RECOGNITION OF A STATUS ACQUIRED ABROAD: GERMANY

RECONOCIMIENTO DE UNA SITUACIÓN JURÍDICA RELATIVA AL ESTATUTO PERSONAL VÁLIDAMENTE CREADA O MODIFICADA EN EL EXTRANJERO: ALEMANIA

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Abstract: The case law of the CJEU and the ECtHR enhances the recognition of a status acquired abroad. The German legislative and judicative have consequently reacted, especially in the field of international name law. While the case law of the CJEU has fundamentally changed private international law approaches, the case law of the ECtHR so far has only been considered as a part of possible public policy arguments. Regarding the CJEU law, courts have developed a sophisticated system to "recognize" a status according to the theory of *renvoi en bloc*. This report describes how the aforementioned case law has changed and is changing the private international law methodology and practice.

Keywords: status acquired abroad, status recognition, international name law, renvoi en bloc, fraus legis, German private international law.

Resumen: En algunas materias relacionadas con el estatuto de la persona, la jurisprudencia del TJUE y del TEDH ha fomentado el reconocimiento por parte de los Estados de las situaciones jurídicas válidamente creadas o modificadas en otros Estados. Esta jurisprudencia ha cambiado y está cambiando la metodología y práctica propias del Derecho internacional privado de producción interna. Este trabajo analiza los efectos de esta jurisprudencia europea sobre el Derecho internacional privado aleman cuando este se enfrenta a una situación jurídica relacionada con el estatuto de la persona que ha sido válidamente creada en el extranjero y que se quiere hacer valer en Alemania.

Palabras clave: estatuto personal, Ley personal, reconocimiento, situación jurídica relativa al estatuto personal válidamente creada en el extranjero, Derecho internacional privado Aleman.

I. Awareness in academia, politics, judicial and administrative practice

1. In general, the ECJ case law has attracted more attention and triggered a discussion whether and under which circumstances between Member States an obligation to "recognize" a status acquired abroad exists.[1] The ECHR case law, instead is discussed in the context of human rights in general, i.e. as a factor of balancing within the public policy exception.

1. Academic Awareness

2. The general awareness of the discussion regarding "recognition of status" in Germany is high, at least regarding the interplay between free movement of EU citizens and recognition/private international law. Probably, this level of awareness is caused by the fact that several of the relevant ECJ decisions involved German rules.[2] Furthermore, early in the discussion highly renowned scholars and members of the German Council for Private International Law brought the discussion on the table. These are namely Professor Dagmar Coester-Waltjen,[3] Professor Wulf-Henning Roth,[4] and Professor Heinz-Peter Mansel,[5] the latter today president of the German Council. These scholars emphasized the overall importance of the decisions and the impact of the fundamental freedoms on family law and other areas of the law. Thus, there are several general books and articles dedicated to the recognition of status and EU primary law,[6] some focussing on certain questions of family law[7], but others also extending the discussion e.g. to company and firm law.[8] Furthermore, a group of mainly German academics elaborated on the subject and in 2014 proposed an EU regulation on the recognition of names.[9]

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[1] This national report forms part of a comparative law research project which started in 2018. Preliminary results were presented and discussed at an internal meeting in Würzburg in spring 2019, at the JPIL conference 2019 in Munich and at the online conference "La famille dans l'ordre juridique de l'Union européenne" in autumn 2020. The overall comparative analysis, results and discussion are published in this issue in S. Gössl/M. Melcher, Recognition of a Status Acquired Abroad in the EU – A Challenge For National Laws at Cuadernos de Derecho Transnacional Volumen 14, número 1 (MARZO 2022).

[2] CJEU 14 October 2008, *Grunkin & Paul* (German-Danish), C-353/06, ECLI:EU:C:2008:559; CJEU 22 December 2010, *Ilonka Sayn-Wittgenstein ./. Landeshauptmann von Wien* (Austrian-German), C-208/09, ECLI:EU:C:2010:806; CJEU 2 June 2016, *Bogendorff von Wolffersdorff* (German-English), C-438/14, ECLI:EU:C:2016:401; CJEU 8 June 2017, *Freitag* (German-Romanian), C-541/15, ECLI:EU:C:2017:432.

[3] D. Coester-Waltjen, "Das Anerkennungsprinzip im Dornröschenschlaf?", in Mansel et al., *Festschrift für Erik Jayme*, Munich, Sellier European Law Publ., 2004, pp. 121-130; D. Coester-Waltjen, "Anerkennung im Internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 26, No. 4, 2006, p. 392-400.

[4] W.-H. Roth, "Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 26, No. 4, 2006, p. 338-347.

[5] H.-P. Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Vol. 70, No. 4, 2006, p. 651-731; H.-P. Mansel, "The Impact of the European Unions's Prohibition of Discrimination and the Right of Free Movement of Persons on the Private International Law Rules of Member States: With Comments on the Sayn-Wittgenstein Case Before the European Court of Justice", in Boele-Woelki et al., *Convergence and divergence in private international law*, The Hague/Zuerich, Eleven International Publishing/Schulthess, 2010, p. 291.

[6] K. Funken, *Das Anerkennungsprinzip im internationalen Privatrecht*, Tuebingen, Mohr Siebeck, 2009; S. Gössl, "Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 38, No. 6, 2018, pp. 376-382; J. Leifeld, *Das Anerkennungsprinzip im Kollisionsrechtssystem des internationalen Privatrechts*, Tuebingen, Mohr Siebeck, No. 241, 2010; H.-P. Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Vol. 70, No. 4, 2006, p. 651-731, 651; M.-P. Weller, "Vom Staat zum Menschen - Die Methodentrias des Internationalen Privatrechts unserer Zeit", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Vol. 81, No. 4, 2017, pp. 747-780.

[7] A. Ehlers, *Die Behandlung fremdartiger Namen im deutschen Recht*, Hamburg, Verlag Dr. Kovač, 2016; E. Sommer, *Der Einfluss der Freizügigkeit auf Namen und Status von Unionsbürgern,* Jena, JWV, 2009; P. Mankowski, "Primärrechtliche Anerkennungspflicht im Internationalen Familienrecht?", in Hilbig-Lugani et al*., Zwischenbilanz – Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag*, Bielefeld, Gieseking, 2015, pp. 571-586.

[8] C. Behme, *Rechtsformwahrende Sitzverlegung und Formwechsel von Gesellschaften über die Grenze*, Tuebingen, Mohr Siebeck, 2015; J. Schünemann, Die Firma im internationalen Rechtsverkehr, Tuebingen, Mohr Siebeck, 2016, pp. 233-261.

[9] A. Dutta/T. Helms/W. Pintens (Hrsg.), *Ein Name in ganz Europa*, Frankfort on the Main, Wolfgang Metzner Verlag, 2016.

3. Considering the ECHR case law, the awareness is not as high. Some articles explicitly extend the discussion from the ECJ to the ECHR.[10] Sometimes the ECHR cases are mentioned briefly as a further source of recognition without a deeper discussion. One reason might be that the implementation of the European Convention of Human Rights mainly works by reading the fundamental rights into rules of domestic law, e.g. Human Dignity under German law contains Human Dignity as understood by the ECHR.

