IMPACT OF THE EUROPEAN REGULATION ON SUCCESSION* IN CANADA

Jeffrey Talpis[**]

I. INTRODUCTION

A growing need for harmonization owing to increased cross-border contacts triggered by the movement of people and property and the uncertainty and diversity of applicable laws governing international estates were the principal factors leading to the adoption of the *Hague Convention of August 1, 1989 on the Law Applicable to Succession to the Estate of Deceased Persons*, which is not yet and will likely never be in force.

However the general principles — unity of applicable law and right to choose the law applicable to successions under the Hague Succession Convention — have since been taken up by the European Union which has resulted in the adoption of the EU Succession Regulation which came into force on August 17, 2015. The Regulation has changed the law of international successions in all the member states of the European Community where it is in force, as its provisions almost entirely substitute and replace the private international law rules previously in existence.[1]

---

* The official name is: *Regulation (EU) No 650/2012 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*. Since the Regulation is of universal application except for the rules on recognition and enforcement of foreign judgments, the circulation of authentic instruments and the certificate, third states are affected by the Regulation.

** Me Jeffrey Talpis, Professor, Faculty of Law, University of Montreal, Attorney at law, Doctor of Laws, Notary, Canadian Delegate at the Hague Conference of Private International Law on Succession, Academician of the International Academy of Estate and Trust Law, arbitrator, mediator.

1. There is an abundance of literature on the topic. I would suggest:

   A. Bonomi, P. Wautelet, I. Pretelli, and A. Öztürk, "Le droit européen des successions – Commentaire du Règlement no 650/2012 du 4 juillet 2012", 2nd ed. (Groupe Larcier, Editions Bruylant, 2016), and references. Andrea Bonomi who is the main contibutor to this work is the Director of the European Center of Comparative, European and International law of the University of Lausanne, Switzerland, whereas co-author Patrick Wautelet is a Professor at the Faculty of Law at the University of Liege, Belgium; and I. Pretelli and A.

The objectives of the EU Succession Regulation are to remove obstacles to the free movement of persons and property in order to allow citizens to organize in advance their succession where they have connections to different jurisdictions. To do so, the Regulation provides a comprehensive approach within a single instrument setting forth uniform rules which determine which courts have jurisdiction to rule upon a matter of succession, and which law applies to international successions. Moreover it provides uniform rules for the recognition and enforcement of decisions and authentic instruments in matters of succession. However the Regulation does not harmonize the substantive succession law of the member states.

The Regulation applies to all successions — testamentary, intestate and contractual. Certain matters which may be incidental to succession are expressly excluded from the scope of the Regulation including taxation issues, matrimonial

---

Öztürk are scientific collaborators of the Swiss Institute of Private International Law.

A. Bonomi, ''Successions Internationales: conflits de lois et conflits de juridictions'', Recueil des cours de l'Acadamie de droit international de la Haye, t 30 (2010), pp. 71 to 418.

R. Frimston, ''The European union Succession Regulation (EU) No 650/2012'' (2012), 6 Private Client Bus. 213, pp. 213-216.

G. Khairallah and M. Revillard (ss dir.), ''Droit européen des successions internationales Le règlement du 4 juillet 2012'' (Defrenois, 2013).

M. Revillard, ''Stratégie de Transmission d'un patrimoine international'', *Nouvelles Perspectives*, 2nd ed. (Defrenois, 2016).

P. LaGarde, ''Les principes de base du nouveau règlement européen sur les successions'', *Rev. Crit. DIP* 2012, pp. 691 to 732.

Max Planck Institute, ''Comments on the European Commission's Proposal for a Regulation of the European parliament and the Council on Jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession'' (2010), 3 Rabels Zeitschrift 552, pp. 552-720.

Cridon de Paris, various authors, ''Commentaire du Reglement sur les successions'' (Paris, Éditions Dalloz, 2015).

For a critical examination of the EU Regulation from the perspective of legal certainty, see Magdalena Pfeiffer, ''Legal certainty and predictability in international succession law'' (2016), 12:3 J. Private Intl L. 566, pp. 566-686.

J. Talpis, ''Freedom of Cross-Border Estate Planning: Anticipated problems (subsequent to the EU Regulation)'' published in (2015), 22 Trusts & Trustees 119, by Oxford University Press.

Specifically as to the impact in third states: In Quebec: see J. Talpis, ''La Liquidation et la Planification d'une succession internationale en droit québécois a la lumiere du nouveau Reglement européen sur les successions'', in (2016), 411 Développements récents en successions et fiducies 1 (Formation continue of the Bar of Quebec), pp. 1 to 45.

See also Fabrrizio Buonaiuti, ''The EU Succession Regulation and third country courts'' (2016), 12:3 J. Intl L. 545, pp. 545-565.

property regimes, trusts or succession substitutes.[2] In spite of its 84 articles, it is easy reading and very civilian in drafting.[3]

The EU Succession Regulation is of universal application. This means that the choice of law rules governing succession, as well as some jurisdictional rules apply not only in disputes having connections between two Member States but also in some situations when the applicable law is that of a third state. However there are no uniform rules within the EU Succession Regulation addressing cases of parallel litigation in third country courts, nor uniform rules governing the recognition and enforcement of decisions delivered by third country courts in matters of succession, which runs the risk of fragmentation and/or parallel litigation.[4]

The Regulation is applicable in all states of the European Union, except for Denmark, Ireland and the United Kingdom. Generally speaking, those states decided not to opt in — at least in the case of the United Kingdom and Ireland — because of the unitary approach of the Regulation, freedom of choice as to the applicable law, the broad scope of the Regulation impacting upon probate, and the provisions allowing for claw-back of gratuitous dispositions under the law of succession which could affect property transferred by the decedent by way of an *inter vivos* trust. Thus they are not bound by the Regulation and will be considered as third states by courts of the Member States.

Canadians who need to be concerned by the Regulation are those having property in a Member State, who are habitually resident or who were working at the time of their death in a Member State, or who are also nationals of a Member State and Europeans who are habitually resident, have property, or who are working at the time of their death in a third state (Canada).

In order to get a better understanding of the issues involved in the settlement or planning of a cross-border estate where

2. Although excluded under the Regulation and a distinct matter from succession, the validity, effect and recognition of trusts may impact on the overall solution to a cross-border estate. It is thus important to recall that the *Hague Convention on the Law Applicable to Trusts and on their Recognition* of July 1, 1985 has been ratified by Canada and is in force in the following Canadian provinces: Alberta, British Columbia, New Brunswick, Prince Edward Island, Saskatchewan, Newfoundland and Labrador, and Nova Scotia. Finally, there is presently before the Ontario legislature a bill (Bill 218) which includes as Annex 7, the *International Recognition of Trusts Act, 2016*, whereby the Trust Convention *will* be in force in Ontario.
3. See Annex A arts. 1 to 36 (or 4, 10, 21, 22, 34 and 36) of the Regulation.
4. See Buonaiuti, *supra*, footnote 1, p. 556.

there are links between a member state and a Canadian province or territory, I will firstly briefly and generally compare the rules of the EU Succession Regulation with those in force in Canadian jurisdictions.

Secondly, using hypothetical cases, I will compare the different solutions under the EU Succession Regulation and with those in the Canadian provinces and territories of Canada and finally I will discuss the challenges that the diversity of solutions bring for the cross-border estate planner.

In Canada, there exists no international Convention, multilateral or bilateral governing jurisdiction, choice of law or recognition of foreign decisions in the matter of successions. Given the constitutional division of powers, there is no federal law governing succession. As a result each province or territory in Canada has its own rules governing jurisdiction, choice of law and recognition of foreign judgments in general in matters of succession.

PART 1: COMPARING APPROACHES

Chapter 1: Jurisdiction

Section 1. Under the EU Succession Regulation

General Jurisdiction (Article 4)

The deceased's last habitual residence determines the general and worldwide jurisdiction of the courts of a Member State (art. 4). The competent authority is broadly defined and comprises any judicial authority and other professionals, such as notaries having competence in matters of succession, exercising judicial functions or acting under the control of an authority.

Where the deceased did not have his habitual residence in a Member State, courts of a Member State still have jurisdiction to rule upon the global estate in two situations as discussed below.

Forum selection (Articles 5 and 6)

Where the deceased has validly chosen the law of a Member State to govern his succession, following the death of the deceased, concerned parties may agree that a court of such state shall have exclusive jurisdiction to rule upon the worldwide

succession, even though the deceased did not have his last habitual residence in the selected state.

Subsidiary jurisdiction (Article 10)

If the habitual residence of the deceased at the time of his death is not located in a Member State, the Courts of a Member State will still have jurisdiction to rule upon his worldwide estate as long as he owned property (even if not all of his property), irrespective of its value, located in the Member State and either (a) the deceased had the nationality of that Member State or (b) ceased to be resident in that Member State at some point during the last five years before his death. The alternative under (b) is likely to create some uncertainty as to when the deceased ceased to be a habitual resident in the Member State.

If none of these conditions are met, under para. 2 of art. 10, the courts in a Member State have jurisdiction to rule on the succession to assets that are located in the Member State.

