

German Federal Court of Justice: Hungarian street tolls can be claimed in German courts, based on, inter alia, Article 21 Rome I Regulation (public policy exception)

By judgment of 28 September 2022 - XII ZR 7/22 (so far, only the press release is available, on which the following considerations are based), the German Federal Court of Justice held that Hungarian street tolls can be claimed before German courts.

The claimant is a Hungarian company that collects Hungarian street tolls, the defendant a domestic car rental company. According to Hungarian regulation, it is the registered keeper of the car that owes the toll. If the toll is not paid by a virtual vignette (e-Matrica), an „increased substitute toll“, five times higher than the vignette, must be paid within 60 days, afterwards additionally a large „processing fee“. The first instance rejected the claim, on appeal the defendant was ordered to pay the claimed amount, the second appeal, on issues of law alone, confirmed the judgment on first appeal (except on the issue of which currency could be claimed, Hungarian Forinth or also Euros optionally).

The main point on the second appeal was whether the public policy exception in Article 21 Rome I Regulation applies. This analysis implies that the claim is characterised as contractual and that the Hungarian law on street tolls applies. The first issue was rather whether imposing liability solely on the part of the registered keeper would conflict with German public policy in case that this keeper is a car rental company whose business obviously is renting out its registered cars to the respective driver. As German law (section 7 German Road Traffic Act) prescribes, rather similarly, at least a subsidiary liability of the registered keeper, the Court rightly rejected a violation of German public policy. Since this result was obvious, the issue must have been dealt with upon party

submission with which the Court has to deal with as a matter of fair proceedings (right to be heard, extending to a right to see the Court dealing with the Party's core points).

More interestingly, the „increased substitute toll“ was seen as a contractual penalty which was - again rightly - considered as „not entirely unknown under German law“, referring to similar substitute tolls indeed used in contracts for tramway or underground railroad traffic etc. if the traveller does not have a valid ticket. One is tempted to add that a contractual practice does not necessarily indicate the legal validity of this practice, but as this practice is virtually uncontested it is certainly convincing to take it as a „proof“ for how German law deals with contractual penalties. The German Civil Code provides for the basis in sections 339 et seq., combined with sections 305 et seq. (control of unfair terms).

On the issue of the currency of the claim, the Court observed that the debt in question in foreign currency can only be claimed in that foreign currency unless the applicable Hungarian law allows optional payment in Euros. In order to assess this point of Hungarian law the case was referred back to the court of first instance.

The case shows that Member State Courts continue being careful before striking down the results of a foreign applicable law as a violation of the national public policy. Had the highest instance of the German civil courts tended towards the opposite it would have had the obligation to refer the question to the ECJ whether activating the public policy exception was still within the confines of this exception as defined in its outer limits by European Union law. Rejecting a public policy violation in the sense of Article 21 Rome I Regulation (and comparable provisions in EU PIL) puts this decision in a (small) series of decisions of Member State courts, compared to almost none that actually assessed a violation. Nevertheless, it is remarkable that the court of appeal gave leave for a second appeal on the grounds that the questions on Article 21 Rome I Regulation would be of fundamental relevance („von grundsätzlicher Bedeutung“). Otherwise, the case could not have reached the Federal Court of Justice, as complaints against not giving leave are only admissible beyond a value of the appeal of EUR 20.000, and the total sum of the claim here was not more than approximately EUR 1.300.