Direct action against liability insurer – jurisdiction and choice of law issues

Two Norwegian Supreme Court decisions related to the Lugano Convention of 2007

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Contents

1. The background for the two decisions

In December 2015 in Indonesian waters, *Thorco Cloud* and *Stolt Commitment* collided. *Thorco Cloud* sank, and six members of its crew were lost. These casualties resulted in two important Supreme Court decisions: HR-2018-869 (*Stolt I*) and HR-2020-1328 (*Stolt II*). The issue concerned jurisdiction of Norwegian courts and choice of law, caused by a direct action suit against the insurers of *Stolt Commitment* for the loss suffered, combined with a claim for damages against the insured at the same venue.[2]

The decisions are based upon the 2007 Lugano Convention, which is made part of Norwegian law.[3] The Lugano Convention of 2007 is *lex specialis* in conflict with national rules.[4] The previous convention (Lugano 1988) – also adopted as Norwegian law – was at the points of interest in our context similar to the present rules, meaning that judgments concerning Lugano 1988 are still relevant.[5]

In 2 below I provide a description of the parties and a survey of the somewhat complicated procedural history before giving a more detailed explanation of the arguments used by the judges. The questions on the direct action against the insurer are dealt with in 3 and 4. Whether there also is venue for the claim against the insured is the topic in 5. A summary of the decisions in *Stolt I* and *Stolt II* is given in 6 – with some information on the further litigation development. Finally, in 8, I venture some reflexions on the two decisions.

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2 The translations from the two decisions in this article are primarily from translations provided by the Supreme Court – annotated, "for information purposes only".

3 Cf. Civil Procedure Act of June 17 2005 No. 90 Section 48.

4 Rt. 2012 p. 1951 paragraph 33.

5 *Stolt I* paragraph 71.

2. The parties and the procedural story

Thorco Cloud was registered in Antigua & Barbado. The owners, registered in Marshall Islands, were A Line, which is a subsidiary of Thorco Shipping A/S in Denmark. At the time of the accident, the vessel was on a bare boat charter to Marship, a German company. P&I insurance was with Standard Club, England, and hull insurance with Mitsui, Japan.

The other vessel was registered in the Cayman Islands and owned by Stolt Commitment B.V in the Netherlands. The vessel was in December 2015 on a bare boat charter to Stolt Tankers in the Netherlands. The owning company and the bare boat charterer are entities in the Stolt group, which is operated from London. P&I insurance was with Gard, Arendal in Norway, and hull insurance was with Gard ME, also domiciled in Arendal, Norway.

Phase one:
The owners, the bare boat charterer and both insurers of *Thorco Cloud* instigated proceedings against the P&I insurers of *Stolt Commitment* in Norway, as well as against the Stolt companies (hereinafter Stolt) at the domicile of Gard, demanding a declaratory judgment that there was in principle liability for the loss suffered.[6]

The Gard companies objected that the chosen court had no jurisdiction according to the Lugano convention.

On the jurisdiction question, the court of first instance:

- dismissed the Thorco insurers' claim against Gard,
- accepted jurisdiction for owners'/charterers' claim (for the sake of simplicity: Thorco's claim) against Gard,
- dismissed the claim against Stolt.

[6] Indicated up to USD 120 million.

The two last issues were appealed, and the Court of Appeal:[7]

- confirmed jurisdiction for Thorco's claim against Gard,
- accepted jurisdiction for the claim against Stolt.

Both Gard and Stolt appealed to the Supreme Court (the *Stolt I*-case), which in a majority decision[8] (three factions):

- set aside the confirmation of jurisdiction for Thorco's claim against Gard,
- set aside the acceptance of jurisdiction for Thorco's claim against Stolt.

On both counts the reason was incorrect interpretation of the Lugano Convention.

Phase two:
In the rehearing, the Court of Appeal[9] held that both the claim against Gard and against Stolt were inadmissible.

On appeal to the Supreme Court (the *Stolt II*-case) we once again had a divided court (3-2). The majority found that the Convention was wrongly interpreted in the case against Gard, and as the case against Stolt was contingent on venue for the suit against Gard, both decisions of the Court of Appeal were set aside.

7 LA-2016-170365.

8 Questions on jurisdiction are decided by an "order", not a "judgment", and according to Norwegian procedural rules, the competence of the Supreme Court is then limited to questions of correct procedure and interpretation of written law including international conventions. Accordingly, the result of an appeal is in principle either a confirmation or a setting aside conclusion. See *Stolt I* paragraph 68.

