

**The New EU Regulation (Brussels IV):
Understanding the Impact on Cross-Border Estate Planning and Administration¹
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I. The Impact of Globalization on Estate Planning

- A. Estate Planning Across U.S. State Lines: As globalization continues to make the world smaller, the number of potential traps estate-planning practitioners will encounter grows larger. In the not too distant past, the phrase “multi-jurisdictional planning” meant there was a New York domiciliary with a Florida vacation home. With 50 states and the District of Columbia, the United States essentially has 51 different jurisdictions, each having its own set of succession laws and probate procedures. Planners need to familiarize themselves with laws that aren’t part of their everyday practice and potentially open ancillary probate proceedings. To avoid possible complications, planners implement techniques such as titling real property located out of a client’s state of domicile in the name of an inter vivos trust. This simple and cost effective technique can avoid ancillary probate and generally ensures the property goes to the intended beneficiary.
- B. Estate Planning Across the Globe: But what about a country that doesn’t recognize trusts? Or even the principle that testators have the right to leave their property to whom they please? Suddenly, the differences among the various U.S. jurisdictions seem minor. This issue has been in the headlines in the last few years. For example, the U.S. press widely commented on this issue when James Gandolfini’s estate plan bequeathed Italian real estate without regard to Italian succession law.² Given that each European country has its own set of rules that can impact the ultimate disposition of property situated in that jurisdiction, namely forced heirship regimes, anyone owning property in Europe needs to appreciate that local laws may apply and ultimately impact the disposition of the property located in those jurisdictions.

¹ These materials are in part an expansion and update of an article co-authored by James I. Dougherty and Robin Paul of Withers LLP entitled “A New Tool in Cross-Atlantic Estate Planning: Implementing Regulation (EU) 650/2012,” which was published in *Trusts and Estates Magazine* in its April 2014 issue.

² E.g., Paul Sullivan, “A Public Debate Over the Wisdom of Gandolfini’s Will,” N.Y. Times (July 19, 2013).

C. The Forced Heirship Issue: Despite the differences between U.S. states, freedom of testation is a concept that's common among them. With the exception of a surviving spouse's elective share or other relatively limited restrictions,³ individuals generally have the right to make lifetime or testamentary dispositions of their property to whomever they please. This gives individuals and their estate planners great latitude in structuring an estate to achieve their dispositive goals. However, this flexibility isn't universal as assets located abroad may be subject to the succession laws of the jurisdiction where the property is situated. While the right to give property as one chooses is a cornerstone of U.S. succession law, the right to receive an inheritance is a cornerstone of many European jurisdictions' succession laws. To give some examples:

1. Italian Succession Law: Returning to the laws that could apply to James Gandolfini's Italian real estate, Italian succession rules restrict the freedom of testation by creating reserved shares in the estate.⁴ These rules apply anytime the decedent died intestate (meaning he died with no will, his will is declared void, or his will only mentioned some of the assets that are part of his estate, thus leaving the distribution of the remaining portion subject to the rules of the Italian Civile Code). These rules also apply when the decedent left a valid will to correct any distribution made by the testator in violation of the "forced heirship" provisions that are meant to protect his heirs. The amount of these reserved shares varies depending on which family members survive the decedent, and the degree of their relationship with the deceased. In a common scenario in which a decedent is survived by his spouse and two children, absent any testamentary instrument the spouse and the two children will each receive 1/3 of the estate (Codice Civile Articles 566 and 581). If the deceased left a will, the distribution would be as follows: one-half to his two children, one quarter to the surviving spouse (Codice Civile Article 542, par. 2). Only on the remaining one quarter the testator is allowed to freely make distributions as he wishes. In addition, lifetime gifts are considered and could further reduce the small share of the estate over which the decedent has testamentary freedom. It is worth mentioning here that, pursuant to a recent Italian law of December 10, 2012 no. 219, the Italian legislator has intentionally chosen to eliminate any distinction affecting the *status* of children born to parents who are legally married and those whose biological parents were not legally married. Even though the family law reform of 1975 had already modified article 566 of the Italian Civil Code to remove major

³ For example, Louisiana, despite having significantly reduced the situations in which forced heirship rules will apply, still retains the concept of forced heirship in limited circumstances. La. Rev. Stat. Ann. Sections 1493, 1495, 1496.

⁴ Art. 536-552 Codice Civile (Italy).

discriminations in their respective inheritance rights that were originally established under the 1942 Civil Code, the fact that now the Italian legislator unifies their legal *status* under the common term “child” found in article 315 of the Italian Civil Code has implications also on the Italian inheritance rules. More specifically, law no. 219 of 2012 amplifies the categories of the descendants (article 536 and 565), ascendants (Codice Civile Articles 538 and 569, 570 and 571), and siblings who at various degrees are protected by the “forced heirship” rules affecting all inheritances procedures opened after January 1, 2013. Not to mention the new “disinheritance rule” introduced by article 448*bis* of the Italian Civil Code: under this new provision, a child may eliminate his parent(s) from his inheritance for “facts” that do not necessarily fall within the definition of “unfitness to inherit” of Article 463 of the Italian Civil Code (i.e. attempt murder, undue influence, willful fabrication of a false will, willful concealment of a will, and of course the loss of any parental rights due to neglect or abusive behavior as defined by article 330 of the Italian Civil Code.) There appears to be no case law available to illustrate what type of “facts” - other than those exemplified in the causes that may lead to a declaration of “unfitness to inherit” - can support and validate a child’s provision to disinherit his parent(s) by will.

2. French Succession Law: French law similarly has the concept of a right to an inheritance of a portion of the estate, referred to as *la reserve héréditaire*, though there are differences between the French and Italian systems. The amount of these rights will first depend upon the number of children, knowing that the forced heirship rights will be of half of the estate if there is one child, 2/3 of the estate if there are two and ¾ of the estate if there are three children or more. If a child is predeceased, special rules are applied to that his/her closest descendants benefit from the forced heirship rights which the deceased child would have enjoyed if he had been alive. And in the absence of descendants, if there is a surviving spouse, he / she is entitled to forced heirship rights of ¼ of the estate. Lifetime gifts are also normally considered under French law, without any limitation in time. When determining the jurisdiction of the courts in succession matters prior to August 17, 2015, a distinction was made under French law between:

-The claims which related to real property in which case the court with jurisdiction over the location the real property is located. Therefore the French courts if the proceeding related to real property situated in France);

-Claims related to movable property (i.e. tangible or intangible personal property), in which case the court which had jurisdiction was the court of the place where the succession had started, which under French law was the place of the last domicile of the deceased.

In addition, there are exceptional jurisdiction rules (“Privilège de juridiction”) which exist in articles 14 and 15 of the French Civil Code and which allow a French citizen to bring claims against any other person or entity before a French court, even if the jurisdiction rules which are normally applicable lead to the jurisdiction of the courts of another country (article 14). Similarly, a claim against a French citizen can always be brought before the French courts (article 15). The application of these two provisions in succession matters has been confirmed on numerous occasions and the only situations in which they cannot be applied to determine the jurisdiction of the courts is in the event of claims linked to immovable property located abroad and when the decision to be issued by the French court would have to be enforced abroad. It does not seem that the application of the Regulation may have an impact on these exceptional rules, which should therefore remain alongside the new rules deriving from the Regulation.

3. German Succession Law: Even European systems that purport to allow for testamentary freedom have more limitations than the U.S. application of this concept. For example, the freedom to make testamentary dispositions of one’s estate is protected by the federal German constitution.⁵ However, unless the testator can show sufficient cause in his last will, a descendant or spouse of the deceased has a right to a payment from the estate in an amount equal to one-half of that individual’s intestate share.⁶

D. Differences in Choice of Law Provisions: For Americans with property in European countries, the question becomes to what extent will the various laws on succession apply? The answer is that it depends, as different European countries have different factors in determining what applicable law applies and to what property. Until August 17, 2015, French law had a dualist system that applied. The law of the location of the property applied to the devolution of rights held in real property while the law of the last domicile of the deceased at the time of death (a concept which seems to be quite close to what is understood, so far, to be the habitual residence under the Regulation) applied for

⁵ Grundgesetz Für Die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], Art. 14, May 23, 1949, BGBl. S. 1 (Ger.).

⁶ Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 2303, 2333 (Ger.).

the transfer of right in movable property.⁷ Other countries, such as Germany, Spain and Italy, used to apply the succession laws of the decedent's nationality.⁸ For an individual with dual citizenship in the United States and Italy and with property remaining in Italy, U.S. law may not apply for property in Italy.⁹

II. Background on Regulation (EU) 650/2012

- A. Past Efforts: While the European Union (EU) has made great strides towards uniformity, with many jurisdictions either eyeing or decrying a federal system of government, it's moved rather more slowly in terms of creating a uniform set of rules to govern succession. As a result of the unionization of Europe over the years, it's become easier and more common for an individual to hold property in multiple European jurisdictions, yet the lack of uniformity of succession law has made effective estate planning complex and difficult. After a failed attempt to create some uniformity in the Hague Conference in 1989, little progress occurred until quite recently.¹⁰
- B. Passage of the Regulation: In 2012, the EU adopted Regulation (EU) 650/2012 (the Regulation), commonly referred to as Brussels IV.¹¹ Under the Regulation, all EU countries, except the United Kingdom, the Republic of Ireland, and Denmark¹², as of August 17, 2015, when the Regulation came into effect, have a uniform rule in determining what law will apply to the disposition of a decedent's property in these jurisdictions. This will significantly change estate planning and administration for those who hold property in any of the 25 countries that are "Member States" under the

⁷ See, Code Civil [C. Civ.] Art. 3.2, 102 (Fr.)

