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Forcing the issue

Maryse Naudin TEP and Jean-Marc Tirard assess forced heirship as a human right, with a focus on France

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On 11 May 2016, in *Case no. 14/26247*, the Court of Appeal of Paris (the Court of Appeal) fully confirmed the judgment handed down by) the Paris High Court (*Tribunal de Grande Instance*, the High Court) on 2 December 2014 in *Case no. 10/05228*, relating to the estate of the late Maurice Jarre.

By this important decision, the Court of Appeal confirmed that:

- a US domiciliary dying prior to 17 August 2015 may dispose of their French estate as they wish without being subject to the laws of French forced heirship;
- a US trust is fully recognised by French law, even where the settlor is also the trustee and the primary beneficiary; and
- transferring French real estate property into a *Société Civile Immobilière* (SCI) in order to transform real estate property into movable assets is not fraudulent.

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

Since Jarre died in 2009, *Regulation (EU) No.650/2012* (the EU Succession Regulation) did not apply. Under the French private international law applicable at the time, movable property was subject to the law of the deceased's last domicile and immovable property was subject to the *lex rei sitae*.

In 1991, Jarre and 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, Jarre and Khong were also the two sole trustees of the trust. All movable and immovable, tangible and intangible assets belonging to Jarre were transferred into the trust.

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

On 13 July 2008, Jarre executed a will (the 2008 Will), the terms of which revoked his previous will, made in 1987. Under the 2008 Will, Jarre bequeathed all his movable assets to 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 two children (the Children) from benefiting from his estate.

Supreme Court proceedings

In July 2009, following Jarre's death in California, the Children raised several arguments and numerous legal proceedings were commenced in the High Court against Khong, including:

- A freezing order that was referred to the High Court of Nanterre with a view to suspending distributions requested by Khong to *La Société des Compositeurs, Auteurs, et Éditeurs de Musique* (SACEM), a French organisation that collects and distributes artists' royalties, and of which Jarre was a member. These distributions, if made, would benefit Jarre in his capacity as a member of SACEM. The freezing order was decided by way of an order handed down by the High Court on 4 February 2010.
- A summons on which the High Court was asked to rule, where the deeds made by Jarre and Khong to establish the trust, the 2008 Will and the 1995 SCI, which together had the effect of excluding the Children from any benefit in Jarre's estate, were held to be fraudulent and, therefore, could not be enforced.

Consequently, the Children claimed that Khong should not be allowed to claim any portion of Jarre's assets or music rights, whether already obtained or which she would have otherwise claimed or received. The Children claimed they were the rightful heirs to Jarre's estate and could, therefore, exercise their right of ownership over his movable and immovable property located in France, pursuant to art.2 of the *Law of 14 July 1819* (the 1819 Law), 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 the Children, Khong brought two matters before the High Court, with a view to obtaining release from the conservative measures imposed by the High Court order of 4 February 2010. Her request was dismissed by the judge by way of a further order of 12 March 2002.

The first matter raised by Khong followed *Decision No.2011-159 QPC of 5 August 2011*, in which the French Constitutional Council (the Council), whose primary role is to ensure that the principles and rules of the French *Constitution* are upheld, ruled that art.2 of the 1819 Law was contrary to the *Constitution*, owing to the difference in treatment it established between French heirs and foreign heirs.

The Children also referenced the August 2011 decision in their submissions, but they advanced the argument that, should the Council decision be effective in abrogating the effect of art.2, the reserved share (*réserve 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 High Court ruled that:

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

The High Court also ruled against the application of art.2 of the 1819 Law, as abrogated by the Council in the August 2011 constitutional decision. It also ruled that:

- as Jarre's final residence was in California, the law applicable to the succession of his property was that of the state of California;
- the establishment of the trust should be deemed normal practice and not fraudulent, pursuant to Californian law;
- the arguments based on fraud and French international public policy should be dismissed;
- the provisions of the trust should be enforceable against the Children;
- transfer of Jarre's Paris property to the 1995 SCI did not constitute fraud; and
    - consequently, succession of Jarre's estate did not, in reality, include any property in France and, therefore, could not lead to the application of French inheritance law;
- pursuant to the provisions of the trust, according to which Khong was the sole trustee after Jarre's death, and the provisions of the 2008 Will, the Children could not benefit from any of Jarre's movable assets nor could they claim the deferral or reduction of any claimed donations made by Jarre, by virtue of either the provisions of the trust or the 2008 Will; and
- Khong, in her capacity as sole legatee of Jarre's estate, was the sole owner of the moral rights in Jarre's creations.

The High Court consequently dismissed the Children's claims.

Appeal submissions

First submission

The Children lodged an appeal against the High Court ruling.

Their first and main argument was that, contrary to the ruling of the 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 law 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 is essentially a universal agreement among the nations of western Europe and North America. The 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, the Children contended that there is a virtually universal agreement that proper public policy requires forced heirship.

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

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

The Children justified their submissions that forced heirship should be treated as a matter of international public policy with arguments 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 the Children were not found to be persuasive by the 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 the law was adopted but rather depends on the current environment at the time when the foreign law is to be applied. The argument that testamentary freedom is analogous to laws that discriminate against individuals on the basis of sex, race or sexual orientation was found by the Court of Appeal to be far from convincing.

The Children also claimed that England and Wales 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 Jarre's estate was not governed by French law, but rather by the law of the state of California. Although this explains why forced heirship is a matter of internal public policy, which Khong

accepted, it does not justify, as the High Court rightly ruled, that it should be treated as a matter of international public policy.

