The Protection of Third Party Interests in German Private International Law

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§ 1. Introduction

In consequence of the Europeanization of private international law in the form of regulations and in light of the numerous international conventions which include conflict rules, national codifications of private international law have suffered a major decline in importance over the last decade. Nevertheless, whole areas of law as well as single questions expressly taken out of the European regulations' scopes still fall under the responsibility of national legislators[2].

With regard to the subject-matter of this volume – the protection of third party interests – four topics of German private international law deserve particular attention: proprietary rights (II.), the authority of agents (III.), matrimonial property regimes and property consequences of registered partnerships (IV.), and torts (V.).

In German doctrine, third party interests are often labelled *Verkehrsinteressen*[3], a term that proves difficult to translate meaningfully into English and that is also endowed with great prominence in substantive law, especially in the context of property law, the law of agency, and the law of unjustified enrichment[4]. Its exact sense is far from certain and it can have different meanings in different

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[2] For a survey on the current and future role of national conflict-of-laws codifications, see *E. Jayme*, Die künftige Bedeutung der nationalen IPR-Kodifikationen, IPRax 2017, 179. The national rules, which were replaced by the European regulations, still govern older cases to which the European regimes do not apply temporally.

[3] Cf. the distinction between *Parteiinteressen* (party interests) and *Verkehrsinteressen* drawn by *G. Kegel/K. Schurig*, Internationales Privatrecht, 9th ed. 2004, § 2 II (p. 135 ff.).

[4] *L. Rademacher*, Verkehrsschutz im englischen Privatrecht, 2016, p. 1 ff., 238. The suggested translation there, albeit in the context of substantive law, is "protection of expectations in commercial transactions" or "security of receipt".

contexts. In the present context of third party interests, however, it is important to note that the concept is by no means restricted to multi-party situations but also encompasses, for instance, the reliance of a party on his contractual partner's statements. With Art. 12 EGBGB, German private international law includes a provision which is dedicated to *Verkehrsschutz* in two-party situations by preventing a party to invoke his lack of legal capacity or capacity to contract under the law of his personal status, unless the other party knew or ought to have known of the lack of capacity[5].

The protection of third parties is addressed explicitly in the private international law of matrimonial property regimes and property consequences of registered partnerships (Art. 16, 17b EGBGB), in the private international law of torts (Art. 42 EGBGB), and in the (presumably) soon to be enacted private international law of agency (Art. 8 EGBGB). Third party interests also lie at the foundation of international property law, although third parties do not find special mention in Art. 43–46 EGBGB.

§ 2. Proprietary Rights

Property rights, in principle, entail an entitlement towards all members of the legal community *(erga omnes)* under substantive law. They are enforceable against anybody who commits an infringement. Therefore, there is an interest in society as a whole to have the ability to verify easily the law applicable to proprietary rights. At the same time, a third party may intend to acquire a propriety right and consequentially has an interest in determining the requirements for the transaction and the scope of the rights vested. Once a proprietary right, e.g. a security right, has been acquired, the question arises whether and to what extent this right can be lost or modified through a change of the applicable law. Furthermore, creditors in an international case may strive to determine the debtor's available property with regard to debt enforcement and insolvency proceedings. To summarize, third parties have an interest not to suffer a legal disadvantage in relation to a proprietary right through the application of an unexpected law[6].

To promote third party interests, German international property law is pervaded by the publicity of connecting factors and thus by the principles of

[5] For an in-depth account, see *G. Fischer*, Verkehrsschutz im internationalen Vertragsrecht, 1990, p. 24 ff.; *U. Spellenberg*, [in:] Münchener Kommentar, BGB, 6th ed. 2015, Art. 12 EGBGB no. 1 ff., Art. 13 Rom I-VO no. 1 ff.

[6] *H.-P. Mansel*, [in:] Staudinger, BGB, new ed. 2015, Art. 43 EGBGB no. 24 f.

foreseeability and legal certainty[7]. With Art. 43–46 EGBGB, the legislator in 1999 enacted concise provisions which codified previous case law and academic legal opinion[8].

I. Overview

In accordance with the traditional principle of international property law, the law applicable to property is determined by the property's location *(lex rei sitae)*, unless there is a significantly closer connection to another jurisdiction (escape clause of Art. 46 EGBGB). Therefore, the basic connection established in Art. 43 para. 1 EGBGB is convertible. If property is moved to the territory of another state, the applicable law changes accordingly. Such a change of applicable law can easily occur with chattels when they are taken across the border but it can also be brought about both for movable and immovable property when national borders are moved, as, e.g., with the annexation of Crimea by Russia in 2014 or the exchange of land between Belgium and the Netherlands in the Lower Meuse region in 2016.

