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The European Succession Regulation and the Arbitration of Trust Disputes

S.I. Strong*

ABSTRACT: Over the last few decades, U.S. citizens have become increasingly mobile, with significant numbers of individuals living, working, and investing abroad. Estate planning has become equally international, generating ever-larger numbers of cross-border succession cases. While these sorts of developments are welcome, they require lawyers to appreciate and anticipate the various ways that the laws of different jurisdictions can interact.

One of the most important recent developments in international succession law comes out of the European Union. While the European Succession Regulation may initially appear applicable only to nationals of E.U. Member States, U.S. citizens can also be affected by its provisions. This Article analyzes the interaction between the Regulation and trust arbitration, which has become increasingly popular in various U.S. and foreign jurisdictions. In so doing, the Article discusses how trust arbitration furthers the goals of the Regulation and how individual provisions in the Regulation may support or restrict the possibility of arbitration of trust-related disputes.

I.	INTRODUCTION.....	2206
II.	TRUST ARBITRATION AROUND THE WORLD	2207
III.	THE REGULATION.....	2210
	A. THE REGULATION AND PRIVATE INTERNATIONAL LAW.....	2210
	B. JURISDICTION.....	2211
	C. SCOPE.....	2212
	D. APPLICABLE LAW.....	2214

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E.	CHOICE OF FORUM	2215
F.	RECOGNITION	2223
G.	PUBLIC POLICY	2224
IV.	CONCLUSION	2227

I. INTRODUCTION

Over the last few years, trust arbitration has gained a significant foothold, both domestically and internationally.¹ Not only have an increasing number of jurisdictions adopted legislation explicitly permitting the arbitration of trust disputes, but case law and commentary have demonstrated how trust arbitration can proceed even in the absence of statutory authorization.² Many of these developments can be traced to the increased appreciation by judges, lawyers, and others in the trust industry of (1) the differences between trust arbitration and the more problematic forms of arbitration (most notably consumer arbitration); and (2) the benefits of arbitration in matters involving internal trust disputes, meaning disputes between beneficiaries or between beneficiaries and the trustee.³

As encouraging as these developments may be, some issues remain unclear. Perhaps the most important matter to consider involves the applicability of European Union (“E.U.”) Regulation 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 (“Regulation”) to efforts to arbitrate disputes involving trusts.⁴ As a matter of European law, the Regulation is binding on most E.U. Member States in its existing form, without any need for domestic implementation.⁵

Because the Regulation is meant to harmonize the rising incidence of cross-border successions within the E.U., the Regulation may at first glance

1. See generally ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW (S.I. Strong ed., 2016) (discussing various issues involving arbitration of trust disputes); Grant Jones & Peter Pexton, ADR AND TRUSTS: AN INTERNATIONAL GUIDE TO ARBITRATION AND MEDIATION OF TRUST DISPUTES (2015) (same).

2. See ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 143–432 (discussing trust arbitration as a matter of national law); S.I. Strong, *Arbitration of Trust Disputes: Two Bodies of Law Collide*, 45 VAND. J. TRANSNAT’L L. 1157, 1195–1245 (2012) (outlining theoretical obstacles to trust arbitration).

3. See Strong, *supra* note 2, at 1161–64, 1181–87; S.I. Strong, *The Future of Trust Arbitration: Quo Vadis?*, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 531, 543 n.60; see also *infra* notes 92–94 and accompanying text (describing the benefits of arbitration in the trust context).

4. See Council Regulation 650/2012, 2012 O.J. (L 201) 107.

5. See Consolidated Version of the Treaty on the Functioning of the European Union, art. 288, 2012 O.J. (C 326) 47, 171–72.

appear relevant only to parties and practitioners in E.U. Member States.⁶ However, experts in private international law accept that E.U. legislation can—and increasingly does—have external effects on individuals outside the E.U.⁷ The Regulation is no exception and can have a surprising effect on the estate plans of non-E.U. nationals, including U.S. citizens, who reside in the E.U. or who hold property in the E.U. at the time of their death.