According to art. 12, entitled "limitation of proceedings", there is an important exception to the jurisdiction rules under arts. 4 and 10, where amongst the assets of the estate there is property situated in a third state and there is jurisdiction to rule upon the whole estate. At the request of a party, the court seized could decide not to rule upon one or more of the assets situated in the third state, if it may be expected that its decision in respect of those assets will not be recognized and declared enforceable in that third state.[5] The parties themselves could decide to limit the scope of the proceedings in this respect under para. 2.

Forum of necessity (Article 11)

If no court of a Member State has jurisdiction under arts. 4 and 10, the courts of a Member State may, on an exceptional basis, rule on the succession where proceedings cannot reasonably be brought or conducted or would be impossible in the third state with which the case is closely connected. As has been argued, the court could limit its jurisdiction to property with respect to property situated in the third state in question,

5. This is important from a Canadian perspective as subsidiary jurisdiction on the basis of art. 10, p. 1 alone will not likely constitute a real and substantial connection with the country of origin under the law of the common law jurisdictions nor under the *Civil Code of Quebec*, CCQ-1991 ("C.c.Q.") (arts. 3153 and 3164 C.c.Q.).

considering the subsidiary nature of art. 11 and its objective to avoid a denial of justice.

Lis Pendens (response to parallel proceedings) and Provisional and Conservatory Measures (even where courts have no jurisdiction over the merits of the dispute)

The Regulation adopts a strict approach to the problems created by parallel litigation within the EU amongst Member States. Where there exists an identity of parties, cause and facts, the court of the state seized secondly must decline jurisdiction (art. 17).

Under the EU Regulation, the Court of a Member State is not obliged to stay its proceeding simply because the courts of a third state, such as a court of a Canadian jurisdiction, have been firstly seized of the case. Whether or not the court of the Member State chooses to stay or decline jurisdiction in these circumstances when the state of a third country is seized in the first place depends upon its national law.

The Regulation also allows a Member State to take Provisional and Conservatory measures, even if it has no jurisdiction to rule on the substance of the case (art. 19).

Section 2. In Canada

(a) Under the laws of Quebec

In Quebec law, under art. 3153 C.c.Q., there is no single rule of general jurisdiction in matters of succession authorizing the court to rule on the worldwide property of the succession of the deceased. There are alternative choices: jurisdiction exists where Quebec was the last domicile of the deceased or where Quebec law has been chosen to govern the succession or where one of the defendants is domiciled in Quebec at the time when the proceedings are taken.

As in all matters, the doctrine of forum non-conveniens, under art. 3135 C.c.Q., applies giving the court discretion to decline jurisdiction in favour of another court better placed to hear the case which is certainly a possibility where jurisdiction is exists on the sole basis of the domicile of one of the defendants.

As well, where the court does not have jurisdiction to rule upon the whole of the estate, it does have a subsidiary jurisdiction to rule upon a matter of succession concerning property situated within its jurisdiction (para. 2 of art. 3153

C.c.Q.), although it was been suggested that this rule authorizes jurisdiction over assets outside Quebec as well.[6]

The doctrine of forum by necessity also applies. According to art. 3136 C.c.Q., applicable to all matters, if the Quebec court does not have jurisdiction to hear a dispute, it may nevertheless hear it, provided that the dispute has a sufficient connection to Quebec if proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required.

It remained to be seen how our courts would interpret art. 3136 C.c.Q., liberally or restrictively. It is now clear from the case law that the test is rather stringent: it is not sufficient that going abroad would simply be more complicated or costly.

The Civil Code deals with *lis alibi pendens* (parallel litigation) in two ways: firstly by way of a jurisdictional rule under art. 3137 C.c.Q. and secondly at the stage of enforcement of foreign judgments. (art. 3155, para. 4, C.c.Q.). Both seek to avoid litigation in multiple fora, resulting in the risk of contradictory judgments and the inherent costs and delays of parallel litigation.

With respect to the jurisdictional rule, Quebec law stands in a unique position. It blends the civil law rules, whereby the second-seized Quebec court will desist and there must be a good chance that the judgment of the first-seized court will be recognised in Quebec with the common law approach, by virtue of which the second-seized Quebec court has discretion not to stay the proceedings when it decides that it was the most appropriate forum.

There is also a rule providing for jurisdiction on provisional or conservatory measures, even where the court does not have jurisdiction on the merits (art. 3138 C.c.Q.) as well as jurisdiction in case of emergency or serious inconvenience to take measures necessary for the protection of a the person or property present in Quebec (art. 3140 C.c.Q.).

---

6. Gerald Goldstein, in *Commentaires sur le Code Civil du Québec* (Cowansville, Éditions Yvon Blais), p. 281, to a certain extent this position has been applied recently in *Re Ferretti Art Establishment et Chiassi*, 2016 QCCS 3470 (C.S. Que.), as well as by Janet Walker and J.-G. Castel, *Canadian Conflict of Laws* (Markham, Ontario, Butterworths), Vol. 2, ch. 27, (27.1). I disagree with this interpretation, which suggests the same solution as that found for matrimonial regimes under art. 3154 C.c.Q. should apply. See J. Talpis, "La Liquidation", *supra*, footnote 1, p 9.

(b) In the Common Law Provinces and Territories of Canada

There are usually no codified or statutory rules on jurisdiction in matters of succession.

It seems that common law courts in Canada have jurisdiction to rule upon the administration of an estate of a deceased and to issue a grant of administration where the deceased had his last domicile in the province or territory. Whether this jurisdiction extends to immovable property situated outside the jurisdiction seems to be an open question. Common law courts also have jurisdiction to issue a grant of administration even where the deceased did not have his last domicile in that jurisdiction with respect to assets situated in that jurisdiction.

Although administration does not include questions of succession, if the court has jurisdiction to make a grant of representation, subject to compliance with the constitutional requirements of the principles of order and fairness in the exercise of jurisdiction, it also has jurisdiction to rule upon succession, subject to doctrine of *forum non conveniens*.[7]

Chapter 2: Choice of Law

After setting forth the universal application of the Regulation as to the applicable law under art. 20, arts. 21 and 22 determine the law applicable to succession adopting the main principles of the Regulation — unity and the right to choose the law applicable to succession. As a result the choice of law rules could lead to the application of the law of a third state. However the Regulation rules make this rather exceptional.

Section 1. Absence of a Choice of Law by the Testator

1. Under the EU Succession Regulation

In accordance with para. 1 of art. 21, the habitual residence of the deceased at the time of his death is the primary connecting factor, which determines the law applicable to the worldwide succession of the deceased whether the succession is legal or testamentary.

As in the case of jurisdiction, there will be some difficulty in determining the location of the habitual residence since the

7. Walker and Castel, *supra*, footnote 6, ch. 26 and 27.

Regulation does not define this vague and unstable concept.[8] Although the connecting factor of habitual residence is well known under the private international law of the Member States, the connecting factor is not defined in the Regulation.

However recital number 23 of the Regulation does provide some guidance in terms of how to define a person's habitual residence, indicating that it would be determined by an overall assessment of the circumstances of the life of the deceased during the years preceding 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 conditions and reasons for that presence.

Anticipated difficulties will still occur in complex cases as to what constituted the deceased's last habitual residence where he/she resided for a long period during winter or summer months *or* for the purposes of work in a country other than that of his/her nationality, while retaining in the country of origin the bulk of his property.

For example, where the deceased being a national of both Spain and Canada, having his closest connection in Canada to Manitoba, lives half the year in Ibiza, Spain and the other half in Manitoba died having property in both jurisdictions, there is no certainty under the Regulation as to his last habitual residence.

The Regulation introduced the escape or exception clause under para. 2 of art. 21, which will allow the court not to apply the law of the last habitual residence of the deceased, where it is clear from all the circumstances of the case that the deceased was manifestly more closely connected at death with some other state, in which case the law of that state applies.[9]

For example Ariel lives in Israel. His son Daniel decides that Ariel is going to stay in a nursing home in Toronto. Some years later Ariel dies in the nursing home. It would seem that, especially where Ariel was a national of Israel, the law of Israel should apply.[10]

Although the exception clause is applicable by the court of the jurisdiction seized, it will normally be requested by one of the parties. This rule, however does not apply where the deceased had made a choice of law under art. 22, or where renvoi applies under art. 34.

8. Pfeiffer, *supra*, footnote 1, p. 573.
9. See Bonomi, *supra*, footnote 1, pp. 318 and 319 for interesting examples.
10. *Ibid.*, p. 319.

2. Under the laws of Canada

(a) Under the laws of Quebec

Under the law of Quebec, in the absence of a valid choice of law, the principle of scission (or duality) applies in virtue of which succession to movable property is governed by the law of the last domicile of the deceased whereas succession to immovable property is governed by the law of the situs of the immovable (art. 3098 C.c.Q.).

The escape clause also applies, exceptionally, to all rules in the Civil Code based on proximity, including succession (art. 3082 C.c.Q.). The rule allows the courts to ensure that where in a given case, the law that would otherwise apply has only a remote connection to that law, and a much closer connection to another law, the court may apply the other law.

