EU Treaties
The Treaty of Rome as amended by the treaties of Maastricht, Amsterdam, Nice and Lisbon now consolidated since 1 December 2009 as the Treaty of European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”).

EU Regulations
Adopted by the Council in conjunction with the European Parliament or by the Commission alone, a regulation is a general measure that is directly applicable, which means that it creates law which takes immediate effect in all the Member States in the same way as a state’s legislation, without any further action on the part of the state’s legislature.

EU Directives
Adopted by the Council in conjunction with the European Parliament or by the Commission alone, a directive is addressed to the Member States and is binding on the Member States as to the result to be achieved but leaves each state the choice of the form and method they adopt to realise the Community objectives within the framework of their own legal structures.

If a directive has not been enacted into national legislation in a Member State, or if it has been enacted incompletely or if there is a delay in enactment, EU nationals can directly invoke the directive in question before the national courts.

The European Union Succession Regulation (EU) No 650/2012
The EU Succession Regulation (“SR”)¹ entered into force on 17 August 2012.

What was the problem?

Different states have completely different private international law rules (“PIL”) for succession. Some use “domicile” but with different definitions to those of the UK. The PIL of most of the EU is that succession law is governed by the law of an individual’s nationality and that the entire estate, movable and immovable, is governed by that law. Whether “law” means a state’s internal law or includes its PIL, i.e. whether renvoi is accepted, and whether only directly or also indirectly, varies considerably.

A court decision or probate in one state was not recognised in another. The conflicts involved were often irreconcilable and added expense and time to the administration.

The EU and the Succession Regulation
The harmonisation of PIL for succession was first declared a priority in 1998. The draft SR was published in October 2009.

Political agreement was reached in March 2012 and the final SR - Regulation (EU) No 650/2012 - entered into force on 17 August 2012, although most of the SR will not apply until 17 August 2015.

Opt ins
Because of clawback and other matters, the UK Government exercised its right not to opt in. Ireland also did not opt in and the Regulation does not bind Ireland, UK or Denmark.

The SR will still apply to assets situated in most EU Member States (“the SR Zone” - all EU Member States other than Denmark, Ireland and the United Kingdom) and to the succession of persons dying habitually resident in the SR Zone. The SR will govern the PIL for succession in the SR Zone, not only between States within it, but also between them and States outside it.

Thus, the provisions of the SR, including those governing choice of law, are vital for all practitioners to understand.

The Succession Regulation
The SR, similarly to other EU Regulations, is divided into chapters dealing with separate PIL topics:

- Scope and Definitions in Chapter I (Arts.1 to 3).
- Jurisdiction in Chapter II (Arts.4 to 19).
- Applicable Law, questions as to capacity and validity of Wills and Succession Agreements in Chapter III (Arts.20 to 38).
- Recognition, Enforceability and Enforcement in Chapter IV (Arts.39 to 58).
Scope, Exclusions and Definitions

Art.1 defines the scope of the SR. If the SR does not apply, none of the other articles apply. Thus none of the SR applies to property passing by survivorship or to revenue, customs or administrative matters. Any issue relating to tax is therefore excluded and is still governed by the existing rules. Thus the tax effects of instruments of variation would be excluded, whilst any effects classified as a succession matter would be governed by the SR. A deed of disclaimer is usually classified as a succession issue. A deed of variation is often, although not always, classified as a gift, although for UK tax purposes deemed to be part of the succession.

By contrast, the scope of the applicable law under Art.23 does not limit other portions of the SR. Even though a matter may not be governed by the applicable law, it may still be governed by the SR and therefore subject to issues of Jurisdiction, Recognition, Enforceability and Enforcement under the law of the state of the Jurisdiction as opposed to that of the state of the applicable law.

Member States and Third States

As stated in Recitals 82 and 83, Denmark, Ireland and the United Kingdom are not bound by or subject to the application of the Succession Regulation.

The draft Regulation proposed that reference in it, to a Member State, was to be to a participating MS only. The final Succession Regulation has no such limitation.

By comparison, the Maintenance Obligations Regulation (EC) No 4/2009 of 18 December 2008 specifically defines in Art.1.2 that “In this Regulation, the term ‘Member State’ shall mean Member States to which this Regulation applies”.

It may therefore be argued that even though Denmark, Ireland and the United Kingdom are not bound by or subject to provisions of the Succession Regulation, the definition of Member State in the Succession Regulation does still include Denmark, Ireland and the United Kingdom, and that therefore the definition of a Third State also excludes Denmark, Ireland and the United Kingdom.

There is however, some disagreement between experts as to these issues. Any reference to a Member State or to a Third State, should therefore be considered
carefully and the distinctions between participating MS and non-participating MS also fully thought through.

**Jurisdiction**

Under Art 4 of the SR, the courts of the Member State in which the deceased had his habitual residence at the time of death, have jurisdiction to rule on the succession as a whole. It is presumed that this may refer to a SR Zone state only.