4. Regarding cross-border questions, the ECHR becomes relevant only as a consequence that domestic law establishes the possibility to recognize or accept a situation established under foreign law. Then the ECHR forms part of the reasoning whether recognition would violate public policy. The rights from the ECHR are considered as one further source of human rights that might strengthen the overall argument, esp. how to interpret the fundamental rights of the German Basic Law (*Grundgesetz - GG*).[11] A discussion whether the ECHR instead can be in conflict with existing domestic law so far is scarce.[12]

2. Legislative Awareness

5. The legislative awareness is intermediate to high, especially, of course, whenever there is an obligation to implement secondary EU law, such as the EU Regulation 2016/1191 on the circulation of public documents. The rules are mainly limited to the absolute necessary, e.g. regarding said Regulation the implementing rules only determine the competent central authority, i.e. the Federal Office of Justice (*Bundesamt für Justiz – BfJ*), and facilitate the procedures of acceptance of foreign public documents.[13]

6. Regarding the case law, there is especially awareness if decisions were directly in conflict with domestic law: Article 48 Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche - EGBGB*) was introduced to implement the ECJ decisions on international name law.[14] Furthermore, a name change by domestic law has been made easier since the ECJ decisions occurred: Domestic name law allows to change a name for "serious reasons". One now widely accepted reason is that according to the law of a second nationality another name has been established and the change has the purpose to avoid a "limping name".[15] Furthermore, after acquisition of the German nationality a person can adapt a foreign name (acquired under the first nationality) to make it look or sound more German (Article 47 EGBGB).

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[10] C. Nordmeier, "Unionsbürgerschaft, EMRK und ein Anerkennungsprinzip: Folgen der namensrechtlichen EuGH-Rechtsprechung für Statusentscheidungen", in *Das Standesamt* No. 5, 2011, pp. 129-140; C. Nordmeier, "Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 32, No. 1, 2012, pp. 31-40.

[11] A. Ehlers, *Die Behandlung fremdartiger Namen im deutschen Recht*, Hamburg, Verlag Dr. Kovač, 2016, pp. 47-50; S. Goessl, "From question of fact to question of law to question of private international law", in *Journal of Private International Law* Vol. 12, No. 2, 2016, pp. 261-280.

[12] But see e.g. C. Nordmeier, "Stand, Perspektiven und Grenzen der Rechtslagenanerkennung im europäischen Rechtsraum anhand Entscheidungen mitgliedstaatlicher Gerichte", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 32, 2012, pp. 31-40.

[13] Gesetz zur Förderung der Freizügigkeit von EU-Bürgerinnen und -Bürgern sowie zur Neuregelung verschiedener Aspekte des Internationalen Adoptionsrechts, January 31, 2019, *Bundesgesetzblatt* I, p. 54, available at https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl119s0054.pdf.

[14] Art. 48 Choice of a name obtained in another Member State of the European Union

(1) Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law. The choice of name shall have retroactive effect from the date of the registration in the register of civil status of the other Member State, unless the person explicitly declares that the choice of name shall be effective for the future only. The declaration must be publicly certified or authenticated. […].

[15] S. Gössl, "Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 38, No. 6, 2018, pp. 376-382, 379.

7. Nevertheless, there is a general and further awareness that the questions of recognition are not limited to name law. In 2017, the German legislator introduced a law strictly forbidding child marriages.[16] One rare exception to the prohibition to recognize marriages concluded abroad involving a minor is the possibility of "serious hardship" for the minor. One example of such a "hardship" is explicitly stated in the *travaux preparatoires*: Recognition might be effected if otherwise the rule would violate EU primarily law, esp. the free movement of citizens.[17]

3. Judicial and Administrative Awareness

8. Regarding the case law on free movement and name law, there is a strong discussion, in courts as well as in professional bodies of civil registrars that give advice to the civil registrars (*Fachausschüsse*). Whenever the discussion circles around the question whether a status should be accepted even though the formal application of German law does not lead to a recognition, the ECJ case law on freedom of movement is discussed. This situation occurs whenever there is no court decision to recognise and the connecting factors used to accept a status via conflict of laws rules do not point to the legal system that established a status.

9. Most recently in 2019, the Supreme Court (*Bundesgerichtshof* – BGH) explicitly stated and analysed the requirements and consequences imposed by EU primary law (esp. free movement) on the recognition of a name acquired in another EU Member State, even if the domestic law does not allow such a recognition.[18] The discussion is also present in advisory opinions for the civil status registrars (*Standesbeamten-Fachausschüsse*). These opinions can give a certain impression how issues are discussed and resolved in the registrar's practice. The published opinions mainly concern questions of name law.[19]

10. Regarding other fields of law, **judicial** awareness of the influence of free movement in the EU context is lower. Very few decisions mention the possibility that the decisions on names could be extended to other types of family status. There is one case regarding the declaration of recognition of fatherhood and the resulting status as father,[20] and one regarding the recognition of same-sex parenthood (co-motherhood).[21] Following the abovementioned law on child marriages, there are already courts invoking the exception mentioned in the *travaux preparatoires* to recognize a marriage of a minor concluded in another EU Member State.[22]

11. The judicial reluctance is even stronger reflected in **administrative practise**, i.e. civil status registrars. Due to the fact that registrars – as part of the administration and thus executive branch – are bound by the rule of law in a stricter way than courts and cannot refer to the ECJ, an extension of the case law to other issues, e.g. acceptance or recognition of a marriage concluded in another EU Member

[16] Gesetz zur Bekämpfung von Kinderehen of 17.7.2017; *Bundesgesetzblatt* I, p. 2429, in force since 22.7.2017.

[17] *Bundestags-Drucksache* (*BT-Drs*.) 18/12086, 25.4.2017, Gesetzentwurf der Fraktionen der CDU/CSU und SPD, Entwurf eines Gesetzes zur Bekämpfung von Kinderehen, p. 17; see now OLG Frankfurt, 28 August 2019, 5 UF 97/19, *Das Standesamt* 2019, p. 1853; OLG Oldenburg, 18 April 2018, *Praxis des Internationalen Privat- und Verfahrensrechts* 2019, p. 160.

[18] BGH 20 February 2019, XII ZB 130/16, *Neue Juristische Wochenschrift* 2019, Vol. 72, No. 32, pp. 2313-2317, 2316, paras 28-30.

[19] E.g. K. Krömer, Fachausschuss-Nr. 4027, *Das Standesamt* 2015, p. 190; H. Kraus, Fachausschuss-Nr. 3930, *Das Standesamt* 2011, p. 346; F. Wall, Fachausschuss-Nr.4041, *Das Standesamt* 2016, p. 54; A. Rauhmeier, Fachausschuss-Nr. 3992, *Das Standesamt* 2013, p. 385.

[20] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2011, p. 70.

[21] OLG Celle 10 March 2011, 17 W 48/10*, Praxis des Internationalen Privat- und Verfahrensrechts*, 2012, p. 544 (rejection).

[22] AG Frankenthal 15 February 2018, 71 F 268/17, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 749 (Bulgarian nationals validly married according to the Bulgarian law in Bulgaria with habitual residence in Germany); AG Nordhorn 29 January 2018, 11 F 855/17 E1, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 750 (Rumanian nationals, validly married according to the Rumanian law in Rumania with habitual residence in Germany); upheld by OLG Oldenburg, 18 April 2018, 13 UF 23/18, available at http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml.

