

RAPHAEL DE BARROS FRITZ

The Characterization
of Provisions
Protecting Forced Heirs Against
Lifetime Dispositions

*Max-Planck-Institut
für ausländisches und internationales
Privatrecht*

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und internationalen Privatrecht*

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Mohr Siebeck

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Raphael de Barros Fritz

The Characterization of Provisions
Protecting Forced Heirs Against
Lifetime Dispositions

A Comparative Law Study of the Laws of
Louisiana and Germany

Mohr Siebeck

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To my family and Caroline

Preface

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Raphael de Barros Fritz

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List of Abbreviations

5th Cir.	United States Court of Appeals, Fifth Circuit
8th Cir.	United States Court of Appeals, Eighth Circuit
9th Cir.	United States Court of Appeals, Ninth Circuit
10th Cir.	United States Court of Appeals, Tenth Circuit
11th Cir.	United States Court of Appeals, Eleventh Circuit
1961 Hague Form Convention	Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, The Hague, 5 October 1961
1989 Hague Succes- sion Convention	Convention on the Law Applicable to Succession to the Estates of Deceased Persons, The Hague, 1 August 1989
1996 Hague Convention	Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Respon- sibility and Measures for the Protection of Children, The Hague, 19 October 1996
2007 Hague Protocol	Protocol on the Law Applicable to Maintenance Obligations, The Hague, 23 November 2007
ABGB	Allgemeines Bürgerliches Gesetzbuch
AcP	Archiv für die civilistische Praxis
A.D.2d	New York Supreme Court Appellate Division Reports, Second Series
Akron L. Rev.	Akron Law Review
Ala.	Alabama Supreme Court
Am. J. Comp. L.	American Journal of Comparative Law
Am. Jur.	American Jurisprudence
Art./Arts.	Article/Articles
BayObLG	Bayerisches Oberstes Landesgericht
BB	Betriebs-Berater
BeckOGK	beck-online.GROSSKOMMENTAR
BeckOK-BGB	Beck'scher Online-Kommentar BGB
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
Brit. Y.B. Int'l L.	British Year Book of International Law
Brook. L. Rev.	Brooklyn Law Review
Bull. civ.	Bulletin des arrêts de la Cour de cassation, chambres civiles
B.U. L. Rev.	Boston University Law Review
Cass.	Corte di cassazione

Ch.	Law Reports, Chancery Division (3rd Series)
CJEU	Court of Justice of the European Union
Clunet	Journal du droit international
cmt.	comment, comments
Colum. L. Rev.	Columbia Law Review
Creighton L. Rev.	Creighton Law Review
DNotZ	Deutsche Notar-Zeitschrift
D.S.C.	United States District Court, District of South Carolina
EC	European Community
ECLI	European Case Law Identifier
ed.	edition
Edin. L.R.	Edinburgh Law Review
E.D. La.	United States District Court, Eastern District of Louisiana
E.D. Va.	United States District Court, Eastern District of Virginia
e.g.	exempli gratia
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche
EheG	Ehegesetz
EIR	Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), Official Journal of the European Union 2015, L 141/19
EIR 2000	Regulation (EC) No. 1346/2000 of the Council of 29 May 2000 on insolvency proceedings, Official Journal of the European Communities 2000, L 160/1
ErbR	Zeitschrift für die gesamte erbrechtliche Praxis
ESR	Regulation (EU) No. 650/2012 of the European Parliament and 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, Official Journal of the European Union 2012, L 201/107
et al.	et alia
et seq.	et sequentes
EU	European Union
EuR	Europarecht
F.2d	Federal Reporter, Second Series
F.3d	Federal Reporter, Third Series
FamFG	Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit
FamRZ	Zeitschrift für das gesamte Familienrecht
FG	Festgabe
fn.	footnote
Foro it.	Foro italiano
FS	Festschrift
F. Supp.	Federal Supplement
F. Supp. 2d	Federal Supplement, Second Series
F. Supp. 3d	Federal Supplement, Third Series

