German

Private International Law

by

Rechtsanwalt Klaus Vorpeil

As per January 2010

Table of Contents

[1] The Rome I Regulation does not completely supersede the autonomous German private international law existing before its entering into force on 17th December 2009.
[2] The Rome II Regulation does not completely supersede the autonomous German private international law existing before its entering into force on 11th January 2009.

I Introduction

1 General Introduction

"The realm of the conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it"[3]. Certainly, times have changed since this well-known quotation. Anyway, it is hoped that should there still be any deficiencies nowadays they can, at least with regard to German private international law be cured by consulting the following explanations. They are directed at a larger audience and are designed for general use, but will be of special interest for those who are involved in international business activities. One of the consequences of this chapter's required brevity is that not all areas of business law which is the focus of this chapter could be covered. But, this chapter is a brief presentation of the most relevant areas of the German private international law.

First, some remarks regarding nomenclature. Neither the terms "private international law" and/or " international private law" nor the term "conflict of laws" is a perfect description. None of them is wholly accurate or properly descriptive. The terms mentioned are generally interchangeable. While for civil law countries, such as Germany, the term "private international law" is more appropriate this terminology was chosen as title for this chapter. Despite the name, private international law is not international by origin. Basically, every state has its own national system of conflict of laws rules.

Business law becomes particularly interesting when the transactions take place between individuals and commercial entities in different countries. The way in which business operates is often different in the countries concerned and the law will certainly be different, too. The commercial world is shrinking every day and the concept of an insular local practice is increasingly becoming outdated. Accordingly, an international perspective has become essential for all business practices.

2 Scope and Purpose of Private International Law

The risk, that a company or an individual might be involved in a dispute having international repercussions is more likely in today's business world. In the event of such a dispute, it is not enough to determine which court has international jurisdiction to hear and to determine the case. It also has to be established which law is applicable to determine the substance of the case. In civil law systems, private international law is a branch of the internal legal system dealing with the determination of which state's law is applicable to cases involving cross-border implications.

The purpose of the conflict of laws rules is to determine which state's substantive law is applicable to a particular international legal relationship. The international element can be represented by the fact that, (i) the parties are of different nationality or reside in different countries, (ii) they have entered into a contract concerning a transaction taking place abroad, or (iii) the relevant object is located in another country. The conflict of laws rules determine the applicable law on the basis of *Anknüpfungspunkte* (connecting factors). Under German private international law there is no uniform connecting factor for all areas of law.

---

[3] Prosser, Mich.L.Rev. 51 (1952/53) 971.

The German conflict of laws rules do not only relate to rules of substantive law but also to another state's conflict of laws rules. Within Europe the conflict of laws rules have been harmonised in certain areas. Certain conflict of laws rules have also been harmonised at an international level. National courts apply their respective national conflict of laws rules. Thus, the place of jurisdiction is of great importance in cross-border cases.

The German private international law, besides conflict of laws rules, partly also encompasses substantive law[4]. The focus of this chapter on German private international law is brought on the conflict of laws rules.

3 Rome I Regulation and Rome II Regulation

The autonomous German private international law has been amended by the Regulation (EC) No 864/2007 (Rome I Regulation)[5] and the Regulation (EC) No 593/2008 (Rome II Regulation)[6]. Pursuant to Art. 249 II of the Treaty establishing the European Community both regulations are directly applicable in Germany as an EC Member State. In order to adapt the German private international law to these EC regulations two separate statutes relating to the adjustment of the provisions of private international law[7] *(Anpassungsgesetze)* have been enacted. The most relevant amendments have been made in the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Act to the German Civil Code, the "EGBGB"). In accordance with European law the Rome I Regulation and the Rome II Regulation enjoy priority over the autonomous German private international law[8]. Where the facts of a case have a connection with a foreign country and the Rome I Regulation and the Rome II Regulation are not relevant the applicable law has to be determined by the provisions of the second chapter of the EGBGB.

While the Rome I Regulation entered into force on 17th December 2009 with respect to contracts made on or after this date and changed the German private international law on contractual obligations the Rome II Regulation entered into force on 11th January 2009 and changed the German private international law on non-contractual obligations[9]. Hence, from its origin the new German private international law on contractual and non-contractual obligations is in fact European law. The old conflict of laws rules for contractual obligations still apply to contracts closed before 17th December 2009 and the old conflict of laws rules for non-contractual obligations still apply to events which occurred before 11th January 2009 and to consequential damages resulting from such events. Furthermore, the latter rules still apply to events which are not covered by the scope of the Rome II Regulation as defined in its Art. 1.

Therefore, this chapter about private international law deals with the law before and after entering into force of the above mentioned EC regulations. As the old autonomous German conflict of laws rules are still applicable to some areas and under certain circumstances as set out below and the new German conflict of laws rules are actually European law this book is focusing on the autonomous German private international law.

4 Sources of German Private International Law

[4] For further details see chapter II.1.1.
[5] OJ 2008, L 177/6.
[6] OJ 2007, L 199/40; for further details see *Ahern/Binchy,* The Rome II Regulation on the Law Applicable to Non-Contractual Obligations, 2009.
[7] Published in *Bundesgesetzblatt* (Federal Law Gazette): BGBl. 2008 Part I p. 2401 (relating to Rome II Regulation) and 2009 Part I p. 1574 (relating to Rome I Regulation).
[8] Only for clarification, this is also ruled in Article 3 I (a) and (b) of the EGBGB.
[9] For an overview of the complete new German conflict of laws rules for business transactions see *Kindler,* Einführung in das neue IPR des Wirtschaftsverkehrs, 2009.

German rules on applicable law are not codified in a single autonomous code or statute. The most important source are Articles 3 to 46 of the old version and Articles 3 to 49 of the new version of the EGBGB which, for example, comprised and comprise, as applicable, the private international law with regard to contractual obligations, non-contractal obligations *(e.g.* torts) and *Sachenrecht* (rights *in rem).* Further conflict of laws rules are contained in various special statutory rules *(e.g.* Articles 91 to 98 of the *Wechselgesetz* (Bills of Exchange Act, the "WG"), Articles 60 to 66 of the *Scheckgesetz* (Cheques Act, the "SchG"), Article 102 secs 1 to 11 of the *Einführungsgesetz zur Insolvenzordnung* (Introductory Act to the Insolvency Statute, the "EGInsO") and secs 335 *et seq* of the *Insolvenzordnung* (Insolvency Statute, the "InsO"). Before the Rome I Regulation has entered into force the law applicable to insurance contracts was determined by Articles 7 to 15 of the *Einführungsgesetz zum Versicherungsvertragsgesetz* (Introductory Act to the Contracts of Insurance Act, the "EGVVG"). Other sources are several supranational instruments, international treaties, conventions and regulations *(e.g.* Rome I Regulation, Rome II Regulation and Brussels I Regulation). Furthermore case law, especially the various contributions from of the *Bundesgerichtshof* (Federal Supreme Court of Justice) have provided important sources to German private international law.

5 Basic Principles of German Private International Law

Only some basic principles of general importance are dealt briefly with in this introduction. The German private international law is based on a system of *allseitige* (universal) conflict of laws rules, *i.e.* it allows the application of both German law and the law of any other state. The private international law governing natural persons adhere to the principle of nationality[10]. If this principle is not applicable, e.g. in the case the parties involved are of different nationality, then the habitual residence is decisive. Article 3a I of the EGBGB references to substantive law refer to the laws of the relevant state with the exception of the rules of private international law. Pursuant to Article 4 I 1 of the EGBGB references to the laws of another state also include the rules of that state's private international law. It is applicable in so far as it is not in contradiction to the reference by the conflict of laws rules. If the laws of the other state contain a reference back to the German laws, pursuant to Article 4 I 2 of the EGBGB the German rules of substantive law apply. German courts have to recognise a *renvoi*[11]*.* In case of successive references to the laws of a third state the chain of references is interrupted as soon as a certain state appears for the second time in this chain. If the application of a foreign country's law according to German conflict of laws rules, manifestly violates German public policy *(ordre public)*[12], the foreign law is not applied.

II Applicable Law to Contractual Obligations before 17th December 2009[13]

1 Introduction

1.1 Conflict of Laws Rules and Substantive Laws

The function of conflict of laws rules concerning the law to contractual obligations is to determine the applicable law in this area of law. These particular conflict of laws rules have

[10] See Article 5 of the EGBGB.
[11] *Renvoi* encompasses a *Weiterverweisung* (transmission to the law of a third country) and a *Rückverweisung* (remission to the law of the forum).
[12] See Article 6 of the EGBGB; for further details see chapter II.7.5.
[13] The Rome I Regulation does not completely supersede the autonomous German private international law existing before its entering into force on 17th December 2009 (see chapter I.3).

to be distinguished from the substantive laws concerning contractual obligations that apply universally to cross-border transactions[14].

1.2 Rome Convention

With regard to private international law on the conflict of laws in the area of the law of obligations, German rules were mainly based on the EC Convention on the Law Applicable to Contractual Obligations (Rome Convention) of 19th June 1980. This convention entered into force for the Republic of Germany on 1st April 1991. It contained conflict of laws rules with regard to contractual obligations in Articles 1 to 21. Basically, within the scope of these rules, the provisions of the autonomous German private international law, which were not in compliance with the Rome Convention, were not applicable. The Rome Convention has been replaced by the Rome I Regulation.

1.3 German Autonomous Conflict of Laws Rules

The conflict of laws rules contained in Articles 1 to 21 of the Rome Convention were implemented into Articles 27 to 37 of the EGBGB. These provisions dealt with private international law in the area of the law regarding contractual obligations in general. For certain areas of the law to contractual obligations special rules applied[15], for example, Articles 7 to 15 of the *Einführungsgesetz zum Versicherungsvertragsgesetz* (Introductory Act to the Contracts of Insurance Act, the "EGVVG"). These rules covered relevant parts of the German private international law for insurance contracts[16].

2 Freedom of Choice of Law

Unless indicated otherwise, all references to the "EGBGB" in this chapter II relate to the version of the EGBGB before entering into force of the Rome I Regulation. Chapter II. 2 to II. 7 is written from the perspective before the Rome I Regulation entered into force.

2.1 Principle of Autonomy of the Parties and Choice of Law

Choice of law is the most important factor with regard to the conflict of laws rules in the area of contractual obligations. Principally, the law chosen by the parties involved governs a contract. However, several provisions, the details of which are dealt with in the following sections, limit the freedom of choice of law. The choice of law must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case (Article 27 I 1 and 2 of the EGBGB)[17]. This rule, being applicable also to unilaterally binding obligations, is a codification of the principle of autonomy of the parties under which the parties of a contract themselves can agree upon the applicable law by a choice of law. It also applies to contracts concluded by electronic means in the area of e-commerce. A court has to examine all circumstances of the case with respect to a choice of law very carefully, whereby the wording of the parties' declarations enjoys priority over the facts of the case.

---

[14] See for example United Convention on Contracts for the International Sale of Goods (CISG), Convention on the Contract for the International Carriage of Goods by Road (CMR), Convention concerning International Carriage by Rail, Warsaw Convention, UNIDROIT Convention on International Factoring and United Nations Convention on the Assignment of Receivables in International Trade.

[15] See chapter I.3.

[16] For further details see chapter II.6.

[17] The Rome I Regulation deals with the freedom of choice of law in Article 3.

The choice of law can result in the direct application of *staatliches* (governmental) law only. This means, for example, that the rules developed by private international organisations *(e.g.* International Chamber of Commerce) do not fall within the scope of a choice of law in accordance with Article 27 of the EGBGB.

2.2 Coming into Existence and Validity of Choice of Law

A choice of law is consummated by a *kollisionsrechtlicher Verweisungsvertrag* (contract for determination of applicable law). The choice of law is a contract in itself, the validity of which is subject to the law chosen and not to the *lex fori* (law of the jurisdiction). This especially applies to clauses in general business conditions, which deal with a choice of law[18]. The coming into existence and the validity of the consent of the parties as to the choice of the applicable law are determined in accordance with the provisions of Articles 11, 12, 29 III and 31 of the EGBGB (Article 27 IV of the EGBGB). That means that the law governing the main contract is the crucial one. Article 11 of the EGBGB sets out which country's law governs the conflict of laws rules with respect to formal requirements pertaining to the validity of a contract. The intentions of the parties may lead to the laws of a particular country within the legal framework of which the contract would be formally invalid[19]. The validity of the choice of law is independent of the validity of the main contract itself[20]. In case of conflicting choice of law clauses in the general business conditions of both parties, no choice of law comes into effect.

2.3 Freedom of Choice of Law and Limitations of Choice of Law

A choice of law requires that both parties of a contract intend to be bound thereby. They are free to choose the law of any country. Generally, the parties have the option even to choose the law of a certain country if a connection between the chosen law and the facts of the case does not exist. For example, sometimes the parties want to choose a neutral law for special reasons. With regard to pure domestic contracts a choice of the law of a foreign country is possible as well. However, there are several limitations concerning the choice of law.

Article 34 of the EGBGB contains the most important limitation concerning the choice of law. Irrespective of a choice of law, mandatory German rules governing the facts of the case must be applied at all events, whatever the law applicable to the contract is[21]. They cannot be derogated by contract. Article 34 of the EGBGB relates to rules that are mandatory for socio-political or economic reasons[22].

In addition, a further limitation results from Article 27 III of the EGBGB. This paragraph relates to mandatory rules of a country other than Germany. If the factual matters of a case at the time of a choice of law, with the exception of the choice, only have a connection with one country, the choice of the laws of another country cannot supersede the mandatory rules of the country first mentioned and therefore, cannot in accordance with the law of that country be derogated by an agreement between the parties. This also applies if this choice of law is supported by the agreement upon the jurisdiction of this other country (Article 27 III of the EGBGB). The mandatory rules of the country in whose territory all elements of the factual situation occur must be applied, irrespective of the law chosen by the parties. In a case of a conflict between the mandatory rules of several countries, from the view of German law, German rules prevail.

---

[18] BGHZ 123 pp. 380, 383; NJW 1997 p. 1697; NJW-RR 2005 p. 1071.
[19] BGH NJW 1969 p. 1760; OLG Nuremberg NJW-RR 1997 p. 1484.
[20] BGH JZ 1963 p. 167.
[21] For further details with regard to mandatory rules see chapter II.7.4.
[22] For further details see chapter II.7.4.

Further limitations concerning a choice of law apply to consumer contracts[23] and employment contracts[24]. An analogous application of the provisions relating to these types of contracts to other ones is excluded because of their exceptional character.

2.4 Distinction between Obligatory Contracts and Contracts *in Rem*

German law distinguishes between *schuldrechtliche Verträge* (obligatory contracts) and *dingliche Verträge* (contracts *in rem)*[25]. This principle is called the *Abstraktionsprinzip* (principle of abstraction)[26]. According to this principle, transactions concerning *dingliche Rechte* (rights *in rem)* are abstract in the sense of legally independent from any underlying obligation that binds the parties of the relevant transaction. In order to perform the obligation under the obligatory contract a further separate contract *in rem* may be required under German law. Article 27 of the EGBGB applies to obligatory contracts only. The contract *in rem* is governed by the *lex rei sitae* (law of the location of the property)[27]*,* even if it is enclosed in the same document as the obligatory contract.

2.5 Choice of Substantive Law

A choice of law concerns the *Sachvorschriften* (substantive law) of the chosen law only. The substantive law sets out which provisions of the law of a certain country become the content of the relevant contract. The result of the application of the law of a special country, whether by choice of law or by operation of law due to an objective *Anknüpfungspunkt* (connecting factor), means the application of all rules of law in force in that country except its rules of private international law. In so far a *renvoi, i.e.* a *Weiterverweisung* (transmission to the law of a third country) and/or a *Rückverweisung* (remission to the law of the forum) are excluded (Article 35 I of the EGBGB).

2.6 Implicit Choice of Law

It is not necessary for the coming into existence of a valid choice of law that it is expressly agreed as, for example, in general business terms. Pursuant to Article 27 II 2 of the EGBGB it may be implicitly agreed, to the extent that the corresponding real intention of both parties with regard thereto can be identified with sufficient certainty from the terms of the contract or the circumstances of the facts of the case.

Following the case law of the German courts, especially that of the *Bundesgerichtshof* (Federal Supreme Court of Justice) and the *Oberlandesgerichte* (Regional Appeal Courts), indications for an implied choice of law are, for example: the conclusion of a contract in Germany in the German language between two parties located in Germany[28]; the conclusion of a contract between two foreign parties located in a foreign country with involvement of lawyers in this foreign country[29]; the agreement about a uniform place of jurisdiction[30]; the

---

[23] See Article 29 I of the EGBGB.
[24] See Article 30 I of the EGBGB.
[25] For further details see chapter VI.
[26] For further details see chapter VI.
[27] For further details see chapter VI.
[28] BGH NJW 2004 pp. 3706, 3708; OLG Düsseldorf NJW-RR 1991 p. 55; OLG Karlsruhe NZG 2001 p. 748.
[29] BGH NJW-RR 2000 p. 1002 (contract between French parties in France); different opinion NJW-RR 2005 p. 206, 208.
[30] BGH RIW 1976 p. 447; OLG Hamburg RIW 1986 p. 462; OLG Frankfurt RIW 1998 p. 477.

agreement about an institutional court of arbitration with a permanent seat[31]; the agreement about the application of the general business terms of one of the parties[32]; the use of forms which are structured in accordance with the law of a certain country[33] when their use, for example, in case of a carriage of goods by sea, is usual international practice[34]; the reference to legal provisions in the documentation of a contract[35]; the agreement about the interpretation of a contract in accordance with the law of a foreign country[36]; finally, the consideration of the content of the contract against the background of the necessities of one of the parties of the contract[37] or of the customary practice in their common country of origin[38].

An indication for a later choice of law can be seen in the behaviour of the parties during court proceedings, especially the treatment of the subject matter by both parties in accordance with the laws of a certain foreign country[39]. When both parties exclusively refer to the German rules of law, usually the preconditions of an implied agreement about the application of German law are given[40]. Both parties must have the awareness to make a statement of legal significance with regard to a choice of law[41]. Acceptance of the grounds for a judgment in appellate proceedings without any objections is sufficient with respect thereto. The intention of both parties to cause legal consequences is required[42]. When lawyers represent both parties, the validity of an implied choice of law also depends upon the lawyers' authority to represent the parties. A close connection between two transactions can also be an indication for an implied choice of law in favour of the law that governs the main contract[43].

For example, an implied choice of law is not part of a standard formalized statement with regard to a place of jurisdiction on an invoice[44] or to the *einheitlicher Erfüllungsort* (uniform place of performance), especially if it is not in compliance with the *Leistungsort* (place where the performance actually shall take place)[45] and the erroneous quotation of German rules[46]. The language itself chosen for a contract is not sufficient for an implied choice of law[47]. The same applies to the place where the contract was concluded[48] and, basically, to performance in a foreign currency[49].

---

[31] BGH RIW 1970 p. 31; OLG Hamburg RIW 1979 p. 482; OLG Hamm IPRspr 93 No. 30; Arbitration Court of Hamburg NJW 1996 p. 3229 and RIW 1999 p. 394.
[32] BGH NJW 2003 p. 288 and 2003 p. 2605.
[33] BGH NJW 1997 pp. 397, 399; 2004 pp. 3706, 3708.
[34] OLG Hamburg MDR 1954 p. 422 and 1955 p. 109.
[35] BGH NJW-RR 1996 p. 1034 and 2000 p. 1002; BAG NZA 2003 p. 318; LG Hamburg RIW 1993 p. 145 (with certain limitations); OLG Cologne RIW 1993 p. 414 (especially in case of an official recording of the documentation by a notary public).
[36] LG Munic IPRax 1984 p. 318.
[37] OLG Zweibrücken RIW 1983 p. 454.
[38] OLG Cologne NJW-RR 1994 p. 200.
[39] BGH NJW RR 1990 p. 248 and 2000 pp. 1002, 1004; OLG Hamm RIW 1999 p. 787 and 2001 p. 867.
[40] BGH NJW 1999 p. 950; 2003 p. 3620; 2004 p. 2523 and 2004 p.3706.
[41] BGH NJW 1991 pp. 1292, 1293.
[42] BGH NJW RR 2000 pp. 1002, 1004; see also OLG Munic RIW 1996 p. 330; OLG Cologne VersR 2002 p. 1374.
[43] BGH NJW 2001 p. 1936.
[44] BGH LM Article 7 *et seq* No. 33.
[45] OLG Cologne RIW 1994 p. 970.
[46] OLG Cologne NJW 1987 pp. 1151, 1152.
[47] BGHZ 19 p. 110; LG Hamburg RIW 1999 p. 391.
[48] BGH NJW 2001 p. 1936 (also in connection with languages); LG Hamburg RIW 1993 p. 144; see also BGH NJW 1998 p. 1321; LG Aachen IPRspr 1993 No. 141.
[49] BGH NJW-RR 1990 p. 183 and 2001 p. 1936; OLG Cologne RIW 1994 p. 970; OLG Celle IPRspr. 1999 No. 31; OLG Brandenburg NJ 2001 p. 257.