State, most recently in 2018 was discussed. The opinion rejected such an extension as being an issue left to courts and parliament.[23] Nevertheless, there is the possibility to use flexible rules provided by the law. Under German conflict of laws the treatment of preliminary questions is not clearly regulated. Thus, there is a certain amount of flexibility to determine the preliminary question with a reference to the conflict of laws of the *lex causae* or the *lex fori*. The registrars advisory opinions propose to determine the preliminary question in a way that acceptance of a "limping name" is possible. The advice focusses on cases to avoid a conflict with the free movement and the case law of the ECJ.[24] Furthermore, some registrars discussed whether Article 21 TFEU would be a (hidden) conflict of laws rule with primacy over national private international law. The question was left open and referred to courts.[25] In general registrars are very reluctant to develop rules. They prefer to obey to the rules established by legislative or courts (which from a constitutional point of view is accurate).[26]

12. The ECHR case law is not used to introduce a special obligation to "recognize" a status, it only becomes relevant in the balancing whether the recognition or acceptance of a status violates the German public policy. E.g. the German Supreme Court (*Bundesgerichtshof - BGH*) recognized a court decision establishing same-sex fatherhood of a child born by a surrogate mother.[27] The human rights of the child were decisive not to refuse recognition. The court referred to Article 8 para. 1 ECHR and the UN Convention on the Rights of the Child. She cited these rights and corresponding case law in line with Article 1 GG (Human Dignity) and other German fundamental rights.[28] Another case in which a lower court[29] refused acceptance of parentage established by the law of the place of birth (thus, no exequatur possible) also referring to the case law of the ECHR, is pending at the *BGH* at the moment (decision expected still in summer 2018). Thus, ECJ and ECHR cases are used in different ways: EU primary law is not discussed as part of public policy but public policy is discussed to restrict EU primary law. Instead, the ECHR can be one issue pointing towards recognition to preserve the rights of the individuals involved.[30]

II. (Substantive) Scope

13. Main changes to German Private International Law brought the case law on cross-border movements of companies in the EU context. German **International Company Law** made a huge shift regarding companies established in an EU or EFTA Member State. In traditional conflict of laws rules the actual seat was the relevant connecting factor. As such a rule can conflict with freedom of establishment, in EU cases the connecting factor now refers to the place of incorporation. Companies from other States, e.g Switzerland, still are subjected to the law of the real seat.[31] As a further consequence, the discussion whether certain rules of company law have the status of international mandatory law has enhanced, e.g. regarding gender quotas or worker's participation in decision making.[32]

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[23] F. Wall, Fachausschuss-Nr. 4037, *Das Standesamt* 2018, pp. 55, 60 *et seq*.

[24] H. Kraus, Fachausschuss-Nr. 3935, *Das Standesamt* 2012, pp. 24, 26 *et seq*.

[25] A. Rauhmeier, Fachausschuss-Nr. 3963, *Das Standesamt* 2012, pp. 281, 283 *et seq*.; F. Wall, Fachausschuss-Nr. 3964, *Das Standesamt* 2012, pp. 185, 289.

[26] E.g. H. Kraus, Fachausschuss-Nr. 3982, *Das Standesamt* 2013, p. 357; A. Rauhmeier, Fachausschuss-Nr. 3992, *Das Standesamt* 2013, pp. 385, 387 *et seq*.; F. Wall, Fachausschuss-Nr. 4008, *Das Standesamt* 2014, pp. 119, 124.

[27] BGH 10 December 2014, XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2015, p. 261.

[28] See e.g. Goessl, "The Recognition of a "judgment of paternity" in a case of cross-border surrogacy under German law", *Cuadernos de Derecho Transnacional*, Vol. 7, 2015, p. 448, paras 14 *et seq*.

[29] OLG Braunschweig 12 April 2017, 1 UF 83/13, *Zeitschrift für das gesamte Familienrecht*, 2017, 972.

[30] OLG Celle 20 February 2015, 17 UF 131/16, *BeckRechtsprechung, 2017, 125339*; BGH 10 December 2014, XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2015, p. 261.

[31] BGH 27 October 2008, II ZR 158/06, *Neue Juristische Wochenschrift* 2009, p. 289 ("Trabrennbahn"); cf. S. Gössl, "§ 11 Internationales Privat- und Gesellschaftsrecht", in Krebs et al*., Gesellschaftsrecht in Europa*, 2018 pp. 28 *et seq*.

[32] M.-P. Weller, "Das autonome Unternehmenskollisionsrecht", *Praxis des Internationalen Privat- und Verfahrensrecht*, 2017, p. 167; M.-P- Weller/C. Harms/B. Rentsch/C. Thomale, "Der internationale Anwendungsbereich der Geschlechterquote

14. Furthermore, international name law changed after the ECJ case law. Article 10 EGBGB, the main **International Name Law** rule, uses nationality as connecting factor, with a preference of the German nationality in case of a double national with German nationality (Article 5 para. 1 s. 2 EGBGB). Furthermore, the provision provides possibilities of limited choices of law. Spouses determining the name after marriage can choose between one nationality (no preference rule) or German law as place of habitual residence. Additionally, parents can determine a child's family name choosing between the parents' nationalities, German law as law of habitual residence of one of the parents.[33] As this rule is not sufficient to comply with the EU case law, Article 48 EGBGB was established. The rule provides for an acceptance of a name that was acquired in an EU Member State and registered there in a civil status register while the person had the habitual residence in that state. The public policy exception furthermore applies.[34]

15. Both rules together are still not able to comply in all cases with EU primary law, e.g. in cases of a double national having the habitual residence in Germany, a possibility to acquire a name abroad that can be accepted in Germany is not possible. Courts are aware of that fact and then deal with the question of acceptance. So far, they have not extended Article 48 EGBGB by analogy to cases where the habitual residence at the time of acquisition of the name was not in the State of acquisition.[35] Most recently, the Supreme Court rejected such a recognition only for the reason that the name had not been acquired correctly according to the rules of the foreign Member State.[36] Thus, implicitly, she accepted a general obligation to "recognize" a name legally acquired.[37]

16. In **other areas**, the ECJ case law is scarcely considered, especially not by courts. There is one case of the regarding the declaration of recognition of fatherhood and the subsequent status as father[38] and one regarding the parenthood of a same-sex couple.[39] As aforementioned, one exception to the prohibition to accept marriages concluded abroad involving a minor is the possibility that the acceptance violates EU primarily law, esp. the free movement of citizens. EU primary law is not explicitly

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für Großunternehmen", *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 44 (2015), p. 361; M.-P. Weller, "Unternehmensmitbestimmung für Auslandsgesellschaften", in Erle et al., *Festschrift für Peter Hommelhoff*, Cologne, Dr. Otto Schmidt, 2012, p. 1275; S. Gössl, "§ 11 Internationales Privat- und Gesellschaftsrecht", in Krebs et al*., Gesellschaftsrecht in Europa,* 2018, pp. 57 *et seq*.

[33] Art. 10 Name

(1) The name of a person is governed by the law of the country of which the person is a national.

(2) At or subsequent to the conclusion of marriage, the spouses may, by a declaration given before the Registrar's of Births, Marriages and Deaths Office choose the name they will use thereafter:

1. under the law of the country of which one of the spouses is a national, notwithstanding article 5 subarticle 1; or
2. under German law, if one of them has his habitual residence within the country.

[…].

(3) The person having the parental authority may declare before the Registrar's of Births, Marriages and Deaths Office, that the child shall obtain the family name

1. pursuant to the law of a country of which one of the parents is a national, without regard to article 5 subarticle 1; or
2. pursuant to German law, if one of the parents has his or her habitual residence within the country; or
3. pursuant to the law of a country of which a person conferring the name is a national

[…].

[34] Art. 48 Choice of a name obtained in another Member State of the European Union

(1) Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law. The choice of name shall have retroactive effect from the date of the registration in the register of civil status of the other Member State, unless the person explicitly declares that the choice of name shall be effective for the future only. […].