Art. 10 sets out the court hierarchy of subsidiary jurisdictions:

1. of a SR Zone State with assets if the deceased had:
   a. The nationality of that SR Zone State at the time of death or if not
   b. His previous habitual residence there within the last 5 years or if not
2. of the SR Zone State with assets situated there in relation to those assets.

**DoPuDs and Choice of Law**

Wills, joint wills and succession agreements are defined as a “disposition of property upon death”. The abbreviation “DoPuD” is used here.

Art. 27 deals with the validity of DoPuDs.

Art.1.2(f) specifically excludes from the scope of the SR, the formal validity of DoPuDs made orally. There may be interesting questions as to whether evidence in writing is sufficient to bring a contract into the scope of the SR.

Arts 24, 25 and 26 deal with the substantive validity of DoPuDs.

Art.27 deals with the formal validity of DoPuDs and is similar to the 1961 Hague Convention. Under Art 75, the Hague Convention will continue to bind participants rather than Art.27.

Art.22 of the SR provides that a person may choose the law of their nationality as the law to govern their succession as a whole. The substantive validity of the choice is to be governed by the chosen national law (Art 22.3). Such a choice may be express or implied. (Art.22.2 and Recital 39). If a choice is made, this may enable parties concerned / heirs to choose that as the jurisdiction under Art. 5.

**Applicable Law and Renvoi**

According to Art 21.1 of the SR, unless otherwise provided, the law applicable to the succession is the habitual residence at the time of death and is to apply to the whole of the succession. This applies whether or not the applicable law is the law of a SR Zone state.

Art.34 by implication abolishes renvoi between participating MS, but if the applicable
law is that of a Third State, the private international law rules of that third state are included, in so far as they make a renvoi to the law of a Member State or to the law of another third State which would apply its own law. Does the use of the singular “a Member State” or “another third State”, mean that only renvoi to one State is permitted?

No renvoi is to apply to the laws referred to in Arts.21(2) [closely connected escape clause], Art.22 [choice of law], Art.27 [formal validity of DoPuDs], Art.28(b) [declaration of acceptance of a succession] and Art.30 [special succession regimes].

Thus the choice of national law by, for example, an Australian citizen living in Spain would be of the relevant internal state law of part of Australia and would not include its private international law rules relating to movables and immovables.

However, there is now considerable uncertainty as to the position of, say, a French domiciliary, habitually resident in London. If it is correct that the UK is not a third State for the purposes of the Succession Regulation, then the succession would be subject to the internal succession law of England & Wales, so that French internal succession law would not apply to his movables.

Immovable property in SR Zone states will remain subject to the succession law of that State for persons habitually resident in third States with private international law rules that direct that the law of the situs applies to immovables, (subject to the interpretation of Art. 34) unless they make a valid choice of the law of their nationality under Art.22.

The inherent conflict between Art 34, that partial renvoi can be valid, and Art.21.1 that the law determined shall govern the succession as a whole, has not been clarified. It is presumed that the words “Unless otherwise provided for in this Regulation” do mean that the renvoi of part will override the unitarian principle.

However, will SR Zone states require assets outside those states not passing under the applicable law whether by virtue of partial renvoi or otherwise, to be brought into account in the sharing out of the assets within the SR Zone? It is presumed that if a SR Zone state has general or subsidiary jurisdiction that it will require such assets to be brought into account.

**Exceptions to the Applicable Law Rule**

Art. 21.1 states that, unless otherwise provided, the applicable law is to govern the
succession as a whole. Art.23.2 sets out a non-exhaustive list of specific matters governed by the applicable law.

However, there can easily be matters not governed by the applicable law.

One, would be a succession agreement, which can be governed by the law under which it was prepared, provided that it complies with Arts.25 and 27. The definition of an “agreement as to succession” under Art.3.1(c) may well include the doctrines of mutual wills and of proprietary estoppel under the law of England & Wales, but the SR does exclude the formal validity of oral DoPuds under Art.1.2(f).

Thus, the entire succession of a person who dies habitually resident in Spain, will be governed by Spanish law as the applicable law. However, if previously, whilst habitually resident in England & Wales, property became subject to a proprietary estoppel claim, that claim would remain subject to the law of England & Wales. The jurisdiction for such claim under the SR would however be in Spain, which would apply Spanish law to all other aspects of the succession but the law of England & Wales to the proprietary estoppel claim if within the definition of a succession agreement. If the however the claim was based on an oral contract, the question of its formal validity would be a matter for the Spanish court to resolve outside the SR.

**Public Policy**

Some Member States regard the possibility of one of their nationals being able to move to a jurisdiction with very different succession law and as a result that succession law could then apply to their succession, as being in breach of public policy that protects the children or spouse of that person.

Recital 58 refers to situations when public policy might override the connecting factor to determine the jurisdiction of the courts and/or the law applicable under the SR. Art. 35 provides that “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 of the forum.”

