Updated by the Law of 1st January 2007

1. Introduction

Many of us are squeamish when it comes to thinking or talking about death, particularly your own. But as this booklet explains there are good reasons to spend some time considering what you want to have happen to your assets subject to French succession law ('your French estate') when you die. Failure to do so or taking poor advice can have serious adverse consequences. In any event, your French affairs should be periodically reviewed to take account of annual changes in tax and other laws. For example, there have been a number of developments in relation to taxation in France over the past 12 months which are likely to have a significant effect on the tax planning of English expatriates living in France. This booklet provides a discussion background on:

- How French succession law and French inheritance tax work. For example, French law does not recognise English trusts and as a result on the death of one joint owner property in France does not automatically pass to the survivor.

- Making an appropriate will. If your will was made more than 5 years ago, or if your family circumstance have changed, you should review your existing will to ensure that it is still appropriate.

- Other legal mechanism(s) for ensuring that your French estate is disposed of in a way that recognises your wishes and the needs of your surviving spouse, partner or friends ('chosen heirs') while also minimising French inheritance tax (which unlike the UK is payable by a surviving spouse) and other taxes. Without planning a married couple may currently only lawfully protect up to 126 000,00 Euros of their French estate from French inheritance tax. In many cases with proper tax planning they may escape French inheritance tax altogether.

- How to administer your French estate quickly and efficiently.

Please note that the information contained in this booklet was correct at the time it was produced and has not been amended to take into account any subsequent changes in the law or practice. Although the main issues have been covered many points in this booklet have been greatly simplified and should not be regarded as a complete statement of the law. The provision of this information does not create a business or professional services relationship and specific professional advice should be obtained before acting on any of the information. Any reliance on the information is solely at your own risk.

2. French succession law

In many ways French succession law differs radically from English succession law. For example, unless proper action is taken in your lifetime your joint bank accounts may be blocked. Your spouse or other chosen heirs may be prevented from inheriting all - sometimes any - of your French estate. They may also be evicted from your French property when you die. Despite this

your chosen heirs may be liable for other people's bills and outgoings (e.g. your children under they are 18).

2.1 Assets governed by French succession law

French succession law distinguishes between:

- French *immeubles* which include your house, flat or other 'real' property in France; and
- Non-French *immeubles* which include your real property outside FRANCE; and
- French *meubles* which include your 'personal' property such as household furniture, bank notes, motor vehicles and boats in France; and
- Non-French *meubles* which include your personal property outside FRANCE.

The devolution of your French *immeubles* is always be governed by French law, even if you die 'domiciled' in England (defined below). Any contrary provisions in your will or other legal document are void. The rest of your estate (French and non-French *meubles* and non-French *immeubles*) will usually be governed by English succession law.

However, if you die with a French *domicile* the devolution of your French *immeubles* and your French *meubles* and your non-French *meubles* is always governed by French succession law. The only asset to escape French succession law is your real property in England. Any other non-French *immeubles* (e.g. your villa in America) will usually - but not always - devolve under the succession laws of the country in which they are situated.

'Domicile' is a difficult concept. For legal and tax purposes you can be 'resident' in England and France at the same time, but you can only be 'domiciled' in one country at any given time. Broadly speaking, you are born with an English 'domicile of origin' if your father is English. Until you are 16 your 'domicile of dependence' is that of your father. Once you are 16 your 'domicile of choice' is English if you remain physically present in England which you regard as your permanent home. Your domicile of choice becomes French if:

- You move your permanent home from England; and
- You physically settle in France for more than 183 days in a calendar year (these do not have to be consecutive days); and
- There is clear evidence of your firm intention to live permanently in France. This is often done by making a declaration to the UK or French tax authorities. In the absence of express evidence the proof of your intention depends on a number of factors such as the possession of a *carte de séjour*, payment of French income or other taxes; the length of your stay in France etc.

Your French estate will be governed by the relevant law at the time of your death and not when you made your will. Thus for example the effect of your English will may change if you take a French *domicile*.

2.2 Forced heirship

Under Articles 913-915 of the French Civil Code ('*C civ*') fixed percentages (*réserve légale*) of your French estate must pass to your *héritiers réservataires* who in order of priority comprise

your surviving decendants (of any age). If any of your children predecease you, their children (your grandchildren) take their late parent's *réserve*.
Stepchildren are not your children for the purposes of French succession law, unless you have adopted them. If you leave no descendants , your parents are not considered since 1st january 2007 as a "*héritier réservataire" (except for the properties given by gift which remain in the deceased's real estate)*
If the deceased is married, the surviving spouse is "reservataire".

The size of the *réserve* depends on the number of your surviving children. If there is one child it is entitled to one half of your French estate. The remaining half of your French estate is called the *quotité disponible* which you are free to dispose of as you wish ('disposable portion'). If there are two children they are entitled to two-thirds of your French estate equally between hem, leaving a disposable portion of one third. If there are three or more children they are entitled to three-quarters of your French estate equally between them, leaving a disposable portion of one quarter.

