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Which country's law applies?

Allemagne

1 Sources of the rules in force

1.1 National rules

Between 2007 and 2016 the EU codified the conflict-of-law rules of important areas of private law in the form of Regulations (in particular Regulation (EC) No 593/2008 (the 'Rome I Regulation'), Regulation (EC) No 864/2007 (the 'Rome II Regulation') and Regulation (EU) No 650/2012 (the 'EU Succession Regulation'). For an overview please refer to the guide 'Judicial cooperation in civil matters in the European Union' (https://e-justice.europa.eu/content_ejn_s_publications-287-en.do). Consequently, the scope of Germany's autonomous conflict-of-law rules has become ever narrower.

The main source of domestic German conflict-of-law rules (or private international law) is the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche –EGBGB*), in particular Articles 3 to 48. Under Article 3 EGBGB, conflict-of-law rules laid down in EU legislation and in international conventions take precedence over the provisions of the Act in their fields of application.

German law also contains scattered conflict-of-law rules elsewhere than in the EGBGB, for example in the Insolvency Code (*Insolvenzordnung – InsO*). In fields that are not regulated by legislation, for example in international company law, the applicable law is determined by the courts.

The remarks under 2 are essentially confined to the domestic German conflict-of-law rules.

1.2 Multilateral international conventions

A list of all multilateral conventions signed and ratified by Germany can be found in Directory B of the Federal Law Gazette (*Bundesgesetzblatt*) (online orders via <https://www.bgbl.de/>). The multilateral international conventions listed include conventions containing unified conflict-of-law rules.

Multilateral conventions of this type are often initiated by international organisations. Particular mention should be made of the Hague Conference on Private International Law (www.hcch.net <https://www.hcch.net/de/home/>), of which Germany has long been a member.

1.3 Principal bilateral conventions

Individual conflict-of-law provisions can also be contained in bilateral conventions. A list of such conventions between Germany and other states can be found in Directory B of the Federal Law Gazette (see 1.2 above).

2 Implementation of conflict of law rules

2.1 Obligation of the judge to apply conflict of law rules on his own initiative

Questions of the conflict of laws do not arise only in disputes before the courts. Business partners in different states need to know which law governs the contract between them, irrespective of any future legal dispute. That law determines their rights and obligations. Car drivers travelling on holiday to other states must be aware of the law under which they are liable if they cause a traffic accident there. That law determines the nature and scale of any compensation.

Where the facts of a dispute present some connection to the law of another state, a German court adjudicating the case will determine which law is to be applied by referring to the German conflict-of-law rules. German judges must be conversant with the German conflict-of-law rules. They must apply them whether or not a party so requests.

2.2 Renvoi

If under the German conflict-of-law rules the law of another state is applicable, but the law of that state in turn refers to the law of a further state, German law generally accepts the further reference, under Article 4(1), first sentence, EGBGB, subject to specific provisions in EU legal acts or international conventions. If the foreign law refers back to German law, the German substantive provisions are applicable (Article 4(1), second sentence, EGBGB).

Where the German conflict-of-law provisions allow the parties to choose the applicable legal system, Article 4(2) EGBGB states that that choice relates only to the substantive provisions.

2.3 Change of connecting factor

A switch in the applicable law in a situation where the facts of the matter are still open to change is a phenomenon familiar to German law. For example, rights *in rem* are in principle assessed according to the law of the location of the property, which means that if an item's location is changed it may come to be governed by a different legal system.

A change of connecting factor is also accepted in other areas of law, an example being a change of nationality.

However, no change in the applicable law is possible if the conflict-of-law rules establish a specific time of connection. For example, to determine the law governing a succession, the connecting factor in the case of persons who die on or after 17 August 2015 will be the place of habitual residence of the testator at the time of death (see 3.7 below).

2.4 Exceptions to the normal application of conflict rules

Article 6 EGBGB formulates the German reservation relating to public policy, whereby a provision of a foreign law is not to be applied where its application would be manifestly incompatible with the fundamental principles of German law. 'Fundamental principles' here means the basic principles of justice.

