiction over cases regarding the application of the Brussels Convention, and pursuant to a declaration made at the signing of the Lugano Convention, 'due consideration' must be taken to the decisions of the ECJ and also to national courts' decisions regarding 'those provisions of the Brussels Convention which are in all essentials repeated in the Lugano Convention' when interpreting the Convention. It follows from this that ECJ case law in particular will be an important source of law when Norwegian courts are to consider the interpretation of the Lugano Convention.

(35) A corresponding obligation to take into account decisions regarding the Lugano Convention 1988, the Brussels Convention and the Brussels Regulation, follows from protocol 2 regarding, among other things, uniform interpretation of the Lugano Convention 2007, see Schei et al, Tvisteloven, Volume 1, page 192. I would add that it is stated in Rt-2011-897 section 35 that the ECJ's interpretation of similar provisions in the Brussels Convention carry "great weight" when interpreting the corresponding provisions in the Lugano Convention.

(36) Trico Subsea has argued that the Court of Appeal's approach to the case is wrong, as it bases its decision on an interpretation of the Lugano Convention without first discussing whether the Convention applies at all. Therefore, I will first consider the question of whether it can be considered an absolute requirement that the plaintiff is domiciled in a state bound by the Convention for the Convention to apply.

(37) I will start with the principle of international law about the relative effect of international treaties, meaning that an international agreement neither establishes obligations nor rights for a state that has not given their consent, see Article 34 of the Vienna Convention on the Law of Treaties of 23 May 1969. I therefore agree that we must establish a particular basis that shows the contracting state intended to commit itself in such a manner.

(38) The parties agree that the dispute seen in isolation falls under the scope of the Lugano Convention, see Article 1, and that the dispute is of an international character. Article 1 limits the scope to "civil and commercial matters", but the wording gives no

guidance with regard to potential claims regarding the parties' or the matters' connection to the Convention area. As is the case with other conventions, there are no preparatory works to provide further illumination of the question. It is, however, clear that the states bound by the Convention generally have been of the view that it is advantageous for the defendant to be sued in his or her domicile.

(39) The clear principal rule of the Convention is that persons that reside in a state bound by the Convention "shall ... be sued in the courts of that State" see Article 2 no 1, which is at the core of our case.

(40) In previous Norwegian case law, the question of whether there should be a requirement that the plaintiff is domiciled in the Convention area has been answered in the negative, with reference to the provision in Article 6 (1) of the Lugano Convention 1988. The provision corresponds to the Article 2 no. 1 of the Lugano Convention 2007 and Article 2 of the Brussels Convention 1968.

(41) In Rt-1995-1244 it was therefore argued that it was an incorrect interpretation of the legal provision when the Court of Appeal presumed that a party which was not domiciled in a state bound by the Convention could invoke the Convention's jurisdiction provisions. The Appeals Selection Committee made the following comment on this, pages 1245–1246:

> When it comes to the Court of Appeal's decision on the question of jurisdiction, the appeal is directed at the interpretation of the Act implementing the Lugano Convention. It is argued that the plaintiff, domiciled in a state not bound by the Convention, cannot invoke the Convention's jurisdiction provisions. The Appeals Selection Committee agrees with the Court of Appeal that it cannot be assumed that the legal domicile of the plaintiff limits the scope of Article 6 (1) of the Convention. Neither in this provision nor in the wording of the Convention, is there any support of such a limitation. What may potentially justify such a limitation would be that it is beyond the purpose of the Convention to benefit plaintiffs from outside the Convention countries. It is not, however, so that this right to bring an action would exclusively benefit the plaintiff. Regardless of who the plaintiff is, it is advantageous that a case involving several defendants within the Convention countries could be filed at the legal domicile of one of them.

(42) It is so that this particular matter concerned two defendants who were alleged to be jointly liable, and who were both domiciled in countries within the Convention area. I will get back to the question of whether one can read a special connection requirement into this. The view that it would normally be advantageous if a case is filed at the defendant's legal domicile, is in any case relevant. The fundamental point of view in the decision is that since this is generally the case, one accepts that the Convention may benefit plaintiffs domiciled outside the Convention area.

(43) That a plaintiff domiciled in a third country may invoke the Brussels Convention's jurisdiction provisions has also been confirmed by the ECJ. In case C-412/98 Group Josi, the question was whether the Brussels Convention applied in cases where the plaintiff was domiciled outside the convention area. The facts of the matter were that a Canadian insurance company – Universal General Insurance company (UGIC) – had brought

proceedings against the Belgian reinsurance company Group Josi Reinsurance Company SA (Group Josi) before a court in France. The Canadian company had its main office in Vancouver, while Group Josi had its main office and domicile in Belgium. The matter concerned a sum of money, which UGIC believed Group Josi was responsible on the basis that the latter was party to a reinsurance agreement.

(44) In answering the question of whether the Convention applied, the ECJ turned directly to Article 2 of the treaty. In section 34 the court says that "the system of common rules on conferment of jurisdiction established in Title II of the Convention is based on the general rule, set out in the first paragraph of Article II, that persons domiciled in a Contracting State are to be sued in the courts of that state, irrespective of the nationality of the parties." The court states that the background for the rule being a general principle is that "it makes it easier, in principle, for a defendant to defend himself", see section 35.

(45) The court expressly declined to place weight on the plaintiff's domicile in its assessment of the Convention's scope, and stated that an exception from Article 2 could only be considered where it is expressly stated in a provision of the Convention that the application of the jurisdiction rules is based on the fact that the plaintiff is domiciled in a Contracting State, see sections 57 and 58.

(46) In section 61, the court concludes: "Title II of the Convention is in principle applicable where the defendant is domiciled or seat in a Contracting State, *even if the plaintiff is domiciled in a non-member country."* (highlighted here).

(47) For Group Josi, the decision was positive because the company should then be sued at its domicile in Belgium and not in France. In my view, the principle that the ECJ expresses, must, however, be applicable also in cases where proceedings are actually brought at the defendant's legal domicile within the Convention area, as in our case.

(48) Thus, the ECJ has not seen the fact that the Brussels Convention is an international treaty which in principle regulates the relationship between the states bound by the Convention as a limitation to the scope of the Convention, i.a. with reference to the principle that it is normally an advantage for defendants to be sued at their legal domicile.

(49) Nor does legal theory assume that the fact that the plaintiff is not domiciled within the convention area prevents the application of the convention, see Bull, Norsk Lovkommentar 2005, note 1, Frantzen, Lov og rett 2012, from page 379 and also from page 573 and Bogdan, Luganokonventionen, TfR 1991 from page 387 (on page 397). Schei et al, Tvisteloven (2007) page 193 and Skoghøy, Tvisteløsning (2010) page 55 are on the same footing.

(50) Following this, I find it clear that there is no room to stipulate an absolute requirement that the plaintiff is domiciled in a state bound by the Convention for the Lugano Convention 2007 to apply.

(51) I will now discuss whether, when the plaintiff is not a resident of a state bound by the Convention, there is a legal basis for an additional condition, namely that the dispute has such a connection to a state bound by the Convention that it is reasonable for the

Convention's rules to apply. Schei et al and Skoghøy have assumed such additional condition exists in their previously mentioned works.

(52) My conclusion is that current law does not open for such an additional term. As previously mentioned, Article 2 no. 1 sets a clear general rule and it is expressly stated that it may only be derogated from where the convention itself contains special rules of jurisdiction, see also Article 3. Thus, the wording does not open for such a condition.

(53) Nor does the legislator assume that such a condition applies.
I refer to Ot.prp no 89 (2008–2009), at page 7 regarding the convention's scope:

> The convention's rules on the jurisdiction of the courts basically applies to all cases where the defendant is domiciled in the state in question (Article 2). In addition, one must read in a requirement that the matter must be international. It is not a requirement that the case has a connection to at least one other state bound by the Convention, see the ECJ's decision in the so-called Owusu case (C-281/02).

(54) Trico Subsea has claimed that the purpose indicates that the Convention may not be given so wide an interpretation that it includes legal action taken by legal entities in third countries, when the matter has no connection to the Convention area. Reference is made to the preamble to the Lugano Convention, which states that the purpose of the Convention is to "strengthen in their territories the legal protection of persons (...) established" in the States bound by the Convention.

(55) However, this purpose may not unambiguously be taken to support such an interpretation. I agree that the Convention's primary purpose is to attend to the considerations of the citizens of the States bound by the Convention. It is my view, however, that it is inaccurate to say that dismissing a legal action from the defendant's legal venue is strengthens the defendant's legal protection. As earlier mentioned, it would on the contrary normally be advantageous for defendants to be sued by at their legal domicile, see Rt-1995-1244 and the ECJ's judgment in case C-412/98 Group Josi, section 35. It is precisely this normal situation that constitutes the background for the rule.

(56) Furthermore, the considerations of clarity and predictability, which are emphasized in Clause 11 of the preamble to the Brussels Regime, argue against giving the courts a discretionary right to reject a case based on a consideration of whether it has a closer connection to another state. In the Group Josi case, the ECJ (in sections 34 and 35 which I have quoted earlier) was entirely clear that this concerns a general principle with little room for exceptions.

(57) The court has further rejected that there is room for a discretionary forum non conveniens assessment as long as a national court has jurisdiction pursuant to Article 2 of the Brussels Convention, because the defendant is domiciled in a state bound by the Convention. In the ECJ case C-281/02 Owusu, a British citizen, domiciled in Great Britain, suffered a personal injury during a vacation in Jamaica. He brought proceedings in Great Britain against the person that had rented him the holiday home, who was also domiciled in Great Britain, in addition to five Jamaican companies.

(58) Initially, the court noted that the Brussels Convention 1968 Article 2 regarding legal domicile at the place of domicile, was applicable even if both the plaintiff and the defendant were domiciled in the same Convention state. Thereafter the ECJ discussed whether the forum non conveniens doctrine could still be applied by the British courts. The question was therefore if the British courts were free to assess whether the case would be more appropriately handled by the Jamaican courts.

(59) The ECJ stated that Article 2 is a mandatory provision that, according to its wording, only could be deviated from where this is expressly determined in the Brussels Convention, see paragraph 37. It was irrelevant if the case due to *the subject matter in dispute or the plaintiff's domicile* had a connection to a third country because it would not impose an obligation on the third country if the court in a Contracting State was found to have jurisdiction, see paragraphs 30 and 31. The court concluded thereafter in paragraph 46:

> ... the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.

(60) I read this statement to mean that when a state bound by the Convention has jurisdiction by virtue of being the defendant's domicile, the courts in that country cannot refuse to hear the case, by with reference to that the fact that the case may be more appropriately dealt with by the courts of another country, within or outside the Convention area. It is so that the question of the Owusu case was whether the internationality condition was fulfilled. The issue in our case nonetheless has clear parallels to the Owusu case, because the question in our case is also whether a court in a contracting state should be able to renounce its jurisdiction on the basis of a discretionary assessment of whether the dispute may be more appropriately dealt with by the courts of a state outside the Convention area, and whether the matter has other connecting factors to another state bound by the Convention.

(61) Foreign theory has also perceived the decision in the Owusu case so that it leaves no room for a forum non conveniens assessment in deciding whether to apply the Brussels Convention, see, for example Fentiman, Common Market Law Review 43, 2006 page 705 et seq. (page 732).

(62) I find further support in Nordic legal theory for the notion that one cannot, by way of interpretation, establish an additional discretionary condition to the effect that the case must have a connection to a state bound by the Convention when the plaintiff is domiciled in a third state, see Frantzen, in a debate with Skoghøy in Lov og Rett, 2012 page 379 et seq. and page 573 et seq. and Bull, Norsk Lovkommentar, footnote 1 with reference to the Owusu case. Also, Pålsson, Bryssel I-förordning jämte Brüssel- och Luganokonventionerna, 2008 rejects such a connection requirement. On pages 71-72 he discusses whether the applicability of the Brussels Convention must be limited to disputes with a connection to at least one Member State:

According to an opinion that has been argued in the literature, it is also necessary that the dispute has a certain connection to *more than one Member State*. The idea has been that the regulation is intended to solve problems relating to jurisdiction issues between Member States, but not to regulate issues relating only to the relationship between a Member State and a third country. However, this restriction does not find support in the text of the regulation and it appears it can now be disregarded. It was clearly rejected by the ECJ in the case of Owusu.

(63) In an older version of the book from 2002, Pålsson has taken a more open attitude to the question, which is now rejected in the above quotation from the 2008 edition.

(64) Thus, I cannot see that, from the current legal sources, there is a legal basis for a particular connection requirement in the Lugano Convention. If this had been the case, it would have to be derived from earlier Norwegian law, which has now been expressed in Section 4-3, first paragraph of the Dispute Act. However, the perception would then presuppose that the Lugano Convention allows national regulation of matters of the type that is the subject of these proceedings. However, the Convention leaves no room for national regulation of the question of jurisdiction. As already mentioned, the Lugano Convention takes precedence over the rules of the Dispute Act as lex specialis. The conclusion is therefore that the Court of Appeal has applied a correct understanding of the Lugano Convention.

(65) I thus find that the appeal has to be rejected. Since I know I am in the minority following the judgment deliberations, I will not formulate a conclusion.

(66) Justice Kallerud: I have reached a different result than the first voting justice.

(67) Initially, I find it appropriate to recapitulate that our case concerns a company domiciled in Singapore that has brought proceedings before a Norwegian court against a Norwegian company with its headquarters here. The plaintiff's claim concerns settlement under a broker contract regarding the sale of two vessels which was allegedly entered into in Singapore. Apart from the fact that the defendant has its legal domicile here, the parties agree that the facts of the case have no connection to Norway. The question is therefore whether the Convention applies to a dispute brought by a plaintiff from a third country when the dispute's sole connection to the Convention area is that the defendant's legal domicile is here.

(68) I agree with the first voting justice's general reflections regarding the sources of law and refer to these. I further agree that the dispute falls within the scope of the Convention and that it is of an international character. This is, however, without significance for my point of view because I cannot see that the Convention grants the plaintiff any right to bring proceedings in Norway in a matter such as this.

(69) I assume, as the first voting justice, that an international convention does not in principle establish rights or obligations for anyone other than the states that are parties to the agreement. There are no indications that when the Lugano Convention was entered into, it was meant to make a general exception to this fairly self-evident principle. The parties to the Convention will of course also here, as in other international agreements of the nature we face here, principally aim to provide legal norms that apply for their own citizens and

their own territory. In the Lugano Convention this is emphasized in the preamble where it is stated that one of the purposes of entering into the Convention is "to strengthen in their territories the legal protection of persons therein established".

(70) Thus, there is a presumption against a convention between states being interpreted as conferring rights to legal entities in a third country without granting similar rights in the third country to persons and companies in the convention state. Such an interpretation of the convention would mean that the legal status of parties in civil cases was unbalanced: the party domiciled in a third country could, pursuant to the Convention, be entitled bring proceedings at the opposite party's legal domicile, while the party in a Lugano state would not have a corresponding right and could only bring proceedings in the third country if that country's national law allows for it. A corresponding imbalance would arise with regard to obligations: the party in the Lugano area would be obliged to accept proceedings being brought at their legal domicile also by parties from third countries, while parties from states which have not signed the Convention can obviously not be subject to such a duty under the Convention. If the introduction of such an arrangement was intended, then it would be natural that this was clearly expressed in the Convention, or was developed through consistent case law. In my view, this is not the case.

(71) Further, I note that when a party in a state bound by the Convention invokes the rules of the Convention this may, of course, sometimes entail benefits for a plaintiff from a third country. In other cases, it may be disadvantageous. This is, however, different from granting rights to a party outside the Convention area. In my view, it is natural to see the two key decisions from the ECJ in this light.

(72) The first voting justice has noted that it may be an advantage for the defendant if the case is filed at his legal domicile. This is of course correct, and is also reflected in the main rule in Article 2. However, for the question of the general understanding of the scope of the Convention, I find it difficult to see that this may be given particular weight. That it may in general be advantageous for a party to be sued in his home country – and that the states bound by the Convention therefore have agreed that this shall be the arrangement between them – does not, in my view, provide any support for parties outside the Convention area being entitled to bring proceedings before a party's legal domicile in a state bound by the Convention.

(73) I will come back to the understanding of the decisions of the ECJ in further detail, but I find it natural to first emphasize how the scope of the Lugano Convention has been perceived in Norwegian law to this date.

(74) The Civil Procedure Commission concluded that the Lugano Convention only applied where either the parties or the dispute had "sufficient connection" to a state bound by the Convention, see NOU 2001:32A page 156. It reads as follows:

> An additional prerequisite for the application of the Lugano Convention is that the parties or dispute have sufficient connection to an EEA/EU state ...

(75) Further guidance for our question is, in my view, not to be found in the preparatory works. In the white paper Ot.prp.no. 89 (2008–2009) regarding consent to the ratification

of the Lugano Convention 2007, the situation where the plaintiff comes from outside the Convention area and the subject matter is not related to the Convention area, is not mentioned. There is no trace of a dismissal of the connection requirement emphasised in the preparatory works of the Dispute Act in the white paper.

