

No Recognition in Switzerland of the Removal of Gender Information according to German Law

This note has been kindly provided by Dr. Samuel Vuattoux-Bock, LL.M. (Kiel), University of Freiburg (Germany).

On 8 June 2023, the Swiss Federal Supreme Court (Bundesgericht) pronounced a judgment on the removal of gender markers of a person according to German Law and denied the recognition of this removal in Switzerland.

Background of the judgment is the legal and effective removal 2019 of the gender information of a person with swiss nationality living in Germany. Such removal is possible by a declaration of the affected person (accompanied by a medical certificate) towards the Registry Office in accordance with Sect. 45b para. 1 of the German Civil Status Act (*Personenstandsgesetz*, PStG). The claimant of the present judgment sought to have the removal recognized in Switzerland and made a corresponding application to the competent local Swiss Office of the Canton of Aargau. As the Office refused to grant the recognition, the applicant at the time filed a successful claim to the High Court of the Canton of Aargau, which ordered the removal of the gender markers in the Swiss civil and birth register.

The Swiss Federal Office of Justice contested this decision before the Federal Supreme Court. The highest federal Court of Switzerland revoked the judgment of the High Court of the Canton of Aargau and denied the possibility of removing gender information in Switzerland as it is not compatible with Swiss federal law.

According to Swiss private international law, the modification of the gender indications which has taken place abroad should be registered in Switzerland according to the Swiss principles regarding the civil registry (Art. 32 of the Swiss Federal Act on the Private International Law, IPRG). Article 30b para. 1 of the Swiss Civil Code (ZGB), introduced in 2022, provides the possibility of changing gender. The Federal Supreme Court notes that the legislature explicitly refused to permit a complete removal of gender information and wanted to maintain a binary

alternative (male/female). Furthermore, the Supreme Court notes that the legislature, by the introduction in 2020 of Art. 40a IPRG, neither wanted to permit the recognition of a third gender nor the complete removal of the gender information.

Based on these grounds, the Federal Supreme Court did not see the possibility of the judiciary to issue a judgment *contra legem*. A modification of the current law shall be the sole responsibility of the legislature. Nevertheless, the Supreme Court pointed out that, due to the particular situation of the affected persons, the European Court of Human Rights requires a continual review of the corresponding legal rules, particularly regarding social developments. The Supreme Court, however, left open the question of whether the recognition of the removal of gender information could be a violation of Swiss public policy. The creation of a limping legal relationship (no gender marker in Germany; male or female gender marker in Switzerland) has not been yet addressed in the press release.

Currently, only the press release of the Federal Supreme Court is available to the public (in French, German and Italian). As soon as the written grounds will be accessible, a deeper comment of the implications of this judgment will be made on ConflictOfLaws.