Paris Court of Appeal Rules on Forced Heirship, US Trusts and Legitimacy of Transforming Real Estate into a Moveable Asset using an SCI Structure

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On 11 May 2016 in case no. 14/26247, the Paris Court of Appeal fully confirmed the judgment handed down by the Paris High Court on 2 December 2014 in case no. 10/05228, relating to the estate of Mr Maurice Jarre.

By this very important decision, the Paris Court of Appeal confirmed that a US domiciliary dying prior to 17 August 2015 can dispose of his or her French estate as he or she wishes, without being subject to the laws of French forced heirship; that a US trust is fully recognised by French law, even where the settlor is also the trustee and the primary beneficiary; and that transferring French real estate property into a *Société Civile Immobilière* (SCI) in order to transform real estate property into moveable assets is not fraudulent.

Maurice Jarre, the renowned French composer (who, amongst many other things, wrote the scores for films such as *Lawrence of Arabia* and *Doctor Zhivago*) was married four times. He had a son, Jean-Michel Jarre (Mr Jarre Jr.), who also went on to become a famous musician, with his first wife; and a daughter, Stephanie Chateau (née Jarre) (Mrs Chateau), with his second wife. Mr Jarre married his fourth wife, Fui Fong Khong (Mrs Khong), in California in 1984 and the couple moved ultimately to Malibu, where Mr Jarre died in 2009.

In 1991, Mr Jarre and Mrs Khong together, settled the Jarre Family Trust under the laws of the state of California. As well as being the two sole settlors of the trust, Mr Jarre and Mrs Khong were also the two sole trustees of the trust. All moveable and immoveable, tangible and intangible assets belonging to Mr Jarre were transferred into the trust.

In 1995, Mr Jarre and Mrs Khong created an SCI (the 1995 SCI), into which they contributed a flat located in Paris that was purchased by Mr Jarre in 1981, prior to his marriage to Mrs Khong.

On 13 July 2008, Mr Jarre executed a will (the 2008 will), the terms of which revoked his previous will, made in 1987. Under the 2008 will, Mr Jarre bequeathed all his moveable assets to Mrs Khong, with the remainder of his estate left to the trust. He also expressly declared that he "intentionally and willingly omitted all provisions concerning his heirs", by which he intended to exclude his children, Mr Jarre Jr. and Mrs Chateau, from benefiting from his estate.

Paris High Court Proceedings

Following Mr Jarre's death, in July 2009, several legal proceedings were commenced in the Paris High Court by Mr Jarre Jr. and Mrs Chateau against Mrs Khong, including

- A freezing order that was referred to the Nanterre High Court with a view to suspending distributions requested by Mrs Khong to *la Société des Compositeurs, Auteurs, et Éditeurs de Musique* (SACEM), a French organisation that collects and distributes artists' royalties, and of which Mr

Jarre was a member. These distributions, if made, would benefit Mr Jarre in his capacity as a member of SACEM. The freezing order was decided by way of an order handed down by the Nanterre High Court on 4 February 2010.

- A summons in which the Paris High Court was asked to rule that the deeds made by Mr Jarre and Mrs Khong to establish the trust, the 2008 will and the 1995 SCI, which together had the effect of excluding Mr. Jarre Jr. and Mrs Chateau from any benefit in Mr Jarre's estate, were fraudulent and, therefore, could not be enforced. Consequently, Mr Jarre Jr. and Mrs J. Chateau claimed that that Mrs Khong should not be allowed to claim any portion of Mr Jarre's assets or music rights, whether already obtained, or which she would have otherwise claimed or received; but rather, that Mr Jarre Jr. and Mrs Chateau were the rightful heirs to Mr Jarre's estate and could, therefore, exercise their right of ownership over his moveable and immoveable property located in France, pursuant to Article 2 of the French Law of 14 July 1819 pertaining to the abolition of the right of windfall and removal, the provisions of which should be exercised in their favour.

Within the framework of the proceedings brought by Mr Jarre Jr. and Mrs Chateau, Mrs Khong brought two matters before the Paris High Court, with a view to obtaining release from the conservative measures imposed by the Nanterre High Court order of 4 February 2010. Her request was dismissed by the judge by way of a further order of 12 March 2012.

Mrs Khong also brought a matter before the Paris High Court concerning a Swiss property, in respect of which Mr Jarre had bequeathed his rights to Mrs Khong by way of a will dated 2002. Mrs Khong claimed that the Paris High Court did not hold jurisdictional constitution to rule on the distribution of properties located in Switzerland; a claim that was upheld by the Paris High Court judge by way of an order of 20 March 2013.