(76) In Rt-1995-1244, as the first voting justice has mentioned, it was argued that the plaintiff, who was domiciled outside the Convention area, could not invoke the Convention's jurisdiction provisions. The Appeals Selection Committee did not, as far as I can see, consider this general question, but said that "... it cannot be assumed that the plaintiff's domicile limits the scope of the Convention...". The core of the matter was that a company from outside the Convention area brought proceedings before a Norwegian court against two defendants. One of them demanded that the case be dismissed because he claimed that he had no legal domicile in Norway, but in the United Kingdom, i.e. in another state bound by the Convention. The highlighted statement by the first voting justice on the advantage of being sued in one's domicile expressly refers to "...a case involving several defendants domiciled in states bound by the Convention". In my opinion, as already stated, one cannot deduce anything about rights for a plaintiff from a third country from this statement.

(77) The Civil Procedure Commission's assumption regarding a connection to the Convention area has been followed up in the core Norwegian legal theory on legal proceedings. Skoghøy, Tvisteløsning, 2010, page 55, reads:

> If the plaintiff is not domiciled in a state bound by the Convention, however, it must be a condition for the application of the Convention that the facts of the matter which is the subject of the proceedings has such a connection to a state bound by the Convention that it is reasonable that the Convention's provisions shall apply.

(78) Schei et al, Tvisteloven Volume 1, 2007, page 193 expresses approximately the same. I cannot see that Bull has commented on our question.

(79) The opinion held in the preparatory works and legal theory is well reasoned i and may, in my opinion, be anchored in the general scope of the convention, as I have already discussed. As I see it, the requirement of sufficient connection to a state bound by the Convention is not a condition that comes in addition to the provisions of the Convention, but follows from a natural interpretation of the Convention itself. In his articles in Lov og Rett 2012 pages 193 and 438, Skoghøy emphasizes this aspect. His states, among other things, on page 440:

> It would be quite sensational if, when entering into the Convention, the Lugano states undertook obligations in favour of plaintiffs from third countries without any subject matter connection to the Lugano area. Such an obligation would have the character of a 'third-country promise'. I cannot see that there is a basis for interpreting any such promise into the Convention.

(80) From my general understanding of the Convention's scope, the plaintiff in our case cannot, *pursuant to the convention*, automatically demand to bring proceedings in Norway.

(81) In my view, case law from the ECJ and foreign theory cannot lead to a different interpretation of the Convention than what I have found so far. I can hardly see that the

decisions are decisive for our case. The issues considered by the ECJ are different from our case and relate to matters within the Convention area. In my view, the general statements in the judgments must be read with this in mind.

(82) The Group Josi decision must, in my opinion, be understood on the basis that the question in the matter was a *choice between two legal domiciles that were both in states bound by the Convention*, and where it was the plaintiff that claimed that the Convention did not apply. The Belgian company, Group Josi, did not have to accept proceedings brought by a Canadian company in France. In accordance with the main rule in Article 2 of the Convention, the defendant could demand that the proceedings were brought before the company's legal domicile in Belgium. The facts of the matter thus concerned a sued company from a state bound by the Convention who, in a court in another state bound by the Convention, claimed that even though the plaintiff came from a third country, the company was entitled to be sued at its own legal domicile, in accordance with the main rule in Article 2 of the Convention. I can hardly see that the judgment gives decisive support for the notion that a plaintiff from a third country can invoke the Convention in a situation like ours.

(83) In the Owusu case, *both the plaintiff and one of the defendants were domiciled in a state bound by the Convention*, while the dispute originated in a third country. The British defendant claimed that a case filed in the United Kingdom had to be rejected, among other things because the dispute had a closer connection to the third country. The central question before the ECJ was whether such a case fulfilled the requirement that the dispute must be 'international' which has been interpreted into the Convention. That the court did answer this question in the affirmative cannot be decisive for our case, which is undoubtedly 'international'. The second question – whether the British non conveniens doctrine was in accordance with the Convention – does not, in my view, answer the issue in our case. That such a doctrine is problematic within the Convention area, says little about the limits of its general scope. I would also point out that this case did not concern a plaintiff from a third country who, in a matter with no connection to the Convention area, invoked the Convention against a legal entity in a state bound by the Convention.

(84) Although certain statements in the decisions are somewhat general and – seen in isolation – may seem farreaching, I emphasize that in neither case were both the plaintiff and the dispute exclusively connected to a third country, as is the case here. And the court does not generally discuss the question of principle regarding whether a third-country citizen is entitled by virtue of the Convention to bring proceedings in a state bound by the Convention solely because the defendant has legal domicile there pursuant to the Convention.

(85) Against this backdrop, I can hardly see that these decisions are decisive in our case. In my view, the foreign theory discussing these decisions does not clarify our question.

(86) In my view, there is hardly any contradiction between the opinion expressed in the preparatory works and legal theory to the effect that the parties or the dispute must have sufficient connection to a state bound by the Convention, and the two decisions I have commented on. In both cases there were in various ways such a connection to a state bound by the Convention that the Convention applied. I find it doubtful and undetermined whether the ECJ would also conclude that legal domicile in itself is a sufficient connection to a state bound by the Convention. The question is thus, as I see it, not answered by the

international sources of law, and I cannot see any reason why the Norwegian courts should take the lead here. This is especially because, as I will discuss momentarily, in my view Norwegian law provides satisfactory solutions that do not conflict with the provisions of the Lugano Convention.

(87) Raffles is accordingly – as I see it – not entitled to bring proceedings against Trico Subsea at a Norwegian court pursuant to the Lugano Convention. The Court of Appeal's ruling should thus be set aside.

(88) I add that in the new hearing, the Court of Appeal must place considerable weight on the fact that – *according to Norwegian law* – it is very rare that a Norwegian company with its legal domicile in Norway cannot be sued in Norway, see amongst others Schei et al, Tvisteloven volume 1, 2007, page 186 and Skoghøy, Tvisteløsning, 2010 page 48.

(89) The appeal has thus been successful, and Trico Subsea has claimed compensation for legal costs for the District Court, the Court of Appeal and the Supreme Court. The case has raised a question of principle that has not previously been clarified, and legal costs should not be awarded for any of the courts.

(90) I vote for the following ruling:

1. The ruling of the Court of Appeal is set aside.

2. The parties bear their own legal costs for the District Court, the Court of Appeal and the Supreme Court.

(91) Justice **Noer**: I agree with the second voting, Justice Kallerud, in the essentials and in the result.

(92) Justice **Matheson**: Likewise

(93) Justice **Stabel**: I agree with the first voting, Justice Normann, in the essentials and in the result.

(94) After voting, the Supreme Court handed down the following ruling:

1. *The ruling of the Court of Appeal is set aside.*

2. *The parties bear their own legal costs for the District Court, the Court of Appeal and the Supreme Court.*

ND-2016-181 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	2016-02-08
Published	ND-2016-181
Keywords	(10) Legislation. Implementation of a convention. State's liability for damages.
Summary	A seaman's employment was terminated with reference to Section 19 (1) of the Norwegian Seamen's Act of 1975, whereby employment protection for seaman lapsed at age 62. Upon an appeal to the European Committee of Social Rights, his claim that the rule in the Norwegian Seamen's Act was in violation of the provisions of the Council of Europe's convention on social rights (the Social Charter) was upheld. The Norwegian Supreme Court had ruled earlier that the termination was valid (Rt-2010-202). Fellesforbundet, which had covered all the costs of the terminated seaman, was not successful in its claim that the Norwegian State should reimburse these costs. After a review of the legislative process prior to the amendments to the Norwegian Seamen's Act in 2007, the Norwegian Supreme Court found that the Social Charter did not prevent continuation of the age limit provision in Section 19 (1). It was not ruled out that the a breach of the Ministry's duty of disclosure to the Storting during the legislative process could result in a liability for damages to citizens who were affected by the legislative enactment, but it was clear that there was in any case no such breach in this case. The appeal of the Court of Appeal's judgment for the defendant was dismissed. (Norwegian Supreme Court Report (Rt) summary.)
Proceedings	The Supreme Court of Norway 8 February 2017.
Parties	Fellesforbundet for sjøfolk (Attorney Erik Råd Herlofsen) versus the Norwegian State represented by the Ministry of Trade, Industry and Fisheries (Attorney General, represented by Attorney Hilde Lund – under examination)
Author	The justices Endresen, Indreberg, Ringnes, Noer, Matningsdal

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(1) Justice **Endresen**: The case concerns a claim that the Norwegian State is liable for costs that Fellesforbundet for sjøfolk incurred in assisting with the judicial review of the

termination of employment for two members, and a subsequent complaint to the European Committee of Social Rights.

(2) Fellesforbundet for sjøfolk ("Fellesforbundet") acted as an accessory intervenor for two seamen in a termination of employment case that was pending before Norwegian courts in 2008–2010. Both seamen were terminated from their positions in the ship-owning company Nye Kystlink on attaining the age of 62 years, with reference to Section 19 (1) of the former Norwegian Seamen's Act of 1975. This provision stipulated that general employment protection for seamen lapsed upon attaining the age of 62 years. The seamen filed a legal action claiming that the terminations were invalid due to wrongful age discrimination.

(3) For one of the seamen, the case ended up in the Norwegian Supreme Court, which concluded with a dissenting vote of 4-1, that the termination was valid (Rt-2010-202, the *Kystlink Judgment*). The costs were not awarded before any court. In addition to their own costs, Fellesforbundet also covered the costs that the terminated seaman incurred in the case.

(4) The seaman who was not successful in the termination of employment case, subsequently filed an appeal with the European Court of Human Rights (ECtHR) on 31 March 2010. The appeal was dismissed on 12 July 2011 in a single judge decision. Only brief grounds were given for the decision, but it follows from the cover letter to the appellant's attorney that the Court had not uncovered anything that could indicate that any violation had taken place according to the Convention.

(5) The European Convention on Social Rights ("the Social Charter") was ratified by Norway, and the original version became binding on Norway pursuant to international law when it entered into force on 26 February 1965. The Convention was revised in 1996, and Norway ratified the revised Convention on 7 May 2001. The Social Charter has not been incorporated into Norwegian law.

(6) Oversight of the states' compliance with the Convention was originally limited to supervision based on self-reports that the states are obligated to submit every other year. These reports were reviewed on behalf of the Council of Europe by the European Committee of Social Rights, which consists of 15 independent members appointed by the Council of Europe, with a view to possible further consideration by the bodies of the Council of Europe.

(7) On 20 March 1997, Norway also ratified an additional protocol that introduced a complaint scheme for representative national working life organisations and certain other organisations. Such complaints are also reviewed in the first instance by the European Committee of Social Rights.

(8) In 2011, Fellesforbundet submitted a complaint to the Council of Europe. The Kystlink case brought about the complaint, but the complaint was due to the fact that the age provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act was in violation of several provisions in the Social Charter. The Norwegian State demanded that the complaint be dismissed due to the fact that Fellesforbundet did not have the right of appeal, but this was not successful.

(9) The complaint was reviewed by the European Committee of Social Rights in accordance with current protocol. In a decision of 2 July 2013, Fellesforbundet was successful in its complaint, since the Committee unanimously concluded that the Norwegian rule in the Norwegian Seamen's Act was in violation of Article 1, Section 2 and Article 24.

(10) On 18 November 2011, the Norwegian State had already appointed a committee that was to assess amendments to the Norwegian Seamen's Act. The mandate also encompassed an assessment of protection from the termination of employment pursuant to Section 19. This led to the age limit for seamen's protection from the termination of employment being changed to 70 years by adoption of Section 5-12 of the Norwegian Ship Labour Act on 21 June 2013. The Act entered into force on 20 August of the same year.

(11) In reviewing the report of the European Committee of Social Rights in September 2013, the Council of Europe's Ministerial Committee did therefore not have occasion to do anything beyond acknowledging that there were no grounds for further review of the complaint from Fellesforbundet.

(12) On 14 February 2014, Fellesforbundet filed the present case against the Norwegian State represented by the Ministry of Trade and Industry with a view to the reimbursement of its expenses in the Kystlink case and its complaint to the Council of Europe.

(13) On 9 September 2014, Oslo District Court rendered judgment [TOSLO-2014-29823] with the following conclusion:

> "1. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay compensation of one million Norwegian kroner (NOK 1 million).
>
> 2. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay costs of NOK 125,000 plus value added tax and NOK 350 in costs and court fees."

(14) The Norwegian State appealed the District Court's judgment to the Borgarting Court of Appeal, and judgment [LB-2014-177018] was rendered on 26 May 2015 in favour of the Norwegian State. The Court of Appeal rendered a judgment with the following conclusion:

> "1. A judgement shall be rendered in favour of the Norwegian State represented by the Ministry of Trade, Industry and Fisheries.
>
> 2. Fellesforbundet for sjøfolk shall pay in costs before the District Court and Court of Appeal one hundred eleven thousand four hundred fifty five Norwegian kroner (NOK 111,455) to the Norwegian State represented by the Ministry of Trade, Industry and Fisheries within two (2) weeks from service of this judgment."

(15) Fellesforbundet has appealed the judgment of the Court of Appeal to the Norwegian Supreme Court. The appeal concerns the Court of Appeal's application of the law, and the judgment is appealed in its entirety. Before the Court of Appeal, the appellant argued,

inter alia, that the Norwegian State's liability followed directly from the incorrect incorporation of EU Council Directive 2000/78. Before the Norwegian Supreme Court the appellant maintained the view that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act was in violation of the EU Directive, but this is not pleaded as an independent ground for the claim. The appellant has also dropped previous arguments that the Norwegian State must be liable for damages due to the fact that the Norwegian Supreme Court's decision in the Kystlink case was incorrect, and that the Norwegian State is liable in accordance with the rules for directors' liability. Otherwise, the case stands the same before the Norwegian Supreme Court as before the earlier courts.

(16) The appellant, *Fellesforbundet for sjøfolk*, has essentially argued:

(17) Section 19 (1), sixth paragraph of the Norwegian Seamen's Act, as it was formulated until it was repealed in 2013, according to its wording gave employers an opportunity to terminate the employment of seamen after they attained the age of 62 years without any objective ground being required. This special scheme for seamen did not have any objective ground in 2005 in any case, and it was in violation of Norway's obligations in accordance with the Social Charter, cf. Part II, Articles 1 and 24 of the Convention.

(18) The statutory provision was also in violation of EU Council Directive 2000/78/EC. An error was accordingly made when the Directive was incorporated into Norwegian law in 2005, and the ban on discrimination was included in Section 33 and 33B of the Norwegian Seamen's Act, without the special rule in Section 19 being repealed. The Council Directive, and not least the fact that the European Court of Justice's judgment of 22 November 2005 in C-144/04 (Mangold) states that the ban on discrimination already follows from the fundamental principles of EU law, are also clarifying for the understanding of the Social Charter. Whether Norway was obligated to implement the direction is of no importance in this context.

(19) The provisions of the Social Charter are not clear in all respects, but that is of no importance to this case. There is no objective ground for the special rule in Section 19 of the Norwegian Seamen's Act, and this does actually not concern an interpretation of the provisions, but rather acknowledging that a violation exists. The fact that this conflicted with Council Directive 2000/78 follows from a number of decisions from the European Court of Justice, and this must also be relevant to the understanding of the Social Charter. With the unanimous decision of the European Committee of Social Rights, it has also been established that the Norwegian rule conflicted with the Convention, and this must be used as a basis.

(20) The fact that Fellesforbundet has incurred the costs for which they claim reimbursement is indisputable, and there is no doubt as to the causal connection either. The question for the Norwegian Supreme Court is whether there are grounds for liability.

(21) It is argued that the Norwegian State is liable on an objective basis for violation of the Social Charter. The fact that the Convention has not been incorporated into Norwegian law is of no importance. The ratification of the Convention entailed an obligation to amend internal Norwegian legislation to the extent that the legislation would lead to solutions in contravention of the Convention. Reference is made to the constitutional

obligation of all branches of government to ensure compliance with human rights. No distinction is made here between incorporated and unincorporated conventions. The Norwegian State's strict liability for damages for breaching the European Convention on Human Rights and the EEA Agreement are well-established, and there is no reason why the Norwegian State's breach of their obligations pursuant to the Social Charter should not have the same consequences.

(22) The Norwegian State is also responsible for the incorrect and incomplete information that the Ministry of Trade, Industry and Fisheries gave the Storting in connection with its law preparation. There is no updated review in Proposition No. 85 (2005–2006) to the Odelsting of whether there still were special grounds to maintain the weakened protection from the termination of employment for older seamen, and a distorted picture of the importance of seamen's pension payments is given. A fundamental weakness is also the fact that the Ministry conceals that the statutory rule will be in contravention of the Social Charter. This problem should at least have been addressed and discussed.

(23) The Norwegian State must be liable for this on an objective basis in the same manner as when the State is liable for invalid administrative decisions. Under any circumstances, the Norwegian State must be liable in accordance with the rules in Section 2-1 of the Norwegian Damages Act for the errors that have been made.