Hague Trust Convention Harv. L. Rev.	Convention on the Law Applicable to Trusts and on their Recognition, The Hague, 1 July 1985 Harvard Law Review
Idaho i.e. Ill. Ill. 2d InsO Int'l & Comp. L.Q. Iowa L. Rev. IPRax IPRG	Idaho Reports id est Illinois Reports Illinois Reports, Second Series Insolvenzordnung International & Comparative Law Quarterly Iowa Law Review Praxis des Internationalen Privat- und Verfahrensrechts Gesetz über das internationale Privatrecht
JA JBl JEV JherJb JR JurA jurisPK-BGB JuS JW JZ	Juristische Arbeitsblätter Juristische Blätter Journal für Erbrecht und Vermögensnachfolge Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts Juristische Rundschau Juristische Analysen juris Praxiskommentar BGB Juristische Schulung Juristische Wochenschrift Juristenzeitung
KG Ky.	Kammergericht Kentucky Reports
La. La. App. 1 Cir. La. App. 2 Cir. La. App. 3 Cir. La. App. 4 Cir. La.C.C. La.C.C. (1870) La.C.C.P. La. Ct. App. La. L. Rev. La.R.S. lit. LPartG L. Q. Rev.	Louisiana Supreme Court; Louisiana Court of Appeal of Louisiana, First Circuit Court of Appeal of Louisiana, Second Circuit Court of Appeal of Louisiana, Third Circuit Court of Appeal of Louisiana, Fourth Circuit Louisiana Civil Code Louisiana Civil Code of 1870 Louisiana Code of Civil Procedure Court of Appeal of Louisiana Louisiana Law Review Louisiana Revised Statutes littera Lebenspartnerschaftsgesetz Law Quarterly Review
marginal no./nos. Mass. Md. L. Rev. MDR Misc. MittBayNot	marginal number/numbers Massachusetts Reports Maryland Law Review Monatsschrift für Deutsches Recht New York Miscellaneous Reports Mitteilungen des Bayerischen Notarvereins

MittRhNotK	Mitteilungen der Rheinischen Notarkammer
Mo. L. Rev.	Missouri Law Review
Motive	Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich
Mugdan	Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich
Mü-Ko	Münchener Kommentar zum Bürgerlichen Gesetzbuch
n.	numero
N.C.G.S.A.	West's North Carolina General Statutes Annotated
N.D. Tex.	United States District Court, Northern District of Texas
N.E.2d	North Eastern Reporter, Second Series
NJW	Neue Juristische Wochenschrift
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht
NJW-Spezial	Neue Juristische Wochenschrift Spezial
NK-BGB	NomosKommentar, Vol. 1: Allgemeiner Teil – EGBGB; Vol. 5: Bürgerliches Gesetzbuch: Erbrecht
NK-Rom-Verord- nungen	NomosKommentar, Vol. 6: Rom-Verordnungen – EuGüVO – PartVO – HUP – EuErbVO
N.M.	New Mexico Reports
no.	number
Nw. U. L. Rev.	Northwestern University Law Review
N.Y.2d	New York Reports, Second Series
N.Y.S.2d	New York Supplement, Second Series
N.Y.U.L.	New York University Law Review
NZ	Österreichische Notariatszeitung
NZG	Neue Zeitschrift für Gesellschaftsrecht
OGH	Oberster Gerichtshof
Ohio App. 3d	Ohio Appellate Reports, Third Series
ÖJZ	Österreichische Juristen-Zeitung
Okl.St.Ann.	Oklahoma Statutes Annotated
OLG	Oberlandesgericht
OR	Schweizerisches Obligationenrecht
p./pp.	page/pages
P.	Pacific Reporter
P.2d	Pacific Reporter, Second Series
P.3d	Pacific Reporter Third Series
Protokolle	Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Regulation No. 44/2001	Regulation (EC) No. 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Communities 2001, L 12/1

Regulation No. 2201/2003	Regulation (EC) No. 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Official Journal of the European Union 2003, L 338/1
Regulation No. 4/2009	Regulation (EC) No. 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the European Union 2009, L 7/1
Regulation No. 1259/2010	Regulation (EU) No. 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Official Journal of the European Union 2010, L 343/10
Regulation No. 1215/2012	Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union 2012, L 351/1
Regulation No. 2016/1103	Regulation (EU) No. 2016/1103 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Official Journal of the European Union 2016, L 183/1
Rev. Jur. U.P.R.	Revista Juridica de la Universidad de Puerto Rico
RG	Reichsgericht
R.G.D.	Revue Generale de Droit
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Riv. civ.	Rivista di diritto civile
Riv. not.	Rivista del notariato
RIW	Recht der internationalen Wirtschaft
RNotZ	Rheinische Notar-Zeitschrift
Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations, Official Journal of the European Union 2008, L 177/6
Rome II Regulation	Regulation (EC) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, Official Journal of the European Union 2007, L 199/40
RPfIG	Österreichisches Rechtspflegergesetz
RTDCiv	Revue trimestrielle de droit civil
S. Cal. L. Rev.	Southern California Law Review
S.D.N.Y.	United States District Court, Southern District of New York
S.D. Tex.	United States District Court, Southern District of Texas
sec.	section; sections
sent.	sentence
So.	Southern Reporter
So. 2d	Southern Reporter, Second Series
So. 3d	Southern Reporter, Third Series
StAZ	Das Standesamt
Sur.	Surrogate's Court