The first matter raised by Mrs Khong followed decision no. 2011-159 QPC of 5 August 2011, in which the French Constitutional Council, the highest constitutional authority in France, whose primary role is to ensure that the principles and rules of the French Constitution are upheld, ruled that Article 2 of the French Law of 14 July 1819 was contrary to the Constitution, owing to the difference in treatment it established between French heirs and foreign heirs.

Mr Jarre Jr. and Mrs Chateau also referenced the August 2011 decision in their submissions; but they advanced the argument that, should the French Constitutional Council decision be effective in abrogating the effect of Article 2, the reserved share (*reserve héréditaire*) of an estate would nevertheless fall within the scope of French international public policy, which implies that contradicting foreign law must be ruled out.

In a ruling of 2 December 2014, the Paris High Court ruled

- that it held jurisdictional competence to rule on the succession of Mr Jarre's estate solely in respect of properties located in France;
- that it held jurisdictional competence to rule on the succession of Mr Jarre's estate in respect of the privilege of jurisdiction, as set forth under Articles 14 and 15 of the French Civil Code; and
- that Mr Jarre Jr. and Mrs Chateau were able to act so as to ensure that the music rights resulting from the succession of Mr Jarre's estate were respected.

The Paris High Court also ruled

- against the application of Article 2, as abrogated by the French Constitutional Council in the August 2011 decision;
- that as Mr Jarre's final residence was in California, the law applicable to the succession of his property was that of the state of California;
- that the establishment of the trust should be deemed normal practice and not fraudulent, pursuant to Californian law;
- that the arguments based on fraud and French international public policy should be dismissed;
- that the provisions of the trust should be enforceable on Mr Jarre Jr. and Mrs Chateau;
- that transfer of Mr Jarre's Paris property to the 1995 SCI did not constitute fraud;
- that, consequently, succession of Mr Jarre's estate did not, in reality, include any property in France and, therefore, could not lead to the application of French inheritance law;

- that pursuant to the provisions of the trust, according to which Mrs Khong was the sole trustee after Mr Jarre's death, and the provisions of the 2008 will, Mr Jarre Jr. and Mrs Chateau could not benefit from any of Mr Jarre's moveable assets, nor could they claim the deferral or reduction of any claimed donations made by Mr Jarre, by virtue of either the provisions of the trust or the 2008 will; and
- that Mrs Khong, in her capacity as sole legatee of Mr Jarre's estate, was the sole owner of the moral rights in Mr Jarre's creations.

The Paris High Court consequently dismissed Mr Jarre Jr. and Mrs Chateau's claims.

Appeal Submissions

Mr Jarre Jr. and Mrs Chateau lodged an appeal against the Paris High Court ruling.

FIRST SUBMISSION

Their first and main argument was that, contrary to the ruling of the Paris High Court, French forced heirship rights of children to an estate should be treated as a matter of "international public policy" and not of mere "internal public policy".

There is a subtle, but key, difference between the two concepts. In principle, when French conflicts of laws rules would otherwise require a French judge to apply a foreign law (in this case, the law of the state of California), the judge should disregard foreign law when it is in conflict with not only French internal public policy, but also with international public policy.

International public policy is considered to be a matter that has essentially universal agreement amongst the nations of Western Europe and North America. The Paris High Court decided that, although forced heirship is a matter of public policy, it is not a matter of international public policy. However, and to the contrary, Mr Jarre Jr. and Mrs Chateau contended that there is virtually universal agreement that proper public policy requires forced heirship.

Although it has been ruled that a foreign law that would offend basic human rights and understandings of equality by according preference to certain heirs based on sex, religion and/or primogeniture should be treated as a matter of international public order, it has never been ruled that foreign laws respecting testamentary freedom similarly offend universal international public policy.

The trust created by Mr Jarre was held to be valid under the law of the state of California which is, as a matter of French private international law, the law governing Mr Jarre's succession as the place of his final habitual residence. The Paris High Court ruled that the trust must therefore be respected in France, even if its provisions deprive Mr Jarre Jr. and Mrs Chateau of that which they would have been otherwise entitled to receive if the succession of Mr Jarre's estate had been governed by French law.

