Is “la réserve héréditaire” part of French international public policy ?

Through two decisions (Civ. 1ère, 27 sept. 2017, n° 16-17198 et 16-13151) both issued on September 27th, The French *Cour de cassation* finally gave an answer to one of the most discussed question of French Succession law: Is *la réserve héréditaire* part of French international public policy?

The circumstances of both cases are very similar. Two French composers living in California, where they had most of their assets, got married respectively in 1984 and 1990. They put their assets in a trust and designated their wives as beneficiaries. In both cases, the settlers did not designate the children they had from previous relationships as beneficiaries of the trust. After the death of their fathers, the latter turned to French courts in order to obtain part of the inheritance. They argued that the Californian law applicable to the succession should be declared contrary to French international public policy for not including a *réserve héréditaire* for certain heirs.

According to Article 912 §1 of the French Civil Code, *la réserve hérédiataire* or the reserved portion « *is that part of the assets and rights of the succession whose devolution, free of charge, the law assures to certain heirs, called forced heirs, if they are called to the succession and if they accept it* ». In other words, under French succession law, a person cannot freely dispose of all of his or her assets. French law set boundaries by putting aside a reserved portion of the deceased’s property. However, he or she can freely dispose of the disposable portion (*quotité disponible*) which is defined as « *that part of the assets and rights of the succession that*

is not reserved by law and of which the deceased can freely dispose by liberalities » (Article 912 § 2).

Whereas the Court of Cassation ruled that the reserved portion is mandatory in internal matters, the question of its imperative nature in international cases was yet unclear. Authors disagree. While some consider that the *réserve héréditaire* cannot be considered as such as part of French *ordre public international*, others consider that due to the fact that it is an expression of solidarity among family members as well as a guarantee of equality between heirs, it has to be part of French international public policy.

The controversy was aggravated in 2011 when the Conseil Constitutionnel condemned le *droit de prélèvement* for amounting to a discrimination based on nationality. The *droit de prélèvement* is another specific French mechanism. It allows French heirs that have been deprived of the reserved portion from the assets located abroad to deduct the equivalent of such reserved portion from the part of the deceased's assets that are located in France. As a consequence of this decision, the reserved portion remained the only protection for heirs from the risk of disinheritance.

However, in both decisions, the Court found that the mere fact that the foreign law does not provide for a mechanism such as the reserved portion does not amount to a violation of French international public policy. The foreign law could nevertheless be disregarded, but only if its concrete application in a specific case leads to a situation that would be incompatible with French essential principles.

Giving the particulars circumstances of the cases, the Court found that in both cases the application of Californian law was not contrary to French public policy. First, the Court outlined that the deceased had lived in California for over thirty years and that most of their assets were located there. As a consequence, both situations were not strongly connected

to the French *forum*. Then, the Court pointed out that the children living in France were adults and that their economic situation will not suffer from their being deprived of the succession.

These observations lead the Court to consider that, in these situations, the Californian law is not contrary to French international public policy even though it does not provide for a reserved portion. The Court emphasis on the particular circumstances of the case, namely that the situation was mainly located in California and that none of the claimants was in need or economically instable, indicates that these circumstances weighed strongly on the outcome. It does not exclude that, in different circumstances, a foreign law that would not provide for a reserved portion could be dismissed as contrary to public policy.

Prior to the coming into force of the Succession Regulation, the solution appears in accordance with its public policy provision. Stating that courts could only refuse to apply provisions that are *manifestly* incompatible with the forum's international public policy, Article 35 allows that foreign laws be disregarded when their application could lead to serious consequences. It does not appear to be the case in the present situations.

The new discussed question is now: In which case the application of a foreign law not including a reserved portion could lead to a situation incompatible with French essential principles ?