CASE TRANSLATION: **DENMARK**

Case citation:
U.2014.52V

Name and level of the court:
Vestre Landsret (Western High Court)

Date of decision:
6 September 2013

Members of the Court:
Lis Frost, Linda Hangaard, Anne-Mette Schjerning

Lawyer for the claimant:
Tim Henry Haarbo

Denmark; digital signature; enforcement

The Bailiff Court in Aarhus ruling of 20 March 2013, FS 20-1188/2013.

No one was called or met.

Presented were:

Application with exhibits

The client's attorney, lawyer Tim Haarbo, informed the court yesterday that an original document of indebtedness does not exist, but the defendant has signed using his digital signature, and that the defendant is identifiable by the specified PIN code.[1]

The following was given

Order:

The application is accompanied by a document called the loan document. As specified in The Administration of Justice Act § 488, paragraph. 2, in fine, cf. § 478, paragraph. 1, no. 5 an original document of indebtedness must be produced in connection with the filing of the application. Lawyer Tim Haarbo has stated that it will not be possible to produce an original document.

The requirement for submission of the original document is justified in the enforcement court being able to assess whether the creditor still controls the claim at the time of enforcement, just as the enforcement court must be able to determine whether the debtor has committed himself in accordance with the enforcement action in question.

Under the provisions of The Administration of Justice Act, digital mortgages can form the basis for enforcement, but the Act does not seem to warrant extension of this ability to include digital loan documents.

According to this the submitted material cannot serve as a base of enforcement, hence the case is rejected.

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Western High Court order

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By order of 20 March 2013, Bailiff's Court in Aarhus has rejected the case with reference to the absence of an original foundation that can form the basis for enforcement in the enforcement court.

With the Permission of the Appeal Board of 23 May 2013, the ruling is appealed by 4finance Aps, alleging that the court's order dismissing the execution ceases to apply and that the case is remitted for reconsideration. In support of the claim, 4finance Aps has in particular referred to the fact that there is a loan document signed with a digital signature.

The High Court made the following

Order:

According to the Administration of Justice Act § 478, paragraph. 4, first sentence, the execution of inter alia a document of indebtedness may be levied against anyone who by his signature upon the document is committed as debtor, surety or mortgagor.

According to the Administration of Justice Act § 478, paragraph. 4, second sentence, enforcement may also be levied against a person who as debtor, surety or mortgagor has committed himself by a digital mortgage that is or has been registered. It can therefore not be assumed that the debtor's approval of the loan document by NemID[2] is a signature in accordance with the Administration of Justice Act § 478, paragraph. 4, first sentence. The High Court

[1] The final part of this sentence is omitted because it is impossible to understand the meaning.

[2] NemID (EasyID) is a product used by Danish internet banks, government web sites and other private companies. NemID is managed by Nets DanID A/S.

therefore approves that the loan document does not provide a basis for enforcement and upholds the enforcement court order.

It is held that

The enforcement court order stands.

The case is closed.

With thanks to **Lars Bo Langsted** for helping with this translation.

COMMENTARY:

By **Lars Bo Langsted**

These two high court rulings from last autumn (U.2014.52 V and U.2014.712Ø) were seen as another sign of a foot-dragging judiciary, where neither the telefax nor the e-mail really seemed to have been invented. This is not, however, quite true – neither is it fair to point at the judiciary.

The real problem is the very different speeds with which digitalization is taking place. In Denmark all citizens must be able to communicate with all public authorities by means of ICT by 1 November 2014, and as a rule it will not be possible to communicate by ordinary mail after this date. A lot of energy and money has been put into advertisements, citizens meetings in libraries, etc. and though many citizens – especially among the elder generation – are still skeptical (or being realistic: in no condition to ever learn how to use a computer or the like) most seem to accept or even approve of this huge step into the digitalized world. This is not surprising, since ICT is already an integrated part of most of our lives, including our business-lives.

Parliament and the politicians have been very focused on taking Denmark to "new levels" of integrated ICT and digital communication in every aspect – but have forgotten to give the rather old rules in the Administration of Justice Act a service check regarding compliance with new technology. This lapse became painfully clear in the autumn of 2013, so in June this year a new bill was passed in Parliament among other things altering the Administration of Justice Act, § 478.

So as of 1 July 2014, it has been possible to use a digitally signed loan document as basis for enforcement, provided of course that the other conditions are met as well. The amendment reads as follows: 'In the cases referred to in paragraph. 1 No. 4 and 5, the signature can be added digitally.' From the preparatory work, we know that not only NemID but also any other digital signature solution is accepted, providing the signature used is based on the OCES standard (http://www.openoces.org), qualified certificates or digital signatures with a level of safety which is at least on par with the OCES standard.

If the defendant claims that he did not sign the digital document, it is for the applicant to meet the burden of proof. This is due to the fact that it cannot be ruled out that someone else other than the defendant had access to his digital signature. This of course cannot be ruled out as for physical signatures either, since forgery has been known ever since ink and paper was invented. But when it comes to "real" signatures, it is possible to establish with a very high degree of certainty who has written the signature in question. This is not (yet) possible when it comes to digital signatures normally used in trading and commercial affairs.[3]

The amendments from this summer do not, of course, mean that the Administration of Justice Act is now perfectly fit for modern technology in every aspect. But legislators and judges are slowly moving in the right direction. Maybe someday in the (near?) future it will be possible to hand in subpoenas, notices of appeal and other essential documents to the courts solely by mail – but Rome was not built in one day.

Lars Bo Langsted is a member of the editorial board.

[3] See previous issues of this journal for examples where thieves have successfully obtained the private key of a digital signature in a number of cases in Russia.