[35] But see discussion F. Wall, Fachausschuss-Nr. 4008, *Das Standesamt* 2014, pp. 119, 124.

[36] BGH 20 February 2019, XII ZB 130/16, *Neue Juristische Wochenschrift* 2019, p. 2313.

[37] BGH 20 February 2019, XII ZB 130/16, *Neue Juristische Wochenschrift* 2019, p. 2313, paras 28 et seq.

[38] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2011, p. 70 (granting acceptance).

[39] OLG Celle 10 March 2011, 17 W 48/10, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2012, p. 544 (refusing acceptance).

stated in the Child Marriage act itself (that only allows exceptions for "serious hardships") but in the *travaux preparatoires*.[40] Courts have already applied EU primary law and free movement as a reason to accept a child marriage from another EU Member State (but the law is pending at the Constitutional Court, so it might be declared unconstitutional[41]).[42]

17. The **ECtHR** cases are cited sometimes to support a fundamental rights argument in the public policy exception. There are two cases on parentage established by surrogacy[43] and one decision on parentage established by adoption.[44] Both only discuss the ECHR and the case law within the public policy exception, not regarding further obligations to "Recognize". Furthermore, there is one decision where the recognition of status (recognition of fatherhood) resulting from EU primary law also is supported by references to Article 8 ECHR[45] and the refusing acceptance of same-sex parenthood as not violating the ECHR.[46]

III. Methods of recognition/acceptance

18. German law traditionally knows two methods of recognition, one the "true" recognition of court decisions as established by procedural law and the so-called "conflict of laws recognition".

19. Furthermore, in the EU free movement context, a new method has emerged that is dubbed "recognition of status by en bloc referral".

1. Recognition of court decisions

20. A family law status established by a court decision can be recognized according to Section 108 Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit – FamFG*). A separate exequatur proceeding is only necessary in marital matters, in general, thus, "incidental" recognition is possible.[47]

21. "Decision of a court" is understood in a broad way. Sufficient is that a public authority of another state issued a decision that was in some way constitutive to establish the status / legal situation. Not sufficient is a mere registration by a non-judicial authority which will not become *res iudicata* and has merely a function of proof. To "recognize" such a registration, a "recognition by conflict of laws" is necessary.[48] Private status decisions, e.g. religious ceremonies, are not regarded as court decisions. Thus,

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[40] *Bundestags-Drucksache* 18/12086, 25 April 2017, Gesetzentwurf der Fraktionen der CDU/CSU und SPD, Entwurf eines Gesetzes zur Bekämpfung von Kinderehen, p. 17.

[41] BGH 14 November 2018, XII ZB 292/16, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, p. 152.

[42] AG Frankenthal 15 February 2018, 71 F 268/17, *Zeitschrift für das gesamte Familienrecht,* 2018, p. 749; AG Nordhorn 29 January 2018, 11 F 855/17 E1, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 750; upheld by OLG Oldenburg, 18 April 2018, 13 UF 23/18, available at http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml.

[43] BGH 10 December 2014, XII ZB 463/13, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2015, p. 261 (granting recognition); OLG Braunschweig 12 April 2017, 1 UF 83/13, *Zeitschrift für das gesamte Familienrecht*, 2017, p. 972 (refusing acceptance).

[44] OLG Celle 20 February 2015, 17 UF 131/16, *BeckRechtsprechung 2017, 125339* (granting recognition).

[45] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2011, p. 70.

[46] OLG Celle 10 March 2011, 17 W 48/10, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2012, p. 544 (refusing acceptance).

[47] Sec. 108 Recognition of Other Foreign Judgments

(1) With the exclusion of judgments in marital matters, foreign judgments shall be recognized without the requirement of a particular proceeding.

[48] BGH 20 March 2019, XII ZB 320/17, *Das Standesamt* 2019, p. 175.

recognition happens by conflict of law and not in a formal procedure. The question was discussed again in 2018 regarding the recognition of religious or private divorces (following the ECJ decision "Sahyouni" that Rome III does not apply to private divorces). The draft proposal by the German government and the following rule (Article 17 para 2 EGBGB) refrained from establishing a recognition proceeding for private status decisions. Thus, the rule confirms the general approach of acceptance of e.g. religious ceremonies only via conflict of laws (apart from the recognition of court decisions in the original sense).[49]

22. Recognition of a court decision can only be refused for cases of public policy, no competence of the foreign court from the point of view of German law, no correct service to one of the parties to allow him access to court or an opposing German decision or pending proceeding (Section 109 *FamFG*).[50] As a general principle of German law, German international family law explicitly provides a generous approach to recognition of court decisions in order to avoid limping status in family law. The ECHR is used to enhance that approach, but always limited to the public policy exception. To overcome the rules provided by German private international law, courts refer to the EU case law.

4. Acceptance via conflict of laws

23. If there is no status decision to recognize, German law accepts a foreign status via conflict of laws. An incidental acceptance is possible (as preliminary question). Courts or authorities have to follow the relevant national conflict of laws rule to determine the *lex causae* governing the establishment of the status at the time of court decision. If the requirements of the *lex causae* are fulfilled, the German law accepts that status as valid (as long as it does not violate German public policy).[51] If status registration is denied, this decision can be appealed and subsequently a court can decide that the competent authority has to change the registration. Incidentally, the court will examine whether a status has been acquired from the point of view of the applicable substantive law (acceptance via conflict of laws). National courts have to apply foreign law *ex officio* (even though the content of the foreign law cannot be reviewed in the instance that only analyses violation of the law). Therefore, the determination of the *lex causae* will not depend on the burden of proof and does not have to be pleaded by the parties/involved.

24. This "recognition" does not require a special document, as long as there is sufficient evidence to convince the civil registrar or (subsequently) the court that the requirements of the (foreign) law are fulfilled. All possibilities of proof are possible, e.g. documents (official or private), testimony etc. Foreign public documents need to be legalized or comply with the requirements of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents. Passports enjoy a high presumption of correctness. As neither registrars nor courts are required to know

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[49] Referentenentwurf, 14.6.2018, Entwurf eines Gesetzes zum internationalen Güterrecht und zur Änderung von Vorschriften des Internationalen Privatrechts, available at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/IntG%C3%BCRVG.html; see further discussion S. Gössl, "Rom III-VO Art. 1 Anwendungsbereich", in: Gsell/Lorenz/Krüger (eds.), *BeckOGK*, München, C.H. Beck, 2018, paras 47 *et seq*.

[50] Sec. 109 Impediments to Recognition

(1) Recognition of a foreign judgment shall be excluded:

1. when the courts of the other state do not have jurisdiction under German law;

2. when a participant, who did not comment on the main action and claims that the document initiating the proceeding was improper or that notification was untimely so that he could not properly exercise his rights;

3. when the judgment is incompatible with a judgment issued or recognized earlier in Germany, or when the proceedings at the basis of such judgment are incompatible with proceedings that were previously pending here;

4. when recognition of the judgment would lead to a result that is obviously incompatible with significant principles of German law, in particular when recognition is incompatible with fundamental rights.

[51] See e.g. S. Gössl, "Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts* Vol. 38, No. 6, 2018, pp. 376-382, 378.

foreign languages, they can either require a translation from the parties or contract with a professional translator, moving the costs to the parties.

