Norwegian Court of Appeals on the Lugano Convention Article 5 nr. 1

The Norwegian Court of Appeal (Haalogaland lagmannsrett) recently handed down a decision on the Lugano Convention Article 5 nr. 1 on the interpretation of the notions "contract", "obligation" and "the place of performance" of the obligation. The decision (Haalogaland lagmannsrett (kjennelse)) is dated 2007-05-16, published in LH-2007-70583, and is retrievable from here.

Parties, facts and contentions

The plaintiffs, A and B, domiciled in Norway, served the defendant, C, domiciled in Spain, with a subpoena in a Norwegian Court of First Instance (Salten tingrett), with the object of action to ask the court to force the defendant C to repay A 265.000 NOK and B 238.550 NOK (and in addition interests for delayed payment) paid to the natural person C, via an account in Norway belonging to a Spanish registered legal person D, for a real estate project to be developed and realized in Spain for further sale with profit. Both parties agreed the legal relationship was contractual. However, the parties disagreed on the question which contract was the contract from which the claim for repayment derived.

The plaintiffs, A and B, contended adjudicatory authority could be attributed to Norwegian courts based on the Lugano Convention Article 5 nr.1, since the place of performance of the obligation in question was in Norway, based on to alternative arguments. The first alternative argument was that C, having admitted to A and B to have breached the conditions of the original agreement of the real estate project, had entered into a new agreement with A and B, which, first, disregarded the claim for compensation derived from the breach of contractual obligations in the original agreement, and, second, obliged C to repay the said sums to A and B in accordance with the new agreement. In accordance with the Norwegian monetary law on promissory notes (law of 1939-02-17, paragraph 3), the place of payment is the place of the domicile or place of business of the creditor, which in this case was Norway. Hence, within the meaning of the Lugano Convention Article 5 nr.1, the "obligation in question" was C´s obligation to pay A and B the said sums in accordance with the new agreement, and "the place of performance" for that obligation was in Norway. Provided the court did

not accept the new agreement as the relevant contract within the meaning of the Lugano Convention Article 5 nr.1, the second alternative argument was that for the original agreement, the "obligation in question" was C´s obligation to pay A and B due to breach of the original agreement, and "the place of performance" for that obligation was not in Spain, but on C´s account in Norway.

The defendant C contended Norwegian courts lacked adjudicatory authority since the place of performance of the obligation in question for the original agreement was in Spain, and argued that C never had entered into a new agreement obliging C to pay the said sums to A and B.

Both the Norwegian Court of First Instance (Salten tingrett) as well as the Norwegian Appeal Court (Haalogaland lagmannsrett) rejected and dismissed the case from becoming a member of the Norwegian adjudicatory law system based on lack of Norwegian adjudicatory authority in accordance with the Lugano Convention Article 5 nr.1.

Ratio decidendi of the Norwegian Court of Appeal

First, in determining its adjudicatory in/competence, the Norwegian Court of Appeal introduced the Lugano Convention, and, first, its main rule of jurisdiction contained in Article 2, where the plaintiff may sue the defendant at the place of the defendant's domicile, provided the defendant is domiciled in a Contracting State, and, second, its exceptions to the main rule contained in Article 5 in general and Article 5 nr.1 in particular, where upon the plaintiff, as an alternative to Article 2, may sue the defendant in matters relating to a contract, in the courts for the place of performance of the obligation in question. On establishing whether Article 5 nr.1 was applicable, the Norwegian Court of Appeal asked 1) which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1, 2) which "obligation" the dispute concerned, and 3) where the place of "performance" of the obligation was.

Second, the Norwegian Court of Appeal went on to determine which legal relationship at hand in the case was a "contract" within the meaning of Article 5 nr.1. The Court did not test the reality of the plaintiffs´ argument that they had entered into a new agreement with the defendant C (see above), but emphasized that significant for the question of adjudicatory authority was whether the plaintiffs´ pretensions about such a new agreement form the basis for the cause

and object of the action and court litigation. The Court stated that since, first, the plaintiffs´ first argument – that the parties had entered into a new agreement obliging C to pay the said sums to A and B – had not been introduced in the subpoena to and arguments before the Court of First Instance, and, second, that the subpoena to and arguments before the Court of First Instance had contained references to the original contract for a real estate project to be developed and realized in Spain, that latter contract was the relevant "contract" within the meaning of the Lugano Convention Article 5 nr.1 from which the "obligation" derived and the "the place of performance" for that obligation is attributed adjudicatory authority.

Third, having identified the relevant contract, the Norwegian Court of Appeal interpreted the notion "obligation" within the meaning of the Lugano Convention Article 5 nr.1, which must be understood as encompassing primary obligations born by each party and not obligations derived from non or wrong fulfilled obligations (the content of this rule is parallel to the rule in paragraph 25 of the Norwegian Civil Procedural Law of 13 August 1915 nr. 6 (Lov om rettergangsmaaten for tvistemaal, which outside the scope of application of the Lugano Convention determines the adjudicatory authority of Norwegian courts). The Court found, like the Court of First Instance, that, for C, the primary "obligation" of the contract was to carry out the development of the real estate project and accordingly administer the sums A and B had paid, and the cause of the plaintiffs´ action was C´s breach of that obligation, subsequently leading the plaintiffs to their object of action which was their claim for repayment, compensation, annulment of contract or some other claim. Hence, the Court dismissed the plaintiffs´ second alternative argument (see above) since "the obligation in question" did not encompass C´s obligation to pay A and B derived from C´s non-fulfilled primary obligation to develop the real estate project.

Fourth, having identified the disputed "obligation in question" born by C, the Norwegian Court of Appeal interpreted the notion "place of performance" of that obligation within the meaning of the Lugano Convention Article 5 nr.1. That notion needed no further interpretation as the Court found it clear that Spain was the place of performance of the obligation born by C since, in accordance with the original agreement, C was to buy, develop and sell real estate in Spain. Subsequently, the Court concluded that the Norwegian courts lacked adjudicatory authority where upon the Court dismissed the case.