You can only therefore leave all of your French estate to chosen heir if you leave no *héritiers réservataires.* Good planning is essential if you do wish to exclude someone from our French estate and are concerned about the consequences for the rest of your family. Otherwise your chosen heirs only take the disposable portion if your will so provides. As explained later in this booklet these forced heirship rules can be avoided or mitigated in a variety of ways. For example, if you make a will which respects the rules outlined above (see… below), you can under *C civ* art 1094-1 leave your surviving spouse - but not any other chosen beneficiary - the option on your death of choosing between full ownership (*pleine propriété*) of the disposable portion of your French estate; or full ownership of one quarter and the other three quarters of your French estate in life interest (*usufruit*); or a life interest in the whole of your French estate.

You cannot avoid the forced heirship rules by making lifetime gifts (*donations*) to your spouse or other chosen heirs of most or all of your French assets. If you leave *héritiers réservataires* such gifts may be classified as a 'disguised gift' and rendered void under *C civ a*rt1099 Although you can reduce your French estate by making gifts to your spouse or other chosen beneficiaries in your lifetime, if the value of any lifetime gifts exceeds the disposable portion on your death, your *héritiers réservataires* can 'claw back' the shortfall under Article 748 of the *Code Général des Impôts* ('CGI').

2.3 Intestacy

In a nutshell and in the absence of a valid will provide the following descending order of priority in the intestate succession of your French estate:

* <u>If you are not married</u> :
- your descendants
- your parents, brothers and sisters, nephews and nieces
- your cousins.

* <u>If you are married with children</u>
- children and surviving spouse.

If children are from the same marriage, the surviving spouse will get either on quarter in full ownership or the life tenancy (usufruit).
If there are children from other marriage then the surviving spouse will get one quarter in full ownership (with no other option).

Nonetheless some other measures can be taken to change the succession of you french real estate or to extend the rights of the surviving spouse.

2.4 *Indivision* ownership

When two or more individuals jointly acquire French *immeubles* directly in their individual name(s) their *notaire* will - unless otherwise instructed in writing - usually structure their legal ownership in the *indivision* légale method, either equally (*en moitié indivise*) or in the proportions to which they contributed to the purchase price. As an *indivisaire* (co-owner *en indivision*) when you die your French estate immediately passes direct to your *héritiers réservataires* (*C civ* art 724) who inherit - irrespective of age - *en indivision forcée* . The effect of this rule is that your Executors or Administrators have no direct power to deal with French *immeubles* and if the administration of your French estate is in the hands of minor children complicated procedures have o be followed. There is no limit on the number of *indivisaires* following a death or a series of deaths with the possible result that over a period of years the title to your French *immeubles* can become so fragmented as to render a sale or other disposal a major task, especially if there is disagreement among the *indivisaires*.

Indivision ownership can cause various problems. For example, under *C civ* art 815 (14) an *indivisaire* who wishes to sell his share of your French estate to an outsider must give written notice to the other *indivisaire*(s) who can themselves purchase that share in place of the outsider. If an *indivisaire* cannot sell his share to the outsider or to his *co-indivisaires* he can ask the French courts to order that all of the *immeubles* (not just his share) be sold without the consent of the other *indivisaires* at a French auction at a price well below the true market value.

To avoid the above and other possible problems, *indivisaires* can enter into a legally binding *convention d'indivision* under *C civ* art 1873 (2) which regulates the use, management and devolution of the French *immeubles*.

However, a *convention d'indivision* cannot avoid the following possible problem: If on an *indivisaire*'s death one or more of his children is under 18 years of age (or any of his childen have predeceased him leaving minor children) your surviving spouse or other chosen heirs may not be able to sell, mortgage, let or otherwise dispose of the French *immeubles* until the youngest of any minors reaches the age of 18. This is because minors cannot themselves dispose of French *immeubles*.

If they are French domiciled, the French courts may authorise a surviving parent or other person to dispose of the minors' *immeubles* under *C civ* art 389 *et seq.* However if the minors are domiciled in England, the French courts have no jurisdiction and under English law the English courts cannot authorise a surviving parent, trustee or guardian to dispose of the minors' *immeubles*.

As previously indicated most English couples are not properly advised about the problems of ownership *en indivision* légale or *en indivision forcé*. Although it may sometimes - but not always - be possible to unlock you from an unsuitable ownership structure after you have acquired French *immeubles*, the French legal costs and duties are likely to be much higher than if proper advice is taken before you make a purchase commitment. Methods of avoiding the problems of *indivision* ownership are outlined in 4. below.