9 LA-2018-82999.

3. The direct action against Gard – phase one (Stolt I)

3.1. The domestic law: the Insurance Contracts Act

In a ruling, which was not contested, the Court of Appeal had found that Thorco's action would be decided according to Norwegian law.[10] The Insurance Contracts Act (of June 16 1989 No. 69) Section 7-6 first sentence allows a direct action against the insurer:

> *"When the insurance covers the liability of the insured, the injured part may claim compensation directly from the insurer."*

This rule is mandatory, but with exceptions for, i. a., marine insurance. Gard has in its conditions an exception in the form of a "pay-to-be-paid" clause: the insured has to pay before he can turn to the insurer. However, the exception is not applicable when the liability insurer is "insolvent" (Insurance Contracts Act Section 7-8).

Section 7-6(5) states that suit against the insurance company according to this section should be instigated in Norway unless it follows otherwise from Norway's international law obligations.

As pointed out by Justice Normann, speaking for the majority in Stolt I, Section 7-6(5) was added due to the insurance companies' concern that the right to bring direct actions could lead to proceedings in countries with different legal traditions relating to actions for damages and the level of compensation.[11] The intent was to avoid such proceedings by making a direct action conditional on it being brought in Norway.

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[10] *Stolt II* paragraph 34, cf. LA-2018-82999 with a detailed discussion on the choice of law issue.

[11] Popularly called «forum shopping».

3.2. Court jurisdiction and the Lugano Convention

The general Norwegian rule on court jurisdiction is that disputes on international matters may only be brought before a Norwegian court if the facts of the case have a sufficiently strong connection to Norway (Civil Procedure Act Section 4-3). However, in practice the competence of the Norwegian court will be decided according to the Lugano Convention. [12]

3.3. Stolt I – the majority's view

The Court of Appeal[13] had in the first phase of this litigation, accepted jurisdiction, based upon Article 2(1) that reads:

> *"Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State."*

When appealed, the majority of the Supreme Court (*Stolt I*) did not agree with this conclusion.

Justice Normann said that the question was whether the Court of Appeal has interpreted the Convention correctly when concluding that Article 2(1) may also be applied in an insurance case such as the one in question. For matters relating to insurance there are comprehensive rules in Section 3 (Articles 8–14), with direct action dealt with in Article 11(2):

> *"Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."*

The question, the judge said, is whether Section 3 provides self-contained rules on jurisdiction in insurance matters in general, and, in particular, whether Article 2(1) may supplement Article 11(2) in direct actions.

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12 See e.g. Backer, Norsk sivilprosess (2015) p. 152.

13 LA-2016-170365

The articles referred to in Article 11(2) comprise a number of possible jurisdictions, i. a. the domicile of the respondent (Article 9(1)(a)). Exercising this right is, however, subject to "where such direct actions are permitted", see above on the Insurance Contracts Act Section 7-8 and in particular the insolvency stipulation (paragraph 7-7).

The judge found that the rules in Section 3 are exhaustive and consequently that the Court of Appeal had applied Article 2 (in Section 2) incorrectly. She said that Article 2(1) indicates that other rules in the Convention may prevail as *lex specialis*, and the wording in Articles 2 and 8 indicates that Section 3 regulates jurisdiction exhaustively in insurance matters, except for the express reservations in Article 8.

She also stated:

> *"In my view, systemic concerns*[14] *suggest the same: Several of the general provisions have parallel rules in Section 3. For instance, Article 9(1) permits actions against the insurer in the courts of its domicile, and a parallel rule is found in Article 2(1). Under Article 10, concerning P&I insurance, the insurer may be sued in the courts of the place where the harmful event occurred, and a parallel rule is found in Article 5(3) on the right to sue in the courts for the place where the harmful event occurred in matters relating to tort. It is hard to understand the relevance of Section 3 if the general rules were applicable" (paragraph 78).*

Further, she found support for this conclusion in the preparatory works to the Convention and in a House of Lords decision. [15]

The Court of Appeal had referred to the ECJ's ruling of December 23 2007 in Case C-463/06 *Odenbreit* paragraph 21, where it is said that the regulation of jurisdiction in Section 3 is "additional" to the general provisions. To this she remarked that:

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[14] In Norwegian: "systembetraktninger", which means – I believe – that a rule should be interpreted so that it is in harmony with principles and rules in sectors of comparable nature.

