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THE EU REGULATION BRUSSELS IV: A COMPARATIVE STUDY BETWEEN THE SUCCESSION LAW OF THE UNITED STATES AND ITALY

Abstract

The European Union continues to shape rules and norms on a global level and offers a rich and diverse economic, political and cultural environment. Indeed, European countries constitute an attractive business location for a large number of individuals and companies. On the level of the individual citizen of the EU and elsewhere, this EU-effect has resulted in an increase of bi-national marriages. Such developments often result in conflicts of jurisdiction and conflicts in applicable laws regarding inheritances. The present paper is an informative tool for international wealth planning lawyers who deal with succession planning for clients that either reside in a European Union Member State, are married to an EU citizen, or hold assets in the EU by providing an insight on the EU Succession Regulation, No. 650/2012. Indeed, the regulation might indirectly apply to individuals residing in States of the U.S.A. pursuant to the key provisions of Articles 20 and 36. The present analysis deals not only with issues of jurisdiction, recognition and enforcement of court judgments and applicable law, but also with the acceptance of notarial deeds, the formal and substantial validity of testamentary dispositions and other succession agreements.

Annotasiya

Avropa İttifaqı (Aİ) qlobal səviyyədə normalar və qaydalar formalaşdırmağa və müxtəlif iqtisadi, siyasi və mədəni mühit yaratmağa davam edir. Əslində, Avropa ölkələri əksər şəxslər və şirkətlər üçün cəlbedici biznes yerləri kimi qəbul olunur. Şəxslərə münasibətdə bu cür "Avropa İttifaqı effekti" millətlərarası evliliklərin sayında olan artımda da müşahidə olunur. Bu cür hadisələr adətən yurisdiksiyaların və tətbiq olunan hüquqların (xüsusən də vərəsəliklə bağlı) ziddiyyətinə gətirib çıxarır. Bu məqalə müştəriləri Aİ Üzv Dövlətlərin birində yaşayan, Aİ vətəndaşı ilə ailə quran və ya Aİ-də əmlaka sahib şəxslər olan və vərəsəlik planlaması ilə məşğul olan beynəlxalq sərvət planlama hüquqşünasları üçün No. 650/2012 nömrəli Aİ Vərəsəlik Direktivi vasitəsilə informativ bir vasitə kimi nəzərdə tutulub. Əslində, 20-ci və 36-cı maddələrə nəzər saldıqda Direktivin bilavasitə ABŞ-da yaşayan şəxslərə də tətbiq olunduğunu görə bilərik. Bu məqalə yalnız yurisdiksiya, məhkəmə qərarlarının tanınması və icrası ilə bağlı məsələləri deyil, həmçinin, notarial hərəkətlərin qəbulu, vəsiyyətnamələrin etibarlılığı və digər vərəsəlik razılaşmalarını da analiz edir.

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Introduction

As globalization continues to make the world smaller, the number of potential issues estate-planning practitioners will encounter grows larger.[1] In the not too distant past, the phrase "multi-jurisdictional planning" meant there was a New York domiciliary with a Florida vacation home.[2] 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.[3]

To avoid estate administration, especially in states in which administration involves cumbersome, time-consuming, and expensive court supervision, estate lawyers implement techniques such as a revocable *inter vivos* trust.[4] This instrument is set up during a person's life and allows

[1] The American Bar Association Section of International Law, *The New EU Regulation (Brussels IV): Understanding the Impact on Cross-Border Planning and Administration,* 1 (2016). Available at: https://shop.americanbar.org/PersonifyImages/ProductFiles/237345198/Session%205.pdf.
[2] *Ibid.*
[3] *Ibid.*, probate is the judicial proceeding for providing and establishing the validity of a purported will. Its principal function is to establish that the instrument is indeed the last will and to affirm the validity of the legal rights flowing from its terms. For further information: *See* Leigh-Alexandra Basha, A Guide to International Estate Planning, 60 (2nd ed. 2014).
[4] *Ibid.* Indeed, revocable trusts have become the most commonly used trusts in the United States since they allow to avoid ancillary probate and generally ensure the property goes to the intended beneficiary. Usually a "pour over" will is part of the plan, devising all of the testator's probate estate to the revocable trust. Alan Newman, *Revocable Trust and the Law of Wills: an Imperfect Fit*, 43 Real Property, Probate and Trust J. 523, 524 (2008).

to title real property to another person.[5] Such a technique, however, would not be available in a place that doesn't recognize that legislative entity.[6]

Each European country, including Italy, has its own set of rules, namely forced heirship rules, which designate those persons whom the testator cannot deprive of the portion of his estate reserved for them by law, except in cases where the testator has just cause to disinherit them.[7] Therefore, 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.[8]

I. Freedom of Disposition v. Forced Heirship Rules

While in the United States the laws of each state differ, they also have many similarities.[9] The laws are all based on the English common law, except for the state of Louisiana.[10] Thus, all the states have the office of executor, sometimes denominated personal representative, and treat the estates as separate entities.[11] All states have a right of election for the surviving spouse, and no state, except Louisiana in limited circumstances, provides an absolute right of inheritance or forced heirship for children and other relatives.[12]

The American law of succession embraces freedom of disposition[13], authorizing dead hand control, to an extent that is unique among modern legal systems.[14] Within the American legal tradition, a property owner may even exclude her blood relations and subject dispositions to ongoing conditions, as a separate stick in the bundle of rights called property.[15]

The freedom of disposition presents only a few of the limitations which include wealth transfer taxation and a handful of other policy limitations, such as the surviving spouse elective share.[16]

The Italian legal system, instead, falls within the civil law tradition.[17] Under Italian law the principle of "unity of succession" applies, meaning that the