3. Taxation

The French tax system is very different to the tax system in England. When planning your French estate efficiently you should also consider potential UK tax liabilities and the impact of the Double Inheritance Tax Agreement of 21 June 1963 S.I. 1963/1319 ("the Treaty") between France and the United Kingdom (the Isle of Man and the Channel Islands are excluded) which largely overrules the provisions of French and UK internal tax law. The Treaty only applies to French inheritance tax ('French IHT') and UK Inheritance tax ('UK IHT'). It does not apply to lifetime gifts or French wealth tax.

Under the Treaty's exchange of information clause more or less any information which comes into the hands of the UK Inland Revenue about an individual resident in France will be automatically passed onto the French tax authorities in Paris, which will then be distributed to the local French tax department. For example, if you have a bank account or a building society account in the UK then the existence of that account, and the interest credited to it, will automatically be passed to the French tax authorities. Similarly, if you buy or sell a property in the UK then the information about that transaction will also be sent to Paris. The Inland Revenue have all the details of such transactions because they are given to them when the stamp duty is paid in the UK. In return, the French tax authorities are providing similar information to the UK taxman.

However in certain cases with careful planning you can take advantage of legal tax loopholes enabling you to avoid French taxation altogether.

3.1 French inheritance tax (*droits de succession*)

Unlike the position in England surviving spouses are not exempt from French inheritance tax ('French IHT') Moreover, French IHT is not paid by the deceased's estate but by each of your heirs in proportion to the net value of the share of your French estate which they inherit. If you die with a *domicile* in France, your beneficiaries pay French IHT on your worldwide assets.

If you die domiciled outside France, only your assets situated in France (*immeubles* and *meubles*) are liable to French IHT. The rate of French IHT payable varies according to the relationship of the heir to the deceased. Gifts made by you within the last 6 years of your life are also subject to French IHT.

A declaration (*déclaration de succession*) giving a description and net market value of the assets which are subject to French IHT tax must b completed and filed by your heirs with the French tax authorities within 6 months of your death (12 months if you died outside France). The only exception to this rule is where the value of your French estate is (currently) less than 50 000,00 €

and your heirs are your spouse, direct descendants or ascendants. Any French IHT must also be paid failing which your heirs may be liable for a surcharge and monthly interest (0.40 %) on the unpaid tax. Assets may be blocked until a receipt for French IHT can be produced. Your heirs should keep a copy of the *déclaration* for at least 6 years during which period the French tax authorities may reopen your file.

A surviving spouse is currently entitled to a tax-free allowance of 76 000 €. Thereafter s/he pays FIT on a sliding scale of between 5% and 40%. Your descendants or ascendants are currently entitled to a tax-free allowance of 50 000 €. Thereafter they pay FIT on a sliding scale of between 5% and 40%. Your brothers and sisters are currently entitled to a tax - free allowance of 5 000 € and the balance of their inheritance is taxed at a rate of 35% if the band of value they inherit is less than 23 000 € and 45% if more. Relatives to the fourth degree are currently entitled to a tax-free allowance of 1 500 € and the balance of their inheritance is taxed at a flat rate of 55%. Relatives above the fourth degree or other beneficiaries who are not related to you by blood or by marriage (e.g.unmarried partners, UK or other non-French registered charities) are currently entitled to a tax-free allowance of1 500 € and the balance of their inheritance is taxed at a flat rate of 60%.

These exemptions apply equally to lifetime gifts, and are available in full every 6 years.

In cases where inheritance tax is still chargeable in both France and the UK, Article VI of the Treaty provides for a tax credit (*imputation sur l'impôt*) to be given by the country in which the deceased died domiciled equal to the amount of inheritance tax paid in the other country. In calculating the amount of French IHT available for credit in the UK the UK Inland Revenue's practice is to use the sterling rate of exchange at the date that French IHT was paid.

If the amount of French IHT exceeds the amount of UK IHT payable, no relief will be granted for the excess.

As it is not possible to accurately estimate how much French IHT will be payable by your heirs when you die, you may wish this to be paid out of your English estate. For example, you can make a codicil in which the English definition of 'testamentary expenses' is extended to include "the payment of taxes and duties payable in France on or by reason of my death".

4. Some French estate and tax planning planning ideas

Although there are various ways to avoid or mitigate the French forced heirship rules and /or the payment of associated taxes, few solutions are infallible and most come with 'viruses' of their own.

4.1 *Tontine* ownership

It costs nothing to insert a *tontine* clause (known more technically as a *clause d'accroissement*) in the French conveyance deed when you acquire French *immeubles*. Afterwards it is too late. *Tontine* ownership creates a legal fiction that the French *immeubles* belonged from the outset to whichever of the *tontiniers* (co-owners *en tontine*) survives the longest, so hat the last to survive will own the French *immeubles* outright. Thus *indivision* (*légale* and *forcée*) problems are avoided because the last surviving *tontinier* is deemed always to

have been the sole owner (the deceased *tontinier* is deemed never to have owned the French *immeubles* at all) and is free to sell or otherwise dispose of the French *immeubles* as s/he wishes. *Tontine* ownership may also be an effective defence against the claim of a creditor because, until one of the *tontiniers* dies, there is no way of knowing which of them has any legal interest in the French *immeubles*.

