# Choice of foreign law not providing for forced heirship

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## Abstract

Inheritance conflict rules have been harmonized in 25 European States through the adoption of Regulation (EU) No 650/2012 on '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', which entered into application on 17 August 2017. This regulation, which consists of 83 Recitals and 84 Articles, provides, in particular, that the law applicable to the succession governs, in principle, all movable and immovable property. It also provides that a person may choose the law of his nationality as applicable to his entire estate. Thus, in France, while *professio juris* is not permitted in domestic law, we now recognize such a choice of law. As a result, we have to apply to movable or immovable property located in France an inheritance law which may ignore the hereditary reserve, particularly for the benefit of the deceased's children, whereas this reserve is of public order in French law. This article first sets out the conditions of validity of the choice of succession law, then its effects when the chosen law ignores the concept of hereditary reserve. Thus, the article attempts to answer the two questions that concern practitioners of the settlement of estates: Can international public policy play? How to reconcile in practice testamentary liberty and forced heirship, two antinomic concepts?

Since 17 August 2015, in accordance with Regulation 650/2012, the foreign law chosen by the deceased to govern his succession is applied. This requires knowledge of the foreign law and the application of new practices and working methods, particularly when that law does not provide for forced heirship (reserved portion of the estate).

Through the examples below, we will explain the various cases in which the Succession Regulation provides for a choice of law. We will then look at the ways of handling a succession governed by a law that does not provide for forced heirship.

## Choice of foreign law

A foreign law may apply as a result of the Succession Regulation's objective criterion, ie the deceased's residence, or as a result of a choice which may be explicit, tacit, or deemed, depending on the case.

The deceased may choose only the law of the State of his nationality; however, as we shall see, the European Regulation may grant effects to the choice of another law made prior to its application.

We will examine these cases by distinguishing, as the Regulation does, between a choice made before or after 17 August 2015, with the understanding that the choice is valid even if the chosen law does not provide for *professio juris* (40th recital).

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### Testamentary disposition prior to 17 August 2015

If the deceased made a will before the Regulation came into force, the law applicable to the succession results from the rules set forth in Article 83.

At present, these are the most frequently applied rules, because we execute many more wills made prior to 17 August 2015 than wills made after that date.

Although they are transitional, these rules will continue to apply for many years, or even decades. In 2030, when a succession opens with a will dating from 2010, the law chosen to govern the succession will still be determined pursuant to Article 83.

Article 83 provides for an express choice, a tacit choice, ie the choice determined from the terms of the will, and a deemed choice.

Article 83-2 covers several situations and it even validates choices of law that are no longer possible after 17 August 2015. The Succession Regulation aims to give effect to a choice made in accordance with rules other than those it stipulates today. Above all, the aim is to respect the choice expressed before any new rule becomes applicable.

Article 83-4 provides that when a will has been made in accordance with the law that the deceased could have chosen, this law is quite simply 'deemed' to have been chosen. Making a will in compliance with the national law is therefore sufficient to trigger the application of that law.

We will look at a few examples:

- According to Article 83-2:
  "Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in *Chapter III* (choice of the law of the state of nationality) or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed".

- *Mr Carson*, a Dutch national, residing in England, made a will in 2010. He expressly chose English law to apply to his succession. He devised all his assets to his wife, thereby disinheriting their children.

This choice for the law of residence must be respected as it was valid in application of the rules of international law in force at the time in Holland, the State whose nationality the deceased possessed. This choice can no longer be made since 17 August 2015.

- *Mr Bates*, a British citizen, residing in France, expressly chose English law in his will made in 2008. He devises all his assets to his second wife, thereby disinheriting his children from a first marriage.

This choice, which was not valid at the time it was made either in France or in England, must nonetheless be respected as it meets the conditions of Chapter III of the Regulation, since the deceased chose the law of the State of his nationality.

- According to Article 83-4:
  "If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession".

