

Domov>Sprožitev sodnega postopka>Kje in kako>Uporaba nacionalne zakonodaje
Which country's law applies?

Nemčija

1 Sources of the rules in force

1.1 National rules

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 of the EGBGB, conflict-of-law rules laid down in European Union legislation and in international conventions take precedence over the provisions of the Act in their fields of application. The European legislature has enacted a large body of legislation governing the applicable law in recent years, thus continually reducing the scope of the domestic conflict-of-law rules.

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 following remarks 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*) (on-line 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/> - <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.

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) of the 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.

Where the German conflict-of-law provisions allow the parties to choose the applicable legal system, Article 4(2) of the 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-laws rules establish a specific time of connection. For example, to determine the law governing a succession, the connecting factor from the time of death onward 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

It may happen that overriding mandatory provisions (mandatory provisions are obligatory rules considered by a State to be so decisive for the protection of its public interest—and, in particular, its political, social or economic organization—as to apply to all matters falling within its scope, regardless of the law applicable to the contract under that Regulation) have to be applied; the application of such provisions assumes its greatest importance in questions of contractual and non-contractual obligations. Special rules on the subject are contained in the EU legal instruments that take precedence (see in particular Article 9 of Regulation (EC) No 593/2008 (the 'Rome I Regulation') and Article 16 of Regulation (EC) No 864/2007 (the 'Rome II Regulation')) and in international conventions.

Article 6 of the 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 EU legal instruments that take precedence (see, for example, Article 21 of the Rome I Regulation and Article 26 of the Rome II Regulation) or 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 responsible agency of the foreign State concerned via the appropriate 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 this Regulation, such as property-law contracts. In addition, Article 46b (f) of the EGBGB, adopted in implementation of that Regulation, are also applicable.

Up to 17 December 2009 the old version of Articles 27 *et seq.* of the EGBGB applied. It 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 old contracts, therefore, the rules are as follows.

Contractual obligations are governed primarily by the law chosen by the parties (old version of Article 27 of the EGBGB). However, in the case of consumer contracts, the choice of law must not override any more favourable mandatory protection provisions of the consumer's country of residence.

If no choice of law is made, the applicable law is determined by reference to objective connecting factors. Under the old version of Article 28 of the EGBGB, in this case the applicable law is that with which the contract is most closely connected. Normally, this will be the legal system of the State of the habitual residence or head office of the party required to effect the characteristic performance of the contract. Special rules apply to real estate, transport, employment and consumer contracts.

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. 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 38-42 of the EGBGB.

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

Under Article 39 of the 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 of the 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 this law, the law of the country in which the injury occurred (*Recht des Schadenseintritts*) is to be applied.

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

In addition, under Article 41 of the 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. This applies in principle to names (for details, see Article 10 of the EGBGB) and to the question whether a natural person enjoys legal capacity and capacity to contract (Article 7 of the EGBGB).

Where a person has more than one nationality, Article 5(1), first sentence of the 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 of the 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 of the 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, her civil status at the time of the birth (Article 14 of the EGBGB) may also acquire significance in the matter of determining parentage. Different rules apply for children born before 1 July 1998.

Under Article 20 of the 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

Under Article 22 of the EGBGB, the effectiveness of an adoption is decided in principle by the law of the State of which the adopter is a national at the time of the adoption. Adoption of a child by one or both spouses is governed by the law that governs the general effects of the marriage (Article 14(1) of the EGBGB). Spouses of different nationalities may therefore adopt a child under the law of a State in which they are both habitually resident. Under Article 23 of the EGBGB, the consent of the child and his or her natural parents to the adoption is in principle governed by the law of the State of which the child is a national.

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

Under Article 13 of the EGBGB, the conditions for the conclusion of marriage are usually those laid down in 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(3) of the EGBGB).

Under Article 14 of the EGBGB, the general effects of marriage are governed primarily by the law of the State of which both spouses are nationals, i.e. their shared national law.

If the spouses are not covered by the same national law, the law applicable in their (last) shared habitual place of residence applies.

A limited choice of law is available under Article 14(3) EGBGB.

However, this is applicable only to opposite-sex marriages.

3.5.2 Unmarried/Cohabiting couples and partnerships

Same-sex marriages and registered life partnerships (*eingetragene Lebenspartnerschaften*) are governed by Article 17b of the EGBGB. The formation of a registered life partnership, its general effects and property regime, as well as its dissolution, are governed by the law of the country in which the marriage or life partnership is registered.

3.5.3 Divorce and judicial separation

The law applicable to divorce has been determined since 21 June 2012 by 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).

Articles 17 and 17a of the EGBGB are applicable in addition.

In Germany, a divorce can be decreed only by a court (Article 17(2) of the EGBGB).

According to Article 17(3) 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 are governed by German substantive law (Article 17a of the 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 this respect have therefore been repealed.

3.6 Matrimonial property regimes

At present, under Article 15 of the EGBGB, the matrimonial property regime is still usually governed by the law applicable to the general effects of the marriage at the time when the marriage was contracted (Article 14 of the EGBGB). If both spouses are nationals of the same State at that time, they are subject to the property regime of their shared State of nationality. If the spouses are of different nationalities, the law applicable is the law of the State in which both spouses have their habitual residence at the time of conclusion of the marriage. Under Article 15(2) of the EGBGB, the spouses have a limited choice of law governing the property regime.

With effect from the entry into force of the conflict-of-law rules laid down in Regulation (EU) No 1103/2016 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, those rules will apply instead, based primarily on the ordinary residence of spouses and extending spouses' right of choice of law.

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 Regulation (EU) No 650/2012. The EGBGB provisions outlined below continue to apply to old cases.

According to Article 25 of the EGBGB, issues relating to the law of succession are governed by the law of the country of which the testator was a national at the time of death. It is possible to opt for German law with respect to immovable property located in Germany.

Under Article 26 of the EGBGB, which incorporates 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 will 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 of the 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 of the EGBGB provides for a special connecting factor for means of transport.

Article 43(2) of the 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 of the EGBGB.

Strictly speaking there is no choice of law as regards rights *in rem*. However, under Article 46 of the 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 (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which contains rules governing the relationships between Member States, Section 335 of the Insolvency Code provides in relation to third States that, in principle, the insolvency proceedings and their effects are subject to the law of the State in which the proceedings have been opened. Sections 336 *et seq.* of the Insolvency Code define special connecting factors for specific aspects of international insolvency law which may depart from this principle (e.g. employment, set-off, and voidability of transactions in insolvency proceedings).

It does not appear that there will be any changes in the field of the applicable law as a result of the recasting of the EU Insolvency Regulation by Regulation (EU) No 848/2015 of 20 May 2015 on insolvency proceedings.

Last update: 05/11/2019

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