In order not to compromise legal security and predictability, it is excluded where the law has been validly designated in a juridical act. In spite of the many situations in which courts could apply the doctrine, its application has been truly exceptional.[11]

(b) Under the laws of the other Provinces and Territories of Canada

Succession to an intestate is governed by the duality (scission) principle — the law of the deceased's last domicile governs his or her movable estate, whereas the law of the situs of his or her immovable property governs the succession to his or her immovable property. Where the succession rights under the law governing movable succession are not the same as those governing immovable successions, Canadian courts have developed rules preventing the surviving spouse from cumulating preferential shares to the disadvantage of children.[12]

Where the deceased has made a will, the law governing the

11. Attempted, but rejected in *H. (J.S.) c. F. (B.B.)*, [2001] R.J.Q. 1262 (C.S. Que.); *F. (D.) c. G. (R.)*, 2005 CarswellQue 3263, J.E. 2005-1116 (C.S. Que.); *Pavlatos c. Millas*, 2007 QCCS 4630 (C.S. Que.), varied 2009 CarswellQue 317 (C.A. Que.), affirmed 2010 CarswellQue 2807 (C.A. Que.), leave to appeal refused 2010 CarswellQue 9936, 2010 CarswellQue 9937 (S.C.C.); admitted in *Re M. (D.)* (1999), (*sub nom. Droit de la famille - 3510*) [2000] R.J.Q. 559 (C.Q.); and in *Adoption (En matière d'); Re T. (M.)*, 2006 QCCQ 8524 (T.J. Que.).
12. See for example, in *Thom Estate v. Thom; Re Thom* (1987), 40 D.L.R. (4th) 184 (Man. Q.B.).

essential or material or intrinsic validity of the will is governed by the duality doctrine, which includes many aspects of what civil law jurisdictions consider to be questions of succession, for example the disposable part of the succession.[13]

Section 2. Choice of Law by the Testator (professio juris)

From a comparative perspective the freedom to choose the law governing succession is not generally allowed. It is however permitted under the Hague Convention of private international law of 1989 as well as under the laws in certain Member States of the European Union, before the coming into force of the EU Succession Convention, for example in Belgium,[14] Italy,[15] and Germany[16] as well as in certain third states, including Quebec[17] and Switzerland.[18]

In common law jurisdictions the right to choose the law to govern succession is not permitted. However certain states of the United States, for example the State of New York, have adopted laws that permit a non-domiciliary testator to elect to have the laws of the enacting state govern the effect of testamentary dispositions of movable property situated therein instead of the law of the domicile which would normally apply. Where permitted, this choice applies only to the succession of property situated in the state enacting the law.[19]

However, the freedom to choose the applicable law to succession has been gaining recognition in recent years as a result of the merits of applying the extended role of party autonomy in private international law. Thus, it comes as no surprise that the EU Succession Regulation introduced the principle of the *Professio juris* or choice of law allowing for a

13. *Succession Law Reform Act* in Ontario, R.S.O 1990, c. S.26, s. 36; *The Wills Act of Manitoba*, C.C.S.M., c. 150, s. 41(1) and (2). Walker and Castel, *supra*, footnote 6, ch. 27, para. 9 and authorities cited.
14. Article 79 of the law of July 16, 2004 of the Code of Private International law.
15. Article 46, para. 2 of Law number 218 on the reform of Italian Private International Law of May 31, 1995.
16. Article 25, Law of July 25, 1986.
17. Article 3098 C.c.Q.
18. Article 91, para. 2 and art. 95, para. 2 of Private International law of 1987; and in general, see A. Bonomi, "Succession Internationales", *Conflits de loi et de Juridiction* (Recueil des Cours Acadamie de la Haye, Brill/Nijhoff, 2011), vol. 350, 74, p. 202.
19. *New York Estate Powers and Trust Law* (NY), EPTL 3-5.1.

choice of law, which will be recognized in all the Member States.

1. Under the EU Succession Regulation

Permitting choice of law was motivated by the desire to enable a testator to reduce uncertainties as to the determination of what constituted the deceased's last habitual residence and/or to prefer the law of his country of origin to apply to his/her succession.

Consistent with the principle of the unity, the choice must apply to the whole succession, movable or immovable and wherever situated.

There is no possibility of submitting succession to a specific property, movable or immovable to the law of its situation. Nor is the doctrine of incorporation permitted as it was under art. 6 of the *Hague Convention of 1 August 1989 on the Law Applicable to Successions* which provided for this possibility.[20]

Thus the deceased may not choose to have the Regulation apply to his assets in the European Union and not to his assets situated in third states, such as in Canada.

Under art. 22 of the European Regulation, the choice is limited to that of a state of which the deceased was a national either at the time of the will or at the time of death, including the law of a third state because of the Regulation's universal application.

Where the choice is valid, it will remain valid even where the decedent at the time of his/her death no longer had the required connection which justified the choice at the time of the will. Thus the choice of the law governing the nationality of the decedent at the time of designation remains a valid choice even where he/she has lost this nationality at the time of death.[21]

Where the deceased had dual nationalities, any of them may be chosen, even if it is not the law of the nationality with respect to which the deceased was most closely connected.[22]

In any event, art. 22 must be read in the light of recital 41

20. "A person may designate the law of one or more States to govern the succession to particular assets in his estate. However, any such designation is without prejudice to the application of the mandatory rules of the law applicable according to Article 3 or Article 5, paragraph 1."
21. In general, see Bonomi, *supra*, footnote 18, pp. 202 *et seq*.; J.A. Schoenblum, *Multistate and Multinational Estate Planning* (Chicago, CCH Publishing, 2010).
22. See M. Gore, ''La Professio juris'' (Défrenois, 2012), p.763.

which states that the determination of nationality is an incidental question governed by the national law including, where necessary any applicable international conventions.[23]

As to the form of the choice, it may be made expressly in a declaration in the form of a disposition of property upon death or it may be evident, *i.e.*, "demonstrated by the terms of such a disposition" (art. 22, para. 2).

There is a lack of certainty as to the factors that will constitute an implied choice of law.

For example where the testator used a type of will permitted under the law of his nationality, such as a mutual will, which is not valid under the law of the last habitual residence, this may constitute a choice which results from the terms of a testamentary disposition. [24] Another example might be the use of a succession agreement or a trust admissible under the law of the nationality but not under the law of his habitual residence.[25]

Finally and not insignificantly, contrary to the pre-Regulation succession laws of certain of the Member States (Italy, Belgium),[26] the choice is not restricted by the result under the chosen law which deprives heirs of mandatory, imperative rights of succession which they would have had under the otherwise applicable law.

2. Under the laws of Quebec and the Common Law Provinces and Territories of Canada

The right of a testator to choose the law applicable to his or her succession was permitted in Quebec in the 1994 Codification and is the only province or territory within Canada to allow the choice of law to govern succession.

Under Quebec law, (art. 3098 para. 2 C.c.Q.) the testator may designate either the law of the state of his domicile or of his nationality at the time of the will or at death. In addition where he has designated a law to govern the whole of his estate he

23. See Bonomi, *supra*, footnote 1, p. 331; also Filiali Osman, "Les droits des pays du Maghreb à l'épreuve du Règlement Européen sur les successions internationales vers une cohabitation", in *Dossier Régimes Matrimoniaux et Successions* : *Regards Croises Maroc-France*, publié.
24. According to Bonomi, *supra*, footnote 1, p. 323, the constitution of an Anglo Saxon testamentary trust by a citizen of a Common law state constitutes a significant indication of the intent of the testator to submit the law applicable to his succession to this state.
25. *Ibid.*, p. 324.
26. See for example art. 79 of the Belgium private international law code.

may nevertheless designate the law of the situs of an immovable to govern the succession to that immovable.

As far as the possibility of choosing the law governing the succession to a particular movable property, it is not permitted under art. 3098 C.c.Q.

It has been argued by Professor Goldstein that nothing precludes the application of the doctrine of incorporation. If it were to apply, the deceased having his or her last domicile in Quebec could validly designate the law of the Bahamas to govern the succession to his movables therein situated and the effect of the choice would depend upon the law applicable to the succession.[27]

However, in my view the doctrine of incorporation does not apply in particular because it was not codified as such with the other provisions and limitations taken from the Hague Succession Convention on the Law Applicable to Succession.[28]

As under the Regulation, where the choice is valid, it will usually remain so even where the decedent at the time of his/her death no longer had the required connection which justified the choice at the time of the will. Thus the choice of the law governing the nationality of the decedent at the time of designation remains a valid choice even where he/she has lost this nationality at the time of death.