[15] Jordan Grand Prix v. Baltic Insurance Group, of December 16 1998.

"the statement is not clear, and, under any circumstance, I cannot see that Odenbreit has such relevance as given to it by the Court of Appeal.

The Court of Appeal has also emphasised the purpose – the consideration for the weaker party, see Odenbreit paragraph 28. To this I would comment that the ECJ, in that case, referred to purpose considerations in support of an interpretation in line with the wording in Article 11(2), cf. Article 9(1)(b), which had the consequence that the injured party in addition to 'the policyholder, the insured or the beneficiary' could sue the insurance company in the courts of its domicile, see paragraph 26.

In the light of the other legal sources in our case, I cannot see that purpose considerations carry much weight. I emphasise that if the purpose were to justify the application of Article 2(1), it would entail an interpretation contrary to the wording of the Convention" (paragraphs 84–86).

3.4. Stolt I – the view of the minority

The minority (two justices) agreed with the Court of Appeal that Article 2(1) was applicable. This fraction accepted that Section 3 on jurisdiction in insurance matters is self-contained. This has been established in a number of rulings by the ECJ and by legal theory. However,

"these rules cannot be more self-contained than what they provide for themselves. When Article 11(2) states that "Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted", it is, in my view, natural to take the provision at its word: If such direct actions are not permitted, Article 8 does not apply either, which is in fact the provision stating that the provisions in Section 3 – with a couple of exceptions – are exhaustive in insurance matters. The argument that such direct claims concern insurance matters within the meaning of the Convention can thus not lead to a different result. I do not see this as a restrictive interpretation of the provision" (paragraph 120).

The minority also said that the insurer could not have been sued in courts of the claimant's domicile. Such a right can only be derived from

the separate provisions on insurance matters in Section 3, more specifically Article 9(1)(b) (paragraph 122).

In Article 2 there is a reservation: "[s]ubject to the provisions of this Convention". To this the minority remarked that the reservation "cannot give any other result as long as Article 11(2) reads as it does with respect to the application of Article 8" (paragraph 124).

The practical consequence of this is that Gard can be sued in the courts of the state of its domicile, in accordance with the basic rule in Article 2 (paragraph 121).

Regarding the insolvency requirement in the Insurance Contracts Act Section 7-6 the minority said:

> *"As emphasised by the Court of Appeal, it is also inexpedient to consider such an insolvency requirement when the court early on is to establish whether it has jurisdiction. The same may apply to any other conditions for direct action under other countries' law. The consequence of my reading of Article 11(2) is that if the action is brought in the domicile state of the P&I insurer, it is unnecessary to consider specifically the conditions for direct action as part of the review of the court's jurisdiction" (paragraph 126).*

The majority considered "purpose considerations" irrelevant, but the minority found that such considerations enforced their interpretation:

> *"The special jurisdiction rules in insurance matters are not there to protect the insurers, but their counterparties. The intent of these rules can thus not have been that an insurer cannot even be sued in the courts of its domicile, as everyone else must accept. The ECJ's judgment December 13 2007 in Case C-463/06 Odenbreit, concerning a slightly different issue relating to the interpretation of Article 11(2), demonstrates in my view that the Court takes the provision for its word – the way I believe I do in my interpretation of the reference to Article 8 in Article 11(2) – when this is in accordance with the protective intent of the provisions" (paragraph 127).*

4. The direct action against Gard – phase two (Stolt II)

4.1. The Court of Appeal decision

With the guidance given in the *Stolt I* decision, the Court of Appeal in the rehearing found (2-1) that Thorco's claim was inadmissible. Norwegian law was found applicable to the direct action. The majority held that the phrase in Article 11(2) "where such direct actions are permitted," entails that the action must be permitted *in the individual case.* In the majority's view, it had not been demonstrated that the Stolt companies were insolvent, and the action against Gard was therefore not admissible. This is in conformity with the view of the minority in *Stolt I*. The dissenting judge found that under Article 11(2) that it is sufficient that direct actions are permitted, *in general*, under the law of the chosen state. Therefore, the suit should be admitted without a preliminary consideration of whether Stolt really is insolvent.

4.2. The Supreme Court decision (Stolt II)

Thorco appealed the Court of Appeal decision,[16] and once again, the Court was divided (3-2).