[5] Black's Law Dictionary, 435 (9th ed. 2009). Available at: https://thelawdictionary.org/trust-intervivos/.
[6] See Leigh-Alexandra Basha, *supra* note 3, 693. The trust concept, rooted in equity, is a product of the common law legal system and is distinct form the civil law system, which does not generally recognize such concept.
[7] *Supra* note 5.
[8] Basha, *supra* note 3, 61.
[9] Louis Garb and John Wood, International Succession, 923 (4th ed. 2015).
[10] *Ibid.*, Louisiana laws are mainly based on the Napoleonic Code, governing law also in France, but reflect also many common law principles adopted over the years.
[11] *Ibid.*
[12] *Ibid.*
[13] Also the United States Supreme Court, in *Hodel v. Irving*, 481 U.S. 704,716 (1987), held that the ability to transmit property at death is a constitutionally protected right that includes the prerogative to exclude.
[14] Dukemier and Sitkoff, Wills, Trusts, Estates, 1 (9th ed. 2013).
[15] *Ibid.*
[16] *Id.*, 2. Under the Restatement (Third) of Property, donative transfers follow the donor's intention unless prohibited by law and descendants are not protected from intentional disinheritance.
[17] Garb and Wood, *supra* note 9, 437.

same law will apply to entire succession, no matter where the estate is situated.[18] Italy does not have a federal system of government and the same law of succession is applied throughout Italy.[19] The principal source of the law of succession is "Il Codice Civile" (The Civil Code), in particular, the Second Book, entitled "Delle Successioni" (Law of Succession).[20]

The freedom of testation is limited in that certain heirs are entitled to a percentage of the share that the law reserves to them, known as forced heirship rules.[21] The amount of these reserved share varies depending on which family members survive the decedent, and the degree of relationship with the deceased.[22]

In the absence of children, the surviving spouse is entitled to at least one-half of the estate of the deceased, even if there are other surviving heirs.[23] Moreover, the spouse inherits the right to live in the family home and to use the furnishings belonging to the home for life, provided that at the time of death such assets either were held in common ownership with the deceased or belonged to the decedent.[24]

In the absence of a surviving spouse, the surviving child takes at least one half of the estate.[25] If there are several children, each is entitled to a reserved share divided equally from a total of two-thirds of the estate.[26]

If there is a surviving spouse and children, then, in the case of a single child, he or she is entitled to one third of the estate, as is the surviving spouse.[27] In the case of several children, one half of the estate is divided between the children in equal shares and the surviving spouse takes one quarter.[28] The

[18] *Ibid.* The principle has a dual meaning in that all the property and the rights of decedent constitute a single entity passing to the heirs and that a single body of law applies to the succession as a whole, without regard to whether the property is moveable or non-moveable.
[19] *Ibid.*
[20] *Ibid.* In 1942, Italy adopted a new Civil Code whose intestate succession rules were generally based on those contained in the 1865 Code, and so modelled indirectly on the Napoleonic Code. All the articles of the Italian Civil Code reported on this paper can be found in their English version on Mario Beltramo, The Italian Civil Code, 154 (1969). [Hereinafter *Civil Code*].
[21] Garb and Wood, *supra* note 9, 437.
[22] *Civil Code*, *supra* note 19, 133.
[23] *Ibid.* Art. 540 titled "Reserve in Favour of the Spouse" disposes that one-half of the estate of the parent is reserved to the spouse, unless as disposed by art. 542 both spouse and children survive the decedent."
[24] *Ibid.*
[25] *Ibid.* Art. 537 titled "Reserve in Favour of Children" disposes that "One-half of the estate of the parent is reserved in favour of the child, if he leaves only one, and two-thirds if there are more than one.
[26] *Ibid.*
[27] *Civil Code*, *supra* note 19, 154. Art. 542 titled "Concurrence of Children and Spouse" establishes that "[i]f one who dies leaves, in addition to the spouse, only one child, the share of the estate reserved respectively for the child and the spouse is one third each.".
[28] *Ibid.* "When there is more than one child, the total share of the estate reserved for them is one half and one fourth is reserved to the surviving spouse".

children's reserved shares are subject to the right of the spouse to live in the family home.[29]

In the absence of children, ascendants, persons with whom one is related in the ascending line such as one's parents[30], have the right to one-third of the estate.[31] If they take in concurrence with the surviving spouse, they have a right to take one quarter of the estate and the surviving spouse takes half.[32]

The decedent is free to decide which property is to be left to those entitled to a reserved share as long as such property is part of the succession and equals or exceeds the value of the share, according to art. 549 of the Civil Code.[33] All limitations deliberately imposed to reduce the value of the share are void.[34]

In addition, art. 458 of the Italian Civil Code[35] prohibits all agreements by which a person disposes of his or her own succession, including all agreements transferring or renouncing rights of inheritance upon the death of a living person.[36]

Essentially, the civil law concept of estate does not correspond to common law concept, in that the forced heirship rules do not merely operate on the decedent net estate as intended in common law, but extend their effect to all the estate.[37] Furthermore, in a civil law system the estate is not limited to the property possessed by the decedent at the time of death, but also includes what the decedent would have possessed at death had he or she not made any gratuitous transfers during his or her lifetime.[38] Thus, lifetime gifts are considered and reintegrated into the estate; so they could further reduce the small share of the estate over which the decedent has testamentary freedom.[39]

There rules apply anytime the decedent died intestate.[40] These rules also apply when the decedent left a valid will to correct any distribution made by