(24) Alternatively, it is argued that the Norwegian State must at least be liable for the costs of the complaint submitted to the European Committee of Social Rights. The prevailing law was clear at this point in time from a number of decisions from the European Court of Justice, and the Norwegian State's opposition to Fellesforbundet's right of appeal and the arguments that the weakened protection from the termination of employment does not entail a violation of the Convention did not have any objective grounds.

(25) The appellant has entered the following statement of claim:

> "1. The Oslo District Court's judgment shall be affirmed, however, with the following amended conclusion.
>
> The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be ordered to pay Fellesforbundet for sjøfolk compensation of NOK 1 million within 14 days from service of the District Court's judgment.
>
> The Norwegian State represented by the Ministry of Trade Industry and Fisheries shall be ordered to pay Fellesforbundet for sjøfolk costs of NOK 125,000 plus value added tax and NOK 350 in costs and court fees, within 14 days from service of the District Court's judgment.
>
> 2. The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall pay the costs before the Court of Appeal and the Norwegian Supreme Court."

(26) The respondent, the *Norwegian State represented by the Ministry of Trade, Industry and Fisheries,* has essentially argued:

(27) Special legal grounds are required in order for the Norwegian State to be liable for the substantive content of the Act. It is clear that the Norwegian State can under the circumstances be liable for Acts that must be set aside as violating the Norwegian Constitution, but this liability is not objective even for a violation of the Constitution.

(28) The Norwegian State can also be liable for a violation of Article 13 of the European Convention on Human Rights, and today it has been established that a breach of the Norwegian State's obligations pursuant to the EEA Agreement may under the circumstances entail a liability for damages to those who are affected.

(29) Also in these contexts, it is a condition for liability that there is a qualified breach of the convention or agreement. The liability is not objective.

(30) There are not any grounds supporting the establishment of strict liability for the Norwegian State for the laws that are laid down, and such a liability would be highly imprudent based on the freedom of action a legislator must have, and such liability would at the same time also represent a challenge to the principle of the separation of powers.

(31) In the area of administrative law, the point of departure is that the Norwegian State shall not have strict liability for errors. The appellant has nonetheless sought to justify strict liability for a legislative error, by making reference to certain exceptions to the general principle, but these individual decisions do not have any transfer value for the question of liability for legislative errors.

(32) With regard to a possible conflict with conventions that have not been incorporated into Norwegian law, a potential liability for damages could also undermine the fundamental principle that, until they are converted, conventions only represent obligations under international law for the Norwegian State, which cannot be pleaded for internal law purposes.

(33) A liability for the Norwegian State for errors in the legislative process must at least presuppose a gross error; the threshold for being able to impose a liability for damages on a legislator must be high. The assessment must in principle be the same whether it is based on Section 2-1 of the Norwegian Damages Act or on a non-statutory culpa basis.

(34) In principle, it is the Storting that must assess whether the Government has satisfied its duty of disclosure, and it would not be prudent to intervene in the relationship between these branches of government by introducing an opportunity for individual citizens to plead a breach of the Government's duty of disclosure.

(35) There has been no breach of the duty of disclosure in connection with the revision of the Norwegian Seamen's Act, and the issue is thus accordingly not actualised.

(36) It cannot be assumed that the provision in Section 19 (1) sixth paragraph of the Norwegian Seamen's Act in 2007 was in violation of the ban on discrimination in Sections 33 and 33B

of the Act, as these provisions had to be interpreted based on the Directive. The 62 year age limit was in 2007 not in contravention of the Social Charter either.

(37) There is no liability-sanctioned obligation to amend internal rules before the understanding of the rule that follows from the obligation under international law has been clarified through an unambiguous decision or a practice of a certain breadth. Anything less can clearly not be required with regard to an unincorporated Convention such as the Social Charter.

(38) There is nothing to fault in the conduct of the Norwegian State in the complaint to the Council of Europe, and the alternative claims cannot be successful either.

(39) The Norwegian State represented by the Ministry of Trade, Industry and Fisheries has entered the following statement of claim:

> The appeal shall be dismissed.
>
> The Norwegian State represented by the Ministry of Trade, Industry and Fisheries shall be awarded costs before the Norwegian Supreme Court."

(40) **I have concluded** that the appeal must be dismissed.

(41) As I will return to later on in my vote, in my opinion, it cannot be assumed that the age 62 years rule in Section 19 (1) of the Norwegian Seamen's Act was in contravention of the Social Charter when the Norwegian Seamen's Act was revised in 2007. This makes it less natural to discuss in-depth the other conditions for liability for damages.

(42) I am then content to begin by placing the issues the case presents into a larger context, and indicating certain points of departure.

(43) The case raises the fundamental question of whether the Norwegian State can be liable for damages for a failure to implement a convention that Norway is bound by.

(44) The point of departure is sufficiently clear; ratification of a convention or acceding to a treaty places an obligation on the state under international law, but with a clear conflict between the international law provisions and Norwegian law, the internal law will take precedence. I then disregard cases in which the convention has been given status as Norwegian law through incorporation, or where the law itself determines that our treaty obligations will take precedence.

(45) When Norwegian law is applied in spite of conflict with an obligation under international law, there will not normally be grounds for filing any claim for damages against the Norwegian State. It will be up to the legislator to determine what conventions are to be incorporated into Norwegian law and how this should be done, and a liability for damages on the part of the Norwegian State can contribute to undermining this principle.

(46) A liability for damages for the failure to implement EEA directives does not entail a deviation from this principal point of departure. The fact that, under certain conditions,

a liability for damages can rise on the part of the Norwegian State in accordance with the principles of EEA law when EEA directives are implemented was established by the EFTA Court in case E-9/97 Sveinbjörnsdottir. The decision is, however, not based on general principles, but the fact that it follows from the EEA Agreement itself, with is regarded as representing "an international treaty sui generis which contains a distinct legal order of its own". It does not concern an ordinary obligation under international law, but an agreement that encompasses in itself a principle that the states can incur a liability for damages for a failure to implement.

(47) The EFTA Court made an independent assessment, but the conclusion and grounds correspond well with the principle that had already been established in the EU area, and the principal grounds for this were given. In the European Court of Justice's judgment of 19 November 1991 in the cases C-6/90 and C-9/90, the discussion of the parallel fundamental question in the EU area is introduced in paragraph 31 as follows:

> "It is remarked by way of introduction that where a special legal order is introduced by the EEC Treaty, which is integrated in the legal systems of the member states, and which is to be applied by their courts. The legal entities from there are not just the member states, but their citizens as well.

(48) It is in other words not the breach of the obligation under international law in itself that entails a potential liability for damages on the part of the Norwegian State.

(49) The European Social Charter is a human rights convention, and the question is whether the obligation of the government agencies to respect and safeguard human rights pursuant to Section 92 of the Norwegian Constitution (formerly Section 110 c) can be regarded as an obligation of such a nature that breach of a ratified, unincorporated human rights convention can result in a liability for damages on the part of the state. The question has not been brought before the Norwegian Supreme Court, and I do not find it natural under the circumstances to develop this in greater detail in this case.

(50) If the Norwegian State was to be liable for damages for failure to implement under the circumstances, there is clearly enough no strict liability. There is no strict liability for the consequences of the fact that an act is found to be in contravention of the Norwegian Constitution, and the appellant has not cited any judgment from the Norwegian Supreme Court that is based on strict liability for an error of law in other contexts.

(51) When a claim for damages is based on a failure to implement the EEA Agreement, it has on the contrary been established by the Norwegian Supreme Court that a liability requires qualified neglect. In Rt-2005-1365 (Finanger II), the Norwegian Supreme Court finds that when the member states are given discretionary authority of a political/financial nature by the implementation of a directive, the threshold for liability must be high and the violation must be obvious and gross.

(52) I find then that, for a claim for damages for a defective implementation of the Social Charter as well, it cannot be relevant to assess the question of possible liability, unless the conflict between the act and the convention represents a qualified failure in the obligation that may possibly exist.

(53) On this basis, I will take a close look at the understanding of the relevant provisions in the Social Charter, as well as what grounds the legislator had in 2007 to stipulate the detailed content of these provisions.

(54) When the Human Rights Act was adopted, an assessment was made as to what conventions were to be incorporated into Norwegian law in connection with the Act, and be given preference then over other acts. The Social Charter was not included as a result of this. In Official Norwegian Report (NOU) 1993:18 Legislation on Human Rights, a more detailed account of the convention is given in Section 9.2.2. Of special interest to the case here is the fact that it has been emphasised that the convention – also in comparison with other conventions on financial, social and cultural rights – is quite vaguely formulated. It has also been emphasised that differing views between the various agencies that have been included in the enforcement system for the convention have contributed to the fact that it is difficult to establish what the legal status is. When the Committee concluded that the Social Charter, which is emphasised as a fundamentally important convention at the European level, should not be incorporated in the Human Rights Act, it is also pointed out, however, that the Convention is under revision.

(55) In Proposition No. 3 (1998–1999) to the Odelsting, page 36, the Ministry of Justice makes reference to the fact that the Social Charter had not achieved its intended status and practical importance. When the proposition was written, the Council of Europe's Ministerial Committee had adopted the revised Social Charter, and the Ministry pointed out that Norway had not ratified this, and that it was unclear when it would enter into force. The Ministry concludes its assessment by emphasising that it would be natural to reconsider the question when the revised Social Charter had been in effect for a while. No proposal for incorporation has yet been entered.

(56) The relevant provisions in Part II of the Social Charter are:

> *"Article 1 – The right to work*
>
> With a view to ensuring the effective exercise of the right to work, the Parties undertake:
>
> 1.
> 2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
>
> ...
>
> *Article 24 – The right to protection in cases of termination of employment*
>
> With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise:
>
> a. the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service;
>
> b. the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief.

> To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body."

(57) As is evident, the wording does not provide any particular guidance with regard to the right to terminate employment as a result of attaining an age stipulated in the national legislation.

(58) The question then is whether there were other certain grounds supporting the understanding of these articles in connection with the legislative amendment in 2007.

(59) The decision by the European Committee of Social Rights on Fellesforbundet's complaint of 2 July 2013 has been of key importance to the appellant's argumentation. The Committee concludes that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act entails a violation of both Article 1, Section 2 and Article 24. Separate grounds are given for each of the violations, but they are generally concurrent. Somewhat simplified, the Committee ascertains that sufficiently detailed grounds have not been provided for why the special circumstances associated with the work of seamen or working conditions can justify the special rule in the Norwegian Seamen's Act. It is emphasised in particular that it is not of decisive importance that seamen will be entitled to a seamen's pension.

(60) The theme for the European Committee of Social Rights was, however, not whether there were grounds in 2007 to conclude that there had been a violation of the convention. Fellesforbundet's complaint did not concern this question. The complaint is summarised in a paragraph as follows:

> "Fellesforbundet for sjøfolk would like the European Committee of Social Rights to confirm that Section 19 (1), sixth paragraph of the Norwegian Seamen's Act, whereby the employment of seamen can be terminated exclusively on grounds that the age of 62 is attained, conflicts with fundamental rights established in the European Social Charter.

(61) In its decision, the Committee does then not occupy itself with the situation in 2007, but it gives a current assessment based on the source of law situation at the time of the decision. Most of the legal material that the decision is based on is from the years after 2007, including the Norwegian Supreme Court's decision in the Kystlink case, and the legislative work that resulted in the repeal of the contested special rule in the Norwegian Seamen's Act.

(62) The development of the law in recent years is discussed in Official Norwegian Report (NOU) 2012:18 Rights On Board – The New Norwegian Ship Labour Act. On page 162 it is stated:

> "In addition, it is clear to the Committee that the case law – both in Norway and in the EU – have developed since the Kystlink judgment, see Section 4.8.4.1 for further details. The Committee would like in particular to point out Rt-2012-219 (Helicopter Pilot Judgment)."

(63) With regard to the legal situation in 2007, no earlier decision or statement from any agency under the Council of Europe has been cited, and reference is not made otherwise to any material that concerns the understanding of the Social Charter that existed already then.

(64) On the other hand, the appellant has made reference to Council Directive 2000/78/EC, which provides general framework provisions on equal treatment in working life. It is argued that the clarification of the scope of the Directive that had taken place within the EU was a reflection of overarching general principles, and that this also contributed to clarifying the scope of the Social Charter in the relevant context.

(65) The appellant has in particular made reference to Article 6 (1) of the Directive, which is asserted to clarify under what circumstances discrimination on the basis of age is permitted. The wording of the provision is as follows:

> "Notwithstanding Article 2, paragraph 2, the member states can determine that differential treatment on the basis of age does not represent discrimination, provided there are objective and reasonable grounds based on a legitimate purpose within the framework of national law, inter alia, legitimate employment, labour market or vocational training policy objectives, and provided the means of fulfilling the relevant objective are appropriate and necessary."

(66) The provision does not stipulate a clear framework for the legislation, and in 2007 there was no decision from the European Court of Justice concerning the authority to issue special rules that weaken protection from the termination of employment due to age in fields of work where relevant considerations indicate a lower retirement age than what otherwise applies. The appellant has cited the European Court of Justice's decision of 22 November 2005 in case C-144/04, the Mangold case. The court discusses the Council Directive. However, the general comments do not add much beyond the Council Directive itself, and the circumstances of the case were so different from the issues in our case, that the decision does not contribute to clarification of how the Council Directive should be understood in our case. What the European Court of Justice ascertained was that an act that permitted a general rule that, after attaining the age of 52 years, an employee had to accept that his employment was converted to a time-limited employment contract was in contravention of the Directive.

(67) The European Court of Justice also pointed out in its decision, under reference to that fact that the ban on discrimination "originates from various international conventions and in the member states' constitutional traditions", that an overarching principle of EU law that entails a ban on discrimination on the basis of age applies regardless of the Council Directive. This does not contribute either to a more detailed determination of what the protection consists of.

(68) An obligation to implement Council Directive 2000/78/EC did not follow from the EEA Agreement, but it was regarded as appropriate and desirable to implement the Directive in Norwegian law, which is part of the overall efforts to establish more general protection from discrimination by law.

(69) With regard to the introduction of a ban on discrimination in the Norwegian Seamen's Act, the Norwegian Maritime Directorate distributed a draft legislative amendment for consultation on 3 June 2005. In the consultative document, it was assumed that the provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act could be maintained. There were no deviating opinions in any of the consultative comments. When the Norwegian Seamen's Act was harmonised with the principles of the Working Environment Act in 1985, both the Norwegian Seamen's Union and the Norwegian Shipmasters' Union spoke for increasing the age limit to age 67. However, even if the question of the weakening of the protection from the termination of employment on attaining the age of 62 was addressed directly in the consultative document, the question was in other words not problematised by either of the two organisations when the question again became relevant 20 years later.

(70) In Proposition No. 85 (2005–2006) to the Odelsting on amendments to the Seamen's Act No. 18 of 30 May 1975, page 13, the Ministry of Trade, Industry and Fisheries made reference in general to No. 49 (2004–2005) to the Odelsting on the Act relating to the working environment, working hours and employment protection. With regard to Section 19 (1), sixth paragraph in particular, the following is stated in Section 5.3.4.3:

> "Section 19 (1), sixth paragraph is understood to mean that a seaman is protected from termination of employment on the basis of age prior to attaining age 62. Entitlement to a seamen's pension is achieved already on attaining the age of 60 years. However, there is no obligatory retirement age pursuant to the Norwegian Seamen's Act. In comparison, it can be mentioned that the Ministry of Labour and Social Affairs concluded in relation to the general age limit of 70 that it can be continued without violating the ban on discrimination. There are considerations indicating that the shall be used as the basis in relation to the age limit of 62 years in the Norwegian Seamen's Act. Due to the nature of the occupation and the exertion this entails, it appears to be natural that one operates with a lower age limit. The fact that entitlement to a seamen's pension is earned at age 60 and one is therefore financially independent indicates that the limit of age 62 is not in contravention of the Directive. Discrimination on the basis of age prior to the attaining the age of 62 will on the other hand represent a breach of the Directive's ban on discrimination."

(71) The grounds are not detailed, but it must be assessed on the background of the fact that it was a question of continuing a provision that had been in force for several decades, and that there were no objections to continuation of the provision in the consultation process. In Recommendation No. 34 (2006–2007) to the Odelsting, page 5, the Standing Committee on Business and Industry also emphasises the strong consensus among the consultative bodies.

(72) In Rt-2010-202 (Kystlink), paragraph 68, the first voting justice expresses that there can be no doubt that the considerations to which reference is made in the proposition are legitimate considerations that can justify the discrimination. With regard to the proportionality, however, he expresses doubt. With reference, for example, to the fact that in cases of doubt, the courts should exhibit restraint with respect to setting aside the legislator's assessment in an area in which the states are allowed a margin of discretion, and the fact that there is no

obligation under international law to implement the directive, the first voting justice concludes that Section 19 (1), sixth paragraph does not conflict with the Directive.

(73) I agree with this, and it is difficult for me to see that the understanding of Council Directive 2000/78/EC in 2007 was established in such a way that it could be regarded as contributing to the understanding of the Social Charter's ban on discrimination.