For the sake of convenience, Lugano Art. 11(2) is quoted again:

> *"Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted."*

The Court stated that it is "the interpretation of this expression – the 'permitted-criterion' – that forms the heart of the matter" (paragraph 32).

[16] LA-2018-83695.

4.3. The majority's view

Justice Bergsjø, speaking for the majority, said that whether

> "*direct actions are permitted must be determined by the national law regulating the matter in dispute. Therefore, the courts must first make a choice of law and decide which state's law regulates the merits of the case. The choice of law must be made based on the choice of law rules of the chosen state, see Stolt I paragraph 90-92" (paragraph 33).*

In his more general remarks the justice says that the rules on direct action arise from a wish to strengthen the injured party's position "in practical and procedural terms", and that direct actions under Section 7-6 of the Insurance Contracts Act must be instigated in Norway.

According to the Courts of Justice Act[17] Section 36 (1), each court must assess *ex officio* whether a case falls within its jurisdiction. When making such an assessment, the court must, according to subsection 2, in most civil cases "base its deliberations on the claimant's submission, provided that it has not been demonstrated that the submission is erroneous". As a main rule, the court must rely on what the claimant or the appellant contends on matters of substance. In other respects, when deciding whether to hear the case, the court must take an individual stand on both legal and evidentiary issues, and base its ruling on the facts it considers more likely. The justice refers (in paragraph 42) to a previous decision, Rt. 2015 p. 129 (Arrow), where it is stated that the assessment under the Lugano Convention is "at least mainly" in line with what generally applies according to general Norwegian procedural law. The justice in that case added that this "does not imply that the claimant, in a case on whether or not to hear an action, must present evidence for the merits of the case"; it is sufficient that the claimant "substantiates"[18]

[17] Act of August 13 1915 No. 5.

[18] The Norwegian text is: «gjer det sannsynleg". In my translation, I would have used the word «probable» or «likely».

that the criteria for competence are met. And the court in that case "assumes"[19] that the same principle is applicable under the Convention.

Then justice Bergsjø turns to the interpretation of Article 11(2) under a number of headings: starting points and interpretive principles, the wording of the article in various languages, Norwegian case law, ECJ case law, case law from national courts, statements in reports and preparatory works, purpose and system considerations.

In his summary, the justice says that the Convention

> *"gives no clear answer to whether insolvency in [a case of direct action] must be considered in connection with the jurisdiction issue. Nonetheless, several language versions point in the direction that the courts are not to carry out an individual assessment of the right to bring a direct action in the particular case. This is the solution that, in my view, best takes into account predictability and the aim to strengthen the position of the weaker party, while it also safeguards the fundamental goal that the defendant's domicile is available. Moreover, an interpretation that implies a thorough examination of the substantive issues during the assessment of territorial jurisdiction is alien to the system. So far, I believe that it would be best to rely on the appellants' interpretation of the Article 11(2) of the Lugano Convention" (paragraph 79).*

He also remarks that the attitude in other Lugano countries varies and one cannot exclude the fact that a rule whereby it is sufficient that direct actions are permitted generally may create delimitation problems in some states. However, he finds that this cannot be decisive for the interpretation in the present case.

The conclusion is that the Convention does not imply that a direct action must be permitted in the particular case, as the Court of Appeal assumed. Consequently, the decision by the Court of Appeal must be set aside.

[19] The Norwegian text is "legg til grunn". Here I would have preferred "finds".

4.4. The minority's view

The minority agreed with the Court of Appeal majority, saying i.a.:

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

The degree of probability required is

> *"a fair chance of succeeding. The insolvency requirement will typically be met when the insured has petitioned for bankruptcy, is undergoing bankruptcy or debt proceedings or is not capable of meeting the obligations as they fall due. In other words, the criteria are as a starting point well known" (paragraph 107).*

The reasons for this opinion are summarized:

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

5. Thorco's claim against Stolt –phase one (Stolt I)

5.1. General rules on joinder of actions

Thorco's claim for jurisdiction should be seen against the background of the general rules on joinder in the Civil Procedure Act Chapter 15. Both claims must be subject to Norwegian jurisdiction. Here it is sufficient to quote Section 15-2(1)(b):

> "Multiple *parties may act as claimants or defendants in one action if:*
>
> …
>
> *b) no party objects, or the claims are so closely connected that they should be heard in the same action."*

The Lugano Convention also has rules on joinder, see Article 11(3):

> *"If the law governing such direct action provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them."*

5.2. The Supreme Court decision

As stated above, the Court of Appeal held that Gard could be sued in Norway, and found that the inclusion of the claims against Stolt was in accordance with Article 6(1) of the Convention.