⁸ Einführungsgesetz BGB, Art. 25 (Ger.); Código Civil (Civil Code) Art. 9.8 (Spain).

⁹ Italy does permit some degree of testamentary freedom; however, a decedent who held Italian citizenship at his death couldn't modify the forced heirship shares to heirs who were residing in Italy at the time when the person died. See, Article 46 Law no. 218, Italian International Private Statute (1995).

¹⁰ For a summary of past attempts at harmonization of European succession laws, see Barbara R. Hauser, "European Harmonization," *Trusts & Estates* (November 2010) at 62-63.

¹¹ Regulation (EU) 650/2012 of the European Parliament and of the Council of July 4, 2012, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2012 O.J. L 201/107 (Regulation (EU) 650/2012).

¹² More specifically: Denmark "opted out" because, as a country, it's not involved in the progressive unification of the private international law that is taking place within the EU altogether and in fact, under articles 1 and 2 of the Protocol No. 22, no judicial cooperation matter applies to that country (see Whereas 83); U.K. and Ireland, instead, did not "opt in" because, even though both countries were part of the negotiation process that lead to the adoption of Regulation (EU) 650/2012, for their own reasons (mainly: fear of the impact of the "claw-back" provisions; desire to maintain their "dualistic approach" for immovable and movable assets respectively, as opposed to the extensive "universal approach" adopted by the Regulation (EU) 650/2012; preference for their probate procedure which encompasses the administration of the estate phase) they decided not to be bound by it at this time, without prejudice to notify their intention to accept it after its adoption basically at any time pursuant to article 4 of the Protocol No. 21 (see Whereas 82).

Regulation's terms.¹³

III. The Terms of the Regulation

A. Effective Date

1. Text of Regulation:

"Article 83: Transitional Provisions

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015...

Article 84 Entry Into Force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 17 August 2015, except for Articles 77 and 78, which shall apply from 16 January 2014, and Articles 79, 80 and 81, which shall apply from 5 July 2012."

B. Analysis: While the Regulation allowed for some planning opportunities prior to August 17, 2015 (as discussed below), it is only effective for those dying after August 17, 2015.

C. What Areas of Law the Regulation does Not Cover: The Regulation specifically excludes certain areas of law.

1. Text of Regulation: Article 1 of the Regulation states:

"Article 1: Scope

1. This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;

(b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;

(c) questions relating to the disappearance, absence or presumed death of a natural person;

(d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;

¹³ The 25 EU countries that will have the Regulation apply and are referred to as "Member States" in these materials are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. Though the United Kingdom, the Republic of Ireland and Denmark will not adopt the Regulation in lieu of their own succession laws, there is still some uncertainty as to whether under the terms of the Regulation they are given the same treatment as Member States or "third States" by the 25 states that will be applying the Regulation. The U.S. is clearly a "third State" under the terms of the Regulation. Despite the confusion generated by the terms improperly used throughout the Regulation (EU) 650/2012 (see, for example, Article 20, Article 34(1) and Whereas (58)), some authoritative commentators suggest that the distinction should be not so much between Member States and non-Member States, but rather between states that are bound by the Regulation (EU) 650/2012 and those who are not. Under this approach, Denmark, U.K. and Ireland would then be considered as Member States not bounded by the terms of the Regulation (EU) 650/2012. See Section V(E) of this outline for a further discussion on this issue.

- (e) maintenance obligations other than those arising by reason of death;
- (f) the formal validity of dispositions of property upon death made orally;
- (g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);
- (h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;
- (i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;
- (j) the creation, administration and dissolution of trusts;
- (k) the nature of rights in rem; and
- (l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register."

2. Analysis: Many of those most important areas of law that are intertwined with estate planning and succession law are explicitly not addressed by the Regulation. Notably, matrimonial property schemes are excluded from its scope.¹⁴ Thus, Member States that have community property regimes or other similar concepts will still have laws that effectively restrict the right of testamentary freedom by deeming a certain part of the estate owned by the surviving spouse. The Regulation also limits itself to property transferred by succession as opposed to other common planning vehicles that are based on other contract or property rights, such as life insurance, pension plans or joint ownership.¹⁵ The Regulation also excludes from its scope "the creation, administration and dissolution of trusts..."¹⁶ Taking these restrictions together, while the Regulation is meant to achieve the significant feat of providing a level of uniformity in estate succession law across 25 separate sovereign countries—

¹⁴ Regulation (EU) 650/2012, *supra* note 11, Art. 1(2)(d), at 201/116. Currently, the matrimonial property regime is regulated by each EU member pursuant to its private international rules, including any applicable international convention (most notably, the Hague Convention of 14 March 1978 on the Law Applicable to the Matrimonial Property Regimes which, as of 19 April 2016, is effective in only three countries: France, Luxemburg, and Netherlands. See the 1978 Convention's status table here: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=87>.) Therefore France, Luxemburg and Netherlands follow the rules of the 1978 Hague Convention, and any other EU Member State follows its own private international rules. Italy, for instance, follows the principles set out by Law of May 31, 1995 no. 218, and more specifically by its article 29 which relies on the common national law of the two spouses (par. 1) or, if the spouses have different or more than one citizenships, on the law of the State where their marital life is predominantly located (par. 2). Within the EU system, there is a "Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM/2011/0126 final - CNS 2011/0059)" which was adopted on March 16, 2011. This raises the question of whether this is the first step towards a new EU Regulation on this matter.

¹⁵ *Ibid.* Art. 1(2)(g), at 201/116. However, the fact that the Regulation (EU) 650/2012, as a uniform sets of rules on conflicts of law, limits its scope to inheritance procedures strictly intended with no consideration of any alternative methods to distribute the deceased's assets (such as POD accounts, insurance policies, and trusts) shouldn't be necessarily seen as a sign of hostility towards such alternative methods. Some commentators actually talk about a "libertarian philosophy" of the Regulation (EU) 650/2012 that favors the testator's freedom to dispose by will and the autonomy of the parties. See Andrea BONOMI, Patrick WAUTELET, "Il Regolamento europeo sulle successioni", *Giuffrè Editore*, 2015, at page 472, 473.

¹⁶ *Ibid.* Art. 1(2)(j), at 201/117.

there are limitations as the Regulation doesn't provide uniformity or the freedom to choose the applicable law regarding many items that are common U.S. estate-planning techniques. The Regulation also doesn't address estate or inheritance taxes imposed by the Member States, which includes whether the Member State will release the assets before any tax liability has been satisfied.¹⁷

D. Choice of Law

1. Applicability of Regulation to All Estates:

i. Text of Regulation:

"Article 20 Universal Application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State."

- ii. Analysis: The rules regarding the choice of applicable law aren't dependent on the decedent being a citizen or resident of one of the Member States, nor does the applicable law need to be that of a Member State.¹⁸ Thus, the provisions of the Regulation are relevant to any person who has property located in a Member State. Even more so if we consider the impact that a provision such as Article 10 entitled "Subsidiary Jurisdiction" might have on a person's case¹⁹. Pursuant to Article 10(2), the jurisdiction of a Member State is limited to the assets located in its own territory ("limited jurisdiction"). However, in the cases regulated by Article 10(1) (i.e.: when the deceased had the nationality of the Member State at the time of death (Article 10(1)(a)) or when the deceased had his previous habitual residence in that Member State and the court is seised within 5 years since his change of habitual residence (Article 10(1)(b)), the court's jurisdiction to rule on the succession theoretically covers "the succession as a whole". This provision has been interpreted as including the assets located in non-EU countries, regardless of the value or the importance of the assets located in the EU

¹⁷ *Ibid.* Art. 1(1), at 201/116.

¹⁸ *Ibid.*, Art. 20, at 201/120.

¹⁹ Article 10 of the Regulation (EU) 650/2012 entitled "Subsidiary jurisdiction" states: "1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as: (a) the deceased had the nationality of that Member State at the time of death; or, failing that, (b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed. 2. Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member States in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets."

member state, and having no regards to the nature of the assets.²⁰

Example: At the time of his death, a US citizen was habitually resident in Florida. Two years before the court's procedure started, his habitual residence was in Italy, where he still owns an apartment. Pursuant to Article 10(1)(a), the Italian court has a general jurisdiction over his succession as a whole. They will apply Florida law to his mobile assets and to his immovable assets located in Florida, and Italian law to the succession involving the apartment located in Italy because Florida law renvois to the law of the place where the property is located, i.e. Italy, and this *renvoi* must be accepted pursuant to Article 34(1)(a).²¹

How can this be avoided? There are two possibilities: 1) Article 6 of the Regulation ("Declining of jurisdiction in the event of a choice of law"): If the deceased person has made a choice of law, the court seized pursuant to Article 10 may decline jurisdiction in favor of another Member State's court at the request of one of the parties to the proceeding (not *ex officio*) if it considers that the courts of the member state of the chosen law are better placed to rule on the succession taking into the account the practical circumstances of the succession (such as the habitual residence of the parties and the location of the assets) or the parties to the proceedings have agreed to confer jurisdiction on a court(s) of the Member State of the chosen law²²; 2) Article 12(1) of the Regulation ("Limitation of proceedings"): The judged seized pursuant to Article 10 may refrain from deciding on certain assets located in a third country if "[...] it may be expected that its decision in respect to those assets will not be recognized and, where applicable, declared enforceable in that third State." Article 6 and 12 of the Regulation are the expression of the EU legislator's intent to adjust its aspirational "universal approach" to conceive the "succession as a whole" expressed by Article 4 to the reality that other countries may not agree with its vision and intents.

