German Federal Supreme Court on International Child Marriages, Decision of 22nd July 2020, Case No. XII ZB 131/20

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In a decision of 22nd July 2020, the German Federal Supreme Court (*Bundesgerichtshof*) rendered its second opinion on the German Law to Combat Child Marriage of 2017,[1] which established a special *ordre public*-clause (public policy) for marriages concluded outside Germany.[2]

I. Facts of the Case[3]

The spouses, Lebanese citizens at the time, married in Lebanon in September 2001. At this moment, the bride was 16, nearly 17 years old, and the groom had recently turned 21. She had been living in Germany and acquired the German citizenship in 2002. In August 2002, the groom followed to Germany, where the spouses lived together from April 2003 to 2016 and got four children (born 2005, 2008, 2009, 2013). After separation the four children lived with her mother who had a new partner. The spouses were divorced according to Islamic law. On the occasion of a registration at the civil registry (*Standesamt*) in October 2018, the wife declared that she did not want to continue the marriage. Thereupon, the competent authorities filed a motion for the annulment of the marriage to the local court, as the wife had been a minor at the conclusion of her marriage. This motion was dismissed by the Local Court (*Amtsgericht*) Tempelhof-Kreuzberg as well as at the Higher Regional Court (*Kammergericht*) Berlin. The authorities lodged an appeal with the Federal Supreme Court (*Bundesgerichtshof*).

II. Decision of the German Federal Supreme Court

The Federal Supreme Court held that the decision to annul a marriage concluded by a minor, who has reached the age of 16, is subject to the (restricted) discretion of the court. Thereby, confirming the decision of the lower courts and upholding the marriage, it makes clear that the appropriate legal instrument for the wife to dissolve her marriage is divorce law.

This opinion is comprised by the general principles of legal interpretation underpinned by guiding constitutional considerations.

First of all, section 13 (3) n. 2 of the Introductory Law of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*) states that a marriage of a minor older than 16 years is voidable under German Law, even if the capacity of that particular fiancé to enter into marriage is governed by a different foreign law. As a result, non-German spouses must comply with at least two different legal systems concerning age limits. That points directly to the substantive provisions of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*).

Secondly, the court refers to the possibility of confirmation by the minor spouse after reaching full age according to section 1315 (1) n. 1 lit. a) BGB. However, such confirmation needs at least some basic awareness of the respective defects of the marriage to be effective. Since the wife, until her religious divorce, had no reason to doubt the validity of her marital status, none of her acts can be reasonably interpreted to constitute such a confirmation. The same goes for the hardship clause of section 1315 (1) n. 1 lit. b) BGB, because the court sees no proof of any exceptional circumstances resulting in hardship for the wife, if the decision were to uphold the marriage. Consequently, the annulment of the marriage is not *prima facie* precluded by the substantive law provisions of the German Civil Code.

Finally, the *ratio decidendi* of the opinion focuses on the question, whether the annulment of "child marriages" is mandatory if no exception applies. Section 1314 (1) n. 1 BGB provides that a marriage "may" ("*kann*") be dissolved, if concluded contrary to the provision of section 1303 cl. 1 BGB, which basically reproduces the text set out in section 13 (3) n. 2 EGBGB. Apparently, the wording is not clear as to whether the court has discretion in the decision. In order to overcome that ambiguity, the Federal Supreme Court resorts to the doctrine of an interpretation in light of the constitution (*verfassungskonforme Auslegung*) as

developed by the German Federal Constitutional Court (*Bundesverfassungsgericht*). This doctrine requires the courts to construe the existing law as far as possible in conformity with the German Basic Law (*Grundgesetz*). For the case in hand the Federal Supreme Court explained that a mandatory annulment would treat foreign marriages differently than marriages concluded solely under German Law and foreign marriages involving minors younger than 16 years, thereby resulting in a violation of Article 3 Basic Law (*principle of equal treatment*). Furthermore, the Court stressed that a mandatory annulment of the marriage is not always in the best interest of the minor spouse, who is protected by Art. 6 Basic Law.[4] Therefore, the court argues that in the light of the Constitution some leeway has to be reserved for the courts to deal with the particular circumstances in individual cases. Nevertheless, the application of judicial discretion must take in account the objective of the Law to Combat Child Marriage. As a consequence, annulment must be the "default" rule, while only in exceptional cases the judge may uphold a marriage. Within this margin, the law grants the court (a limited measure of) discretion.

III. Conclusion

The decision of the German Federal Court (*Bundesgerichtshof*) is in line with the efforts of German courts to mitigate the harsh effects of the Law to Combat Child Marriage.[5] The former *status quo* allowed a case-by-case analysis by the instrument of *ordre-public*. In this context, special attention should be given to the decision of 14th November 2018, Case No. XII ZB 292/16,[6] in which the court considered the parallel section 13 (3) n. 1 EGBGB unconstitutional, because it renders any marriage with a minor younger than 16 years void without reference to the individual situation and circumstances. Both decisions illustrate a consistent approach of the German Federal Supreme Court to the issue of Child Marriages.

The Press Release (available in German only) for the judgment can be found here (the full text is not yet published).

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[1] Law to Combat Child Marriages (*Gesetz zur Bekämpfung von Kinderehen*)

of 17 July 2017, BGBl. I 2017, 2429; see also *von Hein,* "Germany: Legal Consequences of the Draft Legislation on Child Marriage" on Conflict-of-Law.net of 24th March 2017, https://conflictoflaws.net/2017/germany-legal-consequences-of-the-draft-legislation-on-child-marriage/.

[2] See *Antomo,* ZRP 2017, 79 (82); *Majer,* NZFam 2017, 537 (541).

[3] As reported by the recent press release of the Federal German Supreme Court n. 108/2020 of 14th August 2018, https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020108.html?nn=10690868.

[4] One might think of situations in that the social status of the minor depends on being a married person or regarding non-beneficial matrimonial property issues, see *Rath,* "Underage, married, separated" on mpg.de of 9th March 2019, https://www.mpg.de/12797223/childmarriage-legislation-germany.

[5] See e.g. *Antomo,* ZRP 2017, 79 (82); *Hüßtege,* FamRZ 2017, 1374 (1380); *Schwab,* FamRZ 2017, 1369 (1373); for a more positive perception compare *Majer,* NZFam 2017, 537 (541).

[6] Press release of the Federal German Supreme Court n. 186/2018 of 14th December 2018, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&pm_nummer=0186/18.