- *Mrs Denker*, an American citizen residing in the State of Maryland and owning a small apartment in Paris, made a will in 2000, pursuant to which she made dispositions in favour of her grandchildren, thereby disinheriting her children. She devised all her assets, wherever they are located, to a trust created solely for the benefit of her grandchildren.

  She granted the testamentary executor and the trustee the widest powers of administration and disposition to achieve the aim, ie that of placing the funds in trust for the sole benefit of her grandchildren.

No express choice is made in favour of American law. However, the will was drafted having regard to and in accordance with the law of the State of Maryland. This law is deemed to have been chosen. Deemed does not mean presumed. Proof to the contrary should not be admitted.[1] The succession will be governed by the law of that State which does not provide for the children's reserved portion.

Furthermore, there is no certainty that the attorney who assisted Mrs Denker with writing her will was informed of the apartment she owned in Paris. Other possibility, Mrs Denker, who inherited this apartment in 2005 (after making her will in 2000), did not consider it necessary to rewrite her will or did not think to do so. Even in these cases, the law of Maryland should be deemed to apply to the devolution of her assets, including the apartment in France, as she is deemed to have chosen it to govern the succession. Thus, 'The mechanism extends beyond protecting the testator's subjective expectations and takes on a real objective dimension.'[2]

### *Testamentary disposition after 17 August 2015*

The choice of law is governed by Article 22-2. It must be in favour of the national law of the deceased. It must be express choice or be demonstrated by the terms of the testamentary disposition. A person having several nationalities may choose the law of any State whose nationality he possesses at the time of making the choice or at the time of his death.

Unlike Article 83-4, the intent to choose the law applicable to the succession is necessary to meet the requirements of Article 22-2. It may be expressed directly by an express choice, or indirectly by a tacit choice, ie a choice demonstrated by the terms of the will. The choice demonstrated by the terms of the will is a notion that exists in several international instruments, such as the European Regulation on contractual obligations, for example (Article 3-1: A contract shall be governed by the law chosen by the parties. The choice shall be made expressly *or clearly demonstrated by the terms of the contract* or the circumstances of the case).

- Examples for this Article 22:

> "1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
> A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
> 2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
> 3. . . .".

- *Mrs Hugues*, a British citizen having her residence in France, left a will made in 2017, in England, with advice from her solicitor. The will applies to all the assets left by the deceased. It particularly appoints an executor having the widest powers of administration and disposition and creates a trust. This trust is created in favour of her husband throughout his lifetime, who receives both the income and the capital, and in favour of their children, who receive the remainder left upon the death of the survivor.

The choice of the national law is demonstrated here by the creation of the trust, a system which does not exist in French law.

Granting very extensive powers to the testamentary executor also demonstrates this choice of law, since the law applicable to the succession governs the powers of the administrator (Article 23-f). Mrs Hugues wanted her estate to be managed in accordance with English rules. There should be no doubt as to the choice of national law.

- *Mr Alridge*, an American citizen, who had been living in New York for a long time and who

1. P Wautelet, 'Commentary under Art. 83. spec. no. 32' in A Bonomi and P Wautelet (eds), *Le droit européen des successions Commentaire du Règlement UE n° 250/2012 du 4 juillet 2012* (2nd edn, Bruylant 2016).
2. P Wautelet, 'Commentary under Art. 83. spec. no. 6' in Bonomi and Wautelet, ibid.

owned assets both in France and the State of New York, made a will in 2016 with an express choice of the law of his nationality. In accordance with Article 36-2-b), the choice of national law is construed as referring to the law of the territorial unit with which the deceased had the closest connection. In this case, it will be the law of New York.

This express choice will be respected in France even though, in New York, the choice is only permitted for assets located in that State.

We will also note that Article 22-3 states that

> the substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

And recital 40 specifies that:

> it should be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing.

