1-1-1908

Conflict of Laws under the German Civil Code

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ANNUAL BULLETIN

COMPARATIVE LAW BUREAU
OF THE
AMERICAN BAR ASSOCIATION

JULY 1, 1908.

CONTENTS.

Officers and Managers ........................................ 1
Objects and Membership ........................................ 2
Editorial Staff .................................................. 3
Foreign Correspondents ....................................... 4
Editorial Miscellany ........................................... 5
International Law (Reviews) ................................ 9
Covenants in Restraint of Trade ............................ 21
Foreign Legislation, Jurisprudence and Bibliography ........
  Austria-Hungary ............................................... 25
  Belgium ...................................................... 27
  China ....................................................... 28
  France ...................................................... 29
  Germany .................................................... 31
  Great Britain ............................................... 48
  Italy ........................................................ 52
  Japan ....................................................... 55
  Latin America .............................................. 60
  Portugal .................................................... 63
  Russia ....................................................... 63
  Spain ....................................................... 64
  Switzerland ................................................ 67
  Turkey and Egypt .......................................... 72
Exchange List ................................................... Inside Back Cover

1908.
INTERNATIONAL PRINTING CO.
PHILADELPHIA, PA.
CONFLICT OF LAWS UNDER THE GERMAN CIVIL CODE.

The rules governing the Conflict of Laws in Germany, as far as they are established by legislative enactment, are contained in Art. 7-31 of the Law of Introduction to the Civil Code, which went into effect January 1, 1900. On a number of points, modifications have been introduced by treaties, the most important of which are the Conventions of the Hague, of June 12, 1902, dealing with marriage, divorce and judicial separation and guardianship of minors. In two respects Art. 7-31 present peculiarities: (1) They do not cover the whole field of the Conflict of Laws, but only isolated topics; (2) the subjects covered have received but a partial treatment. The aim seems to have been primarily to determine the extent of the application of German law and the status of Germans and to deal with foreign law and foreigners only so far as practical considerations suggested. One rule of a general nature, which constitutes a radical departure from the preceding law, may, however, be noted. Following Italy and other continental countries, the Code has substituted nationality for domicile in the determination of the civil status of persons—in the matter of capacity (Art. 7), family law (Art. 13-15, 17-22) and succession (Art. 24-25). The following will present the substance of the principal articles, with some comment and with an indication of the leading decisions rendered since the publication of the Code.

CAPACITY:

Art. 7. Capacity to act with legal effect is determined by the national law of the party in question, subject, however, to Art. 27.

The foreigner who, after reaching the age of majority, acquires the German nationality, shall retain the status of a major, though he would not be of age under German municipal law.
A foreigner is to be held liable upon all legal transactions entered into in Germany, except those relating to foreign realty or those falling within the family law or the law of succession, if he has capacity according to German law. (See also Art. 84 of Bills of Exchange Act.)

Art. 8. deals with appointments of guardians over foreigners.

Art. 9 deals with the judicial declaration of death. (See also Secs. 13-17 of the Civil Code, and Secs. 946-971 of the Code of Civil Procedure.)

SOCIETIES (Corporations and Copartnerships):

Art. 10. A society organized under the law of a foreign country and possessing juridical capacity under such law, which, if formed in Germany could acquire such capacity only in accordance with Secs. 21, 22 of the Civil Code, shall have a legal existence only if it is recognized by a resolution of the Federal Council. The law of partnership, and Sec. 54, second sentence, shall apply to societies not so recognized.

For explanation of Secs. 21-22 and of the German law concerning societies, incorporated or otherwise, see "The Principles of German Civil Law," by Ernest Schuster, pp. 37-57.

It is held that Art. 10 is not applicable to foreign business corporations. O. L. G. Kiel, March 21, 1902 (Niemeyer's Zeitschrift, 469). See also R. G., October 7, 1904 (15 Niemeyer's Zeitschrift, 293).