The Regulation is extremely far-reaching, and it is impossible to conduct a comprehensive analysis of the entire document in the current Article. This discussion therefore focuses only on the Regulation's applicability to trust arbitration. The Article begins in Section II with a brief introduction to the current status of trust arbitration around the world before turning to the Regulation itself in Section III. After analyzing the most important provisions of the Regulation, the discussion concludes in Section IV with some forward-looking observations.

II. TRUST ARBITRATION AROUND THE WORLD

Although trust arbitration raises a number of theoretical and practical issues not seen in other types of arbitration, the procedure is developing at a rapid rate around the world.⁸ At the time of writing, five U.S. states (Arizona, Florida, Missouri, New Hampshire, and South Dakota) have adopted statutes explicitly recognizing the validity of an arbitration provision found in a trust.⁹

6. See Eva Lein, *A Further Step Towards a European Code of Private International Law: The Commission Proposal for a Regulation on Succession*, 11 Y.B. PRIV. INT'L L. 107, 109 (2009) (providing statistics); Walter Pintens, *Need and Opportunity of Convergence in European Succession Laws*, in THE LAW OF SUCCESSION: EUROPEAN PERSPECTIVES 5, 5 (Miriam Anderson & Esther Arroyo i Amayuelas eds., 2011). An increasing number of U.S. citizens now live, work, or invest abroad. See S.I. Strong, *International Implications of the Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. F. 1, 1–2 (2016).

7. See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 3 (2012); Etienne Patout, *The External Dimension of Private International Family Law*, in PRIVATE LAW IN THE EXTERNAL RELATIONS OF THE EU 107, 109–111 (Marise Cremona & Hans-W. Micklitz eds., 2016) (discussing the Brussels effect in succession law).

8. See Strong, *supra* note 2, at 1160. It is impossible to describe the benefits of and challenges facing trust arbitration in the current Article, but further reading is available. See generally ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1 (discussing various issues involving arbitration of trust disputes); S.I. Strong, *Empowering Settlers: How Proper Language Can Increase the Enforceability of a Mandatory Arbitration Provision in a Trust*, 47 REAL PROP., TR. & EST. L.J. 275 (2012) [hereinafter Strong, *Language*] (discussing issues relating to the drafting of arbitration provisions in trusts); S.I. Strong, *Mandatory Arbitration of Internal Trust Disputes: Improving Arbitrability and Enforceability Through Proper Procedural Choices*, 28 ARB. INT'L 591 (2012) [hereinafter Strong, *Arbitrability*] (discussing procedures associated with arbitration of internal trust disputes).

9. See ARIZ. REV. STAT. ANN. § 14-10205 (2012); FLA. STAT. ANN. § 731.401 (West 2017); MO. ANN. STAT. § 456.2-205(1) (West 2017); N.H. REV. STAT. ANN. § 564-B:1-111A (West 2018); S.D. CODIFIED LAWS § 55-1-54 (Supp. 2017).

Support for trust arbitration also exists in the Uniform Trust Code (“UTC”),¹⁰ which has been adopted in whole or in part by 31 U.S. states and the District of Columbia,¹¹ and in the laws of two other states (Idaho and Washington),¹² although these provisions are somewhat unclear as to who—the settlor or the trustee—has the authority to choose arbitration as a means of resolving disputes.¹³ Several state courts have also adopted pro-arbitration positions, even in the absence of legislation explicitly authorizing trust arbitration.¹⁴

Trust arbitration has also been embraced in other countries. Guernsey and the Bahamas have both adopted legislation explicitly authorizing trust arbitration, with other common law jurisdictions, most notably New Zealand, poised to follow suit.¹⁵ Australia may be moving toward judicial recognition of trust arbitration, similar to what has occurred in Texas.¹⁶ A number of civil law countries, most notably Malta and Liechtenstein, have also shown support for arbitration of trusts or their civil-law analogues.¹⁷ Similar provisions are

10. See UNIF. TRUST CODE § 111 (UNIF. LAW COMM’N amended 2010) (describing requirements for a valid trust arbitration agreement).

11. Acts: *Trust Code*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/Act.aspx?title=Trust%20Code> (last visited Apr. 8, 2018).