## Choice of law not providing for forced heirship

As the deceased chose a law that does not provide for forced heirship, the succession must be handled without any reserved portion, and this solution is approved by the *Cour de cassation.*

### *Position of the Cour de cassation*

#### *Succession opened before entry into force of the Succession Regulation*

The French Supreme Court set out its position in two rulings of 27 September 2017.[3] The reserved portion is not part of French international public policy or more precisely:

> 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.

Applying a method traditionally used in matters of public policy, the *Cour de cassation* added that:

> the foreign law may be set aside only if its effective application to the case at hand results in a situation that is inconsistent with the principles of French law deemed to be fundamental.

#### *Succession opened after entry into force of the Succession Regulation*

The French court's position should be the same for a succession opened after the European Regulation came into force. Recitals 38 and 58 and Article 35 show the extent to which the Regulation seeks to limit the public policy exception to applicable law.

Having provided a strict framework for the choice of law, the European legislature recommends respecting the choice made in favour of national law:

> ... That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share. (Recital 38)

However, it should be noted that one of the cases that were the subject of the decisions of the Court of Cassation mentioned above was recently brought before the European Court of Human

3. Cass Civ I (27 September 2017) no 16-13151 and 16-17198: *RJPF* (December 2017) 44. Note S Godechot-Patris and S Potentier; C Nourissat and M Revillard, *JCP G* no 47 (20 November 2017) 1236.

Rights, so the position of the French courts can still evolve.

### *Handling the succession without a reserved portion*

In its last whereas clause, the *Cour de cassation* clarified its position by adding:

> whereas it is not claimed that application of this law would leave either of the parties X . . ., both of whom are adults . . . in a situation of economic hardship or in need . . . the court of appeal rightly inferred that the law of California was not contrary to French international public policy.

But what if one of the heirs, for example a child of the deceased, is in need? We will attempt to provide some answers below.

So we are considering the case in which a foreign law not providing for forced heirship applies. The deceased has disinherited a child who, under French law, is entitled to a reserved portion. The *Cour de cassation* has decided that, as a matter of principle, the reserved portion is not part of French international public policy. The Court provides for an exception if the situation is incompatible with the fundamental principles of French law, notably if the deceased leaves a child in a situation of economic hardship or in need.

Where this is the case, the child excluded from the succession may avail himself of his needy situation and consequently seek a compensatory allowance to make up for this need. In some respects, this compensation can be likened to the claim for support provided for by Articles 758 and 767 of the Civil Code, in the case where the spouse or ascendants of the deceased who are excluded from the succession are in need, a 'claim for support with a clear inheritance element'.[4]

In our case, the excluded heir would seek what we could call an 'inheritance compensatory allowance'.

In this situation, ie that of an heir excluded by a will complying with a law that does not provide for a reserved portion, we will first search the foreign law to check whether it contains any provisions applicable to the case considered. The European Regulation provides for the application of the foreign succession law. According to Article *23-2.h*, this law governs 'claims which persons close to the deceased may have against the estate or the heirs'. And it is only where the law applicable to the succession does not contain any provision, or where it contains provisions deemed insufficient by the French courts, that the excluded heir may claim a compensatory allowance pursuant to our case law. Payment of the allowance will subsequently be given effect.

#### *Examination of the foreign law*

The foreign succession law may provide a right that is analogous to a reserved portion, or the right to seek an allowance, or it may make no provision at all.

The lawyer in charge of the succession abroad will be able to provide all the necessary information in an affidavit.

As an example, the provisions applicable in England and Wales are often cited: Provision for Family and Dependants Act 1975.

This legislation provides that a person close to the deceased, his spouse, ex-spouse who has not remarried, child, or any person who was dependent upon him, may seek a financial allowance to be taken from the estate, where they have not been or have been insufficiently provided for. The situation is assessed based on the financial circumstances of the claimant heir and of any other heir who may claim likewise, the financial circumstances of the beneficiaries of the will, the physical or mental disabilities of the claimant heir and other heirs, and in general, any other factors, such as *inter vivos* gifts or even the claimant's behaviour.

