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Qualification of private divorce in private international law of Germany

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Abstract. The private divorce is such a dissolution of marriage that does not require the participation of the state. The examples are the Islamic talaq in its original concept still existing in some Arabic countries, the customary divorces in some countries of Sub-Saharan Africa as well as, according to the prevailing opinion in Germany, the divorce by mutual consent in the Far-East countries (Japan, Thailand, South Korea). The problem of classifying a divorce in the situation when European legal order raises the question of its recognition is generated by the fact that there is a conflict method for assessing the validity of transactions made abroad in classical private international law, on the one hand, and, on the other hand, the divorce in the European legal orders is the public instrument which is performed by the state or at least by its active participation so that for the purpose of recognition it is submitted to the special procedure of recognition and enforcement of foreign judgments. Private international law of Germany is a unique case of dual classification of the foreign private divorce both as a public instrument (on the ground of fiction) and as a legal transaction according to the purpose of classification. To apply the procedure of recognizing foreign private divorce in Germany, such a divorce is equated to the foreign public instrument. To determine the scope of verification, such a divorce is regarded as a legal transaction and submitted to the conflict of laws-approach, not to the approach of procedural recognition.

Key words: talaq, repudiation, choice of law-approach, approach of procedural recognition, recognition of foreign judgements, functional qualification

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Квалификация частного развода в международном частном праве Германии

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Аннотация. Частный развод – это такое расторжение брака, где участие государства не требуется. Примерами являются исламский талак в его первоначальной концепции, сохраняющий свою силу в большинстве арабских государств, племенные ритуальные разводы в странах Тропической Африки, а также согласно господствующей в Германии позиции – разводы по взаимному согласию супругов в странах Дальнего Востока (Японии, Таиланде, Южной Корее). Проблема квалификации такого развода в случае, если в европейском правопорядке ставится вопрос о его признании, порождена тем, что, с одной стороны, для оценки действительности совершенных за границей сделок в классическом международном праве существует коллизионный метод, а, с другой стороны, расторжение брака в европейских правопорядках – акт, совершаемый публичной властью или, по крайней мере, при ее активном участии, в связи с чем для целей признания он подчиняется экзекватуре, процедуре признания иностранных публичных актов. Международное частное право Германии является уникальным случаем двойной квалификации иностранного частного развода как публичного акта (в силу фикции) и как сделки в зависимости от целей этой квалификации. Для целей применимости процедуры признания иностранного частного развода в ФРГ такой развод приравнивается к иностранному публичному акту. Для целей определения объема проверки такой развод считается сделкой и подчинен коллизионному методу, а не методу процедурного признания.

Ключевые слова: талак, исламский развод, коллизионный метод, метод процедурного признания, признание иностранных решений, функциональная квалификация

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Introduction

A dissolution of marriage reached by the spouses themselves (or by one of them) without recourse to the state (private divorce) which exists in some countries of Asia and Africa poses in the context of private international law the issue of qualification (article 1187 of the Civil Code of the Russian Federation).

The divorce law in European legal systems where the private divorce does not exist, provides for the dissolution of marriage through court or another public authority (state divorce) and, therefore, requires an act of a public authority such as court decree. In other words, a dissolution of marriage is qualified in the *lex fori* (the law of court) as a public instrument.

A private divorce in its native legal order *lex causae* is a legal transaction.

The concepts of *lex fori* and *lex causae* – a public instrument and a legal transaction – compete being in the state of the conflict in terms of qualification (see, for example, the definition of the conflict of characterization in private international law as a competition of rules of *lex fori* and *lex causae*: (Porotikov, 2011:264).

In Germany, due to existence of special legislation on recognition of foreign divorces, the problem of qualifying foreign private divorces has given rise to an extensive jurisprudence, which has become the subject of detailed study in the German literature.

The aim of the article is, based on German legal practice and literature, to substantiate the theory of functional qualification in private international law which consists in disregarding the legal and technical differences that exist in different legal orders if the compared institutions are functionally equivalent.

The state and private divorce

A dissolution of marriage, the situation which is meaningfully understood anywhere in the world, may take different forms from the legal and technical point of view.

The state divorce. In Russia a dissolution of marriage is carried out through issuing an instrument of a public authority which can be either a court (Article 21 of the Family Code) or a civil registry office (executive authority) (Article 19 (1), (2) of the Family Code).

In Germany the requirements to the public body authorized to issue an act on dissolution of marriage are more stringent: it can only be a court. In fact, the first sentence of section 1564 of German Civil Code states: “A marriage may be dissolved by divorce only by judicial decision on the petition of one or both spouses”.

In such cases the will of the spouses to dissolve their marriage is not in itself sufficient to transform the legal status of being married into the legal status of being divorced. This will only give the right to apply to competent authorities of the state (in the classic version to file a petition in a court) with a request for this transformation. However, these authorities do not satisfy the request automatically, but take a set of measures aimed at both clarifying this will and, if possible, its correction through attempts to reconcile the spouses as well as streamline the legal relations which arise because of transformation of legal status of spouses (liquidation of matrimonial property regime, establishment of maintenance requirements, determining the right to a name, determining the procedure for raising children, communication of divorced parents with children and mutual obligations of parents for maintenance of their children).

Private divorce. This European model of marriage dissolution by means of applying to the state is confronted by legal orders based on the concept of divorce as a deal that does not require state participation.

Islamic talaq. A typical and the most famous example is the Islamic law which leading source is Quran; it is currently in force in the Arab countries such as Iran, Afghanistan, Pakistan and Bangladesh.

According to the Islamic law, dissolution of marriage is a private legal transaction that requires neither sanction nor even any assistance from the state; to transform the legal status only the will of the spouses is enough to dissolve their marriage, or to be more precise, only the will of the husband.

The legal basis of the Islamic dissolution of marriage by unilateral pronouncement of the husband (*talaq*) are two rules of Quran: ayah (verse) 229 of surah (chapter) 2 and ayah

1 of surah 65. The first one speaks about the possibility to return the wife after two declarations of the husband (revocable divorce) and that, after the third declaration (final divorce) the husband must have a special ground to return the wife (apparently, the consent of the wife). The second sets the time frames between husband's declarations (iddah).

In this model there is no state control in the divorce procedure.