25. Regarding capacity, there is an explicit protection of a "vested status" (Article 7 para. 2 EGBGB), but there has not been a court decision, yet, whether a "vested status" would also be recognized in case the connection factor changes between establishment of the status and court proceeding.[52] As far as a status is accepted via conflict of laws or a court decision is recognized, the origin of the status does not matter. Furthermore, names can be recognised according to the CIEC-Convention No. 4 on changes of surnames and forenames.[53]

Apart from those two ways, acceptance becomes only relevant considering a status or other legal situations originating from other EU Member States.[54]

5. Acceptance of Names in the EU Context

26. The ECJ cases on international name law led to a rule which can be considered as a distillation of what the legislator thought would implement such an obligation of recognition: Article 48 EGBGB. The rule provides for an acceptance of a name that was acquired in an EU Member State and registered there in a civil status register while the person had the habitual residence in that state. The public policy exception furthermore applies.[55] The Supreme Court confirmed recently that "acquired in an EU Member State" refers to an acquisition according to law of that Member State.[56]

6. Unwritten Recognition by Acceptance due to an EU Law Obligation

27. If the conflict of laws rule does not lead to the foreign law under which the claimant claims an established status, the question of recognition for reasons of EU primary law becomes relevant, also incidentally (as a preliminary question, without special procedure).[57] A lot of case law exists, thus, certain patterns regarding certain requirements are evolving. In general it can be said that several requirements are necessary to effect such a "recognition", mainly on a substantive level.

A) Exhaustion of Other Means

28. Unclear is whether a claimant has to exhaust all other legal ways to achieve the claimed status. One court refused "automatic" acceptance of a name validly acquired in another Member State, as the person involved still had the possibility to choose that law under German private international law

[52] Explicitly not deciding e.g. BGH 20 March 2019, XII ZB 530/17, *Das Standesamt* 2019, p. 173.

[53] Convention (n° 4) relative aux changements de noms et de prénoms**,** signed at Istanbul on 4 September 1958.

[54] Explicitly: OLG München 19 May 2014, 31 Wx 130/14, *Zeitschrift für das gesamte Familienrecht*, 2014, p. 1551 (no acceptance in case of a name registration in the US); OLG Stuttgart 2 October 2012, 17 UF 45/12, *Das Standesamt* 2013, p. 221 (no acceptance in case of Columbian nationality); OVG Münster 10 September 2012, 16 A 2346/11 (*BeckRS 2012, 56859*) (no acceptance in case of no clear connection to other Member State at all); from the civil registrars: F. Wall, Fachausschuss-Nr.4041, *Das Standesamt* 2016, pp. 54-56; F. Wall, Fachausschuss-Nr. 4033, *Das Standesamt* 2016, pp. 217, 221.

[55] Art. 48 Choice of a name obtained in another Member State of the European Union

'(1) Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law. The choice of name shall have retroactive effect from the date of the registration in the register of civil status of the other Member State, unless the person explicitly declares that the choice of name shall be effective for the future only. […].

[56] BGH 20 February 2019, XII ZB 130/16, *Neue Juristische Wochenschrift* 2019, p. 2313.

[57] OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412.

and achieve the claimed result in that way[58], another referred to a possible name change in substantive German law.[59] Another court regarded that aspect as irrelevant.[60] The BGH (German Supreme court) seems to follow the former approach, meaning that all ways according to domestic law have to be exhausted first before EU primarily law can supersede national law.[61] Some civil registrars left the question open as to be decided by courts.[62]

B) Conflict of laws analysis by "renvoi en bloc" (Blockverweisung)

29. Methodologically, the acceptance by EU law obligation is not limited to a public policy exception but involves a domestic law analysis, even though it is debated, which domestic law. Clear is that acceptance does not require conformity with German domestic law.[63] Sufficient is that it is in conformity with the law of the State of origin, thus the status / legal situation has to exist in the foreign system.[64] Even though there are not many clear decisions, "law of the State of origin" seems to refer to national law including the national conflict of laws rules of the State of origin. There is one case discussed by the civil registrars where also a short note is included that the public authority acted within her competence from her point of view,[65] so the *renvoi en bloc* seems to refer to the competence as well.

30. In 2019, the BGH explicitly embraced this approach and denied the acceptance of a name for a German child abroad, whose name was composed in a way unknown to German name law. The BGH discussed the ECJ case law and rejected acceptance based on the fact that the ECJ only required the recognition/acceptance of a name legally acquired abroad, meaning acquired in accordance to the conflict of laws of the registering state and the consequent domestic law (which here was applied incorrectly in the registering state according to its own law).[66]

31. One court refused acceptance as the foreign registering civil status employee did wrongly determine the law applicable.[67] Point of reference was the application of the foreign conflict of laws rule: connecting factor under the foreign private international law was nationality. The name in question was established under the *lex registri* even though the person was not a national of that law (and the outcome would have been different).

32. This reference to the conflict of laws of the registering State was also confirmed by another court. The latter court, nevertheless, came to the conclusion that the established name could be accepted in Germany. Reason was that even in a case where a name was established in the wrong way it could be accepted as an exception: if it was registered and the person lived in *bona fide* under the wrong name for a long time (i.e. ten years). Under these exceptional circumstances, the special interest of continuity of

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[58] OLG Celle 22 April 2013, 17 W 8/12 (*BeckRS 2015, 12859*).

[59] OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412; AG Nürnberg 13 August 2014, UR III 58/14, *Das Standesamt* 2015, p. 59; OLG Nürnberg 7 March 2012, 11 W 2380/11, *Zeitschrift für das gesamte Familienrecht*, 2012, p. 1520.

[60] OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452.

[61] BGH 9 May 2018, XII ZB 47/17, *NJW Rechtsprechungs-Report Zivilrecht* 2018, pp. 837 *et seq*.; BGH 24 June 2015, XII ZB 273/13, *NJW Rechtsprechungs-Report Zivilrecht* 2015, pp. 1089, 1090.

[62] H. Kraus, Fachausschuss-Nr. 3982, *Das Standesamt* 2013, p. 357; F. Wall, Fachausschuss-Nr. 3964, *Das Standesamt* 2012, pp. 185, 187-189.

[63] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 70.

[64] OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412; KG 14 October 2014, 1 W 554/13, *Das Standesamt* 2015, p. 142; AG Wuppertal 24 September 2015, 110 III 3/15, *Das Standesamt* 2016, p. 86; see also H. Kraus, Fachausschuss-Nr. 4004, *Das Standesamt* 2014, pp. 348-351; F. Wall, Fachausschuss-Nr. 4008, *Das Standesamt* 2014, p. 119.

[65] F. Wall, Fachausschuss-Nr. 4008, *Das Standesamt* 2014, pp. 119, 123.

[66] BGH 20 February 2019, XII ZB 130/16, *Neue Juristische Wochenschrift* 2019, p. 2313, para. 30.

[67] KG 19 January 2016, 1 W 460/15, *Zeitschrift für das gesamte Familienrecht*, 2016, p. 1280; similar F. Wall, Fachausschuss-Nr. 4073, *Das Standesamt* 2017, pp. 119, 122-124.

the name could lead to acceptance.[68] Thus, the explicit exception also confirms that in general the correct application of conflict of laws rules at the place of the registration are part of the revision.

