Evasion of the Law Resulting from a Choice of Law under the Succession Regulation

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Contents

I. Introduction

According to Art. 22(1) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession ("the Regulation"), a testator can choose the law of the Member State whose nationality he[1] possesses either "at the time of making the choice [of law] or at the time of [his] death" to govern his succession as a whole. The right to choose the applicable law is one of

[1] To improve readability and to avoid awkward constructions of "he or she" and "his or her", only masculine pronouns are used. When masculine pronouns are used, readers should assume a reference to both genders.

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two exceptions to the general rule set out under Art. 21(1) of the Regulation, which specifies "the law of the State in which the deceased had his habitual residence at the time of death" as the law applicable to his succession.[2] The chosen law governs, in particular, "disinheritance and disqualification by conduct"[3] (Art. 23(2) lit. d) and "the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs" (Art. 23(2) lit. h).[4]

In our current era of mobility, the availability of the right to choose the law governing one's succession is necessary for efficient estate planning. One of the concerns related to introduction of this right was that it could be used to avoid limitations and burdens that the state of the testator's habitual residence imposed upon a testator writing his will and upon heirs inheriting his estate, in particular to frustrate the legitimate expectations of persons entitled to forced heirship.[5] Therefore, to protect these legitimate expectations, the right to choose the applicable law was limited to the law of a state of the deceased's nationality (recital 38 of the Regulation).[6] However, despite suggestions having been made in this regard, the Regulation does not include a

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[2] The second exception is provided under Art. 21(2) of the Regulation and applies if "it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State" of his habitual residence.

[3] As to the notion of disqualification, the present text uses the phrasing "disqualified from" interchangeably with "deprived of".

[4] See also recital 50 of the Regulation; for further comments see *Anatol Dutta*, in: Münchener Kommentar zum BGB (2018) Art. 23 EuErbVO paras. 35–36.

[5] Rembert Süß expects that, in practice, avoiding or minimalizing forced heirship will be the most important factor in deciding whether to exercise the right to choose the law applicable to succession; see *Rembert Süß*, § 2 Die Bestimmung des Erbstatuts nach der EU-Erbrechtsverordnung, in: Erbrecht in Europa[3], ed. by Rembert Süß (2015) 25, 47 para. 77. In the English version of the Regulation, the term "reserved portion" is used to describe what in German is translated as "Pflichtteilsrecht". However, considering that different states provide different forms of forced heirship, I use the term "compulsory portion" for the form of forced heirship that amounts to an entitlement to a sum of money equal to a portion of a deceased's estate (e.g. in Germany, Austria and Poland) and the term "reserved portion" for the form that amounts to a participation in the estate (e.g. in France and Italy).

[6] As to the protection of persons having a legitimate expectation of a reserved portion under the Regulation; see e.g. *Frank Bauer*, in: Dutta / Weber, Internationales Erbrecht (2016) Art. 22 EuErbVO para. 2; *Dirk Looschelders*, in: Hüßtege / Mansel, NomosKommentar BGB, Bd. VI: Rom-Verordnungen[3] (2019) Art. 22 EuErbVO para. 2. Scholars share the belief that this limitation provides a sufficient protection of persons entitled to a forced heirship; see e.g. *Knut Werner Lange*, Das Erbkollisionsrecht im neuen Entwurf einer EU-ErbVO, ZErb 2012, 160, 164; *Ulrich Simon / Markus Buschbaum*, Die neue EU-Erbrechtsverordnung, NJW 2012, 2393, 2395. Nevertheless, it seems apparent that both the Proposal for the Regulation and the Regulation itself clearly foster freedom of testation at the expense of weakening "national forced heirship rights and […] their effectiveness, at least in transnational situations" (*Andrea Bonomi*, Testamentary freedom or forced heirship? – Balancing party autonomy and the protection of family members, NIPR 2010, 605, 606). But see e.g. *Reinhold Geimer*, Die europäi-

provision explicitly protecting the entitlement to a reserved portion.[7] It is up to a court of the state of the forum to provide such protection by carefully interpreting and applying the Regulation.[8] One of the "safety valves" in private international law that provides such protection is the mechanism designed to deal with the evasion of law. As stated in recital 26 of the Regulation, nothing prevents finding testamentary dispositions made in accordance with the provisions of the Regulation to be evasive.

In German legal literature, it has been a subject of debate whether exercising the right to choose the law applicable to one's succession under Art. 22 of the Regulation could ever be considered an evasive action and whether the factual circumstances and the result of the application of foreign law can impact that assessment. The subject of the debate relates especially to instances where exercising the right to choose the applicable law leads to a reduction or elimination of the deceased's family members' entitlement to forced heirship. Scholars have concentrated on the fact that in most jurisdictions, the deceased's children and/or spouse are provided with some compensation from the deceased's estate.[9] Therefore, the risk is low that by choosing a certain national law a testator can eliminate or significantly limit his liability towards his family members. Yet this opinion seems to overlook that each legal system regulates not only by whom, in what form and size and under what circumstances a reserved portion can be received,[10] but also who can be deprived of it by a testator as well as under what conditions. The formulation of grounds for deprivation have a fundamental impact on whether entitlement to forced heirship will constitute something more than an empty right that an entitled person can easily be deprived of where a testator possesses the nationality of a state different than that of his habitual residence. The grounds for disqualification can differ between states due to cultural or moral discrepancies existing between these states and as result be more discretionary or extensive in one jurisdiction in contrast to another. For instance, the finding of the German Constitutional Court that "not

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sche Erbrechtsverordnung im Überblick, in: Die neue europäische Erbrechtsverordnung, ed. by Johannes Hager (2013) 9, 35.

[7] MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 43.

[8] MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 43.

[9] *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession, RabelsZ 74 (2010) 522, 664. See also MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 43; *Felix Odersky*, Die Europäische Erbrechtsverordnung in der Gestaltungspraxis, notar 2013, 3, 6.

[10] Also, the categories of persons entitled to forced heirship are different in different Member States; see the examples given by *Constanze Fischer-Czermak*, Gestaltung der Erbfolge durch Rechtswahl – Vorwirkungen der Europäischen Erbrechtsverordnung, ZFE 2013, 52, 53–54.

every misconduct of a child leading to alienation or a rift with the testator justifies the primacy of testamentary freedom"[11] is not commonly agreed upon. Exactly what misconduct justifies deprivation of forced heirship depends on the relevant national legislation. In fact, one need look no further than the legal systems of Germany's next-door neighbours, e.g. Austria, the Czech Republic and Poland, to find examples of disqualifying circumstances that substantially vary from those that would be recognized under German law as grounds to deprive a person of an otherwise existing right to a compulsory portion.

In this paper I will consider whether a German court can identify a case of evasion of the law as resulting from a choice of law made under the Regulation, based on different jurisdictions' varying regulation of the circumstances that allow for a disqualification from forced heirship. Could the exercise of the right to choose the applicable law (Art. 22 of the Regulation) be challenged under certain circumstances as an evasion of the law under private international law? Particularly, where the aim of the testator's choice was to deprive his descendants of a compulsory portion based on facts (disqualification by conduct) that would not support such an action under German law, could a German court conclude that the result would be inappropriate from the perspective of German law?

