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The penalty clause no longer effective in so-called donations-partage and testaments-partage?

Notaries usually recommend inserting a penalty clause in so-called deeds of *donations-partage* (i.e. inter vivos gifts for the division of estate among the presumptive heirs) and deeds of *testaments-partage* (i.e. inter vivos testamentary partition of estate) in order to make sure that the wishes of the donor/testator will be respected by the heirs.

The effectiveness of such a clause – which is lawful under certain conditions – was already questionable in inheritance disputes as French courts seemed reluctant to order their enforcement.

In a decision dated December 16, 2015[1], the *Cour de Cassation* (French supreme Court) refused to enforce a penalty clause inserted in a deed of *donation-portage* – even though all of the plaintiffs' claims were dismissed – and held that it was not established that the initiated legal proceedings were abusive in light of the provisions set forth in Article 6 § 1of the European Convention on Human Rights.

The penalty clause inserted in gratuitous legal instruments is a provision by which the donor/testator provides in advance for a penalty that will be imposed on any beneficiary who fails to respect the donor's/testator's desires.

It is, therefore, a means for the donor/testator to corroborate the allocation of the estate among the various heirs and deter the latter from initiating legal proceedings after his/her death.

It is generally provided that if the relevant instrument were challenged by any of the beneficiaries on any ground whatsoever, that beneficiary would be deprived of his/her rights in the disposable portion (i.e. the fraction of the estate which a person is entitled to dispose of freely).

When one the heirs summons the other beneficiaries to challenge the *donation-partage* or the *testament-partage*, the defendants typically file a counterclaim and request the enforcement of the penalty clause, in the hope of receiving a bigger share of the deceased's estate wherever the plaintiff's action is held unfounded.

Yet, the *Cour de Cassation* has specified that the penalty clause should not be applied wherever the legal action was not intended to challenge the provisions set forth in the *donation-partage* or *testament-partage*.

As such, it has been held that the legal action brought by a heir against an ante-mortem partition of estate under which he had received an asset and subsequently been deprived thereof following the cancellation, after the death of the donor, of the latter's title to such assets, does not entail the enforcement of the penalty clause[2].

Similarly, the penalty clause should not be applied wherever the co-heir's legal action is brought to challenge a transfer of shares made by the deceased during his/her lifetime to the benefit of another beneficiary, whereas (i) the deceased only mentioned this assignment in his deed of *testament-partage*, and (ii) the shares were transferred before the enforcement of the dispositions of property upon death that contained the penalty clause[3].

In addition, French courts have ruled that the legal action brought by one of the beneficiaries seeking judicial interpretation of the provisions set forth in the *testament-partage* does not warrant the application of the penalty clause[4].

Even before the decision of the *Cour de Cassation* dated December 16, 2015, it already appeared that the effectiveness of a penalty clause inserted into a deed of *donation-partage* or deed of *testament-partage* was quite limited wherever one of the co-heirs brought the matter before the courts.

Yet, the refusal to apply the penalty clause could be justified by the need to respect the deceased's presumed desires at the time the estate was partitioned under the deed and/or the need to limit the effect of the allocated portions set forth in the inter vivos gifts or at the time of the dispositions of property upon death.

Now, the decision of December 16, 2015, in which the *Cour de Cassation* refused the application of a penalty clause inserted in a deed of *donation-partage* – even though all of the plaintiffs' claims were dismissed – suggests that the penalty clause in deeds of *donation-partage* or deeds of *testament-partage* will become no longer effective.

Indeed, the heirs summoned by the other beneficiaries of the inter vivo gifts or dispositions of property upon

death will no longer benefit from the penalty clause if they fail to establish that the action brought by the other heirs is abusive.

It is true that this reasoning, that relies on Article 6 § 1 of the European Convention on Human Rights according to which *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"* may appear to be welcome as it respects a fundamental right.

However, preventing the application of the penalty clause in case where the court dismisses the unfounded claims brought by plaintiffs who *de facto* refused to respect the desires of the donor/testator infringes the principle according to which contracts have binding force, not to mention the fact that the number of proceedings before French courts – that are already clogged – could increase drastically as a result of this decision.

[1] 1st Civil Chamber of the *Cour de Cassation*, December 16, 2015, appeal n°14-29285

[2] 1st Civil Chamber of the *Cour de Cassation*, May 10, 1989, appeal n° 87-12576

[3] 1st Civil Chamber of the *Cour de Cassation*, March 19, 2014, appeal n° 13-11939

[4] Court of Appeals of Aix-en-Provence, October 19, 2014, JurisData n°2004-257372