12. See IDAHO CODE §§ 15-8-101, 15-8-103 (2009); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2016).

13. See Strong, *supra* note 2, at 1189–90.

14. See *Rachal v. Reitz*, 403 S.W.3d 840, 846 (Tex. 2013); see also Mary F. Radford, *Trust Arbitration in the United States Courts*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 175, 181–96; Strong, *supra* note 2, at 1207, 1245 (discussing case law in other states, including New York, Michigan, Texas, and California). *But see* *Shri Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) Civil Appeal No. 8164 ¶¶ 58, 61 (India), http://supremecourtindia.nic.in/supremecourt/2013/10322/10322_2013_Judgement_17-Aug-2016.pdf (finding by the Supreme Court of India that “there exists an implied bar of exclusion of applicability of” India’s arbitration statute for matters arising under the Trust Act and holding that trust disputes are non-arbitrable).

15. See Arbitration Amendment Bill 2017, cl. 4 (N.Z.) (proposing a new section 10A in the Arbitration Act 1996 (N.Z.) that would “deem[]” arbitration clauses in trusts to be arbitration agreements under the 1996 Act and would give arbitrators the ability to appoint representatives empowered to act for minor, unborn or unascertained beneficiaries); David Brownbill, *Arbitration of Trust Disputes Under the Bahamas Trustee Act 1998*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 313, 313; Paul Buckle, *Trust Arbitration in Guernsey*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 289, 289; Strong, *supra* note 3, at 531, 533.

16. See *Fitzpatrick v Emerald Grain Pty. Ltd.* [2017] WASC 206, at [90]–[91], [99] (Austl.) (allowing arbitration of trust disputes even over the objection of one of the parties); *Rinehart v Welker* [2012] NSWCA 95, at [173]–[177] (Court of Appeal NSW) (Austl.) (Bathurst, C.J.) (allowing arbitration of trust dispute when all the parties and beneficiaries agreed); see also *supra* note 14.

17. See Johannes Gasser & René Saurer, *Trust Arbitration in Liechtenstein and Austria*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 408, 413; Edgardo Muñoz & Sofía Llamas, *Arbitration of Mexican Trust Disputes: A Couple Made for Each Other?*, 23 U. MIAMI INT’L & COMP. L. REV. 1, 81–83 (2015); Georg von Segesser & Katherine Bell, *Arbitration of Trust Disputes*, 35 ASA BULL. 10, 35 (2017). Much has been written about the common law origins of trusts and the efforts of various civil law jurisdictions to adopt analogous mechanisms. See Alexandra Braun, *The Framing of a European Law of Trusts*, in *THE WORLDS OF THE*

found in Panama and Paraguay, although the devices in these countries are primarily commercial rather than testamentary in nature.¹⁸ Switzerland does not contemplate trust arbitration per se (since Swiss law does not provide for trusts) but appears capable of enforcing awards arising out of arbitration of foreign trusts pursuant to the Swiss statute on private international law.¹⁹ Although commentators have also argued that trust arbitration falls within the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), which is the primary means of enforcing arbitral awards across national borders.²⁰

TRUST 277, 279–84 (Lionel Smith ed., 2013) (discussing civil law trust equivalents in Europe); Madeleine Cantin Cumyn, *Reflections Regarding the Diversity of Ways in Which the Trust Has Been Received or Adapted in Civil Law Countries*, in RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 6, 14–20 (Lionel Smith ed., 2012); Ben McFarlane, *The Trust and Its Civilian Analogues*, in THE WORLDS OF THE TRUST, *supra*, at 512, 512–23. The Maltese Arbitration Act reads:

(2) It shall be lawful for a settlor of a trust to insert an arbitration clause in a deed of trust and such clause shall be binding on all trustees, protectors and any beneficiaries under the trust in relation to matters arising under or in relation to the trust.