[29] The relevant compulsory share also applies to adopted children and children born out of the marriage. Half-siblings have the right to the reserved share in the succession of their biological parent.
[30] *Supra* note 5, 23.
[31] *Civil Code*, *supra* note 19, 133. Art. 538 titled "Reserve in Favour of Ascendants" states that if one who dies leaves ascendants but no children, one third of the estate is reserved for such ascendants..
[32] *Id.*, 135. Art. 544 titled "Concurrence of Ascendants and Spouse."
[33] *Ibid.* Art. 549 titled "Prohibition of Burdens or Conditions on Share of Forced Heirs" recites that " [T]he testator cannot impose burdens or conditions on the share belonging to the forced heirs, subject to application of the rules contained in Title IV of this book.
[34] Garb and Wood, *supra* note 9, 442. The testamentary dispositions that violate the elective share are valid until challenged by the person entitled to the share.
[35] *Civil Code*, *supra* note 19, 133. Art. 458 titled "Prohibition of Succession Agreements" recites that "Any agreement by which one disposes of his own succession is void. Any act by which one disposes of the rights that can belong to him by a succession not yet opened, or renounces such rights, is equally void."
[36] Garb and Wood, *supra* note 9, 443.
[37] *Id.*, 454.
[38] *Ibid.*
[39] See *supra* note 34.
[40] Kenneth Reid, *Comparative Succession Law, Intestate Succession,* 68-69 (2015).

the testator in violation of the "forced heirship" provisions that are meant to protect his heirs.[41]

II. The EU Regulation no. 650/2012, "Brussels IV"[42]

After the 2012 adoption of the Regulation (EU) 650/2012 (the Succession Regulation), commonly referred to as "Brussels IV", European conflict of laws in the area of succession has changed.[43] As a consequence, an American citizen owing property in Italy and making plans for his or her estate should take into account not only the Italian choice of law principles as described, but also consider the recently enforced European law.[44] Indeed, Italy is part of the European Union and any EU regulation has immediate legal effect in each Member State when it comes into force and supersedes national law.[45]

It has become easier and more common for an individual, as a result of the harmonization of laws of Europe over the years, to hold property in multiple European jurisdictions.[46] Because of that, there was a lack of uniformity of succession law.[47] The European Union (EU) moved rather slowly in creating a uniform set of rules to govern succession.48

After a failed attempt to create some uniformity in the Hague Conference in 1989, with an international agreement on the law applicable to succession to the estates of deceased persons[49], little progress occurred until quite recently.[50]

The EU regulation 650/2012, enacted in August 17, 2015, provided that all the EU countries[51] share a uniform rule that determines what law will apply to the disposition of a decedent's property in these jurisdictions.[52]

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[41] *Ibid.*

[42] 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.

[43] The regulation is also referred to as Succession Regulation. See at: https://www.step.org/policies/european-succession-regulation-regulation-eu-no6502012

[44] Ralph H. Folsom, *Principles of European Union Law,* 72 (2005).

[45] Ralph H. Folsom, *Principles of European Union Law,* Thomson West, (2005).

[46] *Supra* note 1, 4.

[47] The issue for a decedent having property in multiple jurisdictions and who has executed only a will (for example in the jurisdiction of domicile) is if such will is valid in other jurisdictions where the property is located. *See* Basha, *supra* note 3, 60.

[48] Garb and Wood, *supra* note 9, 454.

[49] The agreement was ratified only by Argentina, Luxembourg, Netherlands and Switzerland. Barbara R. Hauser, European Harmonization, Trusts & Estates, 62-63 (2010).

[50] *Id.*, Italy signed the Hague Convention on The Conflict of Laws Relating to The Form of Testamentary Dispositions in 1961, but it was never subsequently ratified by Italy.

[51] Except the United Kingdom, the Republic of Ireland and Denmark.

[52] The scope of the regulation defined by art 1 is: "to provide a common test for determining the law governing succession, to provide courts of such jurisdiction to determine disputes related to the succession, to facilitate the mutual recognition and enforcement of decisions, and to provide the creation of a uniform certificate of inheritance."

The new legislative scenario will significantly change estate planning and administration for those who hold property in any of the 25 countries that are "Member States" under the Brussels IV.[53] However, even if the regulation does not directly apply to non-Member States, art. 20 of "Brussels IV" may lead indirectly to the application of the law of third countries to residents or domiciled or property owners in a Member State.[54]

The regulation limits itself to property transferred by succession.[55] It does so, contrary to other estate planning instruments that are based on non-probate tools such as life insurance, pension plans or joint ownership.[56] The regulation also excludes from its scope "the creation, administration and dissolution of trusts"[57] and any "property rights, interests and assets created or transferred otherwise than by way of succession, for instance by way of gifts".[58] In addition, the regulation doesn't address estate or inheritance taxes imposed by the Member States, either.[59]

Matrimonial property arrangements are excluded from its scope.[60] 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 reserved to the surviving spouse.[61]

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[53] The 25 EU countries are referred to as "Member States" in these materials and include: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, German, 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 Members 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. 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 that 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.

[54] Article 20 states that: "any law specified by this regulation shall be applied whether or not it is the law of a Member State". The meaning of universal application is that conflict of law rules must be applied also to non Member States. This choice is consistent with the unitary nature of the regulation which aims to achieve the uniformity of private international law with regard to succession matters. This is relevant especially in the event that a third State does not provide for equality among heirs. Then, the application of the law will be declined based on public policy exception. See Haris P. Pamboukis, in H. Pamboukis (ed.), *EU Succession Regulation No 650/2012, A Commentary,* 51 (2017).

[55] *Supra* note 1, 7. See art 1, section 2(f) of the regulation 650/2012.

[56] Some commentators argue it should also apply to non-probate assets for the same policy reasons that extend wills rules to non-probate assets. Dukemier and Sitkoff, *supra* note 14, 6.

[57] See art 1, section 2(j) of the regulation no. 650/2012.

[58] See art 1, section 2(g).

[59] Art. 1, section 1. The exclusion refers also to whether the Member State will release the assets before any tax liability has been satisfied. *Supra* note 1, 7; Garb and Wood, *supra* note 9, 454.

[60] See art 1, section 2(d) of the regulation 650/2012. Currently, the matrimonial property regime is regulated by each EU member pursuant to its private international conflict of law rules, including any international convention.

[61] *Supra* note 1, 37.