2.7 Choice of Law for Whole or Part of Contract

By their choice the parties can select the law applicable to the whole or a part of the contract only (Article 27 I 3 of the EGBGB). Thus, the law of different countries may apply to several parts of a single contract.

2.8 Substitution of Former Choice of Law

The parties of a contract may at any time agree to subject the contract to a law other than that which previously governed it whether as a result of an earlier choice of law or of other applicable provisions. Any variation by the parties of the law to be applied made after the conclusion of the contract does not prejudice its formal validity or adversely affect the rights of third parties (Article 27 II of the EGBGB). Also a later choice of law which substitutes a former one must meet the requirements of Article 27 I 1 of the EGBGB[50]. Should a later new choice of law lead to another applicable law, this change will be effective *ex tunc* (from that time), if there are any doubts with regard thereto[51]. In order to avoid such a situation, the parties can implicitly preclude the aforementioned retroactive effect[52].

3 Applicable Law in the Absence of Choice of Law

3.1 Objective Connecting Factors

Sometimes cross-border contracts do not contain a choice of law clause. In this case, the determination of the applicable law does not directly depend upon the will of the parties of a contract. If the parties make no explicit or implicit choice of law, objective *Anknüpfungspunkte* (connecting factors)[53] determine the applicable law. In the absence of choice of law, the crucial German conflict of laws rule with regard to contractual obligations is Article 28 of the EGBGB[54]. Pursuant to Article 35 I of the EGBGB a *Weiterverweisung* (transmission to the law of a third country) or a *Rückverweisung* (remission to the law of the forum) is also excluded within the scope of Article 28 of the EGBGB. With the exception of consumer contracts and employment contracts, the latter article is applicable to all types of contracts.

3.2 Principle of Closest Connection with Certain Country

As already mentioned above, Article 28 of the EGBGB governs the applicable law to contractual obligations if it has not expressly or implicitly been chosen in accordance with Article 27 of the EGBGB[55]. The decisive factor in the determination of the applicable law in the absence of a choice of law is the closest connection with a certain country. To the extent that the law applicable to the contract has not been chosen in accordance with Article 27 of the EGBGB, the contract is governed by the law of the country which is most closely connected (Article 28 I 1 of the EGBGB). The principle of closest connection relates to the application of the substantive provisions of law only – not to the conflict of laws rules. The relevant aspect of Article 28 I 1 of the EGBGB is, when considering all circumstances of the case, where the main local references can be found. There is no strict distinction between this objective *Anknüpfungspunkt* (connecting factor) and the indications for an implied choice

[50] BGH NJW-RR 2000 pp. 1002, 1004.
[51] LG Heidelberg IPRax 2005 p. 42; different opinion OLG Frankfurt IPRax 992 pp. 314, 317.
[52] LG Essen RIW 2001 p. 943.
[53] For further details see chapter II.3.2 *et seq.*
[54] For further details see chapter II.3.2.
[55] The Rome I Regulation deals with the applicable law in the absence of choice in Article 4.

of law. It is presumed that the contract is most closely connected with the country where the party who is to effect the performance that is the characteristic one of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a corporate body, an association or legal entity, its central administration. However, if the contract is entered into in the course of that party's trade or profession, it is presumed that the contract is most closely connected with the country in which the *Hauptniederlassung* (principal place of business) is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated (Article 28 II of the EGBGB).

3.3 Indications for Closest Connection of Contract

The German courts have ruled on indications for the closest connection with the laws of a certain country in several cases. Such indications are in the courts' opinions, for instance, the common citizenship of the parties[56], the location of assets being the subject matter of the contract[57] and subject to the circumstances of the case, the place where the contract was concluded and the language of the contract. Contracts with a state or its public law entities have, in case of doubt, the closest connection with the relevant state[58].

3.4 Characteristic Performance

The most important *Anknüpfungspunkt* (connecting factor) with regard to the closest connection of a contract with a certain state is the characteristic performance[59]. This term describes on the one hand both the typical elements of the concrete type of contract and the core elements of its nature and on the other hand makes it distinguishable from contracts of other types. In case such a characteristic performance can be identified for a special type of contract, Article 28 I of the EGBGB constitutes a presumption with regard to the applicable law.

3.5 Special Factual Matters

Aside from the general rule described above the closest connection is defined also with regard to some special factual matters in Article 28 of the EGBGB. Contracts over rights in immovable property or the carriage of goods are, in accordance with this article, governed by special provisions.

3.5.1 Immovable Property

To the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it is presumed that the contract is most closely connected with the country where the immovable property is situated (Article 28 III of the EGBGB). Thus, this presumption applies the *lex rei sitae* (law of the location of the property). If the subject matter of a contract is an obligatory right as, for example, the acquisition of a claim that is secured by way of a *dingliche (in rem)* security, Article 28 III of the EGBGB does not apply[60].

---

[56] BGH WM 1977 p. 793; see also LG Hamburg IPRspr 73 No. 16 (different opinion in case of a common habitual residence in another country than the common home-country of the parties).
[57] LG Stuttgart IPRax 1996 p. 140.
[58] OLG Koblenz IPRspr 1974 No. 1 a; LG Bonn NJOZ 2002 pp. 222, 246; other opinion KG Berlin IPRax 1998 pp. 280, 283.
[59] With regard to the characteristic performance of special types of contract see chapter II.3.8.
[60] BGH NJW-RR 2005 pp. 206, 209.

Dingliche Rechtsgeschäfte (contracts *in rem)* concluded in order to complete an obligatory contract due to the *Abstraktionsprinzip*[61]*,* are always governed by the *lex rei sitae*[62]*.*

3.5.2 Carriage of Goods

In a contract for the carriage of goods if the country in which, at the time the contract is concluded, the carrier has his *Hauptniederlassung* (principal place of business) is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it is presumed that the contract is most closely connected with that country. In applying this principle, single voyage charter-parties[63] and other contracts – the main purpose of which is the carriage of goods – are treated as contracts for the carriage of goods (Article 28 IV of the EGBGB). Article 28 IV of the EGBGB does not require the carrier personally to transport the goods. Therefore, this provision also applies to *Speditionsverträge* (forwarding contracts)[64]. The question of applicable law of contracts for the carriage of goods only arises to the extent that the Convention on the Contract for the International Carriage by Road (CMR) is not applicable[65]. Contracts for the transport of persons do not fall within the scope of Article 28 IV of the EGBGB.

3.6 Rebuttable Presumption of Applicable Law

The presumption of the applicable law as laid down in Article 28 II, III and IV of the EGBGB for special types of contract can be rebutted. It is disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country (Article 28 V of the EGBGB). This provision applies as an exception only. The presumption of applicable law can be rebutted only if there is an accumulation of several serious indications for a closer connection with the law of another country[66].

3.7 Splitting of Applicable Law for Severable Parts of Contract

The law of the country that is applicable in accordance with the principle of closest connection, basically, rules the contractual relationships of the parties as a whole. However, if a contract contains severable parts, an exception is possible. A severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country (Article 28 I 2 of the EGBGB). Such a splitting usually applies to very complex contractual constructions only.

3.8 Law Applicable to Special Types of Contracts

The characteristic performance of a contract must be determined separately for every type of contract. The following compilation is based on types of contracts under German law.

3.8.1 Purchase Agreements

The international purchase of goods is primarily governed by the United Convention on Contracts for the International Sale of Goods (CISG), which entered into force for the Federal

---

[61] See the explanations concerning the *Abstraktionsprinzip* in chapter II.3.5.1.
[62] For further details see chapter VI.
[63] *Chartervertrag für eine einzige Reise.*
[64] OLG Hamburg IPRspr 1989 No. 62; OLG Hamm IPRspr 1998 No 49 A.
[65] OLG Oldenburg IPRspr 2000 No. 112.
[66] BGH NJW-RR 2005 p. 206.

Republic of Germany on 1st January 1991. The CISG is especially applicable in such cases where, in accordance with the rules of private international law, the law of a contracting state is applicable[67], for example, by the choice of German law[68], but not directly by the choice of the CISG[69], or by application of Article 28 of the EGBGB[70]. To this extent, the rules of private international law keep their significance.

If the parties, in accordance with Article 6 of the CISG, exclude the application of the CISG, for instance, by opting out the CISG in favour of the *Bürgerliches Gesetzbuch* (Civil Code, the "BGB")[71] the chosen national law applies. Without a choice of law, it is the seller who is to effect the performance which is characteristic for a purchase agreement[72]. Thus, in such cases the law of the habitual residence and/or the central administration of the seller usually regulates purchase agreements. However, Articles 29 and 29 a of the EGBGB[73] govern purchase agreements with consumers.

3.8.2 Exchange Agreements and Donations

The applicable law for *Tauschverträge* (exchange agreements[74]) cannot be determined by the closest connection because contracts of this type do not have a characteristic performance. With regard to a donation[75], the question of applicable law is twofold. While for the donation of immovable property the location of the property is the decisive factor, the determination of the applicable law for the donation of movable property depends on the habitual residence of the donor[76].

3.8.3 Leases and Franchise Agreements

The *Miete* and *Pacht* (rental/lease[77]) of immovable property are governed by the law of its location. In the case of movable property, a lease is governed by the law of the country where the lessor has his habitual residence and/or his central administration. Commercial leases are governed by the law of the principal place of business of the lessor. Leasing agreements, in the absence of a choice of law, are governed by the law of the lessor to the extent that Articles 29 and 29a of the EGBGB, which relate to consumer contracts[78], are not applicable. Franchise agreements are usually regulated by the law of the country where the franchisor is located[79].

3.8.4 Loan Agreements

The characteristic performance of a loan agreement is provided by the lender[80]. Loan agreements between a bank and a borrower usually contain a choice of law clause in the

---

[67] See Article 1 I (b) of the CISG; OLG Cologne RIW 1994 p. 972; OLG Frankfurt RIW 2001 p. 383.
[68] BGH NJW 1997 p. 3309; 1999 p. 1259.
[69] Different opinion OLG Jena IPRspr 1999 No. 25.
[70] OLG Hamburg IPRspr 1997 No. 176.
[71] OLG Cologne IPRspr 1997 No. 217.
[72] See secs 433 *et seq* of the BGB *(Kaufvertrag).*
[73] For further details with regard to consumer contracts see chapter II.4.
[74] See sec 480 of the BGB *(Tausch).*
[75] See secs 516 *et seq* of the BGB *(Schenkung).*
[76] OLG Cologne NJW-RR 1994 p. 1026; OLG Frankfurt GRUR 1998 p. 141.
[77] See secs 556 *et seq* and 581 *et seq* of the BGB.
[78] For further details see chapter II.4.
[79] OLG Düsseldorf IPRspr 2002 No. 31.
[80] OLG Düsseldorf NJW-RR 1998 p. 1145; RIW 2001 p. 63; OLG Celle IPRax 1999 p. 456; KG Berlin ZIP 2003 p. 1538.

general business terms of the bank. If in deviation of this common practice no choice of law is agreed upon, such agreements are governed by the law of the place of business and/or the principal place of business of the bank to the extent Article 29 II of the EGBGB does not apply[81]. Loan agreements pertaining to the financing of immovable property, are governed by the law of the location of the property if no choice of law has been agreed upon.

3.8.5 Service Agreements

The characteristic performance of a *Dienstleistungsvertrag* (service agreement[82]) is provided by the the person who promises services[83]. Therefore, *freiberufliche* (self-employed) services are regulated by the law of the place of business *(e.g.* office) of the person who promises services to the extent Article 29 II of the EGBGB does not apply. A contract with a medical practitioner is, basically, governed by the law of the place where the medical practice is located, and a contract with a lawyer or notary public by the law of the place where their law offices are located[84]. The characteristic performance of a *Werkvertrag* (contract to produce a work[85]) is provided by the contractor[86]. Thus, the law of the place of business of the contractor governs this type of contract. The same applies to contracts with subcontractors, *Werklieferungsverträge* (contracts dealing with the supply of movable objects to be produced or manufactured[87]) and *Pauschal-Reiseverträge* (package travel contracts[88]). The *Anknüpfungspunkt* (connecting factor) of contracts with architects[89] is, basically, the place where the architect's office is located. Sales agency agreements and authorised dealer agreements are governed by the law of their place of business[90], unless the circumstances of the case as a whole indicate a closer connection with another state[91].

3.8.6 Mandates, Contracts for Management of Affairs of Another and Agencies

The characteristic performance of an *Auftrag* (mandate for the management of the affairs of another[92]) is provided by the mandatary. The *Anknüpfungspunkt* (connecting factor) is his habitual residence[93]. The same applies to a *Geschäftsbesorgungsvertrag* (contract for the management of the affairs of another[94]). Claims arising under a *Geschäftsführung ohne Auftrag* (agency without specific authorisation[95]), basically, are regulated by the law of the place where the agency conducts business (Article 39 I of the EGBGB)[96].

---

[81] OLG Düsseldorf FamRZ 2001 p. 1102.
[82] See secs 611 *et seq* of the BGB *(Dienstleistungsvertrag).*
[83] BGHZ 128 pp. 41, 48.
[84] KG Berlin Rpfleger 2000 p. 85; LG Hamburg NJW-RR 2000 p. 510; OLG Stuttgart IPRspr 2000 No. 135.
[85] See secs 631 *et seq* of the BGB *(Werkvertrag).*
[86] OLG Schleswig-Holstein IPRax 1993 p. 95; OLG Nuremberg IPRspr 1993 No. 31; OLG Hamm IPRax 1995 p. 104; LG Berlin IPRax 1996 p. 416.
[87] See sec 651 of the BGB *(Werklieferungsvertrag)*; OLG Frankfurt NJW 1992 p. 633; OLG Düsseldorf RIW 1993 p. 845.
[88] See secs 651 a *et seq* of the BGB *(Reisevertrag);* BGH NJW 1996 p. 54; OLG Düsseldorf IPRspr 1997 No. 29.
[89] OLG Brandenburg OLG-NL 2002 p. 3.
[90] BGH NJW 1993 pp. 2753, 2754; 1995 pp. 318, 319; NJW-RR 2002 p. 1433; OLG Munic RIW 2006 p. 706.
[91] LG Nuremberg DB 2003 p. 2765.
[92] See secs 662 *et seq* of the BGB *(Auftrag).*
[93] OLG Hamm NJW-RR 1997 p. 1008.
[94] See secs 675 *et seq* of the BGB *(Geschäftsbesorgungsvertrag);* BGH DtZ 1996 p. 51; NJW-RR 2003 p. 1582.
[95] See secs 677 *et seq* of the BGB *(Geschäftsführung ohne Auftrag).*
[96] For further details see chapter IV.4.

3.8.7 Safekeeping and Trust Agreements

The characteristic performance of safekeeping[97] is provided by the bailee to the extent that there is no consumer contract in accordance with Article 29 I and II of the EGBGB. Thus, the law of the bailee applies[98]. The characteristic performance of a *Treuhandvertrag*[99] (trust agreement) is provided by the trustee[100].

3.8.8 Chance Business Without Corporate Organisation

The law of a *Gelegenheitsgesellschaft* (chance business without corporate organisation) is in most of the cases at least governed by an implied choice of law. The decisive factor in case of the absence of a choice of law is the closest connection. Article 28 II of the EGBGB is not applicable[101]. This applies, especially, for syndicated loans provided by banks.

3.8.9 Relationships Between Banks and Customers and Inter-Bank Relationships

The business relationship between banks and their customers is basically governed by the law of the place of business of the relevant bank where the bank customer keeps his account. The reason is that the general business terms of (German) banks contain a choice of law clause[102]. In most cases, the absence of a valid choice of law has the same result because the bank provides the characteristic performance at the place where the relevant accounts are kept[103].

The business relationship between banks is, in the absence of choice of law, governed by the law of the place of business of the bank that provides the characteristic performance in the relevant case[104]. For example, the cross-border transmission of money is regulated by the law of the place of business of the bank that has been mandated for the relevant part in the chain of transmission.

3.8.10 Suretyships

The *Anknüpfungspunkt* (connecting factor) with respect to a *Bürgschaft* (suretyship[105]) is independent of the underlying contract. Crucial is, primarily, the law chosen by the parties[106]. In the absence of a choice of law, basically, the law of the habitual residence of the surety is

---

[97] See secs 688 *et seq* of the BGB *(Verwahrung).*
[98] LG Aachen RIW 1999 p. 304 (term money account).
[99] For the avoidance of doubt, the concept of a *Treuhandverhältnis* under German law is not comparable with a trust under English law.
[100] BGH NJW 2004 p. 257; NZG 2005 p. 41; OLG Hamm RIW 1994 pp. 513, 516.
[101] OLG Frankfurt RIW 1998 p. 807; OLG Hamburg NJW-RR 2001 p. 1012.
[102] BGH NJW 1987 p. 1825.
[103] BGH NJW 2001 pp. 2968, 2970; OLG Celle IPRspr 1998 No. 76; LG Aachen RIW 1999 p. 304; OLG Saarbrücken IPRspr 2001 No. 30.
[104] BGHZ 108 p. 353, 362; BGH WM 2004 p. 1177.
[105] See secs 765 *et seq* of the BGB *(Bürgschaft).* A German law suretyship *(Bürgschaft)* creates an accessory right. Instruments which are titled “guarantee” and are governed by another law than German law are, most of the times, comparable with a suretyship under German law. For the avoidance of doubt, a *“Garantie”* under German law is a non-accessory instrument which is independent of the underlying contract. A German law *“Garantie”* is abstract, in a sense of legally independent, and comparable with a bond *(e.g.* performance bond).
[106] BGH NJW 2003 p. 2605.

applicable because he is the party who provides the characteristic performance of a suretyship[107].

3.8.11 Abstract Bank Guarantees, Stand-by Letters of Credit, Letters of Comfort and Letters of Credit

An abstract bank guarantee (bond) is governed by the law of the place of business of the bank[108]. The same applies to stand-by letters of credit, accessory bank suretyships[109] and letters of comfort[110]. A back-to-back guarantee (bond), absent an express choice of law, is governed by the law of the place of business of the bank which has been mandated first and provides the corresponding guarantee (bond)[111]. The business relationship between the bank issuing a letter of credit and the beneficiary of the relevant letter of credit is, in the absence of choice of law, governed by the law of the place of business of such bank[112]. The applicable law for the various parts in the chain of settlement of a letter of credit must each be determined independently.

3.8.12 Forfaiting

The forfaiter provides the characteristic performance. Therefore, forfaiting with a bank is, in the absence of a choice of law, governed by the law of the habitual residence of the forfaiter.

3.8.13 Trading at Stock Exchanges

The *Anknüpfungspunkt* (connecting factor) for trading at a stock exchange is the law of the place where the stock exchange is located. Secs 50 *et seq* of the *Börsengesetz* (Stock Exchange Act) and sec 764 of the BGB which contained special conflict of laws rules with regard to trading at stock exchanges were deleted.

4 Consumer Contracts

4.1 Choice of Law and Limitation of Choice of Law

As already mentioned above, special rules apply with respect to the applicable law for consumer contracts[113]. With regard to this type of contract, the option for a choice of law is limited and aims at protecting the interests of consumers because they are usually in a weaker position than the party who supplies goods and/or services. Thus, the *Anknüpfungspunkt* (connecting factor) is the habitual residence of the consumer. Basically, the parties of consumer contracts can decide themselves to expressly or implicitly make a choice of law. However, under the preconditions laid down in Article 29 I of the EGBGB for

---

[107] BGH NJW 1993 p. 1126.
[108] BGH NJW 1996 p. 2569.
[109] In the documentation of cross-border transactions in Engish language they are often called "guarantees".
[110] OLG Frankfurt IPRspr 1979 No. 10; *Vorpeil,* Internationales Privatrecht zu Garantie, Stand-by Letter of Credit, Bürgschaft und Patronatserklärung, IWB F. 10 International Gr. 8 pp. 265.
[111] OLG Cologne RIW 1992 p. 145.
[112] OLG Frankfurt RIW 1992 p. 315; different opinion OLG Frankfurt WM 1988 p. 254; OLG Cologne ZIP 1994 p. 1791 (law of the *Zahlstelle* (place of business of the domestic nominated bank)).
[113] See chapter II.2.3 and chapter II.3.1; the Rome I Regulation deals with consumer contracts in Article 6 (for further details see chapter III. 4).

special types of contracts[114], additionally the mandatory rules for the protection of consumers of the country in which the consumer has his habitual residence[115] are guaranteed if the law that governs the contract in the concrete case provides less protection to him[116]. Otherwise, a choice of law may lead to a situation in which the legal provisions intended to protect the interests of consumers do not apply.

4.2 Supply of Goods or Services to Consumers

Article 29 of the EGBGB contains special provisions for contracts that concern the supply of goods or services to consumers. An analogous application to other types of contracts is not permitted due to the exceptional character of Article 29 of the EGBGB[117]. For a contract the object of which is the supply of goods or services to a consumer for a purpose which can be regarded as being outside the consumer's trade or profession, or a contract for the provision of credit for that object, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising, and the consumer had taken in that country all the steps necessary on his part for the conclusion of the contract; or
- if the supplier of goods or services or his agent received the consumer's order in that country; or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy (Article 29 I of the EGBGB).