In considering these questions, I will first give some brief examples of factual circumstances that would, in jurisdictions outside Germany, allow a testator to deprive his family member of a forced heirship, these being circumstances that vary significantly from those provided under German law. Secondly, I will identify the conditions for finding an evasion of law under European and German private international law and, in turn, consider those instances where a choice of law under Art. 22 of the Regulation might serve to fulfil these conditions. In conclusion, I will reflect on the likelihood of a German court making a finding of evasion of law under private international law.

II. Different factual circumstances allowing disqualification by conduct

German law, as in many European legal systems, provides a deceased's descendants, spouse and parents with a compulsory portion (§ 2303 BGB). According to a definition formulated by the German Constitutional Court in 2005, the compulsory portion amounts to "a minimum economic por-

[11] BVerfG 19 April 2005 – 1 BvR 1644/00, BVerfGE 112, 332, 348, 349 (translation by author).

tion in the testator's estate that is fundamentally indefeasible and does not depend on the need of the person entitled thereto".[12]

The most distinctive feature of the German compulsory portion is its constitutional protection. Namely, according to a ruling of the German Constitutional Court, Arts. 6 and 14 of the German Constitution guarantee a testator's descendants the right to a compulsory portion. The constitutional guarantee of the portion compels a narrow interpretation of the grounds for disqualification by conduct, which are for their part already very restrictively formulated (§ 2333 BGB).[13] In other jurisdictions where the right of a testator's descendant to forced heirship is not constitutionally guaranteed, like Poland,[14] not only are the grounds for disqualification by conduct more broadly formulated than under German law, but also their interpretation favours the testator's freedom of testation. For example, Polish law allows a deprivation of the portion if the person entitled to the portion "contrary to the will of the testator persistently behaved in contravention of the principles of community life" (Art. 1008 point 1 Civil Code).[15] Until 1 January 2010, German law included a similar provision; it allowed a testator to deprive a descendant of the portion on account of this person having led a dishonourable or immoral lifestyle contrary to the will of the testator (§ 2333 para. 1 point 5 BGB old version). Nevertheless, even under this provision, a testator's freedom of testation was more limited under German law than it is under Polish law. German case law provides an illustrative example. The German Constitutional Court decided in 2005 that a testator's child was entitled to the compulsory portion inspite of having declined to maintain any contact with the testator and having deprived the testator of any personal access or written contact with the testator's grandchild. This occurred

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[12] BVerfG 19 April 2005, BVerfGE 112, 332, 348, 349.

[13] § 2333 BGB provides four very specific factual scenarios under which a person entitled to a compulsory portion could be disqualified by a testator from receiving it: Para. 1: A testator may deprive a descendant of his compulsory share if the descendant (i) makes an attempt on the life of the testator, of the spouse of the testator, or of another descendant or of a person similarly close to the testator; (ii) is guilty of a major offence or of a serious intentional minor offence against one of the persons designated in no (i); (iii) wilfully violates the statutory obligation to maintain the testator; or (iv) is finally sentenced to at least one year's imprisonment without probation because of an intentional criminal offence, and participation of the descendant in the estate is hence unreasonable for the testator. The same applies if the placement of the descendant in a psychiatric hospital or in a withdrawal clinic is finally ordered because of a similarly serious intentional offence. Para. 2: Para. 1 applies with the necessary modifications to the revocation of the parental or spousal compulsory share.

[14] Wyrok Trybunału Konstytucyjnego z dnia 31 stycznia 2001 r. – P 4/99, Dziennik Ustawa 2001, nr 11, poz. 91 [Judgment of the (Polish) Constitutional Tribunal 31 January 2001 – P 4/99, Journal of Laws of the Republic of Poland 2001, No. 11, item 91].

[15] Translated by *Olgierd A. Wojtasiewicz*, in: The Polish Civil Code, ed. by Danuta Kierzkowska (1994) 186. The "principles of community life" are generally understood as the moral, ethical and/or social norms accepted in the Polish society.

despite the testator's and the grandchild's attempt to cultivate their relationship. As can be deduced from the ruling, the situation lasted for at least two years prior to the testator's death and deeply upset him. My review of Polish legislation and case law leads me to believe that in a comparable situation a Polish court would have found that the deceased validly disqualified his child from receiving any compulsory portion based on this child's conduct.[16]

Moreover, there are legal provisions in a number of Member States that could potentially allow for disqualification by conduct under the above-described factual scenario.[17] For instance, the Czech Civil Code allows deprivation of forced heirship for a person who "fails to show such genuine interest in the decedent as he should" (sec. 1646 para. 1 lit. b). Under Finnish law, a person entitled to forced heirship can be disqualified therefrom if he "through a deliberate act, has seriously offended the decedent […]. The same applies if the heir continuously leads a dishonourable or immoral life" (chap. 15, sec. 4 para. 1 Code of Inheritance). Hungarian law provides that disqualification by conduct "can take place if a person entitled to a compulsory share [*inter alia*] e) lives by immoral standards or g) has failed to offer aid or assistance as it may be expected by the testator at a time of need" (sec. 7:78 para. 1) Act V of 2013 – Civil Code). Further, "[t]he testator may disinherit a descendant of legal age for reasons of gross ingratitude the descendant has displayed toward the testator" (sec. 7:78 para. 2 Act V of 2013 – Civil Code). Similarly, mistreating a deceased in deed or seriously insulting him by speech is a ground for disqualification under Spanish law (Art. 853.2. Spanish Civil Code). And also under Austrian law, a person entitled to a compulsory portion can be deprived of it if he has caused the deceased serious emotional distress in a reprehensible way (§ 770 point 4 ABGB). Under Austrian law a testator could also "reduce the size of the compulsory portion by half if his and the entitled person's relationship was, at no time or at least for a long period of time prior to the testator's death, not as close as is usually the case between such members of a family" (§ 776 para. 1 ABGB).[18] To be able to exercise a greater freedom of testation and avoid the stricter German law of

[16] See e.g. Wyrok Sądu Najwyższego z dnia 7 listopada 2002 r. – II CKN 1397/00, LEX nr 75286 [Judgment of the Supreme Court of Poland 7 November 2002 – II CKN 1397/00, LEX No. 75286]; Wyrok Sądu Najwyższego z dnia 25 czerwca 2015 r. – III CSK 375/14, LEX nr 1794316; [Judgment of the Supreme Court of Poland 25 June 2015 – III CSK 375/14, LEX No. 1794316]; *Tomasz Sokołowski*, in: Gutowski, Kodeks cywilny – Komentarz[2] [Civil Code – Commentary[2]], Vol. III: Art. 627–1088 (2019) Art. 1008 paras. 9, 15.

[17] Another example can be found in Slovenian law; see *Miroslava Geč Korošec / Suzana Kraljić*, Familienerbrecht und Testierfreiheit im slowenischen Recht, in: Familienerbrecht und Testierfreiheit im europäischen Vergleich, ed. by Dieter Henrich / Dieter Schwab (2001) 273, 292–293.

[18] However, complete deprivation of a compulsory portion is not always possible under Austrian law as a person entitled to forced heirship is in every case entitled to the necessary maintenance allowance out of the deceased's estate (§ 777 ABGB).

his habitual residence, a national of one of these states can simply choose the law of that state to govern his succession as a whole under Art. 22 of the Regulation.