Article 43 para. 2 EGBGB reveals that proprietary rights vested before the change of applicable law continue to exist in the new location or within the altered borders. However, the new applicable law may restrict the scope and exercise of such previously acquired rights. Problems can arise when a proprietary right is unknown under the new applicable law and this jurisdiction follows the *numerus clausus* principle according to which only distinctly specified types of proprietary rights exist. The foreign proprietary right then has to be nostrified under the new applicable law, i.e. adapted in some form to the currently relevant jurisdiction. The exact mode of adaption has been the subject of debate. According to the prevailing opinion, a foreign proprietary right generally is perpetuated but its legal effects are aligned with those of a functionally equivalent domestic proprietary right[9].

A different situation is addressed in Art. 43 para. 3 EGBGB. The provision is concerned with incomplete acquisitions in an international setting. When property is moved to a new location, legally relevant facts which have occurred in the jurisdiction of origin are to be taken into account under the new *lex*

[7] *Kegel/Schurig* (fn. 3), § 2 II 2 (p. 138), § 19 I (p. 765); *Mansel* (fn. 6), Art. 43 EGBGB no. 25; *C. Wendehorst*, [in:] Münchener Kommentar, BGB, 6th ed. 2015, Vorbemerkung zu Art. 43 EGBGB no. 12; *A. Spickhoff*, [in:] Beck'scher Online-Kommentar, BGB, 41st ed. 2016, Art. 43 EGBGB no. 3.

[8] *Mansel* (fn. 6), Art. 43 EGBGB no. 83 ff.; *Wendehorst* (fn. 7), Vorbemerkung zu Art 43 EGBGB no. 14 ff.; *Spickhoff* (fn. 7), no. 1.

[9] *Mansel* (fn. 6), Art. 43 EGBGB no. 1254 ff.; *Wendehorst* (fn. 7), Art. 43 EGBGB no. 152 f.; *Spickhoff* (fn. 7), Art. 43 EGBGB no. 13.

rei sitae as if they had taken place there. Yet, a change of the applicable law cannot automatically remedy a previously incomplete acquisition. Rather, all requirements for the acquisition in question must be complied with under the new applicable law[10].

Special rules of German international property law apply to nuisance claims in relation to immovable property (Art. 44 EGBGB) and to aircraft, vessels, and railway vehicles (Art. 45 EGBGB).

II. Third Party Interests

As mentioned above, the guiding principles of German international property law are legal certainty and predictability – both are envisaged to work to the third party's advantage. Thus, the pivotal connecting factor according to Art. 43 para. 1 EGBGB is the property's location which the legislator assumes to be easily recognizable for third parties in most cases. For this reason, neither the owner nor the parties to a proprietary transaction are eligible to choose the applicable law[11], making international property law one of the few areas of conflict of laws where party autonomy still does not reign supreme. The determinability of the applicable law on the basis of an obvious, objective criterion is considered to help both third parties who intent to acquire proprietary rights as well as those who could possibly incur liability for interference with someone else's property. It also facilitates the identification of the applicable law for creditors who want to recover proprietary assets.

The *lex rei sitae* is considered to be the law which, under ordinary circumstances, has the closest connection to proprietary rights. If, under the peculiarities of the case, the application of the *lex rei sitae* appears accidental and another jurisdiction is significantly closer connected to the given facts, the escape clause of Art. 46 EGBGB provides for an alternative connection to the more adequate law. A typical example are goods which are transported across several states *(res in transitu)*. Third party interests, however, may set boundaries to the application of the escape clause. As a general rule, a deviation from the *lex rei sitae* is admissible only when the interests of third parties are not discriminated against as a result of the application of another law[12]. Therefore, the application of the escape clause is usually restricted to issues of property law in an *inter partes* relationship.

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[10] *Kegel/Schurig* (fn. 3), § 19 III (p. 773); *Mansel* (fn. 6), Art. 43 EGBGB no. 747 ff.; *Spickhoff* (fn. 7), Art. 43 EGBGB no. 16 f.

[11] Federal Court of Justice (*Bundesgerichtshof* – BGH), judgment of 25.9.1996 – VIII ZR 76/95, NJW 1997, 461; *Mansel* (fn. 6), Art. 43 EGBGB no. 14; *Wendehorst* (fn. 7), Art. 46 EGBGB no. 18.

[12] *Mansel* (fn. 6), Art. 46 EGBGB no. 40; *Wendehorst* (fn. 7), Art. 46 EGBGB no. 22.

From the perspective of a third party who holds a proprietary right, the conflict-of-laws rule of Art. 43 para. 2 EGBGB is a safeguard against the loss of said right through a change of the applicable law. The right's scope and content is preserved as far as the new applicable law does not oppose its exercise (Art. 43 para. 2 EGBGB). Types of rights which domestic law does not know and which it cannot adopt one-to-one due the *numerus clausus* of substantive property law are transposed to sustain their character as far as possible[13]. Of course, the recognition of proprietary rights from another member state can also be a requirement of EU primary law[14].

Functionally related to Art. 43 para. 2 EGBGB is the provision's para. 3. Third parties who have initiated a process for the acquisition of a proprietary right do not lose the requirements which they accomplished to fulfil under the former *lex rei sitae* after a change of the applicable law.