S.W.2d	South Western Reporter, Second Series
Tul. Eur. & Civ. L.F.	Tulane European and Civil Law Forum
Tul. L. Rev.	Tulane Law Review
UCLA L. Rev.	University of California at Los Angeles Law Review
UPC	Uniform Probate Code
UT	Supreme Court of Utah
Utah Ct. App.	Court of Appeals of Utah
UTC	Uniform Trust Code
U. Tol. L. Rev.	Toledo Law Review
VerschG	Verschollenheitsgesetz
Vol.	Volume
Wash.	Washington Reports
W.D. La.	United States District Court, Western District of Louisiana
Willamette L. Rev.	Willamette Law Review
Yale L. J.	Yale Law Journal
ZbIFG	Zentralblatt für freiwillige Gerichtsbarkeit, Notariat und Zwangsversteigerung
ZErB	Zeitschrift für die Steuer- und Erbrechtspraxis
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge
ZfRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht
ZGB	Schweizerisches Zivilgesetzbuch
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

A. Introduction

I. The Characterization of the Provisions Protecting Forced Heirs Against Lifetime Dispositions by the Decedent

In a world with ever-increasing cross-border flows of persons, services and goods, cases with connections to different jurisdictions are day after day becoming a more important part of the ordinary course of business. In the United States alone, more than 5,000 conflicts cases were decided by the courts in 2019.¹ According to recent estimates, 80% of the cases brought before the Commercial Court in London have involved at least one foreign party,² and around 450,000 successions with an international dimension are opened every year in Europe, amounting to a sum of €123 billion.³ The inevitable consequence of this growth in the number of cross-border cases is the increasing importance of the legal field called “choice of law”. For regardless of the exact fact-pattern, the one question that will always have to be resolved in a case with ties to different legal systems is the choice-of-law question, that is, the question of the applicable law.

There is probably no legal system in the world with only a single choice-of-law rule. Thus, when determining the law applicable to a case, a court will also necessarily have to ascertain which of its jurisdiction’s several choice-of-law rules applies. Choice-of-law rules have a limited ambit of application: they only apply to delictual matters, inheritance law issues, matrimonial regime questions etc. Ascertaining which choice-of-law rule is applicable to a certain case hinges, therefore, on the delimitation of the exact scope of application of the different conflicts rules.

This process of delimiting the exact scope of a conflicts rule is generally called characterization.⁴ Even though it is involved in every conflicts case, in

¹ *Symeonides*, Am. J. Comp. L. 68 (2020), p. 235, p. 237.

² *Lein/McCorquodale/McNamara/Kupelyants/del Rio*, Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts, p. 10.

³ Press Release, Notaries of Europe, 450,000 international successions in Europe and 123 billion Euros, issues debated during Brussels conference on 15 October, available under: <<http://www.notaries-of-europe.eu//index.php?pageID=166>> (accessed 7 Aug 2021).

⁴ This is obviously a very simple description of the characterization process. It highlights, however, the essence of this process.

many of them the issue of characterization is fairly straightforward, and the courts may not even perceive that they have performed a characterization analysis. For this reason, the conflicts scholar *Robertson* compares it with breathing, “as that is performed habitually and, for the most part, unconsciously”.⁵ Even the most basic processes, such as the process of breathing, can, however, occasionally become challenging. As to the process of characterization, courts tend to experience some “shortness of breath” when the rules of law to be characterized lie at the interface of two different fields of law.

A good example of such rules of law are the ones protecting forced heirs against lifetime dispositions by the decedent. Forced heirship is normally primarily associated with a restraint of the decedent’s *testamentary* freedom of disposition⁶ because it is a share of the decedent’s estate that the law “reserves” for certain persons and of which the decedent is not allowed to dispose. Nevertheless, a forced heirship system can only be fully effective if it also constrains to some extent the decedent’s *lifetime* freedom of disposition. For if the decedent were completely free to dispose of his property via *inter vivos* dispositions, he could easily circumvent his forced heirs’ rights by giving away his property prior to his death and leaving an empty estate to his forced heirs.

