German Federal Court of Justice rules on what constitutes a genuine international element within the meaning of Art. 3(3) of the Rome I-Regulation (BGH, judgment of 29 November 2023, No. VIII ZR 7/23)

by Patrick Ostendorf (HTW Berlin)

The principle of party autonomy gives the parties to a contract the opportunity to determine the applicable substantive (contract) law themselves by means of a choice-of-law clause – and thus to avoid (simple) mandatory rules that would otherwise bite. According to EU Private International law, however, the choice of the applicable contract law requires a genuine international element: in purely domestic situations, i.e. where *"all other elements relevant to the situation at the time of the choice"* are located in a single country, all the mandatory rules of this country remain applicable even if the parties have chosen a foreign law (Art. 3 (3) Rome I Regulation).

In the absence (for the time being) of relevant case law from the European Court of Justice, the precise requirements of this threshold are not yet settled. However, in a recent judgment, the German Federal Court of Justice (Bundesgerichtshof) has – seemingly for the first time – considered the requirements for a sufficient international element in this respect.

The decision concerned a lease agreement for an apartment in Berlin which was rented out by the embassy of a foreign state (the embassy acting on behalf of the foreign ministry of that state, which was the owner of the apartment). The lease contained a choice-of-law clause in favor of the law of that state and was drafted in the language of that state.

As the lease was entered into for a fixed term, the landlord informed the tenant shortly before the expiry of the lease that it would not be renewed and asked them to vacate the premises accordingly. The tenant in turn invoked section 575(1) of the German Civil Code (Bürgerliches Gesetzbuch – BGB), according to which a fixed-term lease agreement is deemed to have been concluded for an indefinite period of time if the landlord has failed to inform the tenant in writing of the reasons for the fixed term at the time the lease was concluded.

The Bundesgerichtshof concludes that these facts constitute a purely domestic situation within the meaning of Art. 3 (3) of the Rome I Regulation; therefore section 575 BGB (a mandatory provision of the German Civil Code) applies notwithstanding the governing law clause in the contract providing otherwise. Accordingly, the request by the claimant to grant eviction has to be rejected.

As a starting point for its analysis, the Court emphasised that the genuine international element required for a choice of law must be of some significance and weight for the specific transaction in question (based on the principles of the applicable conflict-of-laws rules, in particular the connections with a foreign state referred to in Art. 4 Rome I Regulation), whereas subjective references to a foreign law based solely on the agreement of the parties will generally not suffice.

Even the fact that a foreign state was a party to the lease agreement does not, in the view of the Court, change this, since the embassy, acting both as the agent of the foreign state and as the institution responsible for the further implementation of the lease agreement, constitutes a branch within the meaning of Art. 19(2) of the Rome I Regulation ("*If the contract is concluded in the course of the business of a branch, agency or other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or establishment is situated shall be treated as the place of habitual residence*"). It follows that not only the tenant's but also the landlord's habitual residence is deemed to be in Germany. Finally, according to the Court, the fact that the apartment in question was primarily used for the accommodation of embassy staff (although not in the present case), that the contract was concluded in a foreign language and that the tenant was (also) a foreign national is not sufficient to establish a genuine international element as well.

Although the decision of the Bundesgerichtshof is undoubtedly well reasoned, it reaches the opposite conclusion to recent English case law: in particular, the

English Court of Appeal has (even before Brexit) taken the contrary view that the use of a foreign contractual language or a standard form contract tailored to international transactions would even on a standalone basis be sufficient to constitute a relevant international element – and accordingly allow the parties to escape the restrictions stipulated by Art. 3(3) Rome I Regulation (Dexia Crediop SpA v Comune di Prato [2017] EWCA Civ 428, discussed here).

Further guidance from the European Court of Justice on the interpretation of Art. 3(3) Rome I Regulation would therefore be desirable.