2. Applicability to the Entire Estate:

²⁰ See Andrea Bonomi and Patrick Wautelet, "Il Regolamento europeo sulle successioni", cit., pages 162, 165.

²¹ This example is taken from *Ibid.*, at 168.

²² Notice that only the courts of Member States are mentioned in Article 6 of the Regulation, as the intent is to unify forum and applicable law.

i. Text of Regulation:

"Article 23 The Scope of the Applicable Law

1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.
2. That law shall govern in particular:
 - (a) the causes, time and place of the opening of the succession;
 - (b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;
 - (c) the capacity to inherit;
 - (d) disinheritance and disqualification by conduct;
 - (e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;
 - (f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);
 - (g) liability for the debts under the succession;
 - (h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;
 - (i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and
 - (j) the sharing-out of the estate."

- ii. Analysis: One of the most important choice of law provisions of the Regulation is that the applicable law shall govern the entire estate, effectively eliminating any distinction between real property and other property, such as under French law, as discussed above.²³

3. Default Under Regulation:

i. Text of Regulation:

"Article 21 General Rule

1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.
2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State."

ii. Analysis

- a. Law Determined by Habitual Residence: In terms of what law will apply, in the absence of the election discussed below, "the law

²³ Regulation (EU) 650/2012, *supra* note 11, Art. 23, at 201/120-121.

applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.”²⁴ Instead of some countries looking to the law of the decedent’s nationality, place of domicile or residence, now there’s one uniform rule—the law of the decedent’s place of “habitual residence” at the time of death shall govern. This is a key term used by the EU legislator to establish, under certain conditions, both the applicable law as well as the competent jurisdiction: as such, it can only have an autonomous and uniform interpretation throughout the EU²⁵ (not left to the single Member States), having regard to the context of the provisions and the goals of this specific regulation²⁶.

- b. Definitional Issue: While this rule seems to simplify matters, there are two issues in applying it. First, the term “habitual residence” isn’t a defined term in the Regulation. The preamble to the Regulation does provide some guidance stating: “[a]n overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking into account all relevant factual elements, in particular the duration and regularity of the deceased’s presence in the State concerned and the condition and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.”²⁷ In some cases, the habitual residence of a decedent may be obvious. However, as noted in the preamble to the Regulation, determining a decedent’s habitual residence “may prove

²⁴ *Ibid.* Art. 21(1), at 201/120.

²⁵ See, Case C-523/07, A, [2009] ECR I-2805 (delivered April 2, 2009), point 34. (addressing the need for a community definition of “habitual residence” in the context of Regulation (EU) 2201/2003 of the European Council of November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels II”).

²⁶ *Ibid.*, point 35.

²⁷ Regulation (EU) 650/2012, *supra* note 11, Whereas (23), at 201/109. This is a notion whose origins are in the international legal community: it’s often found in the Hague Conventions of private international law (see Article 3(2) of the 1989 Hague Convention), and it’s also used by the majority of the private international law EU sources of law on both commercial and family law matters. For example, it’s used by the EU Regulation Rome I (contractual obligations), Rome II (non contractual obligations), Rome III (divorce and separation of the spouses), and finally by the Regulation (EC) 4/2009 on maintenance obligations. Brussell II-bis (covering divorce and the protection of minors) also uses the “habitual residence” criterion, more specifically to determine the jurisdiction.

complex.”²⁸ The preamble provides examples, such as someone who was resident in one place due to business but kept his family and social ties elsewhere or the case of someone who moved so regularly that determining the last place of habitual residence would be difficult. Furthermore, the Regulation doesn’t require a minimum amount of time needed in order to validly establish a “habitual residence”: considering how easily a EU citizen can establish his residence in any of the EU countries, this significantly amplifies the possibilities available to the deceased person to subject his succession to various applicable laws (absent any valid choice of law, of course). Some guidance may be found in the European Court of Justice case law that defines the “habitual residence” as situated in the place where a person has established his interests (the “center of his life”)²⁹, not to be confused with a mere temporary and occasional presence³⁰ as, in principle, it should have a certain length and express a sense of stability³¹. Personal and familiar ties should prevail over a person’s professional connections to a place³²; however, the importance of the place where a person engages in a profession may vary depending on how central that profession is to the individual. Though the preamble provides examples, it provides no answers or bright line rules, but such is the nature of international law.

- c. Exception to Habitual Residence: Another issue in applying the rule of habitual residence is there’s an exception to the rule. Another jurisdiction’s law may apply if “it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State” other than that of the habitual residence.³³ Once again, there’s no clear rule on what constitutes a situation in which this exception would be implemented. Thus, there’s a general rule that’s not entirely clear and an exception that’s not entirely clear,

²⁸ *Ibid.* Whereas (24), at 201/109.

²⁹ Case C-497/10PPU, *Mercredi*, [2010] ECR I-14309 (delivered December 22, 2010), point 51.

³⁰ Case C-523/07, *A*, cit., point 38.

³¹ *Ibid.*, point 44.

³² Case C-523/07, *A*, cit., point 44; Case C-497/10PPU, *Mercredi*, cit., points 54 and 55.

³³ Regulation (EU) 650/2012, *supra* note 11, Art. 21(2), at 201/20.

and uncertainty as to what law will apply can make structuring an estate plan extremely difficult for individuals who may be borderline cases (which by the way defies the goal of certainty announced by Whereas (37) of the Regulation). While this may not be ideal, as of August 17, 2015 these provisions are now in force in the 25 Member States so planners for individuals with property in any of these jurisdictions must be aware of this significant change. This exception is seen by authoritative authors as something that should be interpreted in strict terms, and certainly not to avoid the application of “forced heirship” rules that would otherwise come into play based on the laws of the deceased’s last habitual residence (this can only be accomplished by relying on the “ordre public” principles mentioned by Article 35 of the Regulation)³⁴. Judges can apply this exception “ex officio”³⁵, but never to overcome a specific choice of law made by the decedent pursuant to Article 22 (where this exception is not mentioned). Finally, the application of this exception clause may change only the applicable law, not the jurisdiction: this may easily lead to situations where EU courts apply the laws of a third country³⁶. However, uncertainty is only one face of the medal; flexibility in evaluating a case based on factual circumstances is another.

Example # 1: An Italian citizen dies immediately after he had launched a new business venture in Switzerland, where he had recently relocated to take care of his business. His habitual residence was, therefore, in Switzerland. However, his family remained in Italy, and most of his assets of a certain value (a house, bank accounts, pension plans, a collection of cars, etc.) are also located in Italy. In this situation, an Italian court could *ex officio* determine that the deceased was “manifestly more closely connected” with Italy than to Switzerland, thus applying Italian law *in lieu* of Swiss law.

³⁴ See Andrea Bonomi and Patrick Wautelet, “Il Regolamento europeo sulle successioni”, cit., page 234.

³⁵ The judge can use it regardless of the parties’ prior specific request.

³⁶ One should remember that, pursuant to Article 6(1) of the Regulation (EU) 650/2012, courts may decline their jurisdiction only where the deceased has made a valid choice of law as allowed under the terms of Article 22 (national law).

Example # 2: While vacationing in Italy, a US citizen has a serious car accident. The nature and extent of injuries suffered because of this accident force him to be hospitalized in an Italian health care facility, against his will, for about six months. During that time, and not knowing how his recovery will progress, his wife decides to temporarily move to Italy with the couple's minor child in order to be able to better assist him. The wife rents a small apartment, opens an Italian bank account where she deposits a substantial amount of money needed to cover the husband's medical expenses as well as her family's ordinary needs, and enrolls the child into a local preschool. She does not sell the family's main residence located in California as she hopes to be able to return to the US as soon as possible; however, if her husband's recovery does not improve, she is open to that possibility due to financial constraints. In a consequence of ongoing and concurring major health issues, the husband suddenly dies in Italy. He dies intestate leaving real and personal property both situated in California. Could the husband's "habitual residence" be in Italy, pursuant to the terms of Article 23(1) of the Regulation, or should we consider him "more closely connected" to California using the exception of Article 23(2)?

The Election:

iii. Text of Regulation:

"Article 22 Choice of Law

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.
4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death."

iv. Analysis

- a. Overview: While the Regulation may create a new default rule

that has some uncertainties, it provides estate planners with a potentially powerful tool that can provide a greater degree of certainty and has the potential to provide a more desirable law that will govern the disposition of property. Under Article 22 of the Regulation, “[a] person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.”³⁷ This allows any individual with property in one of the 25 Member States to proactively select the law of his citizenship, which should be valid even if the chosen law does not provide for a choice of law in matters of succession (see Whereas (40)), thus greatly extending the possibilities offered to the testator. In the case of dual citizens, they may select which nation’s laws will apply.³⁸ This gives Americans, including dual citizens, who would otherwise be potentially exposed to forced heirship rules, the ability to effectively reclaim their freedom of testation by making this election³⁹. The determination of the testator’s citizenship(s) is a preliminary question that is not covered by the scope of the Regulation no. 650/2012 as it is left to the free, legislative determinations of each individual country; as such, an individual’s multiple citizenship *status* cannot be contested or discussed by the authorities of other countries under the pretense that the other citizenship is not effective⁴⁰.