Although in the most Islamic countries this original concept has now undergone significant changes due to introduction of obligatory application to the state (represented by religious authorities to which the state delegates its powers) for reconciliation, acknowledgement or registration of a divorce which entails a shift in its qualification toward a state divorce, like dissolution of marriage by mutual content of the parties in the civil registry office in Russia. Nevertheless, there are countries, such as Egypt, where the lack of talaq registration does not entail its invalidity.

The tribal ritual divorce in Sub-Saharan Africa. In German judicial practice there are cases of recognition of divorces committed in Sub-Saharan Africa (including Ghana, Nigeria and Burundi) according to the tribal rite which does not imply any participation of the state or institutional religious authorities to which the state has delegated part of its powers.

These divorces are certainly private.

The divorces by mutual consent in the countries of the Far East. German legal practice and literature consistently indicate that the divorce by mutual consent of the spouses performed under to the law of Thailand¹, Japan², South Korea (Beule, 1979:32) and Taiwan (Mankowski, 2010: Art. 17 EGBGB, Rdnr. 59), is a private divorce.

This qualification seems to be erroneous.

Thus, section 1514 (1) of the Civil and Commercial Code of Thailand³, devoted to a divorce by agreement of the parties, reads: "Divorce effected by mutual consent must be made in writing and certified by the signatures of at least two witnesses".

At the same time section 1515 establishes that, in the case, where marriage has been registered as provided by this Code, divorce by mutual consent is valid only if the registration thereof is effected by both the husband and wife.

Such situation may give the impression that state registration is only necessary in the case of section 1515 but not for marriages under study concluded abroad.

But section 1531 (1) states, that in case where a marriage has been registered according to law, divorce by mutual consent entails legal consequences from the date of its registration.

It follows from these rules that the extrajudicial divorce according to the law of Thailand is an administrative divorce similar to the divorce provided for in article 19 (1) of the Family Code of the Russian Federation. This is how it is qualified in the French jurisprudence⁴ and literature (Ralser, 2021:408).

¹ The decision of the Federal Court of Justice of Germany (Bundesgerichtshof, BGH) Nr. IV b ZB 718/80 vom 14.10.1981. Die Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) Bd. 82, 34.

² Kammergericht (KG) Nr. 1 VA 1010/20 vom 03.11.2020. Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2022, 186 (Leitsatz), Anm. E.J.

³ Civil and Commercial Code of Thailand. Available in English at <http://library.siam-legal.com/thai-civil-and-commercial-code/>. [Accessed 11th May 2023].

⁴ Tribunal de grande instance de Paris 10.05.1990. Revue critique de droit international privé (RCDIP) 1991, 393, note Muir Watt.

Similarly, in Japan, a divorce by mutual consent is implemented through registration in the municipality (section 764 of the Japanese Civil Code) (Nagata, 2022: Rdnr. 13) and is also not private.

However, given that a significant number of principle theses of interest concerning the problem have been formulated in German legal practice in cases related to Thai divorce where it was qualified as private, this article will use it, even if the opinion concerning qualification of Thai divorce maintained here is the opposite. Otherwise, the disclosure of the topic in full will not be possible.

Recognition of foreign private divorces

The problem of recognition of foreign private divorces is caused by the fact that the European legislators, focused on the divorce with participation of the state, have formulated their rules on recognition of foreign divorces in such a way that the question whether the scope of these rules includes the foreign private divorces at least raises doubts.

For instance, in Russian Article 415 of the Civil Procedural Code is dealt with dissolution of marriage committed abroad by means of the foreign judgement and Article 160 (3) and (4) of the Family Code is dealt with dissolution of marriage committed outside Russia “in compliance with the legislation of the relevant state on the *authority of the bodies that make the decisions* on dissolution of a marriage” (emphasis added).

The option when dissolution of a marriage is made not by the “decision-making authority”, but by a private person is obviously overlooked in these norms.

German legislation on recognition of foreign divorces

A special place of German law in this matter is due to the fact that in Germany the foreign divorces do not generally (i.e., except for the foreign divorces committed in a European Union-Member State and subject to the preferential treatment provided for by the Brussel Ibis Regulation No. 2019/1111 of 25 June 2019) obtain the legal effect automatically (as opposed to the concept underlying Article 415 of the Russian Civil Procedural Code), but require a special recognition decision of the state department of justice. This rule is established by the first sentence of section 107 (1) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction of 17 December 2008 (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, Familienverfahrensgesetz), which reads as follows:

“Decisions annulling, terminating, or dissolving a marriage, or declaring a legal separation, or establishing the existence or non-existence of a marriage between the participants in a foreign country shall only be recognized when the Land justice administration department has established that the prerequisites for recognition are fulfilled” (hereafter cited as section 107).

This rule is consistently implemented in legal practice: the foreign divorce decisions are completely ignored, until the parties implement this procedure in the Land justice administration department.

As a result, a huge number of court cases on the issue of recognition of foreign divorces, including recognition of foreign private divorces (Privatscheidungen) has been collected.

*Interpretation of the term “decisions” in section 107 of the German Act
On Proceedings in Family Matters*

If we turn to the letter of the cited section 107, we may argue that the term *decisions* (Entscheidungen) clearly correlate with the terminology of Russian Article 415 of the Civil Procedural Code and Article 160 of the Family Code.

The German doctrine and practice unanimously interpret this term as a public instrument (Siehr, 1969:186; Gärtner, 2008:161). Such interpretation corresponds to the classical dichotomy of the private international law approaches when foreign legal acts are estimated by referring to the conflict of law methods and foreign public acts by referring to the method of procedural recognition (Tarikanov, 2022:25). In fact, section 107 is a legislative consolidation of the procedural recognition approach.

But then, a private divorce being a legal transaction, should not fall within the scope of regulation of section 107. In the early German legal practice this issue was raised and resolved in a manner that the interested persons may file in such a situation a declaratory judgment lawsuit to establish the fact of legal significance (Feststellungsklage), i.e., the fact of divorce through transaction⁵.

However, subsequent legal practice took a different path and the reasons for this are as follows.

