




The two German Agreements with Morocco on Social Security and Child Benefits

LOS DOS ACUERDOS DE ALEMANIA CON MARRUECOS SOBRE SEGURIDAD SOCIAL Y PRESTACIONES POR HIJO

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ABSTRACT

This paper analyses the two agreements in force on social security coordination between Germany and Morocco: the Agreement on Social Security from 25 March 1981 (quoted as “SSA Morocco”), and the Agreement on Child Benefits also from 25 March 1981 in the form of the Supplementary Agreement of 22 November 1991 (quoted as “CBA Morocco”).

RESUMEN

El presente artículo analiza los dos acuerdos vigentes en materia de coordinación de la Seguridad Social entre Alemania y Marruecos: el Acuerdo sobre Seguridad Social de 25 de marzo de 1981 (citado como “SSA Morroco”), y el Acuerdo sobre Prestaciones por Hijo, también de 25 de marzo de 1981, en forma de Acuerdo Complementario de 22 de noviembre de 1991 (citado como “CBA Morroco”).

KEYWORDS

Germany
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Social security coordination
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PALABRAS CLAVE

Alemania
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CONTENTS

- I. INTRODUCTION
- II. THE SSA MOROCCO
 - A. Personal scope
 - B. Equal status of ordinary residence and export of pensions
 - C. Legislation applicable
 - D. Pension insurance
 - 1. Totalization
 - 2. Calculation
 - 3. Export of pensions
 - 4. Multiple marriage situation
 - E. Practical questions in relation to “gottardo” not only in terms of pensions
 - F. Sickness insurance (benefits in kind) and future of the SSA Morocco
- III. THE CBA MOROCCO

I. INTRODUCTION

With regard to social security coordination there are two agreements in force. One is the Agreement on Social Security from 25 March 1981 (quoted as “SSA Morocco”) and the other is the Agreement on Child Benefits also from 25 March 1981 in the form of the Supplementary Agreement of 22 November 1991 (quoted as “CBA Morocco”). The SSA Morocco entered into force on 1 August 1986 and the CBA Morocco on 1 September 1996.

By far the most important agreement is the SSA Morocco. It follows the general coordination principles, which comprise legislation applicable and in its material scope the coordination of pension insurance, farmers’ old age security in terms of pensions, sickness insurance and accident at work insurance. In terms of sickness insurance it includes benefits in cash and benefits in kind. However the articles on coordination of sickness benefits in cash have not yet entered in force.

The CBA Morocco is due to amendments in the German national tax legislation in the year 1996 of very low importance, and was the last agreement on child benefits Germany concluded.

With regard to the SSA Morocco this article shall only embark on particularities and on the main situations which might be covered in a way other Member States handle differently or not at all in their SSA with third countries.

II. THE SSA MOROCCO

A. Personal scope

Article 3 - covers the following persons:

The SSA Morocco covers

- a) nationals of a Contracting State,
- b) refugees within the meaning of Article 1 of the Convention on the Status of Refugees dated July 28, 1951 and the Protocol to that Convention dated January 31, 1967,
- c) stateless persons within the meaning of Article 1 of the Convention on the Status of Stateless Persons dated September 28, 1954, and
- d) other persons with respect to the rights they derive from a national of either Contracting State, from a refugee or a stateless person within the meaning of this Article.

The personal scope does not cover nationals of a state other than a Contracting State, unless they are included in the group of persons specified in (d).

The SSA Morocco is therefore a so-called “closed Agreement”. Only a very few SSA Germany has concluded are closed Agreements. Normally also in the past the German Agreements contained all third country nationals in their personal scope. Nowadays Germany considers that all insured persons should be covered by the personal scope of an Agreement regardless their nationality or in which country they reside.

B. Equal status of ordinary residence and export of pensions

Article 4 of the SSA Morocco reads as follows:

1. Unless otherwise provided in this Agreement, persons specified in Article 3 who reside in the territory of one Contracting State shall, in the application of the legislation of either Contracting State, receive equal treatment with the nationals of the latter Contracting State.
2. Unless otherwise provided for in this Agreement benefits under the legislation of one Contracting State shall be awarded to nationals of the other Contracting State, resident outside the territories of both Contracting States, under the same conditions as they are awarded to the nationals of this Contracting State who reside outside the territory of this Contracting State.

