Conveyancer and Property Lawyer

2001

The convention d'indivision and the tontine: a short comparison of two methods of owning French residential property

Stephen Smith

Peter Harris

Subject: Real property. **Other related subjects:** Succession

Keywords: Coownership; France; Real property; Succession

***Conv. 141** The differences between French property law and that of England and Wales are total.

Given the absence of any formal recognition of trust arrangements, the prevalence of French matrimonial property regimes, and the French forced heirship rules which allocate property automatically on death to the blood line, both ascending and descending, and not to the spouse, it becomes clear that some additional preparation may be necessary to ensure that the property passes in the manner required by the purchasers on their decease. These matters become rapidly complex, at least in appearance, in relation to unmarried couples, or married couples having children from previous marriages or unions. There are however French legal solutions to these which merit study. Two of these are reviewed briefly here. There are others, and the authors would be happy to discuss the available options with advisers.

The fundamental point to bear in mind is that the liquidation of the estate of a deceased person who is married has to be dealt with by the prior liquidation of the French situs matrimonial property under the applicable regime. This applies to movable and immovable property alike. Here we are concerned with immovable property, as it is now settled that movable property of persons who are *domicilées* abroad are dealt with under the law of their *domicile.* Note that the French definition of *domicile* is residence, and not the English or United Kingdom notion. Care has to be taken here, especially where the couple may be thinking of retiring to France.

Take the example of a British couple, either married or unmarried, who have children, whether from their present or from previous unions and who are uncertain as to the amount of time that they are likely to spend at their French property.

They wish to purchase a French residence, or have already done so. They would like to ensure that the issue on the decease of the first does not dispossess the survivor, and that the property passes to the issue on the decease of the survivor. They also agree that in ***Conv. 142** the event of a separation or divorce, they should have access to the capital in shares agreed or to be agreed, without one being entitled to block the other by refusing to sell.

The couple in this example are not linked by any form of community regime: this type of arrangement is not recognised under English law, whether they be married or unmarried, the situation is the same. They could perhaps also consider a matrimonial property regime called the *communauté universelle avec attribution au dernier survivant,* provided that they can secure the agreement of the issue of the previous marriage, who therefore ideally should be over the age of majority, and obtain court approval for the operation in France: *homologation.* In the case where this cannot be obtained, the *convention d'indivision* provides an elegant solution.

Note that the French rules of conflict of laws in matters of matrimonial property are now dealt with under the Hague Convention on Matrimonial Property Regimes, which was brought into force in France in 1992. The conflict rules may benefit citizens of countries such as the United Kingdom, which have not as yet ratified this Convention, as these citizens can elect to have a French matrimonial property regime apply to their French situs immovable assets, both as to particular properties and generally. The fact that the French treat the non-existence of any matrimonial property regimes as separate ownership, *séparation de biens,* leaves a further choice of options, which are not the subject of the present article.

Here, the notary would research where the couple's marriage was celebrated, and in which country they first had their permanent residence. This is the crucial point, as it is this State's law that under

French conflict rules will determine the matrimonial regime applicable. Let us content ourselves with a couple who marry in New York, who return immediately after the honeymoon to the United Kingdom, and do not go directly to France. Were they to go immediately to France, they would be considered to be married under the French regime of *communauté légale,* unless they had specified another contractual regime prior to their marriage.

It is therefore crucial to distinguish cases where the marriage has been celebrated elsewhere, under foreign law, for example in New York or another state which has an automatic community system, or where one or both of an unmarried couple are domiciled in a state which recognises and assumes community property arrangements for concubines, or unmarried couples. In these cases, the couple may be unable to allege that they are ***Conv. 143*** separated for property ownership purposes, and may therefore be unable to purchase French property in undivided shares, *indivision.* These cases raise different considerations which require different solutions. In any event, a couple married under a foreign community regime cannot adopt the *convention d'indivision,* but could adopt the *communauté universelle* in relation to the French property, either specifically, or globally, under certain circumstances.

In France, the estate of a deceased is not governed by one rule, such as domicile or nationality. The *domicile* of a deceased person may serve to fix the point where the opening of the administration of the estate is carried out, but after that, in international cases, the French system is scissionist. The number of Englishmen who had a residence in France, and who died there, whose *dépouilles* have been repatriated immediately by aircraft to avoid the estate being opened there proves that such issues can have serious consequences.

