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Doctrine

Some Difficulties on the Holding of French Properties by English minor Children ¹

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1. The holding of a property by an English minor presents a classic difficulty in the practice of notarial private international law. The report that we published in this review, entitled "*Certain Aspects of the Sale of French Property by an English Minor*"², remains a reference work for practitioners. However, because of the relevance of the question and changes to English procedural law, the coming into force of international conventions and Community Regulations has allowed us to update our commentary.
2. In French private international law, the regime for protection of a minor is governed by his or her national law. English law is competent to apply its regime of protection, if the minor is of English nationality and has his or her habitual residence in England. On the other hand, if the minor has double French and English nationality, French law will determine his/her regime of protection and the difficulty outlined below is avoided. The same will apply if the English minor has his/her habitual residence in France.
3. The situation referred to in this study relates to a minor of English nationality only, having his/her habitual residence in England.

¹ The first part of this article has been written by R.A.D. Urquhart. The section on the Hague Convention 1996 and community law has been written by Mariel Révillard.

² R.A.D. Urquhart "Certain Aspects of the sale of French property by an English minor", Defrénois 1995, Article 36135, p.927.

4. The problem is as follows. A considerable number of British persons have purchased, and continue to purchase, secondary homes in France. In recent years, a large number of these acquisitions have been made in the name of individual persons, often married couples, with children, as undivided owners of the whole (on terms similar to tenants in common in English law). On the death of one of the spouses, the children, including the minor children, are vested *ipso facto* in possession of the land and receive part of the French property in accordance with French law. That is when problems arise.
5. English law and, particularly, the Law of Property Act 1925 (Article 1(6)) provides that a legal estate in a property may not be held by a minor child. This notion of a legal estate in land may be interpreted in French law as being owner of such property.
6. The Children Act 1989 Article 3 paragraph 3 provides that an estate involving a minor may be validly administered by the surviving parent, but this right does not extend to disposal of the asset which is authorised neither by case law, nor by English law, nor by jurisprudence, nor by common law. In English law, on a death, all the real and personal assets of the deceased are vested in personal representatives, that is to say in the testamentary executors in the case of a testate estate or the administrators in the case of an intestate estate.
7. Furthermore, in English law, if a parent wishes to purchase a property in the name of his or her minor child, this can only be done as a trustee, which is a concept unknown in French law. In French law, there are no personal representatives and immovable property is vested directly in the heirs, among whom are minor children. Thus, in English law, as a minor child may not own immovable property directly, neither of the surviving parents nor the trustees nor the testamentary executors have the power to sell an immovable asset vested in a minor child. French private international law makes a reference to the nationality of the minor for questions of capacity.
8. From a practical point of view, how does one deal with this and sell the property in France belonging to a minor who has his habitual residence in England? It is necessary to petition an English court. In England, the competent court is the Chancery Division of the High Court of Justice presided over by a Judge or Chancery Master. The first thing to do is to appoint a litigation friend whose role is more or less the equivalent of a *tuteur ad hoc* in French law. Thereafter, one prepares the particulars of the claim, explaining in detail the situation and seeking the intervention of the Chancery Division for the purposes of obtaining an order authorising the sale of the property in France by the

surviving parent for and on behalf of the minor child. It is current practice to draft an order which is submitted to the court among the court papers which will facilitate the comprehension of the file and will state the scope of powers to be given by the authorisation sought.

