

Recent Developments in German Private International Law

Heinrich DÖRNER

Professor Dr.; Faculty of Law, University of Münster (Germany)

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I. Introduction

The long-awaited “Act on Private International Law relating to Extra-contractual Obligations and to Property” which entered into force on June 1, 1999⁽¹⁾, appeared to complete the development of the German law on conflicts for some time to come. However, this impression has proved incorrect. Since the Act was passed, the German legislator has made no fewer than four amendments to the Introductory Act on the Civil Law Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch - hereinafter “EGBGB”). It has:

- summarised different conflict rules hitherto strewn throughout several European Consumer Protection Directives and their Implementing Acts into one measure on “European consumer protection” in Art. 29a EGBGB, by an Act of June 27, 2002⁽²⁾ (II.);
- created a conflicts rule dealing with intercountry life partnerships in Art. 17b EGBGB⁽³⁾ by the “Act Ending Discrimination Against Single - Sex Households” (Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher

Gemeinschaften - Gesetz über Lebenspartnerschaften - LPartG) of February 16, 2001⁽⁴⁾ (III.) ;

- refined the way effects of adoption are treated under the law on conflicts in, amongst others, Art. 22 paras. 2 and 3 EGBGB by the “Act Settling Legal Issues Relating to Intercountry Adoption” (Gesetz zur Regelung von Rechtsfragen auf dem Gebiet der internationalen Adoption) of November 5, 2001⁽⁵⁾ (IV.) and finally
- settled the dispute concerning a conflict rule dealing with the allocation of the marital home and household equipment where married couples and life partners separate or divorce by the “Protection Against Domestic Violence Act” (Gewaltschutzgesetz) of December 12, 2001⁽⁶⁾ in Art. 17a EGBGB (V.).

II. European Consumer Protection Law : Art. 29a EGBGB

The recent consumer protection Directives of the European legislator on abusive contract terms⁽⁷⁾, time-sharing⁽⁸⁾, distance-selling⁽⁹⁾ and sale of consumer goods⁽¹⁰⁾ oblige Member States of the European Union to create legal conflict rules: These are intended to prevent European consumers losing protection guaranteed *within* the Union where the latter have agreed (or have had to agree) with their contractual partners - companies - that the law of a third party state with lower standards of consumer protection will apply. In order to ensure clarity of German conventional international law and prevent legal fragmentation, the German legislator decided to consolidate the provisions of the Directives on private international law in a single provision within the EGBGB - i. e. in a new Art. 29a EGBGB⁽¹¹⁾.

Paragraph 1 of this provision contains a special rule for European consumer protection law: If the contractual parties have chosen the law of a third party state in accordance with Art. 27 EGBGB, but the contract displays a “close connection” to a Member State, the above-mentioned European consumer protection provisions of the Directives (*c. f.* Art. 29a para. 4 EGBGB) regardless of the contract law selected apply in the version implemented in the Member State concerned.

The provision does not say what is meant by “close connection” . Considering

all circumstances of a given case proves decisive although account can be taken of nationality, habitual residence of the consumer, seat of the company, where the contract was concluded and where performance was carried out⁽¹²⁾. Such a connection is, however, presumed if the contract arose owing to a public offer or a public advertisement of the company in a Member State of the Union (para. 2 no. 1) and the consumer has had his habitual residence in a (not necessarily the same⁽¹³⁾) Member State (para. 2 no. 2) when making his declaration to contract.

Article 29a EGBGB differs from Art. 29 para. 1 EGBGB - the reference rule for consumer contracts originating from the Rome Convention on the law applicable to contractual obligations (Art. 5) - mainly in three points:

First, whereas Art. 29 EGBGB only relates to contracts on the delivery of movables or the provision of services to consumers and underlying financing agreements, Art. 29a EGBGB applies in relation to *contracts of all kinds*.

Secondly, whereas Art. 29 para. 1 EGBGB compels the applier of law to compare the law selected by the parties with the right of residence of the consumer and then to apply the law most beneficial to the latter ("comparison of benefit"), Art. 29a para. 1 EGBGB states unconditionally that the law of the Member State to which there is a "close connection" is to apply. This is the case even if the latter offers a *lower* protection than the law selected. From the view of European law this consequence is questionable⁽¹⁴⁾ but unavoidable according to the wording of the provision. In this respect, the European consumer conflicts law lags behind the international convention rule of Art. 29 EGBGB.