Generally, this refers to serious violations of fundamental rights guaranteed in the German Constitution. For the applicability of the public policy reservation it is also important that the facts of the case present a domestic connection; otherwise the German legal system cannot be involved. Here too, precedence has to be given to any special rules, in particular those laid down in EU legal instruments that take precedence (see, for example, Article 21 of the Rome I Regulation, Article 26 of the Rome II Regulation and Article 35 of the EU Succession Regulation). A further exception to the application of conflict-of-law rules applies in the case of overriding mandatory provisions. Under an overriding mandatory provision national rules are applied compulsorily, as respect for these provisions is regarded as crucial by a country for safeguarding its public interests, in particular its political, social or economic organisation. Mandatory provisions assume their greatest importance in questions of contractual and non-contractual obligations. Special rules on the subject are laid down in the EU legal instruments that take precedence (see in particular Article 9 of the Rome I Regulation, which contains a legal definition, and Article 16 of the Rome II Regulation) and in international conventions.

2.5 Proof of foreign law

Not only must German courts apply the conflict-of-law rules of their own motion, but, according to Section 293 of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*), they are also required, after due consideration, to determine the substance of the applicable foreign law. This is not limited to

perusal of the foreign legislation: the court must consider the treatment of the legislation in academic writing and case-law. The court must put itself in a position to be able to apply the foreign law in the same way as a court would do in the country concerned.

To determine the substance of foreign law, courts may use any sources of reference available to them.

One source of information for contracting states is provided by the European Convention on Information on Foreign Law, signed in London on 7 June 1968.

The request must be sent to the competent agency of the foreign state concerned via the competent receiving/transmitting agency.

Instead of a request for legal information under the London European Convention, the court can also obtain a legal opinion from an expert, provided the expert also possesses knowledge concerning the practical application of the foreign law.

For straightforward questions, under certain circumstances, information obtained from the contact point of the European Judicial Network in civil and commercial matters or from the court's own research into the foreign law may also suffice to establish the substance of the foreign law.

Courts may also call on the cooperation of the parties for proof of foreign law, but are not bound by their pleadings. They can therefore exploit any source of reference, of their own motion, without being bound by the evidence submitted by the parties.

In exceptional cases where despite all due care the content of the foreign law to be applied cannot be established, German law is to be applied as an alternative.

3 Conflict of law rules

3.1 Contractual obligations and legal acts

International sales contracts are subject in the first place to the UN Convention on Contracts for the International Sale of Goods, which applies automatically between businesses from any of the large number of contracting states unless the parties have ruled this out sufficiently clearly, for example by 'waiving the UN Sales Convention'.

For all other promissory contracts concluded since 17 December 2009, the question of the applicable law is, in principle, determined in accordance with the Rome I Regulation, unless the contract is outside the scope of that Regulation, such as property-law contracts. In addition, Articles 46b to 46d EGBGB are also applicable.

Up to 17 December 2009 the old version of Article 27 et seq. EGBGB applied. This was based on the 1980 Rome Convention on the Law applicable to Contractual Obligations. It was repealed with effect from 17 December 2009, but still applies to contracts concluded before that date.

For certain insurance contracts concluded before 17 December 2009, Articles 7 to 14 of the Introductory Act to the Insurance Act (*Einführungsgesetz zum Versicherungsvertragsgesetz – EGVVG*), in the version valid until 16 December 2009, contain special conflict-of-law rules.

3.2 Non-contractual obligations

Since 11 January 2009, the selection of the legal system applicable to non-contractual obligations has generally been determined by the Rome II Regulation, supplemented by Article 46a EGBGB.

In cases not covered by the Regulation, such as, for instance, infringements of the right to protection of one's personality (*Persönlichkeitsrecht*), German law provides for specific conflict-of-law rules to determine which country's law will apply; these rules are laid down in Articles 38 bis-42 EGBGB.

Article 38 EGBGB lays down rules on the law to be applied in respect of different types of claims based on unjust enrichment.

Under Article 39 EGBGB, legal claims arising out of acts performed without due authority in connection with the affairs of another person are governed by the law of the state in which the act was performed. A special rule applies to settlement of a debt owed by another person.

Under Article 40 EGBGB, claims for damages arising from an unlawful act are in principle governed by the law of the place in which the liable party has acted (*Recht des Handlungsorts*); the injured party can decree that instead of that law, the law of the country in which the injury occurred (*Recht des Schadenseintritts*) is to be applied.

Article 42 EGBGB provides that the parties may in any event choose the law applicable to a non-contractual relationship after the event that gave rise to it.

In addition, under Article 41 EGBGB, the applicable system of law may be replaced by a system of law which, owing to particular circumstances, has a substantially closer connection to the facts of the case.

