THE IMPORTANCE OF SEPARATE INDEPENDENT LEGAL ADVICE

Few countries in the world can be geographically so close as Great Britain and France, and yet remain so different.

For example, the French legal system is a 'civil law' system quite unlike the 'common law' systems which operate in the UK and in many other English-speaking countries throughout the world. Each system has its advantages and disadvantages, and there are many aspects of French conveyancing that are not found in the systems operating in common law countries.

As explained below, although French *notaires* have a cartel in the French conveyancing process, they cannot properly advise a UK buyer on the impact of the purchase of French property in both legal and tax terms. *Notaires* tend not to be able to think outside issues of French law (e.g. UK legal issues may also play a part), and have very little idea about the interaction of tax between the UK and France. As a consequence, *notaires* are not able to consider how best to make the purchase suit the individual circumstances of the UK buyer.

For these and many other reasons explained below, the added value of an independent bilingual legal adviser when acquiring French property is self-evident.

1. Why you should read this document carefully

This document is intended to help you understand and deal with the imperfect framework within which you must operate when buying your chosen property in France ('the subject property').

Unless you are a French property lawyer, this document is unlikely to be your first choice of bedside reading. Nevertheless, it is far better to be safe than sorry, and reading this document now could save you a great deal of time and money in the future. In doing so you will also be able to make informed and objectively based decisions rather than trusting to luck. You should therefore have a much greater personal controlling hand over the French conveyancing procedures involved.

This document is also a guide to the hearts and minds of French lawyers and the other parties involved in the purchase of the subject property. It explains how they are likely to conduct themselves in your transaction, and how those standards of conduct can vary considerably from what you are used to in your home country.

For many people French conveyancing will be one of the biggest transactions of their lives and, if it goes wrong, it can go horribly wrong. At the time of writing this document, The Times newspaper reports (3 April 2006) that "… thousands of Britons who have bought houses in Spain face having their homes demolished after the exposure of a multi-million property scam run by the mayor, councillors, developers, estate agents, Spanish lawyers and businessmen."

France was probably the first European country to counteract by legislation the abuses of law and loss of investment confidence as a result of fraudulent and incompetent property dealings, particularly in the second home market, and which continues to be a depressing feature of a number of other jurisdictions, particularly eastern bloc countries and other emerging/immature property markets in the world.

However, the French are also highly skilled at relieving British residents and other foreigners of large amounts of cash, and the worry is that they might be left with properties they cannot sell at anything like the price they paid, or even have properties which cannot be sold. There are several recurring themes which include: buyers left high and dry and out of pocket with a half-built/renovated property because of the builder's cash flow problems or insolvency; problems establishing a clean legal title to French properties; buyers who bought unaware of outstanding mortgages or tax liabilities against the subject property, and who risk having it sold at public auction to pay these debts; illegal sites of unauthorised building on cheap land (the builder hopes to obtain planning consent after construction) which is sometimes polluted or contaminated. In rural areas of France rights of way, septic tanks, well access and the like can all prove problematic.

Please do not be put off by some of the horror stories illustrated in this document. All too often clients come to their lawyers to seek help in resolving problems that need never have occurred in the first place. Don't let cheap(er) property prices in France cloud your judgment. A property that costs £50,000 may cost you a lot more once you realize it needs £100,000 spending on it to make it legally habitable, that there is an outstanding mortgage of £50,000 on it for which you have become liable, and that out of season it takes you the best part of a day or more to reach it from the UK.

Most of these and other problems stem from a lack of care on the part of the buyers themselves, rather than the fact that the subject property is in France and is governed by a different legal system. You should not be the victim of these and other possible problems if you take separate independent legal advice before the point when there is a legally binding agreement ('the preliminary contract') for the purchase of the subject property.

Property in many parts of France is overvalued. The subject property may have legal and/or structural problems which are not always visible to the untrained eye. As a result you may not be able to sell the subject property in years to come. None of this will usually be explained to you by the various non-independent parties involved in France (or elsewhere), despite the fact that these parties often charge heavily for their involvement. Throughout this document, therefore, stress is placed on urging you not to assume that advice and information given to you by those with a financial interest in the sale of the subject property, whatever their nationality, is accurate or truthful. By contrast, the fees you pay to your separate independent legal adviser are a fraction of what you will incur in France, and he may be the only independent voice you will have throughout the transaction.

Any person transacting with France should be aware that his rights and liabilities under French law may be different to those in his home country. Do you know what these differences are? To take just one example, please note that in France the preliminary contract does not have to be a formal written document drawn up by lawyers. Under French law a purchase agreement is 'perfected' (binding) as soon as the parties agree on the object of the sale and on the price, even if no formal document is signed. These simple provisions are open to abuse. Offer letters should therefore be drafted with care (preferably by your independent legal adviser) if the offering party does not wish to be legally bound by their terms. An oral or written expression of serious intent, however informal or innocent it appears, can also be legally enforceable. People may take advantage of this, making you sign documents with legal consequences which you might regret later on. For example, a letter of instruction by you to an estate agent to

prepare a preliminary contract may be considered as good evidence of the existence of a verbal contract. To take another example, do not be misled by a document seeming to be a *réservation* only. The French word '*réservation*' does not mean 'reservation' in the English sense. It is a legally binding preliminary contract.

