Make a choice

Sophie Ducamp-Monod and Simrun Garcha examine forthcoming EU regulations changing the ways in which British spouses may deal with their property in France

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'From 29 January 2019 it will no longer be possible for British couples to choose a French matrimonial property regime to apply to only their French assets.'

This article is concerned with the treatment of real estate located in France. In accordance with common law principles, individuals have testamentary freedom to bequeath their property located in France (and more broadly, in continental Europe) to their surviving spouse or civil partner. In France, however, the rights of the surviving spouse are limited by the provisions for a deceased parent to leave a share of their property to their children: this amounts to a one-half share if the individual has one child, two-thirds if there are two children and three-quarters if there are three or more children.

Potential solutions

It is common for British spouses (and civil partners) to protest against French civil law, when they wish to leave their estate to their spouse, rather than to pass a portion to their children in accordance with the requirements of French law. In order to achieve this desired outcome, there are several possible ways to circumvent the requirements:

Survivorship

The spouses may enter into an agreement by which they agree that the French property will be the property of the survivor of the couple, to take effect only in the death of one spouse. In order to be valid however, this clause is restricted to circumstances in which the spouses finance the property in the same proportions and belong to the same age group.

EU Succession Regulation (EU 650/2012)

Alternatively, the spouses may decide to designate the law of a common law jurisdiction such as England and Wales or Ireland to govern their succession, in accordance with the EU Regulation 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 (EU 650/2012) (the EU Succession Regulation) which is applicable in France. This solution is all the more advisable given that the French Court of Cassation has stated (in two decisions dated 27 September 2017) that if the foreign law did not recognise a reserved right in the case of death, this 'omission' was not contrary to the international public order rule and the foreign law should apply in full.

While including a choice of law clause in a will is straightforward, its implementation is much less so. Notwithstanding that the EU Succession Regulation has been applicable in France since 17 August 2015, the French courts are not familiar with applying common law provisions. France does not recognise the obligation to appoint an executor of the testator's estate to manage its administration, and French courts will not issue a grant of probate or grant of letters of administration as on death the assets vest in the heirs. It is also important to bear in mind that in France, the concept of trusts, including testamentary trusts, does not exist, creating difficulties regarding the administration of trusts in that jurisdiction. Broadly speaking, it is not advisable to create a trust for real estate that is located in France, partly because French civil law ignores how trusts work, and also because the

French tax administration takes advantage of the non-recognition of trusts in order to tax them at the highest level possible.

Purchasing property via a company

Spouses can decide to buy a French property through the mechanism of a company, in relation to which they will be the main shareholders. Under French private international law, the company formation must be carried out in accordance with French law, ie the law of the forum. Under French law, company shares are governed as follows:

- if the spouses are domiciled in their country of origin, succession is governed by the common law, and in such circumstances France will also apply the common law principles pursuant to the provisions of the EU Succession Regulation (EU 650/2012); or
- if the spouses are domiciled in France, the estate will pass in accordance with French law.

Choice of matrimonial regime

There is a fourth solution, although due to forthcoming changes in EU law, this will no longer be available with effect from 29 January 2019. But before considering this last option, it is necessary to explain the matrimonial property regime in France. In France, and in many other European jurisdictions, any married person is subject to a matrimonial property regime, even where a pre-nuptial agreement has not been signed. Where a pre-nuptial agreement has been entered into, the law applies legal matrimonial property rules. Thus, in absence of a pre-nuptial contract, married couples are subject to, for instance:

- in France, Italy or Portugal – a community of assets regime;
- in Austria or Greece – a separation of assets regime; or
- in Germany or Switzerland – a community of accrued gains regime.

Legal advisers, before taking any steps, should determine, in cases where there are international aspects, which matrimonial property regime a couple is governed by. International private law then appoints the law of the state that will determine the matrimonial property regime. These rules will soon be replaced by the EU's Council Regulation (EU) 2016/1103 of 24 June 2016 on implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (with equivalent provision regarding registered partnerships in (EU) 2016/1104), that will come into force in France on 29 January 2019 (but not in the UK, which has not adopted this regulation). Article 26, (EU) 2016/1103 provides:

> In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State: (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

Given that common law ignores the notion of matrimonial property regimes, a legal adviser in France has to determine the matrimonial property regime of a couple who, for example, married in the UK, and lived in the UK after their marriage.

Under common law, spouses have full freedom to administer and engage their asset. They are full and sole owners of any assets acquired during their marriage, meaning that their matrimonial property regime is effectively that of the separation of assets.