As to whether the choice needs to be express, or could alternatively be implied by circumstances or from the document, the question has not yet been resolved by the courts, however the majority of Quebec authors are of the opinion that predictability, pragmatism and simplicity mandate a clear and express choice, which was indeed the preferred solution under the Hague Convention.[29]

As to the results of the choice, art. 3099 para. 1 C.c.Q., provides that the designation of the law applicable to the succession is without effect to the extent that the law so designated substantially deprives the spouse or a child of the decedent of a right of succession to which but for such

27. See Gérald Goldstein, *Droit international Privé*, commentaires vol. 1 (Cowansvile, Quebec, Editions Yvon Blais, 2011), p. 560; and in Goldstein and Ethel Groffier, *Droit international privé*, vol. 2, Specific rules (Cowansville, Quebec, Editions Yvon Blais, 2003), p. 514.

28. See J. Talpis, ''La Planification successorale dans le nouveau droit international privé québécois'' (1995), 97 R. du N. 251, at pp. 279-280; and Talpis, ''La Liquidation'', *supra*, footnote 1, p. 16.

29. As well as the Belguim Code of Private International law and under Italian law (Pre-Regulation); see Talpis, ''La Liquidation'', *supra*, footnote 1, p. 16.

designation, he or she would have been entitled. This provision was inspired by art. 24(1)(d) of the *Succession Convention*, which was simply a reservation which a state may make at the time of signature, ratification, approval or acceptance if the choice under art. 5, in certain situations, would totally or very substantially deprive the spouse or a child of an inheritance or family provision to which the spouse or child would have been entitled under the mandatory rules of the law of the state making this reservation.

The Quebec rule is subject to various interpretations.

According to Professor Goldstein even if the result of the choice substantially deprives a child or spouse of such a right, the choice is invalid in part but valid for the rest of the issues governing succession under the chosen law.[30]

In my opinion if the designated law deprives a child or spouse of such a right, under the otherwise applicable law, the choice of law is invalid and the law otherwise applicable applies in lieu of the chosen law to all of the questions governing succession.[31] This opinion avoids introducing another breach in the doctrine of unity, in particular, the problem of determining the scope of a chosen law and the law applicable in absence of choice. If the other opinion were intended, the legislator would have used the formula employed under arts. 3117 and 3118 C.c.Q.

In any event, the terms of the provision invite complex comparisons and interpretations when the chosen law and the otherwise applicable law provide different indefeasible succession rights. For example, under the designated law, the child or spouse is protected by the discretion of the court (the judicial adjustment or compensation system), whereas under the law that would apply in the absence of designation, protection of the

30. Goldstein, *supra*, footnote 27, pp. 327 and 328; Goldstein, *Commenantaires sur le Code Civil du Québec, Droit internatinal privé*, vol.1 (Cowansville, Quebec, Éditions Yvon Blais, 2011), p. 327; Stéphanie Ghozlan, "La désignation de la loi applicable en matière de succession internationales: La Professio juris en droit international privé québécois et compare, thesis to be published by Thémis, Montreal (2017), p. 229 *et. seq.*; Martine Lachance, "Quand le droit international privé se mele de nos successions" (2001), C.P. du N. 249, at p. 268; Edith Vezina, "Casse-tete notarial sur le plan international: Le mandat de protection et les successions" (2010), 1 C.P. du N. 121.

31. Talpis, "La Liquidation", *supra*, footnote 1, p. 18; and Talpis, "La Planification successorale dans le nouveau droit international privé québécois", *supra*, footnote 28.

claims of the child or spouse would occur by usufruct or forced shares.[32]

Clearly, the advantages of the introduction of the professio juris are seriously compromised by para. 1 of art. 3099 C.c.Q., and I would strongly suggest the provision be removed, so as to harmonize Quebec law with the Regulation, and leave it to the public order exception to resolve the potential problem.[33]

Finally in accordance with art. 3100 C.c.Q., there exists the possibility of the compensatory takings where the solution applicable under the Quebec conflict of law rule is not respected in the foreign state where the deceased owned property.

As in all common law jurisdictions (save exceptionally in certain states in the United States),[34] the professio juris is not valid. Duality applies and a testator may not designate the law applicable to his succession.

Chapter 3: Scope of the applicable law governing succession

1. Under the EU Succession Regulation

Article 23(2), sub-paras. (a) to (j) provide a non-exhaustive list of matters which are to be governed by the law applicable to succession, including the liquidation or administration of the succession, without prejudice to the powers and rights of an administrator appointed under the law of a court seized of the matter pursuant to art. 29.

Known problems will continue, such as the law applicable to incidental questions. As a result the jurisdiction seized will decide under its own private international law rules whether or not the incidental question should be determined as an autonomous matter or by the conflict rule of the state whose law governs the succession.

In addition, difficult problems of characterization will

32. For example, in the Netherlands, a usufructuary has even more important rights and can even use the assets which he holds in usufruct, including alienating them or replacing them with other assets.

33. The choice is also limited by another barrier, in that the choice will not apply to particular succession regimes which are governed by the law of the situs of property (art. 3099 C.C.Q., para. 2). The same rule exists under the European Regulation.

34. Under s. 3-5.1(h) of EPTL of New York, a testator who is not a New York domiciliary may make an express choice of New York law to govern almost all questions of succession to property movable or immovable situated in New York, including intrinsic validity, effect, interpretation, revocation or alteration.

continue, which will be determined by the forum, for example whether the increased share of the surviving spouse under the legal matrimonial regime in German law is governed by the law applicable to succession as determined under the Regulation or by the law governing the matrimonial regime of spouses which is excluded from the Regulation.[35]

The following addresses certain specific derogations or exclusions from the law governing the succession under the Regulation.

(a) Dispositions of Property upon Death (Articles 3(1)(d), 24 and 25)

A disposition of property upon death is defined under art. 3(1)(d) of the Regulation as a will, a joint will or an agreement as to succession. The law governing these dispositions is not governed by the law applicable to succession, which derogates from the unity doctrine; it may be possible for the deceased to choose the same law as that applicable to successions.

Article 24 governs dispositions of property in contemplation of death, other than succession agreements, which concern essentially wills, including joint wills.[36]

In virtue of art. 24, the law applicable to the admissibility and substantive validity of these dispositions is governed by the law which would have been applicable to the succession of the deceased if he had died on the date when the testamentary disposition was signed. The application of the anticipated succession law might provide for a more effective cross-border estate plan.

Article 25 governs Agreements as to Succession, which provides that the admissibility, the substantive validity and the binding effects of succession agreements, including mutual wills are governed by the same law as under art. 24, save for the agreement, which concerns many parties, where its validity depends upon the cumulative application of the law governing the anticipated succession of the parties to the agreement.

35. See the recent case rendered on May 13, 2015 in *Oberlandesgericht Frankfurt am Main* in Germany which settled the controversy under German law, characterizing the question as one governed by the law of matrimonial regime.

36. If two wills are written down in one document, without reciprocal dispositions, the wills are joint wills and governed by art. 24. If they are written with reciprocal dispositions they will be treated as a mutual will within the definition of succession agreements and are governed by art. 25.

However as with respect to testamentary dispositions of property at death, certain effects of succession agreements are governed by the law applicable to the succession under arts. 21 and 22 of the Regulation. Article 25 derogates from the law applicable to such agreements in most common law jurisdictions, which characterize mutual wills as matters of contract and governed by the law applicable thereto.[37]

The scope of these derogations is rather large, as under art. 26 they govern, *inter alia*, capacity to dispose, particular causes which bar the person disposing in favour of certain persons or from receiving from the person making the disposition, admissibility of representation, interpretation, consent, including vitiated consent and intention.

(b) Administration

According to art. 23(2)(f), the law applicable to the succession determines the powers of the heirs, executors or other representatives of the succession, without prejudice to the powers and rights of an administrator appointed under the law of the court seized of the matter, pursuant to art. 29, paras. 2 and 3.

In an obvious attempt to take into account, in particular, the laws of the United Kingdom and Ireland, under para. 1 of art. 29, where the appointment of an administrator is mandatory or mandatory on request under the law of a Member State whose courts have jurisdiction to rule on the succession, and the law applicable to the succession is a foreign law, the courts of that Member State when seized, may appoint one or more administrators of the estate under their own law subject to the conditions laid down in this article.

The administrator appointed should be the person(s) entitled to execute the will of the deceased and /or to administer the estate under the law applicable to the succession and shall exercise the powers under the foreign law applicable to the succession (art. 29, para. 2).

However under para. 3 of art. 29, it is provided that notwithstanding the rights and powers established in the previous paragraphs, where the law applicable to succession is that of a third state, the court may, by way of exception, decide to vest in those administrators all of the powers of

37. Bonomi, *supra*, footnote 1, pp. 446-447.

administration provided for by the law of the Member State in which they are appointed.

2. Under the Laws of Quebec and the Common Law Provinces and Territories of Canada

Quebec law attributes a large scope to the law applicable to succession, which contrary to the solution under the EU Succession Regulation, includes the substantial validity and effects of the law governing testamentary dispositions, the validity and effects of joint wills, succession agreements[38] and mutual wills.[39]

Furthermore, certain matters which are governed under the Regulation (art. 26) by the law applicable to the testamentary disposition, such as the capacity to dispose and the interpretation of the will are governed under Quebec law by the law governing the personal status of the deceased (art. 3083 C.c.Q.), and the law governing the interpretation of a juridical act (arts. 3111 and 3112 C.c.Q.).