For the above reasons, and for many other reasons, some of which are explained throughout this document, it is recommended that you obtain separate independent legal advice before you have even found the subject property.

At Stephen Smith (France) Ltd we aim to answer your letters and e-mails within twenty four hours of receipt (in practice our response is usually much faster) unless more time is needed to provide a detailed reply. We may however be dependent on estate agents or others in France or elsewhere to move at the same speed which, as explained throughout this document, can never be guaranteed. Do not therefore leave things till the last minute. There may be (real or fictitious) competition for the subject property, and it can therefore be tempting for you to rush at this stage. Please however do not allow yourself to be pressured/ambushed by Frenchmen or others into signing a preliminary contract, and then hope to obtain independent legal advice about your transaction. Whilst it may give you more confidence to sign the preliminary contract in haste, it makes it much more difficult, if not impossible, afterwards for you to renegotiate the essential terms of that document. You may not find an independent legal adviser who is available or willing to undertake urgent matters like these. Buying French property is not a decision to be taken lightly nor on impulse, even when the turnover of properties in your chosen area is fast-paced.

2. What does 'separate independent legal advice' mean?

The term 'legal advice' not only covers all aspects of French conveyancing. It should also include advice on the way in which owning the subject property will affect the rights of your spouse, partner, children or others when you die. Each family situation is unique. Under French succession law, the subject property and any other property you own in France does not necessarily automatically pass to your surviving spouse or partner, even if you have made provision for it to do so in your UK or other will. Children (of any age) automatically inherit part of your French estate. A spouse or partner may be entitled only to a minority share, whatever the wishes of the deceased. Owning assets in France can give rise to various legal and/or tax problems, even if your family situation is not complex. More complex family situations (e.g. second marriages, stepchildren or minor children) usually need to be provided for before the point where there is a legally binding preliminary contract in order to avoid difficult circumstances later. For example, if you do not insert a *tontine* clause in the preliminary contract, it may be impossible to do so at a later stage in your transaction. We can advise on a number of legal solutions which may offer you more control over what happens to the subject property and (if appropriate) other assets in France after your death. We can advise whether you should buy jointly with your spouse or partner, and if so in what method? Do you want your children to be involved also? In some cases a company may be recommended to hold the subject property. Your circumstances may need a very complex solution. Or you may find less sophisticated methods effective and appropriate, even if they achieve more limited objectives at less overall cost and maintenance. The main thing is to plan ahead. Failing to plan is planning to fail. In addition to advising you, we can also ensure that our recommendations are fully implemented in France, ideally on or before you complete the purchase of the subject property. Otherwise, rectifying a wrong initial decision may prove to be difficult (if not impossible) and expensive.

The terms 'separate' and 'independent' mean more than just obtaining advice from a source other than the person trying to sell you the subject property. First, the advice must be unbiased and given by someone experienced in this area of law, whose daily business it is to act in your best interests only. Secondly, your adviser must have no legal connection or other profit–sharing arrangement (e.g. agency or partnership) with the seller and/or estate agent involved. Otherwise a 'conflict of interest' could arise. A conflict of interest occurs, for example, when an estate agent purports to offer in-house legal or other advice as part of his services. Another conflict of interest arises when a lawyer has competing professional or personal or financial interests that would make it difficult for him to fulfill his duties fairly. It may for example be difficult for a *notaire* (1) who is a member of the French *Administration* (which is a closed shop) or any other lawyer employed/recommended by an estate agent to provide you with independent advice, especially when the estate agent stands to gain a hefty commission on the sale of the subject property. On the one hand, although people have little confidence in estate agents generally, and very few think that they can usually be trusted, and the current evidence means that they are right to be suspicious, on the other hand there are a number of excellent French estate agents based in France and in the UK. Unfortunately, however, many more are not. Therefore, regardless of their very high standards of conduct, those estate agents who can safely be recommended still tend to get tarred with the same generic brush. The *notaire* suggested will usually be the person who acts for the seller or, if not, has some link with the estate agent. Unfortunately, the 'advice' offered by those with a conflict of interest is often so perfunctory that it does not in fact act as a safeguard.

For these reasons a buyer should not accept without advice any suggestion that he use a *notaire* who is recommended by an estate agent. It is an inviolable rule that the buyer has the choice of his own *notaire,* and it cannot be too often repeated that this right should usually be exercised. We work closely with *notaires* throughout France, whose services we can recommend to you, and with whom all correspondence is dealt with by us.

As explained in Footnote 1 below, the *notaire's* duties and role are not comparable to those of a lawyer in the UK, and you should not expect them to be the same. French estate agents are considered by some *notaires* and other lawyers (in France or elsewhere) to be a main source of business and income, and therefore a *notaire* or other lawyer recommended by these estate agents may be biased due to this business relationship. There are reported cases of *notaires* and/or lawyers in the UK deliberately ignoring or failing to investigate matters which could adversely affect the best interests of the buyer in order to profit the French estate agent/seller.