3.3 The personal status, its aspects relating to the civil status (name, domicile, capacity)

Under German conflict-of-law rules, legal questions raised by the personal legal status of a natural person are governed by the legal system of the country of which the person concerned is a national (*Heimatrecht*). This applies in principle to names (for details, see Article 10 EGBGB) and to the question of whether a natural person enjoys legal capacity and capacity to contract (Article 7 EGBGB).

Where a person has more than one nationality (*Mehrstaater*), Article 5(1), first sentence, EGBGB stipulates that reference must be made to the 'effective nationality', i.e. the nationality of the state with which the person with multiple nationalities has the closest connection. If, however, a person with multiple nationalities also has German nationality, Article 5(1), second sentence, EGBGB provides that German nationality alone applies.

3.4 Establishment of parent-child relationship, including adoption

3.4.1 Establishment of parent-child relationship

Under Article 19 EGBGB, the parentage of a child is subject in the first place to the law of the state in which the child is habitually resident. In the relationship to each parent, the parentage can also be determined by the law of the state of that parent's nationality. Lastly, if the mother is married, the law governing the effects of the marriage (*Ehevertragsstatut*) (Article 14 EGBGB) that applies at the time of the birth may also acquire significance in the matter of determining parentage. Different rules apply for children born before 1 July 1998.

Under Article 20 EGBGB, challenges to parentage are governed generally by the legal system that determines parentage, and, where a challenge is brought by a child, by the law applying in the place where the child is habitually resident.

3.4.2 Adoption

Since 31 March 2020 the adoption of a child within Germany has been subject to German law. It is otherwise governed by the law of the state in which the adoptee is habitually resident at the time of the adoption (new version of Article 22(1) EGBGB). Adoption procedures completed before 31 March 2020 are subject to the previously applicable international private law, i.e. the adoption is governed by the law of the state of which the adopter was a national at the time of the adoption (old version of Article 22(1), first sentence, EGBGB). Adoption by one or both spouses is subject to the law that governs the general effects of the marriage (old version of Article 22(1), second sentence, EGBGB).

The recognition and establishment of the effectiveness of foreign adoptions are regulated in the Act on the effects of adoption of a child under foreign law (*Gesetz über Wirkungen der Annahme als Kind nach ausländischem Recht*) (Effectiveness of Adoption Act (*Adoptionswirkungsgesetz – AdWirkG*)).

3.5 Marriage, unmarried/cohabiting couples, partnerships, divorce, judicial separation, maintenance obligations

3.5.1 Marriage

The following remarks are applicable only to opposite-sex marriages. Please refer to 3.5.2 for same-sex marriages.

Under Article 13 EGBGB, the conditions for the conclusion of marriage are usually governed by the law of the state of which the person engaged to be married is a national. Exceptionally, under special circumstances, German law may apply instead.

In Germany, a marriage may be concluded only in the presence of the registrar, or exceptionally of a person specifically empowered by a foreign state (Article 13(4), second sentence, EGBGB).

If general effects of the marriage do not fall within the scope of Council Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (EU Matrimonial Property Regulation), they are subject to the law chosen by the spouses (Article 14(1) EGBGB).

3.5.2 Unmarried/Cohabiting couples and partnerships

Same-sex marriages and registered life partnerships (*eingetragene Lebenspartnerschaften*) are governed by Article 17b EGBGB. Under that Article the formation and dissolution of a registered partnership, as well as any general effects that do not fall within the scope of Council Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (EU Registered Partnership Property Regulation), are governed by the law of the country in which the life partnership is registered (Article 17b(1), first sentence, EGBGB). The same applies by analogy if the spouses are of the same sex or if at least one spouse is of neither the female nor the male sex (Article 17b(4), first sentence, EGBGB). Since 1 October 2017 it has no longer been possible for registered partnerships to be formed in Germany (Article 3(3) of the Act introducing the right of marriage for same-sex couples (*Eheöffnungsgesetz*)) and Article 17b(1), first sentence, EGBGB is therefore, in relation to the formation of a life partnership, an extremely rare case of a German conflict-of-law rule covering a legal relationship that can only come into being abroad.

3.5.3 Divorce and judicial separation

The law applicable to divorce has been determined since 21 June 2012 by Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (the 'Rome III Regulation'). The Regulation applies even if under its provisions the applicable law is the law of a state not participating in the enhanced cooperation (Article 4 of the Regulation). Divorce and legal separation are also governed by the Rome III Regulation in the case of opposite-sex marriages (Article 17b(4), first sentence, EGBGB).

Articles 17 and 17a EGBGB are applicable in addition.