In the absence of a marriage contract in France, a matrimonial property regime exists whereby each party to a marriage retains any property acquired before the marriage in their sole name, including property received by gift or inheritance, whereas assets acquired during their marriage belong to the couple jointly, ie the community of assets regime. Where a married couple is governed under a community regime, assets are deemed to be joint whether they were acquired jointly or individually during the marriage, and therefore any decisions must be made jointly by both spouses.

In France, the concept of trusts, including testamentary trusts, does not exist, creating difficulties regarding the administration of trusts in that jurisdiction.

In practice, the following example illustrates the difference between the two main matrimonial property regimes:

Juliet belongs to a wealthy family and does not work whereas Romeo comes from a working-class family, but throughout all his married life, and due to his qualified skills, he has cultivated a successful career. If the couple is governed under a separation of assets regime, in the event that Romeo dies, his heirs will share in all of his gains generated during marriage; whereas under a community of assets regime, his heirs will inherit only one half of his estate, as the other half belongs to Juliet by application of the matrimonial property regime.

Married couples can choose not to be governed by the legal matrimonial property regime, and instead can choose to adopt either a regime of separation of assets, a community of assets regime close to the legal status, or a reinforced community regime by awarding the

survivor spouse all assets, including, for example, assets received by the deceased as family gifts.

The Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes (the 1978 Hague Convention) is currently applicable in France. It allows married couples to change the law applicable to their matrimonial property regime. It is possible, therefore, for couples to elect to adopt the law of a country in which one of them resides, or at least one of them is a citizen. Contrary to (EU) 2016/1103, it is possible for couples to choose to apply the law of the country where the real estate is situated only to real estate located in France.

The 1978 Hague Convention provides that for couples married since 1 September 1992, when the convention came into force in France, the matrimonial property regime changes automatically if a couple live in another state for more than ten years. For example, say a British couple get married on 4 April 1994 and live in London after their marriage. They subsequently move to Paris in July 2004 and remain there to the present day. Their matrimonial property regime is governed successively by common law until July 2004, then by French law, as they have lived in France for more than ten years. In the event of divorce, the liquidation of assets will be governed by two regimes: those of separation of assets and of common assets. In order to avoid such complications, it is advisable for couples to draft a contract by which they will choose the law applicable to their matrimonial property regime.

For British couples who have no children from a previous relationship, and who own or plan to own real estate in France, it has been a popular estate-planning tool to choose the French matrimonial community regime. However, this requires that their matrimonial contract provides the surviving spouse be allocated the whole of any jointly owned present and future assets located in France on the death of the first of them, and the deceased's children would not be able to claim their forced heirship rights on the death of the first spouse. This solution not only corresponds with the wishes of a British couple who seek to protect themselves on the death of the first spouse, but also avoids the difficult application of common law in a French jurisdiction.

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Forthcoming changes

However, the new EU regulations that will come into force on 29 January 2019 ((EC) 2016/1103 and (EC) 2016/1104), which have both been adopted by France, will change the current position. Article 21 of the new regulations provides:

> The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.

The words 'all assets' exclude the possibility for spouses to be subject to the laws of different jurisdictions, such as those of the UK and France.

According to Art 22, this choice is limited either to the law of the state in which at least one of the spouses has their habitual residence, or to the law of the state of which one of the spouses is a national. The choice of law made by a couple will apply to all of their assets wherever they are located, and it will no longer be possible to choose the law of the state where the real estate is located. Although the UK did not participate in either of these EU regulations, Art 20 of the regulations provides that their application is universal, and applies even if the designated law is not the law of an EU member state or from a state who opted out.

The implication of the EU regulations is that from 29 January 2019 it will no longer be possible for British couples to choose a French matrimonial property regime to apply to only their French assets. If they do so before 29 January 2019, their matrimonial contract will apply in the future, including to their actual and future real estate located in France, despite the provisions of the new EU regulations. The split of matrimonial property regime between common assets in France and deemed separation of assets in the UK will still be valid, even after the EU regulations enter into force.

There are no strict formalities to be followed in order to enter into a nuptial agreement providing for all French assets to be transferred to the surviving spouse, and no judicial approval or verification is required. In France, a contract should be drawn up by a public notary where the laws of France will be chosen, and where all assets acquired in France will be common and where these joint assets are to be assigned to the surviving spouse.

Conclusion

Couples who wish the French matrimonial property regime to apply to their French property should seek advice in advance of the new EU regulations coming into effect, in order to explore the possibility of making an election prior to this date that any future acquisitions of French property will be subject to the law of the jurisdiction in which they are situated. More broadly, even where a universal community regime has not been adopted, British couples who own assets in France should check the matrimonial property regime they are governed by. ■

Court of Cessation 27 September 2017 n°16-17.198 and n°16-13.151