Under Quebec law, the administration/ liquidation falls within the scope of the applicable law governing succession. Where under the foreign law a personal representative must be named and where the representative does not have authority to take possession of and if necessary alienate property situated in Quebec, an administrator or liquidator to deal with property in Quebec may be named (art. 3101 C.c.Q.).

Under the common law applicable in Canadian provinces, the scope of the law applicable to succession is narrower than that under the Regulation and in Quebec law. Administration is governed by the law of the province or territory where a grant of administration has been issued, which usually corresponds to the law of the situs of the asset and is dealt with prior to application of the law or laws applicable to succession.

---

38. Talpis, "La Planification successorale dans le nouveau droit international privé québécois", *supra*, footnote 28, pp. 273 to 276; Talpis, "La Liquidation", *supra*, footnote 1, p. 19.

39. The characterization of joint wills is controversial as there is case law which has held them to be governed by the law governing the formal validity of the document, whereas succession agreements and mutual wills are governed by the law applicable to the succession of the parties whose succession is in issue. See the recent Quebec case of *Kadar v. Reichman (Succession)*, 2014 QCCA 1180 (C.A. Que.).

Chapter 4: Renvoi

1. Under the EU Succession Regulation

Article 34 abolishes renvoi when the applicable law is that of a Member State.

However, where the applicable law is that of a third state, the private international law rules of that third state are applied insofar as they make a renvoi back to the law of a Member State or to the law of another third state which would apply its own law.

For example, a French citizen having his last residence in Nova Scotia leaves immovable property in France, Italy and in Nova Scotia. The French court having subsidiary jurisdiction to rule upon the whole estate under art. 10 applies the law of Nova Scotia, which operates a renvoi to French law for the succession to the immovable in France and to Italian law to the succession to the immovable in Italy.

However certain questions remain unclear:

For example, should the court of the Member State take into account only the conflict of law rule of the third state governing succession or its solution to the renvoi problem? If the latter is the correct solution, then if the law of a third state uses total renvoi or the foreign court theory, as do most common law jurisdictions, this would most often lead to the application of the internal law of the third state, contrary to the likely objective of the rule. As a result, the better approach, one that in cases where renvoi is not excluded, is for the court of the Member State to take into account only the choice of law rule of the third state.[40]

Another problem is where the deceased had two nationalities — that of the third state chosen and that of a Member State. Should preference be to the law of the Member State to ensure greater application of the Regulation or should it be the law of the state of which he is a national with respect to which he had his closest connection?

Where there has been a choice of law by the testator under art. 22, to a third state then under para. 2 of art. 34, no renvoi shall apply.

Another unresolved question which will arise in situations where renvoi is not applicable and the applicable foreign law contains geographical or jurisdictional limitations. Should the

40. See Bonomi, *supra*, footnote 1, pp. 516-517.

court of a Member State characterize such limitations as internal law rules or conflicts of law or jurisdictional rules?

For example a U.K. national residing in France designates English law to govern his succession. *The Inheritance Act 1975* of England provides that the application for financial provision from the deceased's estate may only be made where the deceased died domiciled in England. This raises the question as to whether the rule fixing the territorial scope of the act is part of internal law or private international law, as renvoi does not apply under art. 34.

Although the matter is rarely discussed, the general opinion in private international law is that the provision determining the international geographic scope of application (localiser) is part of internal law, which in the situation discussed, would appear to eliminate any protection of the deceased's children or surviving spouse, either under the chosen law or under the law otherwise applicable.

Whatever solution be given to this problem in general, I suggest that in the philosophy of the Regulation the jurisdictional and geographical limitations be interpreted as rules of private international law, to be ignored by Member States — so as to avoid resorting to using the public order exception.

2. Under the Laws of Quebec and the Common Law Provinces and Territories of Canada

The Quebec Code formally rejects renvoi (art. 3080 C.c.Q.). It was considered that the eventual advantages were outweighed by the complexity and uncertainty of the resolution of conflicts of law. In any event, given that the basis of most of the rules is that of the closest connection, it was felt that the goal of international harmony can be better guaranteed at the level of recognition of judgments instead of rules.

Furthermore in exceptional cases, other than where the choice of law has been made in the will, the escape clause might avoid an undesirable result — although that is not the basis for the provision.

Other than the provision under art. 36 of the Succession law Reform Act of Ontario, which provides that reference to foreign law to govern the essential validity of a will is a reference to internal law to the exclusion of its conflict rules, the common law rules generally apply renvoi in matters of succession.[41]

Chapter 5: Public Order

1. Under the EU Succession Regulation[42]

Article 35 conforms to the restrictive concept of public order in international instruments. Furthermore, the article should be interpreted as it is in a large number of Member States requiring that there be a significant connection between the situs and the legal system of the forum.

As such, courts of Member States should take into account the fundamental principles of EU law, rather than the interpretation of public order in a national or an international sense, should there be a difference.

Anticipated disputes will include situations where the deceased, residing in a Member State where he has the bulk of his property will have chosen the law of his nationality, being the law of a third state to govern his succession. Where the chosen law contains discriminatory features determining rights of succession, based on gender, religion, birth or otherwise, the generally held opinion is that the exception of public order will apply, as these rules are considered incompatible with the fundamental principles of the forum.

As well there will be cases where there are no imperative succession rules under the chosen law of a third state of which the deceased is a national protecting children, wives and ascendants contrary to the solution under the law of the deceased's last habitual residence, otherwise applicable. The generally held opinion is that the exception of public order should not apply and a recent decision confirmed this approach.[43] Nonetheless attempts to argue that the reserve is a rule of international public order will be made for years.

2. Under the Laws of Quebec and the Common Law Provinces and Territories of Canada

In Quebec, the article in question is art. 3081 C.c.Q.

Firstly the content of the foreign law must be analyzed in the abstract. To that end the Quebec rule is based upon the concept of manifest incompatibility with public order "as understood in international relations". Our courts have been open to a

41. See Walker and Castel, *supra*, footnote 6.
42. See the discussion in Bonomi, *supra*, footnote 1, pp. 574-562.
43. *Re Colombier* (December 16, 2015), Doc. no. 13/17078, C.A. Paris.

reasonable accommodation, which might lead to a different solution in Quebec law as under the EU Succession Regulation.

Secondly, in the event that the foreign law is incompatible in the abstract with international public order this must be appreciated in the specific case which requires that there be a significant connection between the situs and the legal system of the forum, usually a territorial connection.

The same restrictive approach to public policy applies in the other Canadian provinces and territories as in Quebec.

Chapter 6: Evasion of the Law

1. Under the EU Succession Regulation

There will also be cases where the deceased changed his nationality or his habitual residence for the sole purpose of having his succession governed by the new law of nationality or residence to avoid certain imperative rules under the former law of his residence or nationality.

Under the recital number 26 it is provided that nothing in this Regulation should prevent a court from applying mechanisms designed to deal with the evasion of the law. However, there is no binding disposition in the text authorizing its use. What may be possible depending upon circumstances is the resort to the escape clause under para. 2 of art. 21, although not where a law has been chosen (art. 20.2).

2. Under the Laws in Quebec and the Common Law Provinces and Territories of Canada

In Quebec, there is no specific rule adopting the doctrine, although the escape clause may be used if the situation fits.

Under the laws of the other the Canadian provinces and territories — the situation is similar to that of Quebec.

Chapter 7: States with More Than One Legal System - Territorial and Inter-personal Conflicts of Law[44]

1. Under the EU Succession Regulation

Where the applicable law is that of a non-unified system with different laws of succession for each person or territory, there

44. Article 37 applies the same principle to inter-personal conflicts of law.

may be national conflict of law rules determining which territorial unit therein applies (art. 36, para. 1).

Where there are no such rules, which is the situation in Canada, in accordance with art. 36.2(a), reference to the law of the last habitual residence of a person is to the law of the territorial unit where the person resided at the time of his death.

If the law of a state is chosen, which is limited to the law of the decedent's nationality, the law of the territorial unit which is applicable is that with respect to which the decedent had his "closest connection" (art. 36.2(b)) at the appropriate time.

The direct choice of the territorial unit of a state of which the deceased is a national is only valid if it is the territorial unit (for example the province or state) where the deceased had his closest connection in the that country, which makes the choice uncertain at the time it is made. The Regulation gives priority to proximity at the expense of predictability, which in my opinion is unfortunate.

Thus Canadian nationals having connections to an EU state should designate the law of Canada and the province with which he had the closest connection — if not, it would not be a valid choice of that province.

2. Under the laws of Quebec

Firstly one must keep in mind that under art. 3077 C.c.Q. where a state comprises several territorial units having different legislative jurisdictions, each territorial unit is regarded as a state.

Under Quebec law, in absence of choice, the law of the province in Canada or state in the United States where the deceased, had his last domicile (for movables) governs succession to movables.