III. Conflict of Laws

By comparing the basic principles of the law of succession in the United States to the Italian system it is evident that in the United States estate planners have great latitude in structuring an estate to achieve the decedent's dispositive goals.[62] However, this flexibility doesn't automatically apply when assets are located abroad and may be subject to the succession laws of the jurisdiction where the property is situated.[63] Indeed, while the right to give property as one chooses is the core of U.S. succession law, the right to receive an inheritance is a cornerstone of many European jurisdictions' succession laws.[64]

Different prospectives arise in the two legal systems when there is a conflict of laws issue.[65]

A. Common law prospective

American citizens with property in European countries must first identify to what extent the various laws on succession apply.[66]

Under the usual common law rules of choice of law, the law of the state where the decedent was domiciled at death governs the validity of a disposition by will of personal property.[67] However, the law of the state where real property is located governs the validity of a disposition by will of that property.[68] Consider the following example.[69] A person executes a will while domiciled in Illinois, then moves permanently to New Jersey and dies owning Florida real estate, some tangible personal property, and some stocks and bonds.[70] New Jersey law will govern the validity of the disposition of the tangible and intangible personal property, and Florida law will govern the validity of the disposition of real estate.[71] Almost all the states in the United States have a statute[72] that recognizes the validity of a will executed with the formalities required either by the state where the testator was domiciled at death, by the state where the will was executed, or by the state where the testator was domiciled when the will was executed.[73] Because the law is not uniform, a specific statutory procedure denominated model execution ceremony will assure that the instrument will be valid in all states

[62] *Id.* For a more detailed overview about the advantages and disadvantages of the freedom of the testator in the United States, *see* Elaine Lam, *Disinheritance v. Forced Heirship*, 32 *Probate and Property* 41 (2018).
[63] *Ibid.*
[64] *Ibid.*
[65] *See* Basha, *supra* note 3, 3.
[66] *Id.*, 9.
[67] *Ibid.*
[68] Dukemier and Sitkoff, *supra* note 14, 6.
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] Such as the Unif. Probate Code, section 2-506 (1990), 8pt 1 U.L.A. 291 (2013).
[73] Dukemier and Sitkoff, *supra* note 14, 6.

notwithstanding where the testator is domiciled at death or at the time of execution or where the property is located.[74]

However, if the decedent owns property in a foreign country or may die while having domicile there, the law of the foreign country should be examined and the will executed in compliance with such law.[75] This issue arose for example when James Gandolfini[76] devised real estate in a will drafted according to common law rules, without taking in consideration Italian succession law.[77]

Further complications can arise if a decedent decides to draft two wills, one according to Italian law of successions and one based on common law rules, which can lead to costly litigation, such as Luciano Pavarotti's case.[78]

B. The Italian System

Italian conflict of laws rules apply the principle of the unity of succession, whereby the same national law applies to the entire succession, no matter where the estate property is situated.[79]

The general applicable law to succession in Italy before the enactment of Brussels IV was the national law of the decedent's citizenship to be determined at the time of his or her death.[80] Where the decedent has many nationalities which do not include the Italian citizenship, the laws of the state with the closest connection applies, otherwise the Italian citizenship prevails for the determination of the applicable law.[81]

As an exception to general rule, a person can make his or her estate subject to the law of the state of residency, by explicitly declaring the choice in the will.[82]

[74] *Ibid.*, for a more extensive explanation of the model execution ceremony.
[75] Jeffrey A. Schoenblum, Multistate and Multinational Estate Planning, 151 (2012).
[76] James Gandolfini, the actor who played Tony Soprano, died on June 19, 2013. Kleinberg et al, *Estate Planning: Misfires of the Rich and Famous*, Westlaw, 20170727P NYCBAR 89 (2017).
[77] "Mr. Gandolfini's will, dated December 19th, 2012, provides that he left his home in Italy in trust for his children until they both reached the age of 25. However, Italian inheritance law dictates how the property is left to heirs. In this instance, Gandolfini's children automatically receive half of the estate and his wife receives a quarter of it. Mr. Gandolfini had the right to dispose only of the last quarter.
[78] Nick Pisa, *Pavarotti's Widow Breaks Silence on Will*, 2008 https://www.nysun.com/arts/pavarottis-widow-breaks-silence-on-will/82260/ (last visited 26 August 2019).
[79] Garb and Wood, *supra* note 9, 454.
[80] This is the provision under Article 46, Law no. 218 of 1995 (Italian International Private Law).
[81], Law no. 218/95, art. 19.
[82] In this case, the law chosen will regulate the entire succession, subject to any reserved shares in the estate in favour of the heirs who are resident in Italy at the time of death. It follows that if there are non-resident children, the exception to the general rule will deprive a spouse or children of the reserved shares to which they would otherwise have been entitled by applying the Italian law.

IV. The "Brussels IV" scenario

The revolutionary step under Brussels IV is to unify the succession rules that apply to an estate, rather than allowing any number of succession laws to possible apply to the same assets in different circumstances. Therefore, Italian law is now governed by the Euroepan law of succession.[83]

A. The Competent Court

Art. 4.[84] of the Succession Regulation sets out habitual residence[85] as a is a general ground for international jurisdiction. The European legislator has not indeed designated a particular court in the jurisdiction of the Member States that is competent.[86]

The comprehensive jurisdictional function of art. 4 with regard to succession is restricted in two cases.[87] Article 12 provides that the court may decide not to rule on assets located in a third State if it deems that its decision will possibly not be recognized and declared enforceable in that state of the location of the estate, in whole or in part.[88] The second case is when the decedent has chosen his law of nationality as the law governing the succession. In this case, under Article 6 of the regulation the court, may decline jurisdiction.