The first of the three alternatives mentioned requires a prior express offer or advertising on the initiative of the supplier or the service provider in the country in which the consumer has his habitual residence before the contract is concluded[118] and, furthermore, that the consumer has fulfiled all the necessary requirements with respect to the conclusion of the contract in this country, as for example, the acceptance of the offer. Advertising or acceptance at an Internet website are sufficient.

As already mentioned above, Article 29 of the EGBGB also covers contracts for the financing of the acquisition of goods or services. This especially concerns purchase on credit but not ordinary consumer loans[119].

In the absence of a choice of law consumer contracts are governed by the law of the country in which the consumer has his habitual residence if it is entered into in the above mentioned circumstances described in Article 29 I of the EGBGB (Article 29 II of the EGBGB). If this is the case formal requirements are governed by the law of the country in which the consumer has his habitual residence (Article 29 III of the EGBGB).

4.3 Mandatory Rules

If the consumer has a domestic habitual residence in Germany, amongst others, the following mandatory rules of the BGB apply in accordance with Article 29 I of the EGBGB:

---

[114] For further details see chapter II.4.2.
[115] For further details concerning German mandatory rules see chapter II.4.3.
[116] For further details see chapter II.4.2.
[117] BGHZ 135 p. 124; BGH NJW 2006 p. 230.
[118] BGHZ 123 pp. 380, 389.
[119] BGH NJW 2006 p. 762.

secs 305 *et seq* (drafting contractual obligations by means of standard business terms), sec 312 (right of revocation in the case of doorstep transactions), secs 491 *et seq* (consumer loan contract), secs 655 a *et seq* (loan brokerage contract between an entrepreneur and a consumer) and secs 651 a *et seq* (package travel contract). In the cases mentioned there is no need for the application of Article 29a of the EGBGB[120].

4.4 Contracts of Carriage of Goods and Contracts for Supply of Services

The principles laid down in Article 29 I to III of the EGBGB do not apply to contracts of carriage of goods and contracts for the supply of services where the services provided by the contract for the supply of services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. But, as an exception, they apply to a contract that, for an inclusive price, provides for a combination of travel and accommodation (Article 29 IV of the EGBGB).

4.5 Impact of EC Directives on Protection of Consumers under German Law

The protection of consumers was extended by inserting Article 29a into the EGBGB[121]. This article is based primarily on Article 12 II of the Distance Selling Directive[122]. Article 29a of the EGBGB guarantees a minimum standard of consumer protection for certain contracts. It ensures that consumers do not lose the protection granted by European law following a choice of the law of a non-member country of the European Community (EC) or the European Economic Area (EEA) as the law applicable to the contract, if this contract has a close link with the territory of one or more EC Member States or EEA Member States. Such a close link is deemed to be given, especially if:

- a contract comes into existence on the basis of a public offer, a public advertising or a similar professional action which takes place in an EC Member State or an EEA Member State; and
- the other party has his habitual residence in an EC Member State or another EEA Member State when making his declaration for the purpose of the conclusion of the contract.

EC Directives for the protection of consumers for the above explained purposes of Article 29a of the EGBGB are:

- the Directive on Unfair Terms in Consumer Contracts[123];
- the Directive on the Protection of Purchasers in Respect of Certain Aspects of Contracts relating to the Purchase of the Right to Use Immovable Properties on a Timeshare Basis[124];
- the Distance Selling Directive[125];
- the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees[126]; and
- the Distance Selling Directive for Financial Services[127].

This list of EC Directives is final. An analogous application of other EC Directives in this regard is not permitted. However, according to academic literature, this issue is disputable[128].

---

[120] For further details with regard to Article 29 a of the EGBGB see chapter II.4.5 and chapter II.4.6.
[121] Sec 12 AGBG and sec 8 TzWrG have been replaced by Article 29 a of the EGBGB.
[122] 97/7/EC.
[123] 93/13/EC.
[124] 94/47/EC.
[125] 97/7/EC.
[126] 99/44/EC.
[127] 02/65/EC.
[128] For further details see *Palandt-Heldrich,* Article 29 a of the BGB, margin No. 2.

The version of each of the above mentioned EC Directives, for the time being, is the decisive one.

4.6 Extended Consumer Protection pursuant to Article 29a of the EGBGB

Contracts of all types are covered by the scope of Article 29a of the EGBGB. It does not matter whether the parties of the contract are natural or legal persons and/or whether they are merchants and close the contract in connection with their trade or profession. Again, according to academic literature, this issue is also disputable[129]. Article 29a of the EGBGB is not applicable if the law of a third country is applicable due to the lack of choice of law as a result of an objective *Anknüpfungspunkt* (connecting factor). This article contains a *Weiterverweisung* (transmission to the substantive provisions of law). Thus, the transmission to the law of a third country and/or a *Rückverweisung* (remission to the law of the forum) are irrelevant (Article 35 I of the EGBGB).

The law applicable in accordance with Article 29a I of the EGBGB continues to be applicable even if the law of a third country chosen by the parties provides a higher level of consumer protection. A comparison of whether the foreign or the German law chosen is more favourable than the law applicable in accordance with Article 29a I of the EGBGB is not undertaken. This issue is disputable as well[130]. In case German law is applicable in accordance with Article 29a I of the EGBGB due to a close link, those provisions of the BGB apply that are based on the implementation of the above mentioned EC Directives.

Although Article 29a of the EGBGB extends the consumer protection provided by Article 29 of the EGBGB[131], the latter Article enjoys priority over Article 29a of the EGBGB.

5 Employment Contracts

5.1 Protection of Employees

Under German law, the interests of employees are protected to a great extent. Therefore, Article 30 of the EGBGB contains special conflict of laws rules for contracts of employment[132]. This article is also applicable to employer-employee relationships covering (i) the situation that the employment contract is void but, nevertheless the employee actually fulfils his obligations as if the employment contract was legally binding and (ii) factual employment relationships without an employment contract. The parties of an employment contract, basically, can expressly or implicitly choose the law for their contract[133]. Thus, the parties of an employment contract may decide to apply a law other than German law for their employment relationship. For example, it is possible to agree upon English labour law in the case of an English employee who has been sent to Germany. However, it must be noted that it is not allowed to deprive the employee of the specific protection regarded by German law as binding in all cases (Article 34 and Article 27 III of the EGBGB).

5.2 Mandatory Rules

---

[129] For further details see *Palandt-Heldrich,* Article 29 a of the BGB, margin No. 3.
[130] For further details see *Palandt-Heldrich,* Article 29 a of the BGB, margin No. 5.
[131] For further details see chapter II.4.2.
[132] The Rome I Regulation deals with employment contracts in Article 8 (for further details see chapter III.5).
[133] BAG NZA 2002 pp. 734; 2003 p. 339.

In an employment contract and an employer-employee relationship a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice of law (Article 30 I of the EGBGB). An employment contract and an employer-employee relationship is, in the absence of choice of law, governed:

- by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or
- if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract and an employer-employee relationship is more closely connected with another country, in which case the contract is governed by the law of that country (Article 30 II of the EGBGB).

5.3 Scope of Applicable Law to Employment Contracts and Employer-Employee Relationships

Subject to special *Anknüpfungspunkte* (connecting factors) with regard to mandatory rules and Article 34 of the EGBGB, the law chosen for the employment contract by both parties or applicable in accordance with Article 30 II of the EGBGB, basically, governs all issues in connection with the coming into existence, the content, the fulfilment of obligations and the termination of an employment relationship. This especially applies to: the duty to pay wages including remuneration for extra work; continuation of remuneration payments upon sickness, accident or death; old age and dependant provisions; settlement payments; bonus payments; gratuity payments; business expenses and refund of expenses; employee benefits; company cars; the reimbursement of relocation expenses[134]; duties with respect to care and supervision; damages for breach of contract (for example in case of discrimination); compliance with company policies; work product; employee inventions; secondary employment; statutory holidays; the takeover of a contract through the transfer of business[135]; protection against unlawful dismissal[136]; references; non-competition following termination (restrictive covenant)[137]; and occupational pension schemes[138].

Article 30 of the EGBGB does not apply to collective labour law[139]. Whether an employee is, by the choice of law, deprived of the protection afforded to him by the mandatory rules of the law applicable in accordance with Article 30 II of the EGBGB must be determined by a comparison between the corresponding provisions of German law with those of the alternate law. Mandatory rules which pursuant to Article 30 I of the EGBGB cannot be waived by choice of law, exist in the whole area of labour law. In this connection, for instance, the following issues are of relevance: principle of equality in employment law; anti-discrimination; working time; employee inventions; protection against unlawful dismissal[140]; the takeover of a contract through the transfer of business[141]; the protection of minors; the protection of the rights of working mothers; and the protection of disabled persons.

---

[134] BAG NJW 1996 p. 741.
[135] BAG IPRax 1994 pp. 123, 126. The Federal Labour Court *(Bundesarbeitsgericht)* applies the *Kündigungsschutzgesetz* (Act of Protection against Unlawful Dismissal) to domestic enterprises only. The academic literature partly does not accept this limitation.
[136] BAG NJW 1987 p. 211; IPRax 1994 No. 64.
[137] LAG Frankfurt IPRspr 2000 No. 40; Celle NZG 2001 p. 131.
[138] BAG IPRax 2006 p. 254; LAG Frankfurt IPRspr 2000 No. 42.
[139] For further details concerning conflict of laws rules with regard to collective labour law see *Paland-Heldrich,* Article 30 of the EGBGB, margin No. 3 a.
[140] BAG MDR 1998 p. 543; LAG Cologne RIW 1992 p. 933.
[141] BAG IPRax 1994 pp. 123, 126.

6 Insurance Contracts

6.1 Sources for Determination of Applicable Law

German rules with regard to private international law for insurance contracts are very detailed[142]. They are partly based on the Second Council Directive on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life insurance and cover the provisions to facilitate the effective exercise of the freedom to provide services[143]. The rules with regard to the conflict of laws contained therein were implemented into Articles 7 to 15 of the *Einführungsgesetz zum Versicherungsvertragsgesetz* (Introductory Act to the Contracts of Insurance Act, the "EGVVG"). In so far the law applicable to insurance contracts, with the exception of of re-insurance contracts and covering risks situated within the EC Member States and the EEA Member States (both a "Member State" as defined in Article 7 II of the EGVVG), is determined in accordance with the special provisions laid down in the named articles of the EGVVG (Article 7 I of the EGVVG)[144]. Article 7 of the EGVVG does not determine the applicable law. It solely defines the scope of Articles 8 to 15 of the EGVVG.

Further sources of private international law with regard to insurance contracts are Articles 27 to 37 of the EGBGB and *Gewohnheitsrecht* (customary law). Regarding insurance contracts which were concluded before 1st September 1986, the date of the reform of the private international law, unwritten principles of law are still applicable[145]. A number of insurance contracts which have been concluded since the aforementioned date are governed by Articles 27 to 37 of the EGBGB. This applies to all re-insurance contracts and those direct insurance contracts covering risks which are not situated in the territory of the European Community or the European Economic Area[146]. Thus, the crucial issue in determining the different scopes of the EGBGB and the EGVVG is the question where the risk is situated. The decisive factor in this connection is the main focus of the covered risk.

6.2 Articles 27 to 37 of the Introductory Act to the Civil Code

So far as the provisions of the EGBGB are applicable[147] to a contract and no country's law has been chosen, Article 28 of the EGBGB is applicable. According to academic literature, it is disputable in this case whether the *Gefahrtragungstheorie* (doctrine of risk assumption) or the *Geldleistungstheorie* (doctrine of cash benefit) determines the applicable law[148]. The doctrine of risk assumption states that the insurer would be the party who is to effect the performance which is characteristic to the concrete contract because it would be the insurer who provides the insurance cover. In contrast, the doctrine of cash benefit is based on the theory that the main performance of the insurer is only to provide the cash benefit in case of the occurrence of an insured event. The difference between the duties of the parties to pay the insurance premium or, conversly, the insurance benefit, would be that the latter is only payable on the condition of the occurence of an event insured. Thus, the presumption of

---

[142] For details see *Vorpeil,* Internationales Privatrecht zum Versicherungsvertragsrecht, VersAl 2008 p. 50 (part 1) and 2009 p. 1 (part 2).
[143] 88/357/EEC (22nd June 1988).
[144] The Rome I Regulation deals with insurance contracts in Article 7 (for further details see chapter III.6).
[145] See Article 220 I of the EGBGB.
[146] See Article 37 No. 4 of the EGBGB.
[147] For further details see chapter II.6.1.
[148] For further details see *Prölss/Martin,* Introductory remarks to Article 7 of the EGVVG, margin No. 13 and No. 14.

closest connection[149] would be rebutted and the closest connection would have to be determined case by case. Independent of the two doctrines, in all cases with a connection to a foreign country additionally Articles 3 to 12 of the EGBGB are applicable.

6.3 Articles 7 to 15 of the Introductory Act to the Contracts of Insurance Act

So far as the provisions of the EGVVG are applicable[150], Articles 8 to 15 of the EGVVG determine the law applicable to insurance contracts. Where a policy-holder has his habitual residence or central administration within the territory of the Member State in which the risk is situated, the law applicable to the insurance contract is the law of that Member State (Article 8 of the EGVVG). Article 8 of the EGVVG aims at protecting the interests of consumers. To achieve this aim, its intention is to provide a parallel structure of substantive law and international jurisdiction.

Where a policy-holder does not have his habitual residence or central administration in the Member State in which the risk is situated, the parties to the insurance contracts may choose to apply either the law of the Member State in which the risk is situated or the law of the country in which the policy-holder has his habitual residence or central administration (Article 9 I of the EGVVG). Where a policy-holder pursues a commercial activity, *bergbauliche Tätigkeit* (activity in the mining-industry) or a self-employed activity, for example as a lawyer, and where the contract covers two or more risks relating to these activities and situated in different Member States, the parties of the insurance contract may chose the laws of each of those Member States or the law of the country in which the policy-holder has his habitual residence or central administration (Article 9 II of the EGVVG).

When the risks covered by the insurance contract are limited to events occurring in a Member State other than the Member State where the risk is situated the parties may choose the law of the other state (Article 9 III of the EGVVG). Where a policy-holder who has his habitual residence or central administration within the territory of operation of the EGVVG concludes an insurance contract with an insurer not directly or indirectly providing insurance services within the territory of operation of the EGVVG the parties may choose any law for the insurance contract (Article 9 IV of the EGVVG). Article 10 of the EGVVG permits a choice of law for insurance contracts which cover large risks as described in detail therein.

If no choice of law has been made, the contract is governed by the law of the country that can be chosen in accordance with the principles laid down in Articles 9 to 10 of the EGVVG, and with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country, from amongst those which law can be chosen, may by way of exception be governed by the law of that other country. The contract shall be rebuttably presumed to be most closely connected with the Member State in which the risk is situated (Article 11 of the EGVVG).

Article 12 of the EGVVG governs the rules of conflict of laws for compulsory insurance contracts. There also exist special provisions for life insurances in Article 9 V of the EGVVG and, Article 13 of the EGVVG, for health insurances. So far as the provisions with regard to the conflict of laws in the EGVVG do not contain special rules Articles 27 to 36 of the EGBGB are applicable analogously to contracts of insurance (Article 15 of the EGVVG).

7 General Rules

[149] See Article 28 II 1 of the EGBGB.
[150] For further details see chapter II.6.1.

7.1 Conclusion of Contract and Material Validity

An important precondition for a legally valid and binding cross-border contract is that all requirements for the coming into existence of an enforceable contract are met. The coming into existence and the validity of the contract, or of any term of the contract *(e.g.* the incorporation of general business terms), is determined by the law which would govern it if the contract or term were valid (Article 31 I of the EGBGB). Nevertheless, a party of a contract may rely upon the law of the country in which he has his habitual residence to establish that he did not consent to the agreement if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in Article 31 I of the EGBGB (Article 31 II of the EGBGB). Pursuant to Article 27 IV of the EGBGB, this also applies to the choice of law because the choice of law is an agreement in and of itself. Formal requirements in connection with the conclusion of a contract and its material validity are determined by Article 11 of the EGBGB[151] and, if applicable, Article 29 III of the EGBGB[152].

Basically, the coming into existence of the necessary *Einigung* (agreement) between the parties of a contract with respect to their *Willenserklärungen* (declarations of intent) regarding the conclusion of a contract[153] and the preconditions for its substantive validity, are determined by the law applicable to the main contract[154]. However, pursuant to Article 34 of the EGBGB, internationally mandatory German rules[155] enjoy priority over foreign law. Furthermore, pursuant to Articles 27 III[156], 29 I[157] and 30 I of the EGBGB, in the case of a choice of law, also the *Sonderanknüpfung* (special connection with respect to the determination of applicable law) in favour of the mandatory rules of the law which is in itself decisive must also be considered, in so far as its provisions concern the coming into existence and the material validity of a contract. Additionally, Article 29 a of the EGBGB[158] applies with regard to the validity of general business terms if a foreign country's law is applicable.

The main focus of Article 31 I of the EGBGB comprises, for example, conditions regarding the conclusion of a contract by way of offer and acceptance[159], receipt of offer and acceptance, disagreement, conditions relating to a contract, defect in a declaration of intent and its legal consequences, acting in its own or in another person's name, rights of revocation, nullity due to a breach of law or unconscionable behaviour[160], the legal consequences of partial invalidity, the possibility of reinterpretation, the amendment or termination of an agreement by *actus contrarius,* the incorporation of general business terms, the validity of general business terms and the interpretation of general business terms. Basically, if the customer is not a German citizen, German law does not require the understanding of a German text in order to validate the use of general business terms in the German language[161]. A translation is not required in connection with the statutory duty[162] of giving the customer, in an acceptable manner, the opportunity to take notice[163]. Furthermore,

---

[151] For further details see chapter II.7.3.
[152] Article 29 of the EGBGB deals with consumer contracts. For further details see chapter II.4.
[153] German law, as a basic principle, requires corresponding *Willenserklärungen* (declarations of intent) with respect to the coming into existence of a contract.
[154] See Article 27 to 30 of the EGBGB.
[155] For further details see chapter II.7.4.
[156] For further details see chapter II.2.3.
[157] For further details see chapter II.4.1 and chapter II.4.2.
[158] For further details see chapter II.4.5 and chapter II.4.6.
[159] Under German law, as a basic principle, a contract comes into existence by way of offer and acceptance.
[160] See Article 32 I No. 5 of the EGBGB (legal consequences of nullity).
[161] BGH NJW 1995 p. 190; different opinion OLG Koblenz RIW 1992 p. 1019.
[162] See sec 305 II of the BGB.
[163] BGHZ 87 pp. 112, 114.

a translation of general business terms is not necessary if negotiations took place in a foreign language[164].

Preconditions for the application of Article 31 II of the EGBGB in connection with the necessary consent to the agreement, what is a condition for the conclusion of a contract under German law, are

- that the law applicable in accordance with Articles 27 to 30 of the EGBGB is different from that of the habitual residence of the relevant party;
- that the contract has been validly concluded in accordance with all applicable provisions; and
- that it would be unfair under the circumstances of the case to construe the consent of the relevant party only in accordance with the law applicable if it is not the law of the homeland of that party[165].

If these preconditions are met, both the law applicable to the contract and the law of the habitual residence of the party who challenges the conclusion of a contract must be considered.

The Rome I Regulation[166] deals with the conclusion of a contract and its material validity in Article 10. In essence, the main principles remain unchanged.

7.2 Scope of Applicable Law

The scope of the law applicable to a contract is defined by a non-exclusive statutory enumeration. The law applicable to a contract by virtue of Articles 27 to 30[167], 33 I and 33 II of the EGBGB governs, in particular:

- its interpretation;
- the performance of the obligations arising under the contract;
- within the limits of the powers of German procedural law, the consequences of the total or partial non-performance of these obligations, including the assessment of damages in so far as it is governed by rules of law;
- the various ways of extinguishing obligations, limitation of claims and the loss of a legal position according to lapse of time; and
- the consequences of nullity of the contract (Article 32 I of the EGBGB).

Some examples hereto: The law applicable to a contract determines its interpretation. However, this does not exclude the consideration of legal views resulting from the language of a contract[168]. Performance of obligations, especially, comprises the place of performance. The consequences of non-performance, in particular, encompass the preconditions and consequences of a *Leistungsstörung* (breach of contract, *e.g.* default, impossibility and the German law *positive Vertragsverletzung*[169] – literally “positive breach of a contractual duty”). For instance, the various ways of extinguishing obligations comprise the contractual rights of rescission of a contract, termination, set-off, limitation of contractual obligations and forfeiture. One consequence of the nullity of a contract, as an example, is the reimbursement for the performances effected.