Third, the interpretation of Art. 29 EGBGB must be determined by the wording and aim of the Rome Convention considering that it originates from an international convention and, in particular, that rules contained in international conventions must be uniformly interpreted in all contracting states as far as possible (*c. f.* Art. 36 EGBGB). By contrast, Art. 29a EGBGB implements European Directive law. It therefore requires an interpretation which complies with European law and, in particular, Directives. According to Art. 234 EC Treaty, the competence to decide questions of interpretation ultimately lies with the European Court of Justice⁽¹⁵⁾.

III. Private international law on registered life partnerships : Art. 17b EGBGB

The German legislator created a legal framework for the cohabitation of single-sex partners for the first time by the Life Partnership Act (LPartG) 2001. Whilst the model of marriage largely determines substantive law governing the partnership in terms of its founding, personal and matrimonial property requirements, dissolution of partnership and inheritance rights, Art. 17b EGBGB contains autonomous - and unnecessarily complicated - conflict rules governing the jurisdictional basis of international partnerships. The private international law of life partnerships essentially consists of five rules:

First, the founding and dissolution of a (single-sex) partnership and its effects on personal and property rights is subject to the law of the state in which the partnership was registered (Art. 17b para. 1 sentence 1 EGBGB). Since to date only a small number of legal systems have recognized single-sex partnerships as a *legal institute*⁽¹⁶⁾, this ensures that in each case a law system ordinance can be applied which provides express rules for the legal issues mentioned above⁽¹⁷⁾. At the same time, this also allows partners to consciously decide in favour of rules of a certain legal system by selecting the registration state⁽¹⁸⁾. If homo-sexual couples accordingly decide to register in Germany, then the personal and property effects of their relationship and a later dissolution are subject to German law even if the partners do not have either German citizenship or their habitual residence within the country. Dispensing with any objective relationship with the authoritative legal system in this way is certainly unusual and contradicts the maxims normally adopted by international family law⁽¹⁹⁾. If single-sex partners have registered their relationship in different states then, under the law of conflicts, the last registration takes priority (Art. 17b para. 3 EGBGB).

Second, in relation to the consequences of the partnership on maintenance and inheritance rights, Art. 17b para. 1 sentence 2, half-sentence 1 EGBGB refers to "general provisions". Whether a life partner succeeds the other is therefore decided by the law of the home state of the deceased in accordance with Art. 25 para. 1 EGBGB. The question as to whether and under which conditions a life partner can claim maintenance from the other should be

determined⁽²⁰⁾ by the provisions of the Hague Convention on the Law Applicable to Maintenance Obligations of 2nd October, 1973⁽²¹⁾ (the text is identical with that of Art. 18 EGBGB). This international treaty governs maintenance duties resulting from “family relationships” (Art. 1) ; broadly interpreted, this can also cover relationships between single-sex partners⁽²²⁾. Where the inheritance or maintenance law relied on does not grant any inheritance right or maintenance claim, then the provisions of the registration state are to be applied again as a substitute (Art. 17a para. 1 sentence 2, half-sentence 2 EGBGB).

Third, Art. 17b para. 2 sentence 1 EGBGB refers to an analogous application of Art. 10 para. 2 EGBGB regarding the use of a name: Accordingly, the partners can when or after entering into the partnership choose the names they wish to use in the future either according to the law of the home state of one of the participants or according to German law if one of the partners has his habitual residence within the country.

Fourth, in order to protect legal relations of the home state Art. 17b para. 2 sentence 2 EGBGB (in connection with § 8 para. 1 and 2 LPartG) also refers to individual provisions of German law where the effects of the registered partnership on personal and property rights are subject to the law of a foreign registration state. Under certain circumstances therefore, one life partner is liable for the transactions of the other and it is presumed in the interests of the creditor of one partner that movables in the possession of the life partner (where they are located in within the state) belong to the debtor (so that they can be executed without difficulty) . This regulation largely corresponds to Art. 16 para. 2 EGBGB applicable in relation to married couples.