(3) In the cases referred to in the preceding subarticles, the right of a party to seek directions of the Court of voluntary jurisdiction in terms of the Trusts and Trustees Act shall not be limited by any such clause and notwithstanding the provisions of this Act, the said Court shall not be bound to stay proceedings in terms of article 15(3) or otherwise, but shall enjoy a discretion to do so until such time as it determines that the matter is of a contentious nature, in which case it shall stay the proceedings and shall refer the parties to arbitration.

Arbitration Act 1996, ch. 387, § 15A (Malta). The Liechtenstein law has been translated as:

Trusts pursuant to foreign law may be created in Liechtenstein provided (1) that as far as necessary in the individual case the relationship between settlor, trustee and beneficiaries is subject to the trust regulations of the foreign law which must be included in detail in the trust instrument and that the relationship between the Trust and third parties shall be subject to Liechtenstein law; (2) that a mandatory court of arbitration shall decide disputes between settlor, trustee and beneficiary.

von Segesser & Bell, *supra*, at 35 n.94.

18. See Rafael Ibarra Garza, *(Un)enforceability of Trust Arbitration Clauses in Civil and Common Law*, 22 TR. & TRUSTEES 759, 765 (2016); see also Dante Figueroa, *Civil Law Trusts in Latin America: Is the Lack of Trusts an Impediment for Expanding Business Opportunities in Latin America?*, 24 ARIZ. J. INT'L & COMP. L. 701, 704–07 (2007) (suggesting Latin American trusts (“fideicomisos”) are primarily commercial and contractual in nature); S.I. Strong, *Congress and Commercial Trusts: Dealing with Diversity Jurisdiction Post-Americold*, 69 FLA. L. REV. 1021, 1089–91 (2017) (distinguishing commercial and testamentary trusts under U.S. law); Strong, *supra* note 2, at 1209–19 (noting fewer problems with arbitration in cases where trusts are considered contractual in nature).

19. See Tina Wüstemann & Roman Huber, *Trust Arbitration in Switzerland*, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 383, 386, 406–07.

20. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3, 38 [hereinafter New York Convention]; Sarah Ganz, *Enforcement of Foreign Arbitral Awards Arising from an Internal Trust Arbitration: Issues Under the New York Convention*, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 494, 494–95; Margaret L. Moses, *International Enforcement of an Arbitration Provision in a Trust: Questions Involving the New York Convention*, in

III. THE REGULATION

The Regulation is a complex document with numerous intersecting provisions. While it is impossible to provide a comprehensive analysis of all trust-related issues, the following discussion provides an introduction to the Regulation as a whole and highlights some of the more critical concerns for trust arbitration.

A. THE REGULATION AND PRIVATE INTERNATIONAL LAW

In many ways, the Regulation, which came into effect in 25 E.U. Member States on August 17, 2015,²¹ is a marvel of private international law, achieving through procedural law what might have been impossible at the substantive level.²² In essence, the Regulation seeks to facilitate “[t]he proper functioning of the internal market . . . by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications.”²³ This goal is achieved through the creation of a single, pan-European system of rules regarding jurisdiction, conflict of laws and recognition of judgments in the area of succession law.²⁴

The structural similarity of the Regulation to other E.U. regulations on jurisdiction and judgments²⁵ has led the succession regulation to sometimes be referred to as “Brussels IV.”²⁶ While the classification of the Regulation as a Brussels-style enactment carries no legal ramifications, commentators have noted that the E.U. has a far-reaching “tendency to use jurisdiction [as

ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 467, 493; Strong, *supra* note 2, at 1213–18; Wüstemann & Huber, *supra* note 19, at 405–06. Issues relating to trusts have also arisen in the context of investment arbitration, which is a treaty-based form of dispute resolution. See Odysseas G. Repousis, *The Use of Trusts in Investment Arbitration* 34 ARB. INT’L (forthcoming June 2018), available at <https://doi.org/10.1093/arbint/aiy015>.

21. See Council Regulation 650/2012, art. 83(1), 2012 O.J. (L 201) 107, 133. The applicability of the Regulation in three additional Member States (Ireland, Denmark and the United Kingdom) is questionable. See *id.* at 116 ¶¶ 82–83.