Firstly equal status is only granted to persons covered by Article 3 resident in the other Contracting State and secondly, with regard to persons residing outside of the Contracting states benefits are only paid to nationals of the other Contracting states under the same terms as they are awarded to their own nationals residing outside.

This leads to consequences in terms of totalization and export of pensions. These consequences are described in the relevant subchapters.

Special rules:

As Article 4 (1) is far-reaching with regard to nationals of the other Contracting State in the area of social security certain restrictions are necessary. They are covered in the Concluding Protocol to the SSA Morocco which forms an integral part of the SSA Morocco.

1. The legislation of one Contracting State which guarantees participation of the insured and of employers in the organs of self-government of institutions, and associations of institutions, as well as in the adjudication of social security matters shall remain unaffected.

The reason for this clause is that e.g. in Germany the social security institutions are self-governing institutions. The top hierarchy representatives of these institutions are elected by the insured. It needs to be guaranteed that nationals of a Contracting state do not have the same rights as Germans to elect or to be elected. The same applies in respect of lay judges of a court competent for social security matters (Social Courts, State Social Courts and Federal Social Court).

2. Nationals of a Contracting State covered by Article 4 (1) SSA Morocco are not entitled to voluntary coverage in the pension insurance of this Contracting State as long as they reside outside the territory of this Contracting State.

In principle only German nationals are entitled to a German voluntary pension insurance if they reside outside Germany. Modern Social Security Agreements (SSA) of Germany also entitle nationals of the other Contracting State residing outside of Germany to voluntary coverage under the German pension insurance, if these have completed periods of contributions to this insurance of at least 60 months. Special rules apply to nationals of EU/Norway, Iceland, Liechtenstein (EEA)/Switzerland according to Regulation (EC) No. 883/2004 (Annex XI Germany 4): If these reside outside Germany and fulfil the general conditions of the German pension insurance scheme they may pay voluntary contributions if they had been voluntarily or compulsorily insured in the German pension insurance scheme at some time previously. One contribution (= 1 month) suffices.

C. Legislation applicable

This chapter follows the lines the majority of EU member states follows. It contains the *loci laboris* rule and the exception from this rule in cases of postings and similar situations including the possibility to conclude exceptional agreements. Only the coverage of one social security system in relation to the material scope of the SSA Morocco (pension insurance, farmers' old age security in terms of pensions, sickness insurance and accident at work insurance) applies which avoids situations of double coverage.

The duration of postings with leads to the continuing competence of the sending State is up to 36 months and with the consent of the competent institutions of both Contracting States this duration can be prolonged up to a further 36 months. In case a further prolongation becomes necessary only an exceptional agreement between the competent institutions is possible.

D. Pension insurance

First of all some numbers: Some numbers on the export of pension insurance: In the year 2019 Germany exported pensions to 3287 persons living in Morocco of whom

168 with German nationality. The total sum of these transfers amounted to almost 20 Million Euros.

The articles on pension insurance also follow the principles of all modern social security agreements:

1. Totalization

The general waiting period in Germany for a regular pension is only 5 years and therefore much lower than in the majority of countries. If the German periods do not suffice to receive a German State pension, periods of insurance from Morocco are added to the periods of insurance in Germany,

2. Calculation

The calculation does not lead to a single full pension which only has to be paid by one of the Contracting States. The Moroccan pension is calculated from contributions the person has completed in Morocco and the German pension from periods completed in Germany.

3. Export of pensions

Full export of German pensions for non-Germans is nowadays granted to everybody fulfilling the general conditions, but to reach this result took a long way, which needs to be explained as national legislation and European legislation and European jurisprudence gradually paved the way to this final good result.

a) *Export of pensions and claim according to SSA Morocco for persons residing in Morocco.*

100% of the German pension for the persons covered by the personal scope of the SSA Morocco: Equal treatment for the persons mentioned in Article 3 is granted to the persons mentioned in Article 3 SSA who ordinarily reside in the territory of either Contracting State (Article 4 (1) SSA. They get the full export of the pensions (mainly nationals of Contracting States and survivors pensions and orphans regardless of nationality). Other persons are not included: These were all other citizens of a third country including the EU Member States, EEA as well as Switzerland.