The first instinct of the French notary would be to propose that the married couple execute a deed of gift of future property, which in this case would normally be drafted so as to leave the choice to the survivor of a *usufruit* over the deceased's share of the property or of a quarter of the deceased's share of the full property. In the event that nothing was done, the survivor would be at risk of seeing the property going to forced heirs. However, such a gift, restricted as it is, would probably not satisfy the couple's intentions. In their view, it would be normal that the surviving spouse be left the whole estate, with eventually the residue being left to the children.

The code divides the estate firstly amongst the children, or where these have died, any issue, then, failing any issue, into maternal and paternal lines. This means that the parents of the deceased can also claim a share of the property.

Under the civil code, the only guarantee that the surviving spouse will take the full share of the estate is where there are no children, or grandchildren, no parents or ascendants, and no brothers and sisters, or issue.

Where there are children, the only right of the survivor is to a *usufruit* of a quarter of the property. Where there are no children, or illegitimate children or brothers and sisters, this is increased to one half. However, this right is subject to any prior gifts or disposals, which the deceased may have made. Again, the rights can be increased up to a *usufruit* of the whole of the property, or up to one quarter of the property in full ownership. This has to be done by notarised deed.

Conv. 144 In general, the rule is that succession to immovable property is governed by the *lex situs,* and to movables by the law of the *domicile* of the deceased. This means that the forced heirship rules, very briefly and incompletely summarised above, will apply to French immovable property purchased by the spouses.

The difficulty is that the children can require the *usufruit légale* of a quarter to be converted into a pension, and the spouse can only object to this on the grounds that the children may be unable to provide guarantees. Here the conversion of a *usufruit* granted by gift cannot be required to be changed in the same manner. However, in order to escape the conversion, the spouse has to show that the residence was their principal residence at the time of decease. There may be tax consequences here, as this may have the effect of bringing the entire estate of the deceased into the scope of French taxation, as this is effectively an admission of *domicile* for French purposes.

It is therefore clear where there are children, that action has to be taken if the surviving spouse is to have any rights at all, and further that these be protected. Recalcitrant heirs with a reserve, that is children and parents, not brothers and sisters, can require the reduction of any gift or legacy made to the spouse, to the extent that their rights have been infringed.

This is where the notary will start to think about a *tontine.* This has been compared to a joint tenancy, however the difference between the two concepts is such that the comparison can be misleading. The main difference is that a *tontine* is a form of contractual Russian roulette. The contractual element of risk and gamble enables the contract of *tontine* to take its effect. The notary will need to ensure that the couple are in good health, and that there is little risk of one being more likely than the other to die first. This is a serious risk taken by both parties and it equates to a form of consideration. In addition, both parties must contribute to the purchase price, preferably in equal shares.[1]

A *tontine* arrangement is only available in France where the parties' property arrangements are not governed by any form of community property regime. If they are, and they omit or wrongly decide not to advise the notary of the legal position as to their property arrangements at the time of drafting of the deed of purchase, and thereby obtain a *tontine* in the deed of purchase, this may result in the clause being set aside or treated as a civil ***Conv. 145*** fraud on a later application by one of the couple in the event of a separation, or a third party, such as a child or its guardian, from their or from a previous union, to enable them to assert rights over the property at a later date. A *tontine* is only available to persons who can contract to risk their estate losing all interest in the property on death, in other words, those persons with independent property rights, who are not yet linked in community.

This rarely applies to couples of purely British nationality. However, the previous trend to live or celebrate marriage in other jurisdictions such as New York, can lead to a community regime governing even an unmarried couple's property affairs. In such circumstances, detailed advice as to the use of matrimonial regimes in France for married couples, and further advice for unmarried couples[2] may be needed. The questions relating to the capacity of unmarried partners who may be adjudged to be living under a community regime under the laws of their domicile can become quite difficult where the matter is not clearly dealt with at the outset.