Fifth, a life partnership registered abroad cannot trigger off effects any more extensive than those provided for under German law according to Art. 17b para. 4 EGBGB. This regulation has however not been wholly thought through⁽²³⁾. For example, if the foreign partner in a German-foreign life partnership dies, then succession is determined by the law of the home state of the deceased (Art. 25 para. 1 EGBGB)⁽²⁴⁾. If this law grants the surviving partner a share of the inheritance which exceeds the inheritance right provided for under German law (*c. f.* § 10 LPartG), then - if the life community was registered *abroad* - the surviving partner can receive no more than that which is provided under German law⁽²⁵⁾.

Where the partnership was registered *in Germany* then, by contrast, the law of the home state of the deceased foreign partner applies without restriction. Exactly why the *place of registration* should constitute an appropriate criterion determining the existence and extent of a share in an inheritance is not clear, however.

IV. Rule for effects of adoption: Art. 22 paras. 2, 3 EGBGB

The German Federal Republic ratified the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption by an Act of 23 October 2001⁽²⁶⁾. However, this Convention does not determine either international jurisdiction in the adoption procedure or the law applicable thereto. Rather, it simply determines the minimum substantive law and procedural requirements in relation to intercountry adoptions of minors and governs co-operation amongst contracting states⁽²⁷⁾. At the same time, the legislator has established the recognition of foreign adoptions in general without taking the applicability of the Hague Convention on Intercountry Adoption into account by the “Act on the Effects of Adoption” (Adoptionswirkungsgesetz)⁽²⁸⁾; in this context, Art. 22 EGBGB was also amended.

First of all, para. 1 of this measure establishes that adoption is subject to the law of the state to which the adopting party belongs when adopting the child (sentence 1); according to sentence 2, adoption by a married adoptive parent is subject to the law on the effects of marriage (Art. 14 EGBGB). According to the new para. 2, the right of adoption determined in accordance with para. 1 also includes the “effects of adoption relating to the kinship between the child and adopting party”. Article 22 para. 3 sentences 1 and 3 EGBGB enables a testator to place an adopted child in the same position as a child adopted under German law in terms of inheritance rights regardless of the law governing adoption in the form of a disposition *mortis causa* if succession is subject to German law. Article 22 para. 3 sentence 2 EGBGB also provides for a corresponding possibility where the adoption decision of a foreign authority or of a foreign court is to be recognized within the country.

At first glance, the new provisions are not immediately comprehensible.

Article 22 para. 2 EGBGB only makes clear that the law applicable to adoption in para. 1 governs not only the requirements but also the effects of an adoption, i. e. in particular, whether in legal terms the act of adoption completely releases the child from its original family and integrates it into the adoptive family (so-called “strong” adoption) or at least allows some legal relationships with the original family to exist (so-called “weak” adoption). Effects exceeding this - whether the adopting party e. g. receives parental care for the child or becomes liable to support it - are *not* determined according to the adoption right as the wording of Art. 22 para. 2 EGBGB could suggest but according to the legal system which governs the parent-child relationship in general (Art. 21 EGBGB) or the maintenance rights (Hague Convention on the Law Applicable to Maintenance Obligations⁽²⁹⁾).⁽³⁰⁾

In this respect, difficulties are mainly caused by the distinction between adoption and inheritance rights⁽³¹⁾. The right of an adoptive child to succeed its adoptive parents (and vice versa) can be regarded both as an effect of adoption pursuant to Art. 22 EGBGB and as a question of the right to inherit pursuant to Art. 25 para. 1 EGBGB. This qualification attains practical importance where the right to adopt and inherit are not identical. Certainly, the law of the home state of the adoptor or the testator is referred to in each case by Art. 22 para. 1 EGBGB and also by the conflicts rule relating to inheritance rights of Art. 25 para. 1 EGBGB. However, both rights diverge if e.g. the adoption right of spouses with different nationalities is determined in accordance with Art. 22 para. 1 sentence 2, 14 para. 1 no. 2 EGBGB by reference to the habitual residence of the spouses at that time or if an adoptive parent has changed nationality following adoption.