It is likely that German courts will at some point face the question of whether a choice of foreign law done with the intention of preventing a forced heirship can be identified as an evasion of law, as over 12% of the people living in Germany are foreigners.[19] Therefore, German courts, as the courts having general jurisdiction, will have to decide on the succession of a deceased that has chosen the law of the state of his nationality to avoid the strict provisions on forced heirship under German law. This is especially true given that the deceased's family members will be unlikely to confer jurisdiction to a court of the state of the chosen law – under Art. 5 of the Regulation – where this latter state's law is less favourable to them than German law.

III. Evasion of the law under European and German private international law

1. Evasion of the law in European private (international) law

Utilizing the provisions of the Regulation in order to evade the national law of a Member State is not explicitly disallowed in the Regulation. In recital 26 it is only stated that "[n]othing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law". The Regulation should be understood and applied uniformly in all Member States.[20] However – in what seems surprising – neither the Regulation nor European case law determines the conditions for identifying an evasion of law under European private law or private international law.[21] The European Court of Justice (ECJ) has only stated that "the national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny

[19] *Statistisches Bundesamt*, Pressemitteilung Nr. 314, 21 August 2019, <www.destatis.de/DE/Presse/Pressemitteilungen/2019/08/PD19_314_12511.html;jsessionid=84E8950FB073FBA6D42D1D692D7D19AA.internet742>.

[20] See e.g. *Jan Schmidt*, in: Beck-Online, Großkommentar zum Zivilrecht (as of 1 June 2019) Art. 1 EuErbVO paras. 5, 6; *Christoph Döbereiner*, § 47 Die Europäische Erbrechtsverordnung EuErbVO, in: Nachlassrecht[11], ed. by Karl Firsching/Hans Lothar Graf (2019) para. 4.

[21] The ECJ speaks only of the possibility to identify a wrongful avoidance of obligations regulated under national law; see e.g. ECJ 5 October 1994 – Case C-23/93 (*TV10 SA v. Commissariaat voor de Media*) [1994] ECR I-4795, para. 21; ECJ 3 December 1974 – Case C-33-74 (*Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*) [1974] ECR I-1299, para. 13.

them the benefit of the provisions of Community law on which they seek to rely". But the courts "must nevertheless assess such conduct in the light of the objectives pursued by those provisions".[22] The lack of prerequisites for finding an evasion of law under European law leads to the conclusion that references to the general rules of the respective national legal systems have to be made.[23] Courts are therefore allowed to find an evasion of law based on their national understanding of evasion of law in private international law while keeping in mind the objectives pursued by European law.

In European public law, the evasion of law is expressly mentioned in case law,[24] but in those cases the ECJ also seems to consider it to be a specific form of abuse[25] of European public law.[26]

The problem of evasion of law is discussed in German legal literature dedicated to private international law, also in context of the Succession Regulation. However, the topic of evasion of law in European private (international) law is not expressly examined in legal literature. Therefore, due to a lack of clear European standards on the applicability of evasion of law in private international law, the applicability of the German prerequisites will be considered in the context of European law.

2. Evasion of the law according to German private international law scholarship

In general, German legal literature defines evasion of the law as a situation where a party alters the case circumstances to avoid the unwanted legal con-

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[22] ECJ 9 March 1999 – Case C-212/97 (*Centros Ltd v. Erhvervs- og Selskabsstyrelsen*) [1999] ECR I-1459, para. 25.

[23] *Marius M. Schick*, Die Gesetzesumgehung im Licht der nationalen und gemeinschaftsrechtlichen Rechtsprechung (2008) 223.

[24] The ECJ has repeatedly stated that provisions of European public law may not be adopted to "wholly artificial arrangements, aimed at circumventing the legislation of the Member State" (ECJ 1 April 2014 – Case C-80/12 (*Felixstowe Dock and Railway Company Ltd and Others v. The Commissioners for Her Majesty's Revenue & Customs*), ECLI:EU:C:2014:200, para. 31); also to this effect, e.g. ECJ 16 July 1998 – Case C-264/96 (*Imperial Chemical Industries plc (ICI) v. Kenneth Hall Colmer (Her Majesty's Inspector of Taxes)*) [1998] ECR I-4695, para. 26; ECJ 12 December 2002 – Case C-324/00 (*Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt*) [2002] ECR I-11779, para. 37.

[25] In the case of an abuse of law, the ECJ requires, apart from considering the purpose of the European Union rule that is being applied, also "a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it"; ECJ 14 December 2000 – Case C-110/99 (*Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*) [2000] ECR I-11569, paras. 52–53.

[26] ECJ 14 December 2000 – *Emsland-Stärke GmbH* [2000] ECR I-11569, paras. 52–53; *Adam Zalasiński,* Obejście prawa krajowego z wykorzystaniem europejskiego prawa wspólnotowego [Evasion of National Law through the Use of European Community Law], in: Studia z prawa publicznego [Studies in Public Law], ed. by Kazimierz Lubiński (2001) 237.

sequences resulting from application of the otherwise governing legal rule; thus, through the change of circumstances a different legal rule becomes applicable and a different set of consequences unfolds.[27] In private international law evasion of the law occurs when a party changes the case circumstances in order to establish or modify a connecting factor, thereby preventing application of one jurisdiction's undesired substantive law rules in favour of another jurisdiction's more desirable rules.[28]

Evasion of law is not explicitly legislated under German private international law. Legal commentators, however, have identified five elements whose existence – or non-existence – speaks to whether an evasion of law has taken place: an evaded norm, an applied norm,[29] evasive action (improper course of action), an evasive intention, and an inappropriate result.[30]

The debate centres on the significance of subjective and objective criteria in finding an evasion of law under private international law. Particularly, it is not clear what exactly constitutes an evasive intention or evasive action nor how important these circumstances are for finding an evasion of law.[31]

The minority of authors is of the opinion that an evasive intention is a prerequisite for finding evasion of law. For instance, Alexander Lüderitz finds that a person has to have an exclusive or predominant intent to foreclose the application of one set of laws in favour of another set of laws by manipulating the connecting factor.[32]

Other authors regard intention as only a subjective indicator of an evasion of law and that it should be established based on objective criteria. Thus Johannes Fetsch believes that it is insufficient if the intention regards only the creation of a connecting factor, concluding instead that the alteration of the connecting factor has to be achieved in a fraudulent and objectionable way as well.[33] He finds the case circumstances decisive and proposes to include the conduct of all the parties involved, including the persons affected

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[27] *Markus Voltz*, in: Staudinger, Kommentar zum BGB (2013) Art. 6 EGBGB para. 67; *Thomas Wachter*, in: Flick / Piltz, Der internationale Erbfall[2] (2008) 39 para. 121.

[28] *Jan v. Hein*, in: Münchener Kommentar zum BGB[7] (2018) Einl. zu IPR para. 282; Flick / Piltz / *Wachter* (n. 27) 39 para. 121; *Oliver Heeder*, Fraus legis (1998) 85; *Alexander Lüderitz*, Internationales Privatrecht (1987) 72 para. 144; *Gerhard Kegel / Klaus Schurig*, Internationales Privatrecht[9] (2004) 476.

[29] See IV.1.

[30] *Kegel / Schurig*, Internationales Privatrecht (n. 28) 476, 478. Similarly *Felix Odersky*, in: Geimer / Schütze, Internationaler Rechtsverkehr in Zivil- und Handelssachen, vol. III (2018) Art. 21 EuErbVO para. 18; *Rembert Süß*, in: Mayer / Süß et al., Handbuch Pflichtteilsrecht[4] (2017) chap. 6, p. 926 para. 258.