- b. Timing: Timing matters for making the election, both in terms of what law will apply and the effectiveness of the election. A U.S. jurisdiction’s law may be chosen if the person making the

³⁷ Regulation (EU) 650/2012, *supra* note 11, Art. 22(1), at 201/120.

³⁸ *Ibid.*

At the same time, international estate planners should be very sensitive to the implications connected to the fact that their client has (or might have) more than one citizenship. For example, Italy relies on the Italian law of February 5, 1992 no. 91, effective as of August 16, 1992 (as implemented by the Presidential Decree of October 12, 1993 no. 572) whose article 13, letter d), includes a little-known (yet quite dangerous) provision that defines the conditions under which it is possible to automatically re-establish a previously lost Italian citizenship solely based on the continuous legal residence in Italy for more than one year. For many naturalized U.S. citizens who were born in Italy and who, after their retirement, decide to spend sometime in Italy, this provision might trigger the automatic re-establishment of their Italian citizenship (which they had lost due to their naturalization completed before August 16, 1992). To the eyes of an international estate planner, this detail (coupled with the fact that his client actually relocated in a country bound by the Regulation (EU) 650/2012) is extremely relevant, because it invites the possibility that his U.S. client might be exposed to the provisions of the Regulation (EU) 650/2015 by virtue of his “habitual residence” (which, pursuant to its Article 4, may radicate an Italian court’s “general jurisdiction” on his succession “as a whole”).

⁴⁰ Case C-369/90, *Micheletti*, [1992] ECR I-4239 (delivered July 7, 1992), points 10-11; Case C-148/02, *Garcia Avello*, [2003] ECR I-11613 (delivered October 2, 2003), point 28; Case C-168/08, *Hadadi*, [2009] ECR I-6871 (delivered July 16, 2009), points 51-56

election is a U.S. citizen at the time of the election or the time of death. For those who are U.S. citizens for life, this timing requirement is of little concern. However, for those considering expatriation to a jurisdiction that has less testamentary freedom, making the election prior to renouncing citizenship could make the timing matter a great deal⁴¹. Likewise, an individual who is in the process or plans to obtain U.S. citizenship may still make the election to have U.S. law apply prior to becoming a citizen, provided that the person ultimately dies a U.S. citizen. As this provision of the Regulation was not effective until August 17, 2015, no effect will be given to the election for those who die prior to that date. Individuals may have validly made the election prior to August 17, 2015- provided that it complies either with the provisions of the Regulation or in application of the rules of private international law which were in force at the time when the choice was made in the of state his habitual residence or the state(s) whose nationality(ies) he possessed - and it will be valid if the individual survived until August 17, 2015.⁴²

- c. Form of Election: Procedurally, to make the election, a U.S. individual would include it in his last will. The Regulation requires that an individual seeking to avail himself of the new ability to select the law of one's nationality must do so "in a declaration in the form of a disposition of property upon death..."⁴³ For a U.S. individual, this would be his last will, provided that it's valid in the applicable U.S. jurisdiction.⁴⁴ In making the election, the testator should not only be stating that the chosen law applies to the disposition of property and administration of the estate, but also the substantive validity and admissibility of the last will and testament.⁴⁵ If, for some reason, the individual wishes to revoke the choice of law that was properly made, he must do so in a fashion that "meet[s] the requirements as to form for the modification or revocation of a disposition of property upon

⁴¹ However, Whereas (40) of the Regulation (EU) no. 650/2012 also states that "a choice of law under this regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession."

⁴² Regulation (EU) 650/2012, *supra* note 11, Art., 83(2), at 201/133.

⁴³ *Ibid.* Art. 22(2), at 201/120.

⁴⁴ Note that the issue of which state's law is applicable for purposes of an instrument's validity is similar to that of which state's law may be selected as previously discussed.

⁴⁵ Regulation (EU) 650/2012, *supra* note 11, Art. 24(2), at 201/121.

death.”⁴⁶ So a revocation of the will or a codicil amending the specific election would effectively revoke the choice of law previously elected. It should be noted that in the absence of an election regarding the choice of law, under the Regulation, the law that would be applied by a Member State to the validity of the testamentary instrument is similar to the default rule in regards to the applicable law of succession, which would generally be the jurisdiction of habitual residence. However, the timing is different as the succession law that would govern the administration of the estate is determined by the habitual residence at the time of the person's death, while the law regarding the validity of the document is based on where the person was habitually residing at the time the document was executed unless the law elected was chosen for these purposes.⁴⁷

d. Validity Issues from a French Perspective:

- i. Until the Regulation came into effect, the law which was applied, under French law, to the formal and substantive validity of such declarations was the law of the succession, with the consequence that various laws could apply if there were different succession laws because some assets were located in various countries. The Regulation now provides for a different rule as far as the formal validity of such declarations is concerned. Under Article 28 of the Regulation, testamentary instruments will be valid if they are made in accordance with the succession law elected under Article 22, or in accordance with the law of the state in which the person making the declaration has his habitual residence (no “renvoi” being allowed in the latter case).
- ii. Particular consequences also stem from the wide definition of “dispositions of property upon death” under the Regulation, with Article 3(1)(d) providing clearly that dispositions of property upon death include not only

⁴⁶ *Ibid.* Art. 22(4), at 201/120; Art. 24(3), at 201/121.

⁴⁷ *Ibid.* Art. 24(1), Art. 24(2), at 201/121.

wills, but also joint wills and agreements as to successions. On the contrary, the formal validity of oral dispositions of property made upon death is excluded from scope of Regulation (Article 1(f)). This is already different from French law under which the authorised dispositions of property upon death normally include:

-Wills, which are normally made in writing and have to be handwritten, dated and signed in order to be valid (“testaments olographes”) but can also be executed before a “notaire” (“testament authentique”);

-Exceptionally, but increasingly, particular types of succession agreements:

Although such agreements are in principle contrary to the public policy under French law (see articles 722 and 1130,2 of the French Civil Code), the number of exceptions to this rule has grown progressively to include various instruments such as waivers to forced heirship rights (“renonciation anticipée à l’action en réduction”), gifts of future property made to the surviving spouse (“donations entre époux au dernier vivant”) and gifts by which the donor already apportions part of his assets among his future heirs (“donations-partages”).

But French law does not recognize the concept of joint wills (“testaments conjonctifs”), which are prohibited under article 968 of the French Civil Code. The situation was of course slightly different in an international context, in which the applicable law may not be French law, and the Regulation now brings significant changes to these rules.

a.The formal validity of dispositions of property upon death under French Law

First, France ratified the 1961 Hague Convention on the conflict of laws relating to the form of testamentary dispositions which was applied before the August 17, 2015 to

issues of validity of testamentary dispositions and which will continue to be applied on the basis of Articles 75(1) and 75(2) of the Regulation. This will apply not only to wills, but also to joint wills, a solution which is in conformity with the case law which had progressively emerged in France on the issue of the validity of joint wills in France in an international context, which was already a matter of formal validity. But the 1961 Hague Convention never applied to succession agreements, which are considered to be outside of its scope and, under the Regulation, the formal validity of such agreements will therefore be determined on the basis of Article 27 of the Regulation. It is also important to note that no “renvoi” will arise in any of these instances, whether the validity is determined on the basis of the 1961 Hague Convention or, when succession agreements are being considered, in accordance with the Regulation (see Article 34(2) of the Regulation).

b. The substantive validity (also incorporating questions of the admissibility and of the binding effects) of the disposition of property upon death

The substantive validity of wills and joint wills in an international context was traditionally governed by the succession law in France, which was of course determined at the time of death. But, under Articles 24 and 26 of the Regulation, the law to be applied in this field is now the law which would have been applied to the succession if the person had passed away on the day of the execution of the will (and not at the time of death). The Regulation also allows choices of law in relation to the substantive validity of wills and joint wills. This is an important point to remember when drafting choice of law provisions, as it is essential that the succession law is extended to the law to be applied to the disposition of property upon death, to avoid any difficulty and potential incompatibility between two different applicable laws. But the situation is different as far as agreements as to succession (“pactes successoraux”) are concerned. Traditionally, such agreements were recognised by French courts, in an international context, if the succession was governed by a foreign law which allowed such agreements. The Regulation, which addresses the question of substantive validity of these instruments under Article 25, now provides clarity on this point as well as interesting estate planning opportunities. First, the definition of succession agreements under Article 3(1)(b) is quite wide and includes any “agreement, including an agreement resulting from mutual wills, which with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement”. It is therefore clear that such succession agreements for instance include not only “mutual wills”, but also French “donations entre époux de biens à venir” and “donations-partages”. Secondly, the substantial validity of such

agreements will be determined differently if the agreement relates to the succession of only one person or of several persons, with the possibility to choose the succession law in all these instances, which is a very useful tool for securing the recognition of such agreements in the future succession. In addition, under Article 23(1), when the agreement relates to the succession of several persons, the parties to the agreement can choose as the law governing the admissibility, the substantive validity and the binding effects of this agreement “the law which the person or one of the persons whose estate is involved could have chosen in accordance with article 22...”. On the basis of this provision, it seems that testators can use extended planning opportunities as they are able to benefit from the provisions of a law which is not the law of their nationality...