§ 3. Authority of Agents

A typical multi-party situation arises when a party to a transaction employs the services of an agent. Despite the indisputable relevance of agency also in the international context, the German (as well as the European[15]) legislator had handed over the task of determining the applicable law to the courts and legal doctrine and had always refrained from laying down a conflict-of-laws rule. Until now. Based on a resolution adopted by the German Council for Private International Law *(Deutscher Rat für Internationales Privatrecht)*[16], the German Federal Ministry of Justice and Consumer Protection *(Bundesministerium der Justiz und für Verbraucherschutz)* in August 2016 submitted a bill to amend the EGBGB in the to date uncodified area of agency in private international law[17].

[13] For examples from case law, see *Mansel* (fn. 6), Art. 43 EGBGB no. 1255 ff.; *Spickhoff* (fn. 7), Art. 43 EGBGB no. 13.

[14] See chapter *A. Kozioł*, Ochrona osób trzecich w kolizyjnym prawie rzeczowym, p. 150–154 of this book.

[15] Art. 1 para. 2 lit. g Rome I-Regulation distinctly "excludes the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party" from the regulation's scope.

[16] A preparatory paper for the German Council, including a draft of the provision, was published by the rapporteur *A. Spickhoff*: Kodifikation des Internationalen Privatrechts der Stellvertretung, RabelsZ 80 (2016), 481. See also *J. von Hein*, Beschluss der Zweiten Kommission des Deutschen Rats für Internationales Privatrecht zu dem auf die Vollmacht anwendbaren Recht, IPRax 2015, 578.

[17] Available online at http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Internationales_Privat_und_Zivilverfahrensrecht.html. It can also be found in IPRax 2016, issue 5, p. II (Neueste Informationen).

In a marginally amended form[18], the proposal has been adopted by German Federal Parliament *(Deutscher Bundestag)* in March 2017[19] and presumably will have entered into force in the following form before this paper has been published:

"Gewillkürte Stellvertretung

(1) Auf die gewillkürte Stellvertretung ist das vom Vollmachtgeber vor der Ausübung der Vollmacht gewählte Recht anzuwenden, wenn die Rechtswahl dem Dritten und dem Bevollmächtigten bekannt ist. Der Vollmachtgeber, der Bevollmächtigte und der Dritte können das anzuwendende Recht jederzeit wählen. Die Wahl nach Satz 2 geht derjenigen nach Satz 1 vor.

(2) Ist keine Rechtswahl nach Absatz 1 getroffen worden und handelt der Bevollmächtigte in Ausübung seiner unternehmerischen Tätigkeit, so sind die Sachvorschriften des Staates anzuwenden, in dem der Bevollmächtigte im Zeitpunkt der Ausübung der Vollmacht seinen gewöhnlichen Aufenthalt hat, es sei denn, dieser Ort ist für den Dritten nicht erkennbar.

(3) Ist keine Rechtswahl nach Absatz 1 getroffen worden und handelt der Bevollmächtigte als Arbeitnehmer des Vollmachtgebers, so sind die Sachvorschriften des Staates anzuwenden, in dem der Vollmachtgeber im Zeitpunkt der Ausübung der Vollmacht seinen gewöhnlichen Aufenthalt hat, es sei denn, dieser Ort ist für den Dritten nicht erkennbar.

(4) Ist keine Rechtswahl nach Absatz 1 getroffen worden und handelt der Bevollmächtigte weder in Ausübung seiner unternehmerischen Tätigkeit noch als Arbeitnehmer des Vollmachtgebers, so sind im Falle einer auf Dauer angelegten Vollmacht die Sachvorschriften des Staates anzuwenden, in dem der Bevollmächtigte von der Vollmacht gewöhnlich Gebrauch macht, es sei denn, dieser Ort ist für den Dritten nicht erkennbar.

(5) Ergibt sich das anzuwendende Recht nicht aus den Absätzen 1 bis 4, so sind die Sachvorschriften des Staates anzuwenden, in dem der Bevollmächtigte von seiner Vollmacht im Einzelfall Gebrauch macht (Gebrauchsort). Mussten der Dritte und der Bevollmächtigte wissen, dass von der Vollmacht nur in einem bestimmten Staat Gebrauch gemacht werden sollte, so sind die Sachvorschriften dieses Staates anzuwenden. Ist der Gebrauchsort für den Dritten nicht erkennbar, so sind die Sachvorschriften des Staates anzuwenden, in dem der Vollmachtgeber im Zeitpunkt der Ausübung der Vollmacht seinen gewöhnlichen Aufenthalt hat.

(6) Auf die gewillkürte Stellvertretung bei Verfügungen über Grundstücke oder Rechte an Grundstücken ist das nach Artikel 43 Absatz 1 und Artikel 46 zu bestimmende Recht anzuwenden.

