

The End of the “Sahyouni Saga”

The German Bundesgerichtshof (BGH) in August finally decided the case “Sahyouni” that made it twice to the ECJ (Sahyouni I and Sahyouni II). The BGH decision (German text here) applied the new German rules on private divorces. The German legislator had enacted these rules after the ECJ declared the Rome III Regulation as only applicable on divorces by a court. Additionally, the court took the opportunity to comment on several other private international law issues. The probably most interesting issues of the case are (1) the new German rules, (2) the treatment of parties with more than one nationality if the connecting factor is nationality and (3) the question whether the unilateral private divorce finally was recognized.

1. German law regarding “private divorces”

Following the second “Sahyouni” decision, new private international law rules were enacted. German private international law follows the principle of “recognition via conflict of laws”, meaning that a divorce not issued by a court decision will only be recognized if it complies with the rules applicable according to German private international law. The new rules basically declared the Rome III Regulation applicable to private divorces *mutatis mutandis* except for those rules that could not be applied on a private divorce (e.g. the application of *lex fori* as there is not *forum*). Furthermore, Article 10 Rome III, the rule that initially triggered the request for the preliminary ruling, is not applicable. Thus, only the “usual” public policy exception can prevent the application of the *lex causae*.

1. Treatment of double-nationality

The court came to the conclusion that the spouses did not have a common habitual residence as required by Article 8 lit a, b Rome III (*mutatis mutandis*). So, the question occurred whether the spouses had a common nationality (Article 8 lit. c). In this special case, both spouses did not only have one common nationality but two: German and Syrian. As the Rome III regulation is silent to the treatment of double-nationals (and, furthermore, Rome III only applied *mutatis mutandis*), the court applied Article 5 para. 1 EGBGB (English non-official translation here). This rule provides in case of double-nationality (1) a prevalence of the German nationality and (2), if no German nationality is in play, a prevalence of the “effective” nationality, ie the nationality that is closer connected to the

person, usually the one of habitual residence. In the context of EU private international law, there was a discussion whether these two rules can hold - given that in Garcia Avello and Haddadi similar rules had been regarded as violating EU primarily law, esp. the principle of non-discrimination.

In "Sahyouni" the BGH concluded that both cases were not relevant. The second (and probably non-effective) nationality of both spouses was the Syrian, a non-EU nationality. Thus, the principle of non-discrimination did not apply. Therefore, German law applied on the case. German law does not allow a "private divorce". For that reason, the divorce was regarded as invalid in Germany.

1. Unilateral divorces and *public policy*

Finally, the court took the opportunity to mention that the public policy exception also would have made the divorce invalid: Article 10 Rome III was not applicable, thus, Article 6 EGBGB (English) would have applied. Contrary to Article 10, Article 6 requires an analysis of the concrete result of the application of the *lex causae* to determine whether this result violates fundamental principles/values of the German legal system. In Germany, divorces by unilateral declarations (such as *talaq* or *ghet*) can be regarded as not violating the German *ordre public*, especially if both spouses agree on the divorce. From the facts of the case the BGH concluded that in "Sahyouni" the wife did not wish for divorce. For that reason, the recognition of the unilateral declaration would violate the German public policy ("would" as this argument was not decisive for the case - as aforementioned, German law applied).