Firstly, as a result of the functioning since 1941 of the special procedure for recognition of foreign divorces in the institutions of justice in Germany⁶ by the 1980s departments consisting of unique specialists in comparative law in the field of divorce were formed. For example, two employees of these departments have published a very successful monograph on recognition of foreign divorces (Kleinrahm & Partikel, 1970). It attracted attention of the Federal Court of Justice of Germany in 1981 when deciding on the expansion of the scope of regulation concerning the predecessor of section 107, the first sentence of Article 7 (section 1 (1)) of the Family Law Amendment Act of Germany (Familienrechtsänderungsgesetz, FamRÄndG) of 11 August 1961 (hereinafter Article 7) by including into this scope the private divorces committed in the consular offices of foreign countries in Germany:

“This procedure should ensure ... by concentration of recognition competence that the issues that arise during this procedure whose decision often requires special knowledge will receive answers from the competent and experienced specialists”⁷.

The transfer into the scope of competence of such specialists of all issues of recognition of foreign divorces regardless of the form, state act or transaction such divorces were effected in, was consistent.

Secondly, the answer to the question whether a divorce was effected by means of a public instrument or of a legal transaction is not so obvious on its own. Moreover, this issue is often the most challenging in the entire procedure. Indeed, according to some legislations, private divorce suggests that public authorities would be involved at some of

⁵ Landgericht (LG) Hamburg Nr. 5 R 170/76 16.07.1976. Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts (IPRspr.) 1976, 157, Nr. 51.

⁶ This procedure was introduced in Germany by Regulation for Implementation and Addition of the Marriage the Uniformity of International Family Law Act of 25 October 1941 (Verordnung zur Durchführung und Ergänzung des Ehegesetzes und zur Vereinheitlichung des internationalen Familienrechts).

⁷ BGH Nr. IV b ZB 718/80 vom 14.10.1981. BGHZ Bd. 82, 34.

its stages. At the same time, it is sometimes practically impossible to determine what kind of burden, constitutive, declarative or only evidentiary, is carried by the action committed by the state (cf. the different qualification of a Thai divorce in Germany and France). The sense of creating a condition, connected with such intellectual and psychological costs for admissibility of the procedure in a certain public authority seems rather doubtful.

Finally, if we abstract from the methodology chains in the form of a dichotomy between the conflict method and the method of procedural recognition, then the procedure for recognizing foreign divorces which are legal transactions, is more essential for divorces-transactions than for divorces-public instruments.

Objectively, the divorce clothed in the form of a public instrument has one way or another passed the preliminary test by a public authority in its domestic legal order. How this test ensures the implementation of guarantees necessary in recognizing legal order, is another matter. It is important that the very participation of the state in the divorce procedure creates, at least psychologically, more confidence in this instrument than in the situation of the private divorce completely emancipated from state participation. Verification of the foreign divorce by German authorities in this situation is double.

In the situation of a private divorce, no external power verifies either the grounds of this divorce or the observance of the weaker party's rights. The husband has decided to leave his wife, and that is enough. And such divorce must be implemented within the German legal order. If, following the methodology of private international law, we deny an admissibility of verification procedure by German authorities, we will create the situation of critical legal uncertainty for persons whose interests are affected by the status of spouses in this marriage. In this case, verification by German authorities is more considerable than in the situation with the state divorce since here verification is not duplicated; it only happens once.

In fact, despite of the obvious public policy clause with regard to inequality of husband and wife in the implementation of Islamic talaq, the German authorities are entitled not to apply it, if the wife expresses consent with this dissolution of marriage that may be supported by her petition to the German authorities to recognize this divorce⁸.

Therefore, the prevailing tendency in German law to include into the substantive scope of section 107 all possible divorces, regardless of whether they are clothed in the form of a legal transaction, or a public instrument is quite understandable: "The concept of divorce should be understood as broadly as possible, so that it can cover the widest possible range of the divorce forms" (Gärtner, 2008:433).

However, due to fact that the methodological principles are here in conflict with the social needs, the path to this compromissory principle is rather thorny.

Evolution of implementation of private divorces into the scope of recognition procedure in Germany

Initial phase: requirement of the constitutive participation of the state in dissolution of marriage

The first stage in interpreting section 107 (at that time, before 1 September 2009 it was Article 7 of the Family Law Amendment Act) was expansion of the scope of this rule

⁸ BGH Nr. XII ZR 225/01 vom 06.10.2004. BGHZ Bd. 160, 322.

(which could also be understood as exclusively foreign judgements) by including in it of foreign divorces, where a foreign public authority participated in an active (constitutive) manner. In 1967, this doctrine was named in the literature as dominant (Neuhaus, 1967:578).

However, it is impossible to give an example from legal practice where this doctrine would actually be confirmed.

The judgement of Court of Appeal of Hamburg quoted by some authors (Kleinrahm & Partikel, 1970: 6) concerns, in fact, Islamic talaq committed in the consulate office of Egypt in Hamburg but not the divorce when a state participated in a constitutive manner. At the same time the court determined admissibility of the procedure provided for at that time by Article 7 on recording the divorce in the Egyptian civil registry, i.e., it bore on the declarative public instrument⁹.

Completed stage: sufficiency of the declarative participation of the state in marriage dissolution

Therefore, the opinion, which in the 60s was characterized as marginal (Neuhaus, 1967:578; Reinl, 1967:67; Kleinrahm & Partikel, 1970:68) and which consisted in admissibility of the procedure under Article 7 with regard to foreign divorces where a foreign public authority took only declarative participation gradually became dominant: in 1969 it was referred to as indisputable (Partikel, 1969:15) and dominant (Siehr, 1969:185), in 1976 as adopted by all the state departments of justice throughout Germany (Otto, 1976:279) and in 1979 as an absolutely dominant legal practice of the state departments of justice (Lorbacher, 1979:772).

In 1968 the Regional Court of Stuttgart noted in this regard that for applicability of Article 7 it does not matter whether “the foreign public authority has the ability to independently assess the circumstances or it exercises only the certifying function”; it recognized, in fact, this article as applicable to Iraqi talaq, since “either a judgement of a religious court has to be adopted or the divorce declaration has to be registered with the court”¹⁰.

In 1970 the Ministry of justice of Baden-Württemberg decided that Article 7 was applicable to private divorces if they were registered in a foreign civil registry. In that particular case such an instrument of registration was established in relation to Pakistani talaq, notification of which had to be sent to the Chairman of the appropriate municipality who was in turn obliged to hand it over to the wife of the talaq author. The legal consequences of that talaq arose under Pakistani law upon expiry of 90 days from the date the notice was delivered to the wife if the husband did not revoke talaq before expiration of that period. Compliance with this procedure was confirmed by a special certificate¹¹.