9. To continue the procedure, the litigation friend must produce a witness statement giving a detailed exposé of the situation and setting out the position in French law and, more particularly, the effects of the French legal reserve or *portio legitima*. The following points must be dealt with in the witness statement, *inter alia*:
 - that a minor child in possession is vested of all or parts of a French property;
 - that the sale of the said property is desired or necessary;
 - that the contract for the sale must be signed;
 - that a valuation of the property on the date of death of the parent has been supplied and the valuation must also confirm that the price proposal to sell the property is fair and equitable, having regard to the then current market conditions,
 - that the sale is in the interest of the minor child (this must be proved by argument);
 - a Chancery barrister must be instructed and appear before the court, together with the litigation friend in order to plead the matter.
10. Once the Judge or Chancery Master has studied the file and decided that an order is necessary and may be given, only then may an order be given and this will be issued on the basis of a claim form which authorises the surviving parent to sell the property by granting a power of attorney to do so on behalf of the minor child. The order is translated into French and an affidavit of law is prepared on English law confirming that the English court is the competent court to issue such an order and that the judgment is final and not liable to appeal. This is drawn up and sent to the notary dealing with the sale and purchase.
11. The question of the jurisdiction to be used merits particular attention as the English courts have shown themselves reluctant to issue such orders because of the real lack of jurisdiction in English law for such an action. Two jurisdictions may be relied upon, one by invoking Article 53 of the Trustee Act 1925, the second being the concept of maritime salvage. Article 53 of the Trustee Act 1925 provides that "*where an infant is beneficially entitled to any property, the court may, with a view to the application of the capital or income thereof for the maintenance, education or benefit of the infant, make an order: (a) appointing a person to convey such property, or*".

We have seen that the concept of maritime salvage is wider in its application and more easily applicable by the Judge rather than Article 53 of the Trustee Act 1925. The concept of salvage is very useful as it is a question of claiming protection in situations which arise merely because of an event of *force majeure*. There are of course variants of this procedure to which one can have recourse even in the event of an intestate estate.

12. The problem of sale having been dealt with, more generally, it is then necessary to consider the possibility of a English minor acquiring land in France. Capacity of a minor, as we have already seen, is governed by English law and, in the case of an acquisition by an English minor of land in France, his or her parents may acquire the property for the minor as trustees but the concept of trustee is not recognised in France. Furthermore, a minor child may not be a party to an onerous contract, for example a loan agreement. Any onerous contract to which a minor child is party is either voidable by the child, that is to say, it may be set aside, when the child attains 18 years of age (the age of majority in England), or considered *ipso facto* null and void. Consequently, an acquisition of property on onerous conditions, such as for example the taking out of a loan with a mortgage on a property owned by a minor is to be avoided.
13. Is the incorporation of a French *société civile immobilière* between the parents and the minor children of English nationality possible? This is not a simple investment of capital but the bringing in of a minor child into a French civil company incorporated in France. By becoming a member, a minor can be made liable for the debts of the SCI and this would be as onerous as a loan. The French notarial profession is not particularly favourable to the entry of a minor into a *société civile immobilière* and a number of English lawyers advise against this structure for the purchase of a property in France³.
14. When parents and their children purchase, a French notary must advise them accordingly and warn the clients of the difficulties to which they expose themselves particularly if the sale of the property is going to be possible following the death of one of the parents.
15. This difficulty will be solved by Article 8-2-b of the Hague Convention of 19th October 1996 relating to the competence, the applicable law, the recognition, the execution and cooperation in the matter of parental

³ M. Révillard, "Purchase in the name of an English minor", *Conseils pour des notaires*, January 2003, no. 312, p.11.

authority and measures for protection of children ⁴, which more particularly gives competence to the authorities in the State in which the assets of the child are situated. The Hague Convention of 1996 came into force on 1st January 2002 in Monaco, the Czech Republic, the Slovakian Republic, on 1st December 2002 in Morocco, in 2003 in Australia, Estonia, Latvia, and Ecuador, on 1st September 2004 in Lithuania. It was signed by Cyprus and Poland and by 15 States of the European Union.

16. We will give a brief explanation of this Convention which has an important practical interest for the administration of the assets of minors in an international context ⁵.
17. The Hague Convention of 19th October 1996 corrects certain imperfections in the Hague Convention of 5th October 1961 in respect of the competence of authorities in applicable law in the matter of the protection of minors. In the relationships between contracting States, the Convention of 1996 replaces the Convention of 5th October 1961 on the competence of authorities and applicable law in the matter of protection of minors (Article 51).
18. In accordance with Article 1, the object of the Convention is:
 - to determine the State whose authorities have competence to take measures for the protection of the person or assets of the child;
 - to determine the applicable law by these authorities in the exercising of their competence;
 - to determine the applicable law for parental responsibility;
 - to establish between the authorities of the contracting States the cooperation necessary to realise the objects of the Convention (Article 1, no.1).