- v. State Law Selection: There are some issues that must be considered in applying this election. One question, of particular concern for Americans is what law would apply if the election was made. The text of the Regulation says that a person can chose the law of “the [country] whose nationality he possesses...”⁴⁸ This provision presumes that the country has a single law of succession, however, the United States has no national law of succession as each U.S. state has its own set of laws. So the question becomes—which U.S. state’s law would apply? The Regulation includes provisions for selecting the law of a country that has multiple territorial units (such as U.S. states) in determining which law should apply.⁴⁹ The first analysis under the Regulation is to apply the country’s internal conflict-of-laws rules.⁵⁰ The United States has no codified federal set of conflict-of-law provisions to determine which

⁴⁸ *Ibid.* Art. 22(1), at 201/120.

⁴⁹ Article 36 (States with more than one legal system – territorial conflicts of laws) of the Regulation addresses this issue and reads:

"1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the deceased, be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to the law of the territorial unit with which the deceased had the closest connection;

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

3. Notwithstanding paragraph 2, any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the relevant law pursuant to Article 27, in the absence of internal conflict-of-laws rules in that State, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had the closest connection."

⁵⁰ *Ibid.* Art. 36(1), at 201/124.

state's law should apply, and it's jurisprudence generally leaves the issue of succession to the states.⁵¹ However, both the federal and state jurisprudence as well as the *Restatement Conflict of Laws* suggest that a decedent's domicile is the proper determining factor.⁵² So there is a tenuous argument to be made that domicile would be the appropriate determination of what U.S. state's law should apply. However, the stronger argument is that the United States does not have its own conflict-of-laws provisions for purposes of the Regulation. The Regulation provides that in cases in which a country doesn't have internal conflict-of-laws rules and the individual's nationality is the determinative factor, the law of the territorial unit that the decedent had "the closest connection" will apply.⁵³ This approach seems to produce a fair result in line with the purposes of the Regulation as it allows U.S. citizens to elect a law, but not to forum shop by providing guidance on which state's law should apply. For U.S. citizens domiciled in a U.S. state, that would be the state the individual had the closest connection with. U.S. citizen residents domiciled abroad would be able to select the state that they had the closest connection with.

4. Renvoi:

i. Text of Regulation:

"Article 34 Renvoi

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law.

2. No renvoi shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30."

ii. Analysis

a. When an Election is Made: Another important aspect of the election is the elimination of *renvoi*. The concept of *renvoi* is an aspect of private international law that can create further

⁵¹ See *Marshall v. Marshall*, 547 U.S. 293 (2006) (for a discussion of the "probate exception" to the federal judiciary's jurisdictional powers); *Ellis v. Davis*, 109 U.S. 485, 495-498 (U.S. 1883) (holding that as the power to make a will is derived from state law, the law governing the instrument and its validity must also be state law).

⁵² *Harrison v. Nixon*, 34 U.S. (9 Pet.) 483 (1835) ("In regard to personalty, in an especial manner, the law of the place of the testator's domicile governs in the distribution thereof..."); *Restatement (Second) of Conflict of Laws* Section 316 (1971).

⁵³ Regulation (EU) 650/2012, *supra* note 11, Art. 36(2)(b), at 201/124.

complexity in determining what law will apply. The underlying issue of *renvoi* is whether one jurisdiction will accept another jurisdiction's law calling for another law to apply. For example, prior to the Regulation coming into force, the law of a Member State may call for a U.S. state's law to apply to an estate of a person domiciled in the Member State. Generally, U.S. succession law for all but real property is based on the decedent's domicile. Thus, the U.S. state's law would call for the law of the Member State to apply as the decedent was domiciled there. This confusion can be avoided as a result of the Regulation to the benefit of the individual making an election. Under the terms of the Regulation, no *renvoi* would apply if an individual made an election for a certain law to apply.⁵⁴ A U.S. individual domiciled outside of the United States who makes an election for a U.S. state's law to apply would do so even if that state's conflict-of-law rules would have applied the law of the person's domicile.

- b. Without an Election: Importantly, in the absence of an election, Member States will accept *renvoi* from non-Member States, such as the United States. Thus, if the U.S. jurisdiction's conflict of law would apply a Member State's law to real property located in that Member State, that European jurisdiction would accept *renvoi* and apply its own succession law. Thus for those habitually residing in the United States holding real property in a Member State, relying on the new default rule wouldn't remove the property from potential forced heirship rules.
- c. Result of the Change from a French Planning Perspective: Before August 17, 2015, "renvoi" (single or double) was applied under French law, with a requirement made in some court decisions that it achieved unity in the succession law. The concept of "renvoi" is now greatly limited under Article 34 of the Regulation but nevertheless remains very relevant when the succession involves a third states such as the United States of America (and its different states) and may be a very good incentive to make a choice of succession law, as "renvois" will

⁵⁴ *Ibid.* Art. 34 (2), at 201/124.

not occur in such instances.

E. Simplifying Probate:

1. Cross Border Administration: The Regulation not only helps individuals during life plan the disposition of their estates, but also, it will help those administering these multi-jurisdictional estates. One issue that can often complicate multi-jurisdiction estate administration is local law limiting who may serve as the executor or administrator and what powers that person has. The Regulation directs that the individual entitled to administer the estate under the applicable law should be appointed by a Member State provided the appointment of an administrator was mandatory or mandatory upon request.⁵⁵ In addition, the powers that the executor or administrator may be given by the Member State are those the executor or administrator would have under the applicable law of succession.⁵⁶ However, the Member State courts have discretion in what powers are permitted under applicable law, as they may place restrictions on the exercise of the powers if the Member State court finds it necessary to protect those who have an interest in the estate, such as creditors.⁵⁷ Further, when the applicable law is that of a non-Member state, such as a U.S. jurisdiction, the Member State “may, by way of exception” determine that its own local law should govern what power the executor has.⁵⁸ While these exceptions may limit the potential benefits of the Regulation, generally it puts those who are appointed as executors in a better position than they’re in under current law.

2. Jurisdictional Issues: The Regulation does not distinguish between movable and immovable property and provides that the jurisdiction is normally determined on the basis of the last habitual residence of deceased. There is also a guarantee given under Article 10 (“subsidiary jurisdiction”) that the courts of a Member State in which some assets are located will have subsidiary jurisdiction for at least all claims relating to those particular assets. Finally, other rules provided under Article 6,⁵⁹ as well as under Articles 17 and 18 (situations involving multiple claims in the same succession before the courts of different Member States) and Articles 39 and 43 (recognition and enforcement of decisions and court settlements within the Member States) have an important impact on the way

⁵⁵ *Ibid.*, *supra* note 11, Art 29(1), at 201/123-124.

⁵⁶ *Ibid.* Art. 29(2), at 201/124.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* Art. 29(3), at 201/124.

⁵⁹ When the deceased chose the succession law, the court which is seised of a matter relating to his succession may decline its jurisdiction, upon the request of one of the parties to the proceedings, if it considers that the courts of the Member State of chosen law are better placed to rule on the succession.

succession proceedings are now being managed in Member States, when there are assets in different Member States.

3. Cross Border Documentation: Another issue that often complicates multi-jurisdictional estate administration, even within the United States, is presenting documentation attesting to the authority and powers of an executor or administrator duly appointed by an appropriate jurisdiction. While the documentation is usually effective in the jurisdiction it's issued in, its validity may not be recognized or understood outside of that jurisdiction. This often leads to the executor having to obtain local documentation, which may only be possible with ancillary probate proceedings. The Regulation seeks to address this issue within the Member States by creating a European Certificate of Succession (the Certificate).⁶⁰ An executor may, but isn't required, to petition a Member State court that has jurisdiction over the estate to issue a Certificate. The Certificate would provide details as to what law governed the administration of the estate, who was appointed executor and the powers the executor has.⁶¹ Just as important as the Regulation allowing the executor to obtain a Certificate, parties located in any of the Member States who transfer property to an executor on the basis of the Certificate are deemed to have given the property to someone properly authorized to receive it.⁶² How the Certificate will work across various jurisdictions in practice is yet to be seen, but in theory it may be easier for a Croatian appointed executor to act in Finland than a California appointed executor to act in Florida. Another aspect of the cross-border documentation, in line with the Regulation's main intent to "[...] facilitate the removal of obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications"⁶³, is the ample recognition given to "authentic instruments" formally drawn up or registered as authentic in a Member State [that is, a member state that is bound by the Regulation]. This reflects the importance of the Roman-Germanic legal tradition within the EU legal system, and goes hand-in-hand with the role and function of notaries that belong to the Latin-type notarial system.⁶⁴ Though not public authorities, these notaries are nonetheless assimilated to them because

⁶⁰ *Ibid.* Art. 62, at 128.

⁶¹ *Ibid.* Art. 68(i)(o), at 201/130.

⁶² *Ibid.* Art. 69(3), at 201/130.

⁶³ *Ibid.*, see Whereas (7).

⁶⁴ Many associations of notaries from countries that follow the Latin-type notarial system are members of the International Union of Notaries, a non-governmental organization legally incorporated in 1950 with registered office in Rome, Italy. See the website here: <http://www.uinl.org/1/home-page>.