33. Furthermore, the *lex registri* has to be determined as it should be applied by the registrar. Thus, in one case a court came to the conclusion that even if the name was determined incorrectly according to the foreign private international law rules and substantive law, it could still be acquired correctly (and subsequently accepted). Acceptance was possible if the foreign practise regarded the name as acquired validly despite the lack of legal requirements. In this case: if the person lived under that name in the state.[69] Similar a court considered sufficient that the name was accepted as validly obtained by authorities of the State of origin.[70]

34. In academic literature, this approach is called "*renvoi en bloc*" (*Blockerweisung*), as it refers to the complete foreign legal system as such.[71] According to the abovementioned decisions, the revision refers to the "law in action" to the State of origin. Thus, a status that was established by law or common legal practise in the State of origin can be accepted as such. As in the usual "acceptance via conflict of laws" the revision is as substantial as under usual circumstances. Point of reference is the status/legal situation in practice (law in action, not law of the books). Thus, it is sufficient if the formal application of the law leads to the status/legal situation. Nevertheless, a long period of time or a legal practise in the State of origin can overcome the fact that the formal application of the rules is insufficient.

C) Probably No Formal Requirements

35. There is also no clear answer to the question whether the status has to be registered in an official or public register. Cases, in which acceptance was discussed (sometimes granted, sometimes refused), mainly circled around the acceptance of a status that was registered in an official register[72] or used in official documents[73]. Not relevant was whether the registration was required for the validity or only a mere consequence. Undecided but discussed remained the case that a name was changed under English law by a solicitor's "deed poll" and subsequently other documents such as a driver's licence were issued in the same country under the same name.[74] Furthermore, there is no case available in which a court refused to start the discussion for the reason that the status in question was not embodied in some kind of public or private document. Probably no feasible case was brought to court.

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[68] AG Berlin-Schöneberg 24 January 2012, 70 III 472/11, *Das Standesamt* 2013, p. 21.

[69] OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452.

[70] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473; OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 210.

[71] S. Gössl, "Ein weiterer Mosaikstein bei der Anerkennung ausländischer Statusänderungen in der EU oder: Wann ist ein Name „rechtmäßig erworben"?", in *Praxis des Internationalen Privat- und Verfahrensrechts*, Vol. 38, No. 6, 2018, pp. 376-382, 379 *et seq*.; H.-P. Mansel, "Anerkennung als Grundprinzip des Europäischen Rechtsraums", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* Vol. 70, No. 4, 2006, p. 651-731, 705; K. Siehr, "Paolo Picone: Gesammelte Aufsätze zum Kollisionsrecht und die Blockverweisung auf die „zuständige Rechtsordnung" im IPR", in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2005, pp. 155, 157.

[72] BGH 26 April 2017, XII ZB 177/16, *Das Standesamt* 2017, p. 270; BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473; BGH 24 June 2015, XII ZB 273/13, *NJW Rechtsprechungs-Report Zivilrecht* 2015, p. 1089; OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452; OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412; KG 19 January 2016, 1 W 460/15, *Zeitschrift für das gesamte Familienrecht* 2016, p. 1280; VGH München 17 September 2014, 5 ZB 13.1366, *Das Standesamt* 2015, p. 150; KG 14 October 2014, 1 W 554/13, *Das Standesamt* 2015, p. 142; AG Berlin-Schöneberg 24 January 2012, 70 III 472/11, *Das Standesamt* 2013, p. 21.

[73] OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 210.

[74] OLG Jena 1 February 2016, 3 W 439/15, *Das Standesamt* 2016, p. 114; OLG Nürnberg 2 June 2015, 11 W 2151/14, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 1655 (undecided as acceptance would violate public policy); upheld by BGH 14 December 2018, XII ZB 292/15, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2019, p. 542.

36. No case law explicitly deals with the question whether a public authority must be involved. But, as cases of a "deed poll" were at least discussed, it seems courts would not require the involvement of a public authority. Under German law most status questions stem from the law itself. Civil status registries usually do not establish but only subsequently document the legal situation (apart from conclusion/dissolution of marriage, public name or gender change etc.). Thus, status always focusses on the underlying legal situation, the status registration or a certified copy has a high value of proof but is also limited to these evidentiary effects. They do not proof the underlying law.

D) Public policy and *fraus legis* exception

37. The recognition of status was denied for public policy reasons, especially the prohibition of nobility in Germany as a republic[75] and sometimes courts referred to the principle of *fraus legis* / circumvention of law as a reason to refuse recognition.[76] Even though a German name cannot easily be changed, the principle of continuity of the name was not regarded as part of the public policy.[77] While the latest decision of the ECJ seems to indicate that in an incidental acceptance the public policy exception applies in a more restricted way and the result of the overall decision is the one that matters, German courts are not that clear. The OLG Celle refused acceptance of a same-sex parenthood of two women validly married abroad because not only the acceptance of same-sex-parenthood but also the acceptance of the same-sex marriage at this time violated German public policy.[78] Most recently, the OLG Brandenburg accepted a name change abroad that alluded to a name from nobility as the court did not see it proven that the name change was only made with the intention to acquire a name of nobility.[79] Therefore, the court seems to assume that the motive for the name change can be decisive – probably to deny acceptance for reasons of *fraus legis*.

38. Recognition was refused for *fraus legis* in a case where **the connection** between the foreign country and the case **was not sufficient**.[80] The quality of the connection can vary. Sufficient was either habitual residence[81] at the time of the registration or nationality[82] of the State where the status is registered or a combination of nationality of the registering State and habitual residence in that State[83] or the place of birth in the country of registration and person lived under the name in that State.[84] In the case where the place of birth was in another Member State, it was sufficient that the registration happened in the same state where the person in question was recognized by the Member State authorities under that name and afterward lived under the registered name.[85] **Not** sufficient, instead, is the mere place of birth for the registration in the State of birth, if neither habitual residence nor nationality nor a subsequent living in that State constituted any further connection.[86] Furthermore, not sufficient as a connection was

[75] ECJ 2.6.2016, C-438/14, *Bogendorff von Wolffersdorff*; see also BGH, 9 January 2019, XII ZB 188/17 (ECLI:DE:BGH:2019:090119BXIIZB188.17.0); 14 November 2018, XII ZB 292/15 (ECLI:DE:BGH:2018:141118BXIIZB292.15.0); KG (Berlin), 9 May 2019, 1 W 110/16, *Zeitschrift für das gesamte Familienrecht,* 2019, p. 1528.

[76] VGH München 17 September 2014, 5 ZB 13.1366, *Das Standesamt* 2015, p. 150.

[77] OLG Brandenburg 28 August 2021, 7 W 87/21, *Neue Zeitschrift für Familienrecht* 2021, p. 987.

[78] OLG Celle 10 March 2011, 17 W 48/10, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2012, p. 544.

[79] OLG Brandenburg 28 August 2021, 7 W 87/21, *Neue Zeitschrift für Familienrecht* 2021, p. 987.

[80] VGH München 17 September 2014, 5 ZB 13.1366, *Das Standesamt* 2015, p. 150.

[81] BGH 26 April 2017, XII ZB 177/16, *Das Standesamt* 2017, p. 270.

[82] AG Wuppertal 24 September 2015, 110 III 3/15, *Das Standesamt* 2016, p. 86; OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412 (even nationality of the husband sufficient, if husband's name is chosen family name).

[83] AG Karlsruhe 19 August 2016, UR III 26/13, *Das Standesamt* 2017, p. 111.

[84] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473; OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452.

[85] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473.