Mr Jarre Jr. and Mrs Chateau justified their submissions that forced heirship should be treated as a matter of international public policy in almost 10 pages of argument that included, *inter alia*, the reasons why the French Revolution of 1789 curtailed testamentary freedom, notably as a reaction against the aristocracy of the time, who supported it.

The arguments put forward by Mr. Jarre and Mrs Chateau were not found to be persuasive by the Paris Court of Appeal. Whether or not a foreign law should be respected in France does not depend on the cultural, historical or psychological environment in France at the time when the law was adopted, but rather on the current environment at the time when the foreign law is to be applied. The notion that testamentary freedom is analogous to laws that discriminate against individuals on the basis of sex, race or sexual orientation was found by the Paris Court of Appeal to be far from convincing.

Mr Jarre Jr. and Mrs Chateau also claimed that England and the US (and, more particularly, the state of California) are the only jurisdictions in the world that recognise testamentary freedom, which they defined in their appeal as the "Anglo-Saxon exception". This is, however, untrue, as many countries (including certain civil law countries) permit testamentary freedom.

Whether or not it is true that forced heirship is, according to an obscure member of the French Parliament, a "rule to which the French people, since the French Revolution and the abolition of privileges [sic] remain particularly attached", is irrelevant in

the circumstances of this case, as the succession of Mr Jarre's estate was not governed by French law, but by the law of the state of California. Whilst this explains why forced heirship is a matter of internal public policy, which Mrs Khong accepted, it does not justify, as the Paris High Court rightly ruled, that it should be treated as a matter of international public policy.

Mr Jarre Jr. and Mrs Chateau's argument was further flawed in that it deliberately underestimated the impact of the French Law of 23 June 2006, which considerably reduces the importance of the principle of forced heirship under French law. Forced heirship is further reduced by the EU Succession Regulation of 4 July 2012, which confirms the principle of the law of the last habitual residence governing succession of both moveable and immoveable property, and which permits an individual to choose the law of his or her nationality to govern that succession.

The EU Succession Regulation is not restricted to cross-border succession issues within the European Union, but also applies to disputes between EU and non-EU jurisdictions, including that of the state of California. Further to the entry into force of the EU Succession Regulation, from 17 August 2015 onwards, the succession of a Californian habitual resident who owned French located assets is governed by Californian law.

SECOND SUBMISSION

Mr Jarre Jr. and Mrs Chateau's second argument before the Paris Court of Appeal related to the August 2011 decision of the French Constitutional Council. Article 2 of the French Law of 14 July 1819 provides that that where an heir's global share of an estate is deemed under a foreign succession law to be lower than that which he or she would have received under French succession law, that heir is entitled to receive a supplementary share of the deceased's French assets corresponding to the portion that he or she was otherwise deprived of by the foreign law.

Mr Jarre Jr. and Mrs Chateau asserted that the August 2011 decision should not apply to their case. Their submission was based on a mere statement and no convincing argument was advanced in support of this proposition.

Contrary to Mr Jarre Jr. and Mrs Chateau's argument, Mrs Khong submitted that, as provided by Article 62 of the French Constitution, the August 2011 decision took immediate effect and Article 2 was, therefore, immediately unenforceable.

THIRD SUBMISSION

Mr Jarre Jr. and Mrs Chateau advanced a third (subsidiary) argument in support of the appeal and submitted that for the Paris Court of Appeal not to grant to them their reserved share of Mr Jarre's estate would be contrary to Article 1 of the 1st Protocol to the European Convention on Human Rights (ECHR) and to recognition of the concept of Mr Jarre Jr. and Mrs Chateau's rights of ownership (presumably over Mr Jarre's assets).

This was a rather strange interpretation of the principles of the ECHR. Contrary to Mr Jarre Jr. and Mrs Chateau's submissions, this argument is misguided and it is the absence of testamentary freedom that should be treated as a violation of the concept of rights of ownership.

FOURTH SUBMISSION

Mr Jarre Jr. and Mrs Chateau raised a fourth argument, in respect of Mr. Jarre's Paris property. They submitted that contributing the Paris property to the 1995 SCI had the effect of transforming it from an immoveable asset (and, therefore, subject to French succession law, including forced heirship) into a moveable asset (in the form of the shares of the SCI) that was, therefore, subject to Californian succession law.