The historical option where there was no community property regime applicable was that the dead of purchase would include a *tontine* arrangement. This consists of a coupled set of resolutory and conditional contractual terms pertaining to ownership which is settled to be in the hands of defined parties, but which is left in abeyance. In effect, French principles of public policy as to property ownership are satisfied in the sense that at least one of the parties will become the definite owner, even though, until the deaths of all but the survivor, the identity of the owner remains undefined. The owners of a *tontine* therefore have a right of *jouissance,* of enjoyment, but cannot act independently of the others as owners in relation to the property. Certain forms of life insurance contract are organised on a *tontine* basis.

Provided the couple are not under any form of community arrangement, a *tontine* is sufficient in legal terms to enable a couple, whether married or unmarried, to ensure their wishes are respected, insofar as each other is concerned. However, it does not regulate certain issues that may appear distant or inconceivable at the time of purchase such as divorce or separation. These may be dealt with in a limited manner under the laws of the residence or domicile of the parties. A *tontine* had the dubious advantage, at least until a recent application of a pauline remedy, ***Conv. 146*** of providing a block against creditors of one of the *tontine* owners as against the property.

For *tontines* created after September 1979, the previous advantageous tax regime which allowed the registration in the name of the survivor at contractual rates, rather than gift rates, no longer applies where the *tontine* clause is inserted in a contract of acquisition. Since that date, the registration will be taxable at estate duty rates, unless the market value of the property on death does not exceed 500 000 Francs, in other words, a small apartment or cottage. In this latter case, the rate of tax due on the registration of the property in the survivor's name will be that applicable to contractual transfers: 4.84 per cent. This includes the now standard departmental rate of 3.6 per cent, the additional communal tax of 1.20 per cent, and the registry costs, which are calculated at a percentage of 1.2 per cent of the departmental rate (approximately 0.043 per cent of the price). There will be an additional notarial fee for the registration.

Where the property is worth more than 500 000 Francs, the present legislation deems the whole transfer to be a gratuitous transfer on death, subject to death duty rates according to the lineal link between the deceased and the survivor. In the case of an unmarried couple, this is 60 per cent. There is no mortgage relief available. There is one *caveat.* To be taxable as a gift or heirloom, the *tontine* has to be technically inserted in a contract of acquisition. This device of including a *tontine* clause in another type of contract, for example the *status* of a *Société Civile Immobilière,* is becoming popular but there is as yet little administrative or judicial authority on the tax effects.

One difficulty with obtaining a *tontine* in France, is that the notary may underestimate the foreign couple's need for the survivor to take the entire property to the exclusion of the children. There is such a cultural difference in practice, that certain notaries consider the action of their foreign clients envisaging “disinheriting” one's own children as an affront to normal behaviour, as defined by French notions of *ordre public,* even when this is to protect the surviving spouse.

Provided certain conditions as to payment age and health are met, the couple can therefore purchase with a *tontine* arrangement, but insofar as real property is concerned, they will thereafter be unable to change the ownership without being in agreement. In addition, the *tontine* arrangement is inflexible, and the implications on divorce or separation can be crudely disappointing, and whilst it is possible to regulate this through a ***Conv. 147*** foreign court order, it is sometimes difficult to obtain enforcement in France. There is no room for derogation.

One criticism of the use of *tontines* has been that they can only be put to an end by agreement between the parties to the arrangement. The question is frequently raised in relation to the effect of divorce or separation proceedings. There has been a publicized situation where a French notary has been reported as refusing to use a *tontine* owing to:

“a bad experience which he had with a divorcing couple. The husband had become ill and needed to take his money out of the French property. Without his ex-wife's agreement he could not dissolve the tontine or sell or mortgage the property. That consent was withheld and there was nothing he could do to prevent his wife from sitting back and waiting for him to die, when the property would pass to her.”[3]

Whilst the couple could have purchased in *indivision* with a *convention d'indivision,* the description of the hapless situation in which the husband found himself may be incomplete. Certainly, were the divorce or separation to have taken place in France, and the French courts to have had jurisdiction over the settlement, there is little doubt that they would not set aside the *tontine* arrangement. However, provided that the couple maintained their domicile or their habitual residence in England or Wales, and the English courts could take jurisdiction over the divorce or separation, the wife could be compelled to abide by a ruling of the court under the Matrimonial Causes Act 1973. If the order were a consent order, it would be usual for the one or both parties to give undertakings to determine the *tontine.* In this case preferably both. Failure to abide by such an undertaking or defiance of an order not made by consent could be remedied by action against the defaulting spouse by the English court.