However, *tontine* ownership may have adverse tax or other consequences and, depending on your individual circumstances, may not be appropriate at all. For example:

- A surviving spouse is assessed under CGI art 754A to French inheritance tax on the value of the deceased's share of the French *immeubles.* Nonetheless, the Surviving spouse will enyoy the benefit of several allowances (please contact us)

  The position is worse where the parties to a *tontine* are unmarried or otherwise unrelated. For example, A, B (business partner) buy French *immeuble en tontine* for 92 000 € When A dies, B pays French inheritance tax at a rate of 60% on their inheritance of 46 000 €.

- If the parties are in dispute (e.g. one *tontinier* wishes to sell but the other does not) the French *immeubles* cannot be disposed of until one of the two *tontiniers* dies. It is possible for parties who have purchased *en tontine* to put an end to the arrangement by both agreeing to a *partition* which converts ownership to *indivision* and the problems which that structure entails.

- Children of a deceased *tontinier* can claim that a purchase *en tontine* was a misuse of French law intended deliberately to disinherit them from their *réserve légale.*

A tontine is also open to attack as a disguised gift if there is a major age difference between the parties; or one *tontinier* is the sole or main supplier of the purchase price. If a claim succeeds (which on a pragmatic level presupposes legal knowledge or the wherewithal to obtain such advice and to litigate) the French courts will convert joint ownership to *indivision* enabling the children to enforce their French inheritance rights.

4.2 Company ownership

If you die domiciled outside France the problems of *indivision* (*légale* and *forcée*) and *tontine* ownership outlined above can be avoided by forming a company to own your French *immeubles*. Under *C civ* art 529 shares in a company are classed as movable property and thus devolve in accordance with the law of the country in which the shareholder was last domiciled (see 2.1 above). So if you die domiciled in England your shares could pass under your English will to your surviving spouse or other chosen heirs and your children would inherit nothing.

However this advantage would be lost if you died with a French *domicile.* Moreover an SCI is not immune from French inheritance tax or French wealth tax and, as a UK- resident or domiciled shareholder, you may also be liable to UK tax. Despite the above a company owning structure may still be of interest because it offers the advantage of flexibility. For example, the articles ad memorandum of association can be drawn up in such a way that your surviving spouse would have full and unfettered control to live in or to sell French *immeubles*.

Since the 1985 *Caron* case (*JCPG 1986 20630 Cass Civ 1er 20 Mars 1985 Caron v Odell*) such a purchase or transfer may be judged a misuse of French law by the French courts if they consider that the **sole** aim of converting French *immeubles* into movable property was to elude the application of French law and especially to defraud an heir of his *réserve légale.* Mr *Caron* was domiciled in the USA and bought a flat in France which before his death was transferred to an American company in which he was the majority shareholder. The remaining shares belonged to a friend. Under his American will Mr *Caron* made no provision for his two children and on his death they brought proceedings against his estate. The French Supreme Court held that the ownership structure in this case was a misuse of French law and each child had a right to a *réserve légale* of one-third of the French *immeubles*, the devolution of which was governed by French law.

To prevent problems of this nature arising on your death make sure that the aim of structuring ownership of your French *immeubles* is not solely to avoid French succession law. As one leading *notaire* in France puts it: "*l'apport ou la vente d'un immeuble situé en France à une société ne peut pas en soi être présume frauduleux alors que les parties et leurs héritiers cherchent à régler, de la manière le plus équitable, certains problèmes économique, familial ou fiscal."* Ensure also that you have accounted for and fairly treated anyone in your lifetime who could possibly make a claim. You can always leave a clause in your English will stating that if anyone disputes their legacy they will be counter-sued by your English estate.

Remember that anything you give away in your lifetime in order to prevent someone else from inheriting it later can be clawed back.

4.2.1 English and other non-French companies

For various (mainly tax) reasons it is not generally wise to own French *immeubles* via a company which is registered in England or in an 'offshore' country like the Channel Islands or the Isle of Man.

4.2.2 French companies

Unlike the position in England French companies (*sociétés*) are not divided into those which have limited liability and those which do not. Instead, they are divided into those which have 'commercial' objects (*sociétés commerciales*) and those which have 'civil' objects (*sociétés civiles*).

(b) *Sociétés civiles*

If you die domiciled outside France, most French succession law and other problems are avoided by owning your French *immeubles* via a *Société Civile Immobilière* ('SCI') which is governed by *C civ* arts 1845 to 1870(1). Unlike commercial companies an SCI does not normally have a minimum registered capital (*capital social*) fixed by law. It must have at least 2 members (*associés*) The registered capital is divided into shares (*parts d'intérêt*) which are not represented by share certificates but are recorded in the articles and memorandum of association (*statuts*) of the SCI which must be prepared and registered with the *RCS* (French Commercial Registry) by a *notaire*. The SCI only officially exists once this

last formality is completed, at which stage an *extrait K bis* (certificate of incorporation) is issued. The transfer of shares in an SCI inter alia involves executing a written document (*cession de parts*), amending the *statuts* and registering these amendments with various French authorities for which a fee is payable. Share transfer usually require the unanimous consent of all members (*associés*).