For the protection of forced heirs, most forced heirship systems in the world have, therefore, provisions restraining the decedent’s lifetime freedom of disposition. Compared to other rules of law on forced heirship, these provisions have the peculiarity that they are located at the boundary between succession law and the law on *inter vivos* dispositions. Early on, conflicts scholars thus debated the proper characterization of these provisions. At the end of the 19th century, *Carl Ludwig v. Bar*⁷ and *Zitelmann*⁸ began a debate about the proper characterization of the so-called clawback claims⁹ of forced

⁵ *Robertson*, Characterization in the Conflict of Laws, p. 62.

⁶ See only *Frank/Helms*, Erbrecht, § 1 marginal no. 4 (p. 3); *Brox/Walker*, Erbrecht, § 32 marginal no. 1 (p. 239).

⁷ *v. Bar*, Theorie und Praxis, Vol. II, marginal no. 376 (p. 335) (in favor of a characterization as an inheritance law matter).

⁸ *Zitelmann*, Internationales Privatrecht, Vol. II, pp. 999–1004 (in favor of a characterization as either an issue pertaining to the law of obligations or real rights).

⁹ In the context of inheritance law, “clawback claims” can be defined as claims (like the claim for an augmentation of the compulsory share (*Pflichtteilsergänzungsanspruch*) pursuant to § 2329 BGB or Louisiana’s action for reduction against the donee or his successor by gratuitous title) granted to forced heirs against the recipients of lifetime gifts made by the decedent which aim to protect forced heirs against being defrauded through lifetime gifts made by the decedent; for a similar definition of “clawback claims” see document 14894/09, 26.10.2009, JUSTCIV 213 CODEC 1228, marginal nos. 6–9; *House of Lords, European Union Committee*, 6th Report of Session 2009–10, The EU’s Regulation on Succession, pp. 25, 52. For an overview of the Member State law on these claims see also document 14894/09, 26.10.2009, JUSTCIV 213 CODEC 1228; *Holliday*, Clawback Law in the Context of Succession, pp. 175–225.

heirs against the recipients of *inter vivos* gifts made by the decedent. This discussion continued throughout the 20th century¹⁰ and regained attention in Europe after the enactment of the ESR. No less debated has been the question of the proper characterization of donations *causa mortis*.¹¹ Prior to the enactment of the ESR, German scholars and courts developed a colorful array of views about the correct way of characterizing donations *causa mortis* under the German autonomous conflicts rules, which included proposals to adopt the distinction set forth by § 2301 BGB between executed and non-executed *Schenkungsversprechen von Todes wegen*¹² on a choice of law level¹³ and to distinguish between questions pertaining to donations *causa mortis* arising prior to the decedent's death and those arising afterwards.¹⁴ This plurality of views has not shrunk since the ESR's enactment¹⁵ and has recently culminated in the Austrian Supreme Court (*Oberster Gerichtshof*)¹⁶ requesting a preliminary ruling from the Court of Justice of the European Union on the characterization of a donation *causa mortis* under the ESR.¹⁷

¹⁰ See *Frankenstein*, Internationales Privatrecht, Vol. IV, pp. 401–404 (in favor of characterization as either an issue pertaining to the law of obligations or real rights); *Raape*, Internationales Privatrecht, pp. 442–443 (in favor of characterization as an inheritance law matter); *Nußbaum*, Deutsches Internationales Privatrecht, p. 352 fn. 3 (in favor of characterization as an inheritance law matter); *Raape*, in: Staudinger, 9th ed. 1931, Art. 24 EGBGB marginal no. D IV (in favor of characterization as a matter of the inheritance law applicable at the time the gift was made); *Scheuermann*, Statutenwechsel im internationalen Erbrecht, pp. 116–117 (in favor of characterization as a matter of the inheritance law applicable at the time the gift was made); *Firsching*, in: Staudinger, 12th ed., Vorbem zu Art 24–26 marginal nos. 97–99 (in favor of characterization as a matter of the inheritance law applicable at the time the gift was made).

¹¹ In very simple terms, donations *causa mortis* are donations that have a close connection to the donor's death (e.g., because they are made in contemplation of the donor's imminent death) and that present features common to legacies and donations *inter vivos*.

¹² The *Schenkungsversprechen von Todes wegen* is the German version of the donation *causa mortis*. For a thorough analysis of *Schenkungsversprechen von Todes wegen* see *infra* chapter C.II.1.b)bb), p. 148.