It is dangerous to rely on 'advice' given by the seller and/or estate agents mainly because: (a) they are not lawyers; and (b) unqualified advice of this nature is not backed up by professional indemnity insurance; and (c) they both have a financial stake in selling the subject property to you, which inevitably therefore means that their different interests do not coexist well with yours. Some of them may not want you to know the truth. Put another way, they might tell you what they want you to hear, but not necessarily what you need to know. This explains why some estate agents are so often elusive and obstinate in negotiation, and at best lukewarm if not outright hostile to you taking separate independent legal advice. Between the lines of such rebuke one can often read another story.

The term 'separate independent advice' should also apply in all your dealings with surveyors/architects, mortgage brokers and tax advisers, buildings insurance advisers and anyone else whose advice you might need.

3. The importance of written records

Beware of relying on any oral comments, representations or advice. *Notaires,* estate agents and others in France are used to meeting face to face rather than working via written correspondence. For example, following a lengthy meeting with a *notaire,* you are unlikely to be given a detailed typed attendance note of what was discussed. The *notaire* will probably not speak English and, if he does, it is unlikely to run to legal English. Hence, any verbal explanation he may give of the effects of any provisions of French law may not unreasonably be doubtful because he is not using the correct English technical terms. By the same token, unless the parties are proficient in speaking legal French, they will not be able to explain the full nature of their enquiry. In the event of a dispute you may have limited or no protection if you cannot prove what was actually said. It is therefore preferable for you to have a clear and accurate written record of any important statements, promises or representations made throughout your transaction (see Footnote 2). Proof of the date, time and number of pages of a document sent/received can also be important, hence the particular value of fax and email communications.

Written statements may also need to be authenticated or substantiated. For example, it may be dangerous to accept the word or letter of an estate agent who says that he has written confirmation from the local planning authorities that you can build on your plot of land (see the Case Study at 5. below). You should instead insist on obtaining a complete copy of the written confirmation referred to, and have it carefully verified by your independent legal adviser.

4. The importance of ad hoc advice

You should consider yourself and your transaction to be unique, and should therefore listen to but never rely on the anecdotal or other general advice - however well intentioned it may be – given by friends or others who already own or are in the process of buying French *immeubles.* They say the devil is in the detail and, to take just one of many examples on this theme, French town and country planning and other regulations affecting French *immeubles* can vary markedly from *commune* to *commune*, and that what is permitted on one property may not be allowed on an identical property in the same immediate locality.

Do magazines, newspaper supplements and TV programmes ever tell the whole story? It is also dangerous to believe what you read in books and hear at French property exhibitions. They may be a useful source of general information, but can also be misleading. Moreover, in order to survive, publications and venues like these need to make money, and do so by selling much of their advertising or other space to estate agents. Any 'advice' given in these or other publications and venues should not necessarily therefore be treated as correct or unbiased. In any event, no publication (to include this document) can ever be comprehensive or up-to-date.

Once again, money paid for tailor-made ad hoc legal advice is money saved in the long run.

5. A case study

To illustrate the main points made in this document so far, consider the English buyer ('Mr. X') who found a French property for sale next door to a property already owned by his English friend ('Mr. Y'). Mr. X was persuaded by Mr. Y not to

bother taking separate independent legal advice, as the estate agent and *notaire* would apparently do all that was required. The dozen or so properties in the *cul de sac* formed part of a small housing development and so were virtually identical in appearance. They all had private swimming pools, except for the property that Mr. X was interested in buying. Mr. X felt that a swimming pool would not only increase the market value of his property, but would also make it more attractive if he wanted to let the property to holidaymakers.

Mr. X was verbally assured by the estate agents that there would be no problem installing a swimming pool. They also allegedly said (although this cannot be proven) that they had a letter to confirm this from the planning authorities, but which they had unfortunately mislaid. The estate agents have subsequently denied saying any of the above. The seller himself (allegedly) swore blind that he would have built a swimming pool in his back garden years ago, were it not for the fact that neither he nor any of his extended family and friends could swim! The *notaire* (who shared membership of the same golf club as the seller and the estate agent) allegedly told Mr. X (but did not confirm so in writing) that he could not prepare a preliminary contract with a condition to the effect that Mr. X could withdraw from his purchase without penalty if permission to build a swimming pool was not obtained. This was wrong advice, which the *notaire* subsequently also denied ever giving. It is unfortunate that the *notaire* did not volunteer to contact the planning authority himself, or to outsource the matter to someone else, to verify whether or not Mr. X could build a swimming pool on his property. Mr. X met in person with the planning authorities to check the position himself, but found that his poor spoken French was just as bad as the planning authorities' command of the English language, with the result that he made no progress on the question of planning permission.