The *statuts* determine how the SCI is to be managed and conduct its affairs. The burden of administration falls on the manager (*gérant*) who is usually one of the founder members and represents the SCI *vis-à-vis* third parties. When dealing with third parties all correspondence should be headed showing the name, form, capital and registration number of the SCI. The manager cannot usually bind an SCI to transactions outside the scope of its objects clause, nor may he dispose of its assets or alter the *statuts* without the unanimous consent of all the members. Important decisions are taken at meetings (*assemblées*) and the required majorities - often unanimity - are determined by the *statuts*. The *statuts* can specify that some decisions may be made in writing without the need to call a meeting.

Towards third parties the members have an unlimited liability so creditors can sue the members to the full extent of their assets if the assets of the SCI are not sufficient to meet the liability. However, a member's liability is limited in proportion to his shares in the capital of the SCI. So, if you own 50% of the shares in an SCI, you are liable for 50% of any debts. Provided an SCI only engages in civil acts - such as acquiring, holding, managing or improving French *immeubles* - this lack of limited liability should be of no concern to members.

The *gérant* must obtain and file Tax Form 2072 by 28 February each year, notifying the French tax authorities of any income or gains made by the SCI in the past year. An SCI engaged only in civil acts is 'fiscally semi-transparent'.

This means that for tax purposes the SCI is deemed to have no existence distinct from its members and is not therefore usually subject to French corporation tax (currently 33.33% on income and profits plus a surcharge of 10% of the tax due). Instead, the French tax authorities treat any income and profits as accruing directly to the members each of whom pays French income and capital gains tax in proportion to his shareholding at usually more favourable rates (typically 25%). Each member must report any net taxable profit s/he makes on Form 2042 which must be completed and submitted to the *Centre des Impôts des Non*-Residents in Paris before 30 April each year.

The letting of furnished premises (e.g. self-catering units) is not, strictly speaking, regarded as a commercial activity. An SCI can therefore carry on this type of letting, but if the rental receipts exceed 10% of the total turnover of the SCI, it will lose its fiscal semi-transparency and be liable to French corporation tax and other commercial taxes (e.g. *taxe professionelle and taxe d'apprentissage*). The legal, tax and accountancy requirements of an SCI in this situation follow those applicable to an SARL.

The French tax authorities have established a unit in the UK which is charged with discovering direct or indirect owners who have been letting their French *immeubles* and failing to declare their income in France. The source of their information are many and varied. When French rental income which has not been declared in France the French authorities may apply various civil and criminal penalties.

The detailed requirements relating to the book-keeping of an SCI depend on the nature and activity of the company, and on the level of any profit it generates. Generally speaking, strict and regular book keeping is compulsory for SCI's if their activities involve regular dealings with tenants, contractors or other third parties. It is advisable to ensure that accounting records for an SCI are always up to date. This information is essential in case of litigation, sale or a member's death.

The following requirements must always be observed :

- Keep income and expenditure accounts.
- Update a balance sheet each year.
- Hold at least one General Meeting each year to discuss a report prepared by the *gérant* who presents the above figures.
- Keep copies of meetings, notices and agendas sent to members.
- Keep an attendance register (*feuille de presence*).
- Prepare minutes and have them signed by all participants.
- Keep all essential documents (or copies) such as the *statuts*, certificate of incorporation at the SCI's registered office which is usually at the French *immeubles* which it owns.

In case of transfer of shares by the members, gains realized on a sale of the shares by an individual are subject to the private capital gains rules.
In case of sale of the *french immeuble* by the SCI the French capital gains tax rules will be the same than for a sale by an individual. (the cost price will be equal to the amended aquisition price and will be subject to the same allowances).

Please note that an individual, business or company that buys and sells French *immeubles* on a regular basis can be classified by the French tax authorities as a speculator and charged French CGT at the higher rate.

An annual 3% tax is levied on companies which own French *immeubles*, calculated on their market value as at 1 January each year. French companies and companies incorporated in a country such as the UK which has signed a double tax treaty with France can be exempt from the 3% tax if by 15 May each year they submit an annual return (Form 2746) showing details of the shareholding, personal details of the shareholders and a valuation of the French *immeubles* held.

Another way of obtaining the exemption is for the *gérant* to submit a letter of undertaking to disclose the above information upon request by the French tax authorities.

This letter must be submitted within two months of completing the purchase of the French *immeubles*.