“empowered for that purpose by the State of origin”⁶⁵. Article 59 of the Regulation uses the term “acceptance” to extend the “evidentiary effects” of an authentic instrument established in one Member State into another which, according to Whereas (63), “[...] should be interpreted as referring to the contents as to substance recorded in the authentic instrument.” Therefore the intervention of the competent authority in preparing an “authentic instrument” is not limited to the authentication of signatures of the parties involved, but encompasses the content of the act itself whose authenticity must be in any case evaluated according to an autonomous concept that combines national and EU standards, in line with the goals of this Regulation⁶⁶. Perhaps of most interests for practitioners is that, according to Article 74 of the Regulation, “no legalization or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation”: therefore gone is the need to obtain an Apostille issued pursuant to the Hague Convention of 5 October 1961 Abolishing the Requirements for Foreign Public documents on, for example, a French “act authentique” that will be used in the context of a cross border succession opened in Italy after August 17, 2015.

- i. French Approach to the Succession Certificate: In France, the documents relating to successions, such as the “acte de notoriété” or the “attestation immobilière” are generally issued by “notaires” in authentic instruments, in particular when they involve real property located in France. But there were difficulties concerning the recognition, in other Member States, of such documents. First, the European Certificate of Succession, which is organized under Articles 62 et seq., will provide a very useful for French successions involving assets abroad, and for successions in other Member States with assets located in France. Such documents will be issued by “notaires” in France. Secondly, the Regulation includes some rules relating to the acceptance and enforceability of authentic instruments, with the possibility to use a

⁶⁵ These are the words used by the European Court of Justice in its decision in *C-260/97, Unibank A/S c. Flemming G. Christensen*, [1999] ECR I-3715 (delivered June 17, 1999), points 15. In francophone jurisdictions, authentic, enforceable instruments of non-judicial nature are called “actes authentiques” [in Italian: “atti autentici”] or “acts notariés” [in Italian: “atti notarili”]. Such acts exist in various EU Member States, namely: Belgium, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Scotland, and Spain, and are enforceable under the Brussel I Regulation subject to certain requirements specified by its article 50.

⁶⁶ Pursuant to Whereas (62) of the Regulation (EU) no. 650/2012, “The ‘authenticity’ of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before the authority on the date indicated and that they made the declarations indicated. [...]”.

specific form describing the evidentiary effects of the authentic instrument (see articles 59 and 60 of the Regulation) and to use a particular procedure to enforce an authentic instrument in a different Member State. Finally, it is worth mentioning the fact that Article 74 of the Regulation puts an end to the requirement of a legalization “or other similar formalities” for documents which are issued “in the context of this Regulation”. This provision of course applies to European Certificates of Succession but, considering its general wording, it could maybe also be applied to other documents issued in international successions.

IV. Case Studies:

A. **Example #1:** The following example illustrates how powerful the new tool can be when the Regulation comes into force. Tom is a successful corporate executive at an international business. Though Tom is a U.S. citizen and was previously domiciled in New York, work has taken him to Europe for an extended period of time. Tom has resided in Germany for several years and would be considered domiciled there for U.S. purposes. He has property in the United States and Germany, as well as a piece of French real property that he had acquired when he was working in France.⁶⁷ What law will apply when Tom dies? It depends on when he dies and what estate planning steps he took.

1. Prior to August 17, 2015: Germany would apply U.S. law to the property located in Germany as it applies the law of the decedent’s nationality. However, applying a U.S. jurisdiction’s law, U.S. conflict-of-law provisions generally apply the law of the decedent’s domicile to all but the real property, so U.S. law would call for German law for tangible and intangible property, as Tom was domiciled in Germany. As Germany has *renvoi* under its private international law, it would then apply German law to the estate. However, France will apply its own law to the French real property.

2. Regulation in effect with no election: As Tom was habitually resident in Germany, both Germany and France would apply German law to the estate’s property they had jurisdiction over. As Germany is a Member State the reference to German law would be to German domestic law, and there wouldn’t be a

⁶⁷ The ownership of French real property presents an interesting example of how forced heirship rules can currently be addressed with proactive planning. A piece of French real property can be placed in a holding company known as a Société Civile Immobilière (SCI). By owning shares of the company as opposed to the real estate directly, the ownership of the shares is deemed a movable object that won’t be subjected to French forced heirship laws for non-French domiciliaries. Despite the benefits of avoiding French succession laws, there are drawbacks, such as additional formalities and potential tax costs associated with SCIs.

referral on to U.S. law. Thus, even though Tom took no action, the applicable law to the French real property has changed.

3.Regulation in effect with election made: If Tom validly elected U.S. law, presumably that of New York, to apply to the estate, the succession laws of New York would apply. Although New York's conflict of law provisions would have the law of the decedent's domicile apply, Member States would reject *renvoi* under the terms of the Regulation. Therefore, New York law would apply to the entire estate located in Germany and France. If Tom had made lifetime gifts, was seeking to provide unequal inheritances to his children or wanted to have assets held in trust, being subject to the laws of Germany and/or France could prevent Tom from implementing his dispositive goals. Tom could solve these problems by making an election for U.S. law to apply.

B. **Example #2⁶⁸:** Miranda survived her late boyfriend, James, who was an American artist who had lived in Italy for 30 years and had two Italian children from a previous marriage. He'd had no patience for "the administration of life" in general and any form of paperwork in particular. James was a beneficiary of several U.S. trusts and had a large one of his own in New York that benefited Miranda after his death. So, while she was set for life financially, the assets that James did not have in trusts — an investment account in Milan and his home in Treviso — were subject either to his will or, if he didn't have one, to the succession laws that governed to his estate; in this case Italian laws.

1.Prior to the Regulation: Before the new EU Regulation took effect, Italy's Private International Law, which deals with conflicts of law issues, specified that a deceased person's national law extended to the governing of their estate. If an American owned assets in Italy, U.S. state law was primary, regardless of residency. A provision existed allowing the individual the option, in a will, of choosing to apply the law of the country where they were resident at the time it was signed, so long as the person still resided in that country at the time of their death.

2.With the Regulation in Effect: The EU Regulation flipped that process. Now, the law applied to estates located in the EU is that of the country of the deceased's "habitual residence" at the time of death, unless the dead person was "manifestly" more closely associated with another state or their will specifically states that they wanted their own national laws to apply. His first will had been

⁶⁸ This example is adapted from Donald Carroll's Article "Triple Scotch" in his column, Closing Argument, published in the March 2016 issue of *The American In Italia*.

handwritten (a so-called holographic will), legal under Italian law. But the opening text of his second will, a U.S. one, stated that it "revoked all prior wills." So much for the Italian will. The second will was executed after the new EU law took effect. It, too, was legal, and gave Miranda the investment account and the house in Italy. The problem was that while James could give those assets in their entirety to Miranda under U.S. law, the will didn't specify that U.S. law should govern his will, and so, being "habitually resident" in Italy, Italian laws applied to his estate.⁶⁹ Since Italian succession law does not recognize the rights of a non-married individual, Miranda had no standing to claim a share of the investment account or the home. Instead, those went to James' two Italian children who were recognized as legittimi, with rights of forced heirship (a legal concept that confers rights to blood relatives and surviving spouses).

- C. **Example #3:** Mark is a US citizen residing in Arizona who teaches English literature at college level. Though extremely competent in his field, he is not equally at ease when dealing with legal and business matters. In 2010, Mark accepts a non-tenure position with a University in Italy, and decides to relocate there with the intention to eventually return to Arizona, where he spends every Christmas. In Italy, he meets and falls in love with Alessandra, an Italian citizen, whom he marries in Italy in 2011: the couple, married in a separate property regime⁷⁰, has an only child, Lavinia, a dual Italian-American citizen. Shortly after the marriage Mark buys a beautiful apartment in Italy using his own separate funds: the title of the apartment is in his name only as his sole and separate property. In December 2012, while in Arizona for Christmas as usual, Mark executes legal documents that establish an Arizonan living trust and a pour-over Arizonan will. He appoints his sister and his brother-in-law (both U.S. citizens residing in Arizona) as the co-trustees; while his trust documents have a provision that clearly elects Arizona law as the sole

⁶⁹ However, against this [very reasonable] conclusion one could argue that the testator (an American citizen) made a "tacit choice of law" in favour of the US law, and most specifically the state law where the US will was prepared. The following points could help supporting such conclusion: (i) The original formulation of Article 22(2) of the Regulation, only mentioned that the choice had to be "made expressly", whereas the current formulation also mentions the possibility that the choice of law "[...] shall be demonstrated by the terms of such a disposition"; (ii) A "tacit choice of law" already appears in article 3, par. 1 of the Regulation "Rome I" which states that the choice of law may be "[...] clearly demonstrated by the terms of the contract or the circumstances of the case"; (iii) The Italian jurisprudence is in favour of a tacit choice of law: see Italian Supreme Court decision of 19 March 2001, no. 3940 and the Italian Supreme Court decision of 17 April 2001 no. 5604; (iv) Other national legal system also support a "tacit choice of law", and more specifically Germany (ATF 125 III 35, Whereas (2) and (3)); (v) Whereas (39) of the Regulation (EU) 650/2012 states that "A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. [...]"; (vi) The testator's reference to notions or institutions that are typical of his own national legal system (for example: a trust set up according to a specific law mentioned in a pour-over will) and unknown to the legal system that would otherwise apply based on the "habitual residence" criterion; (vii) The circumstance that the testamentary dispositions have the form of a public will prepared by a notary of the State of which the testator is a national, according to a specific style and pursuant to a legal system that is normally used for dispositions that are regulated by the law of the state involved.

⁷⁰ The spouses' election of a separate property regime is registered and publicized through their marriage certificate, as provided by the applicable Italian law.

applicable law, his Arizona will doesn't. Mark's intention is to register his trust in Italy and eventually transfer the apartment's title into the trust; however, this never gets accomplished for various reasons. In the spring of 2015 Mark, who uses a "Vespa" for his commute to fight the Italian traffic, has a very serious accident. He recovers, and one of his first decisions is that his estate planning needs are now a priority.

