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Introduction to Polish private international law: General Part

Law evasion

"Mobile conflicts", which were discussed in the previous section, may be related to a phenomenon that the science and practice of law is trying for centuries to fight out: the law evasion (fr. *fraude à la loi,* Ger. *die Gesetzesumgehung*). The very structure of this institution and its consequences seem to be generally known to the readers of the present contribution; however, it is necessary to briefly explain what its specificity is based on the discipline we are currently dealing with.

Example. A somewhat archaic, but very legible illustration is the famous case study of the *Duchess de Bauffremont,* decided by the French Court of Cassation by a judgment of 18 March 1878: A woman of French nationallity, separated from her spouse, left for a short time to a German Duchy of Saxe-Altenburg where she became naturalized, by which she obtained the German nationality and, theoretically, she got rid of her French personal status; then she married in Berlin to a Romanian national, prince George Bibesco. The then French law completely forbade divorce, while the law of Prussia characterized the separated Catholic persons as divorced. The French spouse brought an action for annulment of a bigamic marriage before the French courts, winning the case in all instances. When dismissing the defendant's cassation appeal, the Court of Cassation emphasized that the decision under French law did not call into question the validity and effectiveness of the actions taken by the applicant under German law, yet still "the applicant has sought and obtained this new nationality not in order to exercise her rights and perform her duties which arise from it... but only for the purpose of evading French

law." For this reason, **it refused to recognize the effectiveness of the change of citizenship for the purposes of establishing the connecting factor**.[1]

The object of law evasion is not the private international law as such, for it is rather an instrument for the party or parties to a certain relationship used with the aim of obtaining a specific substantive result. It is achieved by an intentional change of factual circumstances corresponding to the connecting factor of the conflict-of-law rule, so that another law replaces the one normally applicable. A party, for example, changes her nationiality, place of residence or location of her property - and in this way influences in a deliberate manner the circumstance which forms the basis of the conflict law provision.[2] The necessity to establish the intention to circumvent the law (*animus fraudis*), that is to create an artificial connection between the relationship and the specific law applicable, constitutes the Achilles' heel of the whole doctrine because of making it arbitrary.

The law evasion has not been codified anywhere in the Polish conflict of laws. However, availing of it by the court is considered admissible. Moreover, there are provisions of private international law, which aim at preventing the parties from evading the law applicable in some specific cases. These include, for example, Article 3(3) of the Rome I Regulation—

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

The result of the above cited provision is that the parties may not, by choosing the law for a contract the elements of which are located in a single country, escape the imperative

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[1] See at https://mafr.fr/en/article/cour-de-cassation-chambre-civile-2/ (in French, last visited: 30/03/2020).

[2] M. Lijowska, *Zakaz obejścia prawa jako instrument kolizyjnoprawnej ochrony konsumenta?*, „Kwartalnik Prawa Prywatnego" 2006 z. 4, s. 1003–1004.

norms of the law of that country.[3] Similarly, Article 3(4) Rome I Regulation prohibits the evasion of the EU law by choosing the law of a non-Member State.

Example. A self-employed commercial agent operating in the territory of a Member State would therefore not be deprived of his rights protected by Union law, irrespective of the choice of law of a third country imposed on him by a foreign contractor interested in a lower level of its protection.[4]

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[3] See M. Lijowska, *Zakaz obejścia prawa…,* p. 1013 *et seq*.; for a similar provision of the preceding 1980 Rome Convention, cf. M. Wojewoda, *Zakres prawa właściwego dla zobowiązań umownych,* Warszawa 2007, p. 147–151.

[4] ECJ judgment of 9 November 2000, C-381/98, *Ingmar GB Ltd v Eaton Leonard Technologies Inc.*, ECLI:EU:C:2000:605; cf. W. Popiołek, *Zagadnienia unormowane w art. 3 ust. 3 i art. 7 konwencji rzymskiej i w odpowiednich przepisach rozporządzenia UE o prawie właściwym dla zobowiązań umownych (Rzym I),* 3 Problemy Prawa Prywatnego Międzynarodowego" [2008], p. 21.