22. See Andrea Bonomi, *Choice-of-Law Aspects of the Future EC Regulation in Matters of Succession—A First Glance at the Commission’s Proposal*, in CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM KURT SIEHR 157, 166 (Katharina Boele-Woelki et al. eds., 2010). A focus on procedural law is necessary because the E.U. does not have competence to legislate on substantive matters relating to succession law. See Lein, *supra* note 6, at 111.

23. Council Regulation 650/2012, ¶ 7, 2012 O.J. at 107.

24. See *id.* ¶ 8 (noting “the creation of a European Certificate of Succession”).

25. See Council Regulation 1215/2012, arts. 4–35, 2012 O.J. (L 351) 1, 7–13; Council Regulation 2201/2003, arts. 3–20, 2003 O.J. (L 338) 1, 5–9; Council Regulation 44/2001, arts. 2–31, 2001 O.J. (L 12) 1, 3–10.

26. See Richard Frimson, *Brussels IV: The Problems of Trusts and Characterisation in the Civil Law*, 3 PRIV. CLIENT BUS. 170, 170 (2007). But see Fabrizio Marongiu Buonaiuti, *Choice-of-Court Agreement*, in THE EU SUCCESSION REGULATION: A COMMENTARY 149, 151 (Alfonso-Luis Calvo Caravaca et al. eds., 2016) (noting that settlors of trusts have wider authority to choose a forum under the Brussels I Regulation and Brussels I Recast than under the Regulation); Pataut, *supra* note 7, at 119–20 (noting differences between the Regulation and Brussels I and II).

outlined in the various Brussels regulations] as a means to ‘defend’ European substantive standards against different . . . international standards.”²⁷ Although there is no evidence yet of judicial protectionism arising in cases arising under the Regulation, such a phenomenon could occur in cases involving trust arbitration given that some Member States are highly protective of succession rights and quietly skeptical about the value of non-judicial forms of dispute resolution.²⁸

Commentary regarding the Regulation has been largely positive, since the Regulation grants a welcome—and in some cases, revolutionary—degree of deference to testator autonomy.²⁹ However, the Regulation also creates some ambiguity, most notably with respect to the ability of the parties to engage in various forms of non-judicial dispute resolution.³⁰ This issue is bound to be tested in the coming months and years, given the ever-increasing reliance on alternative dispute resolution (“ADR”) in the E.U.;³¹ the extremely protective attitude in many E.U. Member States regarding succession rights and forced heirship;³² and the recognition that questions of jurisdiction, choice of law, and recognition and enforcement of decisions have the potential to affect matters of substantive concern.³³

B. JURISDICTION

Although some people might think that the Regulation applies only to E.U. nationals, jurisdiction under the Regulation is based on “habitual[] residen[ce],” which means that the estate of any person, even a non-E.U. national, who is habitually resident in the E.U. at the time of his or her death

27. Marise Cremona & Hans-W. Micklitz, *Introduction*, in *PRIVATE LAW IN THE EXTERNAL RELATIONS OF THE EU* 1, 4–5 (Marise Cremona & Hans-W. Micklitz eds., 2016); see also Hans-W. Micklitz, *The Internal Versus the External Dimension of European Private Law: A Conceptual Design and a Research Agenda*, in *PRIVATE LAW IN THE EXTERNAL RELATIONS OF THE EU*, *supra*, at 9, 24.

28. See Silvia Barona Vilar & Carlos Esplugues Mota, *ADR Mechanisms and Their Incorporation into Global Justice in the Twenty First Century: Some Concepts and Trends*, in *GLOBAL PERSPECTIVES ON ADR* 1, 10 (Carlos Esplugues & Silvia Barona eds., 2014); Michael W. Galligan, *US Expatriate Persons and Property Owners, the European Union Succession Regulation and the Choice of New York Law*, 23 *TR. & TRUSTEES* 325, 326 (2017); Debbie De Girolamo, *Rhetoric and Civil Justice: A Commentary on the Promotion of Mediation Without Conviction in England and Wales*, 35 *CIV. JUST. Q.* 162, 163 (2016); Adam S. Hofri-Winogradow, *Trust Jurisdiction Clauses: Their Proper Ambit*, 13 *J. PRIV. INT’L L.* 519, 526–27 (2017); Lein, *supra* note 6, at 132.