[31] As argued by Staudinger / *Voltz* (n. 27) Art. 6 EGBGB para. 67.

[32] *Lüderitz*, Internationales Privatrecht (n. 28) 72 para. 144. See also *Klaus Schurig*, Kollisionsnorm und Sachrecht – Zu Struktur, Standort und Methode des internationalen Privatrechts (1981) 243, 246.

[33] *Johannes Fetsch*, Auslandsvermögen im Internationalen Erbrecht – Testamente und Erbverträge, Erbschein und Ausschlagung bei Auslandsvermögen, RNotZ 2006, 1, 20–21.

by the evasive conduct.[34] Similarly, Klaus Schurig requires that apart from the evasive intention, the application of the applied norm should be inappropriate in light of the sense and purpose of the norm.[35]

Another group of authors rejects a consideration of the party's intention entirely.[36] These authors concentrate on objective criteria, namely the parties' actions and their results. It seems that these authors treat the character of parties' actions only as an indicator of evasion of law and not as a prerequisite for finding it. Gerhard Kegel and Klaus Schurig state that the inappropriate, unusual and fraudulent fulfilment of the connecting factor indicates evasion of the law.[37] Markus Voltz describes such fulfilment as needing to be "artificial".[38] Kegel and Schurig add that the applicability of the evasion of law doctrine depends on the degree to which the evasive action is immoral or inconsiderate towards the rights of others, as well as on the degree of maliciousness of the person undertaking such action, all of which is to be measured by the degree of awareness as to the inadequacy of the applied norm and the intention to gain benefits that this person is not entitled to.[39] The notion of evasive action is also discussed by authors in terms of the inappropriateness of the course of action.[40]

It appears that the most reliable basis for finding an evasion of law is an evaluation of the result of the parties' actions. Junker is of the opinion that the alteration of the connecting factor has to aim at achieving a particular result.[41] Kegel and Schurig stress that the inappropriate results are ones that cannot be tolerated by a legal system because the applied norm does not protect the actual interests involved.[42] The authors add that an evasion of law takes place only if non-application of the evaded norm would lead to an unacceptable violation of the standards of appropriateness and tolerance. Michael Kränzle states that the result of the alteration must appear reprehensible in the context of its intended purpose.[43] But Rembert Süß points out that because the formal prerequisites for applying the norms in question are ful-

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[34] *Fetsch*, RNotZ 2006, 1, 20–21.

[35] *Schurig*, Kollisionsnorm (n. 32) 243, 246. Similarly *Andreas Köhler*, in: Gierl / Köhler et al., Internationales Erbrecht[2] (2017) 146–147 para. 1827.

[36] See e.g. *Paul Heinrich Neuhaus*, Die Grundbegriffe des Internationalen Privatrechts[2] (1976) 198.

[37] *Kegel / Schurig*, Internationales Privatrecht (n. 28) 494.

[38] Staudinger / *Voltz* (n. 27) Art. 6 EGBGB para. 66.

[39] *Kegel / Schurig*, Internationales Privatrecht (n. 28) 482.

[40] E.g. *Schurig*, Kollisionsnorm (n. 32) 245; *Rüdiger Werner*, Der Pflichtteil und seine Vermeidung – Überblick und Gestaltungsmöglichkeiten, NWB Erben und Vermögen 2011, 260 ff. Problems in the interpretation of this factor are mentioned by *Schurig*, Kollisionsnorm (n. 32) 241.

[41] *Abbo Junker*, Internationales Privatrecht[3] (2019) § 6, 97 para. 61. See also Geimer / Schütze / *Odersky* (n. 30) Art. 21 EuErbVO para. 18.

[42] *Kegel / Schurig*, Internationales Privatrecht (n. 28) 476, 478.

[43] *Michael Kränzle*, Heimat als Rechtsbegriff? (2014) 276.

filled, it is most difficult to decide whether the result is inappropriate as it requires a subjective value-based assessment.[44]

Finding an evasion of the law leads to the direct or analogous application of the evaded law.[45] This means, for instance, that where the deceased's choice of law under Art. 22 of the Regulation was found to constitute an evasion of law, the choice would be invalid and the law of the habitual residence would apply.[46]

Every potential case of evasion of the law has to be assessed individually.[47] Evasion of the law can be found only in glaringly exceptional cases,[48] something that is unsurprising given that evasion of the law is embraced only with great restraint in Germany. Moreover, as is recognized in legal literature, evasion of the law plays no (significant) role in German judicial practice.[49] The scholarly discussion on the possibility of German courts applying the evasion of law doctrine has therefore only theoretical significance.

It can be concluded that finding an evasion of the law is excluded neither under the Succession Regulation nor under German private international law. Therefore, it remains to be considered (IV.1.) whether the German law on forced heirship can be evaded, (IV.2.) whether a testator's choice of the law of the state of his nationality to govern his succession under Art. 22 of the Regulation can constitute an evasive action, and (IV.3.) whether a compulsory portion's elimination under the law chosen by the deceased would be an improper result when such an outcome would not be achievable under German law.

IV. Evasion of the law resulting from a choice of law under the Succession Regulation

1. Evaded and applied norms

Only rules that have compulsory application can be evaded in the sense being discussed in this paper. Rules that have a dispositive character, like the

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[44] *Rembert Süß*, § 5 Grenzen der Anwendung ausländischen Erbrechts, in: Erbrecht in Europa (n. 5) 151, 160 para. 25.

[45] *Kegel / Schurig*, Internationales Privatrecht (n. 28) 482–483.

[46] See *Martin Soutier*, Die Geltung deutscher Rechtsgrundsätze im Anwendungsbereich der Europäischen Erbrechtsverordnung (2015) 196–197.

[47] Gierl / Köhler / *Köhler* (n. 35) 147 para. 182.

[48] Gierl / Köhler / *Köhler* (n. 35) 147 para. 182; *Fetsch*, RNotZ 2006, 1, 20 f.

[49] *Johannes Weber*, in: Dutta / Weber, Internationales Erbrecht (2016) Einl. EuErbVO para. 112; MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 64; *Heinrich Dörner*, in: Staudinger, Kommentar zum BGB (2017) Art. 25 EGBGB para. 744; *Rüdiger Werner*, Der internationale Erbfall – Gestaltung von Erbfällen mit Auslandsbezug, NWB Erben und Vermögen 2011, 128 ff.

one in Art. 22 of the Regulation, cannot be evaded, as it is impossible to evade laws that are generally applicable except where a person undertakes some action (e.g., makes a contrary disposition). In legal literature, it is disputed whether it is a rule of private international law or of substantive law that is being evaded as a result of evasion of private international law.[50] Regardless of which position is being supported in this discussion, it is clear that by altering the connecting factor, the applicability of the substantive law of one state is excluded in order to allow for the applicability of laws provided by a different state. Exercising a permitted choice of law under Art. 22 of the Regulation leads to the inapplicability of the law of the testator's habitual residence by making the law of the state of a testator's nationality applicable. To decide whether and under what circumstances exercising the right to choose the applicable law can constitute evasion of the law, other prerequisites for finding an evasion of law must be considered.