Under Quebec law, the deceased may also choose the law of his nationality to govern his succession. If the deceased was a Canadian national, not domiciled in Canada, who designated directly the law of a province of Canada or territory, the choice should be still be valid (qua nationality) if at the time of the designation he had the closest connection in Canada to that province.

3. Under the laws of the Common Law Provinces and Territories of Canada

Since the testator may not choose the law applicable to his succession, the law of the territorial unit where the deceased had his last domicile applies to the succession to his movables.

PART 2: IMPACT IN CANADA OF THE EU SUCCESSION REGULATION

The principal objective of the Regulation is to enable citizens to know in advance which law will apply to their succession by way of harmonizing private international law rules. This objective is seriously compromised where the succession presents connections with third States, since the Regulation will not change the private international law rules in force in third States, such as in Canada, where a question of succession arises.

Therefore in order to determine the impact of a judicial decision rendered by a court of a Member State or the validity and effect of an authentic instrument drawn up by a notary of a Member State pursuant to the EU Regulation, it is necessary to complete the previous discussion under Canadian law.

Chapter 1. Recognition and Execution in Canada of Judicial Decisions of Member States in Matters of Succession

Section 1. In Quebec

The modern orientation of Quebec legislation favors a broad recognition and enforcement of almost all foreign judgments.

The general rules found in arts. 3155, 3156, 3157, 3158 and 3164 C.c.Q. are completed by some specific provisions related to the subject matter of the action. The grounds for refusal are traditional and similar to those found in many laws (absence of jurisdiction of the court of origin, finality, public order, lis pendens and so on).

However, Quebec law adopted a rather elliptic method to determine the jurisdiction of the court of origin: jurisdiction is established by a three-part test. First, for most matters the court will determine whether jurisdiction can be established under the so-called "mirror principal" (bilateralising Quebec direct jurisdiction rules), whereas in three areas (namely, filiation,

divorce and patrimonial matters), specific rules were adopted. Second, the jurisdiction must meet the "substantial connection" test, consistent with constitutional considerations for inter-provincial judgments. Finally, a discretionary power was superimposed allowing the court to reconsider on a case-by-case basis whether any rule-conferring jurisdiction on the court of origin should be applied so as to give or to take away the jurisdiction of a foreign court.[45]

This scheme creates a rather complex mechanism, the full extent of which was only realized after some 20 years of practice. As a result, our law on the recognition and enforcement of foreign judgments became, and indeed still is, rather unpredictable from a jurisdictional perspective, both because of the scope and interpretation of the "substantial connection" condition, and as a result of the potential application of the general rules of Quebec jurisdiction on the jurisdiction of the foreign court. Quebec law also provides that exclusive jurisdiction may be given to Quebec or to foreign courts by way of a choice of court or arbitration.

As there is no specific rule determining the jurisdiction of the court of origin, in matters of succession, jurisdiction is established using arts. 3153 and 3164 C.c.Q. where the deceased had his last domicile in the state of the court of origin, or one of the defendants was domiciled in that state or the testator had designated the law of that state to govern his succession, or the state was the situs of the property which was the object of the decision, on the condition that there exists an important connection between the state of origin and the succession.

Given the broad formulation of art. 3164 C.c.Q., it is theoretically possible to recognize the jurisdiction of the court, otherwise lacking, where it was for example the jurisdiction of necessity, where succession was an incidental matter to another where the court's jurisdiction exists, in an urgent matter or for conservatory measures, subject to the condition of the existence of the important connection under art. 3164 C.c.Q.

In addition, recognition does not depend upon the law applicable by the court of origin (art. 3157 C.c.Q.).

In most cases, jurisdiction taken by a court of a member state

45. *Hocking c. Haziza; HSBC Bank Canada c. Hocking*, 2008 QCCA 800 (C.A. Que.); *Lépine c. Société Canadienne des postes; Canada Post Corp. v. Lépine*, [2009] 1 S.C.R. 549 (S.C.C.). Since *Lepine*, courts can no longer take away jurisdiction by forum non conveniens.

on the basis of one of the subsidiary criteria under the Regulation would not be recognized and enforced in Quebec.

Section 2. In the Common Law Provinces and Territories of Canada

There are no statutory rules governing the recognition and enforcement of foreign decisions in matters of succession. As a result the common law rules apply, which generally speaking mirrors the jurisdictional rules and would recognize and enforce foreign decisions where there exists a real and substantial connection between the court of origin and the dispute.[46]

Chapter 2: Recognition and Execution of Foreign Authentic Acts in Matters of Succession

Section 1. Evidentiary effect, content, legal relationships recorded in the Act

1. Under the EU Succession Regulation

Article 59 of the Regulation distinguishes evidentiary effects of the authentic act ("Act") from the legal relation recorded in the Act.

The evidentiary effect of the Act under the law of a Member State where it was established has the same effect in other Member States. A party wanting to use the Act in another member state may request the authority of the state of origin to fill out a form. Any contestation of the authenticity must be brought before the courts of the country of origin.

Article 59 does not guaranty the free circulation of the Act within Member States insofar as the legal relations recorded in the Act as these may be contested before any court of competent jurisdiction.

2. Under the laws of Quebec and the Common Law Provinces and Territories of Canada

In Quebec, the general jurisdictional rules apply to determine jurisdiction to decide upon the evidentiary effect of the foreign authentic act, contrary to art. 59 of the regulation.

Should there be contestation with regards to the evidentiary effect of the foreign authentic act, and its content under art.

46. Walker and Castel, *supra*, footnote 6.

3130 C.c.Q., the law under which it was established applies subject to more favourable rules to the establishment of the truth under the law of the forum.

As to the legal relations recorded therein, art. 2822 C.c.Q. presumes that they are as written, but they may be contested (art. 2825 C.c.Q.).

In the Canadian common law provinces of Canada, an authentic Act established under a foreign law has no particular evidentiary value and can be contested as any other contract.

Section 2. Enforceability of authentic instruments

1. Under the EU Regulation

In matters of succession, very few authentic instruments have an enforceable effect, such as the partition of a succession by authentic instrument. Most authentic instruments only have a declaratory effect.

The EU Regulation does not retain the automatic intra-European enforcement of authentic instruments, which are enforceable in the courts of origin of a Member State. It needs to be declared enforceable on the application of an interested party in the state where enforcement is sought (art. 60).

The article only concerns authentic instruments, which are enforceable in the Member State of origin, excluding as such instruments where the enforceable effect in their own right of such instruments is unknown.[47]

The articles do not apply to the enforcement of enforceable authentic instruments of Member States in third states.

2. Under the Laws of Quebec and the Common Law Provinces and Territories of Canada

In order for the instrument to be enforceable under Quebec law, a court in the state of origin would firstly declare the authentic act to be enforceable, and then its recognition and enforcement would be subject to the general rules on recognition of foreign judgments.

A foreign authentic act which has been judicially declared enforceable may be recognized and executed in Quebec in accordance with art. 3163 C.c.Q.

47. Bonomi and Wautelet *et al.*, *supra*, footnote 1, p. 682.

An authentic instrument, which is enforceable in the Member State of origin, is not enforceable as a judicial decision under the laws in force in the Canadian provinces and territories.

Section 3. The European Certificate of Succession (Articles 62-73)

1. Within Member States of the EU

The Regulation creates a European Certificate of Succession, which shall be issued for use by heirs and legatees having direct rights in the succession and executors of wills or administrators of the estate in another member state.

The Certificate may be used in particular to determine one or more of the following (art. 63.2): the status and rights of an heir or legatee mentioned in the certificate and their respective shares, the attribution of a specific asset or specific assets of the estate and the powers of the person mentioned in the estate to execute the will or to administer the estate.

The certificate is useful to prove the law and rights of parties under the law governing succession, but its use is not mandatory and in any event is not a title to the property.

2. In Third States, such as in Canada

The effect of the European Succession certificate in third states depends upon the rules of the third state. Therefore, the effect of the content of the certificate, as determinative of the rights of the heirs and legatees and powers of an executor or administrator under the succession law applicable pursuant to the Certificate, will depend upon whether or not it coincides with the law applicable under third state seized of the case.

PART 3: HYPOTHETICAL CASES

The comparisons have shown that there exist important differences under the Regulation and under the law of third states, such as in a Canadian province or territory on jurisdiction, choice of law, scope of the applicable law, the conditions for the recognition and enforcement of foreign judgments in matters of succession.

The following hypothetical cases will demonstrate that the

solution depends upon the private international law rules of the authority seized of the case.

Estate of Pierre

Pierre is a dual national of France and Canada and has been residing in Quebec for the last 10 years. He has remarried a Canadian national born in Quebec. His assets include an investment portfolio at a Quebec branch of a French Bank, a bank account and a condominium held in a joint tenancy with one of his three children in the state of Florida, an immovable situated in Paris and the residue of his assets are formed entirely by movables and an immovable situated in Quebec. He has three children by his first marriage.

He would like to know which law or laws will apply to his succession under the laws of France, Quebec and Florida if (A) he were to fail to make a will or if (B) he were to make a will in Quebec and, left his entire succession to his wife and chose Quebec law to govern his succession.