In such cases a distinction must be made: The law of the home state of the deceased adoptive parent referred to in accordance with Art. 25 para. 1 EGBGB determines *whether* the adoptive child has an inheritance right upon the death of his adoptive relatives and whether this inheritance right requires a “strong” adoption or whether it also exists in the case of a “weak adoption”. By contrast, the legal system governing adoption in accordance with Art. 22 para. 2 EGBGB decides whether there is actually a “strong” or “weak” adoption in a given case⁽³²⁾. A “weak” adoption will often be insufficient to grant an adoptive child

the right to succeed his adoptive parent or the relatives of the latter - e. g. the adoptive grandparents. The new Art. 22 para. 3 sentence 1 EGBGB has been provided for this case: It allows the testator to place the child adopted “weakly” on an equal footing with one which has been adopted “strongly” and thereby grant it a complete right to inherit. This requires that the case be subject to German inheritance law and that the testator has made a corresponding order in the form of a disposition *mortis causa* (i. e. by will or deed of inheritance)⁽³³⁾.

If adoption has been carried out by a court or by an official decision made abroad, their effects must be recognized in Germany according to § 16a of the “Act Regulating Jurisdiction over Non-Contentions Matters” (Gesetz über die freiwillige Gerichtsbarkeit - FGG). If this foreign “decreed adoption” is only connected with “weak” effects of adoption, only these effects are also recognized within the country⁽³⁴⁾. Here, Art. 22 para. 3 sentence 2 EGBGB likewise grants the possibility to prevent the adoptive child being disadvantaged in terms of inheritance rights.

V. Allocation of marital home and distribution of household equipment : Art. 17a EGBGB

If married couples cannot agree as to whom the home or household equipment should devolve upon separation or divorce, this will be decided by the judge in a special procedure (§ § 1361a, 1361b BGB, § 1 para. 1 Household Equipment Order - Hausratsverordnung⁽³⁵⁾). The same applies in relation to registered partnerships (§ § 13, 14, 17 - 19 LPartG). Treating this legal institution under the law of conflicts used to be very controversial. Some case law and literature classified it under the general effects of marriage, but it is sometimes seen as raising issues relating to the law governing maintenance or divorce⁽³⁶⁾.

The legislator has now settled this dispute. An “Act Improving Protection under Civil Law in the Case of Violent Acts” (Gesetz zur Verbesserung des zivilrechtlichen Schutzes bei Gewalttaten)⁽³⁷⁾ which entered into force on 1 January 2002 - which permits judicial protective measures mainly where a family member (usually the husband) becomes violent towards other family members (usually the wife and children) - provides in the newly created Art. 17a EGBGB, that German law applies to the right of beneficial use for a marital home and household

equipment situated within the country just as it does in relation to the “associated prohibitions on entering premises, approaching and contacting persons”. This makes it considerably easier to apply the law within the country, particularly in summary procedures to be carried out here, since there is no need for a time-consuming investigation of foreign law⁽³⁸⁾.

Where the question concerning allocation of a marital home or of household equipment effects situated abroad arises within the country, the “one-sided” conflicts rule of Art. 17a EGBGB must be elaborated into a “universal rule” by analogy. The law of the country of *situs* is then authoritative. Any property law effects of a distribution of household equipment or an allocation of the home (e. g. the method and nature of acquiring property) are, in any event, subject to the *lex rei sitae* (Art. 43 para. 1 EGBGB) with regard to the objects situated both within the country and abroad.

VI. Outlook

Once the Treaty of Amsterdam of 2nd October 1997⁽³⁹⁾ had created, for the first time, the legal foundations for unifying conflict laws in the Member States of the European Union in Articles 61 c) and 65 b), a European-wide harmonization of legal measures in the field of private international law became imminent. The preliminary draft of a proposal for a European Regulation on the law applicable to extra-contractual obligations has already been made. A revision of the Rome Convention is being prepared. In addition, a unification of international marital property and inheritance law is currently being contemplated at a European level. Therefore, the further development of German private international law will primarily be decided in Brussels.

(1) BGBl. 1999 I 1026.

(2) BGBl. 2000 I 897.

(3) Originally : Art. 17a EGBGB.

(4) BGBl. 2001 I 266.

(5) BGBl. 2001 I 2950.