(74) It has not been contested that the special provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act had good grounds in a historical perspective, but that there is clearly room for various views on whether it was well-justified to maintain the provision in 2007. The provision was not maintained when the Norwegian Ship Labour Act was adopted on 21 June 2013. This political assessment of appropriateness does, however, not say much about what freedom of action the legislator had in 2007 in accordance with the Social Charter.

(75) So overall, in my opinion, there were no grounds in 2007 to assume that the Social Charter impeded a continuation of the special provision in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act. Under any circumstances, it must be assumed that the broader understanding of the Social Charter that the European Committee of Social Rights used as the basis for its decision in the complaint case in 2013, had not been established in 2007, so that continuation of the provision in Section 19 (1), sixth paragraph could under some circumstances entail liability for damages on the part of the Norwegian State. Even if the convention had been incorporated into Norwegian law, the conditions for a liability for damages had not been satisfied.

(76) The appellant has also argued that the Norwegian State must be liable because the Ministry of Trade, Industry and Fisheries failed to comply with its duty of disclosure to the Storting during the preparation of Proposition No. 85 (2005–2006) to the Odelsting. The Ministry failed to clarify the relationship to the Social Charter and there is no independent discussion in the proposition whether there was a continued need for a lower age limit at sea. In particular, it is emphasised that it is strongly misleading when importance is attached in the proposition to the fact that the right to a seamen's pension entails that seamen will be financially independent when they attain retirement age.

(77) It has been generally assumed in theory that a legislative enactment can become invalid as a result of a gross breach of the adoption procedure pursuant to the Norwegian Constitution. Various less than practical examples have been pointed out, but no errors of such a nature have occurred in practice.

(78) This case concerns alleged errors of a completely different nature, and it is difficult to imagine that errors of the nature cited could result in the invalidity or a legislative enactment or a liability for damages on the part of the Norwegian State. The courts must observe substantive law adopted by the Storting. It is up to the Storting to assess whether extensive law preparation is required, and it is up to the Storting to both assess the actual prerequisites for the legislative enactment and what effects the act must be expected to have. Judicial review does not encompass, as is the case with administrative decisions, the question of whether the legislative enactment is based on a proper review, builds on actual prerequisites that are correct or if the act will result in qualified unreasonable results. Whoever has such objections to an act that the Storing has adopted must seek to amend it by political means.

(79) The executive branch of power has undoubtedly a duty of disclosure to the Storting. Today this is expressly stipulated in Section 82 of the Norwegian Constitution, which is worded as follows:

> "The Government is to disclose to the Storting all information that is necessary for the proceedings on the matters it submits. No Member of the Council of State may submit incorrect or misleading information to the Storting or its bodies."

(80) The provision was added by a constitutional amendment in 2007, but it was assumed to have the same content as prior customary constitutional law. In Recommendation No. 210 (2002–2003) to the Storting, page 15, a unanimous Scrutiny and Constitutional Affairs Committee emphasised the importance of the Storting have a good basis for the resolutions that are adopted:

> "The Committee would like to emphasise the importance of the Storting receiving information that enables it to make a proper assessment of the content and impact of the resolutions that are adopted. Since it is the Government that prepares and submits most of the items to the Storting, which leads the administration and has the right to use the public investigative resources, it has a particular responsibility for ensuring that the Storting has a proper basis for making decisions.

(81) The Committee defines the scope of the duty of disclosure as follows:

> "The Committee would like to point out that the information the Government presents to the Storting must be correct. This means that the information must be in agreement with the underlying reality. The Committee would also like to point out that a certain level of detail must be required for the information that is presented."

(82) Accordingly, there may be grounds for differing opinions on whether the Ministry of Trade, Industry and Fisheries should in Proposition No. 85 (2005–2006) to the Odelsting have discussed the relationship to the Social Charter, whether the benefits in accordance with the seamen's pension legislation should have been disclosed, and whether the Ministry should have made a more detailed clarification of the relevant maritime working conditions. I do not find any reason to delve further into this. It will be up to the Storting to ensure that a proper basis is provided for legislative enactments, and it will be up to the Storting to follow up any breach of the duty of disclosure. It can perhaps not be rules out that the duty of disclosure to the Storting can be misused to such a degree that a liability for damages on the part of the Norwegian State may arise in relation to citizens that are affected by the legislative enactment, but it will not normally be relevant to interfere with the relationship between the branches of government by establishing such a liability for damages. In this case, it is of course clear that there is not under any circumstances a breach of the duty of disclosure of such a nature, and the action claiming damages cannot be successful on this basis either.

(83) Alternatively, the appellant has claimed that the Norwegian State must be liable for the costs associated with the complaint to the European Committee of Social Rights. It has been asserted that when the complaint was filed it was very clear that the special rule in Section 19 (1), sixth paragraph of the Norwegian Seamen's Act could not be maintained

and that it was unwarranted for the Norwegian State to contest this. In addition, it is argued that there was no justifiable basis for contesting Fellesforbundet's right of appeal.

(84) The Norwegian State has not asserted that it follows from the distribution of power between the government agencies that the courts cannot review the Government's assessment of whether there is a need for additional legal clarification. I point out nonetheless that it cannot just be assumed that the courts, in addition to having the jurisdiction to decide on the legal question at issue, shall also be able to review the Government's assessment of the need for such clarification with the consequence that the Norwegian State is held liable for damages. As the case stands, there is no need to take a stand on this question.

(85) In Rt-2015-385, the Norwegian Supreme Court heard a case in which damages were claimed for an allegedly groundless action. The first voting justice dismissed that the question of liability could be decided based on a broad due care assessment. It was pointed out, inter alia, that such an approach could result in a reluctance to have legal questions clarified by the courts, and that justified claims could also be affected negatively. The Norwegian Supreme Court concluded that the liability for damages must be limited to cases of misuse. Paragraph 34 states sums this up as follows:

> "Based on the sources that have been reviewed above, and particularly the statements in Rt-1994-1430 on page 1436 and the principle of the right to review by a court of law, I believe that a liability for damages beyond the costs must be reserved for the cases of misuse. Misuse will normally exist if the case is completely without any chance of being successful and the party understands that this is the case. A legal action will then be motivated by aims other than winning the case, and it will normally entail misuse of the right to legal action to institute legal action in such a case."

(86) It goes without saying then that only in completely extraordinary cases may it be relevant for a party to incur a liability for damages by defending himself against a claim filed in a lawsuit.

(87) Some of the considerations that indicate such a limitation of the opportunity to claim damages for lawsuits that should not have been filed, do not apply with the same weight when it concerns the conduct of the Norwegian State before the courts and various international institutions, but I add that it would not be relevant either for the State to incur a liability for damages unless misuse of the legal system is established.

(88) It is clear then that the alternative claim for damages cannot be successful either.

(89) The appeal has not been successful, and the case has not raised any doubt. However, since the case raises problems of a fundamental nature, I have concluded that the costs before the Norwegian Supreme Court should not be awarded, cf. Section 20-2, third paragraph (c) of the Norwegian Dispute Act.

(90) I vote for this judgment:

1. The appeal shall be dismissed.

2. Costs before the Norwegian Supreme Court shall not be awarded.

(91) Justice **Indreberg**: I am essentially and as regards the outcome in agreement with the first voting justice.

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

(93) Justice **Noer**: Likewise.

(94) Justice **Matningsdal**: Likewise.

(95) After voting, the Norwegian Supreme Court handed down the following

JUDGMENT:

1. The appeal shall be dismissed.

2. Costs before the Supreme Court shall not be awarded.

ND-2016-219 - The Supreme Court of Norway

Authority	The Supreme Court of Norway
Date	2016-06-14
Published	ND-2016-219
Keywords	(14) Labour law. Dismissal. Foreign registered ship. Choice of law.
Summary	A Norwegian seaman, whose employment was terminated, had worked on a ship that was registered in Antigua, and which was hired by a Norwegian company under a time charterparty. The Norwegian Supreme Court found that the seaman's working conditions were not regulated by the Norwegian Ship Labour Act. The ship was not Norwegian, cf. Section 1, first paragraph of the Norwegian Maritime Code, and the seaman's working conditions were thus not subject to the Norwegian Ship Labour Act, cf. Section 1-2, first paragraph, first sentence. This provision must be understood as a choice of law rule, and it is dependent on a conscious choice on the part of the legislator. The general rule that the flag state's labour legislation applies had not been set aside by agreement either. (Norwegian Supreme Court Report (Rt) summary.)
Proceedings	The Supreme Court of Norway 14 June 2016.
Parties	A (Attorney Gaute Gjelsten – under examination) versus Eimskip Norway AS (Attorney Jan Vablum – under examination)
Author	Justices Arntzen, Indreberg, Webster, Extraordinary Justice Sæbø, Justice Skoghøy

(1) Justice **Arntzen**: The case concerns the question of the choice of law in a dispute concerning the termination of a Norwegian seaman on a foreign-registered ship. The question is whether it is the labour legislation of Norway or of the flag state Antigua and Barbuda (hereinafter referred to as Antigua) that regulates the employment relationship.

(2) A was employed as a mate by Eimskip-CTG AS on 21 July 2010. The company subsequently changed its name to Eimskip Norway AS (hereinafter referred to as Eimskip). The original employment contract was executed on the Norwegian Maritime Directorate's standard form. In accordance with the employer's wishes, the parties executed a new employment contract on 12 September 2012; this time on a form that had been prepared by Eimskip's lawyer. The employment contract contained a provision that disputes were to be settled in Vesterålen District Court, but no express regulation of the choice of law. During the term of his contract A worked on board two ships, both of which were registered in Antigua.

(3) After prior discussions between the parties, Eimskip terminated A's employment in a letter of 24 October 2014, and he was to leave on 10 November of the same year. At the time of the termination, he worked on board the MS Svartfoss, which was owned by an Antiguan company. The ship was hired under a bareboat charterparty to a Faroese company, which rehired it to Eimskip under a time charterparty. The Faroese company also had a crewing and technical management agreement with an Icelandic company, which leased A, among others, from Eimskip. The MS Svartfoss has primarily sailed along the Norwegian coast, including in Norwegian territorial waters.

(4) A contested the validity of the termination and filed a legal action with Vesterålen District Court on 30 December 2014 claiming that the termination be ruled invalid, and that he be awarded damages. A preliminary injunction entitling him to resume his employment was requested at the same time. Eimskip opposed this and claimed a decision in their favour, both in the principal case and in the case concerning the preliminary injunction. Vesterålen District Court dismissed the request to resume employment in a ruling of 24 February 2015. The ruling is legally enforceable.

(5) During preparation for the case before the District Court, the question arose whether Norwegian or Antiguan substantive law would apply in this case. The District Court considered the choice of law question separately and on the basis of a written hearing, cf. Section 16-1, second paragraph (b) and Section 9-9 second paragraph of the Norwegian Dispute Act.

(6) On 10 April 2015, Vesterålen District Court rendered judgment [TVTRA-2015-808] with the following conclusion:

> "The Norwegian Ship Labour Act does not regulate the employment relationship between the plaintiff and defendant."

(7) A appealed the District Court's judgment to the Hålogaland Court of Appeal. The Court of Appeal also decided on the case on the basis of a written hearing, cf. Section 29-16, fifth paragraph of the Norwegian Dispute Act. On 30 September 2015, the Court of Appeal rendered judgment [LH-2015-95334] with the following conclusion:

> "1. The appeal shall be dismissed.
> 2. Costs before the Court of Appeal shall not be awarded."

(8) A's principal argument in the District Court and Court of Appeal was that Norwegian law was the agreed choice of law in accordance with the employment contract.

(9) A has appealed the judgment of the Court of Appeal to the Norwegian Supreme Court. The appeal concerns the assessment of evidence and application of the law. The argument of the agreed choice of law has not been maintained.

(10) The appellant, A, has in brief argued:

(11) The choice of law shall be determined in accordance with Norwegian international private law. Section 1-2 of the Norwegian Ship Labour Act is not a choice of law rule, and the Act applies if Norwegian law is to be used.

(12) The EU choice of law rules concerning individual employment contracts that are laid down in the Rome 1 Regulation [Regulation (EC) No. 593/2008] must apply analogously in Norwegian law. The rules have universal application for protection of the weak party in contractual relationships. Consideration of uniformity of the law indicates that the rules shall be used as a basis for Norwegian law. Article 8 of the Rome 1 Regulation is a continuation of Article 6 of the Rome Convention, and prior case law is still relevant. This case law indicates the law of the country to which the work has a significant association.

(13) As is evident from Article 8 (2) of the Rome Regulation, the general rule is that the substantive rules in the country where or from where the employee normally performs his work shall be used as the basis, unless otherwise agreed. If a country to which the employment relationship has a significant association cannot be determined, Article 8 (3) stipulates an alternative provision that the employment relationship is subject to the law of the country in which the employer has his place of business. Another alternative choice of law provision has been laid down in Article 8 (4) concerning the choice of law following the law of the country to which the employment contract is most closely associated.

(14) A's employment contract falls under all of the association criteria of the Rome Regulation for the application of Norwegian law. A is a Norwegian citizen who resides in Norway and has place of work has primarily been Norwegian waters. The employer is also domiciled in Norway. The employment contract does not have any genuine association with the flag state Antigua.

(15) Under the assumption that the Rome Regulation is not applied analogously, it follows nonetheless from the Irma Mignon formula that the employment contract shall be regulated by Norwegian law. The employment contract was executed in Norway between parties domiciled in Norway, and Norway was chosen as the legal venue. The sailing took place primarily in Norwegian waters, and instructions on the sailing were given from a Norwegian place of business. The flag of the ship is only one factor in the assessment. This factor is weakened by the fact that the flag of Antigua is listed as a flag of convenience by the International Transport Workers' Federation.

(16) Ultimately, the Norwegian rules concerning protection against unfair dismissal and unlawful dismissal must be regarded as mandatory internationally. Any application of Antiguan law must therefore be supplemented by the Norwegian employment protection rules.

(17) The Law of the Sea Convention regulates the legal relationship between states, not civil law circumstances. Article 91 of the Convention, cf. Article 92, requires the states to exercise governmental jurisdiction in accordance with the flag state principle, but it does not stipulate any international private law rules concerning the choice of law.

(18) A has entered the following statement of claim:

> "1. The case shall be heard and decided in accordance with Norwegian law.
>
> 2. Eimskip Norway AS shall be ordered to reimburse A's costs before the Court of Appeal and Norwegian Supreme Court."

(19) The appellant, **Eimskip Norway AS**, has in brief argued:

(20) When the choice of law has not been regulated contractually, it follows from both Norwegian and international law that it is the law of the flag state that regulates the working conditions on board.

(21) Section 1-2, first paragraph of the Norwegian Ship Labour Act states that the Act applies to employees working on board "Norwegian ships". The provision entails a deliberate delimitation against employees on foreign-registered ships, cf. Prop.115 L (2012–2013), page 66 and NOU 2012:18, page 95. Such employees are subject to the law of the flag state. The flag state principle is laid down in Article 92 of the Law of the Sea Convention concerning jurisdiction, which both Norway and Antigua have ratified. The principle promotes the international legal order and is based on shipping policy reciprocity considerations. The obligations pursuant to the Maritime Labour Convention also lie with the flag state. The Norwegian Ship Labour Act and authorities to issue regulations are based on the jurisdiction rules of the Law of the Sea Convention.

(22) The Irma Mignon formula only applies of the choice of law question is not regulated by law, customer or other fixed rules, cf. Rt-2011-531. The formula therefore does not apply in this case. Even if the formula was used as a basis, decisive importance must be attached to the ship's domicile and registration. The rule is accordingly harmonised with our treaty law obligations related to international shipping.

(23) The Rome 1 Regulation [32008R0593] is not part of the EEA Agreement, and there are no grounds for applying EU law analogously at the expense of clear Norwegian law. The EU has also ratified the Law of the Sea Convention, and clarified the individual state's responsibility for complying with treaty obligations at the same time. There are no decisions from the European Court of Justice that support that the flag state principle does not apply in relation to third-party countries, even if both the employee and employer are domiciled in an EU country. The European Court of Justice's judgment of 15 December 2011 in case C-384/10 Voogsgeerd is not relevant because the flag state was an EU state and not a third-party state.

(24) Moreover, there are no Norwegian employment protection rules for employees on foreign ships that are mandatory internationally in the sense that they must be applied by Norwegian courts regardless of the choice of law. Norwegian employment protection rules are relatively speaking of a more recent date, and are not of fundamental importance to our legal order, cf. for example Section 5-6 third paragraph of the Norwegian Ship Labour Act. The fundamental view of the employees' employment protection is in any case safeguarded adequately by Antiguan law.

(25) Eimskip Norway AS has entered the following statement of claim:

> "1. The appeal shall be dismissed.
>
> 2. A shall be ordered to reimburse the costs of Eimskip Norway AS before the Norwegian Supreme Court."

(26) **I have concluded** that the appeal will not be successful.