¹³ According to this view, executed donations *causa mortis* are to be characterized for choice-of-law purposes as gifts, non-executed donations *causa mortis* as testamentary dispositions.

¹⁴ According to this view, questions pertaining to donations *causa mortis* arising prior to the decedent's death are to be characterized as gifts and questions arising afterwards are to be characterized as testamentary dispositions. For an overview of the different propositions made prior to the enactment of the ESR see *Dörner*, in: Staudinger, 2007, Art. 25 EGBGB marginal nos. 372–374.

¹⁵ For a detailed analysis of the proposals made regarding the characterization of donations *causa mortis* under the ESR see *infra* chapter C.III.1.c)aa), p. 156.

¹⁶ OGH, 27.5.2020 – 5 Ob 61/20m.

¹⁷ CJEU, 9.9.2021, case C-277/20 (*UM*), ECLI:EU:C:2021:708.

The motivation behind the present work is to address the many open questions surrounding the characterization of provisions limiting the decedent's lifetime freedom of disposition for the protection of forced heirs. Moreover, these provisions (and, therefore, also their characterization) will likely gain more importance in the years to come in transnational succession cases. The reason for this is the change in behavior regarding the transfer of wealth on death. Whereas the number of persons writing wills seems to have stagnated at low figures in recent decades in several jurisdictions,¹⁸ the use of *inter vivos* devices such as will-substitutes¹⁹ to pass wealth without having to resort to mechanisms of inheritance law has rapidly increased worldwide.²⁰ Thus, more and more property is being passed from one generation to the next by *inter vivos* transactions instead of wills. An inevitable consequence of these developments is that cases involving forced heirs will increasingly concern rules of law pertaining to the decedent's lifetime dispositions. There will be less concern about the rules of law setting aside testamentary dispositions. This will in turn increase the likelihood that their characterization becomes an issue in cross-border cases.

II. The Perspectives of German and Louisiana Law

The characterization of the provisions protecting forced heirs against lifetime dispositions by the decedent will be analyzed from the perspective of German law and the law of Louisiana. On a substantive law level, the reason for choosing these two jurisdictions is that combined they enable an analysis of several different devices that protect forced heirs against lifetime dispositions by the decedent. From the perspective of German law, §§ 2325 BGB *et seq.* will be discussed first. These provisions are those of the *Bürgerliches Ge-*

¹⁸ For an overview see *Reid/de Waal/Zimmermann*, in: *Reid/de Waal/Zimmermann*, *Comparative Succession Law*, Vol. II, p. 442, p. 444. In France, for instance, fewer than 10% of estates are transferred by will. The Italian nationals appear to have a similar aversion to wills (15%) and also in the United States and Germany estimates indicate that about 60% and 65% of the population dies intestate, respectively.

¹⁹ Will-substitutes are defined in the Restatement 3d of Property (Wills & Don. Trans.) § 7.1 as being "an arrangement respecting property or contract rights that is established during the donor's life, under which (1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor's death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor." Examples of will-substitutes are revocable *inter vivos* trusts and life insurance policies. For a thorough analysis of will-substitutes from a comparative law perspective see *Braun/Röthel*, *Passing Wealth on Death*.

²⁰ See *Langbein*, *Harv. L. Rev.* 97 (1984), pp. 1108–1141; *Braun/Röthel*, *Passing Wealth on Death*.

setzbuch (BGB) that address the claim for an augmentation of the compulsory share (*Pflichtteilsergänzungsanspruch*). The claim for an augmentation of the compulsory share is the claim German law gives the persons entitled to the compulsory share (*Pflichtteil*) against an heir, a donee or a donee's successor by gratuitous title when the decedent gifts away his property prior to his decease.²¹ In addition, § 2301 BGB will be discussed, which is the provision of German law dealing with donations *causa mortis*.²² Finally, § 2316 BGB will be analyzed. § 2316 BGB modifies the method for calculating the compulsory share of the testator's descendants. Normally, this share is calculated according to §§ 2303, 2311 BGB. However, if there is more than one descendant and one of them has received a benefit from the testator or has made a special contribution to maintaining or increasing the decedent's assets that must be equalized in the partition of the succession, § 2316 BGB sets forth that the compulsory share is to be calculated in accordance with the collation provisions in §§ 2050 BGB *et seq.*²³

