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Forced heirship and French international public policy

In two decisions handed down on September 27, 2017[1], the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) held that *"a foreign law designated by the conflict-of-law rule, which excludes forced heirship, is not, in and of itself, contrary to French international public policy and may be set aside only if its effective application to the case at hand results in a situation that is inconsistent with the French law principles deemed to be fundamental".*

These decisions settle the debate over how forced heirship should be articulated with French international public policy.

Forced heirship is a public policy rule under French law

It should first be recalled that the forced heirship portion (*réserve héréditaire*) is the specified minimum fraction of the estate that must be bequeathed to protected heirs (i.e. the descendants or the non-divorced spouse).

The amount of the forced heirship portion varies according to the number of children that the deceased leaves behind:

– 1/2 of the estate if there is one surviving child;

– 2/3 of the estate if there are two surviving children;

– 3/4 of the estate if there are three or more surviving children.

If the deceased has no children, he/she must bequeath 1/4 of his/her estate to his/her non-divorced spouse.

If these rules are not complied with, protected heirs can bring a legal action and ask the competent court to reduce the gifts made by the deceased in excess of the disposable portion of his/her estate.

The *Cour de Cassation* has ruled that excluding the forced heirship is not, in and of itself, contrary to French international public policy

The facts of the two cases commented herein were quite similar: The deceased were two French citizens who had been living in California for many years and who bequeathed all of their estate to their spouse.

They had willingly left no part of their estate to their children, as permitted under the law of California which does not recognize forced heirship and which makes it possible to completely disinherit one's children.

The children of the deceased initiated proceedings, and ultimately appealed to the *Cour de Cassation*, to obtain their share of the forced heirship portion. To support their claim, they relied in particular on the so-called "right to collect" (*droit de prélèvement*) created by a Law dated July 14, 1989 and according to which French heirs who, as per local laws and customs, have been deprived of their share in the deceased's assets located abroad, have the right to collect an amount equal to such share on the deceased's assets that are located in France.

The *Cour de Cassation* dismissed the argumentation developed by the children and held that:

- The law of California (last place of residence of the deceased) was applicable to the succession of the estate;
- Article 2 of the aforementioned Law of July 14, 1989 which created the *droit de prélèvement* had been repealed by a decision of the French Constitutional Council dated August 5, 2011.

The *Cour de Cassation* also further specified that excluding the forced heirship portion, pursuant to the foreign law designated by the conflict-of-law rule, "*was not, in and of itself, contrary to French international public order policy*".

It, however, introduced a restriction to the above as it added that the non-application of the forced heirship rule should not result "*in a situation that is inconsistent with the French law principles deemed to be fundamental".*

In this respect, forced heirship cannot be excluded whenever the children are not of legal age, or whenever they are in a "*state of financial hardship or in need*".

In any event, wherever the succession of an estate is governed by a foreign law that does not recognize forced heirship, the children of the deceased who are not deemed in need cannot invoke French law to obtain their fraction of the forced heirship portion.

The commented decisions concern successions opened in 2004 and 2009 and should be put in perspective with the provisions set forth in Regulation (EU) No 650/2012 dated July 4, 2012 which became effective in France

on July 17, 2015.

The impact of Regulation (EU) No 650/2012 dated July 4, 2012 on the application of forced heirship

On July 4, 2012, the European Parliament adopted Regulation (EU) No 650/2012 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 (hereafter the "Regulation"). The Regulation is binding in all EU Member States except Denmark, Ireland and the United Kingdom.

Before the entry into force of the Regulation, French inheritance law made a distinction between moveable property and immoveable property. The law applicable to the succession of moveable property was the law of the place of residence of the deceased (*lex domicilii*) while the law applicable to the succession of immovable property was the law of the place where such property was located (*lex situs*).

Article 21 of the Regulation now provides that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death, unless otherwise specified by the deceased.

In addition, pursuant to Article 22 of the Regulation, nationals of EU Member States who are not nationals of the country in which they are domiciled may choose to apply the law of the State of which they are nationals.

As a result, it follows from the above decisions and EU provisions that French citizen domiciled abroad and foreign citizens residing in France are now provided with a real possibility to escape the forced heirship rules provided for by French law.

[1] First Civil Chamber of the *Cour de Cassation*, September 27, 2017, n°16-17.198 and n°16-13.151