

# Norwegian Supreme Court of Appeals on the Lugano Convention Art 16(1)(a)

The Norwegian Supreme Court of Appeals has recently handed down a judgment on the Lugano Convention Art 16(1)(a). The decision (Norsk Høyesterett (kjennelse)) is dated 2006-09-07, was published in HR-2006-01547-U - case no. 2006/1310 and is retrievable from [here](#).

## Facts and contentions

The facts and contentions of the case were the following. In 2003, C and his cohabitant A bought a house in Spain. A died 15 January 2004. Serving the decedent estate on 21 June 2005 with a subpoena in the forum (Oslo tingrett) at the place of the decedent estate's domicile in accordance with the Norwegian Civil Procedural Law of 13 August 1915 nr 6 (Lov om rettergangsmaaten for tvistemaal) § 30, C claimed the joint ownership dissolved in accordance with the Law of Joint Ownership of 18 June 1965 nr. 6 (Lov om sameige) § 15. C extended his claim on 29 September 2005 and contended to buy the decedent estate out of the joint ownership in accordance with an agreement between C and A of 14 August 1997. The decedent estate contended, first, there was no agreement on buy out, and, second, the forum (Oslo tingrett) at the place of the decedent estate lacked adjudicatory authority. Therefore, the decedent estate asserted the court must reject to hear the case and subsequently dismiss the case from becoming a member of the Norwegian adjudicatory law system.

## Legal basis

The relevant provision for determining the adjudicatory authority of Norwegian Courts was the Lugano Convention Art 16(1)(a). That provision reads:

*“The following courts shall have exclusive jurisdiction, regardless of domicile: (1) (a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated;”*

In general, the legal basis for conferring, delimiting and thus both attribute and

exclude adjudicatory authority to Norwegian courts is regulated by chapter 2 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmåten for tvistemaal) where § 36a decides that the Norwegian Civil Procedural Law Chapter 2 is limited by “agreements with a foreign state”. Such an agreement is the Lugano Convention, which was ratified by Norway on 2 February 1993 and adopted and implemented by incorporation as law of 8 January 1993 nr. 21 (Luganolooven). The law entered into force on 1 May 1993 and regulates international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

### **Court instances and conclusions**

The decisions of the court of first and second instance as well as the Supreme Court of Appeals were as follows. The court of first instance (“Oslo tingrett”), in its decision on 14 October 2005, attributed adjudicatory authority to hear the case. The decedent estate appealed to the court of second instance (“Borgarting lagmannsrett”), which on 23 January 2006 decided, first, the decedent estate was obliged to pay C’s court costs only for the proceedings before the court of second instance, and, second, to attribute adjudicatory authority to Norwegian courts. Hence, the court of second instance sent the case back to the court of first instance to be heard. The decedent estate appealed to the Supreme Court of Appeals, which on 29 March 2006, rejected the judgement of the court of second instance and returned the case to that court for adjudication. The court of second instance decided on 30 June 2006, first, the decedent estate was not obliged to pay C’s court costs, and, second, to attribute adjudicatory authority to Norwegian courts and send the case back to the court of first instance to hear the case. The decedent estate appealed that decision to the Supreme Court of Appeals contending Norwegian courts lacked adjudicatory authority. The Supreme Court of Appeals was, in accordance with the Norwegian Procedural Law (tvistemålsloven) § 404, competent to hear questions pertaining to procedure and interpretation, and the appeal to the Supreme Court of appeals concerned the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). Hence, the Supreme Court of Appeals was competent to test the correctness of the interpretation of the court of second instance on the Lugano Convention Art 16(1)(a). The Supreme Court of Appeals agreed with the lower instances on adjudicatory authority being attributed to Norwegian courts, and subsequently rejected the appeal from decedent estate. Hence, the case was sent

back to the court of first instance.

### **Ratio decidendi of the Supreme Court of Appeals**

In the following, the rationale of the Norwegian Supreme Court will be described.