Subsequently, the appropriate state participation in the private divorce procedure was seen in the issuance of the certificate of non-reconciliation of spouses by the Iranian State

⁹ Oberlandesgericht (OLG) Hamburg Nr. 2 a VA 2/64 24.11.1964. Das Standesamt (StAZ) 1965, 249.

¹⁰ LG Stuttgart Nr. 15 R 56/67 vom 20.03.1968. Zeitschrift für das gesamte Familienrecht (FamRZ) 1968, 391, 392. In the same vein OLG Stuttgart Nr. 1 VA 2/68 vom 05.04.1968. FamRZ 1968, 390.

¹¹ Justizministerium Baden-Württemberg Nr. 346 E – 199/68 vom 28.07.1970. FamRZ 1971, 436.

Court which was the ground for divorce registration by an Iranian notary¹², registration of Egyptian talaq in the relevant registry¹³, and, finally, registration of divorce by mutual consent in the Thai registry¹⁴.

The Federal Court of Justice of Germany confirmed its opinion concerning Thai divorce but formulated it in a general way: “Into the scope of decisions, in respect of which recognition procedure provided for by Article 7 of the Family Law Amendment Act, private divorces are subject, ... if a foreign public authority took any participation in them, including if such participation consisted in the divorce registration”¹⁵.

Therefore, the Federal Court of Justice has fundamentally raised to the rank of positive law the expansion of the scope of Article 7, then in force, and currently of section 107 on private divorces registered in a foreign public registry.

Since then, application of the recognition procedure to Islamic talaqs has been on a victorious march: in practice, such decisions were made in relation to Lebanese¹⁶, Jordanian¹⁷, Pakistani¹⁸, Egyptian¹⁹, Qatari²⁰, Syrian²¹, Moroccan²², Bangladeshi²³ and Iranian²⁴ talaqs as well as in relation to Islamic private divorces by mutual consent

¹² Oberlandesgericht Düsseldorf Nr. VA 1/76 vom 27.07.1976. IPRspr. 1976, 504, 505, Nr. 180.

¹³ Bayerisches Oberste Landesgericht (BayObLG) Nr. BReg. 1 Z 41/81 vom 30.11.1981 // IPRax 1982, 104, 94, Anm. Henrich.

¹⁴ Bayerisches Staatsministerium der Justiz Nr. 3465 E – I – 295/76 vom 21.01.1977. StAZ 1977, 201, Anm. Otto; Justizminister des Landes Nordrhein-Westfalen Nr. 3465 E – II B. 150/80 vom 03.12.1980. IPRax 1982, 25, 12, Anm. Bürgle; OLG Düsseldorf Nr.3 VA 1/81 vom 11.04.1981. IPRspr. 1981, 458, Nr. 190 b.

¹⁵ BGH Nr. IV b ZB 718/80 vom 14.10.1981. BGHZ Bd. 82, 34.

¹⁶ BayObLG Nr. BReg. 1 Z 139/81 vom 25.02.1982. FamRZ 1982, 813 (Leitsatz); OLG Düsseldorf Nr. 3 Va 3/02 vom 28.08.2002. FamRZ 2003, 381 (Leitsatz).

¹⁷ BayObLG Nr. 1 Z 54/82 BReg vom 29.11.1982. IPRax 1983, 130 (Leitsatz), Anm. Henrich; Justizministerium Nordrhein-Westfalen Nr. 3465 E – II B.701/81 vom 23.03.1984. IPRspr. 1984, 5, 6, Nr. 5; OLG Frankfurt Nr. 20 VA 14/83 vom 12.07.1984. IPRax 1985, 48, Anm. Henrich; Justizminister des Landes Nordrhein-Westfalen Nr. 3465 E – B. 243/84 vom 02.07.1985. IPRspr. 1986, 430, 431, Nr. 186 a; OLG Düsseldorf Nr. 13 VA 1/85 vom 24.01.1986. IPRax 1986, 305 (Leitsatz), Anm. Henrich.

¹⁸ KG Nr. 3 UF 6398/83 vom 20.06.1984. StAZ 1985, 104 (Leitsatz), Anm. Bürgle; Landesjustizverwaltung Baden-Württemberg Nr. 346 E 325/85 vom 23.05.1986. IPRax 1988, 170, 150, Anm. Beule; OLG Stuttgart Nr. 1 VA 5/86 vom 11.04.1987. IPRax 1988, 172, 173, Nr. 23b, 150, Anm. Beule; OLG Celle Nr. 10 VA 1/90 vom 05.02.1990. IPRspr. 1990, 455, 456, Nr. 215 (moreover, in this judgement the participation of a civil officer in the Pakistani divorce proceedings was evaluated as constitutive).

¹⁹ OLG München Nr. 34 Wx 80/10 vom 31.01.2012. FamRZ 2012, 1142; KG Nr. 1 VA 9/12 vom 03.01.2013. FamRZ 2013, 1484. Cf. also BGH Nr. XII ZB 217/17 vom 28.11.2018 // Neue Juristische Wochenschrift (NJW) 2019, 931, 932, where the issue was to exclude Egyptian private divorce from the scope of the second sentence of section 107 (1) because both spouses had the common citizenship of the country which provides for private divorce (Egypt). The fact that Egyptian private divorce was evaluated from the point of view of section 107 testifies that the Federal Court of Justice of Germany admits the general applicability of this rule to Egyptian private divorces.

²⁰ OLG Stuttgart Nr. 3465 E 519/2018 vom 03.05.2019. FamRZ 2019, 1532.

²¹ BayObLG Nr. 3 Z BR 66/93 vom 13.01.1994. IPRax 1995, 324, 309, Anm. Börner; OLG Braunschweig Nr. 2 W 148/00 vom 19.10.2000. FamRZ 2001, 561, Anm. Gottwald; OLG München Nr. 34 Wx 146/14 vom 02.06.2015. IPRax 2016, 158, Anm. Weller / Hauber / Schulz; OLG München Nr. 34 Wx 146/1429 vom 29.06.2016. IPRax 2017, 92, 65, Anm. Pika / Weller; BGH Nr. XII ZB 158/18 vom 28.06.2020 (Sahyouni). BGHZ Bd. 226, 365.

