

Austrian Supreme Court—English or Austrian law after Brexit?

Dispute Resolution analysis: 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. Although the Austrian Supreme Court correctly came to the conclusion that the Rome I Regulation (EC) 593/2008 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. Written by Jakob Widner, partner at Graf Isola.

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 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.

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 (EC) No. 593/2008 (Rome I) 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 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, regardless of when the legal proceedings were instituted. The Rome I 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 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 UK 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.

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