Swedish Supreme Court on Legal Basis for Jurisdiction

The Swedish Supreme Court (Högsta Domstolen) recently rendered a decision on the legal basis for its international adjudicatory authority in civil matters when the Council Regulation no 44/2001 of 22 December 2000 (hereinafter "the Brussels I Regulation") is inapplicable. The decision rendered 15 June 2007 with case no. Ö 494-06 can be retrieved here.

Parties, facts, contentions before the court

The plaintiff, BIG, a company domiciled in Sweden, served the defendant, Isle of Man Assurance Limited (IOMA), an insurance company domiciled in Isle of Man, with a subpoena in a Swedish court, asking that court to force IOMA to pay BIG 48 million Swedish Kroner on the basis of BIG having acquired the rights and obligations of the original policyholders´ insurance agreement with IOMA entered into in November 1991. The background for that agreement was allegedly that BIG in 1991-92 had offered goods to customers while issuing certificates promising to repay customers the sum of the purchase price 10 years after purchase. BIG contended IOMA in accordance with an insurance agreement had promised to recompense BIG for the sum equivalent to that of the sum claimed in accordance with the said certificates. The judgment of the First Instance was appealed to the Swedish Court of Second Instance (Hovrätten för Övre Norrland) whose judgment was appealed to the Swedish Supreme Court.

Ratio decidendi of the Swedish Supreme Court

First, the Swedish Supreme Court questioned whether there was legal basis for attributing adjudicatory authority to Swedish courts.

Second, the Swedish Supreme Court stated that Swedish law did

not have any general rules for determining Swedish adjudicatory authority in international civil and commercial disputes, which, by contrast exist in the Brussels I Regulation and the Lugano Convention. The former is, within its scope of application, directly applicable in Sweden and is applicable in disputes involving parties domiciled in the EU, whereas the latter is adopted and implemented by incorporation as law in Sweden and is applicable in international civil and commercial matters between persons domiciled within EFTA-States, and between persons domiciled in an EFTA-State and an EU-State.

Third, the Swedish Supreme Court asserted that in accordance with the Brussels I Regulation and the Lugano Convention, when the defendant is domiciled in a Member State or Contracting State, the plaintiff may, in accordance with the main rule of jurisdiction in Article 2, sue the defendant at the place of the defendant's domicile. By contrast, if the defendant is not domiciled in a Member State or Contracting State, the international adjudicatory authority is as a main rule to be determined by national law, including also disputes relating to insurance. Since the defendant, IOMA, was domiciled in Isle of Man where IOMA pursued its business activities, and Isle of Man neither is a Member of the EU nor is a contracting State to the Lugano Convention, it follows that the question of international adjudicatory of Swedish courts must be determined by national Swedish rules.

Fourth, the Swedish Supreme Court stated there did not exist any particular rules in Swedish national law determining international adjudicatory authority of Swedish courts. Under such circumstances, the Court reasoned, this question is to begin with determined by analogical application of the forum-rules in Chapter 10 of "Rättegångsbalken", which in this case did not support the attribution of adjudicatory authority to Swedish courts.

Fifth, BIG contended that Swedish courts were competent to

adjudicate, insisting, first, that the insurer, in accordance with Brussels I Regulation (and the relevant provisions in the Lugano Convention) may be sued not only in the courts of the State where the insurer is domiciled (Article 9.1.a), but also, in case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled (Article 9.1.b), and, second, that the insurer, in accordance with Brussels I Regulation Article 10 (and the relevant provisions in the Lugano Convention) may be sued in the courts for the place where the harmful event occurred. Further, BIG contended – with reference to the Swedish Supreme Court decision in NJA 1994 p. 81, where the Court had stated that "the Lugano Convention must be seen as expressing international accepted principles on conflicts of competence between courts of different States" – that the rules of the Brussels I Regulation and the Lugano Convention should be applicable in order to attribute adjudicatory authority to Swedish courts regardless of the said regulations not being directly applicable. In answering those contentions, the Swedish Supreme Court pointed out, first, that the Court had stated that cited phrase in a dispute between two Swedes in relation to a better right to foreign patent claims, and, second, that the cited phrase was occasioned by the circumstance that the Lugano Convention on exclusive jurisdiction in proceedings concerned with certain patent claims did not give better rights for the seeking of a patent invention, and by consequence was not an argument for the lack of Swedish adjudicatory authority. Further, the Swedish Supreme Court pointed out that the reasoning in NJA 1994 p. 81 – that Swedish courts in that case had adjudicatory authority in accordance with the main principle that defendants shall be sued in the courts of the State where they are domiciled – was not to be conceived as an expression of a general principle so that the rules of the Brussels I Regulation (and the Lugano Convention) were applicable by analogy in cases where the question of adjudicatory authority is to be determined in accordance with national law. Furthermore, in support of such

lack of a general principle, the Swedish Supreme Court referred to NJA 2001 p. 800.