The underlying rational behind the system of allocation of jurisdiction in the regulation is that it should provide an exhaustive set of rules determining the jurisdiction of the courts of the Member States to rule on any succession matter falling within the relevant scope of application, without leaving any room for the application of domestic rules of jurisdiction. With this comes the inherent advantage of pursuing a greater extent of uniformity. This objective is accomplished also through the rules of art. 10 of the regulation, which dictates additional connecting factors.

When the decedent's residence cannot be located in any Member State at the time of his or her death, art. 10 of Brussels IV applies.[89] Such provision introduces three subsidiary factors to be considered.[90] The first factor is the nationality of the decdent which must be that of a Member State.[91] When the factual elements of nationality are not met, the courts must refer to the previous habitual residence of the decedent, provided that it was in a Member State and that five years have not elapsed since the decedent changed

[83] *Ibid.*
[84] Art. 4 states that: "The courts of the Member State in which the decedent had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole."
[85] Defined as "center of the decedent's life". Haris P. Pamboukis, *supra* note 54, 119.
[86] *Ibid.*
[87] Haris P. Pamboukis, *supra* note 54, 119.
[87] Defined as "center of his life".
[88] *Ibid.*
[89] George Panopoulos, in H. Pamboukis (ed.), 145.
[90] *Ibid.*
[91] *Id.*, 146.

residence to a non-Member State.[92] Finally, if the jurisdiction cannot be determined neither through the decedent's nationality, nor through the previous habitual residence, the jurisdiction must be found by identifying a single or proportionally insignificant part of the decdent's property in a Member State.[93] Thus, there is a hierarchical interrelation among the factors recited in art. 10.[94].

The subsidiarity of art. 10 however is related to Member States only.[95] Therefore, the fact that a third state court recognizes its competency to rule on the succession of a decedent who had his last habitual residence in that state, does not preclude a member State from establishing jurisdiction over the same dispute by virtue of Art. 10.[96]

In any case, art. 10 does not solve conflicts related to the application of the three factors.[97] Therefore, the following hypothetical situation does not find its discipline under Brussel IV: whenever both a third state court where the decedent had his habitual residence recognizes it's jurisdiction over a dispute and at the same time also a Member State established its jurisdiction according to art 10.[98]

B. The Choice of Law

The principal choice of law provisions of the regulation 650/2012 is art. 23[99] according to which the applicable law shall govern the entire estate, effectively eliminating any distinction between real property and other kind of of property.[100]

1. The "Last Habitual Residence" Factor[101]

In terms of what law will apply, according to Article 21(1) "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."[102] European countries have developed different connecting factors with reference to their international private law. Brussels IV introduced a uniform rule: the law of

[92] *Ibid.*
[93] *Id.*, 147.
[94] *Ibid.*
[95] *Id.*, 146. For example, if the decedent was a Greek national and his last residence was located outside of the European Union and he owned assets in both Greece and Italy, the jurisdiction of Italian courts may not be established under art, 10 (2) or art. 10 (1) (b), since Greek courts have jurisdiction pursuant to art 10(1)(a).
[96] *Ibid.*
[97] *Id.*, 151. Therefore, the second paragraph of art. 10 provides for jurisdictional powers only to a limited extent, as opposed to the jurisdiction of the first paragraph which is general.
[98] *Ibid.*
[99] "The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole."
[100] Garb and Wood, *supra* note 9, 3.
[101] The European legislator confers international jurisdiction to the courts of the Member State in which the decedent had his last habitual residence. Alfonso-Louis Calvo Caravaca in Caravaca et al (ed.), The EU Sucession Regulation, A Commentary, 127.
[102] This in the absence of a choice of law.

the decedent's place of "habitual residence" at the time of death shall govern.[103] 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 of the Member State of succession.[104] As such, it can only have an autonomous and uniform interpretation throughout the EU[105] having regard to the context of the provisions and the goals of this specific regulation.[106]

While this rule seems to simplify matters, there are two issues in applying it.[107] First, the term "habitual residence" isn't a defined term in the regulation, but the recitals provide guidance on how it should be construed.[108] The preamble states: "In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the decedent during the years preceding his death and at the time of his death, taking into account of all relevant factual elements, in particular the duration and regularity of the decedent's presence in the State concerned and the conditions and reasons for that presence." The habitual residence so determined should reveal a close and stable connection with the State concerned, considering the specific aims of this Regulation." Notwithstanding such guidance, the preamble to the regulation also states that determining a decedent's habitual residence "may prove complex."

Furthermore, the Regulation doesn't require a minimum amount of time needed in order to validly establish a "habitual residence".[109] Considering how easily a European 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 starting from August 17th, 2017. Further clarity may be found in the European Court of Justice case that defines the "habitual residence" as situated in the place where a person has established his interests not to be confused with a mere temporary and occasional presence as, in principle, it should have a certain length and express a sense of stability.[110] Personal and familiar ties should prevail over a person's professional connections to a place.[111] However, the importance of the place where a person engages in a profession may vary

[103] Garb and Wood, *supra* note 9, 3.
[104] *Supra* note 1, 11.
[105] *Ibid.*, the interpretation is not left to the single Member States.
[106] See *supra* note 50, 9. This concept finds its roots 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.
[107] *Supra* note 1, 11.
[108] *Ibid; See also*, Garb and Wood, *supra* note 9, 3.
[109] *Supra* note 1, 12.
[110] *Ibid.*
[111] *See supra* note 91.

depending on how central that profession is to the individual.[112] Though the preamble provides examples, it provides no answers or bright line rules.[113]

2. The Test of Close Connection[114]

Another issue in applying the factor of "habitual residence" is that the primary test can be displaced in exceptional cases.[115] The law of a different jurisdiction 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." There's no clear rule on what constitutes a situation in which this exception would be implemented.[116] Thus, there's a general rule that's not entirely clear and an exception that's not entirely clear[117], and uncertainty as to what law will apply that can make structuring an estate plan extremely difficult for individuals who may be borderline cases.[118]

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 decedent's last habitual residence.[119]

3. The Choice of the Decedent

Courts can apply the exception of the closer connection on their own, unless there is a specific choice of law made by the decedent pursuant to Article 22.[120] Under Article 22 of the Regulation, "[a] person may choose, as the law governing 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

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[112] *Supra* note 1, 12.