The analysis of Louisiana law will begin on the other hand with the rules on the action for reduction. The action for reduction enables forced heirs to reduce donations *inter vivos* and testamentary dispositions²⁴ by the decedent that impinge upon their legitimes, that is, on the portion of the decedent's estate reserved to them.²⁵ The analysis of Louisiana law will then continue by addressing the general principle of the impermissibility of burdens on the legitime. According to this principle, normally no charges, conditions or burdens can be imposed on the legitime.²⁶ The last legal institution to be dealt with from the perspective of Louisiana law will be the legal institution of collation. In simple terms, this legal institution consists of the return of goods to the mass of the succession which an heir received in advance of his or her share.²⁷

On a conflicts law level, German and Louisiana conflicts law has been chosen because many questions related to the characterization of the provisions being addressed here are not settled yet in these jurisdictions. In addition to the open questions under the ESR referred to above,²⁸ Louisiana courts and scholars have not yet discussed extensively the characterization of these provisions under Louisiana choice-of-law rules. A further reason for analyz-

²¹ See *infra* chapter C.II.1.b)aa), p. 137.

²² See *infra* chapter C.II.1.b)bb), p. 148.

²³ See *infra* chapter C.II.1.b)cc), p. 156.

²⁴ A terminological remark must be made here. When referring to testamentary dispositions, the Louisiana Civil Code uses the term "donation *mortis causa*". This term will, however, not be used in the present work to avoid a confusion with the term "donation *causa mortis*".

²⁵ See *infra* chapter C.II.2.b)aa), p. 186.

²⁶ See *infra* chapter C.II.2.b)bb), p. 195.

²⁷ See *infra* chapter C.II.2.b)cc), p. 197.

²⁸ See *supra* chapter A.I., p. 1.

ing the characterization problem under Louisiana law is that the last comprehensive treatment of the characterization process in the United States dates more than seventy years back.²⁹ This lack of attention from American scholars in recent decades is probably due to the tendency of American law after the conflicts revolution³⁰ to employ more flexible choice-of-law rules with soft connecting factors (so-called “approaches”)³¹ instead of rigid black letter rules such as the ones encountered in Europe.³² After all, the concept of characterization is used to delimitate the exact scope of the different choice-of-law rules.³³ If, however, most of the choice-of-law rules do not prescribe solutions in advance but simply enumerate factors that the judge should take into consideration when adjudicating a conflicts case, the importance of performing the process of characterization is substantially reduced in that a court will have considerable leeway to determine the applicable law regardless of which choice-of-law rule exactly it deems to be applicable.³⁴

Nevertheless, although the spread of open-ended choice-of-law rules in the United States may *explain* the limited interest of American scholars in the characterization problem in recent decades, it does not *justify* it. For despite the tendency of American choice of law to employ more flexible conflicts rules, rigid black letter rules were never able to be fully dispensed with. Therefore, still nowadays large fields of law such as succession,³⁵ property³⁶ and procedural law,³⁷ continue to be controlled by them.³⁸ To the extent that one of these fields of law is involved in litigation, the characterization pro-

²⁹ The work being referred to here is *Robertson’s Characterization in the Conflict of Laws* from 1940.

³⁰ This term is used here to denote the movement which took place in the United States in the second half of the twentieth century and was directed against the orthodox understanding of conflicts law; for this term see also *Symeonides*, Tul. L. Rev. 66 (1992), p. 677, p. 681 fn. 20; *Symeonides*, Md. L. Rev. 56 (1997), p. 1248, p. 1251 fn. 6; *Symeonides*, Willemette L. Rev. 37 (2001), p. 1, p. 10 fn. 20.

³¹ See, e.g., Restatement 2d of Conflict of Laws, § 145.

³² An example of a black letter rule in European law is Art. 4 sec. 1 Rome II Regulation. For a more detailed discussion of the so-called “approaches” and black letter rules see *infra* chapter C.I.2.a), p. 129.

³³ See *supra* chapter A.I., p. 1.

³⁴ See also *Symeonides*, American Private International Law, marginal no. 130 (p. 76); *Symeonides*, Choice of Law, p. 66; *Hay/Borchers/Symeonides/Whytock*, Conflict of Laws, marginal no. § 3.5 (pp. 130–131).

³⁵ See, e.g., Restatement 2d of Conflict of Laws, §§ 236, 260.

³⁶ See, e.g., Restatement 2d of Conflict of Laws, § 223.

³⁷ See Restatement 2d of Conflict of Laws, § 122; *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 267, 220 P.3d 1080, 1086 (2009); *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 193 Ill. 2d 560, 565, 739 N.E.2d 1263, 1267 (2000).