You should seek advance clearance from your accountant or Uk Inspector of Taxes about how the UK Inland Revenue are likely to treat an SCI for UK tax purposes. In general terms any French rental income from French *immeubles* will also be subject to UK income tax and must be disclosed in your UK income tax return. If the members and *gérant* are domiciled in the UK, the UK Inland Revenue may regard the SCI as resident in the UK for UK tax purposes, and therefore subject to UK corporation tax on its profits.

The UK Inland Revenue might also render any member or *gérant* subject to UK tax on any benefits in kind received (e.g. rent-free accommodation provided while in France) by the SCI. Before forming an SCI, I would always recommend that you seek advance clearance from an accountant or from your UK Inspector of Taxes on the above and other issues such as UK tax relief on interest payments.

The transfer (*apport*) of French *immeubles* into an SCI is subject to a flat duty (*droit d'apport*) plus *notarial* fees and duties. If the French *immeubles* are less than 5 years old or otherwise subject to French VAT (e.g. because they comprise building land) transfer duty of 1% of the value of the French *immeubles* is levied. The 1% duty also applies if the transfer is not *pur et simple* (e.g. you are transferring ownership of French *immeubles* not simply for shares in an SCI but for cash or other remuneration).

4.3 Adopting a French marriage *régime*

A cheaper and simpler solution to English couples with no children by previous marriages is the use of the *régime matrimonial* (French marriage contract) which regulates their property rights on death. Another attraction is that French IHT is not payable on the death of the fist spouse.

In a nutshell, there are several types of French marriage contract governed by *C civ* arts 1387 to 1581 divided into two categories known as *régimes séparatistes* and *regimes de communauté.* All *régimes de communauté* provide either for all the property in question to be treated as owned by both spouses or for part only of the property to be treated as a common fund and the remainder to be treated as the husband's or the wife's fund. In all *régimes separatists* there can only be two funds, the husband's and the wife's.

All *régimes* are variable at the instance of the spouses after the fist 2 years of marriage and thereafter at intervals of not less than 2 years, in certain case with the approval (*homologation*) of the French court. Moreover a r*égime* can apply by choice to all or some only of a married couple's property so that in theory, the property of a married couple can be subject to more than one *régime*.

French law recognises hat some countries do not have marriage contracts. These include England and most countries where a system of Anglo-Saxon law applies, although a few of the States of the USA which have a Spanish or a French background know the *regime matrimonial*.

In the case of English persons married in England, since they have no *régime* (the true Marriage Settlement not being counted as a *régime*) the proper description of their status for the purposes of French documents is that they were married in England " without any contract entered into prior to their marriage in accordance with the English legal system which is the equivalent of the French *régime de la séparation des biens*."

Since the English have no *régime matrimonial* the French courts accept that if circumstance arise in which they do wish to adopt a French *régime* they can do so without the consent of the French court and a *notarial* deed - which must be signd by the couple in France - can be used o achieve this end. More recently the Hague Convention of 14 March 1978 which was ratified by France in 1992 has been used to achieve an adoption or variation of a *regime* by English couples. *C civ* art 1525 allows the insertion into a *régime de communauté* of a *clause d'attribution intégrale de la communauté au survivant* which is a provision that on the death of the first spouse all of the assets subject to the *régime* which are common to both spouses pass automatically to the survivor. The *réserve* of the children of the marriage is thus avoided. However by virtue of *C civ* art 1527 the provisions of such a *régime* are void against the children of any previous marriage (but not children born ouside wedlock) who they remain entitled to their *réserve légale.*

Article 6 of the Hague Convention provides that the parties to a marriage may during the period of the marriage submit their *régime matrimonial* to the laws of a country other than that previously applicable. Thus a couple may vary their *régime* to one governed by (i) the law of the country of which one is a national or (ii) the law of the country in which one spouse has his habitual residence or (iii) in respect of real property, the law of the country where the property is situate.

Care must be taken to select a *notaire* fully conversant with the Hague Convention. There are those who distrust its effect and who insist on submitting their documents to the French court for its *homologation.* This is not only unnecessary but in all probability places the adopted *regime* within the rules of ordinary internal French law and makes it unalterable for 2 years.

From a tax point of view the adoption of a *régime de communauté* is efficient since on the death of one of the spouses the assets in the *communauté* are subject to a registration tax of just 1%, whereas gifts between spouses are normally subject to French IHT.

If you are domiciled in France the procedures involved in changing your *regime matrimonial* may necessitate instructing a French barrister (if your children are minor) to appear on your behalf in a French court.

4.4 Lifetime gifts, *usufruit* and *viagers*

Although you will relinquish all control one way to avoid the French heirship rules and reduce the impact of French inheritance tax is to make a lifetime gift (*donation*) of the *pleine propriété* in your French *immeubles* gift to one or more - but not necessarily all - of your *héritiers réservataires.* Although the *héritiers réservataires* who are excluded from the gift have a claim under the forced heirship rules to the value of their *réserve légale* they do not acquire title to your French *immeubles* provided they are prepared to accept the equivalent value in cash or in

kind. A lifetime gift can also be tax efficient. If you survive the gift by 6 years, the value of your French *immeubles* gifted is removed from account when calculating French inheritance tax on the remainder of your French estate when you die.