1.If the death occurred before August 17, 2015: Mark's Arizonan will, though valid, did not specify the applicable law. Assuming that one could read Mark's Arizonan will as tacitly selecting Arizona law as the applicable law to his succession, questions would arise over the validity of such "tacit election" considering that, seen from the Italian law perspective, and particularly under Article 46(2), of the Private International Law no. 218/95, a choice of law is no longer valid if, at the time of his death, the testator lived in a different state than the one selected to govern his succession⁷¹. The default criterion of the national law of the deceased meant to apply U.S. jurisdiction's laws, including its conflict-of-law provisions which generally apply the law of the decedent's domicile to all but the real property. So Italian laws controlled the distribution of Mark's main asset (the apartment located in Italy), including its forced heirship rules.

2.With the Regulation in Effect: Mark is a "habitual resident" of Italy. If his will is interpreted as not having a clear election of Arizona law as the applicable law (not even under the "tacit" legal theory illustrated above under example # 2⁷²), then Italian law would apply to his succession as a whole, including his assets located outside the territory of Italy. If his will is interpreted as having a "tacit choice of law" electing Arizona law as the sole applicable law, and considering that, pursuant to Article 34(2), *renvoi* does not apply, this means that his estate would be distributed according to his wishes as permissible under Arizona substantial law⁷³.

⁷¹ Article 18 of the Italian Private International Law of May 31, 1995 no. 218 had a specific provision for states comprised of several territorial units.

⁷² See comments under footnote no. 66.

⁷³ Questions could arise on whether the application of a provision valid under Arizona law may be refused by the Italian judge (who, pursuant to Article 4 of the Regulation, has a general jurisdiction over Marks' inheritance) because "manifestly incompatible" with the Italian public policy rules (and more specifically, because in violation of the Italian Civil Code provisions on "forced heirship"). In light of the divided Italian jurisprudence on this matter, and especially considering the decision of the Italian Supreme Court of June 24, 1996 no. 5832 (case involving the succession of an Italian citizen by birth, later naturalized Canadian citizen, where the court found no violation of the Italian public order principle even though the distribution - which concerned Italian nationals as beneficiaries - did not follow the forced heirship rules typical of Italian law), I personally don't think that this could be the case. However, the decision no. 5832 involved a former Italian citizen (the deceased was solely a Canadian national at the time of his death). It will be interesting to see whether the entry into force of new Regulation (EU) 650/2012 will make any difference, and if Italian courts will come to the same conclusion when the succession involves a deceased Italian national citizen, or even a

3. **What could mark do:** Insert a clear provision in his Arizonan will specifying a clear election of “Arizona substantive law, with no regard to its conflict of law rules” as the only applicable law is suggested. Because he is a resident of Italy, the language of such choice of law provision should also make reference to Article 22 of the Regulation (EU) 650/2012, to make it clear that he is fully aware of the legal implications of his choice. Italy is a signatory country of the Hague Convention of July 1, 1985 on the Law Applicable to Trusts and on their Recognition. Therefore his Arizonan trust created and regulated under Arizona law will be recognized as valid in Italy, provided that it is validly registered in this country. The choice of law consistently expressed by Mark in both his Arizonan trust and Arizonan will should also prevent the possibility of a residual application of Article 15(1)(c) of the Hague Convention on trusts which, under certain conditions, does not prevent the application of provisions of the law designated by the conflicts rules of the *forum* in so far as these provisions cannot be derogated from by voluntary act (such as a trust) relating to, among other matters, “succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives.”

V. **Outstanding/Issues to be Determined:**

A. **Public Policy Concern:**

1. The Issue and Provision for a Public Policy Exception: One issue that may concern planners is whether the election will have the desired effect in practice or, in other words, whether each of the 25 Member States will implement another country’s law (especially perhaps the law of a non-Member State) identified by an election or the decedent’s habitual residence in the absence of an election. Some commentators have expressed concern over Article 35 of the Regulation, which allows a jurisdiction to refuse to apply another country’s law “only if such application is manifestly incompatible with the public policy (*order public*) of the forum.” However, one should also keep in mind that this “public policy exception” should be used in exceptional circumstances⁷⁴, and in accordance with the principles already established by European Court of Justice⁷⁵. Indeed the

dual citizen. We must, in fact, keep in mind that Article 18, par. 1 of the Treaty on the Functioning of the European Union explicitly prohibits any discriminations on grounds of nationality.

⁷⁴ See Regulation (EU) 650/2012, *supra* note 11, Whereas (58).

⁷⁵ Case C-7/98, *Krombach*, [2000] ECR I-1935 (delivered March 28, 2000), point 37 (“[...] the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order.”); Case C-38/98, *Renault*, [2000] ECR I-2973 (delivered May 11, 2000), point 30; Case C-394/07, *Gambazzi*, [2009] ECR I-2563 (delivered April 2, 2009), point 27.

parameter to evaluate whether the concrete consequences arising from the application of a foreign law are unacceptable is not limited to the principles of the forum state⁷⁶, but includes also EU principles, most notably the fundamental rights as defined by the European Charter of Fundamental Rights⁷⁷. Further, the preamble suggests that the Regulation doesn't prevent a court from rejecting the application of another jurisdiction's law to stop evasion of the law (*fraude à la loi*).⁷⁸ With the various Member States' own legislative and judicial systems and that of the EU itself each having to act in relative uniformity going forward in what constitutes a valid public policy reason to reject the application of another jurisdiction's law, there's some reason for caution.

2. The Public Policy Issue from the French Perspective: Under Articles 35 and 40 (see also Whereas 58 of the Regulation), two cumulative conditions must be fulfilled for the notion of international public policy to be used in relation to any law legal provision which is determined on the basis of the Regulation, knowing that such an exclusion can only take place in "exceptional circumstances":

- 1) The legal provision of the law of the forum must be part of its international public policy rules;
- 2) The provision of the foreign law specified under the Regulation must be manifestly incompatible with this provision of the law of the forum.

Now, if we look at French law, which provisions of French law are considered to be so important that they are also applied in an international context, when French law is not the applicable law, on the basis of the notion of international public policy? There is, first, the absence of discrimination among the heirs based on grounds such as gender.

But what about forced heirship rights which, under French law, protect descendants or, in the absence of any descendant, the surviving spouse if there is one (articles 912 and 913 of the French Civil Code)? In the absence of any decision from the French Supreme Court on this point, this question has been discussed for a long time and academics are often divided on this point. But

⁷⁶ See Case C-36/02, *Omega*, [2004] ECR I-9609, (delivered on October 14, 2004), point 30 ("[...] the concept of 'public policy' in the community context [...] must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions [...].")

⁷⁷ As of December 1, 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the EU institutions and on the national governments, just like the EU Treaties themselves.

⁷⁸ Regulation (EU) 650/2012, *supra* note 11, Whereas (26), at 201/110.

recent court decisions, together with the provisions of the Regulation, have brought some clarity on this question which is so essential when advising foreign clients who own property in France and who may wish to make a choice of their national law to benefit, in relation to the French assets, from the testamentary freedom which they enjoy at home. Indeed, although there was very little case law on this point, some court decisions have been given over the last two years and have clearly indicated that forced heirship rights were not, de facto, part of French international public policy.⁷⁹

The last decision in this field was issued by the Paris Court of Appeal on December 16, 2015 (*Colombier*) and provides that French forced heirship rights are not de facto part of international public policy and that it is only in exceptional cases that this mechanism could be applied in relation to forced heirship rights, after looking objectively at the consequences of the absence of forced heirship rights in the succession (it is for instance understood that a situation of extreme poverty of one of the individuals who would have benefited from forced heirship rights if French law had been applicable could have an impact on the use of this mechanism in that particular case). In their decision, the judges also referred expressly to the impact which the Regulation has on the treatment of forced heirship rights in such situation: "... the mechanisms created by the European Regulation of the 4th of July 2012, which now applies in France, provide a greater testamentary freedom and estate planning possibilities, which have had an impact on forced heirship rights."⁸⁰

This echoes a statement which the French Ministry of Justice had made before the French Parliament on the June 23, 2015 and in which, among other things, she had underlined the fact that forced heirship rights were already protected by the limitation put on the possibility to choose the succession law under the Regulation and had indicated that the notion of forced heirship rights in an international context had to be considered with very carefully, as claims could be brought before the European Court of Justice which would control the refusals to apply the foreign law on this basis.

⁷⁹ See the decision of the Paris High Court which was issued on December 2, 2014 (*Jarre*, with a decision to be expected from the Paris Court of Appeal later this year). Another decision was given in a different matter by the Paris High Court on the 10th of July 2014 (*Colombier*) and, following appellate proceedings, has now been confirmed by the Paris Court of appeal on December 16, 2015.

⁸⁰ "...les mécanismes instaurés par le règlement européen du 4 juillet 2012 marqués par une plus grande liberté de tester et l'anticipation successorale, désormais en vigueur en France, ont fait évoluer le sens de la réserve héréditaire."

A Bulletin (“circulaire”), which was issued on January 25, 2016 by the French Ministry of Justice to assist the courts in the application of the Regulation.⁸¹ This Bulletin contains clear guidance on this point: “It should be noted that there is no provision in the Regulation which provides a direct protection of forced heirship rights. [...] Unless the courts were to consider this matter differently and until such an evolution, forced heirship rights are not currently considered by the Supreme Court as being part of international public policy.”