2. Choice of law as an evasive action (improper course of action)

Articles 21(1) and 22 of the Regulation provide two connecting factors: habitual residence at the time of death and nationality at the time of making the choice or at the time of death. Therefore, a person can change the law governing his succession as a whole by (i) acquiring a new nationality and choosing the law of that state to govern his succession, (ii) choosing the law of a state whose nationality he has already possessed to govern the succession, or (iii) moving from one state to another and thereby changing his habitual residence.

It seems accepted in German legal literature that evasion of the law cannot be found if a person exercises discretion that the legislature intentionally provided or had foreseen.[51] This means that if the application of the substantive law of one jurisdiction is avoided in favour of the application of the substantive law of another jurisdiction by using a legislatively permissible

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[50] See e.g. *Heeder*, Fraus legis (n. 28) 155–160, and literature discussed there; or *Martina Benecke*, Gesetzesumgehung im Zivilrecht (2004) 223–227. Paul Heinrich Neuhaus concludes that it is the application of private international law (determining the applicability of a particular substantive rule) and not a specific rule of international or national law that is evaded; see *Neuhaus*, Grundbegriffe (n. 36) 194 f.

[51] MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 64; Gierl / Köhler / *Köhler* (n. 35) 147 para. 182; *Kegel / Schurig*, Internationales Privatrecht (n. 28) 481; *Kränzle*, Heimat (n. 43) 276; *Andreas Köhler*, in: Kroiß / Horn / Solomon, Nachfolgerecht[2] (2019) Vor Art. 20–38 EuErbVO, Einl. IPR para. 32; *Erik Jayme*, Internationales Erbrecht und Vereinheitlichung des Europäischen Kollisionsrechts – Tagung der Europäischen Gruppe für Internationales Privatrecht in Chania (Kreta), IPRax 2006, 200, 201; Geimer / Schütze / *Odersky* (n. 30) Art. 21 EuErbVO para. 18. But see *Benecke*, Gesetzesumgehung (n. 50) 237.

technique (often by influencing a connecting factor), the evasion of the law doctrine usually does not apply.[52]

Therefore, it is argued that by providing habitual residence (Art. 21 of the Regulation) and the law of the state of one's nationality (Art. 22 of the Regulation) as connecting factors, legislators foresaw that these can be influenced by a deliberate change of circumstances aimed at altering the applicable law.[53] It is recognized in legal literature that this was a conscious political decision.[54] Therefore, it cannot be a case of evasion of the law. There are also further arguments advanced in support of this conclusion; these include: (1) The European legislature limited the testator's possibilities to influence the applicability of a given substantive law by limiting the testator's choice to the law of a state whose nationality the testator possesses.[55] (2) The legislature did not restrict or require the fulfilment of any additional requirements for a valid change of the applicable connecting factor.[56] In particular, a (close) relationship between a person and the country whose nationality that person possesses and whose laws he has chosen does not have to be proven,[57] nor does the effectiveness of the nationality have to be demonstrated in any way.[58] In other words, possessing a nationality of a country in itself establish-

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[52] *Anatol Dutta*, in: Münchener Kommentar zum BGB[6] (2015) Art. 35 EuErbVO para. 110; *Dieter Martiny*, in: Prütting / Wegen / Weinreich, BGB Kommentar[14] (2019) Vorbem. vor EuErbVO para. 6; Staudinger / *Dörner* (n. 49) Art. 25 EGBGB para. 744; Geimer / Schütze / *Odersky* (n. 30) Art. 21 EuErbVO para. 18; *Werner*, NWB Erben und Vermögen 2011, 128 ff.

[53] Explanatory statement to the Report from 6 March 2012 on the proposal for a regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (COM(2009)0154 – C7-0236/2009 – 2009/0157(COD)); *Uwe Pawlytta / Alexander Pfeiffer*, § 33 Internationales Erbrecht und die Europäische Erbrechtsverordnung, in: Münchener Anwaltshandbuch Erbrecht[5], ed. by Stephan Scherer (2018) paras. 139–140; Geimer / Schütze / *Odersky* (n. 30) Art. 21 EuErbVO para. 18; *Soutier*, Geltung (n. 46) 195. See also e.g. *Karsten Thorn*, in: Palandt, Bürgerliches Gesetzbuch[79] (2020) Einl. zu EGBGB para. 26; *Kränzle*, Heimat (n. 43) 278; *Werner*, NWB Erben und Vermögen 2011, 128, 128 (with regard to acquiring a new nationality); Dutta / Weber / *Bauer* (n. 6) Art. 21 EuErbVO para. 7 (with regard to the principle of free movement within the European Union that allows changing habitual residence).

[54] *Stephan Lorenz*, Internationaler Pflichtteilsschutz und Reaktionen des Erbstatuts auf lebzeitige Zuwendungen, in: Die Europäische Erbrechtsverordnung, ed. by Anatol Dutta / Sebastian Herrler (2014) 113, 123 para. 22.

[55] *Tobias Pfundstein*, Pflichtteil und ordre public – Angehörigenschutz im internationalen Erbrecht (2010) 89–90.

[56] *Renate Schaub*, Die EU-Erbrechtsverordnung, Hereditare – Jahrbuch für Erbrecht und Schenkungen 3 (2013) 91, 123.

[57] *Daniel Lehmann*, § 14 Das Internationale Pflichtteilsrecht, in: Schlitt / Müller, Handbuch Pflichtteilsrecht[2] (2017) para. 143. Similarly Mayer / Süß / *Süß* (n. 30) chap. 6, p. 867 para. 33 and p. 924 para. 248; *Pfundstein*, Pflichtteil (n. 55) 89–90.

[58] *Lorenz*, Internationaler Pflichtteilsschutz (n. 54) 120–121 para. 17; *Christian Hertel*, in: Rauscher, Europäisches Zivilprozess- und Kollisionsrecht EuZPR / EuIPR[4] (2016) Art. 22 EuErbVO para. 11. See also *Süß*, § 5 Grenzen (n. 44) 161 para. 29; MüKo BGB / *Dutta* (n. 4)

es a sufficiently close relationship between the law of this country and the person possessing the nationality.[59] (3) A testator's reasons for choosing the law of a state whose nationality he possesses as the law to govern his succession as a whole are irrelevant.[60] (4) Strict conditions for being granted nationality deter acquiring it for the sole purpose of evading law through the use of the provisions of the Regulation.[61] (5) If a testator's family members are of the same nationality as the testator, it should be acceptable to apply the law that is common to all the family members, even if it puts them at a disadvantage.[62] (6) The principle of certainty of law prevents finding an evasion of the law where a person is permitted to exercise a right of choice to change the law applicable to one's succession under the Regulation.[63]

Further, moving from one state to another and thereby changing habitual residence cannot constitute an evasive action, because, for example, high requirements for establishing habitual residence impede changing it in order to influence the applicable connecting factor.[64] Firstly, moving from one country to another does not automatically satisfy the conditions for establishing habitual residence; secondly, Art. 21(2) of the Regulation provides for the possibility to apply in exceptional situations a law different than the law of the state of the deceased's habitual residence if "it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State of a different country". This can be justified, for instance, if the habitual residence was changed shortly before the deceased's death.[65]

Vorbem. zu Art. 20 EuErbVO para. 43; *Peter W. Vollmer*, Die neue europäische Erbrechtsverordnung – ein Überblick, ZErb 2012, 227, 231; Geimer / Schütze / *Odersky* (n. 30) Art. 22 EuErbVO para. 11; *Marion Greeske*, Die Kollisionsnormen der neuen EU-Erbrechtsverordnung (2014) 135 f.

