Norwegian Supreme Court on the Lugano Convention Art 5.1.

The Norwegian Supreme Court has recently handed down a judgment on the Lugano Convention art 5.1. The judgment (Norsk Höyesterett (kjennelse)) is dated 2006-08-29 and was published in HR-2006-01492-U – Rt-2006-1008.

The facts of the case were the following. Hüttlin GmbH and Pharma-Food AS entered into an agent agreement in May 1995, which attributed Pharma-Food AS exclusive agent´s rights in Norway, Sweden and Denmark. Hüttlin GmbH was domiciled in Germany. Pharma-Food AS was domiciled in Norway. There was controversy regarding Pharma-Food AS´ commission for a concrete and individuated sale of goods delivered from Germany to Switzerland. Pharma-Food AS chose court litigation as instrument to redress and sued Hüttlin GmbH in September 2005 in Norway. Pharma-Food AS claimed 320.000 EUR with interest and expenses and asserted the case be adjudicated by a Norwegian court. Hüttlin GmbH denied the correctness of the claim and asserted the case to be dismissed due to the Norwegian court´s lack of adjudicatory authority. Since the parties had neither agreed on which court was to have adjudicatory authority to settle disputes arising in connection with their contractual relationship, nor on the place of performance of obligation, the relevant provision for determining the adjudicatory authority of Norwegian Courts was the Lugano Convention Article 5.1. That provision reads:

> *"A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged;*

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 (the Civil Procedural Act of 13 August 1915 nr

6 om rettergangsmaaten 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 on 8 January 1993 nr. 21 (Luganoloven). 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.

The judgments in the court of first and second instance as well as the Supreme Court were as follows. Lack of Norwegian adjudicatory authority was the result of the judgements of both the court of first and second instance (titled respectively "Asker og Bærum tingrett" and "Borgarting lagmannsrett") of respectively 14 February 2006 and 23 June 2006, whereas Norwegian adjudicatory authority was the result of the judgement of the Norwegian Supreme Court of 29 August 2006.

The rationale of the Norwegian Supreme Court was thus:

- First, the Supreme Court identified the legal basis for the case and the legal question in issue. The legal basis for determining the place of performance of the obligation in question in accordance with the Lugano Convention Article 5.1 was the Norwegian rules of private international law, which specify the Irma-Mignon formula as the relevant choice-of-law rule. According to the Irma-Mignon formula, the legal question in issue was which country the obligation in question, and in particular the agent agreement, had its most significant connection to. That question was, in accordance with the Irma-Mignon formula, to be answered by an assessment of several relevant components.
- Second, the Supreme Court rejected the judgement of the court of second instance where upon the Supreme Court first succinctly described that court´s assessment and thereafter presented its own view.

> *The court of second instance found, in accordance with the Irma-Mignon formula, the case to have most significant connection to Germany so that German law was the proper law to determine the place of performance of the obligation in question (and the court found German law to designate the place for performance of money claims at the place where the debtor was domiciled).*

In favour of connection to Norway, the court of second instance attached importance to the agent being Norwegian, the geographical scope of the agent agreement comprising Norway, the 12-year duration and practice of the agreement and the commission having been paid to a Norwegian bank account.

Weakening the connection to Norway, the court of second instance attached importance to the geographical scope of the agent agreement, which also comprised Denmark and Sweden.

In favour of most significant connection to Germany, the court of second instance attached conclusive weight to the assignor being a German company, the agent agreement formulated in German language, the assignor delivering its goods directly to clients abroad and usually under contracts governed by German law, either formulated in German or English.

- The Supreme Court identified the place where the agent had its main office as the most important component in the assessment of which State the agent agreement had its most significant connection. That view was justified by the following considerations.

First, the agent is the contractual party who is to perform the non-monetary and real obligation, which also in the Rome Convention Article 4, number 2, is formulated as "the performance which is characteristic of the contract".

Second, the agent´s principal place of business is normally carried out at the agent´s main office.

Third, in accordance with Norwegian law, if there is no agreement on the place of performance of the obligation, the creditor´s domicile or place of business is a significant connecting factor for monetary claims in that it is the place of performance of the obligation, which also in this case accorded with practices which the parties had established between themselves.

Four, in accordance with Norwegian private international law, agent agreements have, as a starting point, closest connection to the State where the

agent carries out its operations in accordance with the agent agreement. This view is strengthened if the agent agreement has a long-term duration and actual practice, which in this case were 12 years. The legal sources supporting this view were two former Supreme Court judgements contained in Rt. 1980, p. 243 and Rt. 1982, p. 1294. In the first case, a claim for ex post commission after performance of the obligation had its most significant connection to Norway as the Supreme Court attached major importance to the agent being Norwegian, the long-term duration of the agreement, which also regulated the agent´s rights and obligations in Norway. The second case, which involved an agent agreement between a Norwegian wholesaler of flashes for photography and a German company, was for the same reasons viewed as having its most significant connection to Norway. Further, the Supreme Court attached importance to a judgement by the Swedish Supreme Court (Högsta Domstolen i Sverige av 18. desember 1992), contained in "Nytt Juridisk Arkiv 1992 page 823" which stated that in a dispute pertaining to an agent agreement, where the parties neither had agreed on forum nor on the place of performance of the obligation, the dispute would normally be determined by the law in the State where the agent had its place of business, especially if the agent mainly carried out its operations in that State. The Swedish Supreme Court emphasized that such a rule is motivated not only by the agent´s connection to that State, but also out of social policy considerations, but that, as a main rule, it could be departed from if the legal relationship clearly had a stronger connection to another State. Finally, the Norwegian Supreme Court referred to Joseph Lookofsky´s publication "International privatret på formuerettens område", 3rd edition 2004, p. 55, where the author had stated that the assessment pursuant to the requirements in the Rome Convention Article 4.1 was the same as the assessment in the Norwegian Irma-Mignon formula, where upon the Supreme Court added the text of Article 4.1.

Five, the Supreme Court did not attach any weight to the language of the agent agreement, the relation between the assignor and the (end) buyers and visits to fairs.

Six, since the geographical scope of the agent agreement was not confined to Norway, but also included Sweden and Denmark, the Supreme Court inquired whether the connection to Norway was sufficiently weakened so as the

connection to Germany could be justified to be the strongest. The Supreme Court based its conclusion on two considerations. First, the main rule was well founded. Second, fairly weighty grounds are required for departing from the main rule. The Supreme Court found the geographical scope of the agent agreement extending also to Sweden and Denmark insufficient to justify strongest connection to Germany, and attached minor importance to the fact that the monetary claim arose from a delivery carried out from Germany to Switzerland.

- Hence, the Supreme Court concluded that the dispute had its strongest connection to Norway.

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