[86] VGH München 17 September 2014, 5 ZB 13.1366, *Das Standesamt* 2015, p. 150.

that the only connection was that the birth mother earlier had a habitual residence in the State of birth but gave it up immediately after birth and no other connection existed.[87]

39. In cases where a status or legal situation is not registered in an official registry, the same connection seems to be required.[88] At least in the aforementioned cases of a name change by an English deed poll and a subsequent registration of the name at the Driver & Vehicle Licensing Agency and issuance of an EU driver's licence. Sufficient was that at the time of the deed poll / registration the habitual residence[89] or nationality and habitual residence directed towards the same State.[90]

40. In one case of the civil registrars, the exception of abuse of law seems to play a role: they refused acceptance of a name acquired under Romanian law as this name was first accepted in Germany as part of the usual acceptance by conflict of laws. Later, the person bearing the name changed it intentionally according to German substantive law. Subsequently, this name change could not be undone by a further, additional acceptance by EU law.[91]

E) Time as further factor

41. In general, there is no requirement that the status has to be established for a certain period of time. Nevertheless, time can play a paramount role to overcome other obstacles to accept a status. Whenever all other connecting factors are weak (no habitual residence or no nationality) the connection can still be established if the status was recognized by authorities for a longer period of time or the person lived under that established name in the Member State for a certain period of time.[92] Furthermore, in a case where a status was wrongly registered by the foreign registrar but nevertheless the person lived in that foreign State under that name, after a long period of time a "recognition" of that name in Germany was possible (even though this is normally not the case).[93]

F) Conflicts between different status registrations

42. There are few court decisions indicating how to handle conflicts between different registrations in different Member States.

43. Some courts referred to the "first registration" as the relevant one[94] or refused acceptance of the "second registration".[95] The second decision also referred to the reason that at least acceptance could be refused as long as the person involved had still the option to choose the law of the second registration.[96]

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[87] OLG Celle 10 March 2011, 17 W 48/10, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2012, p. 544.

[88] E.g. no discussion of differences between civil status registry or driver's licence: OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 210.

[89] OLG Jena 1 February 2016, 3 W 439/15, *Das Standesamt* 2016, p. 114.

[90] OLG Nürnberg 2 June 2015, 11 W 2151/14, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 1655 (undecided as acceptance would violate public policy); upheld by BGH 14 December 2018, XII ZB 292/15 – *Praxis des Internationalen Privat- und Verfahrensrechts,* 2019, p. 542.

[91] K. Krömer, Fachausschuss-Nr. 4027, *Das Standesamt* 2015, p. 190.

[92] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473; OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452; OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 210.

[93] AG Berlin-Schöneberg 24 January 2012, 70 III 472/11, *Das Standesamt* 2013, p. 21.

[94] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 70; OLG Naumburg 9 September 2014, 2 Wx 85/13, *Zeitschrift für das gesamte Familienrecht*, 2015, p. 210.

[95] OLG Celle 22 April 2013, 17 W 8/12 (*BeckRS 2015, 12859*).

[96] OLG Celle 22 April 2013, 17 W 8/12 (*BeckRS 2015, 12859*).

44. Furthermore, some registrars did not consider the ECJ case law as relevant as long as they were dealing with the first registration (thus assuming the burden of acceptance as a matter only for the second registration).[97]

45. Nevertheless, a valid name change was regarded as viable object of acceptance,[98] thus a valid change abroad seems to be regarded as a second "first registration". A civil registrar's case where a valid name change under German substantive law could not be undone by acceptance of the name that had been accepted by conflict of laws earlier (and then changed) tends in the same direction.[99] Nevertheless, in a case where a German-Spanish national's name was first registered in Germany according to German law and later in Spain according to Spanish law, the registrars opinions advised to also allow an acceptance of the "second registration".[100] This might only be a question of terminology, as the registration was not constitutive. Thus, both name acquisitions happened by birth at the same moment and both registrations just subsequently documented the legal situation. Anyhow, in these cases the registrars seem to follow the party's intendion.[101]

46. Furthermore, the party's will seems to play a minor but not irrelevant role. In a case of conflict between a name established in a EU Member State and a Third State (Switzerland), the EU Member State law prevailed "at least" in a case where the person involved (better: parents both having parental authority) wished the EU Member State law to prevail.[102] Similarly, another court used the first registration as the relevant one "at least" was intended by both parents.[103]

47. In another case, a court dealt with the question whether acceptance could be refused because the parents intentionally chose one name. Thus, such a choice would exclude the acceptance of another name acquisition. The court finally did not refuse acceptance. Reason was that the court doubted that the choice constituted a "true" and, thus, valid choice: The parents only had the option to accept the name (against their will) or the German authorities would not have issued a passport or other relevant documents. Thus, the parents did not have an actual option or choice if they did not want their child to be without valid documents for months or longer.[104]

G) Role of Party Autonomy

48. Courts did not explicitly refer to party agreements as a reason to refuse or grant acceptance. However, the party's will seems to play a minor role but at least it plays a role. First, acceptance is only necessary if intended by the person involved – at least there is no obligation to avoid a "limping name".[105]

49. Second, in a case of conflict between a name established in a EU Member State and a Third State (Switzerland), the EU Member State law prevailed "at least" in a case where the person involved (better: parents both having parental authority) wished the EU Member State law to prevail.[106] Similarly, another court used the first registration as the relevant one which "at least" was intended by both parents.[107] Thus, courts referred to the fact that a status was not forced on the person involved against his/

[97] H. Kraus, Fachausschuss-Nr. 3930, *Das Standesamt* 2011, pp. 346-347.
[98] OLG München 30 January 2012, 31 Wx 534/11, *Zeitschrift für das gesamte Familienrecht*, 2013, p. 412.
[99] K. Krömer, Fachausschuss-Nr. 4027, *Das Standesamt* 2015, p. 190.
[100] F. Wall, Fachausschuss-Nr. 4081, *Das Standesamt* 2018, pp. 25-26.
[101] F. Wall, Fachausschuss-Nr. 4081*, Das Standesamt* 2018, pp. 25-29
[102] KG 18 January 2018, 1 W 563/16, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 1000.
[103] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2011, p. 70.
[104] OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452.
[105] F. Wall, Fachausschuss-Nr. 4068, *Das Standesamt* 2017, pp. 22, 24.
[106] KG 18 January 2018, 1 W 563/16, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 1000.
[107] KG 23 September 2010, 1 W 70/08, *Praxis des Internationalen Privat- und Verfahrensrechts,* 2011, p. 70.

her will within the question to accept it. So, the (opposing) will of the individual might be a reason to not accept a status.[108]

50. In another case, a court dealt with the question whether acceptance could be refused because the parents intentionally chose one name. Thus, such a choice would exclude the acceptance of another name acquisition. The court finally did not refuse acceptance. Reason was that the court doubted that the choice constituted a "true" and, thus, valid choice: The parents only had the option to accept the name (against their will) or the German authorities would not have issued a passport or other relevant documents. Thus, the parents did not have an actual option or choice if they did not want their child to be without valid documents for months or longer.[109]

51. Finally, in case of acquisition of differing names at the same moment (birth), the party's intention seems to be the decisive factor.[110]

7. Unknown foreign status

52. This paragraph refers to all kinds of recognition, as there does not seem to be a different treatment depending of the method. There is no case law regarding the "recognition" of a status that is absolutely unknown to the German law. There was a case the recognition of a same-sex marriage name was in question. German law at that time did not provide for a same-sex marriage. Nevertheless, the court did not refuse for the reason that the German law does not know that form of marriage as such. Instead, she refused recognition for the reason that the State of origin did not know the concept of "marriage name" and there was no obligation (in general) to recognize/accept the same-sex marriage as such.[111] Furthermore, the *BGH* (German Supreme Court) decided that part of a name unknown under German name law (Danish middle name) can still be recognized or accepted as such as result of the ECJ case law.[112] The same applies to unknown "father names" under Bulgarian law.[113] So, one might presume that in general German law would also consider the acceptance of unknown legal situations.