The Gottardo judgment as such did not change this situation for EU/EEA and Swiss nationals as it required their residence within EU/EEA or Switzerland.

Background:

What means "Gottardo"? With regard to citizens of the EU, EEA and Switzerland a deciding change in policy came with the epoch-making Judgement by the European Court of Justice *Gottardo* (Judgment of 15 January 2002 in Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)*).

In the *Gottardo* judgment, the Court of Justice acted on the principle as set out in Article 45 of the Treaty on the Functioning of the European Union (TFEU) in relation to a person resident in the European Union who had worked in France, Italy and Switzerland. This person did not have sufficient entitlement for a pension in Italy and asked for her periods of insurance completed in Switzerland and Italy to be aggregated, as provided for under the bilateral convention between Italy and Switzerland for the benefit of their nationals. The principle of non-discrimination on the grounds of nationality is an essential safeguard for the freedom of movement of persons, as provided for in Article 21(1) and 45(1) TFEU. This implies the abolition of all discrimination between nationals of Member States.

The Court ruled when a Member State concludes a bilateral international convention on social security with a third country which provides for account to be taken of periods of insurance completed in that third country for the acquisition of an entitlement to old-age benefits, the fundamental principle of equal treatment requires that this Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so. The Court considered that disturbing the balance and reciprocity of a bilateral international convention concluded between a Member State and a third country did not constitute an objective justification for the refusal by the Member State party to that convention to extend to nationals of other Member States the advantages which its own nationals derive from that convention. Nor did the Court accept the objections to the effect that a possible increase in the financial burden and administrative difficulties in liaising with the competent authorities of the non-member country in question could justify the Member State which is party to the bilateral convention failing to comply with its Treaty obligations.

The consequence of the judgement was therefore far-reaching, as it did not allow to treat nationals of EU Member States, EEA and Switzerland differently from German nationals anymore as long as they reside within the territory of the EU/EEA and Switzerland, but the judgement has no consequences when they reside somewhere else!

This situation changed not before 5 May 2005:

An amendment to Article 3 Regulation 1408/71 on social security coordination entering into force on 5 May deleted the requirement of residence within the Union for equal treatment. As the SSA Morocco is a closed agreement, before that date European citizens were not included in its personal scope. Therefore aggregation of periods was not possible before that date for EU citizens residing outside the EU and the full German pension could not be paid to them for the same reason. The same applies to survivors of EU/EEA/Swiss nationals in terms of survivors' pensions.

b) Residence of persons in the EU/EEA/Switzerland.

German and Moroccan citizens:

Under the terms of Article 4 (2), SSA Morocco benefits according to the national legislation of one contracting state are granted to the nationals of the other contracting

state who ordinarily reside outside the Contracting States under the same conditions as to its own nationals residing there.

As Germany always fully exports pensions to Germans residing abroad, this means that also Moroccan citizens receive a full export of the German pension in case of a habitual residence in other EU/EEA countries and in Switzerland.

The German legislation contained a very special rule on the export rate of pensions abroad. While Germans got paid a 100 % of the German pension when they resided in another country, other nationals could only export 70 % of the pension. German pensions were only paid fully to them in case of a SSA or if EU legislation required it. This means that refugees, stateless persons, survivors of a German or Moroccan pensioners for their derived pension as long as these did not have German or Moroccan citizenship only got paid 70 % of the pension abroad.

EU/EEA/Swiss citizens:

Application of the Gottardo judgment to EU/EEA/Swiss citizens: 100 % of the German pension.

c) Residence in other third countries.

In application of Article 4 (2) benefits to Moroccans residing in third countries are granted under the same conditions as to Germans. As the the German pension was always paid fully to a German, Moroccans are treated in the same way. This is also valid for German or Moroccan survivors of these pensioners with regard to their survivors pensions.

In the framework of Article 4 (2), everybody else including refugees and stateless persons is excluded of the full export into third countries. The 70% rule applied.