²² Justizministerium Nordrhein-Westfalen Nr. 3465 E – II B. 444/90 vom 29.07.1991 // StAZ 1992, 46; OLG Hamm Nr. 8 WF 158/92 vom 27.05.1992. IPRspr. 1992, 238, 239, Nr. 101; KG Nr. 1 VA 1/00 vom 06.11.2001. FamRZ 2002, 840; OLG Frankfurt Nr. 4 WF 97/04 vom 26.10.2004. FamRZ 2005, 989.

²³ Justizminister des Landes Nordrhein-Westfalen Nr. 3465 E – II B. 169/81 vom 29.07.1983. IPRspr. 1983, 7, 9, Nr. 2; OLG München Nr. 34 Wx 15/13 vom 01.04.2015. FamRZ 2015, 1611, Anm. Henrich.

²⁴ Landesjustizverwaltung Hessen Nr. 3465 E – II/7 – 472/87 vom 14.07.1988. IPRspr. 1989, 499, 501,

(Syrian²⁵, Jordanian where if the will of the wife is invalid, the divorce may be reclassified to *talaq*)²⁶.

In a recent work, these private divorces have been aptly referred to as *bounded by the procedure* (*verfahrensgebundene Privatscheidungen*) (Ludwig, 2020:346).

The presence of state participation in the divorce procedure, even if this participation is only symbolic, provides grounds for the fiction of *decision* in the sense of section 107.

Stage regarding divorces without state participation

The third step in this evolution logically refers to private without any, even symbolic, participation of the state.

In his article of 1976 Otto argues that under Article 7, then in force, legal practice of applicability of the recognition procedure to private divorces without any participation of the state was established in the state departments of justice of North Rhine-Westphalia and Berlin (Otto, 1976:279). Otto's assertion was subsequently confirmed by Beule (Beule, 1979:33).

In fact, Otto provides examples of divorce by means of tribal rite in Nigeria recognized by Berlin state department of justice, unrecorded divorce agreement in China of the time, and tribal ritual divorce in Ghana, recognized by North Rhine-Westphalia state department of justice (case numbers respectively 3465 E-II B 97/71 and 3465 E-II B. 33/74).

However, in his article of 1979, Lorbacher quotes the opposite decision of Bavaria State Ministry of Justice in case 3465 E – I – 45/79 of 15 March 1979 declaring that Article 7 does not cover the divorce committed by means of tribal ritual rite without any participation of the state in Burundi; it was effected only in the presence of two witnesses (Lorbacher, 1979:772).

In the same vein is the decision of Hamburg district court in 1982²⁷, where the claim to establish the legal fact of the divorce by tribal rite of a married couple in Ghana was recognized as admissible. This admissibility of judicial ruling was justified by the fact that due to the lack of any state participation in that rite the parties were deprived of the possibility to implement the recognition procedure of their divorce in the manner prescribed by Article 7, then in force.

Since then, the German doctrine in the vast majority of cases takes the view that a private divorce cannot be subject to recognition procedure provided for earlier by Article 7 and currently by section 107 (Beitzke, 1974: 533; Lorbacher, 1979: 772). While some authors confine themselves to this statement and do not comment how this issue has to be solved (Wagner, 2013:1629; Arnold, Schnetter, 2018:655; Hau, 2022: Rdnr. 26; Sieghörtner, 2022: Rdnr. 10), others who undertake a more global scale of consideration accompany their attitude with compromise nuances.

Nr. 224 a; OLG Frankfurt Nr. 20 VA 27/88 – 20 VA 27/88 vom 16.05.1989. NJW 1990, 646.

²⁵ BayObLG Nr. 1 Z BR 16/98 vom 07.04.1998. FamRZ 1998, 1594; Justizministerium Baden-Württemberg Nr. 346 E-633/99 vom 27.12.2000. FamRZ 2001, 1018, Anm. Gottwald.

²⁶ BayObLG Nr. 3 Z BR 136/02 vom 12.09.2002. FamRZ 2003, 381.

²⁷ Amtsgericht (AG) Hamburg Nr. 289 F 164/81 vom 10.06.1982. IPRspr. 1982, 159, 161, Nr. 66A.

Thus, Althammer considers applicable in this case the procedure under section 108 (Althammer, 2009:387). This rule establishes recognition of foreign decisions adopted on other family matters in Germany. But it is unclear, why we should address the general rule if there is a special rule on recognition of foreign divorce decisions. If the goal is only to save the doctrine which runs counter the legal practice, then, this is hardly acceptable means: it is better to raise the cardinal question of legitimacy of this very theory.

Geimer, following the decision of the Hamburg District Court of 1982, considers the procedure for establishing the fact of marital status appropriate (Geimer, 2022: Rdnr. 23 und 46). Currently, this procedure is provided for cases without foreign element (section 121 (3) of the Act on Proceedings in Family Matters).

But particular attention deserve those authors who, paying tribute to the dominant doctrine, cannot apply it consistently and eventually join its opposite.

Gärtner (2008: 182, Fußnote 133, Sowie 196); Coester-Waltjen, Mäsch (2017: 194, Fußnote 33, und 197, Fußnote 39) should be mentioned among the first, since they are not representatives of this theory: they subject all private divorces, whether the state took part in them or not, to the recognition procedure under the former Article 7 or to section 107, now in force. But the reference to them in this block is based on the fact that they admit that their opinion is not dominant.

Gruber does not consider section 107, by its letter, applicable to purely private divorces, but suggests applying it by analogy, based on the purpose of legal rule (Gruber, 2021: Rdnr. 59). We meet the idea of analogy in the recent German dissertation by Guedjev devoted to Bulgarian divorce law:

“Regarding purely private divorces, i.e., committed without any state or judicial participation we cannot make any other conclusion. On the one hand, the balance of interests (legal certainty) is identical. On the other hand, verification of validity of private divorce where the state participated also occurs incidentally (clause 1 of Article 118 (1) of Bulgarian private international law act); therefore, in case of exclusion of private divorces without state participation from the scope of Article 117–118, no advantages arise: these divorces will be verified incidentally at any rate” (Guedjev, 2020:375).