53. If no separate choice of law rule denying a certain form of recognition exists, the status is accepted as is. If it becomes relevant as a preliminary question, afterwards the status usually will be transposed into the comparable status under the *lex causae*, but sometimes the *lex causae* will be adapted to the original status. E.g. before German law opened marriage to same-sex couples, a foreign same-sex marriage was accepted as a mere civil union, thus transposed into it (with different consequences regarding adoption and parentage).[114] Reason was an explicit rule in Artciel 17b para. 4 EGBGB that ordered such an adaptation. Regarding EU law there has not been any case law considering the consequences of an acceptance. Most cases considered the acceptance of a name. Courts accepted or refused the name as such. The same applies to the one case where a foreign declaration of recognition of fatherhood was accepted. In both countries, that declaration established fatherhood. Thus, no decision on transformation or adaptation was necessary.

54. Regarding EU law there has not been any case law considering the consequences of an acceptance. Most cases considered the acceptance of a name. Courts accepted or refused the name as such.

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[108] BGH 20 July 2016, XII ZB 489/15, *NJW Rechtsprechungs-Report Zivilrecht* 2016, p. 1473; or will of the parents in case of a newborn KG 18 January 2018, 1 W 563/16, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 1000.

[109] OLG München 19 January 2010, 31 Wx 152/09, *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 452.

[110] F. Wall, Fachausschuss-Nr. 4081, *Das Standesamt* 2018, pp. 25-29.

[111] KG 14 October 2014, 1 W 554/13, *Das Standesamt* 2015, p. 142.

[112] BGH 26 April 2017, XII ZB 177/16, *Das Standesamt* 2017, p. 270.

[113] KG 18 January 2018, 1 W 563/16, *Zeitschrift für das gesamte Familienrecht*, 2018, p. 1000.

[114] E.g. S. Gössl/J. Verhellen, "Marriages and Other Unions in Private International Law – Separate but Equal?", in *Int J L, Pol & Fam* (*International Journal of Law, Policy and the Family*) 2017, p. 174.

The same applies to the one case where a foreign declaration of recognition of fatherhood was accepted. In both countries from that declaration stemmed the fatherhood of the man, so no decision on transformation or adaptation was necessary.

IV. Annex: Relevant Rules

1. EGBGB[115]

55. Article 10 Name

(1) The name of a person is governed by the law of the country of which the person is a national.
(2) At or subsequent to the conclusion of marriage, the spouses may, by a declaration given before the Registrar's of Births, Marriages and Deaths Office choose the name they will use thereafter:

1. under the law of the country of which one of the spouses is a national, notwithstanding article 5 subarticle 1; or
2. under German law, if one of them has his habitual residence within the country.

If the declaration is made subsequent to the conclusion of the marriage, it needs to be publicly certified. As to the effect of the choice on the name of a child, § 1617 c of the Civil Code shall apply mutatis mutandis.

(3) The person having the parental authority may declare before the Registrar's of Births, Marriages and Deaths Office, that the child shall obtain the family name

1. pursuant to the law of a country of which one of the parents is a national, without regard to article 5 subarticle 1; or
2. pursuant to German law, if one of the parents has his or her habitual residence within the country; or
3. pursuant to the law of a country of which a person conferring the name is a national

Declarations made subsequent to the issuing of a birth certificate need to be publicly certified.

56. Article 47 First and Family Names

(1) Where a person under an applicable foreign law has obtained a name and the name is henceforth governed by German law, the person may, by a declaration given before the Registrar of Births, Marriages and Deaths,

1. determine a first and a family name from out of the name
2. choose a first or a family name where such name does not exist
3. give up components of the name that German law does not provide for
4. adopt the original version of a name that has been modified according to the sex or the family relationship
5. accept a German version of his or her first or his or her family name; where such a version of his or her first name does not exist, he or she can accept new first names.

[115] Unofficial translation for the Federal Ministry of Justice and Consumer Protection provided by Priv.-Doz. Dr. Juliana Mörsdorf LL.M. (Univ. of California, Berkeley), available at http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#p0177.

Where the name is a marital name or a life-partnership name, during the subsistence of the marriage or of the life partnership, only both spouses or life partners may give the declaration.

(2) Subarticle 1 is applicable mutatis mutandis as to the formation of a name under German law, if it is derived from a name which has been obtained under an applicable foreign law.
(3) § 1617c of the Civil Code shall apply mutatis mutandis.
(4) The declarations made under Subarticles 1 and 2 need to be publicly authenticated or certified, unless they have been made before a German Registrar of Births, Marriages and Deaths.

57. Art. 48 Choice of a e obtained in another Member State of the European Union

(1) Where the name of a person is subject to German law, that person can, by declaration before the Registrar of Births, Marriages and Deaths, choose a name that he or she obtained when he or she had habitual residence in another Member State of the European Union, where that name was registered in a register of civil status, unless this is manifestly incompatible with the fundamental principles of German law. The choice of name shall have retroactive effect from the date of the registration in the register of civil status of the other Member State, unless the person explicitly declares that the choice of name shall be effective for the future only. The declaration must be publicly certified or authenticated. Article 47 subarticles 1 and 3 shall apply mutatis mutandis.

8. FamFG[116]

58. Section 108 Recognition of Other Foreign Judgments

(1) With the exclusion of judgments in marital matters, foreign judgments shall be recognized without the requirement of a particular proceeding.
(2) Participants who have a legal interest therein may apply for a decision on the recognition or non-recognition of a foreign judgment that does not involve property law. Section 107 (9) shall apply *mutatis mutandis*. As to the recognition or non-recognition of the adoption of a child, however, sections 2, 4, and 5 of the Act on the Effect of Adoptions according to Foreign Law (*Adoptionswirkungsgesetz*; AdWirkG) shall be applicable when the adopted person at the time of the adoption had not yet reached the age of 18.
(3) Local jurisdiction […].

Section 109 Impediments to Recognition

(1) Recognition of a foreign judgment shall be excluded:

1. when the courts of the other state do not have jurisdiction under German law;
2. when a participant, who did not comment on the main action and claims that the document initiating the proceeding was improper or that notification was untimely so that he could not properly exercise his rights;
3. when the judgment is incompatible with a judgment issued or recognized earlier in Germany, or when the proceedings at the basis of such judgment are incompatible with proceedings that were previously pending here;

[116] Unofficial translation for the Federal Ministry of Justice and Consumer Protection provided by Karen Guida, available at http://www.gesetze-im-internet.de/englisch_famfg/index.html.

4. when recognition of the judgment would lead to a result that is obviously incompatible with significant principles of German law, in particular when recognition is incompatible with fundamental rights.

[…]

V. Table of German Abbreviations

AG	=	Amtsgericht	Lowest Instance Court
BGH	=	Bundesgerichtshof	German Supreme Court
BfJ	=	Bundeamt für Justiz	Federal Office of Justice (Federal Agency)
EGBGB	=	Einführungsgesetz zum Bürgerlichen	Gesetzbuche = Introductory Act to the Civil Code (= German Act on Private International Law)
FamFG	=	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (German Act on Family Law Procedure)	
KG	=	Kammergericht	Higher Instance Court of Berlin
LG	=	Landgericht	First or second Instance Court
OLG	=	Oberlandesgericht	Higher (second or third) Instance Court
VGH	=	Verwaltungsgerichtshof	Administrative Court
ZPO	=	Zivilprozessordnung	Code of Civil Procedure