(27) The point of departure for the choice of law is – when there is no law, custom or other more established rules regulating the question – is to find the state that the case has the strongest or closest association with (Irma Mignon formula). If the choice of law question is not solved by Norwegian law, there may also be grounds to attach importance to the EU choice of law rules laid down in the Rome Regulations. I make reference to Rt-2009-1537, paragraphs 32 and 34, and Rt-2011-531, paragraphs 29 and 46 concerning the Irma Mignon formula and the application of the Rome Regulations in Norwegian law. The question is whether there is a statutory choice of law rule that applies to the circumstances of our case.

(28) The Working Environment Act does not apply to shipping, cf. Section 1-2, second paragraph (a) of the Act. Maritime employment protection is regulated in the Norwegian Ship Labour Act of 2013, which is largely a continuation of the Norwegian Seamen's Act of 1975. The scope of the Act is stated in Section 1-2, first paragraph, first sentence:

> "The Act applies to employees who work on board Norwegian ships."

(29) A ship is considered Norwegian if the capital and management requirements in Sections 1 and 3 of the Norwegian Maritime Code have been satisfied. It is also a condition that the ship has not been entered in the ship register of a different country, cf. Section 1, first paragraph of the Norwegian Maritime Code. A worked on board a ship registered in Antigua, and his employment relationship is thus not encompassed by the Norwegian Ship Labour Act.

(30) The provision concerning the scope of the Norwegian Ship Labour Act must be understood as a choice of law rule, cf. Proposition No. 13 (1999–2000) to the Odelsting, page 15 concerning the corresponding provision in Section 1 of the Norwegian Seamen's Act. As is evident from Prop.115 L (2012–2013), page 66, employees on foreign-registered ships will as a general rule "be subject to the seamen's legislation in the country in question". This so-called flag state principle is the result of ships being regarded as part of the flag state's territory with the associated jurisdiction. Section 9-5, first paragraph (c) of the Norwegian Ship Labour Act, which gives an employee the right to leave if the ship loses the right to bear the Norwegian flag, is a consequence of the flag state's legislative jurisdiction. It shall not be possible to force an employment contract under another country's law on the employee.

(31) The general rule that the flag state's labour law legislation applies can be waived by agreement between the employer and employee. In the legislative background to Section 1 of the Norwegian Seamen's Act, it is pointed out that for agreements that the Norwegian Seamen's Act is to apply to employment relationships on foreign vessels "must... bear in

mind that the authority for its application is the agreement entered into", cf. Proposition No. 43 (1973–1974) to the Odelsting, page 21. In our case, it is not alleged before the Norwegian Supreme Court that such an agreement exists.

(32) The fact that the choice of law rule in Section 1 of the Norwegian Seamen's Act and subsequently in Section 1-2 of the Norwegian Ship Labour Act depends on a conscious choice on the part of the legislator, is also underscored by the authorities to issue regulations associated with the provisions.

(33) Section 2 (b) (2) of the Norwegian Seamen's Act granted authority to give the Act full or partial application to anyone who worked on a "foreign ship that was managed by a Norwegian ship-owning company". The repeal of this authority to issue regulations was adopted by Act No. 123 of 19 December 2008, but the Amendment Act never entered into force. The authority to issue regulations has not been maintained in the Norwegian Ship Labour Act. In Prop.115 L (2012–2013), pages 33 and 76 the Ministry makes reference to a statement from the Ministry of Justice's Legislation Department from 14 September 1977, where it is regarded as "doubtful to what extent international law will allow Norwegian legislation to be applied to foreign ships that are managed by a Norwegian ship-owning company in any way other than by a bareboat charterparty". The Ship Labour Law Committee also assumed that there is "limited authority in international law to regulate internal affairs on a foreign ship when it is located outside Norwegian territorial waters", cf. the Proposition, page 77.

(34) Instead of granting general authority to issue regulations concerning employees on foreign ships, the legislative amendment in 2008 adopted more limited access to stipulate supplementary regulations concerning employees working on board "a foreign ship as long as it was permitted by international law and the ship is located in Norwegian territorial waters, ...", cf. Section 1, sixth paragraph of the Norwegian Seamen's Act. This authority to issue regulations has been maintained in Section 1-2, third paragraph (d) of the Norwegian Ship Labour Act, but it has not yet been exercised. The provision was brought about by the need to keep track of compliance with ILO Convention No. 186 on maritime working and living conditions (Maritime Labour Convention 2006) with corresponding regulation in the Norwegian Seamen's Act. Proposition No. 70 (2007–2008) to the Odelsting, page 11, states that it is primarily the "provisions in Sections 3, 21, 22, 27 and 28 that will be relevant to enforce in relation to foreign ships". Employment protection, which was regulated in Section 19 of the former Norwegian Seamen's Act, was not included in the Ministry's list, nor was it laid down in the Convention.

(35) The review so far shows that an attempt has been made to adapt the provisions concerning the scope of Section 1-2 of the Norwegian Ship Labour Act and the associated authorities to issue regulations to the flag state principle in international law.

(36) The flag state principle has been codified in the Law of the Sea Convention of 1982 – which entered into force in 1994. Both Norway and Antigua have ratified the Convention. In accordance with Article 92, the flag state has exclusive jurisdiction on the open sea, while the coastal state's jurisdiction in its own territorial waters is limited to Articles 17 ff. concerning the right to innocent passage. The Convention builds in other words on the interaction between jurisdictions based on personnel affiliation – flag state

jurisdiction – and on the territorial association – coastal state jurisdiction. The distribution of jurisdiction in maritime law also forms the basis for Norwegian shipping policy, as this is expressed in for example the legislative background to the Act relating to the general application of wage agreements etc. in Proposition No. 26 (1992–1993) to the Odelsting, page 18, and the consultation comments by the Ministry of Foreign Affairs on the Norwegian Ship Labour Act, which have been included in Prop.115 L (2012–2013), page 79, which the Ministry "takes note of" on page 81.

(37) My conclusion so far is that A's employment relationship is not regulated by the Norwegian Ship Labour Act.

(38) A has argued alternatively that the Norwegian employment protection rules are mandatory internationally in the sense that they must be applied by Norwegian courts regardless of whether the employment relationship is otherwise subject to Antiguan law.

(39) Brought about by the parties' argumentation before the Norwegian Supreme Court, I find cause to mention that there are two sides to the theory of an international mandatory rule. Firstly, in a contractual relationship the parties should not be able to avoid mandatory Norwegian legislation by means of a choice of law agreement. In such cases, it is the actual choice of law agreement that is set aside, cf. for example the discussion in Hjort, 2009, "Internasjonalt preseptoriske regler i arbeidsretten – en rettskildemessig analyse". Secondly, a Norwegian rule of law could be of such fundamental importance to our legal order that it must apply regardless of what country's law otherwise applies. In such cases, it is the substantive provisions in foreign law that must yield. It is this aspect of a mandatory rule that is discussed in Rt-2009-1537-A37, paragraph 37, as "internationally directly applicable" rules, which are pleaded in this case.

(40) The prerequisite for the principle of international direct applicability is that the Norwegian rule applies according to its content to the circumstances of the case at hand. There are no grounds supporting that the rules of the Norwegian Ship Labour Act concerning employment protection should have a broader scope than the rest of the Act. As is evident from my review of the scope of the Norwegian Ship Labour Act, it does not encompass employees on board foreign ships. It is the "ordre public" rule that must then be pleaded if the application of foreign law gives an outcome that is in violation of fundamental principles in the legal system of the country of the court. Whether the application of Antiguan law in our case will lead to an outcome that will bring about a correction of the outcome on such grounds must be determined in the principal case, since this is not a choice of law question.

(41) Accordingly, I have concluded that the appeal shall be dismissed.

(42) The respondent has won the case and his costs are in principle to be reimbursed in accordance with the general rule in Section 20-2, first paragraph of the Norwegian Dispute Act. The case has not raised unresolved legal issues, and the decision was not made under doubt either. I have therefore not found grounds to apply any of the exemption rules in the Act. The statement of costs, which is limited to covering the counsel's fees for the Supreme Court's hearing of the case, amounts to NOK 490,000. The appellant has not protested, and the amount will be relied on as necessary, cf. Section 20-5 of the Norwegian Dispute Act.

(43) I vote for this judgment:

1. The appeal shall be dismissed.

2. A shall pay Eimskip Norway AS four hundred ninety thousand Norwegian kroner (NOK 490,000) in costs before the Supreme Court within two (2) weeks from service of this judgment.

(44) Justice **Indreberg**: I'am essentially and as regards the outcome in agreement with the first voting justices.

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

(46) Extraordinary justice Judge **Sæbø**: Likewise.

(47) Justice **Skoghøy**: Likewise.

(48) After voting, the Supreme Court handed down the following

JUDGMENT:

1. The appeal shall be dismissed.

2. A shall pay Eimskip Norway AS four hundred ninety thousand Norwegian kroner (NOK 490,000) in costs before the Supreme Court within two (2) weeks from service of this judgment.

ND-2017-63 – The Supreme Court of Norway

Authority	The Supreme Court of Norway - Judgment
Date	2017-02-09
Published	HR-2017-331-A
Keywords	Environmental law. Contamination. Wreck removal. The Maritime Code's provisions on limitation of liability. The court's examination of administrative decisions.
Summary	Follow a shipwreck, the Norwegian Coastal Administration and the affected municipalities incurred significant costs in connection with clearing up the oil spill. The Norwegian Coastal Administration ordered the owner and operator of the vessel, represented by the P&I insurer, to refund the State's expenses for the cleanup, cf. section 76 of the Pollution Control Act and to remove the remaining part of the ship-wreck, cf. section 37, subsection 2, cf. section 28. Like the Court of Appeal, the Supreme Court concluded that the VAT the Norwegian Coastal Administration had paid on goods and services purchased from tradesmen could not be included in the refund. It was not decisive that the State had already received these taxes through the VAT system. A distinction had to be made between the State as a user of services liable to VAT and the State as a collector of taxes. The Supreme Court also concluded that the affected municipalities had mistakenly considered their efforts in the operation as sales liable to VAT and calculated VAT on their claims to the Norwegian Coastal Administration. Since costs for which a refund claim may be submitted pursuant to section 76 of the Pollution Control Act must be based on a factual and legally correct basis, this VAT amount could not be included in the refund claim. In the decision on removal of the wreck, the Ministry had used the alternative condition "is unslightly" in section 28 of the Pollution Control Act as a basis. The District Court and the Court of Appeal considered the decision valid based on the alternative "may cause damage or nuisance to the environment", which the Ministry had not considered. The Supreme Court concluded that the courts could not examine the validity of the decision on a condition the Ministry had not considered. This item in the Court of Appeal's judgment was annulled. The Supreme Court also concluded that the management company could not be considered the owner, cf. section 37, subsection 2 of the Poll uti on Control Act, and therefore could not be the addressee of the removal order. It was finally decided that the obligation to comply with the removal order was not limited by the financial framework of the limitation fund that was established pursuant to Chapter 12 of the Maritime Code.

Proceedings	The Supreme Court HR-2017-331-A, (case no. 2016/1128), civil case, appeal against judgment.
Parties	I. The State represented by the Ministry of Transport v. Dalnave Navigation Inc. Assuranceforeningen Gard - Mutual Avena Shipping Company Ltd. II. Dalnave Navigation Inc. Assuranceforeningen Gard - Mutual Avena Shipping Company Ltd. v. The State represented by the Ministry of Transport
Author	The Justices Bull, Arntzen, Bergsjø, Webster, Endresen

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VOTING:

(1) Justice Bull: Subject matter of the action is the clean-up efforts following a marine casualty. It raises the question as to who can be ordered to remove the wreck, whether the courts can uphold the decision to remove the wreck on a basis on which the court of appeal failed to take a position, and whether the limitation of liability rules in the Maritime Code set a limit to the owners obligation to comply with the order to remove the wreck. It is also an issue whether VAT may form part of the State's claim for reimbursement of the costs involved in the clean-up operation and, in that event, whether this also applies to VAT paid on goods and services not subject to VAT.

(2) On 12 January 2007, the Cyprus registered cargo vessel the MV Server ran aground at Ytre Hellisøy in the municipality of Fedje in Hordaland. Shortly after the grounding, the vessel broke in two forward of the wheelhouse. The forward section was quickly pulled off the shallow and towed to a temporary location. It has since been removed permanently. The aft section, with wheelhouse, cabins and engine room, still remains where it sank.

(3) Ytre Hellisøy and part of the sea surrounding the island constitute a nature reserve and parts of the aft section of the ship lie inside the nature reserve. During the first few years, parts of the wreck were visible above the water surface, but when the decision to remove the wreck was made, evetything was under water. It does not obstruct marine traffic where it now lies.

(4) The MV Server was not carrying any cargo, but the ship's tanks contained considerable amounts of bunker oil and other oil products. Large parts of the oil flowed into the sea, and a state-organised operation to prevent pollution administered by the Norwegian Coastal Administration was immediately initiated. The Coastal Administration and a number of municipalities took part in the operation. The municipalities' efforts were partly handled by inter-municipal action control groups to prevent acute pollution.

(5) The Cyprus registered company Avena Shipping Company Ltd., hereinafter referred to as Avena, is the registered owner of the MV Server. The ship was operated by Dalnave Navigation Inc., hereinafter referred to as Dalnave, which is registered in Liberia, but has its offices in Greece. A Greek citizen, Dimitrios Sficas, is the dominant owner of both companies. The ship had taken out liability insurance - P&I Insurance - with Assuranceforeningen Gard - Mutual, hereinafter referred to as Gard. In this matter Avena, Dalnave and Gard are collectively referred to as the owners side.

(6) In identical letters to Avena and Dalnave dated 16 January 2007, the Coastal Administration informed them that a state-organised operation had been initiated, and that the companies would be held liable for the costs involved pursuant to section 76 of the Pollution Control Act for all claims related to measures taken by the Coastal Administration as a result of the grounding.

(7) On 19 January 2007, the Coastal Administration sent a letter to Dalnave ordering measures to prevent further pollution from the ship and the removal ofboth the forward section, which had already been pulled off the shallow, and the aft section, which was still lying there. In the further handling of the matter it is Gard which has primarily acted on behalf of Avena and Dalnave.

(8) The emptying of the remaining oil from the aft section was carried out in March 2007 and was regarded as successful.

(9) In March 2007, Gard introduced the limitation of liability rules in the Maritime Code into its communication with the Coastal Administration. Gard was of the opinion that the total costs involved in the clean-up efforts and removal of the wreck would exceed the limitation of liability amount and wanted an agreement with the Coastal Administration to ensure the owners side's rights under the Maritime Code as the owners side saw them. In July 2007, the Coastal Administration refused to enter into such an agreement submitting that this would bind the Coastal Administration's administrative authority.

(10) In November 2007, the Coastal Administration announced that the deadline for removing the aft section would be extended until further notice and that an overall evaluation of the further follow-up as regards the aft section of the ship would be made when the complete picture of the costs involved was presented. During the spring and summer of 2008, there was renewed contact between the Coastal Administration and Gard pertaining to this issue. Methods for wreck removal and the distribution of costs were discussed.

(11) Subsequently there was no further follow-up on the part of Gard. During the period between the summer of 2008 and the autumn of 2010 there does not appear to have been any communication between Gard and the Coastal Administration concerning the matter. However, the Coastal Administration continued to work on the claim for recovery of the costs of the operation to prevent pollution.

(12) After an advance notice about the refund claim in 2009, and an advance notice for the removal of the aft section of the ship had been sent out in 2010, the Coastal Administration on 27 May 2011 sent a letter addressed to Gard concluding in a decision. The gist of this decision was first a claim for NOK 198,7 14,272 to cover the States costs involved in the

operation to prevent pollution and, secondly, it contained an order issued to the polluter to remove the aft section of the MV Server from the location of the casualty.

(13) On behalf of Avena, Dalnave and itseif, Gard appealed against the Coastal Administration's decision to the Ministry of Trade, Industiy and Fisheries. The appeal resulted in a minor downwards adjustment of the refund amount, but in a decision of 13 June 2012, the Ministry maintained the order to remove the aft section of the ship.

(14) According to a request from Gard on behalf of Avena and Dalnave, Oslo District Court on 23 May 2012 established a limitation fund according to chapter 12 of the Maritime Code. The limitation amount under section 175a of the Maritime Code is NOK 226,380,814.76. In addition, a guarantee of NOK 115 million has been provided making the total fund amount NOK 341,380,811.76. The State has received an on-account payment in the amount of NOK 130 million.

(15) During the fund proceedings a series of dispute issues arose. These were addressed in fund meetings on 24 September and 5 November 2013 based on a recommendation from the appointed fund administrator, cf. section 241 of the Maritime Code. As regards the points of dispute outstanding after the fund meetings, Oslo District Court stipulated a deadline for filing suit under section 241 fourth subsection of the Maritime Code.

(16) On 15 January 2014, Dalnave and Gard filed a writ with Oslo District Court regarding several of the points of dispute. In addition, they submitted that the decision to remove the aft section of the ship was invalid. Avena has since joined the claimants' side. The State, represented by the Ministry of Trade, Industry and Fisheries, filed a writ concerning other points of dispute in the fund proceedings. One of these was settled during the case preparation before the District Court. These two cases were consolidated for a joint hearing and a joint decision. It is these two cases that are now being heard by the Supreme Court.