If Pierre failed to make a will

If a French court were seized:

- It would not have general jurisdiction pursuant to art. 4 of the European Regulation to decide upon Pierre's global estate. However, the French court would have subsidiary jurisdiction under art. 10(1)(a) to rule upon the whole of the succession.
- It would apply Quebec law to govern his worldwide succession under art. 21 of the Regulation, seeing that the last habitual residence was in Quebec. However in virtue of art. 34 para. 1 of the Regulation there is a renvoi to French law to govern the succession to his immovable situated in France.
- As far as property situated in Florida held in joint tenancy, the will substitute or succession substitute is excluded from the scope of application of the EU Regulation according to art. 1(g). Although the French court could decide under its choice of law rules (excluding the EU Regulation) that the validity of the transfer otherwise than by succession is governed by the law(s) applicable to succession, it would likely characterize it as a matter of contract or property and apply the law of Florida.

- It would not apply the reserve under French law to the movable property situated in France since under the regulation the reserve is not a rule of international public order.
- However since Quebec law governs the succession to movables, a claim against the succession under Quebec law may be made before the French court, taking account of the value of the movable property transferred by his succession.

If a Quebec court were seized:

- It would accept jurisdiction to rule upon the totality of Pierre's estate under art. 3153 C.c.Q.
- It would apply Quebec law to govern succession to Pierre's movables wherever situate, including the effect of the joint tenancy bank account in Florida.[48]
- It would apply Quebec law to the succession to immovable property situated in Quebec, and French internal law to the succession to his immovable property situated in France, as renvoi is excluded under art. 3080 C.c.Q, and the law of Florida to govern the succession to immovable property acquired in joint tenancy in Florida.
- It could order the estate to pay a claim under arts. 684 C.c.Q. *et seq* to his children if they made a claim and were in need, taking into account movable property wherever situated.
- It would not recognize and give effect to a French judgment insofar as assets situated in Quebec, as Quebec law would not recognize the international jurisdiction of the French court taking into account arts. 3153 and 3164 C.c.Q.

If a Florida court were seized:

- It would assume jurisdiction to rule upon the properties acquired in joint tenancy.
- It would apply the law of Florida, in accordance with the law of Florida.

48. Talpis, "La Liquidation", *supra*, footnote 1, "Planification", *supra*, footnote 28; Talpis, *La Liquidation*, pp. 29-30; J. Talpis, "Succession Substitutes in Private international law" (2011), 356 Receuil des Cours de l'Acadamie de la Haye 69, p. 69 *et seq*.; *Drolet v. Trust général du Canada* (1989), EYB 1989-63357 (C.A. Que.), leave to appeal refused (1989), 103 N.R. 320 (note) (S.C.C.); *Kadar v. Reichman (Succession)*, *supra*, footnote 39; *Gauthier c. Gauthier*, 2016 QCCS 2333 (C.S. Que.).

- It might nevertheless recognize a Quebec or EU judgment concerning the attribution of the joint tenancy account.

If Pierre made a will in Quebec and chose Quebec law to govern his succession:

If a French court were seized:

- It would not have general jurisdiction pursuant to art. 4 of the European Regulation to decide upon Pierre's global estate. However, the French court would have subsidiary jurisdiction under art. 10(1)(a) to rule upon the whole of the succession.
- It would apply the internal law of Canada/Quebec to govern Pierre's worldwide succession under arts. 22 and 34 (excluding renvoi) and art. 36(2)(b) of the Regulation, assuming Quebec being the province in Canada where he had his closest connection.
- It would apply Quebec law to govern the substantial validity and binding effects of his will under arts. 24 and 26 of the Regulation.

If a Quebec court were seized:

- It would accept jurisdiction to decide upon the totality of Pierre's estate under art. 3153 C.c.Q.
- It would apply Quebec law to govern his worldwide succession, whether because of his domicile in Quebec at the time of his will or death or because of his Canadian nationality, having his closest connection to Quebec.
- However the designation by Pierre of Quebec law to govern his succession is likely without effect under art. 3099, para. 1 C.c.Q. to the extent that the chosen law substantially deprives a child of the decedent of a right of succession to an immovable in France to which he would otherwise be entitled. Therefore a comparison of rights under the chosen Quebec law and the reserve under French law, which would otherwise be applicable to the succession to his immovable property in France would determine the effect of the choice of Quebec law.
- It would not recognize and give effect to a French decision taken as a subsidiary jurisdiction insofar as property situated in Quebec.

If a Florida court were seized:

- It would take jurisdiction to rule upon the transfer or attribution of the properties situated in Florida acquired in joint tenancy.
- It would apply its own law to the right of the surviving co-tenant to the proceeds in the joint account and the ownership of the condominium.

Estate of Mary[49]

Mary is a Canadian citizen. She married Matteo in Rome in 1992 where they were then domiciled. Since 2000, they have been habitually resident and domiciled in Italy.

Mary has two children and is married to Matteo. Assuming that she dies in 2017 and that 25% of her assets are situated in Italy (bank accounts, car, investments and an immovable) and 75% of her assets are situated in Canada, specifically, 25 % in Ontario and 50% in British Colombia (being shares in a B.C. private corporation).

Mary intends to make primary and secondary wills in Ontario wherein she will name her husband executor of her estate, make a certain number of particular bequests and leave the residue in trust for her husband for his lifetime and, upon his death, the capital will devolve to her children. She has designated her husband as the trustee and the law of Ontario as the governing law of the trust.

Were Mary to choose the law of Ontario to govern her succession pursuant to arts. 22 and 36 of the Regulation, would this choice be recognized and be given effect in Italy and in Ontario? If the choice of the law of Ontario is not recognized, what law or laws would apply?

If an Italian court were seized:

- It would have jurisdiction to rule upon the worldwide succession pursuant to art. 4 since Mary had her last habitual residence in Italy.

49. This example was prepared by Margaret O' Sullivan, O'Sullivan Estate Lawyers, and formed the basis of a discussion at the annual STEP Conference in Toronto, Ontario on June 10, 2015 at which I participated, together with Margaret O'Sullivan, Catherine Watson, and Marilyn Piccini Roy.

- Italian national law would determine whether it would stay a proceeding if Ontario courts were first seized, but not likely.
- The choice of the law of Ontario to govern her succession is not determinative. Firstly she may only designate the law of Canada. Ontario applies if it was the province with which she had the closest connection in Canada under arts. 22 and 36.2(b). However it could be argued that given that 50% of the value of Canadian assets are situate in British Colombia, this factor may be taken into account to determine whether or not the province of Ontario was the jurisdiction which presented the most real and substantial connection with the deceased.
- If Mary were to make the Primary and Secondary wills she should designate the same law to govern her succession.
- Renvoi to Italian law is excluded under para. 2 of art. 34 of the Regulation.
- It would recognize and give effect to the designation of Matteo as personal representative of her estate as it falls within the scope of the law governing her succession (art. 23(2)(f), subject to art. 29).
- Under art. 24.2 the law of Ontario will govern the admissibility and substantive validity of the will if she chooses Canadian/Ontario law to govern these questions (assuming Ontario is the province with which she had the closest connection at the time of the will and not that of British Columbia, which includes the matters listed in art. 26, including "interpretation") as distinct from the law chosen to govern her succession. If there is no specific choice of the law of nationality to govern these matters then they will be governed by Italian law as her habitual residence at the time she makes her will under art. 24.1.
- The Italian court should apply the law of Ontario (assuming it governs the law of the succession) to determine whether Mary could leave the residue of her estate in a trust established in her will under para. b of art. 23, as this matter should fall within the scope of the law governing succession.
- As Italy has ratified the Hague Trust Convention, it would apply the law of Ontario applicable under the Convention to

determine the validity of the trust and its recognition in Italy under art. 11 and the designation of her husband as trustee.

- Italian law will determine the registration, if necessary, of the trust over property situated in Italy.
- The private international law rules of Italy would determine whether or not an Ontario judgment ruling upon succession would be recognized, not those in the Regulation.

If an Ontario court were seized to rule upon the administration, the succession and the validity of the trust:

- It would have jurisdiction over movable and immovable property situated in Ontario to govern the administration and succession to these assets and to the validity of the trust. It seems that it has jurisdiction to rule on at least movable assets situated outside Ontario, which was not her last domicile.
- Whether or not it would stay jurisdiction, if the Italian courts were first seized depends on whether the Ontario courts would consider it is forum non-conveniens.
- If the Ontario court retains jurisdiction, it would confirm the designation of Matteo as personal representative to the movable and immovable estate situated in Ontario as a matter of administration. I doubt the Ontario court has jurisdiction under Ontario law to deal with real estate and maybe movables in Italy.
- It would not recognize the choice of Ontario law to govern the succession to her estate, as the professio juris is not permitted under the laws of Ontario.
- It would determine that Ontario law governs the succession to her immovable property in Ontario and Italian law governs the succession to her movable property wherever situated and to immovable property in Italy.
- As renvoi is not applied in Ontario under art. 36 of the Succession Law Reform Act, the Ontario court would apply the internal rules of succession under Italian law, in particular the forced shares in favour of the children under Italian law to her movable assets situated everywhere and to her immovable property in Italy.
- As Ontario law governs the succession to her immovable property situated in Ontario the bequest of the residue of this

property to a trust is valid. The internal Italian law governs her succession to her movables and immovable property situated in Italy. Although no trust may be created under Italian domestic law, it may be validly created domestically if the trust is governed by a foreign law, which permits the trust (which is the case in Mary's will). Thus Ontario court should recognize the establishment of the trust over property in Italy as well, insofar as the disposable portion.