The previous draft Art.27.2 stating that the application of a rule is not to be contrary to public policy of the forum “on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum” has been removed. Recital 38 refers to this issue, although obliquely.

**Personal Representatives**
The differences between States that have separate administration and those that do not, was a major negotiating issue.

Art.23(f) provides that the applicable law governs the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors without prejudice to the powers referred to in Article 29(2) and (3).

Although various SR Zone States, such as Sweden, Germany and Austria recognise the role of an administrator, the distinction between Administration and Succession is greatest in the UK and Ireland. Since they have chosen not to opt in, the extent to which the powers of personal representatives from non-SR Zone States, under Art.23(f) will actually be recognised within the SR Zone, is uncertain.

Gifts and Succession Agreements
Recital 14 originally reminded practitioners that, since December 17, 2009 the Rome I Regulation applies to the question of the validity of a contractual gift. Rome I does contain choice of law provisions and restrictions on such choice and limitations due to public policy, which should not be overlooked.

Under Art.25 of the SR, the substantive validity of succession agreements which are valid either under the law of the testator’s habitual residence on the date they are created, or by virtue of a valid choice of law, cannot later become invalid, by a change of habitual residence or amendment of the choice of applicable law.

In contrast to succession agreements, gifts can become subject to different clawback rules by virtue of a change of residence. Art.23.2(i) makes this clear. The applicable law governs “any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries”.

Clawback is not a problem unique to common law jurisdictions. In practice, the issue is one that will affect most EU Member States, which have differing rules for gifts to heirs and to non-heirs. In the Netherlands, clawback is limited for gifts to non-heirs made within the 5 years before death and is a monetary claim rather than a claim to the asset itself. In Austria the period is 2 years. In Germany, the time limit is one of ten years, with a tapering provision of 10% per year. In France, there are no time limits and the value of the asset is that as at the date of death. It is inevitable now that clawback will be enforced between SR Zone States that complex problems will arise.
**Use the Choice of Law Provisions Now**

It would be wrong to consider that the SR has no relevance to practice before it becomes fully effective in 2015. There are transitional provisions in Art.83 which give effect to choices of law and DoPuDs made before the SR is fully effective. Art.83 also extends existing choices of law if connected by either habitual residence or nationality. Art.83.4 also creates an implied choice of law in a pre-existing Will made under the law of the nationality.

**Existing Choices of law?**

The proposal to enable a choice of succession law is not new. Most states do not currently allow a testator or the beneficiaries to choose the applicable succession law. However, Belgian, Dutch, Finnish, Italian, German, Danish and Polish laws permit some choice, but have different conditions for doing so.

- The Netherlands has enacted the Hague 32 Succession Convention of 1 August 1989. The testator may choose the law of the State of which he was a national at the time he made his will or at the time of his death, or the law of the country where he had his habitual residence at the time he made his will or at the time of his death.
- Finnish law allows the testator to choose the law of the State of which he is a national at the time he makes his will or at the time of his death, or the law of the country where he had his habitual residence at the time he made his will, or previously or at the time of his death, or, if he is married at the time of choice, the law governing his matrimonial property regime.
- In Italy, since law 218 of 31 May 1995, and under Article 46, the testator can choose the law of his habitual residence at the time he makes his will, on condition that this residence is still the same at the time of his death, and that this is where he actually dies. The choice cannot remove the rights of Italian nationals resident in Italy.
- Swiss law allows the testator to choose the law of the State of which he is a national at the time he makes his will provided that this is still his nationality at the time of his death and he has not taken Swiss nationality. Art 91 of Swiss CPIL of December 18,1987.
- In Poland, since 16 May, 2011 by virtue of Art.64 of the Private International Law Act of 4 February 2011 (O.J. 2011 No.80, item 432) it is possible in a Will to choose the succession law as that of the testator’s nationality or habitual residence either at the time of making the Will or at the time of death.
- In the Czech Republic from 1 January 2014, by virtue of Art.77 of the Act 91/2012 Coll. of 25 January 2012 on Private International Law it is possible in a Will to choose the succession law as that of the testator’s nationality at the time of making the Will.
Conclusion – Use an Existing or New Choices of law Now

All practitioners would be wise to consider suitable choices of law in DoPuDs now.

If an individual has any EU cross border issue, a valid choice of law (either under Art.22 or Art.83) will become effective in 2015 even though made now. To be sure of validity, it is perhaps safest for such a choice of law to be made in a DoPuD which is substantively valid in accordance with the internal law of the State chosen.

The SR is now in force. Many EU practitioners, still do not understand the effects of renvoi and the fact that the SR can be valid and enforceable under continuing UK PIL.

There are still some major uncertainties, for example, whether the UK, Ireland or Denmark are or are not Member States.

The interpretation and effects of the SR will, therefore, continue to unfold.