The estate agent stressed the importance to Mr. X of making an early purchase commitment. Allegedly there was a queue of other people eager to buy the same property, one of whom had driven overnight from Switzerland and was poised with pen in hand ready to sign a contract which the estate agent had prepared. In haste, Mr. X read an English book on French conveyancing which wrongly stated that written permission is not required to build a swimming pool in France and, armed with that comfort, decided not to investigate the matter further. If all the other properties in the development had a swimming pool, then surely so could he?

Mr. X bought the property and then discovered that he would need written permission to build a swimming pool on his property. He was also advised that permission would never be granted for two main reasons: (a) the title deeds to Mr. X's property contained a clause prohibiting any kind of *construction*; and (b) Mr. X' land consisted of shallow earth followed by a thick bed of rock. Even if the title deeds had not restricted *construction*, and the cost factor to Mr. X of excavation was not in issue, the planning authorities would not have granted permission to build a swimming pool in predominantly rocky terrain.

Mr. X's subsequent attempts to sell the property (using the same estate agents and *notaire*) were unsuccessful, even at a knock down price. Potential interested buyers were put off, not only by the estate agents' pressure techniques. These included the suggestion that another very interested party had driven overnight from Switzerland in readiness to sign a preliminary contract. The estate agents were also reluctant to produce a copy of the seller's title deed when requested, let alone anything else in writing (for example, a letter allegedly somewhere in their possession written by the planning authorities confirming that permission to build a swimming pool was a foregone conclusion). Other potential buyers employed separate independent legal advice which quickly diagnosed this and

other problems, which cannot be fully disclosed as they are currently the subject of protracted litigation in France.

Suffice to say that, because of other inaccuracies in the French title documents, Mr. X and Mr. Y now have a boundary dispute (and no longer speak to each other). It also transpires that the original developer never obtained a 'compliance certificate' issued by the planning authorities as evidence that all building works in the development had been carried out properly. The issue was originally raised because cracks had begun to appear in two swimming pools, and subsequently in three of the houses in the development. The developer did not have insurance to deal with these matters.

6. The do-it-yourself approach

At the risk perhaps of sounding self-serving, it is our experience that no-one should seek to buy French *immeubles* relying purely on the advice (verbal or otherwise) of a *notaire* or an estate agent, without having the documentation looked at by bilingual specialists who have knowledge not only of the French and UK legal systems but, more importantly, how they interact and sometimes conflict with each other.

Despite the above warnings, those who want to carry out their own French conveyancing without separate independent legal advice usually find it difficult if not dangerous to do so. At its simplest, French conveyancing demands a detailed knowledge of French land law and tax, French planning and French contract law. French succession law can also be very complex. As a minimum requirement, you should usually make a French will. If you are domiciled in the UK, the process also requires a knowledge not only of French succession law but also of UK taxation and inheritance law. Hence the need to obtain advice from someone familiar with the laws and practices of both systems and how they interact with each other.

If you do not get these and other matters properly vetted by a separate independent legal advisor it is as if you were driving around uninsured – you may not have an accident but all hell will break loose if you do!

7. French law, language and translations

All formal documents relating to French conveyancing must be written in the French language and are always governed by French law, regardless of the nationality, residence or domicile of the parties. The parties cannot therefore designate a different foreign law or language of their choice to govern their property or other transactions in France. French legal jargon often bears as little resemblance to standard French as does its counterpart in English law to spoken English. It is important to ensure that nothing gets misunderstood or lost in translations. Do not therefore sign any document in French without knowing precisely the scope of your commitment in plain English. A number of estate agents use printed contracts which have English translations. None is ever correct in the sense that either the translation itself is wrong or, more usually, terms of English law have been used which creates a false impression of the meaning of the original French. Even if you sign an extract or summary in English, it is usually solely the full French version which will prevail. Do not presume that it is a legal defense to claim that the document in French was not understood. Ignorance of the law and language (in any country) is no excuse.

If the French authorities think that your command of the French language is inadequate, they may insist that you appoint a qualified translator/interpreter in

France throughout or on completion of the French conveyancing transaction, the costs of which for one meeting may be significantly higher than the costs of engaging a separate independent legal adviser throughout the whole transaction. If you want a professional interpreter involved at any stage, please ensure (assuming that you can find one) that he is qualified and totally independent. This would for example exclude a bilingual estate agent, a retired school, teacher or an English-speaking relative of the seller etc. who offer to explain the documents you sign at the *notaire's* offices on completion.

The English language and the French language are not instruments of mathematical precision. According to recently published data, the English language comprises a million words, whereas French offers only about 100,000 words. Many oral or written translations from one language to another are incorrect, misleading or make nonsense reading. To provide translations in wholly 'correct' legal phraseology wrongly implies that French law is the same as English law. For example, the English legal meaning of French words like *domicile, construction* and *contrat de réservation* is different to the French legal meaning. In any event, you are legally bound by the terms of documents written in the French language, not English translations. Independent explanation of the legal implications of these documents is therefore far more important than so-called translations.