[113] *Ibid.* There is no hierarchy among the factors indicated by recital 23 of the Succession Regulation. However, in a globalized world mobility can give rise to a divergence between family home and place of business. In this case there is no doubt that the location of the family home is predominant for determining the habitual residence of a person having his place of business or employment elsewhere. In determining the location of the family home, it is critical to consider where there are children and their place of education. The qualitative predominance of the family is a principle confirmed by recital 24 of the Succession regulation.

[114] This exception clause has the advantage to provide an answer to the criticism expressed in the private international law theory of the United States about the mechanistic conflict of laws rules, by bringing flexibility and by better transposing the private international law theory of proximity. The disadvantage is the relative uncertainty caused with respect to the predictability of the solutions chosen, particularly by the decedent. Haris P. Pamboukis, *supra* note 54, 208.

[115] Garb and Wood, *supra* note 9.

[116] Recital 25 explains that "where, for instance, the decedent had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicated that he or she was manifestly more closely connected with another State, the law applicable to the succession should not be the law of the State of the habitual residence of the decedent but rather the law of the State with which the deceased was manifestly more closely connected."

[117] *Supra* note 1,13.

[118] *Ibid.*

[119] This exception can only be accomplished by relying on the "order public" principles mentioned by Article 35 of the Regulation..

[120] Alfonso-Louis Calvo, *supra* note 93, 321.

of death."[121] While the Regulation may create a new default rule that has some uncertainties[122], it 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[123], thus greatly extending the possibilities offered to the testator.

If, for some reason, the individual wishes to revoke his choice of law that was properly made, he must do so through the appropriate steps according to art. 22(4)".[124] Therefore, in the absence of an election regarding the choice of law, under the regulation or consequently to a revocation[125], the default rule remains the law of the jurisdiction of habitual residence.[126] Such law would be applied by a Member State also to determine the validity of the testamentary instrument.[127] However, the timing is different.[128] Indeed, the succession law that governs the administration of the estate would be determined by the habitual residence at the time of the person's death, while the law regarding the validity of the document would be based on the place where the person was habitually residing at the time the document was executed.[129] That is true unless the decedent chose another state law.[130]

V. The Renvoi

The regulation no. 650/2012 implicitly does not adopt the doctrine of *renvoi*.[131] The concept of *renvoi* is an aspect of private international law that can create further complexity in determining what law will apply.[132] The underlying issue of *renvoi* is whether one jurisdiction will accept another

[121] *Supra* note 1, 15.
[122] *Ibid;* Indeed, it does not have to be a Brussels IV Member State.
[123] Recital 40 of Brussels IV specifies that: "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."
[124] *Supra* note 1, 15. Thus, a revocation of the will or a codicil amending the specific election would effectively revoke the choice of law previously elected.
[125] The regulation does not address the problems potentially raised by a revocation that occurs by operation of law, devised especially under common law systems, which consider events like a marriage, divorce, birth or adoption of children, to be the cause of a revocation. Consequently, if the testator does not replace such dispositions his succession will be subject to intestacy rules. The problem arises if also the choice of law dispositions should be deemed without effect A correct interpretation of the regulation should, however, suggest to give this problem a negative reply.
[126] *Supra* note 1, 15.
[127] *Ibid.*
[128] *Ibid.*
[129] Art 24 (2) of the regulation recites that "Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that person could have chosen in accordance with Article 22 on the conditions set out therein."
[130] *Ibid.*
[131] Garb and Wood, *supra* note 9, 4.
[132] *Supra* note 1, 22.

jurisdiction's law calling for another law to apply.[133] 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.[134]

Even if the operation of *renvoi* is further restricted by Article 34[135] of the regulation it is not totally abolished.[136] Indeed, in the absence of an election, Member States will accept *renvoi* from any non-Member States.[137]

VI. Implementation Hurdles: The 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 identified by an election or the decedent's habitual residence in the absence of an election.[138] Article 35 of the regulation may provide a method for a Member State not to apply the default regulatory standard "only if such application is manifestly incompatible with the public policy (*order public*) of the forum."[139] For instance, relevant case law in the Italian courts illustrates how public policy concerns come into play when the applicable foreign law does not establish any forced heirship rule and reaches the conclusion that in such case the foreign law is not be against public policy. However, this "public policy exception" should be used in exceptional circumstances[140], and in accordance with the principles already established by European Court of Justice.[141] Thus, the parameter to evaluate whether the concrete consequences arising from the application of foreign law is unacceptable is to determine whether such law is inconsistent

[133] *Ibid.*
[134] Art. 22 of "Brussel IV".
[135] Art 34(1) of the regulation states that: "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."
[136] Garb and Wood, *supra* note 9, 4.
[137] *Ibid.* The *renvoi* would include the rules of private international law of the non-Brussels IV State, so far as those rules include a *renvoi* to the law of a Brussels IV State or to the law of another non-Brussels IV State.
[138] Especially perhaps the law of a non-Member State.
[139] *Supra* note 1, 30; *See* also, Jennifer Bost, *Comment: Nothing Certain about Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions,* 27 Emory Int'l L. Rev., 1164 (2013).
[140] Recital 58 of Brussels IV states 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."
[141] Dieter Krombach v André Bamberski, C-7/98, ECR I-1935, 37 (2000) "[…] 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."; Renault, C-38/98, ECR I-2973, 30 (2000); Gambazzi, C-394/07, ECR I-2563, 27 (2009).

with to the principles of the *forum* state, but including the EU principles, most notably the fundamental rights[142] or if the application of the foreign law constitutes an evasion of the law of the jurisdiction.[143]