³⁸ In some states, black letter rules have been retained even in the two fields of law most affected by the conflicts revolution, namely in the contracts and torts fields; see *Symeonides*, Am. J. Comp. L. 68 (2020), p. 235, p. 359.

cess still has an importance comparable to its significance in Europe. In addition, the characterization process can be outcome determinative even in cases in which a court's choice is only between two different open-ended conflicts rules. For the importance of the factors to be considered by a court applying an open-ended conflicts rule may vary depending upon the field of law involved.³⁹ Under the Restatement 2d of Conflict of Laws (§§ 145, 188), for example, the protection of the parties' justified expectations is a factor to be taken into account when applying the general choice-of-law rule on torts as well as the one on contracts. But whereas protecting the parties' justified expectations is of relatively little significance in determining the applicable tort law, it gains considerable importance in contracts.⁴⁰ The same goes for the values of certainty, predictability and uniformity of result, which a court ascertaining the applicable tort or contract law must also factor in.⁴¹ Thus, the law of a certain jurisdiction may end up being applicable in a particular case because a certain factor gained (or lost) importance due to the court's characterization in favor of one flexible choice-of-law rule and at the cost of another flexible conflicts rule.

Discussing the mechanism of characterization from the perspective of Louisiana law will therefore make it possible to revisit this (even nowadays still) important instrument of the conflicts field by considering more recent court decisions and scholarly works together with the doctrinal developments in Europe in recent decades. By doing so, the present work will also be able to contribute to a better general understanding of this mechanism, even beyond the cases expressly dealt with here.

III. The Structure of the Present Work

The present work will be divided into two main parts. The first part (B.) will explain the characterization problem from a more general perspective. Such a general analysis of the mechanism of characterization is very important because it is not possible to discuss the characterization of specific provisions without having first worked out the exact contours of the characterization process itself. This is true not only as to aspects of the characterization process which are generally seen as having more practical significance such as the law governing the characterization process or the methodology to be applied when performing it. It is true also as to questions sometimes considered

³⁹ See also *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶ 15, 54 P.3d 1054, 1059 (“One set of factors will often be more applicable than another set depending on the area of law implicated.”).

⁴⁰ Restatement 2d of Conflict of Laws, §§ 145 cmt. b, 188 cmt. b.

⁴¹ Restatement 2d of Conflict of Laws, §§ 145 cmt. b, 188 cmt. b.

to be of mere theoretical value, such as the proper subject matter of characterization,⁴² as discussion of the characterization of § 2301 BGB under the ESR⁴³ will show.⁴⁴

Discussion of the characterization problem in the second part (C.) will focus on the characterization of those provisions of Louisiana and German law that protect forced heirs and *Pflichtteilsberechtigte* against lifetime dispositions by the decedent. The analysis in this part will begin with an overview of choice-of-law rules in Germany and in Book IV of the Louisiana Civil Code (C.I.). This analysis will concentrate on the two sets of choice-of-law rules that play the biggest role in the last section of the present work: the choice-of-law rules on succession matters and on contracts. Subsequently, the rules of substantive law that the present work will ultimately characterize will be presented (C.II.). These two sections intend to convey to the reader sufficient knowledge about the content of the choice-of-law rules and the substantive law rules involved in the present work. Finally, building on this knowledge, the last section of the present work discusses the characterization of the provisions presented in section C.II. under, respectively, German and Louisiana conflicts law (C.III.).

⁴² See *v. Bar/Mankowski*, Internationales Privatrecht, Vol. I, § 7 marginal no. 179 (pp. 662–663) (“Diese Problemstellung [regarding the proper subject of the characterization process] sieht sich freilich leicht einer Gegenfrage ausgesetzt: Braucht man wirklich eine Antwort auf diese Frage? Die nur auf den ersten Blick überraschende Antwort lautet: Kaum je.”); see, on the other hand, *Bernasconi*, Der Qualifikationsprozess im Internationalen Privatrecht, p. 71 and *Finkelmeier*, Die Qualifikation der Vindikation und des Eigentümer-Besitzer-Verhältnisses, p. 27, who correctly emphasize the importance of this question.

⁴³ See *infra* chapter C.III.1.c), p. 251.

⁴⁴ For the sake of making the general discussion of the (already very complex) characterization process only as complex as necessary, the first part of the present work will be limited to an analysis of the use of the characterization mechanism in those cases where a *renvoi* is excluded. The reason for this is that the question of how characterization is to be performed under the conflicts rules of the legal system that has been referred to by the choice-of-law rules of the forum is immaterial for the purposes of the present work.