---

[164] OLG Hamburg NJW 1980 p. 1232.
[165] OLG Cologne RIW 1996 p. 778.
[166] For further details with respect to the Rome I Regulation see chapter III.
[167] For further details see chapter II.2 and chapter II.3.
[168] BGH NJW-RR 1992 pp. 423, 425.
[169] Breach of contractual duties for reasons other than default, impossibility or other reasons defined by statute.

In relation to the manner of performance and the steps to be taken in the event of defective performance by the creditor consideration is to be taken into the law of the country in which performance takes place (Article 32 II of the EGBGB). The law governing the contract applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof (Article 32 III 1 of the EGBGB). A contract intended to have legal effect may be proved by any mode of proof recognised by procedural German law and, in so far as thereby does not result any conflict, by any of the laws referred to in Article 11[170] and 29 III of the EGBGB[171] under which that contract is formally valid (Article 32 III of the EGBGB).

The Rome I Regulation[172] deals with the scope of applicable law in Article 12.

7.3 Formal Validity

7.3.1 General Rules

Aside from validity in accordance with substantive laws, formal validity is of importance regarding cross-border contracts[173]. German law distinguishes between two possible alternatives with respect to the latter. A contract is formally valid if it satisfies the formal requirements of the law which governs the legal relationship resulting from the subject matter of the contract or of the law of the country where it is concluded (Article 11 I of the EGBGB). A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs the legal relationship resulting from the subject matter of the contract or of the law of one of those countries (Article 11 II of the EGBGB). Formal validity is determined by the *Geschäftsrecht*, *i.e.* the law that governs the legal relationship resulting from the subject matter of the contract, or the *Ortsrecht, i.e.* the law of the place where the contract is concluded. This applies to legal transactions of all kinds and in all areas of civil law. It does not matter whether these are contracts or unilateral legal transactions.

Compliance with the formal requirements which are prescribed by the law of the place where the contract is concluded is also sufficient if the form does not meet the requirements of the law that governs the legal relationship resulting from the subject matter of the contract[174]. Regarding obligatory contracts, the formal requirements of the law of the place where the contract is concluded can be excluded[175]. Solely the formal requirements of the law which governs the legal relationship resulting from the subject matter of the contract are binding if the law of the place where the contract is concluded does not encompass the particular kind of legal transaction. Notably, this does not apply only because the law applicable to the subject upon which the legal transaction is based and the law of the place where the contract is concluded are not in full compliance.

Special rules apply if the parties do not represent themselves, but through an agent. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of the two described alternatives with regard to the formal requirements (Article 11 III of the EGBGB).

---

[170] Article 11 of the EGBGB deals with formal requirements. For further details see chapter II.7.3.
[171] Article 29 of the EGBGB deals with consumer contracts. For further details see chapter II.4.
[172] For further details with respect to the Rome I Regulation see chapter III.
[173] The Rome I Regulation deals with formal validity in Article 11.
[174] BGH NJW 1967 p. 1177.
[175] BGHZ 57 p. 337.

7.3.2 Official Recording by Notary Public

Whether the formal requirements which are required by the law that governs the legal relationship resulting from the subject matter of the contract can be substituted with a *Beurkundung* (official recording*)* by a notary of a foreign country, depends on the purpose of the relevant formal requirements under German law. In this connection equivalence with regard to the person who makes an official recording and the process of official recording is required[176]. Within the area of the so called *"lateinisches Notariat"*[177] (literally "latin notary office")*,* basically, equivalence is given[178].

If German law was that which governed the legal relationship resulting from the subject matter of the contract, the equivalence of a foreign official recording in connection with internal organisational affairs of a company was often denied by German courts, due to insufficient legal advice, especially in connection with acts of registration which concerned the constitution of a German company or other German legal entities *(e.g.* the formation, merger or resolutions pertaining to the amendment of the constitution of a German *Gesellschaft mit beschränkter Haftung* (limited liability company, "GmbH"[179]))[180]. Partly, this was also ruled regarding the transfer of shares in a company, especially in accordance with the formal requirements laid down in sec 15 of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (Act relating to Limited Liability Companies, the "GmbHG")[181] with respect thereto. Official recordings by a notary prescribed by German company law can, basically, also be executed by a foreign notary if he carries out a function which is comparable to that of a German notary and certain other requirements are met, such as a comparable educational system for notaries exists[182].

As regards the obligation to dispose of a plot of land it is sufficient to comply with the formal requirements of the law of the place where the contract is concluded[183]. Thus, a purchase agreement concerning a plot of land located in Germany can be concluded in a foreign country. But, in order to perform the obligations under such an agreement a separate contract *in rem,* the so called *Auflassung* (conveyance), is required under the German *Abstraktionsprinzip*[184] to effect the transfer of ownership of a plot of land. In order to accomplish the conveyance of a German plot of land the fulfilment of formal requirements effected by a German notary[185] in accordance with German law[186] is necessary.

7.3.3 Rights *in Rem*

A contract the subject matter of which is a right in immovable property or a right to use immovable property is subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law

---

[176] BGHZ 80 p. 76; OLG Düsseldorf RIW 1989 p. 225; OLG Munic RIW 1998 p. 147.
[177] Countries *(e.g.* Germany) in which notaries are independent and unprejudiced advisors by appointment to a public office.
[178] The German case law especially deals with the equivalence of a Spanish, Austrian and Swiss notary. Basically, there is no equivalence with regard to a notary public in the United States of America.
[179] The German GmbH is comparable to an English limted company (Ltd).
[180] OLG Hamm NJW 1974 p. 1057; OLG Karlsruhe RIW 1979 p. 567.
[181] LG Munic DNotZ 1976 p. 501.
[182] BGHZ 80 pp. 76, 78; BGH RIW 1989 p. 649.
[183] BayObLG DNotZ 1978 p. 58.
[184] For further details see chapter VI. and chapter II.2.4.
[185] OLG Cologne OLGZ 72 p. 321; KG Berlin DNotZ 1987 p. 44.
[186] See sec 925 of the BGB.

governing the contract (Article 11 IV of the EGBGB)[187]. Article 11 IV of the EGBGB does not concern contracts regarding a plot of land with *dinglicher Wirkung* (effect *in rem)*[188].

A contract by which a right with respect to a property is established or such a right is disposed of, is only formally valid, if the formal requirements of that law are met which is applicable to the subject matter of the contract (Article 11 V of the EGBGB[189]). In so far the *lex rei sitae* (law of the location of the property)[190] determines the formal requirements. Article 11 V of the EGBGB applies to movable and immovable property, but only to *Verfügungen* (disposals *in rem)* and not to the underlying obligatory contracts[191] – even if a *sachenrechtliche Verfügung* (disposal *in rem)* for the purpose of effecting the purchase agreement is, in deviation of German law, not necessary under the relevant legal system[192].

7.4 Mandatory Rules

Despite the freedom of choice of law the parties of a contract are not completely free to agree upon the applicable law. Compulsory rules must always be observed. The application of German rules is not restricted in a situation where they are mandatory irrespective of the law otherwise applicable to the contract (Article 34 of the EGBGB). Article 34 of the EGBGB provides a framework for an evaluation on a case by case basis. A valid choice-of-law clause does not prevent German courts from applying internationally mandatory German rules. To qualify as such, an internationally mandatory rule must be one intended to be internationally applicable. Whether this is the case is determined by an interpretation of the relevant rule.

A very important factor in the application of Article 34 of the EGBGB is a certain *Inlandsbezug,* that means a certain domestic aspect of facts*.* The latter has to be the stronger the weaker the public interests protected by the relevant rule are. The mere indispensability under German law is not sufficient with respect thereto[193].

Article 34 of the EGBGB relates to what are known as *Eingriffsnormen, i.e.* certain overriding mandatory rules which are mandatory for socio-political or economic reasons *(e.g.* export bans, foreign exchange provisions, pricing provisions and cartel provisions). A well-known example in this context is Article VIII section 2 (b) of the Bretton Woods Agreement, which contains a special rule with regard to foreign exchange law, legally binding under German law[194]*.*

Due to their special socio-political importance, basically, provisions which are aimed at the protection of consumers also fall within the scope of Article 34 of the EGBGB, provided that Article 29 of the EGBGB[195] does not exclusively deal with the specific case[196]. If a contract is governed by German law due to a choice of law, the application of mandatory foreign rules

---

[187] Article 11 IV of the EGBGB has been abolished by the Rome I Regulation.
[188] For further details see chapterVI.
[189] Now Article 11 IV of the new version of the EGBGB.
[190] For further details see chapter VI.2.
[191] Regarding the difference between obligatory contracts and contracts in *rem* under the German *Abstraktionsprinzip* see chapter II.2.4.
[192] OLG Cologne OLGZ 77 p. 201.
[193] LAG Düsseldorf RIW 1992 p. 402; LAG Cologne RIW 1992 p. 933.
[194] "… (b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, co-operate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement. …".
[195] For further details see chapter II.4.1 and chapter II.4.2.
[196] BGHZ 123 pp. 380, 391.

can only be taken into consideration under the preconditions laid down in Articles 27 III[197], 29 I[198] and 30 I of the EGBGB. If German law is the law applicable to the contract pursuant to Articles 28[199], 29 II[200] and 30 II of the EGBGB, the application of mandatory foreign rules is excluded. The above mentioned Article VIII of the Bretton Woods Agreement is an exception in this case. If a foreign law is the applicable law to the contract due to a choice of law, or in the absence of a choice of law due to the relevant *Anknüpfungspunkt* (connecting factor) the foreign *Eingriffsnormen* are also applicable, provided that they do not contravene the German public policy as defined in Article 6 of the EGBGB[201].

The Rome I Regulation[202] deals with mandatory rules in Article 9. This article, for the first time, encompasses a legal definition with regard thereto. However, the basic principles remain unchanged[203].

7.5 Public Policy

Under German conflict of laws rules, applicable law is limited by certain fundamental legal principles with respect to special public interests, called the public policy *(ordre public).* Accordingly, a rule of the law of any country is not applicable under German law if such application is manifestly incompatible with the German public policy. This applies, especially, if this application infringes the German law *Grundrechte* (basic rights) laid down in the *Grundgesetz*[204]*,* the constitution of the Federal Republic of Germany (Article 6 of the EGBGB). If the application of foreign law, governing according to German conflict of laws rules, manifestly violates German public policy, the foreign law is not applicable and, basically, substituted by German law. In general, the scope of Article 6 of the EGBGB comprises the essential principles of German law.

Public policy has solely a negative function. Therefore, Article 6 of the EGBGB does not absolutely guarantee the application of certain mandatory German or foreign rules. Non-compliance with fundamental principles of German law requires a violation of the core provisions of the national legal system. For instance, if the application of special foreign law contravenes the basic principles of German law and their corresponding principles of fairness in such a strong way that is unacceptable[205]. This means, that the application of a foreign law has *offensichtlich (prima facie)* not to be in compliance with German public policy. Thus, the infringement of the public policy has to be blatant. The application of Article 6 of the EGBGB is not merely justified because the foreign law is not in compliance with mandatory German rules[206]. Article 34 of the EGBGB, as a special rule, concerns domestic mandatory rules for obligatory contracts. Crucial is whether the result of the application of foreign law in a concrete case is highly incompatible with principles of fairness under German law[207]. The application of Article 6 of the EGBGB requires that the facts of a case have a significant domestic connection with Germany.

To meet the requirements of fairness in the area of private international law, results are accepted which are not in compliance with national German law. However, by way of *kollisionsrechtliche Verweisung* (determination of a foreign law as the applicable law by the

---

[197] For further details see chapter II.2.3.
[198] For further details see chapter II.4.1 and chapter II.4.2.
[199] For further details see chapter II.3.2.
[200] For further details see chapter II.4.2.
[201] For further details see chapter II.7.5.
[202] For further details with respect to the Rome I Regulation see chapter III.
[203] For further details see chapter III.7.
[204] The *Grundrechte* are separately and expressly dealt with in the *Grundgesetz*.
[205] BGHZ 104 pp. 240, 243; 118 pp. 312, 330; 123 pp. 268, 270.
[206] BGHZ 118 pp. 312, 330.
[207] BGHZ 118 pp. 312, 331.

conflict of laws rules), German courts cannot be forced to render judgments that manifestly contravene fundamental principles of German law. To protect German public policy in such cases, Article 6 of the EGBGB does not permit the application of foreign law in so far. In this context, only German public policy, not that of another EC Member State, is decisive. Thus, Article 6 of the EGBGB, within its scope, excludes the application of foreign law. In practice, such cases are very rare. Article 6 of the EGBGB is applicable under exceptional circumstances only.

The Rome I Regulation[208] deals with public policy in Article 21.

7.6 Incapacity and Protection of Other Party

Cross-border transactions require protection with respect to the legal capacity of a person under the laws of his country of origin. In a contract concluded between persons who are in the same country, a natural person who would have *Rechtsfähigkeit* (legal capacity)*, Geschäftsfähigkeit* (capacity to enter into a contract) or *Handlungsfähigkeit* (capacity to act and effect legal consequences) under the substantive law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence (Article 12 of the EGBGB). Pursuant to Article 7 I of the EGBGB the capacity of a person is determined by the law of his country of origin. But, Article 12 of the EGBGB makes an exception regarding this principle in favour of the protection of general interests.

The Rome I Regulation[209] deals with incapacity and protection of the other party in Article 13.

7.7 Assignment of Rights and Transfer of Rights by Operation of Law

7.7.1 Assignment of Rights

The mutual obligations of assignor and assignee under an assignment of a claim or right against another person (debtor) are governed by the law which in accordance with the rules of private international law applies to the contract between the assignor and assignee (Article 33 I of the EGBGB). The effectuation of an assignment of a claim or right itself, that means under German law the *dingliche Verfügung* (disposal *in rem)*, if the applicable law acknowledges such a kind of legal transaction, does not fall within the scope of Article 33 of the EGBGB. Only legal systems with Roman law background make a distinction between the contractual assignment and the disposal *in rem.* German law distinguishes between the obligatory contract and the contract *in rem.* In order to perform the obligation a separate further contract *in rem* may be required under German law to effect a change in title, such as the transfer of ownership or the encumbrance of land. This principle is known as the *Abstraktionsprinzip*[210]*.*

The law governing the right to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the preconditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged (Article 33 II of the EGBGB). In this context, the UNIDROIT Convention on International Factoring which deals with cross-border assignments is of importance. It entered into force for Germany on 1st December 1998[211].

---

[208] For further details with respect to the Rome I Regulation see chapter III.
[209] For further details with respect to the Rome I Regulation see chapter III.
[210] For further details see chapter II.2.4.
[211] See also the United Nations Convention on the Assignment of Receivables in International Trade.

7.7.2 Transfer of Rights by Operation of Law

The conflict of laws rule with regard to a right of subrogation is dealt with in Article 33 of the EGBGB. Where a person (creditor) has a contractual claim upon another (debtor), and a third person has a duty to satisfy the creditor, the law which governs the third person's duty to satisfy the creditor determines whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent (Article 33 III 1 of the EGBGB). The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor (Article 33 III 2 of the EGBGB). An important example of the application of Article 33 III of the EGBGB is the *Bürgschaft* (suretyship) under German law[212]. However, this rule is not applicable to a *gesetzlicher Eigentumsübergang* (transfer of title by operation of law).

The Rome I Regulation deals with the assignment of a right and the transfer of rights by operation of law in Articles 14 and 15[213].

7.8 Exclusion of *Renvoi* and States with Several Legal Systems

The application of the law of any country specified by the rules of private international law as laid down in the EGBGB means the application of the rules of law in force in that country other than its rules of private international law (Article 35 I of the EGBGB), *i. e.* the substantive law. Where a state comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit is considered as a separate country for the purposes of identifying the law applicable under the rules of private international law as laid down in the EGBGB (Article 35 II of the EGBGB).

The Rome I Regulation[214] deals with the exclusion of *renvoi* and states with more than one legal system in Articles 20 and/or 22.

7.9 Uniform Interpretation

In the interpretation and application of the rules of private international law with regard to contractual obligations which are laid down in Articles 27 to 38 of the EGBGB, the achieving of uniformity in the interpretation and application of the underlying rules of the Rome Convention is aimed at (Article 36 of the EGBGB). Article 29a of the EGBGB is exempt from this principle, but not Article 29 of the EGBGB[215], although both articles relate to consumer contracts[216]. If none of the preconditions of one of the three alternatives established in Article 29a of the EGBGB[217] are existent an analogous application, basically, is not permitted[218].

7.10 Scope of German Rules of Private International Law with Regard to Contractual Obligations

---

[212] See secs 765 *et seq* of the BGB *(Bürgschaft).*
[213] For further details see chapter III.8.
[214] For further details with respect to the Rome I Regulation see chapter III.
[215] BGHZ 123 pp. 380, 384; 135 pp. 124, 134.
[216] For further details see chapter II.4.
[217] For further details see chapter II.4.5 and chapter II.4.6.
[218] BGHZ 135 pp. 124, 134; OLG Hamm NJW-RR 1989 p. 496.

The rules of private international law as laid down in Articles 27 to 36 of the EGBGB do not apply to:

- obligations arising under bills of exchange[219], cheques[220] and other *Inhaberpapiere* (bearer instruments) or *Orderpapiere* (instruments made out to order) to the extent that the obligations under such other negotiable instruments arise out of their negotiable character (Article 37 No 1 of the EGBGB);
- questions governed by the law of companies, associations and legal persons such as the creation, *Rechtsfähigkeit* (legal capacity) and *Handlungsfähigkeit* (capacity to act and effect legal consequences), internal organisation or winding up of companies, associations and legal persons and the personal liability of members and organs for the obligations of the company, association or legal person (Article 37 No 2 of the EGBGB);
- the question whether an agent is able to bind a principal on whose behalf he pretends to act to a third party, or an organ to bind a company, association or legal person to a third party (Article 37 No 3 of the EGBGB); and
- insurance contracts which cover risks situated in the territories of the Member States of the European Economic Community (EEC) or the European Economic Area (EEA)[221]. Only contracts of re-inurance are exempt from this principle. In order to determine whether a risk is situated in the above mentioned territories the court applies its internal law (Article 37 No 4 of the EGBGB).

Artcle 29 a of the EGBGB is also applicable in any of the above mentioned cases[222].

The Rome I Regulation[223] deals with the scope of the rules of private international law with regard to contractual obligations in Article 1.

III Applicable Law to Contractual Obligations as from 17th December 2009

1 Introduction

After several years the process of revision concerning the Rome Convention was finished. On 6th June 2008 the EU Council of Ministers of Justice passed the Regulation on the Law Applicable to Contractual Obligations (Rome I Regulation). The Rome Convention has been replaced by the Rome I Regulation. The Rome I Regulation entered into force on 17th December 2009 with respect to contracts closed on or after this date. It does not, however, establish a new set of legal rules, but converted the existing Rome Convention into a new Community instrument, thereby further developing the Rome Convention. Some of the amendments will help to modernise certain provisions of the Rome Convention and make them clearer and more precise[224]. The basic principles of the Rome I Regulation are dealt with in this chapter III.

---

[219] The German rules with respect to the conflict of laws with regard to bills of exchange inclusive promissory notes are laid down in Articles 91 to 98 of the *Wechselgesetz* (Bills of Exchange Act, the "WG").
[220] The German rules with respect to the conflict of laws with regard to cheques are laid down in Articles 60 to 66 of the *Scheckgesetz* (Cheques Act, the "SchG").
[221] The German rules with respect to conflict of laws with regard to contracts of insurance are laid down in Articles 7 to 15 of the *Einführungsgesetz zum Versicherungsvertragsgesetz* (Introductory Act to the Contracts of Insurance Act, the "EGVVG").
[222] For further details see chapter II.4.6.
[223] For further details with respect to the Rome I Regulation see chapter III.
[224] For further details see the various parts of the Rome I Regulation.

As already mentioned, the Rome I Regulation[225] replaced the Rome Convention and became directly applicable law in Germany as an EC Member State[226]. The Rome I Regulation is applicable, in any situation involving conflict of laws, to contractual obligations in civil and commercial matters. The basic principles with regard to the determination of the applicable law to contractual obligations remain unchanged under the Rome I Regulation. The general principles of the Rome I Regulation are as follows:

Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. To contribute to the general objective of the Rome I Regulation, legal certainty in the European judicial area, the conflict of law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation. Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence[227]. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity. In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

The Rome I Regulation seeks to enhance certainty as to the law by converting mere presumptions under the Rome Convention into fixed rules. Since the cornerstone of the instrument is freedom of choice, the rules applicable in the absence of a choice are as precise and foreseeable as possible so that the parties can decide whether or not to exercise their choice. The major issues concerning the Rome I Regulation are summarised in this chapter III.

2 Freedom of Choice of Law

The choice of law is the most important factor with regard to the conflict of laws rules in the area of contractual obligations. Basically, a contract will be governed by the law chosen by the parties. This choice must be expressed or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract (Article 3 I of the Rome I Regulation).