In Germany, a divorce can be decreed only by a court (Article 17(3) EGBGB).

According to Article 17(4) EGBGB, the law applicable to sharing pension entitlements is determined by the law applicable to the divorce (the divorce law). In certain circumstances where sharing pension entitlements is not recognised by the foreign law, it will alternatively be implemented in accordance with German law, if the parties so request.

The usufruct of a marital home and household effects located in Germany is governed by German substantive law (Article 17a EGBGB).

3.5.4 Maintenance obligations

The question which law is applicable to maintenance claims between relatives or between spouses has been determined since 18 June 2011 by the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007. According to Article 2 of the Protocol, the Protocol has universal application, i.e. even if the law to be applied under its provisions is that of a non-contracting state. The German rules in the EGBGB that were applicable hitherto in that respect have therefore been repealed.

3.6 Matrimonial property regimes

The property consequences of a marriage are governed by the EU Matrimonial Property Regulation. This also applies in the case of same-sex marriages (Article 17(4), second sentence, EGBGB). The EU Matrimonial Property Regulation gives priority to the autonomy of the parties: the future spouses can choose the law applicable to their matrimonial property regime (Article 22(1) of the EU Matrimonial Property Regulation). In the absence of an agreement between the parties, the connecting factor is the place of residence of the spouses or, alternatively, their nationality or the state with which they jointly have the closest connection (see Article 26 of the EU Matrimonial Property Regulation).

Owing to its date of application (30 January 2019), the EU Registered Partnership Property Regulation does not cover life partnerships formed in Germany, as since 1 October 2017 it has not been possible to enter into a life partnership under German law (see 3.5.2 above). Under the EU Registered Partnership Property Regulation the choice of the parties is also the principal connecting factor (Article 22(1) of the EU Registered Partnership Property Regulation). In the absence of a choice-of-law agreement, the law applicable to the property consequences of registered partnerships is the law of the state under whose law the registered partnership was created (Article 26(1) of the EU Registered Partnership Property Regulation).

3.7 Wills and successions

Where death occurs on or after 17 August 2015, the rules applicable in the first place are those laid down in the EU Succession Regulation. Under that Regulation the last habitual place of residence of the testator is the fundamental connecting factor for the law applicable to the succession. Successions dating from before 17 August 2015 are governed by the law of the country of which the testator was a national at the time of death, in accordance with the old version of Article 25 EGBGB (the new version of Article 25 EGBGB declares the EU Succession Regulation applicable by analogy). It was possible to opt for German law with respect to immovable property located in Germany.

For successions dating from after 17 August 2015, the formal requirements for dispositions of property upon death are governed by the new version of Article 26 EGBGB, which, for testamentary dispositions, essentially provides for the direct application of the Hague Convention of 5 October 1961, to which Germany, as a contracting state, has been subject since 1965 (paragraph 1), and, with regard to the form of other dispositions of property upon death, refers to Article 27 of the EU Succession Regulation (paragraph 2). Successions dating from before 17 August 2015 are subject to the old version of Article 26 EGBGB, which incorporated the main conflict-of-law provisions of the Hague Convention of 1961 on the Conflicts of Laws relating to the Form of Testamentary Dispositions. A disposition is valid as regards form if its form satisfies the requirements of a legal system with which it has a connection, for instance by virtue of nationality, the habitual residence of the testator, or the place where the will was made.

3.8 Real property

Under Article 43 EGBGB, rights *in rem* are governed by the law of the state in which the property is situated. That local law governs, for example, the scope of ownership rights and the manner in which the property can be transferred or encumbered with a lien or pledge.

Article 45 EGBGB provides for a special connecting factor for means of transport.

Article 43(2) EGBGB lays down a special rule for the transfer of property from one state to another.

Finally, emissions from land are dealt with separately in Article 44 EGBGB.

Strictly speaking there is no choice of law as regards rights *in rem*. However, under Article 46 EGBGB, it is possible to depart from the law determined by reference to the aforementioned connecting factors if the circumstances show a substantially closer connection to the law of another state.

3.9 Insolvency

In addition to the conflict-of-law rules under Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings, which contains rules governing the relationships between Member States, Section 335 of the Insolvency Code provides in relation to third countries that, in principle, the insolvency proceedings

and their effects are subject to the law of the state in which the proceedings have been opened. Section 336 et seq. of the Insolvency Code defines special connecting factors for specific aspects of international insolvency law which may depart from that principle (e.g. employment, set-off, and voidability of transactions in insolvency proceedings).

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