Trending Topics in German PIL 2024 (Part 2 – Online Marriages, Gender Afiliation and Name Law)

As already mentioned in my previous post, 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. This post is the second with an overview over those topics that seem to be most trending.

The two parts focus on the following topics (part 1 contained 1. and 2.):

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 now give attention to the last three topics that 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 2 – Online Marriages, Gender

Afiliation and Name Law

1. **The (Non-)Validity of Online Marriages**
   One highly discussed topic of the last few years was the treatment of Online Marriages. Online Marriage refers to a marriage ceremony where the declarations of intent to marry are declared virtually by digital means. In the relevant cases, at least one of the (future) spouses was located in Germany when this intent was declared via Zoom, Whatsapp or similar means, while the rest of the ceremony, esp. the registration or the other acts of a registrar, was located in another State, esp. in Utah or Afghanistan. The case which the BGH (Supreme Court) decided in September 2024 was about two Nigerians that were in Germany while their declaration was registered in Utah, USA.

   In German law, the validity of such a marriage is determined in two steps: The substantial law of marriage follows the law of the nationality of each spouse (Article 13 EGBGB). The formal validity, in general, follows the classical alternative connecting factors of either the law of the main question (*lex causae*) or the law of the place of the relevant (*lex locus*), Article 11 EGBGB. Nevertheless, regarding marriages, a special rule applies regarding the formal validity: Article 13 para. 4 EGBGB provides that a marriage concluded in Germany necessarily follows German law regarding the form.

   As the requirements of each nationality's laws where fulfilled, main question of the case was: **Where does the celebration of a marriage actually take place if it is celebrated online**?

   Before this question came up, the prevailing opinion and case law referred to the law of the place where the state authority or the religious authority were located (*Coester-Waltjen/Coester* Liber Amicorum Verschraegen (2023), 1 (6); vgl. auch *Gössl* NJW 2022, 3751; BGH 19. 12. 1958 – IV ZR 87/58), which in my opinion makes sense as these authorities make the crucial difference between a mere contract and a marriage conclusion from the point of view of German law. Nevertheless, the Supreme Court (BGH 25.9.2024 – XII ZB 244/22) and other courts (VG Karlsruhe 28.9.2023 – 1 K 3074/23*;* VG Düsseldorf 5.7.2024 – 7 K

2728/22) decided that the place of the marriage is located at the place where the spouses declare their intents to marry – with the consequence that Art. 13 para. 4 EGBGB applied in all cases where at least one spouse was located in Germany at the moment of the declaration.

I am personally not convinced of the case. The Supreme Court distinguishes the decision from so-called proxy marriages where the declaration is made by the proxy and, therefore, not where the spouses are located but where the proxy is communicating. Nevertheless, this comparison is not convincing: German courts characterize the declaration of a proxy as a (merely) formal requirement in cases where the "proxy" has no power to decide but merely communicates the will of the spouse. Thus, in my opinion, the "proxy" is more a messenger than a real proxy and then the location of the declaration again is where the spouses (not the proxies) are in the moment they send the messenger. Furthermore, I am skeptical because the cases decided yet happened in migration contexts and might have been regarded differently with different parties.

What are your thought? Do you have similar questions in your jurisdictions**?**

2. **New German conflict-of-law rules regarding gender afiliation and "Mirin"**
   Since November 2024 the German EGBGB has an explicit conflict of laws rule on gender affiliation / gender identity. It was introduced by the Gender Self-Determination Act. According to Art. 7a para. 1 EGBGB (here you find the provision in German), a person's nationality's law must be applied. That was more or less the unwritten rule, courts followed in Germany. The second paragraph introduces a very **limited form of party autonomy**: According to Art. 7a para. 2 EGBGB , a (foreign) person with **habitual residence in Germany can choose German la**w for the change of gender or a related change of name.

   While this rule opens non-nationals to change their legal gender in Germany, **it does not comply with the case law of the CJEU**. In the decision **Mirin** (ECLI:EU:C:2024:845 – Mirin) the CJEU extended her case law regarding the recognition of names to gender changes that took place in another Member State. It establishes the obligation to recognise the

change of gender validly made in another Member State.

If a person changes the gender in another Member State without being a national of that State but (e.g.) living there, in Germany that gender reallocation cannot be accepted by Art. 7a EGBGB. An extension of Art. 7a para. EGBGB, i.e. a choice of law in favour of every habitual residence (not limited to a German one), might help, even though it probably will not include all situations possible where the obligation to recognize a gender afiliation can exist. This development again shows that the classical "recognition via conflict of laws" method is not able to implement the case law of the CJEU.

What are your thoughts to those developments (Mirin and the new rule)?

3. **Reforms in International Name Law**
   Finally, there was a general reform of German name law and – in a last minute move my the legislator – in **International Name Law as well**. The new rules will enter info force in May 2025.

   At the moment, the law of the person follows her **nationality** (Article 10 para. 1 EGBGB – version until the end of April 2025). Furthermore, there is a very **limited** possibility of a **choice of law** for **spouses** regarding a common name (each spouses nationalities and German law if one has the habitual residence in Germany) and for **children** and their **family names** (nationality of each parent or other person with parental responsibility or German law, if one parent has the habitual residence in Germany).

   The new Article 10 para. 1 EGBGB changes the connecting factor: instead of nationality, **habitual residence of the person determines her name, renvoi excluded**. According to Art. 10 para. 4 EGBGB, instead, **the person can choose the law of the nationality**. The futher choice of law for spouses and children family names remains, but allows spouses to choose the law of the habitual residence of one of them, no matter whether it is the German one or not. A child's name now can be chosen by the parents' and the child's nationality (new). In all those cases, persons with double nationality can choose both nationalities.

   Finally, Article 48 EGBGB contains a provision that implements the **CJEU case law regarding the recognition of names**. Until now, it provides

that a person can choose to change the name into the name acquired during a habitual residence in another Member State of the European Union and entered in a civil status register there, unless this is manifestly incompatible with fundamental principles of German law.

The new provision is almost identical, but some subtle but important changes were made: **First,** a person **does not have to have their habitual residence in the Member State** in which they acquired the name. **Nationality is sufficient.** This implements "Freitag". **Second,** it no longer depends on whether the name was **'lawfully' acquired in another Member State**, but only on the (possibly incorrect) entry of the name in a foreign register. This last requirement (in my opinion, see Gössl, IPRax 2018, 376) goes further that the CJEU requires, as the name has to be "validly acquired" in another Member State to create the obligation to "recognize" or accept that name. Nevertheless, the CJEU most probably will not object to a Member State that is more recognition/acceptance-friendly than necessary.

I hope you found this overview interesting. Next year, I am planing to provide similar articles, so any feedback is very welcome.