A gift between husband and wife (*donation entre époux*) is also subject to the forced heirship rules and can be overridden in the same way as a will.

If you do not wish to part with the *pleine propiété* but wish to retain some control over your French *immeubles* in our lifetime you can make a lifetime gift of the *nue propriété* whilst reserving an *usufruit* in your favour. On your death the *usufruit* is extinguished and *nue propriétaires* of your choice become *pleine propriétaires.*

For French inheritance tax purposes the value of your French estate when you die is calculated by reference to the *nue propriété* which is reduced by the value of the *usufruit.* The value of your French *immeubles* depends on the age of the *usufruitier*(*s*) and is calculated in accordance with the following actuarial table:

Age of *usufruitier*	Value of *usufruit*	Value of *nue propriété*
More than 20	8/10	2/10
" 30	7/10	3/10
" 40	6/10	4/10
" 50	5/10	5/10
" 60	4/10	6/10
" 70	3/10	7/10
" 80	2/10	8/10
" 90	1/10	9/10

4.5 Other solutions

In the case of a very valuable investment, your exposure to French wealth tax and various other French taxes could call for more sophisticated planning. However, the greater the complexity, the greater the chance that something will go wrong.

Other less sophisticated but effective methods may be appropriate, which achieve more limited objectives at less overall cost and maintenance.

It will in most situations be much simpler to reduce the taxable value of your French estate by borrowing to finance the acquisition of French *immeubles.*

Joint bank accounts can offer an inexpensive and simple solution to many problems of estate planning. Since the survivor would not need to obtain probate to gain full title to the jointly held assets, it would be up to anyone who felt that their forced heirship rights had been by-passed to complain that the establishment of the joint holding constituted a gift which exceeded the *quotité disponible*.

5. Making a will

Although you are not legally obliged to make a will, this booklet has shown many reasons why it is preferable to have one. A properly drafted will should give you peace of mind that your French estate will be dealt with in the best interests of your family in the event of your death. If you have already made a will you may have already addressed thee issues. However if your will as made more than 5 years ago or if your family circumstances have changed you should review your existing will to ensure that it is still appropriate.

The first step in making a new will or reviewing an existing will is to draw up a list of your own assets and those of your spouse. This will assist not only in deciding who should inherit what but also ensures that assets are passed on in as tax efficient a manner as possible. Tax advice will often affect the drafting of a will. For example, rather than benefiting your children on your death, it might be preferable to pass assets to your spouse and for her or him then to pass assets down to the children by way of lifetime gifts which will not be liable to French IHT provided that your spouse survives for 6 years after making the gifts.

5.1 English will

Under the Hague Convention XI of 5 October 1961 a will made in accordance with the requirements of English law by an English national will be valid in France as regards form, but it must also respect the rules of French succession law. If you have already made an English will it will be invalid to the extent that it gives to anyone else part of your French estate which, under the rules of French succession law, must go to your *héritiers réservataires.* If it is used in France an English will will also give rise to complex and costly formalities. For example, the will must be translated into French and certified by a French court official, notarised, and its authority proven by lengthy French-language affidavits of law. In some cases (see 6.2 below) the use of the English probate rules has caused problems with the administration of the estate of a person who died domiciled in France.

To simplify the process, and reduce the cost of winding up your French estate, it is usually preferable if you are domiciled in the UK to execute an English will which excludes all reference to your French *immeubles*(but deals with your French *meubles*); and make a French will limited to your French *immeubles*. If you decide not to make a French will, the solicitor chosen to draw up your English will should be familiar with the French succession law and international tax issues which will arise when you die.

A French will can either be *authentique, holographe* or *mystique* (this last form is rarely used). The main advantage of an *authentique* will - which must be prepared by, executed and witnessed before one or two *notaires* - is that the date on which it was made and the capacity of the person making it cannot be questioned. It can validly be made by a testator who cannot write because he is, for example, blind or infirm. By contrast, an *holographe* will - which must be entirely in the handwriting of and signed and dated by the testator (*C civ* art 970) and does not need to be witnessed - is much simpler and less expensive to prepare.

It can be executed in England and no-one needs to know of its contents. It must be executed in France if it is to affect French *meubles.* Its main disadvantages are that the testator may not know how exactly to explain his wishes so that it is open to various interpretations; and that it can easily be destroyed if let at home. These problems can be avoided by having the French will

prepared in unambiguous terms by a lawyer. If the circumstance are such that you re unable to write your own will it is possible to request that a *notaire* and two witnesses attend you for the purposes of making an *authentique* will . However, such a will will only be valid if you speak French, or if the *notaire* and the two witnesses understand your language.

Most English and French wills contain the clause "I revoke all former wills". A recent case saw lady lose the French property she would otherwise have inherited under her late husband's French will because his English solicitor had drawn up a more recent English will, unwittingly cancelling the original French will.