VII. Effect of the Regulation on Cross-Border Estate Planning

One of the objectives of the Cross-Border Succession Regulation is "to allow citizens to efficiently plan and to organize their succession in advance in a cross border context." Cross-border successions present unique difficulties and problems for testators, beneficiaries, and administrators.[144]

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 easy, but increases the ability to avoid mistakes.[145]

A. The Competent Court and the "Last Habitual Residence Factor"

In order for the courts of the Member States to be competent there must be sufficient connection between the dispute and the EU Member State's court.[146]

An example clarifies how the conflict of jurisdiction provision would operate.[147] Suppose a U.S. citizen was habitually resident in Florida at the time of his death, but two years before the court's procedure started, his habitual residence was in Italy, where he still owns an apartment. In this case case competency is determined by article 20, which establishes that the the Italian court has a general jurisdiction over his succession as a whole.[148] The court will apply Florida law to the U.S. citizen's mobile assets and to his immovable assets located in Florida; while Italian law will apply to the succession of the apartment located in Italy, because Florida law makes a

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

[143] Recital 26 of the regulation states that: "[n]othing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law."

[144] These problems include: (1) determining which member state's judicial system has legal competency to handle a particular cross-border succession; (2) resolving conflict of laws issues; (3) limited freedom of choice of law for testators; (4) restricted recognition and enforcement of judgments, non-contentious decisions, and notarial deeds; and (5) being recognized as an heir or administrator of an estate with assets and heirs located in multiple countries.

[145] *Supra* note 1, 9.

[146] Alfonso-Louis Calvo, *supra* note 93, 131.

[147] *Ibid.*

[148] *Id.*, 14. On the contrary a dispute regarding the succession of a person who died in Italy and who had Italian nationality, but habitually resided in France, cannot be filed before the Italian judge. *See* Alfonso-Louis Calvo, *supra* note 93, 133.

renvoi to the law of the place where the property is located, Italy, and this *renvoi* must be accepted pursuant to Article 34(1)(a).

B. The Test of Close Connection

Another example clarifies how the choice of law rule under Brussels IV would apply in a case involving an international client.[149]

While vacationing in Italy, a U.S. citizen has a serious car accident.[150] The nature and extent of the injuries suffered because of this accident force him to be hospitalized in an Italian health care facility, against his will, for about six months.[151] 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.[152] 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.[153] She does not sell the family's main residence located in California as she hopes to be able to return to the United States as soon as possible.[154] As 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.[155]

In this case, an Italian court might decide that even though the decedent's "habitual residence" is in Italy, pursuant to the terms of Article 23(1) of the Succession Regulation, the husband is "more closely connected" to California law using the exception of Article 23(2).[156]

Thus, the application of the connection test may change only the applicable law as to the governing standards, not the competent court, now California: this may easily lead to situations where EU courts apply the laws of a third country.[157]

C. The Choice of the Decedent

Choice of law provisions give a U.S. citizen, including dual citizens, who would otherwise be potentially exposed to forced heirship rules, constitute an additional flexibility created through Brussels IV. Art. 22 provides the ability to effectively reclaim the common law freedom of testation by making this election.[158]

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[149] *Supra* note 1, 14.
[150] *Ibid.*
[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] *Id.*, 15. 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, in

Timing is of essence for making the election, both in terms of what law will apply and the effectiveness of the election.[159] A U.S. jurisdiction's law may be chosen if the person making the election is a U.S. citizen at the time of the election or at the time of death.[160] It would be relevant for those considering expatriation to a jurisdiction that has less testamentary freedom.[161] Likewise, an individual who is in the process or plans to obtain the 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.[162]

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 [...]".[163] For a U.S. citizen, this would be his last will, provided that it's valid in the designated U.S. jurisdiction.[164] In making the election, the testator should state that the chosen law applies to the disposition of property and administration of the estate. In addition, the testator must follow the validity and admissibility of the last will and testament dictated by the chosen law.[165]

There are some issues that must be considered in applying this election.[166] One question, of particular concern for United States citizens, is what law would apply if the election was made.[167] Article 22 recites that a person can choose the law of "the country whose nationality he possesses[...]".[168] This

this regards 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 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.

[159] *Ibid.*

[160] *Ibid.* For those who are U.S. citizens for life, this timing requirement is of little concern.

[161] *Ibid.*

[162] 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 he possessed - and it will be valid if the individual survived until August 17, 2015.

[163] Art. 24(2) of Brussls IV.

[164] *Supra* note 1, 16.

[165] Choice of law applies also to the validity of the instrument chosen. *See* recital no. 50 of Brussels IV.

[166] *Supra* note 1, 20.

[167] *Ibid.*

[168] Art. 22 of the Succession Regulation states that:

"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.

provision presumes that the country has a single law of succession.[169] However, the United States has no national law of succession as each U.S. state has its own set of laws.[170] So the question becomes which U.S. state's law would apply.[171] The regulation provides that art. 36 applies.

In most situations the conflict-of-law rules designate the domicile as determining factor, however there isn't any national law on point. Thus, there is a tenuous argument to be made that domicile would be the appropriate determination of what U.S. state's law should apply. The prevailing argument is to the contrary that the United States do not have conflict-of-laws provisions for purposes of Brussels IV.

The regulation provides that in cases in which a country doesn't have internal conflict-of-laws rules, theindividual's nationality is the determinative factor, the law of the territorial unit where the decedent had "the closest connection" will apply, which will likely often be the same place as the domicile. For example, prior to the regulation coming into force, the law of a Member State could call for a U.S. state's law to apply to an estate of a person domiciled in the Member State.[172] Thus, the U.S. state's law would call for the law of the Member State to apply as the decedent was domiciled there.[173]

D. The Renvoi

In the absence of an election, if the U.S. jurisdiction's conflict of law applied a Member State's law to real property located in that Member State, that European jurisdiction would accept the *renvoi* and apply its own succession law.[174] Thus, for those habitually residing in the United States holding real property in a Member State, relying on the new Brussel IV rule wouldn't remove the property from potential forced heirship rules.[175]

The following example illustrates how powerful the new tool can be.[176] Mark is a U.S. citizen residing in Arizona who teaches English literature at a college level.[177] 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.[178] In Italy,

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."

