Norwegian Court of Appeal on the Lugano Convention Art 27

The Norwegian Court of Appeal (Borgarting lagmannsrett) recently handed down a decision on the question of recognition in Norway of a Swedish judgment, on a distress warrant against the defendant, in accordance with the Lugano Convention. The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-07-11, has case number LB-2007-71963, is published in LB-2007-71963, and is retrievable from here.

Parties, facts, contentions and court conclusions

The plaintiff and distrainer, Truck Parts AB, domiciled in Sweden, served the defendant and distrainee A, domiciled in Sweden, with a subpoena in a Swedish Court (Kronofogdemyndigheten i Göteborg), with the object of action to ask the court to force the defendant, by the seizure and detention of personal property, to perform an obligation to pay overdue loan of money, where upon the Swedish Court in default of A´s appearance gave a judgment on a distress warrant against the defendant A. Later, the defendant moved to Norway where the plaintiff before the Norwegian Court of First Instance sought recognition and enforcement of the Swedish judgment.

The defendant gave two arguments for refusing recognition of the Swedish judgment in Norway. **First**, the defendant contended that since, first, the plaintiff´s claim derived from an agreement a third person B had made in A´s name with the plaintiff, but without A´s knowledge and authorisation, and, second, since the plaintiff knew or should have known B´s misrepresentation of A, that contract would by consequence be considered as invalid and give no claim-right to the plaintiff, and it would therefore, in accordance with the Lugano Convention Article 27 nr. 1, be contrary to Norwegian public policy to recognize the Swedish judgment in Norway. **Second**, the defendant contended that since it had not been proven that the defendant had been duly served with the document, which instituted the Swedish proceedings in sufficient time to enable the defendant to arrange for his defense, the Swedish judgment should not be recognized in accordance with the Lugano Convention Article 27 nr.2.

Responding the defendant´s contentions, the plaintiff contended **first** that the Swedish judgment could be recognised and enforced in Norway, and that Norwegian courts lacked competence to review the Swedish judgment as to its substance in accordance with the Lugano Convention Article 29. **Second**, the plaintiff contended that the Norwegian court had to trust and accept the date the Swedish Court had stated it had served the defendant with the document, which instituted the Swedish proceedings, and that this provision of document had given the defendant sufficient time to enable the defendant to arrange for his defense.

This case note will solely venture into the two above stated questions pertaining to recognition of judgment, and will not elucidate the point on which the disputing parties agreed, namely that Swedish (and not Norwegian) law on the limitation period for money claims was the applicable law (whereas the parties disagreed on the question whether the Swedish limitation period had been cancelled).

Both the Norwegian Court of First Instance and the Norwegian Court of Appeal recognised the Swedish judgment.

Ratio decidendi of the Norwegian Court of Appeal

The Norwegian Court of Appeal introduced its judgment by inquiring whether the conditions for enforcement in accordance with the Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) were fulfilled. **First**, the Norwegian Court of Appeal introduced the parties´ points of agreement, namely that judgments given by the Swedish Court, Kronofogdemyndigheten, was to be considered as legal coercive basis within the meaning of the Norwegian law on coercive enforcement 1992-06-26-86, § 4-1 second paragraph (tvangsfullbyrdelsesloven). **Second**, the Norwegian Court of Appeal remarked that as far as the arguments of the defendant and distrainee A pursuant to the plaintiff´s claim did not relate to circumstances having occurred so late that they could not have been pleaded in support of A´s legal position before the Swedish Court gave its judgment, those arguments were irrelevant for the enforcement in Norway, in accordance with the Norwegian law on coercive enforcement 1992-06-26-86, § 4-2 second paragraph (tvangsfullbyrdelsesloven). The Norwegian Court of Appeal referred to the Swedish judgment where it was stated that A had been served with the document, which instituted the Swedish proceedings 13 days before the Swedish Court gave its judgment, where upon A would have had time to serve the Swedish Court with its arguments directed

against the plaintiff´s claim. **Third**, the Norwegian Court of Appeal remarked that since the Swedish judgment had not been appealed to the Swedish Court of First Instance in accordance with Swedish law (lag om betalningsföreläggande och handsräkning (SFS 1990: 746) § 55), the Swedish judgment was legally binding.

Having established that there was legal basis in Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) to enforce the Swedish judgment, the Norwegian Court of Appeal inquired whether the Lugano Convention Article 27 nr.1 was applicable where upon the Swedish judgment should not be recognised. The Norwegian Court of Appeal concluded that the Lugano Convention Article 27 nr.1 was inapplicable by way of the following reasoning: With reference to a Norwegian commentary to the Lugano Convention (Norsk lovkommentar 2005 p. 2305, note 108), which in turn referred to the ECJ in Case 145/86 Hoffmann v Krieg [1988] ECR 645, the Norwegian Court of Appeal stated that the Lugano Convention Article 27 nr.1 is applicable only in few exceptional circumstances when recognition very strongly would oppose fundamental legal principles in the State of recognition with a special view to fundamental ethical and social conceptions. With reference to legal theory (Rognlien, kommentarutgave til Luganokonvensjonen, 1993, p. 236-237), the Court assumed that the more severe legal grounds for invalidating agreements, such as fraud, would be considered as falling under the scope of the notion of ordre public in the Lugano Convention Article 27 nr.1, but that the legal grounds for invalidation of agreements would be considered less practical in justifying ordre public since these grounds under no circumstance could be used to review the judgment as to its substance in accordance with the Lugano Convention Article 29. Article 29, the Court stated with reference to legal theory (Norsk lovkommentar 2005 p. 2306, note 118, and p. 2305, note 108), is absolute and implies that the Court is excluded from reviewing whether the judgment is materially correct with a view to the taking of evidence as well as the application of the rule of law. Supporting that interpretation, the Court referred to legal theory (Rognlien, kommentarutgave til Luganokonvensjonen, 1993, p. 245), which stated that a judgment can never be refused recognition on the sole ground that it is materially incorrect, regardless of whether the foreign adjudicating Court erred in its test of evidence or erred in its application of the law. The Norwegian Court of Appeal pertained to the opinions in legal theory and concluded that there was no legal basis for refusing the recognition of the Swedish judgment in accordance with the Lugano Convention Article 27 nr. 1.

Having established that the Lugano Convention Article 27 nr.1 was inapplicable, the Norwegian Court of Appeal questioned whether the Lugano Convention Article 27 nr.2 was applicable where upon the Swedish decision should not be recognised. The Norwegian Court of Appeal concluded the Lugano Convention Article 27 nr.2 was inapplicable by way of the following reasoning: With reference to the question of whether the conditions for enforcement in accordance with the Norwegian law on coercive enforcement 1992-06-26-86 (tvangsfullbyrdelsesloven) were fulfilled, where the Norwegian Court of Appeal had referred to the Swedish judgment, where it was stated that A had been served with the document, which instituted the Swedish proceedings 13 days before the Swedish Court gave its judgment, where upon A did not respond and therefore did not deny the correctness of the plaintiff´s claims to the Swedish Court. Further, there were no grounds to assume that the document, which instituted the proceedings, had not been served in accordance with Swedish law. Consequently, the Norwegian Court of Appeal concluded that the conditions for refusing recognition in accordance with the Lugano Convention Article 27 nr. 2 were not fulfilled.