The analogy becomes redundant in Lüderitz’s doctrine. This author recognizes as a basic thesis that recognition procedure is not applicable to the purely private divorces. But then he notes that some schools (e.g., Sunni Islam and Shia Islam) registration is not a condition for talaq validity. In this case, any private divorce can be reduced to a purely private divorce and admissibility of the recognition procedure becomes a matter of chance. The result will be rendering meaningless the procedure of recognition of foreign divorces since it aims specifically to prevent the contradictory decisions on the territory of Germany. In this situation, Lüderitz sees no other way than to flip the ratio of a private and purely private divorce and to consider that every purely private divorce may be reduced to a private divorce; therefore, recognition procedure may be applied to the purely private divorce (Lüderitz, 1990: 342).

In this line of reasoning are currently Hau and Linke since they consider section 107 applicable to purely private divorces, if, under foreign law, state participation is at least

not excluded (Hau & Linke, 2021:262), which amounts to falling into the substantive scope of section 107 of all purely private divorces.

Spellenberg also proclaims his adherence to the theory of necessity of state participation and uses the basic argument that only an act of state power may be the subject of procedural recognition (Spellenberg, 2016: § 107 FamFG, Rdnr. 68–69). But, when it comes to the substantive content of this principle, he writes: “concerning private divorces where the state does not participate ... we have to distinguish: any participation of the state results in the procedure under section 107 of the Act on Proceedings in Family Matters” (Spellenberg, 2016: § 109 FamFG, Rdnr. 342).

Rare legal practice concerning recognition of purely private divorces performed according to the tribal rite in Sub-Saharan Africa is forced to apply to those divorces the recognition procedure and it overcomes the situation by simple means of recognizing as state participation any presence of the state, including outside the proper procedure of a dissolution of a marriage.

Thus, in 1983, Düsseldorf Court of Appeal, with reference to the article by Beule (1979:29, 33), recognizes as a dominant opinion the applicability of Article 7, then in force, to purely private divorces, but subsidiary notes that even if to put forward a condition of state participation, high requirements may not be set out to its substantive content²⁸.

In that case the Court held that the presence of a person appointed by the chairman of the local court in Ghana (Commissioner for Oaths) was sufficient for applicability of the procedure under Article 7 for recognition of a ritual divorce in Ghana.

The Supreme Court of Bavaria recognized as sufficient a certificate issued by the consulate office of Ghana in Germany on the ground of the oath assurance of the father of one of the spouses that they were divorced according to a tribal rite at their homeland in Ghana²⁹.

Finally, in 1989-1990, an act of a notary in Ghana on certifying a joint statement by the parents and uncles of spouses that a year earlier their marriage was terminated according to a ritual rite was regarded as state participation; however, here, the situation was strengthened by the fact that the record of dissolution of marriage was traced in the civil registry of Ghana³⁰.

The result of this evolution is the oft-quoted statement of the President of Frankfurt Court of Appeal in 2001 decision (in Hesse Land where Frankfurt am Main is located, the functions of the state department of justice on recognition of foreign divorces are delegated to the President of Frankfurt Court of Appeal)³¹, according to which purely private divorces committed without any state participation are subject to recognition procedure under Article 7, then in force. The case concerned a Pakistani talaq which, according to the President of Frankfurt Court of Appeal, was valid under Pakistani law

²⁸ OLG Düsseldorf Nr. 13 VA 1/82 vom 20.05.1983. IPRspr. 1983, 479, 480, Nr. 183.

²⁹ BayObLG Nr. BReg. 1 Z 53/81 vom 02.07.1982. Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen (BayObLGZ) 1982, 257.

³⁰ Niedersächsischer Minister der Justiz Nr. 3465 E 204.187/88 vom 09.01.1989. IPRspr. 1989, 505, Nr. 225 a; OLG Celle Nr. 10 VA 1/89 vom 07.03.1989. IPRspr. 1989, 505, 507, Nr. 225 b; OLG Frankfurt Nr. 20 VA 10/89 vom 26.03.1990. StAZ 1990, 195.

³¹ Präsidentin des OLG Frankfurt Nr. 346/3-I/4-89/99 vom 19.11.2001. StAZ 2003, 137.

without any participation of public authorities. Recently this opinion was confirmed by Andrae³².

From a practical standpoint it is impossible to imagine a divorce where the state is not involved: “In almost all cases a foreign court or a foreign public authority (including notary public) are involved in the procedure of marriage dissolution, e.g., due to the need to register or acknowledge a divorce” (Ludwig, 2020:346).

That makes theoretical discussion purely speculative. In this regard, the position of the Swiss Federal Supreme Court is more ambitious and categorical.

In 1962, in Switzerland, which is culturally, economically and socially close to Germany and follows its legal evolution, the Federal Supreme Court made a fundamental decision on inapplicability of the recognition procedure to private divorces (that case concerned an Egyptian talaq): “the recognition procedure ... may not be expanded on ... divorce through unilateral declaration. ... The very conception of out of court unilateral dissolution of marriage contradicts two conditions ..., namely, that a divorce decree can be issued only by court, i.e., by a public authority that verifies the grounds of divorce and, therefore, that a divorce may not be the subject of a unilateral declaration in respect of which a public authority is only limited by its registration”³³.

Let us remind, that in 1960s in Germany the inapplicability of the recognition procedure to private divorces was characterized as a dominant opinion.

In 1996, the Federal Supreme Court of Switzerland, following the changed social conditions, expressed legally in the tendencies in German judicial practice described above, radically changes its practice and admits that recognition procedure is applicable also to private divorce. The case concerned a divorce by means of a tribal rite in Ghana where the state participation consisted only in a record about that divorce in the public registry, whereby the record was based on an oath of the father and a nephew of the husband concerning the fact of that tribal rite. The turn in practice is justified by the Supreme Court by liberalization of views of the Swiss legislator, expressed during the adoption of the Private International Law Act of 18 December 1987, as well as by the fact that in a number of legislations a private divorce is not only possible, but sometimes the only form to terminate a marriage during the life of the spouses. “General non-recognition based on the lack of the subject of recognition would be unfair and detached from reality in this situation”³⁴.

Conclusion: Thus, inclusion of all private divorces without exception in the subject of the recognition procedure, regardless of whether the foreign state has participated in it or not and whatever was the intensity degree of this participation, satisfies the modern social demand.

³² Andrae M. § 109 FamFG. In: *NomosKommentar zum Bürgerlichen Gesetzbuch*, Th. Heidel, R. Hüßtege, H.-P. Mansel, U. Noack (eds.). Bd. 1: Allgemeiner Teil, EGBGB, 4. 2021, Auflage. Baden-Baden, Nomos. 3320 p. Rdnr. 14. (in German).