(17) In addition, a dispute is pending as to what the guarantee arnount of NOK 115 million may be used to cover.

(18) During the Oslo District Court hearing the Ministry of Transport took over the procedural capacity on behalf of the State. On 9 January 2015, Oslo District Court handed down judgment in the two amalgamated cases with the following conclusion:

"In case 14-009365:

1.1. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 regarding wreck removal is invalid in relation to Dalnave Navigation Inc.

1.2. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 regarding wreck removal is valid in relation to Avena Shipping Co. Ltd.

1.3. The obligation to remove the wreck is valid irrespective of the limitation of liability in chapter 9 of the Maritime Code.

2. The claims for a refund of operating costs incurred in the use of the State's vessels, the emergency response supplement for the crews on the vessels of the Coastal Administration's Shipping Company and the Coastal Administration's Shipping Company's administration costs in connection with the operation to prevent oil pollution following the casualty of the MV Server will be approved in the limitation fund.

3. The claim for a refund of input VAT which the Coastal Administration has paid will be approved in the limitation fund.

4. The Coastal Administration is entitled to default interest on approved claims in the limitation fund from the establishment of the limitation fund until payment is made.

5. Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard - Mutual shall jointly and severally pay the State represented by the Ministry of Transport NOK 1,461,449 - onemillionfourhundredandsixtyonethousandfourhundredandfourtynine - by way of costs within 2 - two - weeks from service of this judgment.

In case 14-011646:

1. The claim for a refund of VAT in the amount of NOK 10,644,928.22 -tenmillionsixhund redandfourtyfourthousandninehundredandtventyeight 22/100 - which the Coastal Administration has paid to municipalities and inter-municipal action control groups in connection with the operation to prevent oil pollution following the casualty of the MV Server will not be approved in the limitation fund.

2. The State represented by the Ministry of Transport shall pay to Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard - Mutual a total amount of NOK 250,000 - twohundredandfiftythousand - by way of costs within 2 - two - weeks from service of this judgement."

(19) Avena, Dalnave and Gard appealed to Borgarting Court of Appeal against the conclusion of judgment in case no. 14-009365 with the exception of point 1.1. This action was filed by them. The State, which had filed action no. 14-011646, appealed against the judgement in that matter, as well as against point 1.1 of the conclusion of judgment in case no. 14-009365. During the preparation of the appeal proceedings, a few further points of dispute were waived or settled.

(20) On 4 March 2016, the Borgarting Court of Appeal handed down judgment with the following conclusion:

"**Oslo District Court case no. 14-009365TVI-OTIR/04:**

1. The court finds for the State represented by the Ministry of Transport regarding the submission that the Ministry of Trade, Industry and Fisheries'

decision of 13 June 2012 relating to wreck removal is invalid in relation to Dalnave Navigation Inc.

2. The Appeal from Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - is dismissed.

3. By way of costs before the Court of Appeal Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - shall pay jointly and severally NOK 3,698,131 - threemillionsixhundredandninetyeightthousandonehundredandthirtyone - to the State represented by the Ministry of Transport within two weeks from service of judgment.

Oslo District Court case no. 14-011646TVI-OTIR/4:

1. The appeal from the State represented by the Ministry of Transport is dismissed.

2. By way of costs before the Court of Appeal the State represented by the Ministry of Transport shall pay NOK 250,000 - twohundredandfiftythousand - to Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - within two weeks from service of judgment."

(21) The State appealed against the Court of Appeal's judgment in respect of case 14-011646TVI-OTIR/04 to the Supreme Court. The appeal concerns the application of the law and assesment of evidence as regards the issue whether the State is entitled to claim that the owners side shall cover VAT which - the Court of Appeal found - had been erroneously added to the claims from municipalities and inter-municipal action control groups, but which the Coastal Administration has refunded. Avena, Dalnave and Gard appealed against the judgment insofar as it concerns Oslo District Court case no. 14-0009365TVI-OTIR/04. The appeal concerns the application of the law and on one point also the assessment of evidence.

(22) On 29 July 2016, the Appeal Cornmittee of the Supreme Court decided to allow the State's appeal to go forward for a hearing. The appeal from Avena, Dalnave and Gard was referred for a hearing as regards the courts' right to apply a different statutory condition than the one on which the Ministry's order to remove the wreck was based, whether Dalnave can be the liable party as regards the wreck removal obligation, whether the limitation of liability rules of the Maritime Code comprise an imposed duty to act under the Pollution Control Act and whether paid VAT may form part of the State's refund claim.

(23) A written statement has been submitted to the Supreme Court from Alkiviadis Sficas, who at the time when the statement was made was part of the Dalnave management and who has earlier held various different positions in the company. He is the son of Dimitrios Sficas. Otherwise, the case is in essentially the same position before the Supreme Court as before the Court of Appeal.

(24) The appellants in the part of the case before the Court of Appeal and the Supreme Court which concerns case no. 14-009365TVI-OTIR/04, and the respondents in the part of the case which concerns case no. 14-011646TVI-OTIR/O4 — *Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual* - have essentially submitted:

(25) The Court of Appeal erred in its conclusion that the Coastal Administration is entitled to include VAT, which the Coastal Administration has paid on goods and services procured from traders in its refund claim against the owners side. This VAT has already been paid to the Treasury according to the rules relating to VAT, and the State cannot claim payment once again, now as a refund claim according to the Pollution Control Act. One cannot distinguish between the State as a body entitled to VAT and the State as a pollution control authority. The State is a legal person. VAT consequently does not constitute part of "the public authorities' costs, damage or loss", which may be claimed under section 76 of the Pollution Control Act.

(26) Decisive weight cannot be attached to Rt.[1] 2004 page 723 where the Appeal Committee, without giving any further grounds, accepted that the State, when it has bought external legal services, is also entitled to claim the VAT imposed on the lawyer's fee. The decision concerned the rules of the Dispute Act relating to litigation costs, not section 76 of the Pollution Control Act.

(27) In this respect VAT cannot be compared with special taxes or income tax on wages or salaries, which form part of the calculation of remuneration for services procured by the Pollution Control Authority. Income tax is a subject tax collected from a third party. VAT is an object tax that applies to transactions. Special taxes are end-user taxes without any system for input and output tax.

(28) The State's appeal, which concerns a different VAT issue, cannot be allowed. The Coastal Administration cannot claim VAT which has erroneously been incorporated in a refund claim from the municipalities and inter-municipal action control groups thereby having erroneously been paid by the Coastal Administration. The fact that the tax authorities at one point relied on a different view of the tax issue is irrelevant.

(29) Section 76 first subsection of the Pollution Control Act provides an objective refund obligation to the public authorities and in return it is subject to the condition that it applies only to objectively speaking correct costs. Whether or not the State has acted with due care in the processing of this issue is irrelevant.

(30) To see the State's refund claim as a claim for damages provided in section 191 of the Maritime Code does not lead to a different result.

(31) Should the State nevertheless be considered to be entitled to claim reimbursement for the erroneous VAT claims from the municipalities, this must be subject to the condition that the State has acted with due care. This the State has failed to do.

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[1]Rt. is a publication containing Norwegian Supreme Court judgments.

(32) The Court of Appeal did not have competence to hear the issue whether the wreck-removal order was valid based on the requirement "may cause damage or nuisance to the environment" in section 28 cf. section 37 of the Pollution Control Act. This is due to the fact that the Ministry failed to take a stand on this issue, relying instead on the alternative requirement "being unsightly... for the environment". A wreck-removal order is something that the Pollution Control Authority "may" impose under section 37 second subsection of the act. Here it is necessary to exercise discretion where the advantages of removal must be compared to the disadvantages and costs. The assumption that such discretion is unaffected by which statutory requirement it shall be based on cannot be accepted. The courts' review of administrative decisions is limited to a review of legality. They are not entitled to try the administration's exercise of discretion beyond what follows from the principles of "abuse of authority" and, even less, exercise the discretion themselves.

(33) It is irrelevant that the State, represented by the responsible Ministry, during the fund proceedings has argued that the decision is valid also based on the requirement "cause damage or nuisance to the environment".

(34) Under any circumstances, the courts would in that respect have been required to conduct a far more thorough review of this requirement than what the Court of Appeal has done.

(35) The Court of Appeal also erred when finding that the wreck-removal order could be addressed to Dalnave. Pursuant to section 37 second subsection of the Pollution Control Act such an order can only be addressed to the ship's "owner", which is Avena. There is no basis for regarding Dalnave as "owner" in the sense of this provision, even if Dalnave according to the management agreement with Avena exercises such powers as are otherwise regarded as typical owner's powers. The management agreement between Avena and Dalnave was an ordinary management agreement and it was still Avena that carried the financial risk for the ships earnings and value in the event of a resale.

(36) As the case now stands, Dalnave furthermore cannot be regarded as "the responsible party" under section 7 of the Pollution Control Act to remove pollution, and accordingly the aft section of the vessel, as alleged by the State. And, section 7 can in any event not apply if the removal of the wreck is based on it being "unsightly" rather than "causing damage or nuisance" to the environment.

(37) Finally, the limitation rules in the Maritime Code must also, contrary to what the Court of Appeal has found, limit the duty to comply with an order from the Pollution Authority to remove the wreck. This follows from the wording of the limitation provision in section 172a of the Maritime Code, which concerns "claims in connection with....removal". Such an understanding also follows from the wording of earlier provisions on this issie, and from the wording of the international conventions on which these provisions are based.

(38) If the wreck-removal duty is not subject to the limitation rules, non-compliance would result in the possibility of making a financial gain. The Coastal Administration's refund claim after it has been forced to clean up is clearly comprised by the limitation rule.

(39) An attempt by the Ministry of the Environment in 2001 to incorporate a provision in the Pollution Control Act to the effect that the wreck-removal duty was unaffceted by the

limitation rules of the Maritime Code encountered strong resistance in the round of consultations. Several pointed out that it was wrong of the Ministry to assume that this was already current law. The amendment was not enacted. When the rules of the Maritime Code relating to limitation of liability were later amended, it was admittedly stated in the preparatory works that the limitation rules did not apply to the wreck-removal duty. But the statements concerned current law before the amendment and were incorrect. These statements accordingly cannot form the basis of the interpretation of the new section 172a as to which requirements are comprised by the limitation right. The wording of what has now become seetion 172a was maintained more or less unchanged as compared to the earlier provision. It cannot be assumed that there was a wish to change the prevailing state of the law.

(40) *Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual* - have submitted the following statement of claim/defence:

"I The State's appeal

1. The appeal to be dismissed.

2. Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - to be awarded costs before the Supreme Court.

II The owners side's appeal

On behalf of Dalnave Navigation Inc.

1.1 The District Court's conclusion point 1.1 to be affirmed.

1.2 In the alternative, the Court of Appeal's judgment to be dismissed.

1.3 In the further alternative, Dalnave Navigation Inc. to be granted the right to limit its liability according to the wreck-removal order laid down in the decision by the Ministry of Trade, Industry and Fisheries on 13 June 2012.

On behalf of Avena Shipping Co. Ltd.

2.1 The Court of Appeal's judgment to be dismissed.

2.2 In the alternative, Avena Shipping Co. Ltd. to be granted the right to limit its liability according to the wreck-removal order laid down in the decision by the Ministry of Trade, Industry and Fisheries on 13 June 2012.

On behalf of Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard - Mutual -

3. The decision by the Ministry of Trade, Industry and Fisheries dated 13 June 2012 to be found invalid as regards the claim for state VAT. The claim not to be approved in the limitation fund.

4. Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - to be awarded costs before all courts."

(41) The appellant in case 14-011646TVI-OTIR/04 and respondent in the part of the case that concerns case 14-009365TVI-OTIR/04 - *the State represented by the Ministiy of Transport* - has essentially submitted:

(42) The court cannot allow the owners side's submission that the State is prevented from claiming a refund of VAT which has been paid by the Coastal Administration to commercial suppliers. It follows from Rt. 2004 page 723 that it is necessary to distinguish between the State as a party entitled to VAT and the State as a buyer subject to VAT. VAT is charged to all final end-users, also the State itself. VAT is therefore part of "public authorities' costs, damage or loss" which is claimed under section 76 of the Pollution Control Act.

(43) However, the Court of Appeal erred in its finding that the State is not entitled to a refund of the VAT which some of the municipalities have, partly through inter-municipal action control groups, added to their claims for remuneration from the Coastal Administration. This is VAT which the State, represented by the Coastal Administration, has paid according to invoices from municipalities and action control groups.

(44) The Supreme Court must decide whether it was correct to charge VAT in these cases. Even if the Supreme Court were to find that this was incorrect, the State is entitled to have the VAT refunded from the owners side. The State is not subrogated to the municipalities' claim. It is the Coastal Administration's operation, and it follows from section 76 of the Pollution Control Act that the Coastal Administration is entitled to a refund of its costs incurred in such an operation.

(45) If section 76 of the Pollution Control Act should not give the State a right to a refund of the VAT which formed part of municipal claims, the State's claim for a refund of the VAT has an alternative basis in the compensation rule in section 191, cf. section 208, of the Maritime Code. This is something the Court of Appeal has overlooked.

(46) The only basis for exempting the VAT which formed part of municipal claims against the State, must be negligence on the part of the State, cf. Rt. 2010 page 291 relating to the State's responsibility for misinterpretation of the law. The Coastal Administration has not acted negligently. To assume that t sale subject to VAT had taken place was ajustifiable interpretation of the law, which was also in accordance with the Tax Authorities' own position until 2013.

(47) The Court of Appeal was entitled to assess the validity of the wreck-removal order on the basis of the requirement "damage or nuisance to the environment" in section 28, cf. section 37, of the Pollution Control Act. Even if the Ministry as an appellate authority did not take a stand on this requirement, the Coastal Administration as first instance authority had concluded that it had been satisfied. The courts are free when it comes to application of the law. The "may discretion" which must be exercised with regard to whether a wreck-removal ordet shall be issued is not influenced by the condition on which the decision is based.

(48) Under any circumstances, any deficiency in this respect must be considered to have been remedied by the responsible ministry during the fund process having argued that the decision is valid also on the basis of the condition "harm or nuisance".

(49) The Court of Appeal's application of the law is correct also in its conclusion that the wreck-removal order could be addressed to Dalnave as the management company for the MV Server. The term "owner" in section 37 second subsection of the Pollution Control Act relating to shipwrecks and certain other particularly large objects must be interpreted in light of the fact that a removal order regarding waste under section 37 first subsection can be issued to anyone who has left waste. Over time there has been a development in the waste coneept so that now, in contrast to when the Pollution Control Act was new, it also comprises shipwrecks. It must also be taken into consideration that in legislation in general flexible owner concepts are frequently used. Under any circumstances, the wreck removal order can be addressed to Dalnave as "the responsible party" for the pollution pursuant to section 7 of the Pollution Control Act.

(50) As the Court of Appeal has concluded, the duty to comply with the wreck removal order is not limited by the liability limitation rules in the Maritime Code. The amendment to the rules in the Maritime Code relating to limitation of liability in the removal of wreck and cargo enacted in 2005 is explicitly based on an assumption on the part of the legislator that an order to the owner to remove the wreck himself falls outside the limitation rules. Even if this is expressed as an interpretation of already prevailing law, it is a legislator's statement regarding the understanding of the new rules of law and must be relied on as such. Also as an interpretation of former law this statement is furthermore correct. That the limitation rules become applicable if the public authorities carry out the wreck-removal and claim the costs involved from the owner is another matter.

(51) *The State, represented by the Ministry of Transport*, has submitted the following statement of claim/defence:

"I. The owners side's appeal, Oslo District Court's case no. 14-009365TVI-OTIR/04:

1. The appeal to be dismissed.

2. Avena Shipping Co. Ltd, Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - to pay jointly and severally the costs of the State represented by the Ministry of Transport before the Supreme Court.

II. The States appeal, Oslo District Court case 110. 14-011646TV1-OTIIR/04

1. The Coastal Administration's claim for a refund of or compensation for VAT paid to municipalities and action control groups in connection with the Server operation to be approved in the amount of NOK 10,644,928.22 in the limitation fund.

2. Avena Shipping Co. Ltd, Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual - to pay jointly and severally the costs of the State represented

by the Ministry of Transport before the District Court, the Court of Appeal and the Supreme Court."

(52) *My view of the case*

(53) The case gives rise to several issues arisen in connection with the processing of the financial settlement after the casualty of the MV Server on 12 January 2007. Some of these, which concern the validity of the wreck removal order, are significant also outside the fund proceedings.

(54) *The value added fax issues*

(55) The case gives rise to two VAT issues. I shall first address what has in the case, for example in point 11.3 in the owners sides statement of claim before the Supreme Court, been referred to as "state" VAT, and to which I will refer as "state paid VAT". It is in this context only meant as a simple description of VAT that has been paid by the Coastal Administration to business enterprises and self-employed persons subject to registration who have supplied goods and services directly to the Coastal Administration. The opposite is "municipal" VAT used as a simplified description of VAT that has formed part of some of the refund claims which municipalities and inter-municipal action control groups have presented to the Coastal Administration. I will be referring to this as "VAT on municipal refund claims". The owners side has appealed against the Court of Appeal's decision on the state paid VAT, while the State has appealed against the Court of Appeals's judgement as regards the VAT on municipal refund claims.