(7) Dieser Artikel findet keine Anwendung auf die gewillkürte Stellvertretung bei Börsengeschäften und Versteigerungen.

(8) Auf die Bestimmung des gewöhnlichen Aufenthalts im Sinne dieses Artikels ist Artikel 19 Absatz 1 und 2 erste Alternative der Verordnung (EG) Nr. 593/2008 mit der Maßgabe anzuwenden, dass an die Stelle des Vertragsschlusses die Ausübung der Vollmacht tritt. Artikel 19 Absatz 2 erste Alternative der Verordnung (EG) Nr. 593/2008 ist nicht anzuwenden, wenn der nach dieser Vorschrift maßgebende Ort für den Dritten nicht erkennbar ist."

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[18] Official Records of Parliament *(Bundestag Drucksache)* 18/10714, p. 12 f., 24 ff.; 18/11637, p. 3. See also Official Records of the Federal Council *(Bundesrat Drucksache)* 653/16, p. 7, 22 ff., and 653/16 (*Beschluss*). All documents are available online.

[19] Plenary Minutes of the German Federal Parliament *(Plenarprotokoll)* 18/225, p. 22629 f., 22658 ff. (available online).

English translation provided by http://conflictoflaws.net:

"Agent's authority granted by contract

(1) An agent's authority is governed by the law chosen by the principal before the agency is exercised, if the choice of law is known to both agent and third party. Principal, agent and third party are free to choose the applicable law at any time. The choice of law according to Sentence 2 of this Paragraph takes precedence over Sentence 1.
(2) In the absence of a choice under Paragraph 1 and if the agent acts in exercise of his commercial activity, the agent's authority is governed by the substantive provisions of the country in which the agent has his habitual residence at the time he acted, unless this country is not identifiable by the third party.
(3) In the absence of a choice under Paragraph 1 and if the agent acts as employee of the principal, the agent's authority is governed by the substantive provisions of the country in which the principal has his habitual residence, unless this country is not identifiable by the third party.
(4) If the agent does not act in a way described by Paragraph 2 or 3 and in the absence of a choice under Paragraph 1, a permanent authority between principal and agent is governed by the substantive provisions of the country, in which the agent usually exercises his powers, unless this country is not identifiable by the third party.
(5) If the applicable law does not result from Paragraph 1 through 4, the agent's authority is governed by the substantive provisions of the country in which the agent acts in exercise of his powers. If the third party and the agent must have been aware that the agency should only have been exercised in a particular country, the substantive provisions of this country are applicable. If the country in which the agent acts in exercise of his powers is not identifiable by the third party, the substantive provisions of the country in which the principal has his habitual residence at the time the agent exercises his powers, are applicable.
(6) The law applicable for agencies on the disposition of property or the rights on property is to be determined according to Article 43 Paragraph 1 and Article 46.
(7) This Article does not apply to agencies for exchange or auction.
(8) The habitual residence in accordance with this Article is to be determined in line with Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008, provided that the exercise of the agency replaces contract formation. Article 19, Paragraph 1 and 2, first alternative of Regulation (EG) No. 593/2008 does not apply, if the country according to that Article is not identifiable by the third party."

For the most part, the provision can be characterized as a restatement of previous case law and academic writing[20]. This paper, therefore, will refer to Art. 8 EGBGB when presenting the state of German law, although at the time of writing the provision is not formally good law yet. The general starting point of German private international law of voluntary agency was, is[21], and will be that

[20] *L. Rademacher*, Kodifikation des internationalen Stellvertretungsrechts – Zum Referentenentwurf des Bundesjustizministeriums, IPRax 2017, 56.

[21] Supreme Court of the German Reich (*Reichsgericht* – RG), judgment of 5.12.1896 – I 243/96, RGZ 38, 194, 196; BGH, judgment of 13.7.1954 – I ZR 60/53, NJW 1954, 1561; BGH, judgment of 3.2.2004 – XI ZR 125/03, NJW 2004, 1315, 1316; *Kegel/Schurig* (fn. 3), § 17 V 2 a (p. 621 f.); *G. Hohloch*, [in:] Erman, BGB, 14th ed. 2014, Anhang I zu Art. 12 EGBGB no. 4; *U. Magnus*, [in:] Staudinger, BGB, new ed. 2016, Anhang II zu Art. 1 Rom I-VO no. 10; *R. Doehner*, [in:] NomosKommentar, BGB, 3rd

the law applicable is determined independently both from the transaction in which the agent is envisaged to engage in for the principal and from the internal legal relationship between principal and agent, i.e. an employment contract or mandate.

I. Overview

Article 8 EGBGB applies to agents who were conferred authority by the principal through an autonomous, voluntary legal act. Thus, it applies neither to statutory agents nor to representatives under company law. The provision encompasses the grant of authority and its termination, the authority's scope, and, presumably, the publicity requirements and the admissibility of agency[22]. No unequivocal answer is given on the question whether Art. 8 EGBGB also covers cases of apparent authority, i.e. the appearance of authority attributable to the principal's behaviour, and the liability of an agent without authority, i.e. a *falsus procurator*[23].