When the issue was brought before the Supreme Court – *Stolt I* – the Court was divided.

For the majority the outcome was easy:

> *"The right to include the Stolt companies in the case depends on whether legal action against Gard can be brought in Norway. As I have concluded that the order in the case between Gard and the Thorco companies must be set aside, the same must apply to the court of appeal's order in the appeal case between the Stolt companies and the Thorco companies" (paragraph 107).*

The dissenting justices agreed with the Court of Appeal: when it is assumed that the action against Gard has its legal basis in Article 2, the joinder question can be answered based on Article 6(1):

> *"However, the claims must be so closely connected that it is desirable to hear them jointly to avoid the risk of irreconcilable judgments resulting from separate proceedings. The court of appeal has concluded that this condition is met" (paragraph 129).*

6. Thorco's claim against Stolt –phase two (Stolt II)

On rehearing, the Court of Appeal dismissed the case.[20] On appeal – *Stolt II* – the parties had agreed, that venue for Gard, is a condition[21] for venue for Stolt. Consequently the Supreme Court majority said:

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

The minority agreed with the Court of Appeal's ruling that the suit against Stolt was admissible:

> *"The question whether such accumulation is possible has not been finally decided in the case. However, a completely[22] necessary and general condition for accumulation must be that the court has jurisdiction over the direct action. A certain reluctance should be exercised in accepting a direct action merely based on a general possibility of success. Depending on the fulfilment of other accumulation requirements, such an interpretation may have far-reaching consequences for the tortfeasor" (paragraph 103).*

[20] LA-2018-83695.

[21] Here I have translated "forutsetning" to "condition"; the official translation is "may also be".

[22] The Norwegian text is "helt nødvendig" I would have preferred "absolutely necessary".

7. Stolt I and Stolt II – a summary and "the thereafter"

The results of the two decisions are:

(i) Whether there is jurisdiction in Norway for the direct claim against the insurer depends upon the interpretation of Article 11(2). This article does not require that a direct action is permitted "in the particular case"; and

(ii) The Supreme Court did not clarify when there is venue for Thorco's claim against Stolt.

The litigation before the Court of Appeal has been resumed, and it has been decided that the court has competence for the direct action against Gard. The issue of hether there is also venue for the claim against Stolt has also been decided by the Court of Appeal: the court found that there is jurisdiction according to Article 6(1) and stated i.a.:

> *"The Supreme Court's majority found in Stolt Commitment II, in contrast to the minority in Stolt Commitment I, that insolvency was not a procedural requirement according to Article 11 No. 2. Against this background, systemic considerations and the relationship between the rules of the Convention imply that the insolvency requirement as a basis for the anchor suit does not include the evaluation which the court has to undertake according to Article 6 No. 1."*

The decision is appealed to the Supreme Court.

8. Stolt I and Stolt II – some reflections

The material presented to the courts in the two *Stolt* cases is vast, covering the preparatory story of the relevant legislation, the wording of the pertinent parts of the Convention in a number of countries, as well as decisions and statements from the ECJ and courts in member states. As

I cannot say that I have digested this material fully, it is with humbleness that I in the following will give some of my reflections on certain aspects of the two cases.

To my mind, the natural starting point is the contention that Thorco brought a direct action in Norway for the sole purpose of having the Stolt companies joined in the case, in order to plead the Norwegian global limitation rules in the dispute between Thorco and Stolt. The contention has not been repudiated. This gives the background for a litigation which has been enormously costly (and time consuming) – before the substantive question of liability for the collision disaster has been pleaded.