For the above reasons your separate independent legal adviser should be able to communicate with you in plain English, and also communicate with French professionals in the technical French language they understand. This usually requires a degree of seniority and experience. A senior partner of a firm of lawyers in France may refuse to deal and communicate with a junior employee in a firm of lawyers in England. He will usually insist on dealing with an English counterpart at his own senior level. For this and other reasons you should establish from the outset precisely who will have the day-to-day conduct of your matter in England, and that diplomatic feathers will not be ruffled at the French end as a result. Will it be a partner or other senior lawyer, or will your file in fact be dealt with by a junior member of staff/secretary instead, or by a combination of all three? To avoid unnecessary confusion or duplication of work, and fees, there should only be one person responsible for the handling of your transaction. That person should where necessary be sufficiently senior to take their decisions alone without recourse to higher authority. He should also be able to 'pull rank' within the administration of his firm, for example by putting you where necessary at the top of any typing backlog (which in many law firms is behind by several days or more) to ensure as best possible in pressing cases that your interests are attended to promptly.

There is a big difference between theoretical and practical knowledge of French law. We place great emphasis on our practical experience (and not just theoretical textbook knowledge) built up through acting in thousands of French property transactions. The practical experience of owning French property and having lived and worked as a lawyer in France is also an advantage.

The level of bilingual expertise normally required to deal with your French matters warrants the involvement of someone senior at all times. There are few partners or other lawyers in England who speak French (or French lawyers who speak English) to a high technical level. Some claim to be bilingual, but in fact are not. Having a bilingual secretary to field your calls, or an inexperienced bilingual junior handling your case is not usually good enough.

Although office politics (in any country) may be invisible to you, it can have an adverse influence on your transaction. To avoid these problems, it pays to engage

independent lawyers who offer a personal service, and work as an informal and approachable team with your best interests at the top of their agenda.

8. French office mentality

Language and other barriers apart, conveyancing in France can be a relatively slow process, and the personalities involved in France are not always consumer-friendly, whether they are dealing with their own nationals, let alone foreigners. Many buyers do not have the patience and diplomacy needed for dealing with the various cultural differences and the *Administration* which is composed of French bureaucrats (local and national) who handle their transaction. The *Administration* and many other technocrats or French professionals are reluctant to use fax and e-mail to speed up the process of any transaction. Other obstructive patterns of recurrent behaviour include failure by them and others in France to reply to telephone messages, and/or to deny ever having received other communications when it suits them to do so. Some French professionals are very reliable, but others have a habit of disappearing for days on end, and for never sticking to deadlines that they themselves set. As previously stated in Para 3. above, *notaires,* estate agents and others in France are used to meeting face to face rather than working via correspondence. In the event of a dispute you may have limited or no protection if you cannot prove what was actually said (see Footnote 2).

Interestingly, most buyers who carry out their own transaction without taking separate independent legal advice blame the estate agent and/or *notaire* for any problems that arise. Under French law, a person is negligent if his error or mistake causes someone to suffer loss or damage. Even if these or other problems result in the buyer suffering reasonably foreseeable financial loss, recourse to the French courts should always be viewed as a measure of last resort. (3)

9. Why should you choose Stephen Smith (France) Ltd?

To quote from a well-known London firm of lawyers, "People generally choose the lawyers that they deserve." At Stephen Smith (France) Ltd we and, if necessary, our network of *notaires* and other lawyers throughout France can act as your intermediary. With the depth of knowledge and experience we can offer, our services are on a par with those of London lawyers, without the need to pay London fees. A number of the *notaires* who form part of our network have authored or co-authored some of the leading French legal text books covering areas which complement our own areas of expertise.

We speak the same language as you do, listen carefully to you, and work side by side with you to provide the in-depth advice and individual solutions tailored to your needs. We are proud of our independence, and take steps to ensure that our clients are kept fully informed of progress, and understand each stage of their transaction, without the need to attend meetings in our offices. We will never try to sell you a particular mortgage, life assurance or other financial product. As explained in Para 2. above, this is because it would be difficult for us to provide you with truly independent advice if we stand to gain any commission. We can however put clients in touch with recommended surveyors or financial advisers etc. We do not ask for or accept commission for referrals of any nature. We only refer you if we are convinced that you will be given the same quality of service as you expect from us. All of this means that we have no financial interest in whether or not you decide ultimately to purchase a particular property in France. This also means that we have no difficulty in telling you the truth, which in some transactions can be unpalatable, such as advising you not to go ahead. You are of

course free at all times not to take our advice as you see fit. That is your decision, but please remember that the dictionary definition of the word 'decision' is 'a choice or judgment made under conditions of risk and uncertainty.' Please pay particular note of the words 'risk' and 'uncertainty'.

We recognize that mistakes can sometimes occur. We hold substantial professional indemnity insurance cover which means that we (unlike some others who are either not insured or not adequately insured) will be in a position to compensate for financial losses that arise in the unlikely event that we make a mistake. By contrast, you cannot take out insurance against mistakes made by *notaires* or estate agents. As set out in our Business Terms, we cannot accept responsibility for the work that they or others undertake on your behalf and over whom we have no control.