As to status of foreign corporations in Germany see Julius Plotke: Die Rechtsfähigkeit ausländischer juristischer Personen nach dem Bürgerlichen Gesetzbuch und einzelnen Ausführungsgesetzen, 10 Niemeyer's Zeitschrift, pp. 211-218, 269-277.

FORM:

Art. 11. The form of a legal transaction is governed by the law applicable to the substance of the transaction. A compliance with the law of the place where the transaction takes place is, however, sufficient. This provision, however, shall not apply to a transaction involving the creation or the transfer of real rights.

It seems that the law of the situs governs with respect to formal requirements of contracts, whether real or obligatory, relating to immovables. 63 R. G., 18 (March 3, 1906); see, however, note in 16 Niemeyer's Zeitschrift, p. 329.
GERMANY

TORTS:

Art. 12. In a German court no greater claim can be asserted against a German for a wrongful act committed abroad than is authorized by German law.

The general principle that the *lex loci delicti* governs as to tort actions, is recognized. R. G., March 12, 1906, Juristische Wochen­schrift, 1906, p. 297.

In case of collision in the territorial waters of a nation, the local law will control, R. G., December 11, 1901 (12 Niemeyer's Zeitschrift 121), but German law will apply if both vessels are German. Sup. Hans. Ct., November 12, 1906 (22 Revue Internationale de Droit Maritime 666). If the collision occurs on the high sea, the *lex fori* will govern. R. G., October 22, 1902 (Clunet's Journal de Droit International Prive, 1904, p. 406) ; R. G., November 10, 1900 (12 Niemeyer's Zeitschrift, 457) ; unless both vessels belong to the same country or are subject to the same law, in which case their common law will apply. 49 R. G., 182 (November 18, 1901).

MARRIAGE:

Art. 13. The validity of a marriage, if one of the parties is a German, depends upon their national law. The same rule applies where foreigners marry in Germany. (Subject to Art. 27.)

The form of a marriage celebrated in Germany is governed exclusively by German law.

With the qualification contained in Art. 13, par. 2, the rule is recognized that the marriage may be celebrated as to form in accordance with the law of the State in which it takes place or in accordance with the national law of the parties. See Arts. 11 and 13 of the Law of Introduction, and R. G., May 1, 1902 (Clunet's Journal, 1906, p. 198).

Art. 14 deals with personal rights of husband and wife when either party is a German.

Arts. 15-16 deal with the matrimonial property rights of parties of whom at least one is a German.

DIVORCE:

Art. 17. The national law of the husband at the time the suit is brought, governs in matters of divorce. An act occurring while the husband possesses another nationality, will be recognized as a
ground for divorce or judicial separation only if it constitutes a
ground also according to the law of such State.

German law applies if, at the time of the suit, the husband has
lost his German nationality, but the wife has retained hers.

A suit for divorce or a judicial separation based upon foreign
law can be maintained in Germany only if the divorce could be
granted, both under the foreign law and under German law. Art.
17, par. 1, is subject to Art. 27. It has been held at a joint session
of the Civil Chambers of the Federal Court that no jurisdiction will
be taken even for the purpose of granting a divorce a mensa et thoro,
where an absolute divorce is prohibited by the national law of the
husband. 55 R. G., 335 (October 12, 1903).

As to municipal jurisdiction in general with respect to divorce
see Sec. 606 of the Code of Civil Procedure, and as to recognition
of foreign judgments of divorce, Sec. 328 of the Code of Civil
Procedure.

Arts. 18-22 deal with the legal relationship existing between
parents and children.

Art. 23 deals with the appointment of guardians over foreigners.

Succession:

Art. 24. The succession to the estate of a German, even if he
has a domicile in a foreign country, is governed by German law.

If he has a domicile in a foreign country, his heirs may claim
the benefit of such foreign law with respect to their liability for the
debts of the estate.