Sixth, having concluded that the Brussels I Regulation and the Lugano Convention neither were expressions of general principles, nor were applicable by analogy, the Swedish Supreme Court emphasized that those regulations nevertheless could serve as an important basis for the assessment of whether there should be sufficient ground to attribute adjudicatory authority to Swedish courts even in situations when these regulations were not directly applicable.

Seventh, in recognizing that the Brussels I Regulation and the Lugano Convention expressly are based on the main principle that defendants shall be sued in the courts of the State where they are domiciled, the Swedish Supreme Court stated that one consequence thereof is that exceptions to the main rule are to be interpreted restrictively, also including the rules of jurisdiction in matters of insurance. Further, the Court stated that if the Brussels I Regulation and the Lugano Convention were to serve as legal basis for adjudicatory authority in accordance with Swedish law, it had to be required that adjudicatory authority could have been attributed to Swedish courts if the Brussels I Regulation and the Lugano Convention were applicable.

Eighth, responding to BIG´s contention that Article 10 of the Brussels I Regulation attributed adjudicatory authority to Swedish courts, the Swedish Supreme Court stated, first, that liability insurance is in general considered as an insurance covering responsibility of damage in relation to a third party, and, second, that the insurance at hand in this case could not be qualified to count as liability insurance. Consequently, the Court reasoned, the Brussels I Regulation Article 10 is inapplicable and could therefore not serve as legal basis for attributing adjudicatory authority to Swedish courts.

Ninth, responding to BIG´s contention that Article 9.1.b of the Brussels I Regulation attributed adjudicatory authority to Swedish courts, the Swedish Supreme Court stated, first, that Article 9.1.b presupposes either the policyholder, the insured or a beneficiary to serve the defendant with a subpoena and start court proceedings, which was not the circumstances of the case since the insurance agreement was not entered into between the plaintiff, BIG, and the defendant, IOMA, but was rather an insurance agreement where BIG had acquired the rights and obligations of the original policyholders. Therefore, the Swedish Supreme Court doubted that BIG could be qualified to count as "insurer" within the meaning of Article 9.1.b of the Brussels I Regulation. Having regard to the purpose of that Article, which is to protect the weaker party to the agreement (referring to point 13 of the Preamble of the Brussels I Regulation), its primary purpose is usual standard types of insurance agreements, which in the case at hand deviated there from. Against this background, the Swedish Supreme Court concluded that the Brussels I Regulation Article 9.1.b would not be a strong argument for attributing adjudicatory authority to Swedish courts (referring in parenthesis to the European Court of Justice, Judgment of 13 July 2000, Group Josi Reinsurance Company vs Universal Insurance Company).

Tenth, the Swedish Supreme Court went on to comment, that in determining how and to what extent the Brussels I Regulation and the Lugano Convention should and could be legal basis for attributing adjudicatory authority to Swedish courts in accordance with Swedish national law, the Court stated that both regulations also contain rules on recognition and enforcement of judgements, and that the rules on jurisdiction had been formed in relation to the obligations following from the rules on recognition and enforcement of judgements (and with a view to a common legal market), which especially was the case with insurance disputes.

Eleventh, having regard to the foregoing considerations, the Swedish Supreme Court concluded that without legal support in Swedish law in general, it was out of the question to attribute adjudicatory authority to Swedish courts in insurance disputes as the Brussels I Regulation, independent of the object of the insurance agreement, who the policyholder or insured is, or where the insurer is domiciled or has his place of business. Such special circumstances, which could occasion the attribution of adjudicatory authority to Swedish courts in the present case had not been presented to the Court. Hence, the Swedish Supreme Court concluded that Swedish courts lacked adjudicatory authority.