- First, the Supreme Court of Appeals concluded, with support from the judgement of the Norwegian Supreme Court in Rt-2000-654, the Lugano Convention in material scope was applicable to the dissolution of the joint ownership in accordance with article 1 since the dissolution of joint ownership would entail a sale of the property in question, which did not fall under the scope of article 1 nr. (1), where rights arising out of wills and succession are excluded from the material scope of the Lugano Convention.
- Second, the Supreme Court of Appeals introduced the wording of the Lugano Convention Art 16, which, first, the court stressed, concerns exclusive jurisdiction for certain courts, and, second, the courts of the Contracting State in which the property is situated have such exclusive jurisdiction in accordance with that article paragraph (1)(a) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property.
- Third, the Supreme Court of Appeals stated that the notion “rights in rem” is to be interpreted autonomously, and independent from national conceptions of that notion in each Contracting State. On the concept of autonomous interpretation, the Supreme Court of Appeals referred to its judgement in Rt-2006-391, paragraph 20 and 21, and also to the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice.
- Fourth, the Supreme Court of Appeals accentuated the importance of Art 16 as being an exception to the main rule in Art 2, the article must not be interpreted wider than the limits of its aim and purpose. In that respect, the Supreme Court of Appeals referred to the judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili and the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice on the corresponding article in the Brussels Convention. Thereupon, the Supreme Court of Appeals inserted paragraph 28 of the Danish version of the latter judgement, which in English reads:

*“as regards the objective pursued by Article 16(1)(a) of the Brussels Convention, it is clear both from the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1) and the consistent case-law of the Court that the essential reason for the exclusive jurisdiction of the courts of the Contracting State where the property is situated is that the court of the place where property is situated is best placed to deal with matters relating to rights in rem in, and tenancies of, immovable property (see, in particular, Case 73/77 Sanders [1977] ECR 2383, paragraphs 11 and 12).”*

- Fifth, the Supreme Court of Appeals inserted the Danish version of paragraph 29 and 30 of the judgement of 18 May 2006, case C-343/04, Land Oberösterreich vs EZ as by the European Court of Justice. Those paragraphs read in English:

*“29 As regards, in particular, disputes concerning rights in rem in immovable property, they must generally be decided by applying the rules of the State where the property is situated, and the disputes which arise frequently require checks, inquiries and expert assessments which have to be carried out on the spot, so that the assignment of exclusive jurisdiction to the court of the place where the property is situated, which for reasons of proximity is best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice (see, in particular, Sanders, paragraph 13, and Reichert and Kockler, paragraph 10).”*

*“30 It is in the light of the interpretative principles thus recalled that the Court held that Article 16(1)(a) of the Brussels Convention must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Brussels Convention and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Reichert and Kockler, paragraph 11).”*

- Sixth, the Supreme Court of Appeals quoted paragraph 17 of the

judgement of 5 April 2001, case C-518/99 Gaillard vs Chekili as by the European Court of Justice where it is stated that:

*“the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor (see the judgment in Lieber, paragraph 14).”*

- Further, The Supreme Court of Appeals clarified that the Chekili-case concerned an action for rescission of a contract of sale of immovable property and claim for damages for rescission, which clearly did not concern rights in rem in accordance with the Brussels Convention Article 16(1)(a).
- Furthermore, the Supreme Court of Appeals referred to the judgement of 17 May 1994, case C-294/92 Webb vs Webb as by the European Court of Justice, which concerned proceedings to obtain a declaration that a son holding the flat for the exclusive benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey ownership of the flat to the father. The Supreme Court of Appeals inserted the Danish version of paragraph 15 of that judgement, which in English reads:

*“The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but seeks only to assert rights as against the son. Consequently, his action is not an action in rem within the meaning of Article 16(1) of the Convention but an action in personam.”*

- Seventh, against the preceding considerations, the Supreme Court of Appeals concluded that the claim for dissolution of the joint ownership did not fall under the scope of the Lugano Convention Art 16(1)(a) as conceived as a right in rem under that article. The Supreme Court of Appeals defined the question before the court as a question of whether or not the conditions for dissolution of the agreement on joint ownership were fulfilled, which in turn may be regulated by a contract or by law. Hence, that claim must be directed against those taking over the part of

the joint ownership previously held by the deceased. Therefore, the Supreme Court of Appeals held that the claim could not be directed against anyone since the claim for dissolution of the joint ownership did not follow from the rights of ownership of the property, which if it did, could be directed against anyone. Reiterating the relatively narrow scope of the exclusive jurisdiction of courts in accordance with the Brussels Convention Art 16(1)(a), the Supreme Court of Appeals reaffirmed that article, and also the parallel article in the Lugano Convention, being an exception to the main rule laid down in Art 2, must not be interpreted wider than the limits of its aim and purpose, as follows by case-law of the European Court of Justice and by legal theory.

- Hence, the Supreme Court of Appeals agreed with the lower instances that the Lugano Convention Art 16 was inapplicable (and therefore not attributing adjudicatory authority to Spanish courts), and attributed adjudicatory authority to Norwegian courts at the place of the domicile of the defendant. Subsequently, the Supreme Court of Appeals rejected the appeal from decedent estate and sent the case back the court of first instance.

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