(56) *State paid VAT*

(57) It has not been disputed that the Coastal Administration was obliged to pay VAT on the goods and services which the Coastal Administration bought from business enterprises and self-employed persons subject to registration. The Coastal Administration is not involved in sales subject to VAT and does not have any right to claim deduction for input VAT. The gross amount paid consequently constituted an accounting cost for the State.

(58) The VAT paid by the Coastal Administration has reached the Treasury through the usual system for the colleetion of VAT. If the VAT forms part of the amount which the owners side has to refund to the Coastal Administration after the pollution operation it is, financially speaking, clear that the State will receive the amount in question in the Treasury once again. The question is whether this is right.

(59) I would first like to mention that the introduetion of the net recording system in 2015 does not have any bearing on the answer. Up until 2015 VAT was paid by state agencies and charged to these agencies in budgets and accounts. From 2015, VAT is entered in budgets and accounts in a central chapter for VAT. On the other hand, the allocations to state enterprises have been adjusted downwards corresponding to anticipated VAT costs. It is specified in Prop.1 5 (2014- 2015), page 85, that this is an administrative system within the public administration and not part of the VAT system. The State thus pays VAT on the purchase of goods and services to the same extent as before, and VAT is still recorded as an expense.

(60) As the owners side has emphasised, the State is in principle regarded as one legal person. It is furthermore a fundamental principle in the law of damages that one and the same loss shall only be compensated once. This principle must also apply to section 76 of the Pollution Control Act to the effeet that the public authorities "costs, damage or loss" in the implementation of interventions to prevent pollution under section 74 shall be covered by the persons responsible for the pollution.

(61) In Rt. 2004 page 723 paragraph 23 the Appeal Committee concluded that it is necessary to distinguish between the State as a consumer of services subject to VAT and the State as a VAT collector. Concretely the case concerned VAT on a claim for fees from a lawyer in private practice whom the State had retained. The State had included the VAT in a claim for costs according to the Dispute Act.

(62) The arguments that support that the State cannot include VAT on the Coastal Administration's own purchases during the intervention to prevent pollution - the State as a legal person and the financial effect of including VAT - are similarly applicable to costs in the form of expenses for external lawyers.

(63) The decision from 2004 was later applied in case law, even though the introduction of the net recording principle in 2015 allegedly resulted in some uncertainty concerning this issue. However, as I have explained, the net recording principle does not entail a relevant change. I hesitate to change something that has now become an established system.

(64) The decision is also reasonable. A consistent implementation of the views emphasised in support of claiming deduction for taxes to the Treasury would lead to major practical problems. It is not only as a creditor for VAT that the State may easily end up with "the same" amount twice in refund or compensation settlements. The same would apply for example to income tax on payroll expenses which form part of claims which the State has had to satisfy and subsequently claimed refunded or compensated. Admittedly, there are many fundamental and practical differences between ineorne tax and VAT and, for that matter, between VAT and other state taxes and it is, technically speaking, considerably easier to make deductions for VAT than for income tax. But the views about the State as one legal person and double payment also apply to these cases.

(65) For anyone who has to indemnify or refund the State's expenses, including VAT, such a system means that the level of expenditure will be the same as if a person had paid the expenses himself the first time around, unless he was entitled to claim deduction or refund for input VAT on the expenditure,

(66) Accordingly, the State has in my view the right to include VAT which the Coastal Administration has paid to business enterprises and self-employed persons in its claim under section 76 of the Pollution Control Act, and the owners side's appeal on this point must be dismissed.

(67) *VAT on municipal refund claims*

(68) The second VAT issue in the matter concerns VAT that has formed part of claims from municipalities and inter municipal action control groups against the Coastal Administration

according to section 75 second subsection, cf. section 47 second subsection, of the Pollution Control Act, and which the Coastal Administration has paid without making any reservation. The Court of Appeal concluded that the State could not claim this VAT from the owners side pursuant to section 76 first subsection second sentence of the Pollution Control Act relating to the claiming of costs under section 75. The State's appeal against this point in the Court of Appeal's judgment gives rise to two issues.

(69) The first issue is whether the municipalities' and the action control groups' efforts during the State organised operation to prevent pollution must be regarded as "sales" in the sense of the VAT Act, section 3-1 of the current VAT Act and section 13 of the former act. If the municipal effort, directly or through inter-municipal action control groups, means "sales", output VAT will be charged to the Coastal Administration, while input VAT shall be deducted. If this effort shall not be regarded as "sales", the municipalities shall not charge output VAT but they may on the other hand claim their gross expenditure refunded by the Coastal Administration. In principle, this includes input VAT, the purchase of goods and services, but input VAT shall nevertheless be deducted to the extent that it is covered by VAT compensation from the State.

(70) Here the involved municipalities and inter-municipal action control groups have adopted different positions, and certain municipalities moreover do not appear to have had a consistent position on the issue. Regardless whether the efforts of the municipalities and the action control groups shall be regarded as "sales" or not, some of the relevant municipalities and inter-municipal action control groups have adopted an incorrect position. However, there is agreement between the owners side and the State that if the effort shall not be regarded as sales, the Coastal Administration has refunded an excess amount of NOK 10, 644,928.22 to the municipalities. The second issue on which the Supreme Court must in that case take a position is whether this amount can nevertheless be included in the State's claim against the owners side.

(71) The uncertainty in the municipalities may be attributable to the fact that the VAT authorities and the State Pollution Control Authority have from the outset not had any clear position on this issue. The Tax Directorate has issued a notification dated 24 April 1978 that a municipal effort is not subject to VAT. The reason was that the work must be regarded as carried out for the municipality itseif even if remuneration was paid in the form of a refund from the polluter's insurance company. The situation in the event of a state organised operation was not expressly addressed. The same can be said about an information letter from the State Pollution Control Authority from 1995, while a circular from the Coastal Administration in 2008 about "current practice" seems to assume that nor is there any VAT liability if the effort is the result of a request or an order from the State or another municipality.

(72) After the owners side raised the issue, the Coastal Administration presented the issue to Tax Mid-Norway, which on 12 November 2010 stated that the services which municipalities and inter-municipal action control groups provide in return for a refund of expenses relating to assistance and clean-up in connection with state operations shall be regarded as sales subject to VAT. This position was maintained by the Tax Directorate in a letter to the Ministry of Finance dated 4 March 2011. The Tax Directorate distinguished between the municipalities' obligation to assist in state operations pursuant to section 47 second paragraph of the Pollution Control Act, which triggers an obligation for the State

under section 75 to pay "remuneration", and the municipalities' duty under section 46 second subsection of the Pollution Control Act to take action on their own initiative, which under section 76 first subsection first sentence, triggers a right for the public authorities to claim the expenses "covered" by the person responsible for the pollution. The Tax Directorate asserted that the latter only entailed a recourse claim which, in contrast to a claim for 'remuneration', did not entail "sales". The VAT compensation system nevertheless meant that input VAT had to be deducted in those cases. In a letter of 23 June 2011, the Ministry of Finance had "no comments" on the Tax Directorate's view.

(73) However, after the matter was raised again, the Ministry of Finance changed its view. In a letter dated 29 May 2012 the Ministry stated that "the sales concept must be restricted so as to exclude cases that would have triggered an independent duty of action for the relevant municipality, possibly represented by an inter-municipal control group, if the State had not taken charge of the operation". In other words: In the event of pollution accidents which trigger a duty of action under the Pollution Control Act for the municipality or the inter-municipal action control group in question, there are no sales and accordingly no VAT liability either, even if the State takes charge of the operation.

(74) The reasons for this given by the Ministry is that when a municipality is struck by an acute pollution accident or an accident with a potential for polluting the municipality, a series of obligations are triggered for the municipality under the Pollution Control Act. The core of these obligations is that the pollution shall be fought, and the municipality's resources form part of the emergency plans also at national level. Whether the use of resources is controlled by the municipalities themselves or is subjected to a state headed operation will depend on a partly discretionary evaluation. It is conceivable that the State would head parts of an operation in parallel and in co-operation with measures headed by a municipality. A distinction between state and municipal operations might lead to random consequences.

(75) The Ministry also points to the fact that the distinction in the Pollution Control Act between "remuneration" and refund is not sharp - under section 75 fourth subsection, municipalities that have incurred substantial costs in dealing with acute pollution in a non-state headed operation will receive "remuneration" from the State. In the preparatory works, the comments in Ot.prp. no. 11(1979-90) on what became section 75 of the act, this is referred to as "refund".

(76) I find the reasons given by the Ministry convincing and agree with the Court of Appeal that it reflects current law also for the period of time before they were given.

(77) It is not disputed that the MV Server's casualty resulted in a pollution accident which triggered the duty of action for the municipalities affected. Admittedly, municipalities that were not themselves directly affected participated in some of the inter-municipal action control groups that took part in the operation. But the system itseif of inter-municipal action control groups must mean that also these municipalities must be regarded as having a duty to participate through the relevant inter-municipal action control group.

(78) Municipalities and inter-municipal action control groups should accordingly not have treated their participation in the operation as sales subject to VAT, and the Coastal Administration has refunded an excess amount of NOK 10,644,928.22 to the municipalities. The next

question will be whether the State may nevertheless include this amount in its claim against the owners side.

(79) The Court of Appeal has interpreted section 76 first subsection of the Pollution Control Act providing that the public authorities' "costs" may be claimed to mean that it is only de facto and necessary costs that can be claimed. From this the Court of Appeal has concluded that it must be a question of payments founded on a factually and legally correct basis. This shall apply even if the Coastal Administration has not been negligent in the processing of the claims.

(80) I agree with the Court of Appeal. The refund obligation under section 76 is through section 74 linked to section 7 concerning the polluter's own responsibility for initiating measures, which must be regarded as restricted to reasonable and necessary measures, cf. NOU 1977:11 page 19, and Bugge, The Pollution Responsibility - The financial responsibility for preventing, repairing and indemnifying damages in case of pollution, page 364. As emphasised in NOU 1977:11 as well as by Bugge, there may be professional doubt as to what measures are reasonable and necessary to initiate following a pollution. In a pressured and confused situation measures may be initiated which later prove to have gone too far without this having any impact on the extent of the refund duty as long as the pollution authority has acted with due care. This is nevertheless a situation of an entirely different nature than an erroneous application of the VAT legislation in the subsequent financial settlement. Here there is no reason to let the public authority's right to a refund include incorrect VAT claims.

(81) The State has submitted that the refund claim against the owners side also has a legal basis in section 191 of the Maritime Code relating to strict liability for pollution damage. However, I am of the opinion that the solution must be the same and refer to NOU 1977:11 pages 12 and 19: Also if general principles in the law of damages are applied, liability must be limited to reasonable and necessary sensible - costs. This was an, objectively speaking, unnecessary cost for the State, and the point of departure must therefore be that it cannot be claimed.

(82) The State has referred to Rt. 2010 page 291, where the Supreme Court found that the public authorities are not strictly liable for damages for unauthorised exercise of authority based on a misinterpretation of the authorising statute. But there is a difference between the question when the public authorities shall be liable for a loss caused to private persons in such a connection and the question whether the public authorities in their capacity as the injured party shall bear the risk of an unnecessary cost which the public authorities have incurred themselves due to a misinterpretation of the law.

(83) In this light the State's appeal must be dismissed.

(84) *Can the courts try the validity of the wreck removal order on the basis of another condition in the law than the one on which the decision is based?*

(85) The order to remove the aft section of the ship from the location of the casualty is abased on section 37 second subsection of the Pollution Control Act, where it states that an order "may" be given to remove wrecks abandoned in violation of section 28. It is prohibited to abandon for example shipwrecks that may "appear unsightly or cause damage' nuisance to the environment".

(86) In the Coastal Administration's letter of 27 May 2011 the reasons given for the order to remove the aft section of the ship from the location of the casualty were that the wreck might cause damage or nuisance to the environment. In the reasons the Coastal Administration stated that a shipwreck which is located in a nature reserve may in practical terms always cause nuisance to the environment. It had therefore not been found necessary to initiate any major environmental investigation; the experience which the Coastal Administration had with other shipwrecks provided sufficient grounds for the decision.

(87) The owners side appealed to the Ministry of Trade, Industry and Fisheries. In the owners side's view, the failure to conduct any investigations constituted a procedural error. The owners side also alleged that the situation at the location of the casualty indicated that there was no risk of any damage or nuisance to the environment so that the Coastal Administration's decision in this respect was also based on a misapplication of the law.

(88) In its submission of the appeal to the Ministry, the Coastal Administration pointed out that a shipwreck which is left in a nature reserve will also be unsightly even if it is not visible above the water. The Ministry referred to this statement and maintained the order to remove the aft section of the ship on the basis of the following application of the law:

> *"The Ministry thus finds that the aft section of the Server is a shipwreck which is clearly unsightly for the environment and that the conditions for issuing an order pursuant to section 37, cf. section 28, of the Pollution Control Act were accordingly satisfied. In this light the Ministry sees no need to consider whether the aft section may cause damage or nuisance to the environment."*

(89) The Ministry thus explicitly omitted to take a position on the question whether the aft section constituted damage or nuisance to the environment.

(90) During the fund proceedings the State has argued that also the condition regarding damage or nuisance to the environment is satisfied. Both the owners side and the State have invested considerable resources in clarifying the environmental situation at the location of the casualty. The parties still disagree whether this condition is satisfied.

(91) In its judgment the District Court found that the condition "unsightly ... for the environment" was not satisfied, but that the District Court was also competent to decide whether the decision was valid based on the condition regarding damage or nuisance. The District Court found that this condition was satisfied, and did not review the issues of the reasonableness or proportionality of a removal order on this basis, beyond what follows from what is known as the abuse-of-authority doctrine. The District Court concluded that the Ministry's decision was valid.

(92) The Court of Appeal reached the same conclusion as the District Court regarding its competence to try the validity based on the condition related to damage or nuisance to the environment. Also the Court of Appeal found that the condition was satisfied, that proportionality could not be tried beyond the parameters for "abuse-of-authority", and that the decision was valid. The Court of Appeal did not take a position on the question whether the condition "unsightly... for the environment" was also satisfied.

(93) In the referral decision from the Appeal Committee of the Supreme Court the owners side's appeal on this point was only referred for hearing as regards the issue whether the court is competent to evaluate the validity of the decision on the basis of different condition under the law than the one on which the appellate court has relied. If the Supreme Court should conclude that the court does not have such competence, the Court of Appeal's judgment will in that respect have to be overturned so that the Court of Appeal can decide on the validity based on the condition on which the Ministry relied.

(94) Under section 37 of the Pollution Control Act it does not follow automatically that a removal order shall be issued if one of the conditions in section 28 is satisfied. This is something that the Pollution Authority 'may' do. The exercise of discretion based on such "may-rules" is something that the courts as a main rule do not review beyond the principles for so-called abuse-of-authority.

(95) The State has submitted that the result of the exercise of discretion must be the same regardless of whether the decision is based on the wreck being "unsightly" or whether it "causes damage or nuisance". The public administration shall, in any event, weigh all pros and cons and there are no indications that the Ministry excluded certain considerations because it based the decision on another of the statutory conditions than what the Coastal Administration did, it is alleged.

(96) I do not agree that the courts can automatically rely on such an assumption. There may be a certain difference both in terms of what considerations are relevant and - at any rate - in terms of how the pros and cons shall be weighed depending on whether the exercise of discretion is based on one or the other of the statutory conditions.

(97) In my view, the main rule must therefore be that when an administrative decision has to be made on a discretionary basis which the courts do not review, the courts hearing on the validity of the decision must be based on the same statutory condition as the public administration has applied. Otherwise, the courts may end up maintaining a decision which the public administration would not have made. In this connection I refer to Rt. 1964 page 93, which must be considered to be based on this view, see Eckhoff and Smith, "Forvaltningsrett" (Administrative Law),10th edition, page 462.

(98) There are examples in case law that administrative decisions have been reviewed and found valid on the basis of other conditions in the authorising statute than what the public administration has applied. This is for example the case in Rt. 1979 page 246. However, in that event, the case must be in such a position that the courts do not thereby put themselves in the place of the public administration as regards the exercise of discretion presupposed by the law.

(99) When the Ministry in the decision explicitly states that it does not take a position on the condition "damage or nuisance, it must in my view be clear that the courts cannot base the review of the validity of the decision on this condition. In this case, the appellate court had not even taken a stand on the extent to which the wreck would lead to damage or nuisance.

(100) The State has further pointed out that the State, represented by the Ministry, has during the fund proceedings argued in favour of the removal order being valid also on the basis that the aft section may cause damage or nuisance to the environment. This shows that the Ministry wants the aft section removed also on this basis, it is submitted. However, I fail to see that a position which the State adopts in a dispute can replace the exercise of discretion which is required in the administrative hearing of the case. During the dispute other considerations come into play and may have an influence on the positions adopted. This will also apply during the fund proceedings.