Here the question of the distinction between the various conventions and their applications becomes important. There are those applicable in matrimonial causes, but also those which apply in other distinct areas, such as the Brussels convention (amended) on jurisdiction and the enforcement of judgements in civil and commercial matters, and the Rome Convention on the law applicable to contracts: both of these are Community Treaties, and do not apply to matrimonial causes. Were the *tontine* to be treated solely as a property ownership contract, it is possible that other bases of jurisdiction might be brought into play.

Conv. 148 It is also arguable that a *tontine* could be considered, on a purely insular and chauvinistic basis, as a form of “settlement”, at a push, which can be subject to variation under the Act by agreement or otherwise, by order.

Another line of approach in the case of a refusal to determine a *tontine* entered into by English domiciled co-owners when no divorce proceedings are involved would be to make use of the judgement in *Webb v. Webb* [4] on the grounds that, given the nature of the *tontine,* what each owner has is a contractual right *in personam* and not a direct right *in rem* and that this can therefore be the subject of an action in England.

Here, in both cases, great care has to be taken as to the method by which jurisdiction is sought for example under the Matrimonial Causes Act could have fiscal repercussions. Were one of the parties to elect to choose the English notion of domicile as a basis for his or her claiming jurisdiction, this could be used against them by the Inland Revenue. The definition of domicile is a legal and not a tax definition. It is therefore prudent to employ habitual residence if this is possible. However, where either or both of the couple are habitually resident in France, obtaining an effective right to suit in the English courts could prove difficult.

Generally a notary dealing with a foreign client is expected to provide some advice as to these aspects of the matter in question. This is a professional duty towards foreigners who are deemed to be unaware of French property and succession law.

Unlike the French notarial system, which has “Cridons” (notarial centres of research and learning which provide authoritative research into conveyancing and other related matters), the British system does not provide similar access to notarial or conveyancing information to foreign lawyers and notaries free of charge. There is no centralised college of learning in the United Kingdom comparable to a Cridon in France--solicitors are normally directed to counsel in such matters. Counsel can also advise French notaries directly.[5]

A Cridon is a body set up by the regional association of notaries to provide legal advice to the profession. It was made available to English solicitors until the Cridon centres became aware that there was no reciprocal service in England. The notary will therefore not be in a position himself to give much help to a foreign couple in determining how best to advise them in relation ***Conv. 149*** to their foreign law without assistance from a solicitor or barrister.

There has been some criticism in France of the English system, as until recently, English solicitors were allowed to take advantage of the French Cridon system without the French being able to obtain a reciprocal service. Both solicitors and notaries are therefore condemned to rely on the other for giving correct advice in relation to the law on the other side of the Channel. It frequently happens that a property is purchased, and the couple becomes aware of the difficulties afterwards. They then seek advice.

The last resort of most notaries in face of the evident distaste of the British couple for forced heirship and French taxes might have been to consider proposing a *société civile immobilière,* the shares in which would be movable property, and therefore subject to the law of the deceased's *domicile.* The difficulty here is that were the couple to retire to France, they would become domiciled there for French succession purposes and their world wide estate could therefore become subject not only to French forced heirship rules, but also to French tax. However, where the aim of the structure was to elude application of the law, certain recent cases have shown that this solution is not necessarily a complete one. The case of *Caron,* [6] where an American citizen had sold his French property to a Virgin Island company with the sole aim of avoiding the forced heirship rights of his children, shows that the device is of limited use in the face of a determined challenge by forced heirs against a legacy of foreign shares. The case was decided on the basis that the stated aim of the company was simply to avoid the designation of the property as immovable to escape forced heirship rules and with no other reason. French notions of *ordre public* are more pervasive than the notion of public policy in the United Kingdom, as the question of property ownership is a question of public order and has been since the Revolution.