You should always obtain and agree in writing a prior written quote or estimate of the fees your separate independent legal adviser will charge. A common basis is 1% of the purchase price for the transfer of the subject property, plus additional fees for French wills or similar estate planning matters. Some independent legal advisers will charge on an hourly rate based on daily time recording. There are two potential problems with a time recording system. The first problem is this: fee earners are often under such pressure from their superiors to meet annual financial targets that the temptation to overcharge is great. The second problem is that it is virtually impossible for you to accurately police the amount of time that has truly been spent on your matter. Other advisers will offer a fixed fee (which is usually better value) determined partly by the purchase price of the subject property and partly by the range and complexity of the services to be provided. Our competitive fee structures (see Chapter 10) are tailored as best possible to your specific current needs, and how they may evolve as years go by.

Some advisers will also routinely charge UK VAT at 17.5% (or French VAT at 19.6%) on all transactions involving French law, when in fact they should not usually do so (4). By instructing us in the UK, rather than instructing a lawyer in France direct, we may sometimes also be able to save you paying French VAT at 19.6%. (4)

If, despite reading all of this document the additional expense of taking separate independent legal advice is still a deterrent, please remember that much more of your money may need to be spent in putting an undiagnosed problem right. If a problem arises, you may not find an independent legal adviser who is available or wiling to deal with your matter. In any event, remedial action may not be possible.

10. Living and working in France

The UK Foreign Office currently estimates that 301,000 Britons live in France. Other estimates suggest up to 500,000. Many people move to France because of television programmes that make it look easy. A number of Britons who move to France return home, mainly because of distance, French bureaucracy, boredom (especially if you are not ready for retirement) and the language barrier. However, the number moving to France far outweighs those leaving. Those who have left France tend to be aged below 50, have underestimated the culture shock, the challenge of finding work and the notorious French *Administration.* Some banks are not lending against French bed and breakfasts or similar business ventures now unless there is separate income. Previously they would have done, but the market in France is too full now. Older expatriates sometimes feel that the unexpected tedium of life in rural France plays a larger part than bureaucracy. But the main universal problem is the language barrier.

These are some of the factors which should be carefully considered and discussed with your independent legal and other advisers if you are thinking of moving permanently to France.

12. About Stephen Smith

Stephen Smith is a bilingual French national who read French law and English law at Cambridge University. He is a French lawyer (*juriste*) holding substantial UK professional indemnity insurance, and lives and works as a French lawyer in England and in France. He is one of the leading French property law specialists in the UK, and has over 25 years experience covering all aspects of buying and selling residential and commercial property in France. Stephen is a published author on French law and tax. He appears on television and radio as an expert in French property matters, and also writes for or is quoted regularly in a broad range of specialist publications and in the UK or French press.

On a personal note, Stephen is passionate about France and French rugby. Unlike many lawyers he has a good sense of humour. He has an unfulfilled ambition to create the Society for the Preservation of Authentic Bistros in France.

13. About Stephen Smith (France) Ltd

We are a well-respected bilingual company. We provide strong cross-cultural expertise in all aspects of residential and commercial real property across France. We are experienced in handling higher value or complex French property and commercial transactions, often working closely with clients' professional advisers in the UK, France or elsewhere.

Service from Stephen Smith (France) Ltd means a comprehensive range of skills to include:

- strength in depth and breadth (we know our subject)
- personal service (we care about our clients)
- active communication (we chase unanswered communications)
- informal and approachable staff (we enjoy doing what we do)
- extremely good value (for work requiring specialist skills)

14. Conclusion

To end this document, and to echo what is said at its beginning, the fees you pay to your separate independent legal adviser are a fraction of what you will incur in France, and he may be the only independent voice you will have throughout the transaction.

FOOTNOTES

(1) It is impossible for a buyer to do all his own French conveyancing. This is because the formal legal documentation required to transfer ownership of the subject property can only be prepared by and signed in the presence of a *notaire,* who must be in practice on French soil and nowhere else. Some – usually estate agents – often argue that there is therefore no point in instructing solicitors, barristers, Notaries Public or other foreign

lawyers based in the UK (including French *avocats* or *notaires* based in the UK) or elsewhere in the world to intervene on your behalf. This is only true to the extent that *notaires* in France currently monopolize the preparation of the legal paperwork and formalities required to complete the purchase of French *immeubles.* This does not however mean that clients should be prevented from taking separate independent legal advice.

The *notaire* will not usually protect or act in your best interests. In fact, the *notaire* usually represents both the buyer and the seller in the French conveyancing, and is therefore theoretically required to be neutral. It is however very difficult for anyone to be neutral if for example they have already acted for the seller when the seller originally bought the subject property several years ago, and with whom the *notaire* has since become a personal friend. Although you are his client, and pay him his fees, the *notaire* (remember that he is part of the *Administration*) is only usually answerable to the French State for any mistakes that he makes.

Much of the day-to-day paperwork involved in French conveyancing is not handled personally by a *notaire* but by one of his unqualified *clercs* or secretaries. In other words, the *notaire* is not always familiar with the day-to-day issues of your case.