In para. 1, the provision admits the choice of the applicable law through the involved parties. According to Art. 8 para. 1 sent. 1 EGBGB, the principal can choose the applicable law unilaterally as long as the agent has not yet utilized the authority. An additional requirement is that the choice of law is known both to the agent and to the third party. The provision's wording leaves open what exactly the principal has to do to effectuate a valid choice of law. The convincing interpretation is that the choice of law is a declaration of intention *(Willenserklärung)* and thus needs to be communicated to both the agent and the third party. Additionally, both are required to have actual knowledge of the choice of law[24]. This additional requirement may seem redundant at first sight, but according to the general doctrines of legal acts *(Rechtsgeschäftslehre)* declarations of legal intention become valid when they are communicated to the recipient, and their communication *(Zugang)* only requires the declaration to reach the recipient's sphere of control with the prospect of actual knowledge of the information incorporated in the declaration under ordinary conditions[25].

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ed. 2016, Anhang zu Art. 11 EGBGB no. 3 ff.; *K. Thorn*, [in:] Palandt, BGB, 76th ed. 2017, Anhang zu Art. 10 EGBGB no. 1; *S. Schwarz*, Das Internationale Stellvertretungsrecht im Spiegel nationaler und supranationaler Kodifikationen, RabelsZ 71 (2007), 729, 756 ff.; all with further references also on contrary views.

[22] *Rademacher*, IPRax 2017, 56 f.

[23] *Rademacher*, IPRax 2017, 56, 57.

[24] *Rademacher*, IPRax 2017, 56, 58 f.

[25] *R. Bork*, Allgemeiner Teil des Bürgerlichen Gesetzbuchs, 4th ed. 2016, no. 603 ff., 619 ff.; *M. Wolf/J. Neuner*, Allgemeiner Teil des Bürgerlichen Rechts, 11th ed. 2016, § 33 no. 10 ff.

Therefore, the requirements established by Art. 8 para. 1 sent. 1 EGBGB ensure that all persons involved acquire actual knowledge of the choice of law for the choice of law to take effect.

Article 8 para. 1 sent. 2 EGBGB allows for a multilateral choice of law between principal, agent, and third party. This tripartite agreement can be made at any time, i.e. also after the agent has acted for the principal, and it overrides a prior unilateral choice of law by the principal, when indicated with retrospective effect.

Absent a choice of law, the applicable law is determined by objective criteria depending on the type of agent. Pursuant to Art. 8 para. 2 EGBGB, the connecting factor for agents acting in the course of their business is their habitual residence at the time of making use of the authority. In the case of an agent who is, in contrast, the employee of his principal, the connecting factor is the principal's habitual residence under Art. 8 para. 3 EGBGB. Again, the relevant time for the assessment of habitual residence is when the agent has acted in exercise of his authority. For the determination of habitual residence, Art. 8 para. 8 EGBGB refers to Art. 19 para. 1, para. 2 alt. 1 Rome I-Regulation. A comparatively small scope of application remains for Art. 8 para. 4 EGBGB which is concerned with permanently authorized agents who are neither acting in the course of their business nor as their principal's employee. Paradigmatic examples are durable powers of attorney within family relationships and for health care. The connecting factor here is the place of the ordinary use of the authority. If none of the above connections apply, the applicable law is determined according to Art. 8 para. 5 sent. 1 by the place in which the agent in the particular cases actually uses the authority *(lex loci actus)*.

It is essential to note, however, especially in the context of the subject-matter of this book, that all of the connections of Art. 8 EGBGB presented so far only apply if the relevant connecting factor (agent's habitual residence, principal's habitual residence, place of the ordinary use of the authority, or place of the actual use of authority) is identifiable for the third party. For this reason, the legislator had to implement a subsidiary connection for cases where the relevant connecting factors were unrecognizable for the third party. According to Art. 8 para. 5 sent. 3 EGBGB, the fallback connecting factor is the principal's habitual residence. This connection applies irrespective of this location's recognizability.

II. Third Party Interests

Against this background, the German legislator's approach to take account of third party interests in the private international law of agency becomes apparent. The main objective of Art. 8 EGBGB is to prevent the application of

a substantive law to the surprise of the third party and to facilitate legal certainty and predictability[26]. The applicable substantive law determines whether and to what extent the agent's acts affect the legal position of the principal and bind him *vis-à-vis* the third party. Therefore, the third party has a legitimate interest in being able to verify in advance the agent's scope of authority. If the agent's authority does not (fully) encompass the transaction in question, the third party may be relegated to a claim (economically often less valuable) against the unauthorized agent as *falsus procurator*.