Mr Jarre Jr. and Mrs Chateau's argument in respect of the 1995 SCI was twofold: 1) that contributing the Paris property to the 1995 SCI was void on the grounds that it was contributed by Mr Jarre in 1995 after having been already transferred to the trust in 1991; and 2) that the 1995 SCI was a sham created for the sole purpose of transferring the Paris property in order to deprive Mr Jarre Jr. and Mrs Chateau of an inheritance in Mr Jarre's estate. In support of their argument that the 1995 SCI was a sham, Mr Jarre Jr. and Mrs Chateau alleged that the 1995 SCI had no real substance, nor life, as an independent legal entity, to the extent that none of the legal formalities to which an SCI is usually subject had been fulfilled.

Judgment of the Paris Court of Appeal

The Paris Court of Appeal wholly confirmed the ruling rendered by the Paris High Court in a judgment handed down on 11 May 2016.

The Paris Court of Appeal held that Article 2 could not apply to the appeal, owing to it having been already been repealed by the French Constitutional Council with immediate effect by the August 2011 decision. The August 2011 decision must, therefore, be taken into consideration by all judges from that date forward.

Mr Jarre Jr. and Mrs Chateau's allegations that they had already acquired rights in Mr Jarre's estate at the time of the repeal, and that such rights could not, therefore, be called into question by the repeal, were also rejected. The Paris Court of Appeal upheld Mrs Khong's submission that the French Law of 14 July 1819 was an exception to the rule of conflicts of law; and not an inheritance law, pursuant to which Mr Jarre Jr. and Mrs Chateau might have otherwise acquired rights in Mr Jarre's estate upon the date of Mr Jarre's death in 2009 and prior to the repeal.

The Paris Court of Appeal also rejected Mr Jarre Jr. and Mrs Chateau's argument relating to an alleged infringement of their proprietary rights as protected by the ECHR. The Paris Court of Appeal held that, as Mr Jarre Jr. and Mrs Chateau had no rights in respect of Mr Jarre's estate (but, rather, only the possibility to request, in certain circumstances, the application of French inheritance law over Californian inheritance law), they could not claim that this right was infringed by the abrogation of Article 2.

The Paris Court of Appeal likewise rejected Mr Jarre Jr. and Mrs Chateau's subsidiary argument in which they submitted that claiming the reserved share for which French law provides was a matter of international public order, leading to its application by the Paris Court of Appeal in their case.

In response to this allegation, which had already and unsuccessfully been brought by Mr Jarre Jr. and Mrs Chateau before the Paris High Court, the Paris Court of Appeal briefly confirmed the position of the Paris High Court and also referenced its own ruling rendered in *Colombier*, by stating that the reserved share is not an essential principal of French law and is thus not protected by international public order.

In support of the submissions advanced by Mrs Khong, the Paris Court of Appeal underlined that the principle of the reserved share, as provided for under French law, differs from other principles enacted by French law such as that of non-discrimination between heirs on the grounds of sex, religion or primogeniture, which is an essential principle of French law and, as such, could lead a French judge to disregard the application of a foreign law that would not respect it.

In respect of Mr Jarre Jr. and Mrs Chateau's arguments concerning the 1995 SCI and Mr Jarre's Paris property, the Paris Court of Appeal held that this argument should be set aside, noting that, in his capacity as both settlor and trustee, Mr Jarre was perfectly entitled to contribute the Paris property to the 1995 SCI, in 1995. In response to Mr Jarre Jr. and Mrs Chateau's argument that contributing the property to the 1995 SCI was fraudulent, the Paris Court of Appeal upheld Mrs Khong's argument and the decision of the Paris High Court and stated expressly that the contribution to the SCI "is part of a continuous and well-defined plan of Maurice Jarre that his surviving spouse benefit from all of his assets". The Paris Court of Appeal further noted that, although Mr Jarre's estate planning "may seem excessive and unfair to [his] children, it is denied by none of their father's acts throughout his life (will of November 13, 1987, trust of 1991, will of July 31, 2008)."

Finally, with respect to Mr Jarre's moral rights, the Paris Court of Appeal confirmed the Paris High Court decision, which held that such moral rights rest with Mrs Khong, and that Mr Jarre Jr. and Mrs Chateau cannot claim to share in them.

Accordingly, Mr Jarre Jr. and Mrs Chateau's appeal was dismissed by the Paris Court of Appeal.

As a matter of French law, Mr Jarre Jr. and Mrs Chateau have a maximum period of two months commencing on the date upon which they were notified of the Paris Court of Appeal judgment within which to refer their case to the French Supreme Court.

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