It is possible to use a *société civile immobilière,* whose statutes contain *tontine* attributions of its shares held in both names to the surviving *associé.* The company then purchases the property, or the property is contributed to it in exchange for the shares or *parts.* It is tempting to think that this would provide the definitive solution, however, the shares of the company will still be considered French *situs* for estate duty purposes, and the choice of the device is complicated and less likely to escape ***Conv. 150*** potential criticism from the courts on the basis of a potential *fraude sur la loi,* or even from the tax administration who are becoming increasingly sceptical about such devices. The tax position is that to escape the charge to estate duty, the *tontine* clause must not be inserted in a contract of acquisition. Whilst the constitution of a company is not considered as a contract of acquisition, it could be argued that the company is by essence a contractual vehicle, and that its aim is to acquire and hold property. It is likely that such a company will be subjected to some scrutiny in France as its shares will fall within the scope of French estate duty as representing real estate. This is too convenient a method of escaping the tax for the administration not to criticise it and even challenge it in one way or another. For example, they may prove that the company is fictive, for example, where there are no meetings of *associés,* no accounts kept, and no real evidence that the company in fact has a legal existence. In this case heir and tax authorities alike may be able to challenge the validity of the company, and therefore of the *tontine* rights.

However, there is a different solution, known as a *convention d'indivision* which may be obtained after the event. It is a little more costly and can involve the use of insurance cover to enable the shares of issue to be paid out. The couple in this example would normally have purchased jointly, in other words in *indivision.* It is therefore possible to conclude a *convention d'indivision,* translated as an undivided property agreement which regulates the *indivision.* Married and unmarried couples can use this alike.

The article of the French Civil Codes is as follows:

“Art. 1873-13 (L. no 76-1286 du 31 déc. 1976) Les indivisaires peuvent convenir qu'au décès de l'un d'eux chacun des survivants pourra acquérir la quote-part du défunt, ou que le conjoint survivant, ou tout autre héritier désigné, pourra se la faire attribuer (L. no 76-627 du 10 juin 1978) %42à charge d'en tenir compte à la succession d'après sa valeur a l'époque de l'acquisition ou de l'attribution%48.

Si plusieurs indivisaires ou plusieurs héritiers exercent simultanément leur faculté d'acquisition ou d'attribution, ils sont réputés, sauf convention contraire, acquérir ensemble la part du défunt à proportion de leurs droits respectifs dans l'indivision ou la succession.

Les dispositions du présent article ne peuvent préjudicier à l'application des dispositions des articles 832 à 832-3.”

To use this method, the couple have to have certain characteristics insofar as domicile, residence and nationality are concerned. They must not be subject to a community property ***Conv. 151*** regime, whether married or otherwise. The notions of community property and *indivision* are mutually exclusive and so cannot be combined.

The article refers to the spouse who is seeking to enforce his or her limited rights as an heir, and does not limit their rights to be an *indivisaire* under the convention. They may therefore acquire the property under the condition that the heirs are bought out. The same applies to an unmarried partner, or *concubin.*

Although there is little recent judicial authority or doctrinal position taken by the tax administration, the acquisition is generally considered to be done for *cause* which may be assimilated roughly to consideration in English terms; and therefore not gratuitously, and therefore to fall outside the scope of gift or estate duty. It does not exclude the children of the marriage or of previous unions from benefit. They can therefore not object to it. It does permit the survivor to remain in occupation. It avoids the problem of leaving the property by will, leaving the survivor under the power of the heirs who can either refuse sale or other necessary operations, or even, in the case of minor children render it difficult to proceed without court approval in France.

However, this arrangement does require financing to buy out the heirs' rights. There is no reason why this cannot be done by way of a legacy to the surviving spouse in the United Kingdom, up to the value concerned, or by way of a suitable life insurance policy.

In the event that the couple decide to act before the purchase of the property, a clause can be inserted in the agreement of purchase in a similar manner to a *tontine,* or they can choose a separate notarised deed. In the event that action is taken after purchase, a separate notarised agreement will be necessary.

The reason for the need for notarisation is simple. A private deed between the spouses will not necessarily be valid as against the heirs, or as against third parties such as the tax authorities. The other advantage is one of certainty, owing to the fact that the clauses employed have stood the test of several centuries of use, the notarised deeds are rarely up into question before the courts. A comparison between the non notarial regimes such as the United States and also England, and that of France show that whilst a deed in one of the American States is very likely to be successfully challenged in court, a French notarised deed is rarely, if at all, successfully challenged.

The purchasers agree that the full property rights over the undivided property go to the survivor on the death of one of the parties, *providing that* the survivor buys out the children's rights over the property.