In consequence, Art. 8 EGBGB, as a general principle, makes the application of a substantive law dependent on the knowledge or recognizability of the relevant connecting factor. In the case of a principal's unilateral choice of law, which theoretically can lead to the application of a substantive law which is totally unrelated to the facts of the case, Art. 8 para. 1 sent. 1 EGBGB thus demands the third party's actual knowledge of the principal's choice of law. Here, the third party is in particular need of protection. A multilateral choice of law pursuant to Art. 8 para. 1 sent. 2 EGBGB requires, *inter alia*, the third party's assent. The application of all objective connecting factors demands their recognizability for the third party, and these connecting factors are indeed easily identifiable under ordinary circumstances and hence allow the third party to ascertain the substantive rules governing the agent's authority. Actual knowledge of the connecting factor, however, is not required. The third party's negligent ignorance, accordingly, does not prevent the determination of the substantive law on the basis of these connecting factors. Only subsidiarily the principal's habitual residence – even if unrecognizable – is decisive if no other connecting factor applies.

Yet, this hierarchical system of recognizable objective connecting factors does not seem to be thought through in all its minutest details and may not invariably lead to convincing results. For instance, when the agent is the principal's employee and there is no choice of law, Art. 8 para. 3 EGBGB applies. The connecting factor according to this provision is the principal's habitual residence. However, for the sake of the third party's protection (!), the provision is not applicable if the principal's habitual residence is unrecognizable for the third party. Consequently, Art. 8 para. 5 sent. 1 EGBGB applies, under which the place of the actual use of authority is material. If this connecting factor is not recognizable either, the applicable law will ultimately be determined by Art. 8 para. 5 sent. 3 EGBGB: At the end of the day, the principal's (unrecognizable) habitual residence prevails as connecting factor. This outcome begs the question

[26] Official Records of Parliament 18/10714, p. 5; *Spickhoff*, RabelsZ 80 (2016), 481, 520 ff.; *von Hein*, IPRax 2015, 578, 580; *Rademacher*, IPRax 2017, 56, 59.

of how strongly the legislator actually feels about protecting third parties from the application of the law of an undisclosed principal's habitual residence as purported in Art. 8 para. 3 EGBGB[27].

Furthermore, undesirable results may be yielded by Art. 8 para. 5 sent. 1 EGBGB and the (subsidiary) application of the *lex loci actus*[28]. Modern means of telecommunication have led to an almost gapless interconnection even of the remotest corners of the world, rendering the possibilities of making contracts at a distance more readily available than ever[29]. In consequence, the current geographical whereabouts of a person may appear more and more arbitrary, and therefore the same may hold true for the place where an agent actually exercises his authority, e.g. the location from where he makes an offer or acceptance on behalf of the principal. Indeed, the objective connection of Art. 8 para. 5 sent. 1 EGBGB requires recognizability of the agent's physical location. Nevertheless, the substantive law of this location may lack any material relevance for the case in question. Suppose an agent is travelling by car or train through a number of countries or that his flight stops over in airports of different states – a *repraesentator in transitu* if you will. If he now utilizes his authority to conclude a distance contract and mentions his current location in a telephone conversion with or an email to the third party, the law of a transit country will govern the validity and scope of the agent's authority and may potentially prevent the third party from acquiring contractual rights against the principal. This result, the invocation of a substantive law without a significant connection the facts of the case, cannot be avoided through an escape clause either, for the simple reason that the legislator has refrained from including one in Art. 8 EGBGB. Apparently, the legislator considered the implemented system of subjective and objective connections with their respective requirements as an adequate solution to balance the interests of all parties involved, and, of course, escape clauses always entail a loss in legal certainty[30]. At the same time, however, areas of private international law in which legal certainty traditionally is held particularly high, like property law (Art. 46 EGBGB, see above) and the law of succession (Art. 21 para. 2 Succession Regulation), provide for escape clauses; they abound in great numbers in the international law of obligations (Art. 4 para. 3, Art. 5 para. 3, Art. 8 para. 4 Rome I-Regulation, Art. 4 para. 3, Art. 5 para. 2, Art. 10 para. 4, Art. 11 para. 4 Rome II-Regulation). Thus, the German legislator's decision to do without an escape clause in the international law of

[27] *Rademacher*, IPRax 2017, 56, 61.
[28] *Rademacher*, IPRax 2017, 56, 62.
[29] *Spickhoff*, RabelsZ 80 (2016), 481, 516, 520 ff.
[30] Cf. *Spickhoff*, RabelsZ 80 (2016), 481, 517 ff.; *von Hein*, IPRax 2015, 578, 580.

agency results is an outlier solution, potentially with negative consequences also for the interests of third parties.

§ 4. Matrimonial Property Regimes and Property Consequences of Registered Partnerships

The heydays of national rules on the private international law of matrimonial property regimes in marriage and property consequences in registered partnerships are counted. Two European regulations are looming on the horizon. From January 19, 2019, the regulations will govern marriages and partnerships contracted henceforth. National legislators are currently contemplating the necessary adjustments for the alignment of national laws and the new European rules[31].