[169] *Ibid.*

[170] *Ibid.*

[171] *Ibid.*

[172] Generally, U.S. succession law for all but real property is based on the decedent's domicile.

[173] 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.

[174] *Supra* note 1, 22.

[175] *Ibid.*

[176] *Id.*, 28.

[177] *Ibid.*

[178] *Ibid.*

he meets Alessandra, an Italian citizen, whom he marries in Italy in 2011.[179] The couple, married in a separate property regime, had an only child, Lavinia, a dual Italian-American citizen.[180]

Shortly after the marriage Mark buys an apartment in Italy using his own separate funds.[181] The apartment is titled in Mark's name only as his sole and separate property.[182] In December 2012, while in Arizona for Christmas as usual, Mark executes legal documents that establish an Arizona living trust and a pour-over Arizona will.[183] He appoints his sister and his brother-in-law (both U.S. citizens residing in Arizona) as the co-trustees.[184] While his trust documents have a provision that clearly elects Arizona law as the sole applicable law, his Arizona will doesn't.[185] Mark's intention is to register his trust in Italy and eventually transfer the apartment's title into the trust.[186] However, this never gets accomplished for various reasons. In the spring of 2015 Mark, who uses a motorcycle for his commute to fight the Italian traffic, has a very serious accident.[187] In the event that Mark recovers and takes care of his estate planning needs there are two possible scenarios, depending on whether Mark demise occurs before or after the entry into force of Brussels IV.[188]

1. Before "Brussels IV"

In the event that Mark died before August 17, 2015, his Arizona will, though valid, would not have specified the applicable law.[189] Assuming that one could interpret Mark's Arizona will as tacitly selecting Arizona law as the applicable law to his succession, questions would have arisen over the

[179] *Ibid.*
[180] *Ibid.*
[181] *Ibid.*
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*
[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid;* According to the transitional provisions of art. 83 of Brussels IV:
"1.This Regulation shall apply to the succession of persons who die on or after 17 August 2015.
2. Where the decedent chose 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 decedent 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 with regard to the 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 decedent 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 August 17th, 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."
[189] *Ibid.*

validity of such "tacit election".[190] 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 succession.[191] The default criterion of the national law of the deceased would lead to the application of the U.S. jurisdiction's laws, including its conflict- of-law provisions, that imply the application of the law of the decedent's domicile to all but the real property.[192] Thus, Italian laws would control the distribution of Mark's main asset, the apartment located in Italy, according to the forced heirship rules.[193]

2. After "Brussels IV"

If instead the regulation was in effect at the time of Mark's demise, he would be considered an "habitual resident" of Italy, according to the first default factor of "last habitual residence". If his will were interpreted as not having a clear election of Arizona law as the applicable law, then Italian law would apply to his succession as a whole, including his assets located outside the territory of Italy. Whereas, if his will may now be interpreted as having a "tacit choice of law" electing Arizona law as the sole applicable law, pursuant to Article 34(2), *renvoi* to Italian laws would not apply.

In order to avoid a negative possibility, a U.S. citizen similarly situated should draft a provision in his Arizona will specifying a clear election of "Arizona substantive law, with no regard to its conflict of law rules" as the only applicable law 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.

VIII. The Public Policy Concern

In a standard case of a U.S. citizen, or any other nationality for that matter, claims of violating public policy or trying to evade a certain applicable law should be fairly limited in the case of an individual electing a choice of law since the choice is fairly limited under the terms of the regulation.

A testator can only choose the law of his nationality, not that of his place of residence, place of domicile or location of property. Nationality, as opposed to residence or location of property, is a fairly fixed factor. The ability to choose one law to govern all succession matters prevents a testator from actively trying to *forum* shop a certain set of succession laws.

[190] *Ibid.*
[191] *Ibid.*; See *supra* note 43, 8.
[192] *Ibid.*
[193] *Ibid.*

In addition, even if a court in one of the Member States decided not to accept the election of a U.S. state's law by a U.S. citizen, the decedent would not be left in a worse a position than had the election not be made.

Thus, the court wuld then presumably apply the law of te decedent's habitual residence or the law that the forum country could have applied in the absence of the regulation.

Conclusion

In Europe a large part of the estate administration is based on unwritten rules and local custom implementing the rules that are written.[194] The EU remains over two dozen separate nations, each with its own legal system.[195] The implementation of the regulation is not an elimination of all of these systems, but a change to each of them.[196] Lawyers in Member States may now put the regulation into practice.[197]

In the U.S. it will be determinative how jurisdictions will react in the event of a choice of law that designates U.S. common law as the applicable law.[198] While some U.S. jurisdictions may have mechanisms to refuse the imposition of foreign forced heirship rules on property, they may claim jurisdiction over such matter, through the ability to choose the law that governs.[199] Others recognize more traditional rules such as the law of domicile applying over all, but real property located outside of its jurisdiction. However, the new choice of law provisions that are very broad under the Regulation may go further than certain U.S. laws allow. How U.S. jurisdictions will adopt to the way this Regulation applies will take time and be a state specific law analysis.[200] The real issues may arise in more technical areas, such as basis for fiduciary fees, or whether items are included on accountings or inventories, and how the property is included for purposes of determining a spousal elective share.[201]

[194] Jennifer Bost, *supra* note 139, 1172-1174.
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*
[198] *Ibid.*
[199] *Ibid.*
[200] 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.
[201] Jennifer Bost, *supra* note 139, 1174.