B. The Characterization Process in Louisiana and Germany

The process of characterization has a long history in the United States as well as in Germany.¹ Nevertheless, this does not mean that it is understood in the same way in these two countries. On the contrary, the current understanding of the characterization problem in the United States and Germany presents some important differences. This is particularly problematic for the present work. For the provisions that are the subject matter of the present work will not be characterized only from the perspective of either Louisiana or German law, but from the perspective of *both* jurisdictions. Therefore, a divergent understanding of the characterization process in these two jurisdictions will inevitably result in an additional complication in resolving the question to be addressed here.

To avoid this, the following analysis will critically discuss the current understanding of the characterization process in the United States and in Germany with the ultimate goal of developing a uniform understanding of this process in *both* Louisiana and Germany. This analysis will be divided into three sections and focus on four aspects of the characterization problem. It will start by explaining what the term “characterization” means and what the subject matter of the characterization process is (I.). Then, the different opinions as to the law governing the characterization process will be presented and analyzed (II.). Finally, the methodology surrounding the characterization process will be discussed (III.).

From the perspective of German law, the discussion of the first three aspects will not be limited to an analysis of the prevailing views in Germany but will encompass the opinions of scholars in other Member States. The reason for this is that the choice-of-law rules which will be relevant in the

¹ *Lorenzen* is to be given credit for having introduced the characterization problem in the United States in his 1920 article “The Theory of Qualifications and the Conflict of Laws”; see *Robertson*, Characterization in the Conflict of Laws, p. 3. On the other hand, it was *Kahn* the person responsible for introducing this problem in Germany in his seminal article *Gesetzeskollisionen – Ein Beitrag zur Lehre des internationalen Privatrechts* of 1891. *Kahn* is also considered to be the person who “discovered” the characterization problem together with *Bartin*, who wrote about it in 1897; see only *Weber*, Die Theorie der Qualifikation, pp. 3–4.

present work from the perspective of German law are not exclusively conflicts rules enacted by the German legislator; rather, they also include several choice-of-law rules which have already been harmonized at the European level. Therefore, a discussion of the characterization problem from the perspective of German law would be incomplete if it ignored the scholarly opinions in other Member States. Similarly, when dealing with the characterization problem from the perspective of Louisiana law, the analysis of the first three aspects of the characterization process will also consider sources coming from authors and courts in U.S. states other than Louisiana. Such an approach is justified by the fact that the discussion of the characterization problem has developed much faster throughout the past decades outside Louisiana. Consequently, the discussion of the characterization problem in Louisiana will be enriched by including sources from other U.S. states.

Finally, the last section will analyze the methodology to be applied when performing the process of characterization in German, European and Louisiana law. When addressing the characterization process from the perspective of Louisiana law, this section will not (like the first two sections) include a discussion of the characterization problem in other U.S. states.² Instead, it will focus exclusively on the methodology of the characterization process under Louisiana law. The reason for doing this is that the methods for performing characterization are ultimately the *same* methods that are used in general to interpret *rules of law*.³ Each legal system is, however, alone responsible for setting forth the methods for interpreting its own rules of law.⁴ Thus, the methods for interpreting rules of law can vary from one legal system to another. Hence, also the methods for performing characterization may vary from one legal system to another. When discussing the methodology to be applied during the characterization process inside *Louisiana* conflicts law, it is, therefore, necessary to limit the discussion to the *Louisiana* legal system.

² It will, though, include scholarly works written and court decisions rendered outside Louisiana when discussing *another* mechanism of the conflicts law, namely the mechanism of adaptation (*Anpassung*); see *infra* chapter B.III.5.b)cc)(3), p. 116. The reasons for doing this are twofold. First, cases which in Europe would be solved with resort to the instrument of adaptation are dealt with in Louisiana in the same manner as they are dealt with in the rest of the United States. Thus, there is no reason to exclude scholarly works and court decisions of other U.S. states from the discussion about the mechanism of adaptation. Second, the use (or the lack thereof) of the instrument of adaptation in the United States (and, therefore, also in Louisiana) does not seem to have been the object of a detailed analysis in Europe yet. Consequently, in order to provide for the first time to the European reader a thorough analysis of this topic, also scholarly works and court decisions from outside Louisiana will be taken into account.

³ See *infra* chapter B.III.2., p. 70.

⁴ See *infra* chapter B.II.2., p. 59.

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