Trending Topics in German PIL 2024 (Part 1 – Illegal Gambling and “Volkswagen”)

At the end of each year I publish an article (in German) about the Conflict of Laws developments in Germany of the last twelve months, covering more or less the year 2024 and the last months of 2023. I thought it would be interesting for the readers of this blog to get an overview over those topics that seem to be most trending.

The article focuses on the following topics:

1. Restitution of Money lost in Illegal Gambling
2. Applicable Law in the Dieselgate litigation
3. The (Non-)Valitidy of Online Marriages
4. New German conflict-of-law rules regarding gender afiliation / identity
5. Reforms in international name law

I will start in this post with the two first areas that are mainly dealing with questions of Rome I and Rome II while in my follow-up post I will focus on the three areas that are not harmonized by EU law (yet) and are mainly questions of family law.

This is not a resumen of the original article as it contains a very detailed analysis of sometimes very specific questions of German PIL. I do not want to bore the readers of this blog with those specificities. Those interested in knowing those details can find the article here (no free access).

I would be really curious to hear whether these or similar cases are also moving courts in other jurisdictions and how courts deal with them. So, please write me via mail or in the comments to the post if you have similar or very different experiences on those cases.

Part 1 – Illegal Gambling and "Volkswagen"

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1. Restitution of Money lost in Illegal Gambling

Cases involving the recovery of money lost to illegal online gambling are being heard in courts across Germany and probably across Europe. Usually the cases are as follows: A German consumer visits a website offering online gambling. These websites are in German and offer German support by phone or email with German phone numbers etc. However, the provider is based in Malta or – mainly before Brexit – Gibraltar. After becoming a member, the consumer has to open a bank account with the provider. He transfers money from his (German) account to the account in Malta and uses money from the latter account to buy coins to gamble. In Germany, in order to offer online gambling, you need a licence under German law. The operators in these cases are usually licensed under Maltese law but not under German law.

- In terms of **applicable law**, Rome I and Rome II are fairly straightforward. Since the question in this case is whether the plaintiff can claim the return of money lost on the basis of an illegal and therefore void contract, Rome I is applicable as it also governs claims arising from contracts that are ineffective or of doubtful validity. It is therefore irrelevant that German law would provide for restitution on the basis of unjust enrichment (*Leistungskondiktion*), which generally is a non-contractual obligation that falls within the scope of Rome II. As we have a consumer and a professional, **Article 6 Rome I** has to be applied. As I described the case above, there are also little doubts that the website is (also) directed to Germany and therefore German law as the country of the habitual residence of the consumer applies. To this conclusion came, e.g. the German BGH, but also the Austrian OGH.
- The application of German law leads to the invalidity of the contract

pursuant to sec. 134 BGB, which **declares a contract null and void if it violates a law that prohibits that contract**. In order to determine whether the law prohibits this concrete gaming contract, the question arises as to the **geographical scope of the prohibition on offering gambling/casino contracts without a German licence**. As this prohibition is based on German public law, it is limited to gambling/casino games that take place on German territory. So far, German courts have applied the German prohibition in cases where the consumer was in Germany when playing. One court (LG Stuttgart, 11.9.2024 – 27 O 137/23, 18.09.2024 – 27 O 176/23) even considered it sufficient if the consumer was in Germany when opening the bank account with the gaming provider from which the money was then transferred to the games. The court ruled that it did not matter whether the consumer played from Germany, whether the provider was located abroad or whether the bank account from which the money was finally transferred to the game was located in another country. It appears that Austrian courts have similar cases to decide, but see this point differently, the Austrian OGH decided that the Austrian rules prohibiting unlicensed gambling are limited to providers based in Austria.

- As you probably know, the Austrian OGH made a request to the CJEU to determine the place of the damage (**Article 4 para. 1 Rome II**) in a case where the consumer/player transfers the money from the local bank account to the account of the Bank in Malta and then makes payments from this second bank account. So far, German courts were hesitant to take this road. The way over unjust enrichment resulting from a invalid contract has the charming effect that you do not have to apply Rome II's general tort rule (Article 4 para. 1 Rome II) and dive into the discussion how to determine the place of economic damages. Under German law, however, Rome II may be relevant in cases where the claim is not based on unjust enrichment but on **intentional damage inflicted in a manner offending common decency** (*vorsätzliche sittenwidrige Schädigung*), a special offence which is more difficult to prove (sec. 826 BGB). In some few cases, where sec. 826 was in question, courts still did try to avoid the discussion how to locate this economic loss. One simply applied the law of the place of the habitual residence of the consumer/gamer as the play from which the transfer from the first bank account was effected (OLG Karlsruhe 22.12.2023 – 19 U 7/23; 19.12.2023 – 19 U 14/23). Other courts

avoided the discussion altogether by applying Article 4 para. 3 Rome II directly – leading to an accessory connection to the law applied to the gambling contract (LG Hagen, 5.10.2023).

One footnote to the whole scenario: There is a case pending at the CJEU that might make the whole discussion superfluous (Case C-440/23). The German practice of distributing gambling licences might be classified as unlawful under EU law at least for some older cases. The question by the CJEU to be decided is whether this results in a ban on reclaiming losses from this gambling.

2. Place of Damage in Volkswagen Cases

The Volkswagen emission scandal cases, in German dubbed "Dieselgate", are about claims for damages that end customers are asserting against Volkswagen (or other vehicle manufacturers). The damage is that they bought a car with a manipulated defeat device which, under certain conditions of the type-approval test, resulted in lower emissions than in normal operation. As a result, vehicles with higher emissions than permitted were registered and marketed. Volkswagen is currently being sued throughout Europe. Most cases are initiated by consumers who did not buy directly from the manufacturer but through a local dealer, so there is no direct contractual link. As German law is in some respects restrictive in awarding damages to final consumers, it seems to be a strategy of Volkswagen to come to German law.

- **Rome I**: As far as Volkswagen argued that there is an implicit contract between Volkswagen and the end consumer resulting from a warranty contract in case with a Spanish end buyer, a German court did not follow that argument or at least came to the conclusion that this is a question of Spanish law as such a warranty contract would have to be characterized as a consumer contract in the sense of Article 6 para. 1 Rome I Regulation (LG Ingolstadt 27.10.2023 – 81 O 3625/19)
- In general German courts apply Article 4 para. 1 Rome II and determine the law of the damage following the CJEU decision in VKI and MA v FCA Italy SpA: The place of damage is where the damaging contract is concluded or, in case the places are different, where the vehicle in question is handed over. The BGH (and lower instance courts, e.g. OLG Dresden, 07.11.2023 – 4 U 1712/22 – not free available online) followed

that reasoning. One court had to consider whether, instead, Article 7 Rome II Regulation (**environmental damages**) would be applicable, as the increased emissions would also damage the environment. The LG Ingolstadt did not follow that line of argument, as the damage claimed in the concrete case was a pure economic loss, not an environmental damage.

What are your thoughts? How do courts treat these cases in your jurisdictions (I guess there are many cases as well)? Do you have different or similar issues in discussion?

Stay tuned for the second part of this article which will move to trending topics in family law…