The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice or of other provisions of the Rome I Regulation (Article 3 II 1 of the Rome I Regulation). However, mandatory rules must be observed. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the

[225] For further details see *Leible/Lehmann,* RIW 2008 p. 528; *Clausnitzer/Woopen,* BB 2008 p. 1798.
[226] For further details see chapter I.3.
[227] See definition of the term “habitual residence” in Article 19 of the Rome I Regulation.

parties does not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 3 III of the Rome I Regulation). This provision codifies the case law of the European Court of Justice. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement (Article 3 IV of the Rome I Regulation).

3 Applicable Law in the Absence of Choice of Law

In the absence of a choice of law, the crucial *Anknüpfungspunkt* (connecting factor) is the characteristic performance of a contract. For the most important types of contracts this principle has been put in concrete terms. To the extent that the law applicable to the contract has not been chosen, the following contracts are governed by the law determined as follows:

- a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence;
- a contract for the provision of services is governed by the law of the country where the service provider has his habitual residence;
- a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property is governed by the law of the country in which the property is situated *(i.e.* the *lex rei sitae);*
- a franchise contract is governed by the law of the country where the franchisee has his habitual residence; and
- a distribution contract is governed by the law of the country in which the distributor has his habitual residence (Article 4 I of the Rome I Regulation)[228].

For all types of contract which are not mentioned in Article 4 I of the Rome Convention the general rule applies that they are governed by the law of the country in which the party required to effect the characteristic performance of the contract has his habitual residence (Article 4 II of the Rome I Regulation)[229]. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in Article 4 I and 4 II of the Rome I Regulation, the law of that other country applies. Where the law applicable cannot be determined as indicated in Article 4 I and 4 II of the Rome I Regulation, the contract is governed by the law of the country with which it is most closely connected (Article 3 and 4 of the Rome I Regulation).

4 Consumer Contracts

Fundamental principles of the Rome I Regulation with regard to consumer contracts are that consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities. From the perspective of the old autonomous German private international law on contractual obligations the Rome I Regulation contains a new, simple and foreseeable conflict rule by

[228] Article 4 I of the Rome I Regulation comprises further types of contract.
[229] Certain types of contract are dealt with in special articles (Article 5: contracts of carriage; Article 6: consumer contracts; Article 7: insurance contracts and Article 8: individual employment contracts).

applying only the law of the place of the consumer's habitual residence, without affecting the substance of the professional's room for manoeuvre in drawing up his contracts. The conflict of laws rules regarding consumer contracts have been modified and simplified by the Rome I Regulation. Basically, consumer contracts are governed by the law of the Member State where the consumer has his habitual residence (Article 5 I of the Rome I Regulation). The additional preconditions regarding the applicability of special rules for consumer contracts are defined in Article 6 of the Rome I Regulation.

The conflict of laws rules enshrined in the Rome I Regulation with regard to consumer contracts apply to contracts concluded by a natural person, the consumer, whose habitual residence is in a Member State for a purpose that can be regarded as being outside his trade or profession, with another person, a professional, acting in the exercise of his trade or profession. This applies on the condition that the professional (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities (Article 6 I of the Rome I Regulation). Notwithstanding this principle, the parties may choose the law applicable to a contract which fulfils the requirements of the before mentioned principle, in accordance with Article 3 of the Rome I Regulation (freedom of choice). Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of Article 6 I of the Rome I Regulation (Article 6 II of the Rome I Regulation). These general rules do not apply to several types of contract that are defined in Article 6 IV of the Rome I Regulation.

In order to adapt the German private internatinal law concerning the protection of consumers in special cases Article 46 (b) of the new version of the EGBGB contains provisions with regard thereto.

5 Employment Contracts

The basic principles of the Rome I Regulation with regard to individual employment contracts are as follows: The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16th December 1996 concerning the posting of workers in the framework of the provision of services[230]. Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit. As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

Article 8 of the Rome I Regulation deals with employment contracts. From the perspective of the old autonomous German private international law with regard to employment contracts the main provisions of the conflict of laws rules for such contracts generally remain unchanged[231]. The place where an employee habitually carries out his work is more precisely described. An individual employment contract is governed by the law chosen by the parties in accordance with Article 3 of the Rome I Regulation (freedom of choice). Such a choice of law

[230] OJ L 18, 21st January 1997, p. 1.
[231] See Article 8 of the Rome I Regulation; for further details with regard to changes see *Mauer/Stadtler,* RIW 2008 p. 544.

may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of Article 8 of the Rome I Regulation (Article 8 I of the Rome I Regulation). To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract is governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out is not deemed to have changed if he is temporarily employed in another country (Article 8 II of the Rome I Regulation).

6. Insurance Contracts

Article 7 of the Rome I Regulation deals with insurance contracts. As a consequence Articles 7 to 15 of the EGVVG[232] have been abolished. Article 7 of the Rome I Regulation contains very detailed provisions for insurance contracts.

7 Mandatory Rules

The basic principles established in Article 7 of the Rome Convention and the corresponding Article 34 of the old version of the EGBGB with respect to mandatory rules remain unchanged. Such rules are now defined in the Rome I Regulation in accordance with the case law of the European Court of Justice. Overriding mandatory provisions are those provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation (Article 9 I of the Rome I Regulation). Generally, the application of national mandatory rules must be taken into consideration as before. Nothing in the Rome I Regulation restricts the application of the overriding mandatory provisions of the law of the forum (Article 9 II of the Rome I Regulation). Foreign mandatory rules are also applicable under certain preconditions. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard has to be had to their nature and purpose and to the consequences of their application or non-application (Article 9 III of the Rome I Regulation).

8 Assignment

Article 14 of the Rome I Regulation comprises the conflict of laws rules with regard to an assignment, as laid down in Article 12 of the Rome Convention and the corresponding Article 33 of the old version of the EGBGB. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person are governed by the law which under the Rome I Regulation applies to the contract between the assignor and assignee (Article 14 I of the Rome I Regulation). The law governing the assigned or subrogated claim determines the assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged (Article 14 II of the Rome I Regulation). The concept of assignment in Article 14 of the Rome I Regulation includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims (Article 14 III of the Rome I Regulation).

[232] See chapter II.6.1 and chapter II.6.3.

9 Set-off

Set-off is dealt with in Article 17 of the Rome I Regulation. Where the right to set-off is not agreed by the parties, set-off is governed by the law applicable to the claim against which the right to set-off is asserted (Article 17 of the Rome I Regulation).

IV Applicable Law to Non-Contractual Obligations before 11th January 2009[233]

Unless indicated otherwise, all references to the "EGBGB" in this chapter IV relate to the version of the EGBGB before entering into force of the Rome II Regulation. Chapter IV is written from the perspective before the Rome II Regulation entered into force.

1 Introduction

The German autonomous law contains conflict of laws rules regarding non-contractual obligations in Articles 38 to 42 of the EGBGB[234]. The Rome II Regulation does not completely supersede these rules as they continue to apply to events giving rise to damage which occurred before 11th January 2009. Further, several areas of law are expressly excluded from the scope of the Rome II Regulation *(e.g.* non-contractual obligations arising under bills of exchange, cheques and promissory notes and non-contractual obligations arising out of the law of companies regarding matters which concern the creation, legal capacity, internal organisation or winding-up of companies and the personal liability of officers and members as such for the obligations of the company)[235].

The German autonomous conflict of laws rules with regard to non-contractual obligations in secs 38 to 40 of the EGBGB apply to aspects of laws arising in connection with torts, unjust enrichment and *Geschäftsführung ohne Auftrag* (agency without specific authorisation). In addition, two general rules apply to these three categories. The first one is laid down in Article 41 of the EGBGB and concerns cases where the non-contractual obligation is more closely connected with a country other than a country identified in Articles 38 to 40 of the EGBGB. In such cases the law of the country having the closest connection to the matter shall apply. Article 42 of the EGBGB opens the possibility of a choice of law but only after the occurrence of an event which gave rise to non-contractual obligations.

2 Torts

Under German civil law the basic rule for *unerlaubte Handlungen* (torts) is sec 823 of the BGB[236].

Pursuant to Article 40 I 1 of the EGBGB the applicable law to non-contractual obligations arising out of a tort is the law of the country in which the person who has to pay damages

---

[233] The Rome II Regulation does not completely supersede the autonomous German private international law existing before its entering into force on 11th January 2009 (see chapter I.3).
[234] See chapter V. 2 to chapter V.4.
[235] See Article 1 II of the Rome II Regulation where such areas are defined which are excluded from its scope.
[236] Sec 823 of the BGB reads reads as follows: "(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this. (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.".

committed his act, that is the so called law of the *lex loci delicti commissi* (law of the place where the tort was committed). This is the German basic rule for the whole area of private international law with respect to torts. It determines the preconditions, the content and the scope of claims arising out of a tort. If the place where the tort was committed and the place where the damage occurred are in different countries, basically, the law of the place mentioned first is the crucial law because the injury of the protected object has been caused there. However, pursuant to Article 40 I 2 of the EGBGB the person sustaining damage has the option to demand that instead of the law of the country where the tort was committed the law of that country applies where he sustained the damage.

If both the person who committed the tort and the person who sustained damage at the time of the event giving rise to the damage have their habitual residence in the same country pursuant to Article 40 II 1 of the EGBGB the law of that country shall apply. However, Article 40 II of the EGBGB identifies certain circumstances where notwithstanding the fact that both the person who committed the tort and the person who suffered damage reside in the same country, the laws of that country will not apply and claims existing under the law of another country cannot be enforced, especially, if they extremely exceed an amount necessary for an adequate compensation or obviously serve other purposes than an adequate compensation[237].

3 Unjust Enrichment

Under German civil law the system of claims for restitution distinguishes between three types of claims which are codified in secs 812 *et seq* of the BGB[238]: *Leistungskondiktion* (claim for restitution in case of unjustified enrichment resulting from the performance of another person without legal cause), *Eingriffskondiktion* (claim for restitution in case of unjustified enrichment not resulting from the performance of another person but from interference with protected interests without legal cause) and *Bereicherung in sonstiger Weise* (claim for restitution in case of unjustified enrichment "otherwise" at the expense of another person without legal cause). Corresponding with these systematics the German conflict of laws rule with regard to unjust enrichment also distinguishes between the three types of claims for restitution.

Pursuant to Article 38 I of the EGBGB, in case of a *Leistungskondiktion,* the crucial law is the law which applies to the legal relationship to which the performance relates. Pursuant to Article 38 II of the EGBGB, in case of an *Eingriffskondiktion,* the crucial law is the law of the place where the interference into protected rights took place. If neither a *Leistungskondiktion* nor an *Eingriffskondiktion* is given the private international law with regard to claims for restitution contains a catch-all provision in Article 38 III of the EGBGB. With respect to claims for restitution where a person obtains something "otherwise" at the expense of another person, in accordance with this article, the crucial law is the law of the place where the enrichment took place.

4 Agency Without Specific Authorisation

Under German civil law the *Geschäftsführung ohne Auftrag* (agency without specific authorisation) is dealt with in secs 677 *et seq* of the BGB. The conflict of laws rule with regard to non-contractual obligations in connection therewith is codified in Article 39 of the

[237] See sec 40 III of the EGBGB.

[238] Sec 812 of the BGB reads as follows: "(1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. (2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.".

EGBGB. Pursuant to this article the governing law will be the law of the country within the territory of which the agency took place.

V Applicable Law to Non-Contractual Obligations as from 11th January 2009[239]

1 Introduction

The Rome II Regulation applies from 11th January 2009[240], in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters[241]. The Rome II Regulation does not provide a definition of the term "civil and commercial matters", however, it contains a non-exclusive enumeration of those areas which are not regarded as covered by this term *(e.g.* revenue and customs or administrative matters). The term "civil and commercial matters" has to be interpreted in accordance with autonomous national rules *(e.g.* German rules). The Rome II Regulation determines, in cases with international *Anknüpfungspunkte* (connecting factors), which law is applicable with regard to torts, unjust enrichment, *negotiorum gestio* (agency without specific authorisation)[242] and *culpa in contrahendo* (breach of duty prior to contract). It applies to events giving rise to damage which occur after its entry into force. The Rome II Regulation is binding in its entirety and directly applicable in Germany[243] as a Member State of the European Community (Articles 31, 32 of the Rome II Regulation).

The concept of a non-contractual obligation varies from one Member State to another. Therefore, for the purposes of the Rome II Regulation the term "non-contractual obligation" has to be understood as an autonomous concept. Pursuant to Article 3 of the Rome II Regulation any law specified by this regulation applies whether or not it is the law of a Member State or the law of a third country. As a result, one of the basic principles of the Rome II Regulation is its universal application which seeks to provide greater certainty and predictability as to the law applicable to non-contractual obligations in the European Community. The key provisions of the Rome II Regulation are summarised in this chapter V.

2 Torts

The principle of the *lex loci delicti commissi* (law of the place where the tort was committed) is the basic solution for non-contractual obligations in virtually all of the Member States. Nevertheless, in a given case at first the question arises whether the parties agreed upon a choice of law. But, due to the structure of the Rome II Regulation this chapter starts with the applicable law in general and the law applicable to special torts before the choice of law is dealt with.

2.1 Applicable Law in General

The general conflict of laws rule regarding non-contractual obligations arising out of a tort is Article 4 of the Rome II Regulation. Unless otherwise provided for in the Rome II Regulation, the law applicable to a non-contractual obligation arising out of a tort is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect

---

[239] The Rome II Regulation does not completely supersede the autonomous German private international law existing before its entering into force on 11th January 2009 (see chapter I.3).
[240] Except for Article 29 which applies from 11th July 2008.
[241] See chapter I.3.
[242] With regard to German law see secs 677 *et seq* of the BGB *(Geschäftsführung ohne Auftrag).*
[243] See Article 249 II 2 of the EC Treaty.

consequences of that event occur (Article 4 I of the Rome II Regulation). This rule differs from the one codified in the German EGBGB and is new with respect to the applicable law in Germany. The effects of this new conflict of laws rule are in particular of relevance regarding distance torts, the inherent characteristics of which are that the place where the event giving rise to the damage occurred and the place where the damage actually occurs are not identical. Regarding the place where the damage occurred it is decisive that the relevant place is where an object of legal protection has directly been injured and not where further indirect consequences in connection with the relevant event occurred.

An exception to the above mentioned general conflict of laws rule applies where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs and pursuant to Article 4 II of the Rome II Regulation, under these circumstances the law of the latter country will govern. Furthermore, the Rome II Regulation contains an "escape clause" where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with another country. Where this is the case the law of that other country applies. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort in question (Article 4 III of the Rome II Regulation).

2.2 Applicable Law to Special Torts

Specific rules are laid down in the Rome II Regulation regarding special torts where the general rule does not allow a reasonable balance to be struck between the interests at stake. These rules are summarised below.

2.2.1 Product Liability

The Rome II Regulation contains a special conflict of laws rule regarding damage which has been caused by products. The term "product" has to be interpreted in accordance with Article 2 of the EC Directive on Product Liability[244]. Basically, the law applicable to a non-contractual obligation arising out of damage caused by a product is the law of the country in which the person sustaining the damage had his habitual residence when the damage occurred, if the product was marketed in that country or, failing that, the law of the country in which the product was acquired, if the product was marketed in that country or, failing that, the law of the country in which the damage occurred, if the product was marketed in that country. However, the law applicable is the law of the country in which the person claimed to be liable is habitually resident if he could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under the three alternatives mentioned (Article 5 I of the Rome II Regulation). Pursuant to Article 5 II of the Rome II Regulation where there is a closer connection with another country, the law of that other country will apply.

2.2.2 Unfair Competition and Acts Restricting Free Competition

Conflict of laws in connection with unfair competition and statutes restricting free competition is also dealt with in a special rule. The law applicable to a non-contractual obligation arising out of an act of unfair competition is the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected (Article 6 I of the Rome II Regulation). This rule codifies the market place principle which already was the governing

[244] 85/374/EEC.

principle in this area in Germany in the past. It adequately serves the purpose of protection of competition.

Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 of the Rome II Regulation[245] applies (Article 6 II of the Rome II Regulation). The law applicable to a non-contractual obligation arising out of a restriction of competition is the law of the country where the market is, or is likely to be, affected (Article 6 III (a) of the Rome II Regulation). Article 6 III (b) of the Rome II Regulation contains a special rule when the market is, or is likely to be, affected in more than one country.

Article 6 III of the Rome II Regulation relates only to private but not to official and public cartel law. Official cartel law is excluded from the scope of the Rome II Regulation. In so far conflict of laws rules provided by national cartel law such as the German sec 130 II of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restriction of Free Competition) remain to be of relevance. This section is also applicable if effects of restriction of competition have been caused in a foreign country.

The special rule in Article 6 of the Rome II Regulation is not an exception to the general rule in Article 4 I of the Rome II Regulation but rather a clarification of it. In matters of unfair competition, the conflict of laws rule protects competitors, consumers and the general public and ensures that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

The concept of restriction of competition as laid down in Article 6 of the Rome II Regulation covers prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the EC Treaty or by the law of a Member State.

Public interests require the exclusion of the possibility of a choice of law with regard to conflict of laws rules in the area of unfair competition and acts restricting free competition. Thus, the law applicable under Article 6 of the Rome II Regulation may not be derogated from by a choice of law (Article 6 IV of the Rome II Regulation).

2.2.3 Infringement of Intellectual Property Rights

Article 8 of the Rome II Regulation contains a conflict of laws rule regarding the infringement of intellectual property rights. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right is the law of the country for which protection is claimed. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable is, for any question that is not governed by the relevant Community instrument, the law of the country in which the act of infringement was committed. The law applicable under this rule may not be derogated from by a choice of law (Article 8 of the Rome II Regulation). Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* (law of the place of protection) is preserved. The term “intellectual property” has to be interpreted broadly. For the purposes of the Rome II Regulation, the term “intellectual property rights” has to be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right (right of own kind) for the protection of databases and industrial property

[245] See chapter V.2.1.

rights. Article 8 of the Rome II Regulation does not deal with intangible assets itself but only with non-contractual obligations resulting from the injury of such rights.

2.2.4 Environmental Damage

Also with respect to environmental damage the Rome II Regulation contains a special conflict of laws rule. The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage is the law determined pursuant to Article 4 I of the Rome II Regulation[246], unless the person seeking compensation for damage chooses to base his claim on the law of the country in which the event giving rise to the damage occurred (Article 7 of the Rome II Regulation). The term "environmental damage" means adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

3 Unjust Enrichment, *Negotiorum Gestio* and *Culpa in Contrahendo*

3.1 Unjust Enrichment

In case parties do not choose the applicable law the conflict of laws rule with respect to unjust enrichment is, basically, determined by the law which governs the underlying relationship. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort, that is closely connected with that unjust enrichment, it is governed by the law that governs that relationship (Article 10 I of the Rome II Regulation). This applies to all *Leistungskondiktionen*[247] which fall under one type of claims for restitution under German law.

Where the law applicable cannot be determined on the basis of Article 10 I of the Rome II Regulation and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country applies (Article 10 II of the Rome II Regulation). If the law applicable cannot be determined on the basis of Article 10 I or II of the Rome II Regulation, it is the law of the country in which the unjust enrichment took place (Article 10 III of the Rome II Regulation). The different wording of the mentioned paragraphs of Article 10 of the Rome II Regulation makes clear that the place where "unjust enrichment took place" means the place where the person who obtains something from the other person actually was enriched. Thus, the crucial place regarding Article 10 III of the Rome II Regulation is the place of enrichment.

Pursuant to Article 10 IV of the Rome II Regulation where there is a closer connection with another country, the law of that other country will apply.

3.2 *Negotiorum Gestio*

The Rome II Regulation also encompasses a special conflict of laws rule regarding *negotiorum gestio* (agency without specific authorisation). If a non-contractual obligation

---

[246] See chapter V.2.1.

[247] Sec 812 of the BGB reads in relevant parts: "(1) A person who obtains something as a result of the performance of another person … without legal grounds for doing so is under a duty to make restitution to him …".

arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort, that is closely connected with that non-contractual obligation, it is governed by the law that governs that relationship. Where the law applicable cannot be determined on the basis of this rule, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country applies. If the law applicable cannot be determined on the basis of the rules mentioned above, it is the law of the country in which the act was performed (Article 11 I, II and III of the Rome II Regulation). It is difficult how to define the place where "the act was performed" if the place where the act itself was performed is not identical with the place where the consequences resulting from this act occur.

Pursuant to Article 11 IV of the Rome II Regulation where there is a closer connection with another country, the law of that other country will apply.

3.3 *Culpa in Contrahendo*

A real novelty is the conflict of laws rule with regard to dealings prior to conclusion of a contract in Article 12 of the Rome II Regulation. The law applicable to a non-contractual obligation arising out of such dealings, regardless of whether the contract was actually concluded or not, is the law that applies to the contract or that would have been applicable to it had it been entered into (Article 12 I of the Rome II Regulation). Thus, under German law prior to the effective date of the Rome II Regulation, the law applicable to a non-contractual obligation arising out of dealings prior to conclusion of a contract is the law applicable to contracts as determined by Articles 27 to 37 of the old version of the EGBGB[248].

