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Summary

Recognition of Nationality and Effective Nationality of Natural Persons in Public and Private International Law

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1. "Recognition of a (foreign) nationality" and the principle of "effectiveness" (effective nationality) are concepts both of public international law and of private international law. These concepts differ, however, in both fields of the law as to content and function and should therefore not be used as though they had the same meaning.
2. The application of "nationality" in private international law is based not on its being a public law status, but rather because it is regarded as typically indicating the relationship of a person to a particular legal system. Therefore it is recoursed to as being in the private interest of the person for the purpose of determining the law with which, in the opinion of the legislator, there is the closest relationship.
3. This connecting function is confined to private law relations. "Nationality" used as a connecting factor of private international law does not decide on the the applicability of rules having a state or community regulating character. The conditions under which recourse can be had to a particular nationality in private international law do not anticipate the how and whether of the recourse to it in the case of a state or community regulating rule. The requirements for a state or community regulating rule are also decisive as to whether the applicable law in relation to preliminary (incidental) private law questions is to be determined according to the private international law connecting factors or in some other way.
4. The private international law rules as to choice of law also refer to foreign laws emanating from a state not recognised in accordance with public international law, or from a state arising out of territorial changes contrary to public international law. What is essential is that this law be factually authoritative for the person concerned and be the proper law according to the conflict of law rules. The former presupposes its effective realisation. The latter presupposes, in cases where "nationality" is the connecting factor, that the person concerned has got the nationality of the respective state. This, however, is not relevant for all cases. Exceptions do occur: through relinquishing "nationality" as connecting factor (refugees); in the event of dual nationality — frequently a result of territorial changes contrary to public international law, by the precedence of the "more effective nationality"; through the

non-observance of the applicable nationality, as an exception due to employing the doctrine of "ordre public" (public policy reservation). In so far as Germans are concerned, art. 5 I 2 EGBGB 1986 applies.

5. The principle of "effectiveness" in private international law is used solely with a view to answering the question as to which nationality takes precedence in the event of multiple nationality of a person, in order to relieve a resulting stalement as to the applicable connecting factor. Thus, not the "effective nationality" as known in public international law is relevant, but rather the "more effective nationality". In the rare cases where exceptionally the exclusion of "nationality" as a connecting factor is suggested if the person concerned holds this nationality only in a merely formal way, it is rather a question either of the employment of the ordre public clause, or of the application of the instrument of teleological reduction. Whether over and above this, nationality is to be tied to an effective relationship with the home country of the person concerned, can at best be the subject of a de lege ferenda (legal reform) discussion.
6. The precedence of the "more effective nationality" is confirmed in art. 5 I 1 EGBGB 1986; however in art. 5 I 2 it is revoked again for holders of German-foreign dual nationality, on the basis of an appraisal, foreign to private international law, provided nothing else is stipulated. Independently of the latter, art. 5 I 2 EGBGB 1986, being an exception contrary to the system, is to be construed narrowly and is not to be applied to international treaties. Gross misapplications should be corrected by means of teleological reduction. In addition, the legislator is called upon to amend the wrong decision of enacting art. 5 I 2 EGBGB 1986.
7. Criteria for the "more effective nationality" are not just "residence", but also other individual circumstances of the person concerned, including such manifestations of intention which find objectively discernible expression. This is put forward in art. 5 I 1 EGBGB 1986 with its vague concept of the "course of one's life". This, however, is not meant to concede to the person concerned the power to select the proper law. The necessity to take all circumstances into account indicates the preference for this solution in the event of a stalemate of connecting factors, as against a possible automatic application of the "habitual residence" as decisive connecting factor. The "habitual residence" loses much of its impact as a useful criterion for determining the relationship to a home country and the applicable law if the country concerned imposes restrictions on its citizens as to leaving the country.
8. Inter-German private law remains unaffected by the private international law reform which entered into force on September 1, 1986. Although the Federal Republic of Germany does not recognise the Ger-

man Democratic Republic de iure, reference is possible to its laws within the conflict of laws. This is not disputed. Private international law is not applicable, given that GDR law is not foreign law. Inter-state private law is also not applicable, given that it is not a question of local laws under the umbrella of a common overall state order. Inter-German law is consequently an independent area of law with the connecting factors as the main problem areas, together with a few particular choice of law rules. The precedence previously accorded to to the „habitual residence" of the person concerned as connecting factor is too rigid and inflexible for inter-German private law — as for other fields of the law — and is therefore inappropriate. Just as in private international law the nationality of a non-recognised state can be used as connecting factor, so too can GDR citizenship be used in the same way. This is all the more so, as there is the suggestion of a de facto recognition of this state in the extremely important judgment (Grundlagenurteil) of the BVerfG (Federal Constitutional Court). If GDR citizenship and German nationality coincide, the former may be used as connecting factor in accordance with the rules developed for the "more effective nationality", in which case — following the criteria set out by the BVerfG — particular attention should be devoted to the manifestations of intention of the person concerned, as well as to the individual circumstances. Bearing in mind nos. 2 and 3 above, it would be a gross misunderstanding to regard the application of the GDR citizenship as connecting factor in inter-German private law, as a formal public international law recognition of it as a foreign nationality and a displacement of the German nationality.