If a foreigner who has executed or revoked a will, acquires
the German nationality, the validity of such execution or revocation
shall be governed by the law of the State of which he was a subject
at the time of such execution or revocation; he shall retain also the
capacity to execute a will, though he should not have attained the
requisite age according to German law. The provision of Art. 11,
par. 1, second sentence, remains intact. For comment, see Art. 25.

Art. 25. The succession to the estate of a foreigner, who, at
the time of his death had his domicile in Germany, shall be governed
by the law of the State of which he was a subject at the time of his
death. A German, however, may claim rights in the estate which
are based solely upon German law, unless, according to the law of
the State to which the deceased belonged, German law is held to
apply exclusively to the succession of a German domiciled in such foreign country.

[Art. 24, par. 1, and Art. 25, are subject to Art. 27. Art. 24, par. 1, and Art. 25, have no application to property situated in a State under whose law different principles obtain (See Art. 28). As to the form of wills see also Art. 11, and as to succession with respect to immovables, see R. G., May 3, 1906 (Clunet's Journal, 1908, p. 193.)]

Art. 26 deals with a matter falling within the law of succession which concerns Germany only.

**Reference or Renvoi:**

Art. 27 provides that if German law is applicable under the law of the State to which Art. 7, par. 1, Art. 13, par. 1, Art. 15, par. 2, Art. 17, par. 1, and Art. 25 refer, it shall be applied by the German judge. This article sanctions in a limited way, the doctrine of "Reference" or "Renvoi," in German, "Rückverweisung" and "Weiterverweisung," according to which the applicatory law in the Conflict of Laws will be determined in the last resort, not by the law of the forum but by the law of the place to which the *lex fori* refers or by the law of still another State. The German code adopts the principle when the foreign rules governing the Conflict of Laws refer back to German law. The above is qualified in part by Art. 28. For discussion of English authorities, see John P. Bate, Notes on the Doctrine of Renvoi in Private International Law, London, 1904.

**Lex rei citae:**

Art. 28. The provisions contained in Art. 15, 19, 24, par. 1, 25, and 27, shall not apply to property in another State under whose law different principles obtain.

**Lex domicilii:**

Art. 29. If, where the national law of a party is held to govern, such party is not the subject of any country, the law of the country to which he last belonged shall control and if he has never been the subject of any country, the law of his domicile and in the absence of a domicile, the law of his residence or sojourn shall apply.
PUBLIC POLICY:

Art. 30. The application of a foreign law is excluded if it would be repugnant to good morals (gute Sitten) or to the object of a German law.

RETORSION:

Art. 31. The Imperial Chancellor may with consent of the Federal Council decree that retorsion shall be exercised with respect to a foreign State, its citizens or their assigns.

E. G. L.

REVIEWS:


It is an interesting mark of the new attitude of the East in respect to Western jurisprudence that the first English translation of the Bürgerliches Gesetzbuch für das Deutsche Reich should come from the hand of a Chinese graduate of an American Law School. A similar work is in preparation under the joint auspices of the University of Pennsylvania and the Pennsylvania Bar Association, and is shortly to be issued.

As Dr. Wang has pointed out very clearly in his historical introduction (p. xxv), the Civil Code of 1900 is far from being or from professing to be, a codification of all the civil laws obtaining in the German Empire. Much customary law, partly imperial, and partly peculiar to the particular States of the Empire, respectively, remains in force; and State statutes on many subjects also remain unaffected. The Imperial Commercial Code is also, of course, the authority in its peculiar field, although the Civil Code contains many provisions directly affecting the course of trade, such as those respecting sales, negotiable paper, pledges, and partnerships.

The task of translation has been well performed. The English runs on as easily as could be expected, considering the difficulty of expressing the legal ideas of one country in the terms of speech of another, in which legal institutions rest on a very different foundation. Often a translator is forced to a choice between selecting the word nearest in correspondence, with suitable explanations in a note or parenthesis, or using several words and thus loading down