Article 12 I of the Rome II Regulation covers only a part of non-contractual obligations, namely such resulting from negotiations ("dealings") prior to conclusion. The scope of *culpa in contrahendo* (breach of duty prior to contract) under German law goes beyond this. Excluded in the Rome II Regulation is in particular the pre-contractual duty to inform the other party. A main issue of the scope of Article 12 I of the Rome II Regulation is the breaking off of negotiations in bad faith.

Where the law applicable cannot be determined on the basis of Article 12 I of the Rome II Regulation, it is the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred, or where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country, or where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in the first two alternatives mentioned, the law of that other country (Article 12 of the Rome II Regulation).

4 Freedom of Choice of Law

The Rome II Regulation permits to submit non-contractual obligations to the law of a choice by the contracting parties, provided such choice of law is expressed or demonstrated with reasonable certainty by the circumstances of the case. The parties may agree to submit non-contractual obligations to the law of their choice by an agreement entered into after the event giving rise to the damage occurred or, where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage

[248] For further details see chapter II.

occurred (Article 14 I of the Rome II Regulation). However, such choice of law will not be recognised in respect of claims in connection with infringement of intellectual property rights, unfair competition, or acts restricting free competition. The opportunity to choose the law, on the one hand will give certainty to the parties. However, it is difficult to predict all the circumstances that might give rise to a claim, and the chosen law might turn out to be less favourable than the law which would otherwise have applied. With regard to the special rules, in certain cases, the Rome II Regulation gives more flexibility to the claimant to choose the law which best suits it.

The rule in Article 14 I of the Rome II Regulation which appears to be new under German legal concepts actually only partly differs from Article 42 of the German EGBGB[249] because Article 41 II No. 1 of the EGBGB also allows the freedom of choice, provided that there is a connection between the non-contractual relationship and a contractual relationship.

The principle of freedom of choice of law is limited in several ways. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties does not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (Article 14 II of the Rome II Regulation). Where all such elements are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State does not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement (Article 14 III of the Rome II Regulation).

5 General Rules

The Rome II Regulation encompasses several common rules, only three of which are summarised here. For example, the law applicable to non-contractual obligations under the Rome II Regulation governs in particular the basis and extent of liability and the grounds for exemption from liability, any limitation of liability and any division of liability (Article 15 of the Rome II Regulation). Furthermore, the application of the provisions of the law of the forum is not restricted in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation (Article 16 of the Rome II Regulation). In so far the *lex fori* (law of the place of jurisdiction) is decisive. In addition, the application of a provision of the law of any country specified by the Rome II Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum (Article 26 of the Rome II Regulation).

VI Rights *in Rem*

1 Introduction

To get a better understanding of the German private international law with regard to *dingliche Rechte* (rights *in rem)* the explanation of a German law principle and selected legal terms are indispensable as under German law there are some particularities with regard to the rights in property. First of all the term "law of rights *in rem"* has to be explained[250]. This area of law concerns rights, in whole or in part, a person has in direct relation to a "*Sache"* (object). This

[249] See chapter IV. 1.
[250] The German term *"Sachenrecht"* (literally "law of things") is often translated as the law of property but best translated as the law of rights *in rem.*

term covers both movable and immovable objects. The term right *in rem,* as a general rule, means an absolute legal effect with respect to an object in relation to a third party.

The most important particularity of German law concerning rights *in rem* in respect of property in Germany is the distinction between *schuldrechtliche Verträge* (obligatory contracts) and *dingliche Verträge* (contracts *in rem)*. This principle is called the *Abstraktionsprinzip* (principle of abstraction). According to this principle, transactions concerning rights *in rem* are abstract, in the sense of legally independent, from any underlying obligation which binds the parties of the relevant transaction. Rights over objects *(i.e., in rem)* are separate from any rights against a person *(i.e., in personam).* By way of the obligatory contract the rights and duties of the parties of a contract are established. In order to perform the obligation under the obligatory contract a further separate contract *in rem* may be required under German law. This applies, for example, to effect a change in title, such as the transfer of ownership, or to create an encumbrance over land. Thus, due to the *Abstraktionsprinzip* under German law the transfer of title may well be valid even though the underlying obligatory contract is not.

The law of the rights *in rem* is mandatory law which excludes the principle of autonomy of the parties which is applicable to obligatory contracts. A choice of law is not permitted in this area of law. Therefore, the parties of the contract cannot choose the law applicable to rights *in rem.* A *Rückverweisung* (remission to the law of the forum) is possible[251]. But, as the *lex rei sitae*[252] applies worldwide, this option is of limited relevance.

The German autonomous conflict of laws rules regarding the law of rights *in rem* is codified in Articles 43 to 46 of the EGBGB. All attempts to date to create a universal or at least European private international law with regard to the law of rights *in rem* have been unsuccessful by now. Currently, only in special areas of law attempts are going on to achieve this aim. The best known example in this connection is the Hague Treaty Providing Legal Certainty to Modern Forms of Holding and Transferring of Securities[253]. However, this treaty has not yet entered into force.

2 *Lex Rei Sitae*

The basic German conflict of laws rule with respect to matters of property rights is set out in Article 43 of the EGBGB which codifies the worldwide accepted *lex rei sitae* (law of the location of the property). Title in property is, in general, governed by this law. As to limited rights *in rem (e.g.* mortgages and pledges) the *lex rei sitae* is applicable as well, both to immovable and movable objects.

Whether a *"Sache"*, in the sense of German law[254], can be qualified as such has to be decided in accordance with German law. Furthermore, the *lex rei sitae* is the crucial law concerning the question whether a thing can be an independent object of a right *in rem* or is only a so called *wesentlicher Bestandteil*[255] (essential part) of another thing. The *lex rei sitae* also determines whether an object qualifies as *Zubehör*[256] (accessory). The questions of

---

[251] See Article 4 of the EGBGB.
[252] For further details see chapter VI.2.
[253] See also the preliminary draft of the UNIDROIT Convention on Substantive Rules Regarding Intermediated Securities.
[254] Pursuant to sec 90 of the BGB only corporeal objects are things as defined by law.
[255] Pursuant to sec 93 of the BGB parts of a thing that cannot be separated without one or the other being destroyed or undergoing a change of nature *(wesentliche Bestandteile* (essential parts)) cannot be the subject of separate rights.
[256] Pursuant to sec 97 I 1 of the BGB *Zubehör* (accessories) are movable things that, without being parts of the main thing, are intended to serve the economic purpose of the main thing and are in a spatial relationship to it that corresponds to this intention.

whether property is a movable or immovable object and which types of rights *in rem* exist under the law of the relevant country are determined by the *lex rei sitae* as well. The *lex rei sitae* also determines the nature of rights *in rem,* both principal and ancillary right, as well as the prerogatives that attach to those rights. Moreover, the *lex rei sitae* determines the content of rights *in rem* and the preconditions with respect to their creation *(e.g.* in case of *Verbindung*[257] (connection), *Vermischung*[258] (mixing) and *Verarbeitung*[259] (processing)), amendment, disposal and termination.

Special rules apply to securities (negotiable instruments). The *lex rei sitae* governs the *Wertpapiersachstatut, i.e.* the right to securities as such. In contrast thereto, the *Wertpapierrechtsstatut* is the law which concerns vested rights in securities. The latter is determined by the respective legal status represented by the respective security (*e.g.* company statute in case of company shares)[260]. In addition, under German law a special conflict of laws rule applies to disposals of securities which are registered or credited to an account, thereby establishing rights in favour of the holder of the securities. Sec 17 a of the *Depotgesetz* (Securities Deposit Act) determines that the law of the place of the register and/or the account is decisive in this connection.

A contract by which a right with respect to a property is constituted or such a right is disposed of, is only formally valid, if the formal requirements of that law are met which is applicable to the subject matter of the contract (Article 11 IV of the EGBGB). In so far the *lex rei sitae* also determines formal requirements. Article 11 IV of the EGBGB applies to movable and immovable property but only to *Verfügungen* (disposals *in rem)* and not to the underlying obligatory contracts[261] even if a *sachenrechtliche Verfügung* (disposal *in rem)* for the purpose of effecting the obligatory contract is, in deviation of German law, not necessary under the respective legal system[262]. *Dingliche Rechtsgeschäfte* (contracts *in rem)* which are concluded for the purpose of the completion of an obligatory contract, due to the *Abstraktionsprinzip*[263]*,* are always governed by the *lex rei sitae.* Thus, any transaction or instrument that purports to change, for example, the ownership of immovables must satisfy the requirements of the *lex rei sitae,* even if the contract *in rem* is incorporated in the same document as the obligatory contract.

As an exception, in several cases the *lex rei sitae* does not apply in connection with rights *in rem.* According to Article 45 I of the EGBGB means of transportation, because of their inherent mobility, are not governed by the *lex rei sitae,* but by the law of their country of origin. Furthermore, the *lex rei sitae* is subject to the provisions of Article 46 of the EGBGB which provides where there is a substantial closer connection to the law of a country other than that which would otherwise be applicable in accordance with Articles 43 and 45 of the EGBGB, the law of the country having a closer connection to the matter shall apply.

3 Change of Statute

Special rules apply to a *Statutenwechsel* (change of statute) with respect to an object. If property is moved from Germany to another country, the right *in rem* once acquired is preserved as a vested right, but cannot be asserted in contradiction to the new *lex rei sitae* (Article 43 II of the EGBGB). The new *lex rei sitae* will govern and determine the rights and

---

[257] See secs 946 *et seq* of the BGB.
[258] See sec 948 of the BGB.
[259] See sec 950 of the BGB.
[260] See BGHZ 108 pp. 353, 356.
[261] With respect to the difference between obligatory contracts and contracts in *rem* under the German law *Abstraktionsprinzip* see chapter IV.1.
[262] OLG Cologne OLGZ 77 p. 201.
[263] See the explanations concerning the German law *Abstraktionsprinzip* in chapter VI.1.

duties arising in connection with the *dinglicher* (*in rem)* legal status[264]. For example, in Germany the unpaid seller may retain title under an instalment contract without any formal requirements. If, however, the sold merchandise is exported to another country, where a clause of retention of ownership has to be registered, the German informal security interest will not be enforceable, unless duly registered in the country of the new location of the respective property. If, as another example, the period of *Ersitzung* (prescription) necessary for a transfer of title has not been expired before the change of the location the time expired so far will be added to the time necessary under the new *lex rei sitae* for a prescription.

If an object is moved back to the country under the *lex rei sitae* of which a right *in rem* originally was established, the original right will be reinstated with its former content and nature, provided the respective right *in rem* has not previously been terminated in accordance with the *lex rei sitae* of the country to which it was moved in the first place.

As regards a change of statute it has to be distinguished between those cases where all preconditions regarding the creation of a right *in rem* are completely met and those where this is not the case. If the factual circumstances were not sufficient under the original *lex rei sitae* to lead to the establishment of a right *in rem* the removal of the respective object to a country, the law of which would have accepted such an establishment, does not automatically lead to the establishment of such a right. In the reverse case, a right *in rem* which was established under the original *lex rei sitae* continues to be a valid right *in rem* even though the new *lex rei sitae* requires additional preconditions with respect to the establishment of the right *in rem* in question. If the factual circumstances were not sufficient to create a right *in rem* in accordance with the original *lex rei sitae* solely the new *lex rei sitae* decides about the legal status of a right *in rem.*

Another special area is the international distance purchase in general and with respect to the retention of title in such a case. If in such a case the transfer of title, by way of dispatching the merchandise, has already occurred in accordance with the *lex rei sitae* of the country from which the respective object was dispatched, the purchaser acquires ownership with respect to the respective object even if the law of his country requires a *Übergabe* (delivery) of the respective object to effect a transfer of title. In the reverse case, transfer of title is completed by crossing the border to the country of destination if in accordance with the law of this country the dispatch of property is already sufficient to effect a transfer of title.

In case of an international purchase the preconditions and *dingliche (in rem)* effects of a retention of title are determined by the law of the country of destination as soon as the respective merchandise has crossed the border. Up to this time the law of the country of dispatch is decisive[265]. If the legal instrument of retention of title only exists in accordance with the law of the country of destination, the agreement about the retention of title, in case of doubt, relates to the law of the country of destination.

Where movable property is moved from one country to another, any transitory conflict is, basically, also resolved in accordance with the *lex rei sitae,* especially with regard to the law of a country through the territory of which the transit takes place. Basically, there do not exist any special rules in this connection.

The private international law with regard to the removal of moveable property to Germany is governed by Article 43 III of the EGBGB. Pursuant to this article a right *in rem* continues to be valid after its removal to Germany if the respective right *in rem* has already been created in accordance with the original *lex rei sitae.* But, the content of the respective right *in rem* from this time on is determined by German property law. If a right *in rem* has not yet been

[264] BGHZ 100 pp. 321, 326.
[265] OLG Koblenz RIW 1989 p. 384; OLG Hamm NJW-RR 1990 p. 488.

created in accordance with the original *lex rei sitae* the establishment of the respective right in accordance with German law is possible.

The *Transpositionslehre* (doctrine of transposition) has been established by the German *Bundesgerichtshof* (Federal Supreme Court of Justice)[266] to regulate the rights in respect to moveable property which has been moved back to Germany. Regarding non-German rights, *in rem* created over such movables it was held that a certain right of interest would only qualify as a right *in rem* if there exists an equivalent property interest under German law. The effects of a non-German right *in rem* would then have to be extracted from the comparable rights under German law.

4 Securities for Loans

The general conflict of laws rules apply to securities for loans as well. Thus, the validity and enforceability of security rights *in rem* will be determined by the *lex rei sitae* of the respective collateral, whether movable *(e.g.* machines)[267] or immovable *(e.g.* plots of land), and is not subject to a choice of law by the parties. For example, a mortgage or German law *Grundschuld*[268] (land charge) is governed by the *lex rei sitae* notwithstanding, that the debt, not the charge, is the principal characteristic of the transaction as a whole. If the respective collateral is moved to another country a security right *in rem* may be terminated due to a change of statute[269].

Pledges over securities (negotiable instruments) as such are, basically, also determined by the *lex rei sitae*[270]*.* However, in this connection a special case is noteworthy. Where the buyer or depositor only has a contractual claim on the return of equal, but not identical, securities a special form of securities deposit exists. For example, for the safekeeping of securities abroad foreign securities depositories are used. In such cases the securities account holder receives a so called *Gutschrift in Wertpapierrechnung* (credit from domestic (German) bank for his securities acquired and deposited with foreign securities depositories, the "WR-Gutschrift") from his (German) bank. A pledge over securities is then established by a pledge over the *auftragsrechtlichen Herausgabeanspruch* (right to return in connection with a mandate for the management of the affairs of another)[271]. This pledge is governed by German law.

A pledge over claims *(e.g.* bank balance) is not governed by the *lex rei sitae* but the law applicable to the claim. The same applies to a *Sicherungsabtretung* (security assignment) of claims. Suretyships, abstract bank guarantees and letters of comfort are also not governed by the *lex rei sitae.*

VII Companies

1 German Doctrines as Sources of Private International Law for Companies

To a large extent German private international law for companies[272] has developed from case law based on academic doctrines. In Germany the *Sitztheorie* (doctrine of factual seat)

---

[266] BGH WM 1991 p. 811.
[267] A typical German law security over movables is, for example, a *Sicherungsübereignung* (chattel mortgage).
[268] The German law *Grundschuld* is a non-accessory charge on real property.
[269] For further details see chapter VI.3.
[270] For further details see chapter VI.2 *(Wertpapiersachstatut).*
[271] See sec 667 of the BGB.
[272] See *Vorpeil,* Grundzüge des deutschen internationalen Gesellschaftsrechts, PHI 1999 pp. 229.

used to be the prevailing doctrine. It requires that the internal affairs of a company, *e.g.* its establishment, structure, organisation and dissolution are governed by the laws of the state where the company's centre of business activities and its factual administration headquarter are located. Crucial point is the *faktischer Verwaltungssitz* (factual seat). With respect thereto it is crucial where the centre of the company's "life" is located, *i.e.* where the basic decisions of the board of the company are actually transformed into management acts in the ordinary course of the company's business[273]. The concrete facts thereof always depend on the circumstances of the case. In this regard it is important, for example, where board meetings or general meetings take place. The mere definition of a company seat in the company's statutes and less important administrative acts are irrelevant. The place where internal decisions are made is irrelevant with respect to the factual seat.

The *Sitztheorie* does not recognise a company as a legal entity and treats it like something that does not have any legal personality and, in consequence, as something that does not have limited liability unless the company's factual seat is located in the same jurisdiction as its place of incorporation. Therefore, under this doctrine, a company that removes its factual seat to another country will no longer be recognised, unless it reincorporates within the new jurisdiction. If the company has not been incorporated in accordance with the jurisdiction of its factual seat, it does not exist in accordance with the law of the other country. A change in governing law relating to a company cannot be accomplished without winding up or liquidating the company's business first.

Pursuant to the *Gründungstheorie* (doctrine of incorporation), in contrast to the formerly prevailing *Sitztheorie,* the internal affairs of a company are governed exclusively by the laws of the country where it has been formally incorporated. This doctrine recognises any company that has been lawfully incorporated within the jurisdiction of another country, regardless of the fact where the company's principal place of business is located. Therefore, a company can carry on business, for example, in a certain EC Member State while being incorporated in another.

2 Influence of ECJ's Judicature on German Doctrines relating to Private International Law for Companies

The case law of the European Court of Justice (the "ECJ") has very strongly influenced the question whether the *Sitztheorie* can still be upheld. In the last years several decisions of the ECJ changed the legal situation not only for internationally operating companies by opening up Europe to a competition in company law. As a consequence the *Sitztheorie* is no longer the prevailing doctrine in Germany. The relevant decisions of the ECJ are mainly based on Articles 43 and 48 of the Treaty on European Union and of the Treaty Establishing the European Community (the "EC Treaty") which both deal with the right of establishment in the territory of another Member State[274]. Furthermore, according to Article 31 of the Agreement on the European Economic Area Member States should refrain from introducing as between themselves any new quantitative restrictions or measures with equivalent effect.

---

[273] BGHZ 97 pp. 269, 272.

[274] Article 43 reads as follows: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State …".
Article 48 reads as follows: "Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States. 'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.".

The first relevant case leading to the above mentioned change has been the *Centros* decision[275]. The court held it was contrary to the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the laws of another Member State in which it had its registered office but in which it conducted no business. The judgment concerned a case where the branch was intended to enable the company in question to carry on its entire business in the state in which that branch was to be created, while avoiding the need to form a company there, thus evading the application of the rules governing the formation of companies which, in that state, were more restrictive as regards the paying up of a minimum share capital.

In the *Centros* case the ECJ has begun to vitiate the *Sitztheorie* by reducing barriers to cross-border transactions. Referring to previous cases involving abuse of Community law, the ECJ commented that the very purpose of the EC Treaty is to allow companies to set up subsidiaries and branches throughout the Community. The court stated that a company formed in one EC Member State, for the sole purpose of establishing itself in another, where its main or even sole business activities were to be carried on, could rely on the right of establishment. It added that the fact that the company was set up by nationals of the latter EC Member State resident in that state for the sole purpose of avoiding the minimum capital requirements of that state was immaterial. The ECJ held that the refusal, in such circumstance, of the national authorities of the state in which the branch was to be formed to register that branch amounted to an infringement of the right of establishment, which could not be justified by mandatory requirements in the public interest, or on the ground of improper circumvention of national rules.

In the *Überseering* case the ECJ continued its tendency of deciding in favour of the freedom of establishment by holding that rules submitting so called pseudoforeign companies to the company law of the host state were inadmissible[276]. The court held that where a company formed in accordance with the law of a Member State (A) in which it had its registered office was deemed, under the law of another Member State (B), to have moved its actual centre of administration to Member State B, Articles 43 and 48 of the EC Treaty precluded Member State B from denying the company legal capacity and, consequently, the capacity to bring legal proceedings to its national courts for the purpose of enforcing rights under a contract with a company established in Member State B. Where a company formed in accordance with the law of a Member State (A) in which it had its registered office exercised its freedom of establishment in another Member State (B), Articles 43 and 48 of the EC Treaty required Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoyed under the law of its state of incorporation (A).

By its judgment in the *Überseering* case the ECJ has given the right of establishment a radically new and wider interpretation. The court held a company's legal personality and its capacity to be a party to legal proceedings must be respected all over Europe. Due to the ECJ's wider understanding of the right of establishment, companies can be founded in an EC Member State without having any subsequent relations to it. This was a central obstacle to legislative competition in the past.

In the *Inspire Art* case the ECJ decided again clearly in favour of the freedom of establishment[277]. The court held it was contrary to Article 2 of the Eleventh Council Directive[278] concerning disclosure requirements in respect of branches opened in a Member

[275] ECJ, 9th March 1999, Case C-212/97, Centros Ltd and Erhvervs- og Selskabsstyrelsen.
[276] ECJ, 5th November 2002, Case C-208/00, Überseering BV and Nordic Construction Company Baumanagement GmbH (NCC).
[277] ECJ, 30th September 2003, Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam and Inspire Art Ltd.
[278] 89/666/EEC (21st December 1989).