There are very few *notaires* who can both speak English very well and also have a detailed knowledge of UK law and procedures. Practice shows that most *notaires* dealing with foreigners do not advise on any of the legal consequences of cross-border issues, such as international succession and/or tax planning matters. If they do advise at all it is not unusual to see a *notaire* suggesting a French solution which may impact badly on the clients' position in his home country. In the same way, an English solution proposed by an inexperienced English lawyer to a French legal problem is not usually appropriate, and can instead be damaging to the client.

Even if cross-border matters are not an issue, most *notaires* do not see their remit as giving ad hoc advice about French law. Some *notaries* are openly hostile to clients who expect them to deal with their transaction in an active rather than a passive manner. For example, in one recent case, the *notaire* said that he was "not prepared to act like Zorro" for his English client. Another *notaire* systematically refuses "to be on sentry duty" (i.e. to play an active rather than a passive role) for his English clients. Any advice given to a buyer will not usually be volunteered by the *notaire.* It will instead only usually be given if the buyer asks the *notaire* specific questions. To put it another way, a *notaire* is not negligent for not having volunteered information about which he has not been asked. This presupposes that the buyer knows precisely what questions to ask in the first place! Where the buyer is a foreigner, even the most skilled of *notaires* may not appreciate the level of ignorance shown by his client about French law and practice.

In a recent case Mr D sued his *notaire* who had dealt with the conveyancing of a newly built house in France. The house developed cracks and other structural faults which were due to poor construction. The developer did not have insurance to deal with such matters. The *notaire* had mentioned this point in the French conveyance deed, but did not draw this important matter to Mr D's particular attention, either in a covering letter to Mr D, or when Mr D completed the transaction in person at the *notaire*'s offices. The matter went to the French Supreme Court which decided that, because the conveyance deed prepared by the *notaire*

expressly referred to the absence of insurance, the *notaire* was under no legal obligation to draw the matter to Mr D's particular attention.

In England, lawyers are aware - and usually take steps to ensure – that when advising those who seem to have little knowledge of the English legal system or indeed the language, their advice has been understood. This duty was confirmed by the House of Lords in a 2002 case where the client was Ugandan and did not speak English. The House of Lords made clear that special steps should be taken in advising people like this. In France, however, although the Montpellier Court of Appeal decided in 1997 that in advising an English client (and by implication any other foreign client) *notaires* were under 'a special duty and obligation to ensure that their advice has been understood', this decision has been systematically ignored by French *notaires.* This is partly because in France there is no legal doctrine of cases being binding as there is in the UK (see Chapter 1). The decision of the Court in Montpellier is therefore treated by *notaires* as being for guidance purposes only, and is not legally binding.

In the UK, a lawyer cannot accept instructions to act for two or more clients (e.g. buyer and seller) in the same conveyancing transaction where there is a conflict or significant risk of conflict between the interests of those clients. In France the *notaire* (who incidentally can also act as an estate agent) routinely acts for both the buyer and the seller. As previously explained in the Case Study in Par 5. it is understandably difficult for a *notaire* to act in the best interests of you (a foreigner) if he has known the local seller and/or the estate agent, with whom he may be on best terms, for many years.

The *notaire* is usually appointed by the estate agents or the seller, although the buyer can insist on appointing his own *notaire* at no extra cost. In appropriate cases we can recommend a *notaire* from our network throughout France.

The *notaire* is not usually appointed to act in a French conveyancing transaction until after a legally binding preliminary contract has been entered into between the parties. The period in which the *notaire* is usually involved is when the original contract is 'engrossed' in deed form (*acte de vente*) and signed by the parties. This completes the transaction, hence the legal term 'completion' .

Even if a *notaire* is instructed by you before you enter into a legally binding preliminary contract, his obligations are limited. For example, he will not usually find out if there are any plans to put a new motorway through or near the subject property. The *notaire* will not routinely make what in the UK are described as 'preliminary enquiries' of the seller and/or the local authority. As explained in Chapter 3, these enquiries and questions should be made at the beginning of the transaction following a reading of the preliminary contract and an inspection of the seller's registered title deeds and other documents. Enquiries made at this stage typically cover matters concerning the ownership of boundary walls, rights of others to cross or use the subject property, planning problems, mains services and any disputes involving the subject property, to name but a few potentially relevant issues. In the case of an apartment or other leasehold property, different questions should be asked. Indeed, different questions must be tailored to different types of property. These enquiries are important because the seller is under a very limited duty to disclose legal or structural defects in the subject property. The seller is not legally

obliged to answer any questions, but responses that are deliberately untruthful may make him or his agents liable for misrepresentation and/or give rise to liability in negligence in France.

Before the *notaire* can prepare the legal documents transferring ownership of the subject property to the buyer, he must check that the seller's background title is in legal order. This involves him checking that all the links in the chain of previous ownership, usually over at least the last 30 years (including dispositions following any death/divorce, gift or sale of part, mortgages and other debts etc) are unbroken. If any documents are missing, he should establish why.