[59] Dutta / Weber / *Weber* (n. 49) Einl. vor Art. 20 EuErbVO para. 112. Marianne Andrae seems to presume that nationality as a connecting factor reflects a personal relationship and cultural identification with the law of the state which was chosen; see *Marianne Andrae*, Wertungswidersprüche und internationales Erbrecht, in: FS Bernd von Hoffmann (2011) 3, 14.

[60] Dutta / Weber / *Weber* (n. 49) Einl. vor Art. 20 EuErbVO para. 112. See also *Soutier*, Geltung (n. 46) 195, 196.

[61] Gierl / Köhler / *Köhler* (n. 35) 147 para. 182; Kroiß / Horn / Solomon / *Köhler* (n. 51) Vor Art. 20–38 EuErbVO, Einl. IPR para. 32; *Pfundstein*, Pflichtteil (n. 55) 89–90. See also *Rolf Stürner*, in: Jauernig, Bürgerliches Gesetzbuch – Kommentar[17] (2018) Art. 36 EuErbVO para. 2.

[62] *Heinrich Dörner / Paul Lagarde*, Rechtsvergleichende Studie der erbrechtlichen Regelungen des Internationalen Verfahrensrechtes und Internationalen Privatrechts der Mitgliedsstaaten der Europäischen Union – Studie für die Europäische Kommission, Generaldirektion Justiz und Inneres (2002) 269 f.

[63] *Jan Kropholler*, Internationales Privatrecht[6] (2006) § 23 II 3, p. 161. Adopting the contrary view with regard to changing habitual residence, *Brigitta Jud*, Rechtswahl im Erbrecht: Das Grünbuch der Europäischen Kommission zum Erb- und Testamentsrecht, GPR 2005, 133, 139. See also *Greeske*, Kollisionsnormen (n. 58) 135 f.

[64] Kroiß / Horn / Solomon / *Köhler* (n. 51) Vor Art. 20–38 EuErbVO, Einl. IPR para. 32.

[65] See e.g. Mayer / Süß / *Süß* (n. 30) chap. 6, p. 925 para. 249.

Moreover, the case law of the German courts shows that regardless of the motivation, avoiding or causing the applicability of a particular connecting factor by changing nationality is generally allowed.[66] It has been predicted that this line of rulings will not change.[67] However, Martin Soutier finds that the practice should be amended as it was grounded on the opinion that a connecting factor of nationality is a relatively static factor, something which no longer holds true as the law applicable to the succession as a whole can be changed by the testator under the Regulation by changing nationality or habitual residence.[68]

But some scholars voice reservations.[69] For example, Oliver Heeder has made a general remark that the danger of evasion of succession law (always) exists if a choice of applicable law is allowed.[70] Frank Bauer finds that it cannot be precluded that, under exceptional circumstances, acquiring a nationality for the purpose of choosing the law of a particular state to govern the deceased's succession as whole will – when done to facilitate certain testamentary dispositions – lead to an evasion of law.[71] Martin Soutier even believes that it is possible that the significance of evasion of the law will increase as a result of the Regulation's adoption.[72]

Accepting that the exercise of legislatively provided leeway, e.g. choosing the law of a state whose nationality a testator possesses, can never constitute an evasive action (improper course of action) would significantly limit the possibility of finding an evasion of law in European private international law. Such a result cannot be embraced. Evasion of the law always relates to the undertaking of an action that is technically legal: evasion of the law does not relate to an action that is prohibited by law. Therefore, the bare fact that an action is technically permissible does not eliminate the possibility of an evasion of law.

Accepting that exercising one's right under Art. 22 of the Regulation can be identified under exceptional circumstances as evasive is not precluded by the objectives pursued by the Regulation. Nothing in the Regulation indicates that it was the intention of the drafters of the Regulation to allow a testator to limit burdens imposed upon him and his estate under national substantive law by changing the applicable substantive law. Recital 7 provides that the aims of the Regulation are: to remove "the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications", to

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[66] BGH 4 June 1971 – IV ZR 97/70, NJW 1971, 2124, 2125; *Kränzle*, Heimat (n. 43) 273.
[67] *Soutier*, Geltung (n. 46) 196.
[68] *Soutier*, Geltung (n. 46) 195.
[69] In earlier literature see e.g. *Neuhaus*, Grundbegriffe (n. 36) 196.
[70] *Heeder*, Fraus legis (n. 28) 279.
[71] Dutta / Weber / *Bauer* (n. 6) Art. 22 EuErbVO para. 10.
[72] *Soutier*, Geltung (n. 46) 195.

allow a proper functioning of the internal market, to allow a testator to organize his succession in advance, and to effectively guarantee "[t]he rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession". The goal of unifying private international law in matters of succession as well as the goal of assuring that there would be only one substantive law applicable to govern the succession of a testator as a whole are further aims (recital 37).[73]

It is also unquestionable that the proper means to eliminate or to reduce an entitlement to forced heirship are regulated in national substantive law. National jurisdictions provide either a testator or his heirs with the possibility to withhold or challenge an individual's entitlement to forced heirship under indicated circumstances. Choosing the law of a state whose nationality a testator possesses or changing habitual residence to take advantage of a more lenient law on deprivation of forced heirship is not the proper or usual way to eliminate or reduce the entitlement.

Therefore, in my opinion, it cannot be precluded that choosing the law of a state whose nationality a testator possesses under Art. 22 of the Regulation might constitute an evasive action (improper course of action).

3. Reducing or eliminating forced heirship as an improper result of applying the Regulation

The relative certainty expressed by German commentators that evasion of the law will not be found when a party acts to influence the connecting factor applicable under the Regulation is further challenged in situations where choosing the law of the state of the testator's nationality would lead to reducing or eliminating a forced heirship guaranteed under the law of the state of the testator's habitual residence. Specifically, it is possible under the Regulation to avoid the application of a particular set of laws regulating forced heirship by choosing the law of the state whose nationality a testator possesses, thus not allowing the application of the law of habitual residence by operation of law.[74] That could be done especially when a testator is not

[73] See e.g. *Paul Lagarde*, in: Bergquist / Damascelli et al., EU-Erbrechtsverordnung – Kommentar (2015) Einl. paras. 7–8, paras. 21–22. For a discussion of the goals of the *ordre public* clause, see *Sevold Braga*, Kodifikationsgrundsätze des internationalen Privatrechts, RabelsZ 23 (1958) 421, 447.