State by certain types of company governed by the law of another state for national legislation to impose on the branch of a company formed in accordance with the laws of another Member State disclosure obligations not provided for by that directive. It was contrary to Articles 43 and 48 of the EC Treaty for national legislation to impose on the exercise of freedom of secondary establishment in that state by a company formed in accordance with the law of another Member State certain conditions provided for in domestic company law in respect of company formation relating to minimum capital and directors' liability. The reasons for which the company was formed in that other Member State, and the fact that it carried on its activities exclusively or almost exclusively in the Member State of establishment, did not deprive it of the right to invoke the freedom of establishment guaranteed by the EC Treaty, save where the existence of an abuse was established on a case-by-case basis.

The ECJ stated that, except in cases of fraud, it was immaterial for the applicability of the freedom of establishment that a company had been set up in a certain EC Member State with the sole aim of establishing itself in another EC Member State, where its main, or indeed entire, business was to be conducted. Furthermore, the court stated that it did not constitute an abuse to choose a jurisdiction only for its liberal rules and that it was a different question whether EC Member States could prevent the abusive reliance on Community law in spite of that. With the *Inspire Art* decision, the ECJ has widely opened the door for a new legal basis for companies' activities within Europe. The court extended the obligation to respect a company's legal personality and its capacity to be a party to legal proceedings to the entire legal system of the state of incorporation[279].

As a consequence of the ECJ's judgments, for example, an English limited company (Ltd) operating entirely in Germany must now be recognised as such, and only the laws of the state of incorporation, *i.e.* in this case English law, govern its corporate existence and administration.

There seems to be a vast majority of scholars in German academic literature who draw the conclusion from the ECJ's judicature that the *Sitztheorie* can no longer be followed, at least with regard to the freedom of establishment within the European Union. However, certain special issues are discussed with different views which cannot be dealt with here in detail[280].

3 Supranational Sources of Private International Law for Companies Relevant for German Companies

As stated above the main sources of German private international law for companies are legal doctrines and case law. A comprehensive codification regarding the conflict of laws rules for companies is not existing in Germany to date[281]. Several attempts to create conflict of laws rules for companies under European Community law failed. Best known in this respect is the EC Convention on the Mutual Recognition of Companies and Bodies Corporate of 29th February 1968 which did not become effective as it was not ratified by all EC Member States. Therefore, the corresponding German acts[282] which should have incorporated this convention into German law never entered into force. Under European

[279] Another interesting judgment of the EJC is *Cartesio*; for further details see *Leible/Hoffmann* BB 2009 p. 58.
[280] For further details see *Palandt-Heldrich,* Annex to Article 12 of the EGBGB.
[281] A draft for such a codification titled *"Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen"* has been published on 7th January 2008. For further details see chapter VII.4.
[282] See *Gesetz zu dem Übereinkommen vom 29. Februar 1968 über die gegenseitige Anerkennung von Gesellschaften und juristischen Personen; Gesetz zu dem Protokoll vom 3. Juni 1971 betreffend die Auslegung des Übereinkommens vom 29. Februar 1968 über die gegenseitige Anerkennung von Gesellschaften und juristischen Personen durch den Gerichtshof.*

Community law some legal frameworks regarding the private international law for companies exist but only with a limited scope, for example with respect to companies in the legal form of a European Company.

Some bilateral conventions between the Federal Republic of Germany and other states also deal with conflict of laws rules for companies, for example, the Treaty of Friendship, Commerce and Navigation Between The United States of America and the Federal Republic of Germany of 29th October 1954. Pursuant to its Article XXV paragraph 5 companies constituted under the applicable laws and regulations within the territories of either party shall be deemed companies thereof and shall have their juridical status recognised within the territories of the other party. The German *Bundesgerichtshof* (Federal Supreme Court of Justice)[283] and the leading German academic literature were at all times of the opinion that, in relation to the both countries of the treaty the *Gründungstheorie* is generally applicable. But, in academic literature there is no common understanding whether this applies throughout all areas of company law, regardless of where the factual seat of the relevant company is located[284]. To avoid the existence of so called "pseudo foreign corporations" on the basis of the above mentioned treaty and any form of misuse resulting therefrom it is disputed whether a "genuine link" is required under German law. A minor business activity in a US state is sufficient in this connection[285].

4 Draft of German Codification of Private International Law for Companies

As set out in the preceding chapter several attempts to create general supranational conflict of laws rules for companies have failed. The German legislator recently decided to enact domestic law with regard thereto. On 7th January 2008 a draft of the *Gesetz zum Internationalen Privatrecht der Gesellschaften, Vereine und juristischen Personen* (Act relating to Private International Law for Companies, Associations and Legal Persons, the "IPRG") was published[286]. The crucial *Anknüpfungspunkt* (connecting factor) in this act is the registration of a company in a public register. The draft of the new act takes into consideration the ECJ's judicature[287]. Basically, it contains rules which reflect the transition from the *Sitztheorie* to the *Gründungstheorie*[288]. It is intended to implement the new act into the EGBGB by inserting new Articles 10 to 10 b.

The proposed draft of the new Article 10 I of the EGBGB contains the most important innovation. Pursuant to this article companies, associations and legal persons under private law are governed by the law of the country in which they are registered in a public register. If they are not or not yet registered in a public register they are governed by the laws of the country under which they are organised. This provision codifies the *Gründungstheorie* in German law. The expression "companies, associations and legal persons" comprises all companies under civil and commercial law as well as associations and legal persons under private law. This includes, for example, *Genossenschaften* (cooperatives), *Gesellschaften bürgerlichen Rechts* (partnerships under German Civil Code), *rechtsfähige Vereine* (registered associations), *nicht-rechtsfähige Vereine* (associations lacking legal capacity) and *Stiftungen* (foundations). It does not matter whether they aim to make profit. *Vorgesellschaften* (pre-incorporation companies) fall into the category of companies which are not registered. Their registration is intended, but not yet accomplished.

---

[283] BGHZ 153 p. 353.
[284] For further details see *Palandt-Heldrich,* Annex to Article 12 of the EGBGB.
[285] BGH IPRax 2005 pp. 305, 339.
[286] For further details see *Ring,* IWB 2008 p. 821.
[287] For further details see chapter VII.2.
[288] For further details see chapter VII.1.

The draft of the new Article 10 II of the EGBGB contains a non-exclusive enumeration of issues which are governed by the law applicable to companies. The legal nature of a company, its *Rechtsfähigkeit* (legal capacity to have its own rights) and its *Handlungsfähigkeit* (capacity to act and effect legal consequences) are important elements of this enumeration. A further issue is the establishment of a company including all preconditions necessary therefore such as minimum capital, raising of capital, the duty to effect a registration and the duty to publish relevant facts. Another point is the dissolution of a company and its subsequent liquidation if based on civil law. The company name is also included in the enumeration. In this connection the requirements for the creation of a company name and for the supplement regarding a company's legal nature *(e.g.* [company name] *Gesellschaft mit beschränkter Haftung)* and the abbreviation of this supplement *(e.g.* "GmbH") are of special importance. The constitution of organisation and the constitution of financing also fall under the law applicable to companies. The first concerns, for example, the appointment, composition and disqualification of organs, their rights and duties, the passing and validity of resolutions concerning organisation, the relationship between the company and its members, fiduciary duties and the protection of minority shareholders. The constitution of financing comprises all aspects of the capital structure of the company *(e.g.* capital maintenance, raising of capital, minimum capital and contributory duties). The capacity of a company's organs to act for the company is another important subject matter mentioned in the draft of the new Article 10 I of the EGBGB. It is directly connected with the power to create legally binding obligations of a company. The draft of the new Article 10 II of the EGBGB furthermore deals with the acquisition and loss of company shares including corresponding rights and obligations resulting from company shares. A further element of the draft is the liability of a company in relation to third parties. This topic also comprises the principle of piercing the corporate veil. The last issue mentioned in the draft is the liability based on violations of duties under company law.

The draft of the new Article 10 a of the EGBGB determines the law applicable to a change of corporate form. The preconditions, procedure and effects of a change of corporate form by way of merger, splitting *(e.g.* spin-off) and transfer of assets and the change in the legal nature of a company are governed for each company by the law determined in accordance with the draft of the new Article 10 of the EGBGB.

The draft of the new Artcle 10 b of the EGBGB concerns the change of the law applicable with respect to a company. If a company re-registers in another country in a public register this leads to a change in the applicable law if (i) the former and the new jurisdiction permit such a change without dissolution and new establishment and (ii) the requirements of both jurisdictions are met. The same applies if the law applicable to the organisation of a company is changed in a way that is transparent to third parties.

Furthermore, the draft of the IPRG contains a modified version of Article 12 of the EGBGB. This article deals with the protection of legal positions in case of incapacity of the acting person.

5 Scope of Private International Law for Companies

The law determined by the current German conflict of laws rules with regard to companies covers the existence of a company from its establishment to its dissolution and aspects of its structure and organisation. Important practical issues are for example the commencement and the scope of the legal capacity in general[289], the company name, the constitution of a company including codetermination rights of employees, the conduct of business, especially the appointment and disqualification of directors and the capacity of the company's organs to act for a company.

[289] BGHZ 128 pp. 41, 44; OLG Frankfurt NJW 1990 p. 2204.

In the ordinary course of business a company is often not represented by its directors but by a representative who is authorised to act in favour of the company by a power of attorney. Under German law there do not exist statutory conflict of laws rules with regard to powers of attorney. The law applicable to powers of attorney is independent of the law applicable to the relevant contract and the law applicable to companies. Instead, the crucial law is that of the *Wirkungsland, i.e.* the jurisdiction in which the power of attorney is used and legal effects are caused[290]. In particular this law governs the existence of the power of attorney, especially, whether it has been validly granted[291], its interpretation and scope, the legal possibility of self-contracting[292] and its termination. The *Duldungsvollmacht* (power of attorney by estoppel) and the *Anscheinsvollmacht* (apparent authority) are determined by the laws of the country within the territory of which such power of attorney was rulied upon[293].

Further practical issues which are determined by the current German conflict of laws rules with regard to companies are, for example, the liability of company's organs, directors and shareholders, including piercing the corporate veil[294], the form and validity of the statutes of a company and their amendments, resolutions of the general meeting, prohibition of repayment of the *Stammkapital* (nominal capital) of a German *Gesellschaft mit beschränkter Haftung* (limited liability company, the "GmbH"), acquisition and loss of company shares, transfer of company shares and the restructuring of a company.

6 Recognition of Foreign Companies

The answer to the question whether a legal person validly exists and has legal capacity, *i.e.* whether it has to be recognised, is provided by the law applicable to a company. When acting in foreign countries it should be clear how companies are to be treated in countries other than their home-country. Foreign legal persons which have been validly created under applicable foreign law enjoy legal capacity also in Germany without there being the necessity of an express recognition[295].

VIII Insolvency

1 Introduction

The constantly increasing globalisation of business activities resulted in an increasing number of cross-border insolvencies. Typically in such cases of insolvency the debtors' assets are located in various countries and are subject to the laws of different jurisdictions. International insolvency law deals with such cases. This category of law contains both conflict of laws rules and substantive law which provides rules for special issues such as third parties' rights *in rem,* set-off, reservation of title and contracts relating to immovable property. This chapter mainly deals with the conflict of laws rules with regard to international insolvency law but, some basic principles of substantive international insolvency law are also dealt with here briefly due to the close connection between conflict of laws rules and substantive law in the area of international insolvency law.

---

[290] See BGH NJW 1990 pp. 3088; 2004 pp. 1315, 1316; BGHZ 128 pp. 41, 47; in academic literature there are different views (for further details see *Palandt-Heldrich,* Annex to Article 12 of the EGBGB).
[291] See BGH NJW 1982 p. 2733.
[292] See BGH NJW 1992 p. 618; sec 181 of the BGB.
[293] BGHZ 43 pp. 21, 27.
[294] BGHZ 78 pp. 318, 334.
[295] BGHZ 25 p. 134.

The sources of German international insolvency law are the Council Regulation (EC) No 1346/2000 of 29th May 2000 on Insolvency Proceedings (European Insolvency Regulation), Article 102 secs 1 to 11 of the *Einführungsgesetz zur Insolvenzordnung* (Introductory Act to the Insolvency Statute, the "EGInsO")[296], covering details with regard to the execution of the European Insolvency Regulation and the German autonomous rules concerning international insolvency law, laid down in secs 335 *et seq* of the *Insolvenzordnung* (Insolvency Statute, the "InsO"). All three sources are explained in this chapter in detail.

Another, but from a German perspective in practice less relevant source of international insolvency is the UNCITRAL Model Law on Cross-Border Insolvency of 15th December 1997. This model law contains a legal framework which is similar to the European Insolvency Regulation in various aspects. From the German point of view this model law is of relevance only in relation to countries which have adopted that model law and for which the European Insolvency Regulation does not apply[297].

2 European Insolvency Regulation

2.1 Introduction

The European Insolvency Regulation came into force on 31st May 2002 in all Member States of the European Community except for Denmark. This regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty Establishing the European Community (Article 47 of the European Insolvency Regulation). Therefore, in Germany this regulation is directly applicable[298]. The rationale behind the European Insolvency Regulation was to improve the efficiency and effectiveness of cross-border insolvency proceedings within the European Community. While the insolvency of undertakings with cross-border activities also affects the proper functioning of the internal market, there was a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets. Among other matters, this regulation covers the exercise of jurisdiction over insolvency proceedings, the determination of the applicable law to govern cross-border insolvencies within the European Community and the automatic recognition of insolvency proceedings opened in a Member State by all other Member States. It applies to specific insolvency proceedings in each Member State.

Two key concepts introduced by the European Insolvency Regulation are a debtor's centre of main interests (COMI) and main proceedings. The country in which a company has its COMI will be the primary jurisdiction for the conduct of the company's insolvency. That insolvency, whether conducted through a court procedure or not, is known as the main proceedings. The European Insolvency Regulation applies to an insolvent debtor with the COMI in a Member State (except Denmark). According to its Regard 13, the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Pursuant to Article 3 I 2 of the European Insolvency Regulation the place of the registered office is presumed to be a company's COMI in the absence of proof to the contrary. According to Article 3 I of the European Insolvency Regulation German courts have jurisdiction to open main insolvency proceedings if the debtor's COMI is situated in Germany. Proceedings of this kind have universal scope and aim at encompassing all the debtor's assets. Pursuant to Articles 27, 3 II of the European Insolvency Regulation secondary insolvency proceedings may be opened in another Member State if the debtor possesses an establishment within that Member State. Such secondary

[296] Article 102 of the EGInsO is a *Durchführungsverordnung* (executive order) to the European Insolvency Regulation.
[297] The status of the relevant countries is available at www.uncitral.org/english/status.
[298] See Article 249 II 2 of the EC Treaty.

proceedings are restricted to the assets of the debtor situated within the territory of that Member State. In case of insolvency proceedings which have been opened in a non-Member State, German courts have jurisdiction to open secondary insolvency proceedings in Germany with respect to the debtor's assets located in Germany.

The European Insolvency Regulation is based on the principle of the so called controlled universality. While pursuant to the principle of strict universality the effects of insolvency proceedings reach beyond national borders the effects pursuant to the principle of controlled universality are partly limited with respect to secondary insolvency proceedings[299], certain conflict of laws rules in connection with special rights and substantive rules which "shall not affect" certain rights which are dealt with in the European Insolvency Regulation.

There are many important exceptions relating to the applicability of the law of the debtor's COMI to the conduct of the insolvency. One exception is the existence and the exercise of security rights. Another important exception is the right of set-off[300]. On the one hand, provisions for special rules on applicable law in the case of particularly significant rights and legal relationships are necessary *(e.g.* rights *in rem* and contracts of employment). On the other hand, national proceedings covering only assets situated in the Member State of opening should also be allowed alongside main insolvency proceedings with universal scope.

The case law in various countries shows that the consequences of the European Insolvency Regulation are far greater and more extensive than were initially expected. For creditors the lesson is that the insolvency risks of a debtor with cross-border activities are not automatically governed by the law of the jurisdiction where the company is incorporated or where the main "visible" activities take place. The European Insolvency Regulation refers to the law of the jurisdiction where the debtor has his COMI, which is not necessarily the same as the law of the jurisdiction of its registered office.

The interpretation of the European Insolvency Regulation is independent of national law. It shall always be interpreted in accordance with European Community law while the German autonomous international insolvency law, laid down in secs 335 *et seq* of the InsO, shall be interpreted in relation to third countries in accordance with German law. In exceptional cases this can amount to different results.

The provisions of the European Insolvency Regulation apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of the European Insolvency Regulation continue to be governed by the law which was applicable to them at the time they were done (Article 43 of the European Insolvency Regulation). After its entry into force, the European Insolvency Regulation replaced, in respect of the matters referred to therein, in the relations between Member States, the conventions concluded between two or more Member States (Article 44 of the European Insolvency Regulation). For example, this applies to the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions of 25th May 1979.

2.2 Applicable Law

Pursuant to Article 4 of the European Insolvency Regulation insolvency proceedings are governed by the *lex fori concursus* (law of the place where insolvency proceedings take place). This article has to be read in conjunction with Articles 5 to 15 of the European Insolvency Regulation[301]. Article 4 II of the European Insolvency Regulation enumerates

[299] See Article 28 of the European Insolvency Regulation.
[300] See Articles 5 to 15 of the European Insolvency Regulation; Article 6 of the European Insolvency Regulation relates to set-off.
[301] Articles 5 to 15 of the European Insolvency Regulation are explained in more detail in this chapter.

several issues which are governed by the *lex fori concursus.* This enumeration is a non-exclusive one. Save as otherwise provided in the European Insolvency Regulation, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened. The law of this state determines the conditions for the opening of those proceedings, their conduct and their closure. It determines in particular:

- (a) against which debtors insolvency proceedings may be brought on account of their capacity;
- (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
- (c) the respective powers of the debtor and the liquidator;
- (d) the conditions under which set-offs may be invoked;
- (e) the effects of insolvency proceedings on current contracts to which the debtor is a party;
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
- (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
- (h) the rules governing the lodging, verification and admission of claims;
- (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;
- (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- (k) creditors' rights after the closure of insolvency proceedings;
- (l) who is to bear the costs and expenses incurred in the insolvency proceedings; and
- (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (Article 4 II of the European Insolvency Regulation).

Some details with respect to this enumeration: Against which debtors insolvency proceedings may be brought (lit (a)) means the *Insolvenzfähigkeit* (capacity to be subject of insolvency proceedings). There are different views in the Member States against which debtors insolvency proceedings may or may not be brought. In Germany the statutory privilege of public law *Landesbanken* (state banks) to be exempt from insolvency proceedings was abolished only a few years ago.

Concerning the assets which form part of the insolvency estate under German law (lit (b)) secs 35 *et seq* of the InsO are the crucial provisions. Regarding the powers of the debtor (lit (c)) Article 14 of the European Insolvency Regulation has to be taken into consideration which, as exceptional rule with respect to the protection of third-party purchasers, applies the *lex rei sitae*[302] and/or the *lex libri siti* (law of the place where the property is registered). For the avoidance of doubt not only the powers of the debtor and the liquidator are concerned but, also their duties. While the conditions under which set-offs may be invoked (lit (d)) are determined by the *lex fori concursus* the scope of this term is disputed. With regard to German law secs 94 to 96 of the InsO contain details thereto.

Regarding the effects of insolvency proceedings on current contracts (lit (e)), with certain exceptions, the *lex fori concursus* supersedes the law applicable in accordance with the Rome Convention. The legal protection on the basis of good faith has also to be taken into consideration. Under German law the effects of insolvency proceedings on current contracts are dealt with in secs 103 *et seq* of the InsO. The term “effects of the insolvency proceedings on proceedings” has to be interpreted in a wide sense. Its focus are the rights of secured creditors which are privileged in insolvency proceedings. In general, this definition encompasses measures of foreclosure outside an insolvency proceeding. The claims which

[302] See chapter VI.2.

are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings (lit (g)) concern the question whether claims of creditors have to be fulfiled and how such claims are to be dealt with which arise after the opening of an insolvency proceeding. Under German law secs 38 *et seq* of the InsO are decisive in this connection. The rules governing the lodging, verification and admission of claims are dealt with in secs 28, 174 *et seq* of the InsO.

Under German law the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors (lit (i)) are dealt with in secs 187 *et seq,* 38 *et seq* and 52 of the InsO. So far as German law is concerned creditors' rights after the closure of insolvency proceedings (lit (k)) relate to the *Restschuldbefreiung* (remission of outstanding debt) in accordance with secs 201 and 286 *et seq* of the InsO. With regard to the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors (lit (m)) the *lex fori concursus* supersedes the *lex causae* (law applicable in accordance with the conflict of laws rules). Under German law this encompasses in particular the rescission in case of insolvency proceedings pursuant to secs 129 *et seq* of the InsO.