To avoid these and other possible problems that can lead to costly disputes, it is important that your two wills are drafted in such a way that they should take effect separately and that one does not revoke the other.

You must also ensure that the English and French lawyers you use to make your English and French wills are aware of the existence of the other will.

Whoever you choose to keep your will, make sure your Executor and at least one other person you trust knows where to find it. The first task in the French probate formalities is to locate your will, and you can help by keeping the original in a fairly obvious place such as in an envelope on which you have typed your name and the words "French will". Place the envelope in a fireproof metal box, filing cabinet or home safe. An alternative is to place the original in a safe deposit box. But before doing that, learn the bank's policy about access to the box after your death. If for instance the safe deposit box is in your name alone, the box can probably be opened only by a person authorised by a court, and then only in the presence of a bank employee. An inventory may even be required if any person enters the box . All of this takes time, and in the meantime, your documents will be locked away from those who need access to it.
These problems can be avoided by depositing the original will (s) with a *notaire* who for a small fee will register them at the centralised wills Registry in France. Access to the Register is confidential and only lawyers may under certain legal rules obtain certain limited information.

If you have any special funeral instructions make sure that these not only appear in your will - which may take weeks to locate - but also in a separate document which can be located immediately by your Executors.

6. Winding up a French estate

6.1 French procedure

A French estate is managed very differently to one in England. For example, there is no procedure in France equivalent to a Grant of Probate Within 6 months of your death (12 months if you died outside France) your heirs must - preferably assisted by a *notaire*- file with the French authorities:

- The *declaration de succession* (see above); and pay any French IHT due;

- An *attestation immobilière* which once registered in France transfers ownership of your French i*mmeubles* to your heirs

- An *acte de* notoriété which provide full details about you and your heirs.

Your English Executor cannot deal with any of these formalities. The further documents usually required by the French authorities include:

- An official copy of your English will (if it covers your French estate and respects French succession law) which must be translated into French by an official translator (*traducteur juré*) in France. The French authorities may also insist on a French language affidavit of English law (*certificat de coutume*) confirming that your English will is lawful.

- Your original French will. Even if a thorough search by your Executor and heirs of your personal papers does not reveal the existence of a French will the *notaire* should always be asked to confirm in writing that neither he nor the central authorities in France have any record of one being made which - unless it was subsequently revoked - may still be valid.

- If you have made no valid French will and your English will covers your French estate and respects French succession law the French authorities will require an official copy of your UK Grant of Probate which must be translated into French by an official translator (*traducteur juré*) in France

- Full details of your *état civil* (legal and marital status) will be required together with official copies of your passport, birth and marriage certificates translated into French and duly authenticated.

- If your heirs are not French, full details of their *état civil* will be required together with photocopies copies of their passports, birth and marriage certificates, job descriptions and full current postal addresses translated into French and duly authenticated.

The French authorities may also require that some or all of the above documents are certified by the Foreign and Commonwealth Office in London and/or some other agency. To avoid some of the above costs, the French authorities may accept notarised translations made by an English notary public or some other lawyer in England supported by an affidavit as to accuracy and faithful translation.
Have a notarised translation done by a notary public or made by Koenig supported by an affidavit as to accuracy and faithfulness translation. One cannot use a photocopy or faxed copy of the document to be translated unless that copy is itself authenticated or certified to be a true copy of the original.

If your heirs decide to retain ownership of the French *immeubles* they should not require much persuasion - if they have read this booklet - to make French wills.

6.2 English procedure

Paragraph 30 (1) (a) of the English Non-Contentious Probate Rules ('NCPR') provides that if you die domiciled outside England a UK Grant of Probate can be issued to your English Executor.

If you have no Executor, NCPR para 30 (1) (b) provides the administration of your estate can be entrusted to "the person beneficially entitled to the estate by the court having jurisdiction at the place where the deceased died domiciled." Paras 3 (3)(a)(i) and (ii) state that probate of any will which is admissible to proof may be granted to the executor named therein either if the will is in the English language; or if the will describes the duties of "a named person in terms sufficient to constitute him executor according to the tenor of the will… "

The most usual course adopted in cases where a person dies domiciled in France is to proceed under NCPR 30 (1) (a) or (b), the entitlement of the applicant for the grant being supported by an affidavit of French law prepared by a person knowledgeable in French and English law.

Under *C civ* arts 1025 and 1026 you may nominate one or more *exécuteurs testamentaires* and vest in them on your death all or part only of your personal estate which determines at the expiration of one year and a day from the date of your death. Subject to any such provision ownership of all your French estate vests automatically in your *héritiers réservataires* and chosen heirs (see… above).

The facts of the two cases detailed below explain why I suggested in an article published by the Solicitors Journal on 28 February 1997 that NCPR paras 30 (3)(a) (i) and (ii) should be amended or even suppressed.