Inspecting the seller's title deeds before you enter into a legally binding commitment is however preferable to dealing with matters at a later stage in the transaction. For example, the seller's registered title deeds will indicate whether or not the subject property is freehold or some lesser (e.g. leasehold) form of property. If the title deeds state that the owners of the subject property are a married couple, questions must be asked if only one person is now selling the property. Is this because one owner has died or because of a divorce? If so, what formal legal evidence exists to confirm that title to the subject property now belongs to and has been registered in the name of the individual seller? If for example the registered title deeds describe the subject property as 'a cow barn situated in 20 hectares of land', and the estate agent's particulars describe the subject property as 'a residential dwelling situated in 15 hectares of land', checks should be made to verify among other things that all the necessary French planning documents were obtained permitting the conversion and change of use of agricultural premises (the cow barn) into habitable quarters. Enquiries should also be made to explain the 'missing' 5 hectares of land. Were they sold to a third party (in which case, where are the boundaries), or are they the subject of an ongoing land dispute?

Insurance may theoretically be available to cover situations where it transpires that the seller's title to sell French *immeubles* is defective. However, for the reasons explained above, the expense of such cover is no substitute for checking (via the *notaire* or your independent legal advisers) from the outset that the seller has a clear unbroken title to the subject property.

Lawyers in the UK complain at the bad press they sometimes get. This is nothing compared to the reputation of the *notaire* within France itself. The concept of adequate professional service in France is not as developed or regulated as it is in the UK. In the UK, if a lawyer is slow and unable to organize his time in a diligent and professional manner, he might be considered as providing an inadequate professional service. *Notaires* in France do not face similar rules. It is not reassuring to note that, according to French statistics, more than 80 per cent of buyers and sellers (of any nationality) are unhappy with the level of service provided by the *notaire* appointed for them by estate agents. The rules of conduct of a *notaire* are enforced by the local *Chambre* in which reside all the necessary disciplinary powers. However, the profession is zealous in the protection of its members against complaints made by the public, which rarely therefore have a positive impact. A *notaire* may be sued in negligence, but it would be fair to say that this is not a course of action which is likely to result in success.

(2) E-mail or fax is an ideal method of communication, since it is an instant,

written and dated record of exactly what (to include attachments) has been sent/received. Parties to French conveyancing transactions are frequently required by law to address each other by registered letter (the French call this '*LRAR'*) to ensure their safe arrival. Even when the law does not so require, they should use this means of communication in all dealings with French estate agents and *notaires.* Indeed, every legal or business communication of any significance in France, irrespective of who is the sender and who the recipient, should go by registered post or courier service (e.g. DHL), whether the law requires it or not. French offices have the habit of not allegedly receiving letters, which allows them not to reply to them, and the only manner therefore in which the sender of any documents can protect himself is by the use of this relatively expensive form of postage.

(3) *Avocats* deal mainly but not exclusively with contentious matters in France. Legal disputes relating to French *immeubles* are usually always subject to the exclusive jurisdiction of the French courts. Since an excellent rule for the non-French to observe is never to become involved, if it is at all possible, in litigation in France, an *avocat* is not a professional whom you are likely to meet.

Always try to deal with any problem through mediation. As soon as professionals get involved, things can become confrontational and expensive as your legal costs mount.

A contract for the sale of French *immeubles* is subject to the general principles of the French law of contract. Remedies for breach of that contract follow normal French contractual principles. For example, unless time was of the essence of the completion date, a delay by the seller in completing your purchase of the subject property would not normally be a breach of contract entitling you to recover damages for any loss suffered as a result of the delay. It is only generally possible to recover for financial loss, and no claim can be made in respect of mental distress suffered (e.g. a spoilt holiday) as a result of any breach of contract. Damages can normally be claimed only in respect of losses which have occurred since the preliminary contract was made, thus there is generally no possibility of recovering expenses incurred at the pre-contract stage of the transaction (e.g. for the costs of a wasted survey).

Litigation in France can be extremely slow and the French have a tendency to appeal any unfavourable decision since this puts off the evil day for a long period. Litigants in France have to foot their own legal bills, rather than (as in the UK) the party who wins the case being able to land the losing party with all the legal costs. If you lose a case in France, a French court judgment can be enforced against you in the UK by virtue of the 1968 Brussels Convention on jurisdiction and the enforcement of civil judgements, and the Lugano Convention of 1988.

(4) Under UK tax law, charges in connection with work directly relating to the purchase or sale by UK residents of residential property in France are not subject to UK VAT. However, charges incurred in connection with work not directly relating to the above matters (e.g. the preparation of French wills) are within the scope of UK VAT at the current rate of 17.5%.

Under French tax law, all professional costs and disbursements you incur in connection with services undertaken by professionals in France attract French VAT ('TVA') at the current rate of 19.6%, unless you are registered

for French VAT purposes. If you are not registered for the purposes of VAT in France, we may be able to mitigate your TVA liability by instructing French professionals ourselves. Their services to us would not usually attract TVA at 19.6%.