³³ Bundesgericht vom 08.02.1962, Dame F. c/ Commission d'état civil du canton d'Appenzell Rhodes Intérieures, Die Entscheidungen des Schweizerischen Bundesgerichts (BGE) Bd. 88, I, 48, 50, 52.

³⁴ Bundesgericht vom 03.09.1996, Benjamin T. gegen Esther K. und Direktion des Innern des Kantons Zürich, BGE Bd. 122, III, 344, 348.

Theoretical substantiation of equating private divorces to public divorces: functional qualification approach

It only remains to provide theoretical substantiation of this thesis.

In this regard, Kleinrahm's considerations given back in 1966 seem to be rather precious: "From my point of view, drawing a demarcation line in this case does not make sense at all. In the term *decision* by means of which a marriage was dissolved abroad we can see an instrument transforming the legal status, notwithstanding whether it had public or private nature. *In this interpretation a decision will be any instrument which produces the legal effect of dissolution of marriage in its relative foreign legal order.* This, in our opinion, correct and easy understanding entails the inclusion of private divorces in any form in the scope of competences of state departments of justice. Such a result will correspond to the practical purpose of Article 7, as well as artificial delimitation will become meaningless" (Kleinrahm, 1966:16–17) (emphasis added).

In 2008, this idea, under the well-established term of *functional qualification*, is supported by Gärtner (2008: 184) and in 2016 similar idea concerning the subject-matter of section 328 of the German Code of Civil Procedure (which rules the recognition of foreign judgements procedure in general) with regard to administrative divorces is formulated by Spellenberg: "The decisive criterion is that under the German law a dissolution of marriage in these circumstances would take place by means of a judicial decision" (Spellenberg, 2016: § 328 ZPO, Rdnr. 219).

It is noteworthy, that Spellenberg does not mention this doctrine in connection with private divorces.

When interpreting of the term *decision* in section 107 it is necessary to rely on similar social function performed by a foreign legal institution, the very social function which the German legislator had in mind.

Since marriage dissolution may only be effected by a court decision, the legislator uses the term *decision*, which rests on the national conceptions of German law. At that moment the German legislator did not think about foreign conceptions at all (Andrae & Heidrich, 2004:1626).

However, the purpose of section 107 is, by no means, the application of German law. It is directed towards the outside world and is designed to cover all the legal forms of marriage dissolution that exist in world legal practice. Therefore, it should be interpreted in line with this goal very broadly (Gruber, 1999: 1565, albeit in the context of blocking effect (*lis pendens*) of the procedure of a private divorce initiated abroad; yet the key meaning does not change).

The interpretation criterion here is the functional equivalence, not the outer shell. If in a foreign legal order, the divorce function is performed by a legal transaction of a private nature, this does not prevent this legal transaction from being a procedural recognition subject in Germany, since in Germany the function of marriage dissolution is performed by a public instrument which is the *native* subject of procedural recognition.

We classify a foreign rule on the form of marriage dissolution according to the *lex fori* in the wording of functional qualification, i.e., by means of fiction we regard a foreign dissolution of a marriage as a public instrument, since in the *lex fori* the dissolution of a marriage is a public instrument.

Another qualification of a private divorce in section 109 of the German Act on Proceedings in Family Matters

The thesis of the functional qualification of private divorce in the sense of section 107 does not allow complete this article, since it must certainly be supplemented by the issue of interpreting the term *decision* in section 109 of the German Act on Proceedings in Family Matters.

Section 109 is devoted to the impediments to recognition of foreign decisions in marital matters (including foreign decisions on marriage dissolution), being the classical rule on recognition and enforcement of foreign judgements (in Russia, the rule on recognition and enforcement of foreign judgements is set out in Article 412 (1) of the Civil Procedure Code). Its opening sentence reads as follows: “Recognition of a foreign decision shall be rejected...”.

Both section 107 and section 109 are devoted to the same issue (recognition of foreign judgments) but regulate its different aspects. Section 107 concerns the order of this recognition and section 109 refers to the scope of verification within the framework of this recognition, but both use the same term *decision* (*Entscheidung*).

We have found that legal practice, despite the persistence of the doctrine, includes not only public instruments, but also legal transactions in the term *decision* within the sense of section 107 if their functional content corresponds to marriage dissolution in the sense of German law.

It might seem that there is nothing more logical than to attach the same meaning to the term *decision* in the sense of section 109.

That is what the inexperienced European Court of Justice did in its Judgment No. C-281/15 of 12 May 2016 in Sahyouni case³⁵, where the Higher Regional Court of Munich filed its request for a preliminary ruling on whether private divorces from third countries fall into the substantial scope of the European Union legal act, the Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III). The Higher Regional Court of Munich was hearing the petition on recognition of Islamic talaq committed in Syria under section 107. The Court had to determine the substantive law applicable to that talaq. The Rome III-Regulation containing conflict of laws rules on divorce, seemed applicable, but the Court had some doubts and addressed the European Court of Justice whose function was to interpret the rules of the European Union law.

And here, the case takes an unexpected turn: the European Court of Justice notes that it is not the Syrian divorce case before the Munich Court of Appeal, where a conflict of law issue could arise, to which the Rome III Regulation might or might not apply. The Higher Regional Court of Munich considers a case on recognition of an already completed divorce, i.e., in fact, the exequatur procedure, and within the framework of exequatur the applicable law is not verified under section 109 (5) of the German Act on

³⁵ Available in the official languages of the European Union at <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/15> [Accessed 11th May 2023].

Proceedings in Family Matters which states: “An examination of the legitimacy of the foreign judgment shall not take place”.

Therefore, the European Court of Justice asserts:

“It must be noted, first of all, that the referring court has before it not an application for divorce but an application for recognition of a divorce decision which was made by a religious authority in a third country (clause 18); It must also be noted that it follows in particular from Articles 1 and 8 of Regulation No. 1259/2010 that that regulation, which is the subject matter of the questions referred, lays down only the rules governing conflicts of applicable laws in matters of divorce and legal separation and does not govern the recognition, in a Member State, of a divorce decision which has already been pronounced” (clause 19).

And on these grounds, the Court declares the request of the Higher Regional Court of Munich inadmissible, since, according to the European Court, it is necessary to apply the provision of the national German law, in particular, section 109, which the supranational body, the European Court of Justice, is not entitled to interpret.

