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English or Austrian law after Brexit?

GRAF ISOLA Rechtsanwälte GmbH | Litigation - Austria



JAKOB WIDNER

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The Austrian Supreme Court recently had to decide whether the Brexit referendum has an impact on the issue of which law is applicable to contractual obligations.⁽¹⁾ Although the Supreme Court correctly came to the conclusion that the Rome I Regulation⁽²⁾ continues to apply to contractual obligations, it seemingly applied this only to court proceedings instituted before the expiry of the Brexit transition period on 31 December 2020.

Facts

The plaintiff transferred in trust a property to the defendant. The defendant was a privately limited company under English law, which had a branch office in Austria. The property was also located in Austria. The court of first instance found that the trust agreement had been dissolved and obliged the defendant to agree to the transfer of the property rights to the plaintiff. The court of appeal confirmed this decision and rejected the defendant's objection that the property had been transferred as a contribution in kind, which is why English company law would have to be applied.

Decision

The Supreme Court confirmed the decisions of the lower courts that, in cases with a foreign connection, it must always be examined separately which legal system is specifically applicable. For contractual obligations, such as agreements on real estate, the provisions of the Rome I Regulation must also be applied in relation to the United Kingdom. The Brexit referendum of 23 June 2016 did not change this for the case at hand because, according to article 67(1) of the EU-UK Withdrawal Agreement, EU law is still applicable, if – according to the Supreme Court – the proceedings were initiated before 1 January 2021. The lower courts were therefore correct to apply Austrian law on the basis of the Rome I Regulation because, according to its terms and absent a choice of law, contracts on real estate are to be assessed according to the rules of the jurisdiction in which the real estate is located.

Comment

It could be inferred from the reasoning of the Supreme Court that, in legal proceedings instituted after the transition period (ie, after 31 December 2020), the Rome I Regulation must no longer be observed by the Austrian courts if the case has a connection to the United Kingdom. However, this is not the case. The law according to the Rome I Regulation is to be applied by the Austrian courts and all other EU courts even if the law determined to govern a contract is not the law of a member state. The law of a third country, such as that of the United Kingdom post-Brexit, must also be applied on the basis of the Rome I Regulation, regardless of when the legal proceedings were instituted. The Rome I Regulation itself states that it applies to contracts concluded on or after 17 December 2009. Article 67(1) of the EU-UK Withdrawal Agreement, which was invoked by the Supreme Court, does not deal with the applicable substantive law, but with international jurisdiction and the enforcement of judgments. The provision thus has no bearing on the solution of the case.

In contrast, the rules on how to determine the substantive law applicable to a contract in the United Kingdom post-Brexit are derived from article 66 of the EU-UK Withdrawal Agreement. There, it is regulated that the Rome I Regulation only continues to apply to contracts that were concluded before the expiry of the transition period on 31 December 2020. At which point in time the legal proceedings were initiated, however, is also irrelevant from a UK perspective.

Therefore, only for courts in the United Kingdom does the expiry of the transition period play a role when it comes to the rules according to which the foreign law is to be determined. For EU courts, on the other hand, the transition period is of no relevance in this context.

In short, although the Supreme Court correctly resolved the case, its comments on the effects of the Brexit referendum on the determination of the applicable substantive law caused more confusion than clarification.

For further information on this topic please contact Jakob Widner at GRAF ISOLA by telephone (+43 1 401 170) or email (j.widner@grafisola.at). The GRAF ISOLA website can be accessed at www.grafisola.at.

Endnotes

(1) OGH 9 December 2021, 5 Ob 173/21h.

(2) Regulation (EC) No. 593/2008.