In this volume, the protection of third party rights in the forthcoming European regulations is mentioned in another chapter[32]. Nevertheless, the current German provisions are presented here because they will continue to govern marriages and partnerships entered into before the date the regulations take effect, and they might serve as a point of comparison for the upcoming provisions and give inspiration for the handling of problems which could in a similar way also arise under EU law.

I. Overview

The forthcoming European regulations are based on an understanding of matrimonial property law which is significantly wider than the corresponding concept of *Güterrecht* in German private international law[33]. German law distinguishes between general legal effects of marriage or partnership (*Allgemeine Wirkungen*, Art. 14, 17b para. 1 sent. 1 EGBGB), on the one hand, and the matrimonial property regime (*Güterstand*, Art. 15, 17b para. 1 sent. 1 EGBGB; the term also used in regard to partnerships), on the other.

The general legal effects of marriage or partnership addressed in Art. 14, 17b para. 1 sent. 1 EGBGB are usually defined negatively. They encompass

[31] For a German perspective, see *B. Heiderhoff*, Vorschläge zur Durchführung der EU-Güterrechtsverordnungen, IPRax 2017, 231.

[32] *P. Twardoch*, Ochrona osób trzecich wobec małżeńskiego ustroju majątkowego w prawie prywatnym międzynarodowym, p. 179–185 of this book.

[33] *A. Dutta*, Das neue internationale Güterrecht der Europäischen Union – ein Abriss der europäischen Güterrechtsverordnungen, FamRZ 2016, 1973, 1974; *Heiderhoff*, IPRax 2017, 231, 232 f.

all legal effects for which there is no specific conflict rule[34]. Such preceding connections exist both on the national (Art. 10 EGBGB, family name; Art. 15 EGBGB, matrimonial property regime; Art. 17 para. 3 EGBGB, pension rights adjustment; Art. 19 ff. EGBGB, parent-child relationship) as well as on the European level (Rome III-Regulation, Maintenance Regulation, Succession Regulation). The remaining scope of application for general effects relates to the personal relationship between the spouses or partners and, more importantly in the context of the present book, to certain issues of patrimonial law with external effect, such as spouses' or partners' implied mutual authorization to purchase necessaries, limitations of the right of disposal, and presumptions of ownership[35].

For marriages, Art. 14 para. 1 EGBGB establishes a three-stage system of objective connecting factors which is often referred to as "Kegel's ladder" *(Kegel'sche Leiter)*, named after its inventor *Gerhard Kegel*[36]. Subsidiary connecting factors apply only if the requirements of the higher-ranking connecting factor are not met. These connecting factors relate to the shared nationality of the spouses and their habitual residence, and are supplemented by an escape clause[37]. The connections are dynamic in the sense that they can change *ex nunc* during the course of the marriage, e.g. when spouses change their nationality or relocate to another country. Alternatively, spouses can at all times chose the applicable law under the conditions set out in Art. 14 para. 2–4 EGBGB, which, however, restrict the eligible jurisdictions. In any event, the chosen law must be the law of one spouse's nationality. According to Art. 14 para. 3 sent. 2 EGBGB, the effects of a choice of law end when the spouses acquire a shared nationality. Article 14 para. 4 EGBGB establishes formal requirements for the choice-of-law agreement.

The connection of the general legal effects of partnerships according to Art. 17b para. 1 sent. 1 EGBGB is less complex. The law of the state applies where the register is maintained in which the partnership is recorded. A choice of law remains without effect but partners may have their partnership recorded

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[34] *P. Mankowski*, [in:] Staudinger, BGB, new ed. 2010, Art. 14 EGBGB no. 1; *K. Siehr*, [in:] Münchener Kommentar, BGB, 6th ed. 2015, Art. 14 EGBGB no. 5; *J. Mörsdorf-Schulte*, [in:] Beck'scher Online-Kommentar, BGB, 41st ed. 2013, Art. 14 EGBGB no. 7.

[35] *Mankowski* (fn. 34), Art. 14 EGBGB no. 295 ff.; *Siehr* (fn. 34), Art. 14 EGBGB no. 116 ff.; *Mörsdorf-Schulte* (fn. 34), Art. 14 EGBGB no. 13 ff.

[36] *G. Kegel*, Zur Reform des deutschen internationalen Rechts der persönlichen Ehewirkungen, [in:] W. Lauterbach (ed.), Vorschläge und Gutachten zur Reform des deutschen internationalen Eherechts, 1962, p. 75 ff.

[37] *Kegel/Schurig* (fn. 3), § 20 V 1 a (p. 832 f.); *Mankowski* (fn. 34), Art. 14 EGBGB no. 27 ff.; *Siehr* (fn. 34), Art. 14 EGBGB no. 12 ff.; *Mörsdorf-Schulte* (fn. 34), Art. 14 EGBGB no. 24 ff.

in a particular register and thus indirectly bring about the application of a particular law[38].