The conclusion to be reached on the question of French forced heirship rights is therefore clear: the first condition set by the Regulation, i.e. the fact that the legal provision of the forum must be part of international public policy, is not currently fulfilled under French law (with an exception which may potentially arise in extreme circumstances, without any case law on such situations at that stage).

3. Planning in Light of this Issue: While concerns over how this Regulation will be implemented across so many jurisdictions and over the public policy exception are understandable, they shouldn’t serve as an excuse to ignore the Regulation or not take advantage of electing the law of a testator’s nationality to apply if beneficial for three primary reasons.

- i. First, presumably the public policy exception would be inappropriate in a standard case of a U.S. citizen, or any other nationality for that matter, electing the law of their citizenship. If Member States began rejecting the choice of law of a foreign citizen, or that of a decedent’s habitual residence, solely on the grounds that the chosen law differs from the forum’s own succession laws, it would undermine the Regulation’s entire purpose⁸².
- ii. Second, claims of violating public policy or trying to evade a certain applicable law should be fairly limited in the case of an individual electing

⁸¹ Although the provisions of this document are not considered as law, but are merely some guidance provided by the Ministry to the courts, they are interesting because they provide information on the way the Regulation should be applied by the courts and also include relevant information on the Ministry’s current position on various issues such as international public policy (see below).

⁸² Not to mention that such behavior is against the explicit language of article 18 par. 1 of the Treaty on the Functioning of the European Union: “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discriminations on ground of nationality shall be prohibited.” Whereas (58) reinforces this conclusion by stating that “[...] the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognize or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.”

a choice of law because the choice is fairly limited under the terms of the Regulation. A testator can only chose the law of his nationality—not that of his place of residence, place of domicile or location of property. Given that nationality, as opposed to residence or location of property, is a fairly fixed factor and the ability to choose one law to govern all succession matters prevents a testator from actively trying to cherry pick a certain set of succession laws, claims of public policy or evasion of the law claims should be fairly limited.

- iii. Third, the Regulation is coming into effect regardless of potential uncertainties and concerns regarding its application. The Regulation provides an important tool that could help U.S. citizens avoid the forced heirship rules of the Member States and allow for one law to apply to the administration of the estate throughout the Member States. Even if a forum court in one of the Member States decides not to accept the election of a U.S. state's law by a U.S. citizen, the decedent is left in no worse a position than had the election not be made, as the court would then presumably apply the law of the decedent's habitual residence or the law that the forum country would have applied in absence of the Regulation. Thus, if a U.S. individual has property located in one of the Member States and the election of an U.S. state's law would prove beneficial if ultimately applied by the forum court(s), an election should be made despite any uncertainty.

B. How the Regulation is Implemented in the EU: As many estate planning practitioners know, a large part of estate administration is based on unwritten rules and local custom implementing the rules that are written. The EU remains over two dozen separate nations, each with its own legal system. The implementation of the Regulation is not an elimination of all of these systems, but a change to each of them. The Regulation now gives these many legal systems and the professionals who practice in them the opportunity and challenge to put the Regulation into practice. Thus, the need for capable and experienced local counsel will be as important as ever.

C. How the Regulation is Implemented in the US: One item will be how U.S. jurisdictions react to having their laws apply to property they have not before. While some U.S. jurisdictions may have mechanisms to refuse the imposition of foreign forced heirship rules on property it claims jurisdiction over such as the ability to choose the law that

governs⁸³, others recognize more traditional rules such as the law of domicile applying over all but real property located outside of its jurisdiction.⁸⁴ However, the new choice of law provisions that are very broad under the Regulation may go further than certain U.S. laws allow for. How U.S. jurisdictions will adopt to how this Regulation applies will take time and be a state specific law analysis. For example, New York's choice of law provisions EPTL § 3-5.1 does not apply to real property outside of its borders. However, in terms of choice of law issues, New York's conflict of law rules seem to include not only a jurisdiction's substantive law but its choice of law rules, which would include the Regulation.⁸⁵ Regardless of whether a U.S. jurisdiction recognizes the effects of the Regulation, the Regulation provides that the election will still be effective for purposes of the EU as "[a] choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law."⁸⁶ The real issues may arise in more technical issues, such as basis for fiduciary fees, whether items are included on accountings or inventories, and how the property is included for purposes of determining a spousal elective share.

D. "Transitional Rules"

1. Text of Regulation: Article 83 of the Regulation states:

"Article 83: Transactional Rules"

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015.
2. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.
3. A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.
4. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession (emphasis added).

⁸³ See *Matter of Renard*, 56 NY2d 973 (1982) (allowing for the New York statutory provisions under EPTL § 3-5.1 to allow for New York law to apply over all property in New York despite French domicile of decedent).

⁸⁴ See *Eidman v. Martinez*, 184 U.S. 578 , 581 (1902); see also Restatement (Second) of Conflict of Laws § 260.

⁸⁵ *Matter of Schneider's Estate*, 198 Misc. 2025 (Sur. Ct. NY City 1950), but see *Matter of Tallmadge*, 181 N.Y.S. 36 (NY Surr. Ct. 1919).

⁸⁶ Regulation (EU) 650/2012, *supra* note 11, Whereas (26), at 201/111.

2. Analysis: Article 83 contains what the Regulation calls transition provisions but what would better be described as deemed election provisions. There are various issues that will need to be addressed including:

- i. Codicils: If a will was executed prior to August 17, 2015, but a codicil was executed after, does the effect of the codicil undo what was a deemed election?
- ii. Choice of Law Elections Made: Another question is whether a choice of law under a local U.S. jurisdiction, such as New York, would effectively make a New York choice of law election for all property in the EU. The terms of the New York statute which allows for a choice of law election does not apply to out of state real property. Would the election of New York law prior to August 17, 2015 be deemed to make an election of New York law to apply to real property in one of the 25 EU Member States?
- iii. Potential Havoc of Deemed Elections: The language of Article 83(4) is the most concerning as it may retroactively change estate planning documents that were previously executed without consideration of the Regulation or any EU property if the document was executed prior to acquiring such property.

E. Interpretation and Definitions:

1. Member States: It is clear that the United States is not a Member State under the terms of the Regulation. However, for the three EU countries who are not bound by the Regulation (the Republic of Ireland, Denmark, and the United Kingdom) it is not clear whether they are Member States as the term is not defined in the Regulation. This raises the question of whether Member State refers to countries which are EU members or EU members which are subject to the Regulation, which is relevant for *renvoi* purposes. There are arguments supporting both positions.⁸⁷ For example, in favor of treating them as Member States is the fact that a provision excluding them was included in the draft legislation but later removed. Further, Article 84 of the Regulation states in part that the Regulation "shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties." Given that the three countries in question are EU members who have the right to not be bound by the Regulation under the

⁸⁷ For an excellent discussion see Richard Frimston, "Speak, friend and Enter: Four Riddles, Puzzles and Conundrums Connected with the EU Succession Regulation," STEP Journal, December 2014.

Treaties, this would suggest that they are Member States. In opposition to them being considered Member States, it could be argued that the legislative intent was to not include them but the draft provision was changed so the Regulation would not need to be amended if they were added. Further, treating them as Member States would be inequitable as it gives them all of the benefits of being members without the consequences.

2. Habitual Residence: Very relevant to all individuals for property in one of the 25 EU Members States is how the concept and definition of habitual residence develops. As discussed above, the term "habitual residence" is not defined, there are no bright line tests, and there is an exception to habitual residence applying which is just as unclear. It is possible that different countries will understandably define this term with their own biases surrounding the use of terms like "domicile", "residence," etc.

F. Planning with Foreign Considerations: As mentioned above, the Regulation only has an impact on various components of succession law. It does not touch upon taxation, trusts, marital rights, and many other important issues. Thus, the Regulation does not make cross-border planning easier, but increases the ease with which mistakes can be inadvertently caused. For example, for a U.S. citizen with real and tangible property in one of the EU countries which the Regulation applies, making an election under the Regulation and directing the assets to be divided between a credit shelter trust and a marital trust could be disastrous.

1. French Perspective on International Succession Involving Trusts: French law does not recognize the concept of a trust and there is no provision in the French Civil Code dealing with this notion, even as far as the recognition of foreign trusts in France is concerned (the 1985 Hague Convention was signed but unfortunately never ratified by France).

France has nevertheless been confronted to situations involving trusts for a long time and there is case law going back to the end of the 19th century on such issues. But, because the instances in which trusts arise are very varied and because trusts involve legal concepts which are not recognized under French law, the legal recognition of trusts is very uncertain in France.

As far as the Regulation is concerned, although Article 1(j) provides that the "creation, administration and dissolution of trusts" is excluded from its scope, Whereas 13 provides that, when the trust is created under a will or under a

statute, the succession law which is to be applied on the basis of the Regulation should also govern the determination of its beneficiaries and the devolution of the assets. This, again, is a great incentive, in situations involving foreign trusts, to make a choice of succession law, to provide a unity between the succession law and the law to be applied to the trust, and to avoid the complications stemming from the application of different laws. Other difficulties nevertheless still remain, both legally (for instance in relation to the registration, in the French land registries, of rights relating to real property located in France) and mostly from a tax point of view, following a statute which was adopted on the July 29, 2011 with very drastic tax consequences, in France, as far as trusts are concerned.