- It would recognize and enforce a judgment of the Italian court as the last habitual residence in Italy constitutes a real and substantial connection.
- Complex questions involving incidental matters will arise in Mary's succession. For example, although an Ontario court will apply Italian law internal law to the matrimonial property division under s. 15 of the *Family Law Act* of Ontario[50] and Ontario law to the succession to the immovable in Ontario, should an Ontario court apply s. 6 of this Act, insofar as immovable property in Ontario as a matter of the law governing succession?

PART 4: CROSS-BORDER ESTATE PLANNING WHERE THERE ARE CONNECTIONS BETWEEN EU MEMBERS AND ANY ONE OF THE CANADIAN PROVINCES OR TERRITORIES

It goes without saying that when contemplating and planning for an estate likely to have links with different jurisdictions, it is not advised to only consider the cross-border effect of the devices used to transfer the property and create rights of the deceased from the perspective of the home state. The multijurisdictional estate planner must bear in mind the impact of the will, trust, succession agreement or succession substitute used under the law of other states having connections with the decedent, in particular the law of the location of his/ her assets and residence /nationality of beneficiaries and heirs.

As the questions addressed have illustrated, the law applicable to succession depends upon the authority, judicial or otherwise first seized.

In spite of the likelihood of a uniform solution within the EU

50. R.S.O. 1990, c. F.3., ss. 6 and 15.

and its universal approach, this will be rather exceptional where the connections are with third states, such with the Canadian provinces and territories, because of the different approaches and solutions to jurisdiction, choice of law, and recognition of foreign judgments and enforceable foreign authentic instruments.

The following are a few of the techniques used; generally speaking some solutions are well known, although not always free of contestation.

1. Designate the forum

Designating the forum to resolve a dispute arising from succession is rarely permitted, although under the EU Regulation, once the succession has opened, concerned parties could agree upon a court of the EU, where the deceased has designated the law of that court to govern his succession (art. 5).

In third states, including Quebec, choice of court agreements in matters of succession are generally invalid although in Quebec, if Quebec law has been chosen, Quebec courts have jurisdiction by virtue of the choice of law.

2. Designate a law (or laws) to govern succession in a single will

Under the EU succession regulation, the right to choose the law of a person's nationality to govern his or her succession (art. 22) and to dispositions of property upon death (by will and succession agreements (arts. 24, 25 and 26) allows for a predictable solution as to the applicable law to govern a large number of questions falling within the scope of the law applicable to succession.

There are in principle practical advantages of choosing the law of the nationality from a European perspective, especially if most of the assets are still found in the third state if it was also the deceased's country of origin or even in another Member State.

To this end and to avoid any doubt where the testator has multiple nationalities the testator should state in his will that he holds the nationality whose law he is choosing under his will and has proof annexed to it**.** The testator should state in his will: "I am an Italian national and I herewith choose Italian law as the law applicable to my succession".[51]

In any event, the advantages of the choice of the law of a

third state can only be realized to the extent that the choice is recognized under the laws of concerned third states where the deceased left property.

Furthermore although in all common law jurisdictions the right to choose the law applicable to succession (*professio juris)* is not permitted, a will drafted under the law of the third state may constitute a tacit or implied choice under the Regulation and testators may, depending upon circumstances, stipulate that no choice of law is intended.

3. Make "situs" wills

Some practitioners are under the impression that the best approach to cross-border estate planning is to make multiple wills to govern the succession to property situated in each jurisdiction (situs wills), and this is often accompanied by a choice of such law to govern succession to these assets.

There is no doubt that are advantages in using multiple wills, in particular: reduction of delays, costs of administration, estate taxes and probate fees which is often calculated on the value of property within a state, and confidentiality in that there is not always the need to disclose assets elsewhere.

In addition conflicts of law as to the formal validity can usually be avoided as well by conforming to the requirements of the situs will and avoiding problems of recognition or acceptance of foreign authentic wills or other types of wills, signed before or deposited with a notary or probated formally or informally or not at all.

However, the use of situs wills is not determinative of the law applicable to succession of the situs assets, which depends upon the private international law of the jurisdiction seized of the case.

For example as discussed, under the Regulation, there is no derogation from the unity principle, and accordingly any designation of the law of the situation of property to govern succession to it is invalid and the doctrine of incorporation does not apply.

In Quebec and the common law provinces and territories of Canada, the designation the law of the state where a movable property is situate to govern succession to it is invalid.

51. M. Ten Wolde, paper and conference given at the London Conference of UINL, p. 7.

4. Modification of the localisation of the connecting factor governing succession (a) or changing the nature of property (b)

(a) As discussed, under the EU Regulation and most laws, subject to fraud or evasion of the upon the law, changing nationality (followed by choice) or the habitual residence might achieve the desired result and a uniform solution.

(b) Where the deceased had his last domicile and habitual residence in his/her home state and immovable property in a state other than that of his domicile or habitual residence a uniform solution might be reached by the technique of mobilisation of his or her immovable property. The deceased would transfer the property to a new corporate entity, retaining ownership of the shares (as long as they remain movable under the law where it is situated) so that all of the property of the deceased consists of movable property, and governed by the law of the deceased's habitual residence or where succession to movables is governed by the law of the domicile at death.

5. Use of will or succession substitutes

As a result of changes in patterns of wealth-holding in today's society, an increasing number of decedent's estates in many jurisdictions are planned by resorting to one or more legally authorized methods to transfer property, rights, interests or assets at death, otherwise than by succession. Known devices include: beneficiary designations in life insurance policies or individual retirement savings plans, *inter vivos* or living trusts, joint tenancy with rights of survivorship, Pay on Death clauses with financial institutions in U.S. financial institutions, Transfer on death clauses, Tontine, the Waaqf, corporate or contractual devices and many others.

These techniques have been identified and expressly excluded from the Regulation under art. 1(2)(g).

Given their exclusion in the Regulation and in national laws, it is unclear as to the law governing their admissibility, validity and effect between the parties and against third parties. Because the succession substitutes are established by juridical act, at first blush, one would think that the obvious choice is to submit these matters to the law governing the contract by which the

succession substitute was established. This would further estate planning by virtue of the general recognition of party autonomy. However, succession substitutes involve property and succession and have certain affinities with succession agreements all of which are governed by different choice of law rules, some of which allow party autonomy.

The problem with the use of the succession substitutes is that there is no uniform solution to the law governing the admissibility of these techniques (contract, property or succession). Whereas courts and estate practitioners in common law jurisdictions adopt the position that is easily predictable — the applicable law is that governing the contract in which it is created or the situs of the asset — most civil law jurisdictions which consider that the admissibility of the right to create or transfer property otherwise than by succession is governed by the law applicable to successions.[52]

II. CONCLUSION

In theory, the rise of the freedom of estate planning in a cross-border context is certainly enhanced by the EU Succession Regulation in situations where there the connections between the EU and third states, especially by allowing parties to choose the law applicable to their succession and to succession agreements. However there is much uncertainty resulting from the absence of a definition for habitual residence, the criteria for the escape clauses and the implicit designation, to name a few matters and the limits to the universal application, as previously discussed.[53]

However the essential problem insofar as the impact of the Regulation in third states is the resistance of the common law third states to adopt the doctrine of the unity and the right to choose applicable law (professio juris). As a result the

52. Some civil law jurisdictions characterize imperfect succession substitutes as a matter of contract (France for the tontine). In Québec, their admissibility is determined by the law applicable to succession: See Talpis, ''Succession Substitutes'', *supra*, footnote 48; Note J. Talpis, ''La transmission des biens au décès autrement que par succession en droit international, privé québécois'', Développements récentes en droit des succession s et de fiducie (Cowansville, Quebec, Yvon Blais, 2010), pp. 124 *et seq*.; and in (2009), C.P. du N. 211; *Drolet v. Trust général du Canada*, *supra* footnote 48; *Kadar v. Reichman (Succession)*, *supra*, footnote 39; and *Gauthier c. Gauthier*, *supra*, footnote 48.

53. There are already proposed amendments by learned scholars. See Buonaiuti, *supra*, footnote 1, pp. 563-565.

multijurisdictional estate planner will continue to resort to will or succession substitutes (which is still a problem because of the lack of uniform solutions) as well as the variety of well-known strategies.

APPENDIX

Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 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

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;
(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.

Article 4 - General jurisdiction

The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

Article 10 - Subsidiary jurisdiction

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 State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

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.

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.

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.

Article 35 - Public policy (ordre public)

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 36 - States with more than one legal system - territorial conflicts of laws

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.