Turning to what German law defines as the matrimonial property regime *(Güterstand)* under Art. 15, 17b para. 1 sent. 1 EGBGB, the more restricted conceptualization compared to the forthcoming EU regulations emerges. The matrimonial property regime encompasses the establishment (or absence) of the marital estate and determines which assets are included in the estate, further the estate's management, and its division at the end of the matrimonial property regime, subject to overriding provisions[39]. The application of a matrimonial property regime can be the consequence of a spouses' or partners' matrimonial agreement or determined by statute.

For the connection of matrimonial property regimes in marriages, Art. 15 para. 1 EGBGB refers to the law applicable to the general legal effects of marriage pursuant to Art. 14 para. 1–3 EGBGB. In contrast to the law applicable to the general legal effects of marriage, however, the law governing the matrimonial property regime is static. The relevant point in time is the conclusion of marriage. Subsequent changes in the connecting factors, e.g. through the change of nationality or habitual residence, therefore leave the prior connection unaffected. However, Art. 15 para. 2 EGBGB enables spouses to choose the law of a spouse's nationality or domicile, or for immovable property the law of the property's location. For the choice-of-law agreement, the formal requirements of Art. 14 para. 4 EGBGB apply via Art. 15 para. 3 EGBGB. The choice of law can be made at any time before or during the course of the marriage with *ex-nunc* effect[40].

The connection of the property consequences of registered partnerships is the same as for their general legal effects. According to Art. 17b para. 1 sent. 1 EGBGB, the law of the state applies in which the particular register is maintained without giving the partners the option of directly choosing the applicable law.

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[38] *B. Heiderhoff*, [in:] Beck'scher Online-Kommentar, BGB, 41st ed. 2016, Art. 17b EGBGB no. 18; *M. Coester*, [in:] Münchener Kommentar, BGB, 6th ed. 2015, Art. 17b EGBGB no. 20, 22; *Mankowski* (fn. 34), Art. 17b EGBGB no. 29.

[39] *Kegel/Schurig* (fn. 3), § 20 VI 2 (p. 852 ff.); *Mankowski* (fn. 34), Art. 15 EGBGB no. 231 ff.; *Siehr* (fn. 34), Art. 15 EGBGB no. 59 ff.; *Mörsdorf-Schulte* (fn. 34), Art. 15 EGBGB no. 15 ff.

[40] *Mankowski* (fn. 34), Art. 15 EGBGB no. 107 ff.; *Siehr* (fn. 34), Art. 15 EGBGB no. 28i, 58; *Mörsdorf-Schulte* (fn. 34), Art. 15 EGBGB no. 60 ff.

II. Third Party Interests

With Art. 16 EGBGB, German private international law has devoted a distinct provision to the protection of third parties in the context of the international law on the patrimonial consequences of marriage[41]. The basic idea of Art. 16 EGBGB is that in cases where according to Art. 14 f. EGBGB foreign law applies to the general legal consequences of marriage or to the matrimonial property regime, particular standards of German substantive marital law shall apply nonetheless if there is a domestic context[42]. Third parties are protected in their reliance on the application of domestic rules by preventing spouses from invoking foreign law to the third party's disadvantage. Therefore, Art. 16 EGBGB is sometimes described as functionally related to the exception clause of *ordre public*[43].

Article 16 para. 1 EGBGB addresses the third party's protection in light of the matrimonial property regime connected via Art. 15 EGBGB. When a spouse is habitually residing or runs a business in Germany, a foreign matrimonial property regime can only be invoked against third parties if, pursuant to § 1412 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB[44]), the foreign matrimonial property regime was recorded in the matrimonial property register or when the third party was aware of the application of the foreign matrimonial property regime. According to the German understanding of the concept of matrimonial property regime on which Art. 15 EGBGB is based (see above), the scope of the matrimonial property regime includes the management of the marital estate. Under many national substantive laws, a spouse's dispositions of assets belonging to the marital estate are subject to the other spouse's approval. In some jurisdictions, such rules may entail a discrimination of wives whose legal acts depend on their husband's consent, while husbands are free to dispose of marital property as they see fit. However, even if in principle foreign law governs the matrimonial property regime, according to Art. 16 para. 1 EGBGB and § 1412 BGB the invalidity of the disposition cannot be invoked against the third party if the foreign matrimonial property regime was neither recorded in the matrimonial property register nor known to the third party. In consequence, the third party's reliance on the acquisition from a spouse is protected.

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[41] For an introduction, see *Kegel/Schurig* (fn. 3), § 20 VI 4 (p. 855). More detailed *Fischer* (fn. 5), p. 146 ff.

[42] *Mankowski* (fn. 34), Art. 16 EGBGB no. 1 ff.; *Siehr* (fn. 34), Art. 16 EGBGB no. 1; *Mörsdorf-Schulte* (fn. 34), Art. 16 EGBGB no. 1 ff.

[43] *Mankowski* (fn. 34), Art. 16 EGBGB no. 2.

[44] BGB of 18.8.1896, last amended on 24.5.2016, available online.