(101) As I see it, the owners sides appeal must thus be upheld on this point.

(102) *Can a wreck-removal order be addressed to the ship's management company?*

(103) In contrast to the District Court, the Court of Appeal concluded that the wreck-removal order was in fact addressed to Dalnave, the management company of the MV Server, not just to Avena, which is the ships registered owner. The Court of Appeal further concluded that the wreck-removal order could be addressed to Dalnave. The Supreme Court is only required to take a position on the latter.

(104) Seetion 37 of the Pollution Control Act constitutes the legal basis for the order. First and second subsections read as follows:

> *"The municipality may order any person that has discarded, emptied or stored waste in contravention of section 28 to remove it, clear it up within a specified time limit, or pay reasonable costs incurred by others in removing or clearing up the waste. Such an order may also be issued to any person that has contravened the first or third subsection of section 35 if this has resulted in the spread of waste.*
>
> *The Pollution Control Authority may also issue an order to any person that was the owner of a motor vehicle, ship, aircraft or other similar large object when it was discarded in contravention of section 28, or to any person that is the owner when the order is issued, to clear up and remove the same object."*

(105) While the first subsection concerns waste in general, the removal of ship, aircraft or other similar large object" is regulated by the second subsection. In Ot.prp. no. 11(1979-80) page 149, the reason given for the special rule is that these are such large objects that it is not natural to refer to them as "waste".

(106) Section 28 first subsection provides that no person may empty, discard, store or transport waste in such a way that it is unsightly or may cause darnage or nuisance to the environment. Until an amendment in 2016, the first subsection contained a second sentence to the effect that the provision in the first sentence "also [applies to] shipwrecks, aircraft wrecks and other similar large objects". The reason was also here that these objects were too large to be regarded as "waste".

(107) In other words, the legislative history shows that the reason why it is provided in section

37 second subsection that the Pollution Control Authority may also issue an order to the owner to remove a ship was that the first subsection was not considered to provide a legal basis for the removal of such large objects. The intention was thus not primarily to identify the duty subject in a different manner than under the first subsection or to place competence with other agencies.

(108) In 2016, section 28 first subsection second sentence was rescinded on the grounds that the concept of waste had developed in such a way as to now naturally comprise shipwrecks and similar large objects, cf. Pro. 89 L (2015-2016) page 14. It was also pointed out that this was in accordance with the waste concept in EU/EEA law. However, section 37 second subsection was retained unchanged because the provision has independent significance. The independence significance referred to must then in the first place be that the duty subject is identified differently in section 37 first and second subsections - any person that has discarded, emptied or stored waste in the first subsection - in contrast to the owner when the object was discarded or when the order is issued in the second subsection. Secondly, competence under the first subsection is placed with the municipality, while under the second subsection it is placed with "the Pollution Control Authority. For shipwrecks the competence is delegated to the Coastal Administration.

(109) The amendment to the law in 2016 shows that today it would not have been considered necessary to have a separate provision relating to ships in section 37 only out of consideration for the waste concept. But whether the removal order could be addressed to Dalnave must be decided on the basis of the act as it read when the Ministry made its decision in 2012. Even if there may already at that time have been an evolution of opinions on the waste concept, the act was at that time still based on the principle that shipwrecks fell outside the concept.

(110) I fail to see that the relevant EU/EEA rules regulate the persons who can be ordered to remove waste in the form of shipwrecks.

(111) Accordingly, it becomes decisive for the question whether the wreck removal order could be addressed to Dalnave that the company falls within the owner concept in section 37 second subsection.

(112) The choice of the owner as duty subject in section 37 second subsection rather than "any person that has discarded, emptied or stored waste" in the first subsection is not commented on in any detail in the preparatory works. The fact that the provision does not use the term "registered owner" must in my view be interpreted to mean that it is not limited to registered owner if the real owner is someone else. In this connection, I refer to the fact that section 35 of the Harbour Act has a more or less parallel rule relating to the Harbour Authorities' right to demand the removal of shipwrecks, where the duty subject is stated as the "registered owner or owner".

(113) The agreement between Avena and Dalnave is called a "management agreement". The name cannot be decisive in itself. It is necessary to look at the content of the agreement entered into and the general circumstances,

(114) The Court of Appeal has taken as its point of departure that "Dalnave was not the owner

of the ship", and that "what is described as the relationship between Avena and Dalnave is [not]... sufficient for the general corporate relationships to be set aside with the effect that Dalnave can be regarded as the owner of the MV Server in every context". The reason why the Court of Appeal has nevertheless concluded that also Dalnave must be regarded as "owner", as this concept must be understood in section 37 second subsection of the Pollution Control Act, is that Dalnave "was and is... in a position to exercise a number of the powers which an owner normally holds".

(115) Here I cannot follow the Court of Appeal. It is typical in shipping that some of the powers which an owner normally holds are sourced out to different companies. This was also the case when the Pollution Control Act was adopted. If the intention had been that also such companies were to be regarded as "owner" in the sense of this provision, it would have been natural to specify this in the act. This is especially the case because the responsible party in section 37 first subsection is stated to be "any person that has discarded, emptied or stored waste" and can accordingly and clearly comprise such operating companies.

(116) In this case a very comprehensive management agreement was entered into, but it has not been submitted, nor can I see, that the agreement in itself goes beyond what may reasonably follow from a management agreement.

(117) It transpires from the Court of Appeal's judgment and from the statement from Alkiviadis Sficas which the owners side has submitted to the Supreme Court that the relationship between Dalnave and Avena was characterised by a lack of formalities to an extent that is likely to surprise. To some degree depending on how you interpret the statement, it may, in combination with the management agreement, open the door to regarding Dalnave as the real owner. But I fail to see that this submission has in actual fact been made by the State, and the Court of Appeal has restricted itself to ascertaining that Dalnave must be regarded as owner by virtue of the transfer of owner's powers in the management agreement. In view of my opinion as to how the owner concept in section 37 second subsection of the Pollution Control Act must be understood, the conclusion is that the wreck removal order cannot be addressed to Dalnave on the basis of this provision, and that the owners side's appeal on this point is allowed.

(118) In the alternative, the State has submitted that the management company may, regardless, be ordered to remove the wreck under section 7 fourth subsection, cf. second subsection, of the Pollution Control Act, which provides that "the Pollution Authority may order the person responsible" to mitigate any "damage or nuisance" resulting from the pollution, and that the Coastal Administration's removal order was also mandated by this provision. However, the Ministry as the appellate body based its decision only on section 37 second subsection, cf. section 28 of the Pollution Control Act. As mentioned earlier, the Ministry based its decision on the shipwreck being unsightly and failed explicitly to take a position on the issue whether damage or nuisance has been caused. The condition "unsightly" is not found in section 7 second subsection, and section 7 fourth subsection leaves it to the authorites' free discretion to decide whether or not an order shall be issued. I refer to what I have said about the courts' right to rely on a statutory authority on which the decision up for review is not based. The conclusion must be the same as in respect of section 37 second subparagraph, cf. section 28 of the Pollution Control Act: The courts' review of the wreck-removal order cannot be based on the condition "damage or nuisance" in section 7

of the Pollution Control Act.

(119) *The relationship between the wreck-removal order and the limitation of liability rules in the Maritime Code*

(120) As mentioned initially, a limitation fund was established after the MV Server's casualty pursuant to the rules in chapter 12 of the Maritime Code. The parties disagree whether the financial parameters for the fund limit the owner's duty to take action that follows from the wreck-removal order pursuant to the Pollution Control Act, or whether the limitation only applies to financial claims.

(121) The answer depends on an interpretation of section 172a of the Maritime Code related to the limitation of claims in connection with clean-up measures following marine accidents etc. It is stated here that if the ship's tonnage exceeds three hundred tons, the right to limitation of liability under section 175a - which stipulates the liability limits - "regardless of the basis of the liability, for claims on the occasion of: 1) ... removal ... of ship that has gone down... or been wrecked".

(122) The wording in itself does not provide any clear answer here. The same wording, or more or less corresponding wording, was found in earlier provisions. Nor do these, or the wording in the conventions on which they are based, provide any clear answer.

(123) I nevertheless understand the 1976 Convention relating to limitation of maritime claims, on which section 172a of the Maritime Code is based, to mean that it does not entail any obligation to make a clean-up duty under public law subject to the limitation rules. During the diplomatic conference on the 1976 Convention, a motion for the owner to be entitled to file his own costs for the prevention and limitation of loss to which the limitation rules apply in the fund did not gain a majority. The grounds given for excluding such claims were that the owner had a duty to reduce the effect of his own damage-causing actions, and that it would therefore be immoral if he were to be allowed to file such claims in the fund, I here refer to NOU 2002:15 pages 15-16, which I shall shortly revert to. It would not be consistent with the rules and regulations if the convention were to be interpreted to mean that the limitation of liability rules nevertheless set a limit to the duty to comply with orders for clean-up measures under public law.

(124) In my view, the decisive factor will be the preparatory works to section 172a.

(125) In a consultative paper from the Ministry of the Environment dated 27 February 2001, the Ministry suggested incorporating a provision in section 5 of the Pollution Control Act to the effect that the limitation of liability rules in the Maritime Code do not limit the responsible person's duty to take measures under i.a. section 46, cf. section 7, of the Pollution Control Act. This was in accordance with what the legislative department of the Ministry of Justice had assumed was already existing law in a statement to the Ministry of the Environment following a marine casualty in December 2000, and the Ministry of the Environment stated that the proposal was a clarification of existing law. The refund duty of the person responsible to the State under section 76 was, however - as in the past - to be comprised by the limitation of liability.

(126) The proposal encountered strong opposition during the round of consultations, both in terms of whether this was existing law and whether it was a good solution. The proposal was therefore dropped, but it was left to the Maritime Act Committee to review the issues relating to the limitation of liability rules and the costs of clean-up measures. In NOU 2002:15, On the clean-up duty under the Pollution Control Act, the Maritime Act Committee stated under section 2.3 on page 15 about existing law at the time:

> *"Section 172 first subsection 4. and 5. (of the Maritime Code [corresponding to the current section 172a 1. and 2.] only comprises claims from third parties, including public authorities, who have incurred costs relating to removal and clean-up measures, and who may claim these costs from the owner...*
>
> *Costs which the owner incurs if the owner himseif initiates removal and clean-up measures or other damage-limiting measures as mentioned in section 172 first subsection 4. to 6. are thus not subject to limitation of liability. The owner's and the costs of others entitled to limitation relating to such measures are quite simply not comprised by the enumeration in section 172 of claims subject to limitation of liability and are furthermore not taken into consideration in any other way in the application of the rules relating to limitation of liability. The owner must himself cover any such costs in addition to claims by third parties resulting from the marine casualty."*

(127) In section 8.5 on page 40, the committee pointed out that this is hardly a good solution. In the first place, it might lead to the owner failing to comply with the clean-up obligation and instead leaving the clean-up to the public authorities in order to benefit from the fact that the public authorities' refund claim would be subject to the limitation of liability. Secondly, this complicates the evaluation of what the level of the limitation of liability should be for the claims that were in actual fact subject to [limitation].

(128) However, the Maritime Code Committee's solution was not to let the duty to take action under public law be subject to the limitation of liability rules. Instead, the committee suggested increasing the limitation amount in combination with letting any person who had incurred reasonable costs in carrying out the clean-up operation, and which was comprised by the limitation of liability rules, claim these costs in the fund. This would mean that the ship's owner would in practical terms at least obtain some sort of "discount" on the costs by letting these compete with other claims in the fund. The committee also suggested certain other changes which it is not necessary to go into here.

(129) In Ot.prp. no. 79 (2004-2005), pages 26-27, the Ministiy repeated the Maritime Code Committee's view on existing law and on page 9 endorsed the proposals, the content of which I have described.

(130) In the amendment in 2005 the rules relating to limitation of liability for claims arising from for example the raising and removal of shipwrecks, were transferred from section 172 of the Maritime Code to the new section 172a. The special liability limits for claims comprised by section 172a are laid down in section 175a, and the right for an owner to claim his own costs arising from clean-up efforts in the limitation fund is set out in section 179.

(131) The Committee's statement that the wreck-removal duty according to public law rules falls

outside the limitation of liability rules are thus a prerequisite for the amendments that were enacted. Even if they apply directly to the prevailing state of the law before the amendments suggested by the Committee, they must carry the same weight in the interpretation of section 172a as ordinary preparatory work statements relating to new statutory provisions.

(132) This leads me to the conclusion that the owners side's claim that the duty to comply with the wreck-removal order is limited by the financial parameters in the limitation fund cannot be upheld and that the appeal on this point must be dismissed.

(133) *Costs*

(134) When two actions are consolidated into one case under section 15-6 of the Dispute Act, costs shall be determined separately for each action.

(135) The State has lost its appeal in Oslo District Court case no. 14-011646TVI-OTIR/04, where the subject matter is VAT on municipal refund claims. This means that the owners side is entitled to claim compensation for necessary legal costs, cf. section 20-2 first subsection of the Dispute Act. The owners side has claimed NOK 765,200 by way of legal fees before the Supreme Court in this matter. The State has argued that the claim is too high and, in my view, the amount is higher than what can be considered necessary. In the Court of Appeal, where the owners side submitted a statement of fees amounting to NOK 562,963 in case no. 14-011646TVI-OTIR/04, the necessary costs were on a discretionary basis set at NOK 250,000 with a comment that the hearing by the Court of Appeal had to a large extent related to legal issues. I find that before the Supreme Court the necessary costs cannot be set higher than NOK 300,000, cf. section 20-5 of the Dispute Act.

(136) In addition, NOK 100,306 has been claimed for the printing of the trial bundles without any specification as to how large a proportion is attributable to this matter. The matter has raised five issues and, in the absence of other indications, it is natural to charge one fifth of these costs to the issue of VAT on municipal refund claims. This will be roughly NOK 20,000. On this basis the owners side shall be awarded a total of NOK 320,000.

(137) In Oslo District Court case no. 14-011646TVI-OTIR/04, which was the owners side's appeal and concerned the other issues, the parties have partly won and partly lost before the Supreme Court. The owners side has won in respect of the issue whether the wreck removal order can be addressed to Dalnave and whether the courts have competence to examine the validity of the order on a different basis than the one on which the Court of Appeal relied, but has lost the issues regarding state paid VAT and the relationship between the wreck removal duty under the Pollution Control Act and the limitation of liability rules in the Maritime Code.

(138) Accordingly, neither of the parties has won in the whole or in the main in this matter. There are no circumstances to suggest any exemptions from the rule that the parties must in that case absorb their own costs of the Supreme Court hearing, cf. section 20-2 of the Dispute Act. A decision as to the question of costs in the case in general is postponed until the Court of Appeal's new hearing, cf. section 20-8 third subsection and 20-9 of the Dispute Act.

(139) I vote in favour ofthe following

JUDGMENT:

I In Oslo District Court case no. 14-01 1646TV1-OTIR/04:

1. The appeal is dismissed.

2. By way of costs before the Supreme Court the State represented by the Ministry of Transport shall pay to Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuraneeforeningen Gard - Mutual —jointly and severally NOK 320,000 - threehundredandtwentythousand - Norwegian kroner within 2 - two - weeks of service of this judgment.

II In Oslo District Court case no. 14-009365TVI-OTIR/04:

1. The Ministry of Trade, Industry and Fisheries decision of 13 June 2012 relating to wreck-removal cannot be invoked against Dalnave Navigation Inc.

2. The Court of Appeal's judgment is overturned in respect of the review of the Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal.

3. The Court of Appeal's judgment, point 3 of the conclusion, is quashed. The decision of the claim for costs before the District Court and the Court of Appeal is postponed until the Court of Appeal's new hearing.

4. The appeal is otherwise dismissed.

5. Costs before the Supreme Court are not awarded.

(140) Justice **Arntzen**: I concur in all essentials and as regards the conclusion with the first-voting justice.

(141) Justice **Bergsjø**: Likewise.

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

(143) Justice **Endresen**: Likewise

(144) After the voting the Supreme Court handed down the following

JUDGMENT:

I In Oslo District Court case no. 14-011646TVI-OTIR/04:

1. The appeal is dismissed.

2. By way of costs before the Supreme Court the State represented by the Ministry of Transport shall pay to Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard - Mutual — jointly and severally NOK 320,000 - threehundredandtwentythousand - Norwegian kroner within 2 - two - weeks of service of this judgment.

I I In Oslo District Court case no. 14-009365TVI-OTIR/04:

1. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal cannot be invoked against Dalnave Navigation Inc.

2. The Court of Appeal's judgment is overturned in respect of the review of the Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-emoval.

3. The Court of Appeals judgment, point 3 of the conclusion, is overturned. The decision of the claim for costs before the District Court and the Court of Appeal is postponed until the Court of Appeal's new hearing.

4. The appeal is otherwise dismissed.

5. Costs before the Supreme Court are not awarded.


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