[74] See also *Jud*, GPR 2005, 133, 137. But some scholars exclude the possibility of finding evasion of law when the law of one Member State is applied in another Member State; see Geimer / Schütze / *Odersky* (n. 30) Art. 35 EuErbVO para. 16; *Kurt Lechner*, Die Entwicklung der Erbrechtsverordnung – eine rechtspolitische Betrachtung zum Gesetzgebungsverfahren, ZErb 2014, 188, 191.

allowed to deprive a person entitled to a compulsory portion of that portion under the law of his habitual residence.[75]

Some German scholars find that the law of one's nationality can be chosen even if it serves to allow the reduction or elimination of a compulsory portion.[76] The arguments used here resemble the assertions made in arguing against finding an evasion of law where a party uses the leeway foreseen by lawmakers. Firstly, the Regulation explicitly provides a testator with the option of exercising a choice of law.[77] Secondly, providing this possibility for a testator was a conscious political decision.[78] Thirdly, to hamper the evasion of legal provisions regulating forced heirship and to protect the persons entitled thereto, a testator is limited to choosing only the law of the state of his nationality.[79]

But other German scholars accept that it is theoretically possible to find that Art. 22 of the Regulation could produce an evasion of the law if the provision led to the reduction or elimination of a compulsory portion that would exist under the law of the testator's habitual residence,[80] especially where this would constitute an unjust outcome.[81]

Evasion of the law can be found only under exceptional circumstances.[82] Actions undertaken by a testator to change the law governing his succession as a whole[83] can be deemed evasive where the change of circumstances occurred (i) a short period of time prior to the testator's death for the sole purpose of allowing the choice of a law different than the one applicable to succession by operation of law,[84] (ii) despite the absence of any real relation-

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[75] *Jud*, GPR 2005, 133, 138.

[76] *Lorenz*, Internationaler Pflichtteilsschutz (n. 54) 120–121 para. 17; Prütting / Wegen / Weinreich / *Martiny* (n. 52) Art. 35 EuErbVO para. 3; *Jörn Heinemann*, Die Wahl des Erbstatuts nach Art. 22 EuErbVO, MDR 2015, 928, 929.

[77] *Robert Magnus*, Internationales Pflichtteilsrecht, in: NomosKommentar Pflichtteilsrecht², ed. by Barbara Dauner-Lieb / Herbert Grziwotz (2017) 729, 750–751 para. 60.

[78] *Lorenz*, Internationaler Pflichtteilsschutz (n. 54) 123 para. 22.

[79] *Jan Peter Schmidt*, in: Dutta / Weber, Internationales Erbrecht (2016) Art. 23 EuErbVO para. 115; *Heinz-Peter Mansel / Karsten Thorn / Rolf Wagner*, Europäisches Kollisionsrecht 2012: Voranschreiten des Kodifikationsprozesses – Flickenteppich des Einheitsrechts, IPRax 2013, 1, 7; *Stephanie Herzog*, Die EU-Erbrechtsverordnung (EU-ErbVO), ErbR 2013, 2, 6.

[80] MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 43; *Walter Pintens*, Einführung in die Grundprinzipien der Erbrechtsverordnung, in: Erbfälle unter Geltung der Europäischen Erbrechtsverordnung, ed. by Martin Löhnig / Dieter Schwab et al. (2014) 1, 29; *Thomas Wachter*, Europäische Erbrechtsverordnung in der Gestaltungspraxis, ZNotP 2014, 2, 15.

[81] *Fetsch*, RNotZ 2006, 1, 20 f.

[82] *Pfundstein*, Pflichtteil (n. 55) 89–90; *Soutier*, Geltung (n. 46) 195, 196.

[83] These are: (i) acquiring a new nationality and choosing the law of this state to govern the succession, (ii) choosing the law of a state whose nationality the testator has already possessed to govern the succession, or (iii) moving from one state to another and thereby changing the testator's habitual residence.

[84] Authors find this circumstance includes where a testator moves from one state to anoth-

ship between the testator and the state whose law the testator has chosen to govern his succession,[85] (iii) despite the absence of any relationship between the law chosen by the testator and any of the facts of the case.[86] Further, (iv) the circumstances under which evasion of the law can be found encompass a situation where choosing the law of a state whose nationality the testator possesses will lead to an effective change in the law applicable to a testator's succession as a whole, without any other provisions being made in the testator's will.[87]

However, in ascertaining an evasion of the law, many scholars have stressed that the key indicator is the intention of the person exercising the choice of law under Art. 22 of the Regulation. They find that the undertaken action has to have the (exclusive) purpose of reducing or excluding forced heirship.[88] Therefore, evasion of the law cannot be found if there is a reasonable explanation for changing the connecting factor that is unrelated to reduction or elimination of forced heirship.[89]

It cannot be precluded that a reduction or elimination of the entitlement to forced heirship – as accomplished by the testator's choosing the law of a state whose nationality he possesses or by changing his habitual residence – will constitute an evasion of the law. The validity of this assertion is demonstrated by the preceding discussion, and by the illustrative list of case circumstances that may indicate evasion of law.

There is nothing in the current version of the Regulation that directly or implicitly rejects protection of the right to an entitlement under forced heirship laws. The final text of the Regulation did not ultimately include a proposed paragraph stipulating that treatment of forced heirship in a manner different than prescribed in the forum would, as a sole ground, be insufficient for finding an application of foreign law contrary to public policy (Art. 27(2) of the Proposal of the Regulation).[90] Further, protecting persons

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er and thereby changes his habitual residence or where a testator acquires a new nationality and chooses the law of this state to govern his succession as a whole. See e.g. Dutta / Weber / *Bauer* (n. 6) Art. 22 EuErbVO para. 10; *Manuela Meyer*, Die Gerichtsstände der Erbrechtsverordnung unter besonderer Berücksichtigung des Forum Shopping (2013) 163 f.

[85] Mayer / Süß / *Süß* (n. 30) chap. 6, p. 925 para. 251; *Süß*, § 5 Grenzen (n. 44) 162 para. 30; *Pawlytta / Pfeiffer*, § 33 Internationales Erbrecht (n. 53) para. 140; see ICJ 6 April 1955 – *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ 1.

[86] *Jud*, GPR 2005, 133, 139.

[87] Rauscher / *Hertel* (n. 58) Art. 22 EuErbVO para. 21.

[88] See e.g. Mayer / Süß / *Süß* (n. 30) chap. 6, p. 925 para. 251; *Bianca Walther*, Das deutsche Pflichtteilsrecht in Europa – eine (un)endliche Geschichte?, GPR 2016, 128, 131; *Max Planck Institute for Comparative and International Private Law*, RabelsZ 74 (2010) 522, 664 f.

[89] *Meyer*, Gerichtsstände (n. 84) 163 f.

[90] Art. 27 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (SEC(2009) 410) (SEC (2009)411) ("the Proposal") stated: "1. The application of a rule of the

entitled to forced heirship is mentioned in the recitals of the Regulation. It was also a stated concern during the legislative proceedings. To safeguard this protection, a testator is allowed to choose only between the law of the country of his habitual residence and the law of the state whose nationality he possesses at the time of making the choice or at the time of death. Moreover, even if the position of the European legislature on the need for protection of an entitlement to forced heirship can be questioned, it is a significant aim of German law and, therefore, should not be overlooked by German courts.

Accordingly, it cannot be precluded that, when done with the intention of depriving a person of a compulsory portion, exercising the right to choose the law applicable to one's succession could lead to an improper result.