Some articles of the European Insolvency Regulation which are of great importance in practice with regard to conflict of laws rules are briefly summarised here: The opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, movable or immovable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings (Article 5 I of the European Insolvency Regulation). It is disputed in academic literature how to interpret the term “right *in rem”*, especially whether it has to be interpreted in accordance with autonomous national law or whether the *lex rei sitae* is decisive[303]. Article 5 of the European Insolvency Regulation is a rule of substantive law. In contrast thereto, Article 6 I of the European Insolvency Regulation which covers set-offs is a conflict of laws rule. The opening of insolvency proceedings does not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor’s claim (Article 6 I of the European Insolvency Regulation). It is not quite clear whether Article 7 of the European Insolvency Regulation, the subject matter of which is the reservation of title, is a rule of substantive law or a conflict of laws rule. The opening of insolvency proceedings against the purchaser of an asset does not affect the seller’s rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the state of opening of proceedings (Article 7 I of the European Insolvency Regulation).

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property are governed solely by the law of the Member State within the territory of which the immovable property is situated (Article 8 of the European Insolvency Regulation). Such effects on employment contracts and relationships are governed solely by the law of the Member State applicable to the contract of employment (Article 10 of the European Insolvency Regulation). The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register are determined by the law of the Member State under the authority of which the register is kept (Article 11 of the European Insolvency Regulation). Article 13 of the European Insolvency Regulation deals with detrimental acts. The protection of third-party purchasers is dealt with in Article 14 of the European Insolvency Regulation. The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested are governed solely by the law of the Member State in which that lawsuit is pending (Article 15 of the European Insolvency Regulation).

[303] For further details see *Kindler,* in: Münchener Kommentar, Article 5 of the European Insolvency Regulation, margin Nos. 255 *et seq.*

Pursuant to Article 28 of the European Insolvency Regulation secondary proceedings are governed by the *lex fori concursus* as well. Save as otherwise provided in the European Insolvency Regulation, the law applicable to secondary proceedings is that of the Member State within the territory of which the secondary proceedings are opened (Article 28 of the European Insolvency Regulation).

2.3 Relationship to German Autonomous International Insolvency Law

So far as the territory of the European Insolvency Regulation is not concerned[304] the national autonomous international insolvency law of a Member State, for example Germany, is applicable. It is possible that in one and the same case both the European Insolvency Regulation and the national autonomous international insolvency law of a Member State is applicable. Therefore, in one and the same case both the European international insolvency law and the German international insolvency law can be applicable. This may cause problems due to their different rules for interpretation.

3 German Autonomous International Insolvency Law

3.1 Article 102 of the *Einführungsgesetz zur Insolvenzordnung*

Both secs 335 to 358 of the InsO and Article 102 secs 1 to 11 of the EGInsO were implemented into German law in 2003 in the course of the reform of the German international insolvency law[305]. Article 102 of the EGInsO does not implement the European Insolvency Regulation but only contains executive rules which aim at simplifying the application of this regulation. In conflicting situations the rules of the European Insolvency Regulation enjoy priority over those of Article 102 of the EGInsO. Furthermore, the latter is only applicable within the scope of the European Insolvency Regulation. But, in relation to third countries (non-Member States) the German autonomous international insolvency law, laid down in secs 335 to 358 of the InsO, is applicable. If the European Insolvency Regulation and the executive rules contained in Article 102 secs 1 to 11 of the EGInsO do not cover the facts of a concrete case secs 335 to 358 of the InsO are applicable. In so far an *"Ergänzungsverhältnis"* (supplemental relationship) is existing.

3.2 Secs 335 to 358 of the *Insolvenzordnung*

The German legislature has been influenced by the European Insolvency Regulation. Secs 335 to 358 of the InsO are applicable to insolvency proceedings which have been opened after 20th March 2003 and have an international connection to third countries, *i.e.* countries which are not countries for which the European Insolvency Regulation is applicable. With regard to such insolvency proceedings which have been opened before the mentioned date still Article 102 of the EGInsO in its old version is applicable.

The basic provision of German international insolvency law is sec 335 of the InsO. This section codifies the *lex fori concursus.* Save as otherwise provided, the law applicable to insolvency proceedings and their effects is that of the state within the territory of which such proceedings are opened (sec 335 of the InsO). The term "effects of insolvency proceedings" encompasses the applicable rules of the country within the territory of which the insolvency proceeding is opened. "Effects" means the specific legal consequences of the opening of

---

[304] See chapter VIII.2.1 and chapter VIII.2.2.

[305] Both sets of rules were implemented by the *Gesetz zur Neuordnung des Internationalen Insolvenzrechts* of 14th March 2003 which entered into force on 20th March 2003.

insolvency proceedings in accordance with substantive law. The catalogue of Article 4 II of the European Insolvency Regulation serves as a guideline for the interpretation with respect thereto. In this connection the purpose of insolvency proceedings is of importance.

As *allseitige* (universal) conflict of laws rule sec 335 of the InsO is applicable with regard to the effects of both domestic and foreign insolvency proceedings. On the one hand, basically, insolvency proceedings which are opened in a foreign country are also recognised in Germany. On the other hand in case of opening of insolvency proceedings in Germany German law is decisive. The purpose of sec 335 of the InsO is the equal treatment of all creditors.

While sec 335 of the InsO is the *Grundsatzkollisionsnorm* (principal conflict of laws rule) secs 336 *et seq* of the InsO deal with exceptions thereto. Special rules apply to contracts relating to immovable property. The effects of insolvency proceedings on a contract conferring a right with respect to immovable property or a right to make use of such property are governed by the law of the country within the territory of which the immovable property is situated (sec 336 of the InsO). The qualification as immovable property is determined by the *lex rei sitae.* Sec 336 of the InsO encompasses both obligatory contracts and *dingliche Verträge* (contracts *in rem).*

The idea of protection of employees in acordance with labour law requires special provisions regarding employment relationships. The effects of insolvency proceedings on employment relationships are governed by the law which is the applicable law for employment relationships (sec 337 of the InsO).

A creditor's claim to set-off is not affected by the opening of insolvency proceedings, if he is entitled to set-off pursuant to the law applicable to the debtor's claim at the time of the opening of insolvency proceedings (sec 338 of the InsO). This is not a special conflict of laws rule but a rule of substantive law. In contrast thereto, German law encompasses a conflict of laws rule for challenging an act in case of insolvency proceedings. Such an act can be challenged, if the preconditions for a challenge in accordance with the law of the country within the territory of which such proceeding was opened, are met, unless the person who benefitted from the act detrimental to all the creditors provides proof that the said act is subject to the law of another country and that law does not allow any means of challenging that act (sec 339 of the InsO).

Another important issue in connection with insolvency proceedings are *dingliche Rechte* (rights *in rem).* They are protected by sec 351 of the InsO by restricting the doctrine of universality. This section is not a conflict of laws rule but a rule of substantive law. The rights *in rem* of a third party with respect to an asset being part of the insolvency estate which at the time of the opening of insolvency proceedings in a foreign country was situated in Germany and which according to domestic law provides a claim for *Aussonderung* (segregation[306]) or *Absonderung* (separation[307]), is not affected by the opening of foreign proceedings (sec 351 of the InsO).

It is common view in German academic literature that the law applicable to the creation of third party rights regarding assets located outside Germany is determined by the laws of the country where the asset is located *(e.g.* in case of chattels the *lex rei sitae)* or the laws of the country otherwise applicable to such asset (in case of receivables or contracts the *lex causae).* However, it is disputed among German insolvency law commentators which law is applicable in determining whether such third party rights created under non-German law provide a right of segregation in German insolvency proceedings. Generally, it is the *lex fori concursus* that determines which assets form part of the insolvency estate. As a

[306] See sec 47 of the InsO.
[307] See sec 49 *et seq* of the InsO.

consequence, various commentators take the view that the *lex fori concursus* would also have to decide which consequences a certain right *in rem* would have in insolvency proceedings, *e.g.* whether it would entitle a third party to claim segregation of certain assets from the insolvency estate[308]. Other authors take the view that the *lex causae* is decisive[309]. A third group of legal commentators is of the opinion that the *lex fori concursus* and the *lex causae* should be combined so that with respect to an asset that is located in a state other than Germany, German insolvency law is applicable but only to the extent that German insolvency law does not restrict the creditors' rights in a more rigorous way than they would be restricted by the insolvency laws of the *leges causae* identified in accordance with the view set out by the second group of authors mentioned above[310]. There is no case law available with regard to the question of applicable law in connection with the right of segregation.

IX Bills of Exchange and Cheques

1 Bills of Exchange

1.1 Sources of Private International Law for Bills of Exchange

The German conflict of laws rules with regard to bills of exchange, including promissory notes, are based on the Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes. They are laid down in Articles 91 to 98 of the *Wechselgesetz* (Bills of Exchange Act, the "WG"). These provisions are applicable without any restriction not only in relation to such countries which are parties of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes[311]. The conflict of laws rules in Articles 91 to 98 of the WG are incomplete. Thus, they have to be completed by the conflict of laws rules of the EGBGB and universally accepted principles of private international law.

1.2 Choice of Law

It is permitted to agree on the laws of a certain jurisdiction[312] either by an express or by an implied choice of law[313]. However, an implied choice of law needs some indication on the bill of exchange itself in order to have legal effect in relation to a third party, for example, by an additional note "liability under German law". As between the parties to the bill of exchange the applicable law can be agreed upon without any formal requirements or such an indication note[314]. The incorrect statement of a place in a foreign country does not create any obligations under the laws of such country.

1.3 Capacity of Person to Bind Himself by Bills of Exchange

The capacity of a person to bind himself by a bill of exchange or promissory note is determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law is applicable (Article 91 I of the WG). As regards

---

[308] See, for example, *Kirchhof,* WM 1993, pp. 1401, 1404.
[309] See, for example, *Reinhart,* in: *Münchener Kommentar zur Insolvenzordnung,* margin No. 76.
[310] See, for example, *Prütting,* in: *Kübler/Prütting,* sec 335 of the InsO, margin No. 44 *et seq.*
[311] BGHZ 21 pp. 155, 157.
[312] BGH WM 1988 p. 816.
[313] BGH WM 1974 p. 558.
[314] BGHZ 99 pp. 207, 210; 104 pp. 145, 149; BGH WM 1993 p. 2119; NJW 1994 p. 187.

corporations and partnerships, the *Gesellschaftsstatut*[315] (law applicable to the organisation of corporations and partnerships) is decisive. A person who lacks capacity, as described above, is nevertheless bound, if his signature has been given in any territory in which, according to the law in force there, he would have the requisite capacity. The provision mentioned above is not applicable in case a domestic person has assumed the obligation in a foreign country (Article 91 II of the WG).

1.4 Form of Contract Arising out of Bills of Exchange

The form of any contract arising out of a bill of exchange or promissory note is regulated by the laws of the territory in which the contract has been signed (Article 92 I of the WG). If, however, the obligations entered into by means of a bill of exchange or promissory note are not valid according to this principle, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstance that the previous contracts are irregular in form does not invalidate the subsequent contract (Article 92 II of the WG). A contract arising out of a bill of exchange or a promissory note which a domestic person has signed in a foreign country is valid in his home-country in relation to another person of the same home-country, if the formal requirements of the law of their home-country are met (Article 92 III of the WG). Article 92 of the WG only sets out the formal requirements of a bill of exchange. The substantive effects of a contract arising out of a bill of exchange are governed by the laws of the country in which the bill of exchange or the promissory note is payable[316]. Article 92 II of the WG is based on the principle of independence of each obligation arising under a bill of exchange. Article 92 III of the WG states that a bill of exchange or promissory note is legally binding as between the parties to such instrument in such domestic cases as are described therein. However, in foreign countries the declarations made on a bill of exchange or promissory note are void in their entirety if formal requirements are not met.

1.5 Effects of Obligations under Bills of Exchange

The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place in which these instruments are payable. The effects of the signatures of the other parties liable on a bill of exchange or promissory note are determined by the laws of the country where the signatures were affixed (Article 93 of the WG). Thus, the effects of a bill of exchange and a promissory note are partly determined by the law of the place where the bill of exchange is payable and partly by the law where the signatures have been made. They are independent of the law which regulates the formal requirements[317]. Effects in the sense mentioned above comprise every aspect which concerns the liability of a signatory, for example, the kind and scope of the legal obligations, the admissibility and effects of objections[318], claims based on unjust enrichment, the necessity of measures (such as protest[319]) to preserve a legal status and the statute of limitations. Article 93 of the WG is not a mandatory rule.

1.6 Time Limit, Acquisition of Debt, Restriction of Acceptance, Protest, Loss and Theft

The limits of time for the excercises of rights of recourse are determined for all signatories by the law of the place where the instrument was created (Article 94 of the WG). The question

---

[315] See chapter VII.5.
[316] BGH WM 1999 pp. 1561, 1562.
[317] BGH WM 1999 pp. 1561, 1562.
[318] KG Berlin WM 2002 pp. 2093, 2094; 2006 p. 1281.
[319] BGH WM 1999 pp. 1561, 1562; OLG Saarbrücken WM 1998 pp. 833, 837; LG Mainz WM 1975 pp. 149, 152.

whether the holder of a bill of exchange shall acquire the debt which has given rise to the issue of the instrument is determined by the law of the place where the instrument was issued (Article 95 of the WG). The question whether acceptance may be restricted to part of the sum or whether the holder is bound to accept partial payment or not is governed by the law of the country in which the bill of exchange is payable. The same rule governs the payment of promissory notes (Article 96 of the WG). The form of and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken (Article 97 of the WG). The measures to be taken in case of the loss or theft of a bill of exchange or promissory note are determined by the law of the country in which the bill of exchange or promissory note is payable (Article 98 of the WG).

2 Cheques

2.1 Sources of Private International Law for Cheques

The German conflict of laws rules with regard to cheques are based on the Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques. They are laid down in Articles 60 to 66 of the *Scheckgesetz* (Cheques Act, the "SchG"). These provisions are applicable without any restriction not only in relation to such countries which are party to the mentioned convention. The conflict of laws rules in Articles 60 to 66 of the SchG are incomplete and therefore need to be supplemented by the general conflict of laws rules applicable in Germany and universally accepted principles of private international law.

2.2 Choice of Law

The agreement on the laws of a certain country is permitted. However, an implied choice of law has to find some indication on the cheque itself in order to have legal effect in relation to third parties, for example by an additional note "liability under German law". A choice of law can also be agreed impliedly[320]. The incorrect statement of a place in a foreign country does not create any obligations under the laws of such country.

2.3 Capacity of Person to Bind Himself by Cheques

The capacity of a person to bind himself by a cheque is determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law is applicable (Article 60 I of the SchG). A person who lacks capacity, as described above, is nevertheless bound if his signature has been given in any territory in which, according to the law in force there, he would have the requisite capacity. This provision is not applicable in case a domestic person has assumed the obligation in a foreign country (Article 60 II of the SchG). In this regard the same principles apply as for bills of exchange.

2.4 Persons on Whom Cheques May Be Drawn

The law of the country in which the cheque is payable determines the persons on whom a cheque may be drawn. If, under this law, the instrument is not valid as a cheque by reason of the person on whom it is drawn, the obligations arising out of the signatures affixed thereto in other countries whose laws provide otherwise are nevertheless valid (Article 61 of the SchG).

---

[320] BGH WM 1974 p. 558; OLG Hamm NJW-RR 1992 p. 499.

2.5 Form of Contract Arising out of Cheques

The form of any contract arising out of a cheque is governed by the laws of the territory in which the contract has been signed. Nevertheless, it is sufficient if the forms prescribed by the law of the place of payment are observed (Article 62 I of the SchG). If, however, the obligations entered into by means of a cheque are not valid according to this principle, but are in conformity with the laws of the territory in which a subsequent contract has been entered into, the circumstance that the previous contracts are irregular in form does not invalidate the subsequent contract (Article 62 II of the SchG). A contract arising out of a cheque which a domestic person has signed in a foreign country is valid in his home-country in relation to another person of the same home-country, if the formal requirements of the law of their home-country are met (Article 62 III of the SchG).

2.6 Effects of Obligations under Cheques, Time Limit, Protest and Different Issues Regarding Cheques

The law of the country in whose territory the obligations arising out of a cheque have been assumed determines the effects of such obligations (Article 63 of the SchG). The limits of time for the exercise of rights of recourse are determined for all persons who assumed any obligation under a cheque by the law of the place where the instrument was created (Article 64 of the SchG).

The law of the country in which the cheque is payable determines:

- whether a cheque must necessarily be payable at sight or whether it can be drawn payable at a fixed period after sight, and also what the effects are of the post-dating of a cheque;
- the limit of time for presentment;
- whether a cheque can be accepted, certified, confirmed or visaed, and what the effects are respectively of such acceptance, certification, confirmation or visa;
- whether the holder may demand, and whether he is bound to accept, partial payment;
- whether a cheque can be crossed or marked either with the words *“nur zur Verrechnung”* (“payable in account”) or with some equivalent expression, and what the effects are of such crossing or of the words *“nur zur Verrechnung”* or any equivalent expression;
- whether the holder has special rights to the cover and what the nature is of these rights;
- whether the drawer may countermand payment of a cheque or take proceedings to stop its payment (opposition);
- the measures to be taken in case of loss or theft of a cheque; and
- whether a protest or any equivalent declaration is necessary in order to preserve the right of recourse against the endorsers, the drawer and the other parties liable (Article 65 of the SchG).

The form of and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning cheques, are regulated by the law of the country in whose territory the protest must be drawn up or the measures in question taken (Article 66 of the SchG).

X Jurisdiction

A particularity of German law is that the question whether a court has power to hear and determine the matter is usually not treated as part of conflict of laws. Also in this book this issue is dealt with only very briefly. In principle, the autonomous German law does not provide special rules concerning questions of international jurisdiction. Generally,

international jurisdiction is given when a local venue is established by applying the rules of the *Zivilprozessordnung* (Civil Procedure Rules, the "ZPO"), unless they are excluded by the Council Regulation (EC) 44/2001 of 22nd December 2000 (Brussels I Regulation) which entered into force on 1st March 2002 for all Member States[321] such as Germany. In Germany the Brussels I Regulation is directly applicable and replaced the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27th September 1968 (Brussels Convention). The Brussels I Regulation made some changes to the Brussels Convention, but it is still very similar. In some legal areas, at least, the reciprocal enforcement of foreign judgments is now more straightforward. The Brussels I Regulation enjoys priority over the German civil procedure rules. In most cases questions of international jurisdiction are regulated by the provisions of this regulation.

In addition, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16th September 1988 (Lugano Convention) is binding for Germany in relation to states of the European Free Trade Area (EFTA). The Lugano Convention which has been developed as parallel convention to the Brussels Convention entered into force for Germany on 1st March 1995. This convention contains in its Article 54B a provision which determines the relationship to the Brussels Convention and still has to be adjusted with respect to the Brussels I Regulation. The latter enjoys priority over the Lugano Convention. All three legal instruments are broadly similar in content but there are some differences. In general, it is the domicile of the defendant that determines which of these instruments applies in a given case.

In Germany both above mentioned conventions are supplemented by the *Anerkennungs- und Vollstreckungsausführungsgesetz* (Act relating to Execution of Recognition and Enforcement, the "AVAG") which is an *Ausführungsgesetz* (implementing statute). Also this act has still to be adjusted with regard to the Brussels I Regulation.

Selected Bibliography

I. Commentaries

Baumbach/Hefermehl/Casper, *Wechselgesetz und Scheckgesetz* (2008)
Kropholler, *Europäisches Zivilprozeßrecht* (2005)
Looschelders, *Internationales Privatrecht. Art. 3-46 EGBGB* (2000)
Münchener Kommentar, *Bürgerliches Gesetzbuch, Internationales Privatrecht* (2004)
Münchener Kommentar, *Bürgerliches Gesetzbuch, Internationales Wirtschaftsrecht* (2004)
Palandt, *Bürgerliches Gesetzbuch* (2008)
Paulus, *Europäische Insolvenzordnung* (2008)
Prölss/Martin, *Versicherungsvertragsgesetz* (2004)
Schmidt, *Hamburger Kommentar zum Insolvenzrecht* (2006)

II. Textbooks

von Bar, *Internationales Privatrecht II: Besonderer Teil* (1991)
von Bar/Mankowski, *Internationales Privatrecht I: Allgemeine Lehre* (2003)
Ferid, *Internationales Privatrecht* (1986)
Hirte/Bücker, *Grenzüberschreitende Gesellschaften* (2006)
von Hoffmann/Thorn, *Internationales Privatrecht* (2005)
Junker, *Internationales Privatrecht* (1998)
Kegel/Schurig, *Internationales Privatrecht* (2004)

[321] Except for Denmark.

Kindler, *Einführung in das neue IPR des Wirtschaftsverkehrs* (2009)
Kropholler, *Internationales Privatrecht* (2006)
Lüderitz, *Internationales Privatrecht* (1992)
Siehr, *Internationales Privatrecht* (2001)
Vorpeil, *Internationales Privatrecht* (1997)