(6) BGBl. 2001 I 3513.

(7) Unfair Terms Directive 93/13/EEC of 5 April 1993, Official Journal of the European Community (O. J.) L 95, 29.

- (8) Time-Sharing Directive 94/47/EC of 26 October 1994, O. J. L 280, 83.
- (9) Distance-Selling Directive 97/7/EC of 20 May 1997, O. J. L 144, 19.
- (10) Sale of Consumer Goods Directive 1999/44/EC of 25 May 1999, O. J. L 171, 12.
- (11) Concerning the genesis Wagner, IPRax 2000, 249 (252 ff.); Freitag/Leible, ZIP 1999, 1296 ff.; c. f. also Staudinger, RIW 2000, 416 ff.; the same, ZfRV 2000, 93 (99 ff.).
- (12) C. f. Palandt/Heldrich, BGB, 62 Ed. (2003) Art. 29a EGBGB No. 3; concerning this in more detail Rusche, IPRax 2001, 420 ff.
- (13) C. f. Freitag/Leible, EWS 2000, 342 (344).
- (14) C. f. Staudinger, RIW 2000, 416 (418).
- (15) C. f. Freitag/Leible, ZIP 1999, 1296 (1298).
- (16) Accordingly, - besides the German Federal Republic - in Belgium, Denmark, Finland, France, Iceland, the Netherlands, Norway, Sweden, parts of Spain (Catalonia and Aragon).
- (17) C. f. Bundestagsdrucksache 14/3751, 60 ; Palandt/Heldrich (note (12)) Art. 17b No. 2.
- (18) C. f. Wagner, IPRax 2001, 281 (289).
- (19) C. f. also Kropholler, *Internationales Privatrecht*, 4th ed. (2001) 334.
- (20) C. f. Dörner, *Internationales Unterhaltsrecht* para. 7049a, in: Eschenbruch, *Der Unterhaltsprozeß*, 3rd ed. (2003) ; likewise, in result Hausmann, *Festschrift Henrich* (2000) 241 (260); expressing doubt Henrich, FamRZ 2002, 137 (139).
- (21) BGBl. 1987 II 225.
- (22) Concerning the reasons in more detail Dörner *loc. cit.* (note (20)).
- (23) Extensively on this Staudinger/Gebauer, IPRax 2002, 275 ff.
- (24) Concerning the details of inheritance conflicts law Süß, DNotZ 2001, 168 (172 ff.).
- (25) Critical of this Henrich, FamRZ 2002, 137 (144).
- (26) BGBl. 2001 II 1034 with implementing provisions in the Act Settling Legal Issues Relating to Intercountry Adoption of 5 November 2001, BGBl. 2001 I 2950 ff.; concerning this Bornhofen, StAZ 2002, 1 ff.
- (27) C. f. in more detail Kegel/Schurig, *Internationales Privatrecht*, 8th ed (2002) 836 with further references; Kropholler (note (19)) 398.
- (28) Article 2 of the Act Settling Legal Issues Relating to Intercountry Adoption of 5 November 2001, BGBl. 2001 I 2953 ff.
- (29) C. f. above in note (21) .
- (30) C. f. Bundestagsdrucksache 14/6011, 58.
- (31) Extensively Staudinger/Dörner, Arts. 25, 26 EGBGB (revised edition 2000) Art. 25 No. 161 ff. with further references.

- 32) *C. f.* e.g. BGH NJW 1989, 2197 = IPRax 1990, 55; from literature by Kropholler (note 19) 422 f.; Staudinger/Dörner (note 31) Art. 25 EGBGB No. 165 ff.
- 33) *C. f.* Bundestagsdrucksache 14/6011, p. 58.
- 34) *C. f.* Palandt/Heldrich (note 12) Art. 22 No. 14 with further references.
- 35) RGBl. 1944 I p. 256.
- 36) *C. f.* concerning the dispute only Palandt/Heldrich (note 12) Art. 17 EGBGB No. 17 with further references.
- 37) BGBl. 2001 I 3513.
- 38) *C. f.* Palandt/Heldrich (note 12), Art. 17a EGBGB No. 2.
- 39) O. J. 1997 C 340 I = BGBl. 1998 II 386.