For the purposes of the Convention, the expression “parental authority” includes “parental authority or any other relationship of authority that is similar which determines the rights, powers and obligations of parents, a guardian or other legal representative vis-à-vis the person or assets of the child” (Article 1, no.2).

In accordance with Article 2, the Convention applies to children from the moment of their birth until they obtain the age of 18 years.

⁴ Text of the convention , *Rev. crit. DIP* 1996, p. 813, P. Lagarde “The New Convention of Hague for the protection of Minors”, *Rev. crit. DIP* 1997, p.217 and following Explanatory Report in Acts and Documents of the XVIIIth session.©

⁵ M. Révillard, *Les Conventions de La Haye et l'efficacité des actes authentiques sans le domaine du droit de la famille*, Colloque of the Association of French-speaking Notaries, Paris, 9th March 2003 (*sous presse*).

19. Under the applicable law, parental authority is subject to the law of the habitual residence of the minor and no longer to his or her national law. As for jurisdictional competence, the competent authorities are those of the State where the child has his or her habitual residence. But other authorities may also have authority (Article 5).
20. In the first instance, it could refer to the authority of a "State of which the child is a national". By giving authority of the State of the nationality of the child a subsidiary competence, the Convention resolves the problem of the double nationality not covered by the Convention of 1961 by indicating that, when the child has more than one nationality, the subsidiary competence may be granted to the authorities of either of the national States.
21. The Convention also refers to the authorities of "a State in which the assets of the child are situated". This competence would permit the resolution of the problem, sometime very difficult, brought about by the sale of a property in a State other than the State in which the minor has habitual residence or in an estate where the property is situate in that other State.
22. As we have stated above, to sell and distribute immoveable property situated in France belonging to an English minor domiciled in England, one must follow a long and costly procedure and the French judge is not competent to act such a situation. Thus, the problem is solved by Article 8 paragraph 2 B of the Hague Convention of 9th October 1996 on the protection of minors which gives competence to the authority of a State in which the assets of the minor are situated. The French guardianship judge (*Juge des Tutelles*) can then be consulted to solve the problem of sale or distribution of the property situated in France by the minor of foreign nationality domiciled abroad.
23. The measures taken by the competent authorities by virtue of the provisions of the Convention are acknowledged in all the contracting States (Articles 23 to 28).
24. The Convention of 1996 creates a mechanism of cooperation between contracting States which did not appear in the Convention of 1961. This cooperation is based on the creation in each State of a central authority (Article 29) whose obligation and powers are defined precisely.
25. As general provisions destined to facilitate the applicability thereof, there is provision for the issue of an international certificate showing the person holding parental authority and his or her powers. This

certificate, which will have prohibitive force, will be recognised in all contracting States. This certificate is optional in nature and may be issued by the authorities in the contracting State where the habitual residence of the child is, or the original State in which the measures of protection were taken (Article 40).

26. This new Convention on minors is therefore very important for the notarial profession: it is designed to give a rapid solution to the sale or distribution of assets in France belonging to minors of foreign nationality having their habitual residence in France or abroad ⁶.
27. The involvement of the European Community in private international law adds to and sometimes upsets the rules of international conventions. We make reference to the provisions of regulation CE no. 2201/2003 of the Council of 27th November 2003 ⁷ relating to the competence, recognition and execution of decisions in matrimonial matters and in the matters of parental authorities which abrogates Regulation no. 1347/2003 of 29th May which had a similar object.
28. This text lays down rules of competence, of recognition and of execution of decisions, more particularly in the matter of parental authority and administration of the assets of the child. This Regulation will be directly applicable as from 1st March 2005.
29. Its application refers more particularly to the methods of protection of children concerning the administration, retention and disposal of his or her assets (Article 1, 2, e).
30. For the purposes of conflicts of jurisdiction, Article 15 of the Regulation provides for the *renvoi* to the best-placed jurisdiction to deal with the matter or a specific part of the matter, and when that serves the overriding interests of the child. It is considered that the child has a particular link with a member State, more particularly if the litigation relates to measures of protection of the child linked to the administration, retention or disposal of assets held by the child, and which are to be found on the territory of the member State in question.
31. These provisions are in fact taken up by the Hague Convention of 1996 and, for practical purposes, their application will have the same interest as for the administration of assets of minors.

