Change in German International Adoption Law

Last week the German parliament approved a reform of the German adoption law. The reform was triggered by a decision of the Constitutional Court (Bundesverfassungsgericht – BVerfG) declaring provisions unconstitutional that did not allow a stepchild adoption for non-marital couples (English translation of the decision here).

The legislator took the opportunity to adapt the conflict of law provisions. The relevant rule, article 22 Introductory Act to the Civil Code (EGBGB) only applies to adoptions in Germany and those abroad that were not established by a foreign court or authority. In the latter case the rules on recognition of court decisions apply. Furthermore, the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption prevails. The new rule, thus, mainly determines the law applicable on the acceptance of an adoption by private agreement that occurred abroad.

The former relevant provision, Article 22 para 1 EGBGB stated, cited after the translation made by Juliana Mörsdorf for the Federal Office of Justice:

> *Article 22 Adoption*
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> *(1) The adoption of a child is governed by the law of the country of which the adopter is a national at the time of the adoption. The adoption by one or both spouses is governed by the law which applies to the general effects of the marriage under article 14 subarticle 1. The adoption by a life partner is governed by the law which applies to the general effects of the life partnership under article 17b subarticle 1 sentence 1.*
>
> *[…]*

The new Article 22 para. 1 states that

> *"the adoption of a child in Germany is governed by German law. In all other cases the adoption is governed by the law of the country in which the adoptee*

has his habitual residence at the time of the adoption.“ [my translation – German federal law in general is not very aware of the use of a gender neutral wording. Of course, also female and non-binary adoptees and their habitual residences are included.]

Due to the Constitutional Court’s ruling, all references to an adoption by somebody living in a marriage or registered civil partnership were eliminated. Furthermore, the rule is a good example for some general general shifts in the German International Family law system regarding connecting factors:

- First, in the name of procedural efficiency (according to the travaux préparatoires, BT-Drs. 19/15618, p. 8, 16), there is the tendency to distinguish between legal situations occurring in Germany or abroad and use conflict of laws more often to accept legal situations established abroad. Adoptions in Germany are always governed by German law and always require a court proceeding (sec 1752 German Civil Code for minors and sec 1767 para. 2 for adults). With the new provision, the legislative confirmed that an adoption that occurred abroad will be accepted in German according to the so-called method of “recognition by conflict of laws”, as article 22 para 1 phrase 2 exclusively provides a rule for adoptions that took place outside of Germany.
- Second, by determining the law applicable, the German rule no longer focuses on the adopter(s) but the adoptee. This change is in accordance with the general awareness to put the **child’s best interest** in the centre of attention in cases involving fundamental changes to a child. While, of course, there can be adoptions of adults, the adoption of a minor is the most common (see also the travaux préparatoires, BT-Drs. 19/15618, p. 16).
- Third, the rule also includes a **temporal connecting factor**. Traditionally, German conflict of laws rules do not state the temporal connection factor, thus, the rules always refer to the moment of the closure of the court hearing. This can create uncertainty as it allows a change of connecting factors over time and even in the course of a proceeding.
- Last but not least, and maybe even more interesting, the **main**

connecting factor changed from nationality to habitual residence. Traditionally in German International Family Law, nationality was the central connecting factor, as it is still in article 13 (law governing the conclusion of a marriage). In article 22, instead, **connecting factor is the habitual residence** (of the adoptee). This shows a general tendency in German conflict of laws which was mainly triggered by the harmonization of conflict of laws in the EU. Last year the central rule regarding international marriage law (article 14, losing the importance to the latest EU regulations, though) changed the "rungs" of its famous "Kegel's ladder": Traditionally, the first "rung" of said ladder was the spouses shared nationality or last shared nationality during marriage. Only in case there was neither, applicable was the law of the spouses' habitual residence. Since January 2019, main connecting factor ("first rung") is the spouses' habitual residence, the second the spouses' habitual residence during the marriage if one spouse has maintained that habitual residence. Only the third step refers to the shared nationality.

The new law will come into force 31
March 2020. The new provisions apply to international adoptions that were not completed
before that date (article 229 § 51 EGBGB).