According to an amendment of the German legislation from 19 December 2007 which entered retroactively in force on 5 May 2005 survivors of a German citizen, however receive 100 % of the derived pension abroad regardless of nationality: from then onward for example the German pensioner's Albanian widow residing in Albania received the same amount of pension as she would have got living in Germany, but not the Albanian widow residing in Albania of a Moroccan pensioner with regard to a German pension.

A very important amendment to the German pension legislation came into force on 1 October 2013. It abolishes the 70% rule for everybody. Since then the export restrictions according to the SSA Morocco do not apply any more to a German pension.

EU/EEA/Swiss citizens: See above under a.

4. Multiple marriage situation

With regard to pensions the SSA Morocco contains another interesting aspect.

Multiple marriage (polygamy) is still permitted in Morocco (Art. 40 et seq. Code du Statut Personnel et des Successions CSPS). However, it is being practised less and less, also because it was made considerably more difficult by the reform of family law in 2004. It is limited to a maximum of four women.

Multiple marriages under Moroccan law are also effective in Germany and are associated with the usual legal consequences. Therefore, it is also necessary to ask persons who have entered into a marriage under Moroccan marriage law about the existence of further marriages. If there are several widows upon the death of an insured person, several claims to a widow's pension may arise accordingly, but according to Article 25 SSA Morocco these are to be divided equally and finally among the entitled widows who were spouses at the same time.

E. Practical questions in relation to “gottardo” not only in terms of pensions

One has to be aware of the fact that the gradually reached fair results with regard to aggregation and export of pensions apply only for the German side. The other contracting state can stick to the wording of the respective SSA.

While the legal problems have been solved, practical problems arising from “closed agreements” are not excluded. The Gottardo judgement constitutes only an obligation for the Member States. It is not binding for Third Countries. It depends on their good will to communicate insurance periods of Union nationals to the Contract State.

The Administrative Commission has seen this problem and adopted recommendations on the Gottardo judgment: Recommendation No 22 of 18 June 2003 (2003/868/EC) under Regulation 1408/71, then under Regulation 883/2004 Recommendation No P1 of 12 June 2009 (2010/ C 106/14) clearly mainly in terms of pensions and then Recommendation H 1 of 19 June 2013 (2013/ C279/07) which also repealed Recommendation No P 1. It had to be made clearer than before that the Gottardo judgement is a judgement concerning not only non-discrimination of nationals of other Member States in the area of pensions, but also generally the material scope of all the branches of social security comprised in a SSA concluded by the Member States with third countries. The use of the letter “H” in the Recommendations means therefore that the approach of member States requires to be “Horizontal”.

The consequence is far-reaching as non-discrimination also applies e.g. for the treatment under the Moroccan sickness scheme to e.g. a Spanish tourist being insured in the sickness insurance of another Contracting State than Spain having a “closed” SSA with Morocco if the SSA covers sickness benefits in its material scope. In the author's mind it also comprises applicable legislation i.e. for example postings from one contracting States to Morocco. A Spanish employee employed in a company of another Member States, which is a Contracting State with Morocco and has concluded a “closed” SSA with Morocco should endeavour that Morocco acknowledges this posting as falling under the SSA. Therefore Morocco should, if possible, accept the relevant form (mostly a so-called 101 form) proving that the worker concerned was posted under the SSA.

How to achieve this result?

The Recommendation No H1 contains the following solution:

The Member States should inform the institutions in the countries with which they have signed social security conventions, whose provisions apply only to their respective nationals, about the implications of this Recommendation. Member States which have concluded bilateral conventions with the same third countries may act jointly in requesting such cooperation. This cooperation is clearly essential if EU law is to be complied with.

The Federal Ministry of Labour and Social Affairs contacted the competent authorities in the countries concerned (Morocco and Tunisia) in writing and at the occasion of joint meetings they have been and informed about Gottardo and there seem to be no problems with regard to reporting of insurance periods of EU/EEA/Swiss nationals in the pension insurance of the respective Contracting State.

F. Sickness insurance (benefits in kind) and future of the SSA Morocco

The provisions on the coordination of benefits in kind in the case of sickness in the SSA Morocco are not yet implemented. In the time the SSA Morocco was concluded (1981) it was German policy to coordinate also sickness insurance in SSA if certain conditions were fulfilled. The main condition was that the other country had a functioning sickness insurance offering the citizens adequate medical treatments. Unusual is that the SSA Morocco states in Article 18 that the application of the provisions on benefits in kind in the area of sickness need a special arrangement between Germany and Morocco, “which take into account the differences of existing situations in respect of these benefits in both Contracting States”.