In the German literature this issue was immediately noticed: “the European Court of Justice has erroneously proceeded from the premise that the case concerned the procedural recognition of a foreign judgement” (Gössl 2016:235); “the European Court of Justice – somewhat unexpectedly – proceeds apparently from the premise that before it was put the issue of the *procedural recognition* of a divorce that has been decided in a third country” (Helms, 2016:1134) (emphasis in the original).

Actually, despite the fact that there was indeed a recognition case under section 107 in the Higher Regional Court of Munich, section 109 was not applicable! And the reason for this is that the term *decision* in the sense of section 109 is not equivalent to the term *decision* in the sense of section 107.

The guiding precedent in this matter is the judgment of the Federal Supreme Court of Germany which again considered the issue of Thai divorce qualified as private in the German doctrine and legal practice³⁶.

Having admitted that Article 7, then in force, was applicable to such a divorce, i.e., that it, even being a legal transaction, was subject to verification by the German authorities in the framework of exequatur (clause 10), the Federal Supreme Court in paragraph 14 continues:

“Since a private divorce is not a constitutive public instrument, but a private transaction, its recognition, according to the generally accepted view, is not subject to the rules of section 328 of the German Code of Civil Procedure (at that time analogous to the current section 109 of the Marriage and Family Procedure Act – our note); on the contrary, the rules of German private international law are to be applied. Therefore, the judicial institution and the requesting court rightly assumed that the validity of a private divorce effected abroad is determined on the basis of the divorce statute”³⁷.

The Federal Supreme Court is right that this position has already been generally accepted even before its decision³⁸. It remains the same after it until nowadays, both in

³⁶ BGH Nr. XII ZB 203/87 vom 21.02.1990, Rdnr. 14. BGHZ Bd. 110, 267.

³⁷ BGH Nr. XII ZB 203/87 vom 21.02.1990, Rdnr. 14. BGHZ Bd. 110, 267.

³⁸ OLG Stuttgart Nr. 1 VA 2/70 vom 18.12.1970. FamRZ 1971, 440; Bayerisches Staatsministerium der Justiz Nr. 3465 E – I – 295/76 vom 21.01.1977. StAZ 1977, 201, Anm. Otto; BayObLG Nr. BReg. 1 Z 137/76 vom

judicial practice³⁹ and in literature (Reuß, 2009: 8; Geimer, 2020: Rdnr. 2866; Spellenberg, 2016: § 107 FamFG, Rdnr. 19; § 109 FamFG, Rdnr. 339, 341; Geimer, 2022: § 328, Rdnr. 78)⁴⁰.

The fact that examination of a foreign private divorce takes the procedural form of exequatur under section 107 does not at all mean that the scope of examination is determined by section 109; this scope is determined by the scope of examination of any other legal transaction (contract): it is an examination of the compliance of the act with the substantive law competent in terms of the German conflict-of-laws rule⁴¹ (Gärtner, 2008:182).

This unexpected differentiation of sections 107 and 109 is motivated by the fact that at the stage when the legal transaction entailing marriage termination was committed in a foreign country, there was no state control of the ground for divorce, which is necessary because of the substantial irreversible legal consequences produced by divorce; so, the public control must occur at least once and is therefore realized in the recognition stage of the aforementioned legal transaction in Germany (Henrich, 1995:89; Herfarth, 2000:442).

Although there are voices in literature concerning expanding section 109 also on private divorces (see, Siehr, 2009: 333), on private divorces where public control took place (Dutta, 2018:64), or concerning seeking *simplified recognition procedures* as a mediated solution between full substantive and limited procedural verification (Gössl, 2018:98–99), these are only very limited voices that have not developed into a sustained social request that demands an inevitable response.

Conclusion

The current state of German law with regard to foreign private divorces is as follows: by means of fiction, they are treated as public instruments for the purpose of applying the recognition procedure to them, but on the substantive side of this procedure they are again treated as ordinary legal transactions subject to the scope of verification applicable to ordinary legal transactions, not public instruments. We can describe it as unique hybrid solution.

24.06.1977. FamRZ 1978, 243; BayObLG Nr. BReg. 1 Z 41/81 vom 30.11.1981. IPRax 1982, 104, 94, Anm. Henrich; OLG Frankfurt Nr. 20 VA 14/83 vom 12.07.1984. IPRax 1985, 48, Anm. Henrich; Landesjustizverwaltung Baden-Württemberg Nr. 346 E 325/85 vom 23.05.1986. IPRax 1988, 170, 171, Nr. 23a, 150, Anm. Beule; OLG Frankfurt Nr. 20 VA 27/88 vom 16.05.1989. NJW 1990, 646.

³⁹ OLG Frankfurt Nr. 20 VA 10/89 vom 26.03.1990. StAZ 1990, 195; Justizministerium Baden-Württemberg Nr. 346 E-633/99 vom 27.12.2000. FamRZ 2001, 1018, Anm. Gottwald; BayObLG Nr. 3 Z BR 136/02 vom 12.09.2002. FamRZ 2003, 381; OLG Stuttgart Nr. 3465 E 519/2018 vom 03.05.2019. FamRZ 2019, 1532; BGH Nr. XII ZB 158/18 vom 28.06.2020 (Sahyouni), Rdnr. 23. BGHZ Bd. 226, 365; KG Nr. 1 VA 1010/20 vom 03.11.2020, Rdnr. 6. IPRax 2022, 186 (Leitsatz), Anm. E.J.; KG Nr. 1 VA 1001/20 vom 01.12.2020, Rdnr. 12. FamRZ 2021, 504.

⁴⁰ See also: Antomo J. Anmerkung zum Bundesgerichtshof 28.06.2020 № XII ZB 158/18 (Sahyouni). Neue Juristische Wochenschrift (NJW). 2020, 3599–3600. (in German); Löhnig M. Anmerkung zum Bundesgerichtshof 28.06.2020 № XII ZB 158/18 (Sahyouni). Neue Zeitschrift für Familienrecht (NZFam). 2020, 1016–1017. (in German).

⁴¹ Antomo J. Anerkennung ausländischer Privatscheidungen – Rom III-Verordnung analog?, Anmerkung zum Europäischen Gerichtshof 20.12.2017 № C-372/16 (Sahyouni). Neue Juristische Wochenschrift (NJW). 2018, 435–438. (in German).

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