The litigation has made it quite clear that the jurisdiction for a direct action against Gard depends upon Article 11(2) of the Convention. The action is allowed when "permitted", which raises a choice of law question – here a question of either Indonesian or Norwegian law. In the second decision by the Court of Appeal – LA-2018-83695,[23] it was found that Norwegian law was applicable. This conclusion was not contested, and in *Stolt II* the majority of the Supreme Court remarked that the Court of Appeal:

> *"made a final ruling stating that the direct action brought by the Thorco companies against Gard would be decided under Norwegian law. In its order, the Court of Appeal found that the case, overall, is most strongly linked to Norway" (paragraph 34).*[24]

[23] In the first Court of Appeal decision, LA-2016-170468, the court said that the permitted criterion
"shall be understood as a reference to the law of the country where the suit is instigated, both the substantive law and the choice of law rules applicable according to international private law of the country" (my translation).
And: "It appears in clear words that Section 7-6(5) [of the Insurance Contracts Act] is s a substantive rule. The right to have a direct action is combined with the obligation to have the suit decided in Norway. The injured party has a claim against the [insurance] company only if the case is brought in Norway. The Court of Appeal cannot see it otherwise than that the rule is unambiguously based on the assumption that Norwegian law is applicable in direct suits brought in Norway, regardless of where in the world the damage occurred. The rule has to be seen as a special choice of law regulation, with priority over what might otherwise be deduced from general uncodified principles" (my translation).

[24] This is in conformity with the view of the majority of the Supreme Court in *Stolt I*, see paragraph 92.The minority said that Norwegian law followed from the Insurance Contracts Act Section 7-6(5).

The consequence is (as stated in Article 11(2)) that "Articles 8, 9 and 10 shall apply". According to Article 8 "matters relating to insurance" and jurisdiction are determined by the rules in Section 3 with two reservations: The first one, concerning jurisdiction when the defendant is not domiciled in a Convention state (Article 4), is irrelevant in our context. So is the second reservation regarding disputes arising out of the operations of a branch, agency or other establishment (Article 5(5)). Article 9 on insurer domiciled in a Convention state is, however, important. Subsection 1 gives the injured party the option to sue the insurer, either in the state where the insurer is domiciled (letter a), or in another Convention state or where the plaintiff is domiciled (letter b). Finally, Article 10 on insurance of immovable property is irrelevant.

The implication appears to be that there are no problems connected with a suit in Norway against Gard – with reservations for the solvency requirement (to which I shall revert). The minority in *Stolt I* had, however, a different view: It held that the requirement for a liability judgment against Gard, viz. the insolvency of the insured, was a condition also "for allowing the action" (paragraph 117). And this, the minority said, had consequences for the interpretation of Article 11 (2):

> *"When Article 11(2) states that 'Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted', it is, in my view, natural to take the provision at its word: If such direct actions are not permitted, Article 8 does not apply either, which is in fact the provision stating that the provisions in Section 3 – with a couple of exceptions – are exhaustive in insurance matters" (paragraph 120).*

The further consequence was, according to the minority, that allowing jurisdiction based upon Article 2(1) was correct.

Both Article 2(1) and Article 11(2) open for venue in Norway (the latter subject to the permitted issue, see below). However, the position taken by the majority opens for an alternative venue: According to Article 9(1)(b) there is venue "in another state bound by this Convention". And if the matter is seen in a broader perspective, there are a number of

jurisdiction possibilities indicated in Article 11(2) which we said were of no importance in our special case. The implications of many venues are not considered by the Court.

With the conclusion that Article 11(2) is decisive, the word "permitted" becomes crucial. As stated above, the Court of Appeal had found, with final effect that the Norwegian law was applicable, and consequently the question was whether Stolt was "insolvent". What kind of considerations has the court to take into account before accepting jurisdiction? In the litigation, two concepts have been used: a general consideration and a concrete one. The former conforms to the traditional Norwegian approach, embodied in the Courts of Justice Act Section 36 (1), stating that the court must base its decision "on the claimant's submission, provided that it has not been demonstrated that the submission is erroneous". The latter requires an evaluation of whether the insured is in fact insolvent, which may involve difficult questions both of law and facts. If, however, the jurisdiction requirement is that the insured is declared bankrupt, the difficulties are nonexistent,[25] cf. the Danish Supreme Court case Assens Havn[26] which it is referred to in *Stolt II*. With the Norwegian "insolvency" criterion, it is –in my view – a fair summing up which is given by the majority in *Stolt II*:

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

The weight of such general considerations and the Norwegian procedural background are confronted with the question of whether the Convention has another solution binding on a Norwegian court. The wording of

[25] This is with reservations for the rare case where it may be possible to argue that the bankruptcy declaration is invalid.

[26] Sak 15/2015.