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law determined by this Regulation may be refused only if such application is incompatible with the public policy of the forum. 2. In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum." The text of Art. 27 was criticized because many scholars found the second paragraph unclearly formulated; see e.g. *Christian Kohler / Walter Pintens*, Entwicklungen im europäischen Familien- und Erbrecht 2009–2010, FamRZ 2010, 1481, 1484–1485; *Oliver Remien*, Chancen und Risiken erbrechtlicher Planung und Beratung nach dem Vorschlag einer europäischen Verordnung über das internationale Erbrecht und das europäische Nachlasszeugnis, in: Erbrecht und Vermögenssicherung, ed. by Herbert Grziwotz (2011) 95, 110–111; Rauscher / *Hertel* (n. 58) Art. 35 EuErbVO para. 3. The paragraph might have been incompatible with the case law of the German Constitutional Court, under which the compulsory portion of a deceased's descendants enjoys constitutional protection; see e.g. *Pfundstein*, Pflichtteil (n. 55) 327–328; *Dirk Looschelders*, Anpassung und ordre public im Internationalen Erbrecht, in: FS Bernd von Hoffmann (n. 59) 266, 282; *Michael Stürner*, Europäisierung des (Kollisions-)Rechts und nationaler ordre public, in: FS Bernd von Hoffmann (n. 59) 463, 476. The provision was not adopted in the final text of the Regulation. Scholars interpret this fact differently. One group of scholars takes the position that despite the exclusion of the provision from the text of the Regulation, no difference in the legislative regulation of forced heirship can be potentially seen as manifestly incompatible with the public policy of the state of forum; see e.g. *Odersky*, notar 2013, 3, 6; *Felix M. Wilke*, Das internationale Erbrecht nach der neuen EU-Erbrechtsverordnung, RIW 2012, 601, 607; *Herzog*, ErbR 2013, 2, 6. Scholars supporting the contrary position believe that the elimination of the second paragraph of the *ordre public* clause means that under the current text of the Regulation, the application of a foreign legal provision can be rejected as violating the public policy of the state of the forum based on a differing regulation of forced heirship; see e.g. MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 35 para. 3; BeckOGK / *Schmidt* (n. 20) Art. 35 EuErbVO para. 22; Dutta / Weber / *Schmidt* (n. 79) Art. 23 EuErbVO para. 111. Thus, just what significance the elimination of the proposed Art. 27(2) has for the interpretation of the current provisions of the Regulation remains disputed.

4. Evasion of German law under the Regulation – an example

I believe that evasion of law should be considered by a German court if a testator chooses the law of a state, the nationality of which he possesses, to govern his succession as a whole so as to be able to deprive a person of an otherwise existing compulsory portion. Nonetheless, evasion of law can be found only under extraordinary circumstances. The following conditions could justify a finding of evasion of the law by a German court:
(1) The testator chooses the law of a state (other than Germany) whose nationality he possesses to govern his succession as a whole so as to be able to deprive a person entitled to compulsory portion of this portion;
(2) the testator would not be able to effectively deprive a person of a compulsory portion under the law of the country of his habitual residence – Germany;
(3) the testator has no relationship with the state whose law he has chosen apart from having its nationality (e.g. the testator does not identify himself with this state, does not travel to this state, does not speak the language of this state and does not cultivate the tradition of this state);
(4) the chosen law applies only or mostly to goods located in Germany and to persons living in Germany; and
(5) there is no other apparent reason – beyond depriving a person of a compulsory portion he is otherwise entitled to – for exercising the choice of law.

Finding that a choice of law constitutes an evasion of law would lead to the invalidity of the deceased's choice of law and to the application of German law – as the law of habitual residence.[91]

V. Conclusions

German law – in comparison to the laws of other Member States – provides for a very extensive protection of the right to a compulsory portion. One of the consequences is that it is very difficult for a testator to disqualify anyone from receiving a compulsory portion based on that person's conduct. Therefore, Germany is one of the few jurisdictions – if not the only jurisdiction – where the courts could conclude that a testator's choice of law was an evasion of law if done to deprive a person of forced heirship.

Nevertheless, a court in Germany is generally unlikely to find evasion of the law under private international law.[92] Therefore, the probability that a deceased's choice of law made under Art. 22 of the Regulation will be found

[91] See *Soutier*, Geltung (n. 46) 196 f.

[92] As there are no recent relevant rulings, the discussion of this issue is based almost exclusively on German academic literature. So also *Fetsch*, RNotZ 2006, 1, 20 f.

evasive is very low.[93] A German court finding an evasion of law where a testator chooses the law of the state of his nationality to reduce or eliminate forced heirship is currently only theoretical. However, in my opinion, it cannot be excluded that a choice of law could under particular circumstances be found evasive.

Moreover, the strict requirements for finding evasion of law under private international law make the doctrine of evasion of law impractical.[94] Proving, after the deceased's death, that he intended to evade the law is presumably the biggest difficulty.[95] This has been pointed out especially regarding the acquisition of a new nationality or the changing of habitual residence. For instance, as Michael Kränzle rightly observes, only in exceptional cases can it be established that a person changed his nationality solely to achieve particular evasive legal consequences.[96] Especially the effort required to change habitual residence or to acquire a new nationality makes it improbable that the only reason to do so would be to enable the choice of law of a different country as governing one's succession.[97]

Despite the low probability of it happening, finding an evasion of law under private international law would have the benefit of bringing about a non-discretionary outcome, because in that case the evaded law would have to be applied. Therefore, finding an evasion of law might be the best (only) way to arrive at a satisfactory outcome.

What could be an alternative to finding an evasion of law in a case where a testator with habitual residence in Germany has chosen the law of some other state – whose nationality he possessed – to deprive his descendants of a compulsory portion despite the facts not supporting the same result under German law? A violation of German public policy could be considered.[98] According to Art. 35 of the Regulation, the "application of a provision of the law of any state specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum". The public policy clause – like evasion of the law – serves as a safety valve in private international law and allows a court of the state of the forum to refuse to apply certain provisions of foreign law. Finding a violation of public policy depends, among other prerequisites, on the result of the application of foreign law. However, identifying a violation of German pub-

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[93] MüKo BGB / *Dutta* (n. 4) Vorbem. zu Art. 20 EuErbVO para. 64. See also Paul Heinrich Neuhaus, who points out that authorities tolerate evasion of the law; *Neuhaus*, Grundbegriffe (n. 36) 196–198.

[94] See e.g. *Meyer*, Gerichtsstände (n. 84) 163–164; *Fetsch*, RNotZ 2006, 1, 20 f.

[95] Staudinger / *Voltz* (n. 27) Art. 6 EGBGB para. 67; *Soutier*, Geltung (n. 46) 196.

[96] *Kränzle*, Heimat (n. 43) 273.

[97] *Jud*, GPR 2005, 133, 138.

[98] However, the finding of an evasion of law has to be first excluded; see *Heeder*, Fraus legis (n. 28) 90 f.

lic policy would require proving, among other things, that the entitlement of (certain or all) members of a testator's family to a compulsory portion constitutes a part of German *ordre public* and that disqualifying these testator's family members from receiving a compulsory portion based on grounds that are not recognized as sufficient under German law is manifestly incompatible with German public policy. Further, application of the public policy clause under these circumstances would require a decision as to what extent foreign law and – respectively German law – would have to be applied. Further, if a person entitled to a compulsory portion were not completely deprived of his entitlement, the threshold for finding a violation of German public policy might not be reached.[99] All these issues remain highly disputed and unsettled in German legal literature, making the ascertainment of a violation of public policy an uncertain alternative.

[99] See Mayer / Süß / *Süß* (n. 30) chap. 6, p. 927 para. 259.