Norwegian Supreme Court strikes a blow against forum shopping in direct action

In a landmark decision, the Norwegian Supreme Court has set aside a decision from the Court of Appeal which had concluded that Norwegian courts have jurisdiction under the Lugano Convention in a direct action concerning a ship collision in the Singapore Strait.

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The proceedings arose out of a collision between the "STOLT COMMITMENT" and the "THORCO CLOUD" in Indonesian territorial waters in the Singapore Strait on 16 December 2015. Following the collision, the owners and bareboat charterers of the "THORCO CLOUD" brought a direct action in Norway against the P&I insurers of the "STOLT COMMITMENT", Assuranceforeningen Gard, and sought to join the owners and bareboat charterers of the " STOLT COMMITMENT" in the direct action (*HR-2018-869-A "STOLT COMMITMENT")* .

As both vessels were owned and bareboat chartered by non-Norwegian companies, the only factor connecting the dispute to Norway was the domicile of the P&I insurers. The question brought to the Supreme Court was whether this was sufficient nexus to establish jurisdiction for the direct action and, if so, whether the direct action could act as an anchor providing jurisdiction for the claims against the Stolt companies which had no connection to Norway.

It was clear that the Thorco companies' objective was to benefit from the higher global limitation of liability limits in Norway compared to the limits in the Netherlands, where the Stolt companies are domiciled. In other words, the proceedings were classic ''forum shopping''.

Supreme Court Decision

A majority of four (out of five) judges in the Supreme Court found that the Court of Appeal was wrong in establishing jurisdiction for the direct action on the basis of the Lugano Convention Article 2 No. 1 (which provides that a defendant shall as a main rule be sued in the courts of its domicile). The majority's reasoning was that matters related to insurance are exclusively governed by the jurisdiction rules in the Lugano Convention Section 3. The main rule in Article 2 No. 1, which is found in Section 1, could therefore not be applied. The majority concluded that jurisdiction is exclusively governed by Article 11 No. 2, which is the jurisdiction provision in Section 3 for direct actions.

It is a requirement for jurisdiction under Article 11 No. 2 that direct action is " *permitted* " pursuant to the applicable national law. A choice of law must therefore be made pursuant to Norwegian choice of law rules.

A majority of three judges found that the Court of Appeal erred in law when considering the choice of law under Article 11 No. 2. The Court of Appeal was wrong in holding that the Norwegian Insurance Contract Act section 7-6 (5) is a choice of law rule. The majority found that it was outside the Supreme Court's competency to consider whether the decision could be upheld on a different legal basis, and set aside the Court of Appeal's decision. The majority commented that when the Court of Appeal considers the choice of law further, it must consider whether the choice of law follows from another firm rule or alternatively from the Irma-Mignon-formulae (test of closest connection). The majority stated that in both instances the legislator's assumptions as expressed in the preparatory works to the Insurance Contract Act should be given considerable weight.

A majority of four judges did not consider jurisdiction against the Stolt companies since this depends on there being jurisdiction for the direct action under Article 11 No. 2.

It is worth noting that a minority of two judges found that, assuming Norwegian law applies, it is a requirement under Article 11 No. 2 for the court to have jurisdiction that the assured is insolvent. This is because the pay-to-be-paid clause in the P&I Rules prevents direct action under Norwegian law unless the assured is insolvent. The minority found that, under Article 11 No. 2, the requirement of insolvency in the Insurance Contract Act section 7-8 (2) is transformed from a substantive requirement to a requirement for jurisdiction.

A minority of one judge found that, if there was jurisdiction for the direct action under Article 11 No. 2, the relevant basis for a joinder of an assured would be Article 11 No. 3. He further commented that Article 11 No. 3 provides the basis for a joinder if this is permitted under the Insurance Contract Act section 7-6 (3), which only grants a right of joinder to the insurer which is sued in the direct action, and not to the third party claimant.

Comment

The decision provides welcome clarification to liability insurers across Europe, clearly determining that Section 3 of the Lugano Convention is a self-contained and exclusive code governing matters related to insurance, allowing no recourse to the general rules in Section 1 or the special rules in Section 2 unless specifically provided in Section 3.

Thus, third party claimants cannot rely on Article 2 No. 1 in a direct action, and can only establish jurisdiction on the basis of Article 11 No. 2.

The choice of law rules to be applied under Article 11 No. 2 have not been finally determined. However, assuming that Norwegian law applies, the assured's insolvency is likely to be a requirement for jurisdiction for a direct action pursuant to Article 11 No. 2.

The third party claimant's right to join an assured in the direct action has also not been finally determined, but assuming that Norwegian law applies it seems likely that there will be no such right pursuant to Article 11 No. 3.

Wikborg Rein is assisting Gard and the Stolt companies in this matter and *Herman Steen and Kaare A. Shetelig appeared before the Supreme Court*.