The Children's argument was further flawed in that it deliberately underestimated the impact of the *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, which confirms the principle of the law of the last habitual residence governing succession of both movable and immovable property, and which permits an individual to choose the law of their nationality to govern that succession.

The EU Succession Regulation is not restricted to cross-border succession issues within the EU, as it 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 habitual resident of California who owned French-*situs* movable assets is governed by Californian law.

Second submission

The Children's second argument before the Court of Appeal related to the August 2011 decision of the Council.

Article 2 of the 1819 Law provides that where an heir's global share of an estate is deemed under a foreign succession law to be lower than that which they 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 they were otherwise deprived of by the foreign law.

> *The Children asserted that the August 2011 constitutional decision should not apply to their case as the right to levy is a rule of inheritance law and their right arose on the date of death, so that the subsequent repeal has no impact.*

Contrary to the Children's argument, Khong submitted that, as provided by art.62 of the French *Constitution*, the August 2011 decision took immediate effect and art.2 was, therefore, immediately unenforceable.

Third submission

The Children raised a third argument, in respect of Jarre's Paris property. They submitted that contributing the Paris property to the 1995 SCI had the effect of transforming it from an immovable asset (and, therefore, subject to French succession law, including forced heirship) into a movable

asset (in the form of the shares of the SCI) that was, therefore, subject to Californian succession law.

The Children's argument in respect of the 1995 SCI was twofold, asserting that:

- contributing the Paris property to the 1995 SCI was void, on the grounds that it was contributed by Jarre in 1995, after having been already transferred to the trust in 1991; and
- the 1995 SCI was a sham, created for the sole purpose of transferring the Paris property, in order to deprive the Children of an inheritance in Jarre's estate.

In support of their argument that the 1995 SCI was a sham, the Children alleged that the 1995 SCI had neither 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 Court of Appeal

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

The Court of Appeal held that art.2 could not apply to the appeal, owing to it having already been repealed by the 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.

The Children's allegations, that they had already acquired rights in 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 Court of Appeal upheld Khong's submission that the 1819 Law was an exception to the rule of conflicts of law and not an inheritance law, pursuant to which the Children might have otherwise acquired rights in Jarre's estate on the date of Jarre's death in 2009 and prior to the repeal.

The Court of Appeal likewise rejected the Children'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 Court of Appeal in their case. In response to this allegation, which had already been brought unsuccessfully by the Children before the Supreme Court, the Court of Appeal briefly confirmed the position of the High Court by stating that the reserved share is not an essential principal of French law and is therefore not protected by international public order.

In support of the submissions advanced by Khong, the 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 differences include 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 the Children's arguments concerning the 1995 SCI and Jarre's Paris property, the Court of Appeal held that this argument should be set aside, noting that, in his capacity as both settlor and trustee, Jarre was perfectly entitled to contribute the Paris property to the 1995 SCI, in 1995. In response to the Children's argument that contributing the property to the 1995 SCI was fraudulent, the Court of Appeal upheld Khong's argument and the decision of the High Court, expressly stating that the contribution to the SCI 'is part of a continuous and well-defined plan of Jarre that his surviving spouse benefit from all of his assets'. Finally, with respect to Jarre's moral rights, the Court of Appeal confirmed the High Court decision, which held that such moral rights rest with Khong and that the Children cannot claim to share in them.

Accordingly, The Children's appeal was dismissed by the Court of Appeal. The Children then decided to refer their case to the French Supreme Court *(Cour de Cassation*, the Supreme Court). On 27 September 2017, the Supreme Court upheld the decision of the Court of Appeal.

The Supreme Court ruled that Jarre, as a US domiciliary, could dispose of his French property as he wished without being subject to French forced heirship. It also ruled that a trustee, fully recognised by French law even if as in the case at hand, the settlor is also the trustee and the primary beneficiary. The only qualification the Supreme Court decision made was that forced heirship should be respected whenever the children are not of legal age or whenever they are in a state of financial hardship, which was not found to be the case in the present circumstances.

As a last recourse, the Children decided to bring the case to the ECHR. They submitted that the French courts' decision not to grant them their reserved share of their father's estate was contrary to art.6.1 of the Convention (right to a fair hearing) and art.1 of the Protocol (protection of property). The ECHR ruled that the fact that Jarre has disinherited them via a trust (and that they were not found to be entitled to any 'compensatory levy') was not a violation of these rules, since there is no general and unconditional right of children to inherit from their parents.

Although this decision put a definitive end to the claim of the Children, by confirming the decisions from the French courts, this will not necessarily prevent future litigation on the ground of forced heirship, in respect of international succession with a French connection.

This is because, in reaction against the ruling of the Supreme Court on 27 September 2017 and under pressure from a powerful lobby defending forced heirship, a law passed on 24 August 2021 that reintroduced the right of compensatory levy (*prélèvement compensatoire*) out of property situated in France. This law was introduced for the benefit of children who are not granted a reserved share of inheritance, under the law governing the succession of their parents.

However, by not only confirming the decision of the Supreme Court in the *Jarre* case but also ruling that forced heirship in favour of reserved heirs is not a fundamental right guaranteed by the Convention, the ECHR has dealt a final blow to the new *prélèvement compensatoire*, which is in any case obviously at odds with the EU Succession Regulation.

In practice, domestic legislation protecting the rights of children to inherit (through forced-heirship rules, compensatory levies or equivalent mechanisms) may not supersede the testamentary freedom of their parents when such a freedom is granted by the law governing the succession.

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[1] The ECHR handed down a similar decision on the same day, in another case involving similar circumstances (Colombier c. France). The authors have, however, limited this article to the *Jarre* case.

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