Article 11(2) provides no clear answer. However, in accordance with the principles of autonomous interpretation, the Supreme Court majority concluded as indicated in the citations just above. See also paragraph 79 where it is stated

> *"that it would be best to rely on the appellants' interpretation of the Article 11(2) of the Lugano Convention".*

The Court's summary of the appellants' (Torco's) contention is:

> *"Insolvency is not a condition for proceedings, but a substantive condition that must be determined during the hearing on the merits. … with regard to jurisdiction … it must be sufficient to demonstrate a general right to bring direct actions under applicable national legislation" (paragraphs 21 and 22, my emphasis).*

It has been argued that this conclusion is not in harmony with the decision in HR-2019-2206 (Bring):[27] A number of European truck manufacturers had been fined by the European Commission for price fixing. The Bring companies, most of them Norwegian, had purchased a large number of trucks from these manufacturers, also from one manufacturer's Norwegian subsidiary. This subsidiary was not included in the Commission's decision. Based on the Commission's decision, Bring brought an action before the Oslo District Court against the subsidiary and the manufacturers, invoking Article 6 No. 1 of the Lugano Convention on special jurisdiction. According to this article, the manufacturers may be sued in Norway "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". The Court referred i.a. to two previous decisions regarding Article 5 – Rt-2008-1207 regarding Article 5(1) and Rt-2015-129 (*Arrow*) regarding Article 5(3), and said:

[27] Giuditta Cordero-Moss in Nytt i privatretten No 2 2020 pp. 1517, in a critical article on the Stolt I- and Stolt II-decisions.

> *"Against this background, I conclude that when determining the international venue under Article 5 (1) of the Convention on matters relating to a contract or Article 5 (3) on matters relating to tort, the jurisdiction issue is assessed relatively thoroughly; more accurately: an assessment of whether the mentioned criteria for proceedings can be satisfied to a certain extent. Hence, allegations regarding jurisdiction are not taken into account without an assessment. Some substantiation is required also when the issue is disputed. However, this does not entail that the court is to consider whether the claim is likely to succeed. The threshold* ***will prevent that allegations are created primarily to establish jurisdiction.***
>
> *It is hard to see why the assessment of the procedural criterion that «the claims are so closely connected» as required in Article 6 (1), should derogate much from the assessment of the same under the options in Article 5" (paragraphs 71 and 72, my emphasis).*

The criticism of *Stolt II* is based on the submission that the Bring decision has implications[28] for the *Stolt* case; in other words, that the threshold should be as high as in the Bring case. In my view, it is not obvious that the requirement for including the foreign manufacturers is, or ought to be, the same as when defining "insolvency". Undoubtedly, there was jurisdiction for Bring's claim against the Norwegian subsidiary, and whether there was jurisdiction also for the foreign manufacturers is comparable to the case against *Stolt*. However, *Stolt II* concerns the primary jurisdiction, not the "annexed" litigation.

If the criticism is accepted that the Convention requires a more thorough assessment than stated in *Stolt II*, then we meet the question of how far the court is obliged to go before accepting jurisdiction. The minority used the expression "a fair chance of succeeding", while the majority said that the requirement must be "satisfied to a certain extent" and that "[s]ome substantiation is also required when the issue is disputed". Leaving aside the ex officio- and the objection- problems, to what extent do the views on probability differ? What is the difference in percent?

[28] Norwegian «overføringsverdi», Cordero-Moss p. 16.

As previously indicated, the problems evaporate if the requirement is that the insured entity is bankrupt, i.e. declared bankrupt by the court. Not surprisingly, part of the criticism is that the difficulty is purely Norwegian: the Convention has strict rules – it is said – and the way out of the predicament is to change the Insurance Contracts Act: "Insolvency" should be limited to "bankruptcy".[29]

With the law as it is today, it is necessary to decide on what degree of probability is required. Obviously, it is easier to apply the simple test of the majority (whatever percentage this implies). With the requirement advocated by the minority – with "a relatively detailed evaluation" as it was said in the Bring case – this does not preclude the court, at the end of the day, from saying that the insurer is not "insolvent", dismissing the case. However, when the matter in the first round has been argued p[e]rhaps extensively, it may be feared that the court feels a certain restriction in deviating from the preliminary decision. And it may be added: is it sensible (cost and time wise) for the issue to be debated fully more or less twice over?

[29] See Cordero-Moss op.cit.