Conv. 152 Under Article 1873-13 of the Civil Code, it is also possible for the heirs to require that their share be attributed to them. The value is the value at acquisition by the survivor or at attribution of the property to the heirs. Article 1873-14 provides that the person concerned, whether an heir or *indivisaire,* has to respond to a notification served on him by the other parties concerned within one month. This notice can only be served after the expiration of the period taken for inventory of the estate in France by the heirs. This is why there is normally a notice period provided in the deed, and why the survivor is required to decide whether they wish to exercise their right within one month. In practice this is normally within one month of the heirs requiring it.

This is not a *partage* arrangement, a form of French conveyance winding up an undivided ownership by way of deed. Such an arrangement should be avoided if it is intended to take the maximum tax advantage from the *indivision.*

The couple, in undivided ownership, can therefore contractually provide for the survivor being able to

purchase the deceased's heirs share of the property at the market value at acquisition or at the time of death. It is a contractual agreement affecting the contract of purchase of the property. It is an exception to French public policy as to forced heirship rules, tolerated to the extent that the heirs are paid out. It is not therefore a *libéralité,* [7] and therefore falls outside the scope of estate and gift duty. It has the advantage of being simple, effective and can be put into place at any time after the acquisition of the property. It can also be modified by later agreement between the owners. It can be made between husband and wife, between unmarried couples and between unrelated parties. It does however involve the further cost of a life insurance policy enabling the survivor to buy the heir's share. This can however be tolerable in that it also enables the person who dies first to provide financially for his issue, knowing that the surviving partner will be able to retain the property.

As the *convention* is concerned with the purchase of property, not with the succession, there is a presumption that the transfer duties applicable are not those on death (60 per cent or less, but rather those on a simple contractual conveyance) at present rates 4.84 per cent.[8] There can thus be a significant saving. It is ***Conv. 153*** therefore possible, subject to finalising certain questions of domicile, to place either married or unmarried couples in similar position as either a *tontine* or a *communauté universelle avec attribution au dernier survivant* with the tax economies involved, and also to avoid the problems raised by divorce or separation, provided that adequate wording and clauses are inserted into the *convention d'indivision.*

The fundamental point to bear in mind in any comparison is that a *tontine* is not an *indivision.* However, as with most forms of joint arrangement, it is necessary to take advice from a competent British lawyer in conjunction with the notary to ensure that the contractual arrangements are adequate.

The *convention d'indivision* is a useful conveyancing tool. For the reasons given above, it should normally be notarised and registered to provide protection against third parties and heirs.

It is worth remembering that the use of the *tontine* was penalised severely in 1979 by being deemed to be a disposal on death subject to death duty rates. It is possible, but at present unlikely, that the use of a *convention d'indivision* might come under a similar review in the event that it become more widely employed. In the authors' opinion, it is unlikely to be challenged in relation to heirs resident outside France, as the French administration would not have jurisdiction over the worldwide succession of the deceased, or over the heirs, unless they were resident in France. There would however be a significant loss of duty, given the difference in rates, between stamp and estate duty, so it is advisable to carefully structure and document the acquisition using this method.[9]

Stephen Smith

Head of French law department, Riddell Croft & Co Solicitors

Peter Harris

Barrister, 3 Temple Gardens Tax Chambers

Conv. 2001, Mar/Apr, 141-153

---

1. A most helpful and detailed account of the *tontine* is given by Henry Dyson in a previous article [1993] Conv. 446, to which the reader is encouraged to refer: the authors wish to express their indebtedness.

2. The term *concubin[e]* is employed in France to describe an unmarried partner of the other sex.

3. Excerpted from “The tontine clause--Myths, Misunderstandings and a Cautionary Tale” Kathie Murray-Lacey, Living France (August 2000).

4. Case C-294/92, [1994] E.C.R. I-1717.

5. Peter Harris has practiced in France in this manner for several years, advising solicitors and notaries alike.

6. *(Cass.1er Civ. 20th March 1985).*

7. A voluntary act other than for consideration such as a gift or legacy.

8. This is taken from a Cridon Ouest advice obtained by a notary working with the author in April 1999.

9. The rates referred to in this article are:An allowance of 10 000 FF is granted where there is no other allowance available.


Westlaw UK