⁶ M. Révillard, *Droit international privé et pratique notariale*, Defrénois, 5th edition 2004, no. 433 et seq.

⁷ Journal of the European Union, no. L.338 of 23rd December 2003, p.1; *Rev. crit. DIP* 2004, p.209.

32. The superimposing of the provisions of the Hague Convention of 1996 and of the Regulation brings with it difficult problems of interpretation, even if Articles 60 and 61 of the Regulation of 27th November 2003 contain provisions governing relationships with certain multilateral conventions. Article 61 expressly concerns the relations with the Hague Convention of 19th October 1996 “In relations with the Hague Convention 19th October 1996 relating to the competence, the applicable law, the recognition, the execution and the cooperation in matters of parental authority and measures for the protection of children, this Regulation applies:
- when the child in question has his habitual residence in the territory of a member State;
 - with respect to the recognition and execution of a decision made by a competent jurisdiction of a member State on the territory of another State, even if the child concerned has his habitual residence in a territory of a non-member State which is a contracted party to the said Convention.
33. The absence of relevant legal foundation which permits a conclusion of the superiority of an instrument of Community law such as Regulation of a multilateral Convention is underlined ⁸.
34. Article 52, paragraph 2 of the Convention of 1996 affirms the freedom of contracting States to enter into “agreements which contain, insofar as children habitually resident in one of the party States are concerned, provisions in respect of matters governed by this Convention”. In other cases, Article 52 paragraph 3 of the Convention of 1966 provides that “the agreements to be entered into by one or several of the contracting States in respect of the matters governed by this Convention shall not affect, in relationships between these States and other contracting States, the application of the provisions of this Convention.”
35. The Council, in a decision of 19th December 2002 ⁹, authorises member States to sign, in the interests of the Community, the Hague Convention of 1996 relating to the competence, applicable law, recognition, execution and cooperation in matters of parental responsibility and measures for the protection of children.

⁸ H. Gaudemet-Tallon, “Regulation no. 1347/2000 of the Council of 29th May 2000: Competence, recognition and execution of decisions in matrimonial matters and in the matter of parental responsibility of joint children”, *JDI* 2001, p.381 et seq., spec. p.421 et seq., nos. 104 and 107; C. Nourissatin, *Family Conflicts, movement of children and international judicial cooperation in Europe, under the direction of H. Fulchiron, Centre of Family Law, University of Lyons*, 3rd December 2003, p.1.

⁹ Decision CE 2003/93, *Journal of the European Union*, no. L.48 of 21st February 2003, p1.

Fifteen member States signed the Convention of 1st April 2003 and the Commission, on 17th June 2003, submitted to the Council a proposal for decisions authorising member States to ratify or to adhere to this Convention in the interests of the Community with the object of, and a simultaneous adoption of, the decision and the proposal of the decisions on parental authority.

36. This example underlines the difficulties of articulation in the new Regulation “Brussels-II bis” with the instruments existing in the area covered by the Regulation and to which the member States can be party. Even if the wish to avoid or to settle conflicts is sought in the negotiation of instruments, the provisions inserted in the text do not always achieve this objective ¹⁰.
37. One can foresee that Community private international law will for a long time yet animate specialist legal journals and the jurisprudence raised by this matter.

¹⁰ M. Wilderspin and A-M. Rouchaud-Joët, “The external competence of the European Community in private international law”, *Rev. crit. DIP* 2004, p.1 et seq., spec. p.38; A. Bigot, “The new Community regulation of 27th November 2003 in matrimonial matters and parental authority”, *Family law*, March 2004, p.12.