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Security for legal costs after Brexit

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The Supreme Court recently had to clarify whether a plaintiff from the United Kingdom must provide security for legal costs. Austrian civil procedure law provides for this possibility in order to protect domestic defendants from not being able to recover legal costs from a foreign plaintiff who has sued unsuccessfully.

Facts

The plaintiff, a British citizen, had sued an Austrian defendant in connection with an agency corporation agreement before an Austrian court.

The defendant, an Austrian limited liability company, requested that the plaintiff be ordered to provide security for legal costs in the amount of €30,000. The court of first instance then reduced the security for legal costs to the amount of €8,000.

Both parties appealed. The appellate court modified the order of the court of first instance and declared that no security for legal costs was due. It pointed out that the Brussels I Regulation, the Brussels Convention and the Rome Convention are no longer applicable as of 1 January 2021 due to Brexit. However, the United Kingdom had ratified the Hague Convention on Choice of Court Agreements in Civil and Commercial Matters (the Hague Convention), which was signed into law in the United Kingdom on 1 January 2021 under the Private International Law (Implementation of Agreements) Act 2020. The Hague Convention applies to exclusive jurisdiction agreements in international civil and commercial matters (consumer cases and employment matters are excluded from its scope). Article 8 of the Hague Convention provides that the decision of the court of a contracting state, designated in a forum clause, shall be recognised and enforced in the other contracting state. In the agency corporation agreement, which was the subject matter of the action, the court of jurisdiction in Vienna was briefly agreed as the place of jurisdiction. According to the appellate court, this was an exclusive agreement on jurisdiction as per the Hague Convention. Austrian procedural law,⁽¹⁾ therefore, does exempt the plaintiff from a security for legal costs in such a case.

Absent case law on the issue, the court of appeal allowed the case to proceed to the Supreme Court.

Decision

The Supreme Court confirmed the legal opinion of the court of appeal.

The Supreme Court opined that no security for legal costs can be imposed on a foreigner if a court decision ordering the plaintiff to compensate the defendant for legal costs is enforceable in the state of the plaintiff's habitual residence.

The application of the Hague Convention was also not questioned by the Supreme Court. It came into force for the European Union on 1 October 2015 and for the United Kingdom on 1 January 2021. Hence, it governs the relevant issue, since it was also undisputed between the parties that they had concluded a written and exclusive forum agreement concerning an international civil or commercial matter.

However, based on this legal situation, the courts in the executing state have no discretion as to whether they want to enforce or not. According to the Supreme Court, the actual enforcement practice in legal systems that are strongly characterised by judicial law – as in the case of the United Kingdom - is therefore irrelevant. The Hague Convention clearly stipulates that not only a judgment but also the award of costs is to be enforced in the state of the plaintiff's habitual residence. This means that under Austrian procedural law, there is no need to provide security for the costs of proceedings in the case at hand.

In the appeal proceedings, the defendant had objected that an enforcement practice of Austrian judgments had not yet been established in the United Kingdom. It was therefore uncertain whether, under what conditions and with what financial burdens enforcement was possible. For example, the Hague Convention requires costly translations that are not already covered under the award on costs of the Austrian court. According to the defendant, the Austrian award might also contradict UK law.

However, these fears and speculations expressed by the defendant did not play a role in the opinion of the Supreme Court. The Supreme Court therefore rejected the defendant's rationale, since it was not based on the statutory law applicable to the case, but concerned deliberations on its as yet untested implementation in the United Kingdom.

Comment

This decision is welcome because it creates legal clarity. It remains to be seen, though, how cost awards of Austrian courts can actually be enforced in the United Kingdom in the future. Between the lines, the Supreme Court made it also clear that it is not its task to set aside statutory law just because of practical uncertainties pertaining to its implementation abroad.

UK plaintiffs are therefore not required to post security for legal costs when bringing an action in Austrian courts if:

- it is an international civil or commercial matter (the exception does not apply to consumer and employment contracts); and
- there is an exclusive choice of court agreement regarding the jurisdiction of an Austrian court.

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Endnotes

(1) Section 57 para 2 No. 1a ZPO.