In the case of the surviving spouse, the act refers to the rules applicable in cases of divorce. An allowance

4. S Mazeaud-Leveneur, 'Des droits du conjoint successible. Du droit à la pension': JCL Civil Code. Fascicule 30.

due to a spouse in the event of death is therefore determined as the same way as in the case of divorce.

In most US States, there is no provision for children whereas a spouse who is excluded or insufficiently provided for has a *quasi*-reserved portion called the 'elective share'.[5] S/he may therefore claim a portion of the estate. The American laws of these States regulate the elective share notably by setting a time limit for bringing the claim, defining a calculation mass and stipulating a share as a percentage (usually 30 per cent), etc.

### *An inheritance compensatory allowance paid in accordance with French case law*

If no allowance is granted by the foreign law or if it is considered insufficient from the French perspective, the forced heir (under French law) could then claim compensation borne by the estate. It should be noted that this is not an indemnity of reduction to collect a reserve in value which does not exist. The forced heir receives compensation to fill a need. The *inheritance compensatory allowance* might consist of a share of the estate's assets or a specifically designated asset, or it may take the form of a financial allowance payable as a lump sum or a pension.

As is frequent in succession cases, the value of this compensation will be determined at the end of a procedure involving bringing the parties together, negotiating and mediation, etc. If, despite the steps taken, an amicable solution cannot be found, the excluded heir must apply to the courts.

The jurisdiction of the French courts is governed by Chapter II of the Succession Regulation. Below are the most frequent situations entailing the application of Articles 4 or 10:

> Article 4: deceased having the nationality of a State not providing for forced heirship, residence in France, choice of the national law, the French courts will have jurisdiction as a result of the French residence.
>
> Article 10: deceased residing in a third State not providing for forced heirship, the French courts have jurisdiction because the assets are located in France but their jurisdiction is limited to those assets. However, jurisdiction is extended to the whole estate if the deceased was a French national or formerly had his residence in France and a period of not more than five years has elapsed since that habitual residence has changed.

### Effecting payment of an *inheritance compensatory allowance*

Several situations can arise in practice.

In an amicable context, the only one we will consider in this article, the solutions available to provide for the excluded child or spouse can take several forms. They may give rise to a deed made abroad, particularly in the State of residence where the deceased left the majority of his assets, or to a deed drawn up in France.

One example is a 'deed of variation', which exists in certain common law countries. The parties can agree to alter the testamentary dispositions and then agree on new dispositions in favour of someone who was not a beneficiary under the will.

Another example is a 'disclaimer' whereby a beneficiary can waive the testamentary disposition.

If the agreement made abroad applies to assets located in France, it will be reiterated in a French deed if necessary, particularly if the agreement signed in a third State to the European Regulation contains an allocation of real property requiring registration of rights, exactly like awards of real property pursuant to a divorce decreed abroad.

A French deed may record a 'cantonment' (a partial waiver of a portion of the succession) pursuant to Articles 1002-1 and 1094-1 of the Civil Code when French law applies to a part of the estate. This will be the case of a split triggered by the *renvoi* mechanism

5. Michael W Galligan, '"Forced heirship" in the United States of America, with Particular Reference to New York State' (2016) 22(1) Trust and Trustees 103.

of Article 34 of the Regulation. In this case, the share of the excluded child(ren) in the assets governed by French law may be increased by the cantonment granted by the beneficiary of the disposition. In other words, he or they will receive more than the reserved portion out of the estate's assets that are subject to French law, in order to offset the lack of entitlement to assets governed by the foreign law.

It should also be possible to draft a deed on the basis of the European Regulation and the *Cour de Cassation's* case law to record the parties' agreement and enable the excluded heir to receive this compensation. If reciprocal concessions are made, a settlement agreement could be proposed.

In any event, attention should be paid to the taxation of the operation. The beneficiary of the compensatory allowance should be required to pay inheritance tax on the allowance received, which should be deducted from the taxable portion of the estate vesting in the beneficiary(ies).

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