What here is expressed in legal terms was simply the fact that Morocco had not yet established a sustainable health insurance system at the time of the conclusion of the SSA Morocco.

This did not happen before the arrival of the new century. Nowadays Morocco has a functioning and sustainable health insurance system. Therefore Germany and Morocco are negotiating a revision of the SSA Morocco with special account on benefits in kind in the area of sickness insurance. The existing provisions need a thorough update and at the same time some other areas need new attention. A huge task in this respect is to agree on a completely new provision for data protection, a task caused by the General Data Collection Regulation of the EU (GDCR). Also “Gottardo” should be covered in the revised texts.

Unfortunately the last round of negotiations envisaged in April 2020 could not take place due to the Covid-19 pandemic and needed to be adjourned.

III. THE CBA MOROCCO

As the CBA Morocco is nowadays rather insignificant due to favourable German tax legislation, only a short summary is given:

It is a reciprocal agreement covering employees residing either in Germany or in Morocco. With regard to the personal scope only nationals of both contracting States or refugees and stateless persons (see above under B. are covered.

In the following only a situation where the children reside in Morocco (including the case that they stay temporarily in Germany) is described:

The father or the mother is an employee in Germany. He/she must be entitled to unemployment insurance during this period of employment. Employees within the meaning of the CBA Morocco are also persons who, after the termination of their employment with the company receive parental benefits or parental leave in the event of continuation of the employment relationship according to the Federal Parental Benefit and the Parental Leave Act, or who receive so-called unemployment benefit I (but not unemployment benefit II which is a kind of social assistance), or benefits in cash for sickness, maternity or comparable reasons.

Child benefit rates for children in Morocco or for children, who are only temporarily in Germany, amount for

- the first child to 5,11 Euro (10,00 DM in the CBA Morocco) per month, and
- the second to sixth child to 12,78 Euro (25,00 DM in the CBA Morocco) per month. The order depends on the age of the children. It is only payable for up to six children living in Morocco.

Child benefits to Morocco are only exportable for children who are not married and only until the age of 18.

The definition of “children” comprise the following: legitimate children, children adopted, recognised illegitimate children and stepchildren living in the household of the entitled person. If the child transfers the regular residence from Germany to Morocco during the period of a calendar month, the child benefit for the whole month is paid exclusively by Germany. If the child is regularly residing in Morocco and fulfils there the requirements of the Moroccan child benefit legislation, German child benefits cannot be claimed. In fact the German rates are much higher than the rates in the CBA Morocco:

Following rates are valid for children residing in Germany (rates as of 2019):

First and second child:	204,00 €
Third child:	210,00 €
For each further child:	235,00 €

As mentioned above, child benefits under the CBA Morocco are hardly of any practical significance any more due to a new regulation in German tax law introduced in the year 1996. According to this legislation, there is either a claim to the child benefit or to the tax-free child allowance. The child benefit is paid monthly as a tax refund. After the end of the calendar year, the tax office deducts the tax-free allowance for children from the taxable income as part of the income tax assessment, if this is more

favourable than the child benefit, and offsets paid child benefits. As a rule, it is more favourable to claim the tax-free allowances than child benefit under the CBA Morocco: for children residing in Morocco a quarter of the tax free allowance is taken into account.

The more favourable national legislation in Germany explains also why the rates in the CBA Morocco were never reviewed.

For the sake of completeness it should be added:

For Moroccan nationals who have been granted final recognition as entitled to asylum by the German Federal Office for Migration and Refugees, the European Interim Agreement on Social Security Schemes also applies. They can receive child benefit for their children living with them if they have been living in Germany for at least six months, after the six-month period has expired. It does not depend on whether they are employed or not.

In addition, under the Euro-Mediterranean Agreement, Moroccan nationals are entitled to German child benefit for their children living with them, if they are compulsorily or voluntarily continued to be insured in at least one branch of German social security, regardless of whether an employment relationship exists.