29. See Bonomi, *supra* note 22, at 166.

30. See Mathias Weller, *Definitions*, in *THE EU SUCCESSION REGULATION: A COMMENTARY*, *supra* note 26, at 114, 122–23.

31. See EWALD A. FILLER, *COMMERCIAL MEDIATION IN EUROPE: AN EMPIRICAL STUDY OF THE USER EXPERIENCE* 413–14 (2012); Barona Vilar & Esplugues Mota, *supra* note 28, at 40.

32. See Galligan, *supra* note 28; Lein, *supra* note 6, at 110.

33. See Andrea Bonomi, *Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members*, in *THE LAW OF SUCCESSION: EUROPEAN PERSPECTIVES*, *supra* note 6, at 25, 28 (“[I]t is well known and generally accepted that the solutions of conflict of laws problems are not neutral, but often reflect specific State interests and substantive law policies adopted at the domestic level.”).

will be subject to the principles and procedures described in the Regulation.³⁴ The Regulation also establishes jurisdiction in the E.U. in cases where the law of a Member State was chosen to govern the succession or where certain property exists in the E.U., even if the decedent was not resident in the E.U. at the time of his or her death.³⁵ As a result, estate planners outside the E.U. must consider the possible applicability of the Regulation in cases where clients own property located in the E.U., maintain their habitual residence in the E.U., or intend to engage in those activities.

C. SCOPE

The Regulation addresses a variety of testamentary instruments, including wills, as well as intestate succession.³⁶ However, only a small subset of trust-related disputes fall within the scope of the instrument, at least at first glance.³⁷ For example, according to the Regulation, “[q]uestions relating to the creation, administration and dissolution of trusts [are] excluded from the scope of [the] Regulation.”³⁸ However, the Regulation explicitly states that “[t]his should not be understood as a general exclusion of trusts.”³⁹ Instead, “[w]here a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.”⁴⁰ Matthias Weller interprets this language as meaning that

[w]here a trust is created under a will or by operation of the law as a legal consequence of intestate succession, the applicable succession law should apply with respect to the devolution of the assets and the determination of the beneficiaries. The same applies to trusts by judicial act. Thus, [the Regulation] only excludes trusts created voluntarily by a legal act of the settlor. . . . Further, even in respect to voluntarily created trusts succession law should remain applicable for issues other than the creation, administration and dissolution of trusts such as the interpretation of the disposition upon death by the

34. See Council Regulation 650/2012, art. 16, 2012 O.J. (L 201) 107, 119. The concept of “habitual residence” is subject to a variety of considerations and exceptions. See *id.* ¶¶ 23–25, at 109; Alfonso-Luis Calvo Caravaca, *General Jurisdiction*, in *THE EU SUCCESSION REGULATION: A COMMENTARY*, *supra* note 26, at 127, 127–30.

35. See Council Regulation 650/2012, arts. 7, 10, 2012 O.J. at 118–19; Galligan, *supra* note 28, at 326. Courts in E.U. Member States may also accept jurisdiction based on appearance or need (*forum necessitatis*), although the latter is reserved for extreme cases. See Council Regulation 650/2012, arts. 9, 11, 2012 O.J. at 118, 119.

36. See Council Regulation 650/2012, arts. 1, 3(1), 2012 O.J. at 116–17.

37. *Id.* ¶ 13, at 108; see also Matthias Weller, *Scope*, in *THE EU SUCCESSION REGULATION: A COMMENTARY*, *supra* note 26, at 73, 102 (describing how the term “trust” is to be construed).

38. Council Regulation 650/2012, ¶ 13, 2012 O.J. (L 201) 107, 108.

39. *Id.*

40. *Id.*

settlor or the identification of the beneficiaries. Even the creation by testamentary disposition as such may be seen as covered by succession law.⁴¹

This analysis suggests that questions relating to the arbitration of trust disputes may very well be covered by the Regulation's choice of law provisions, as well as by provisions relating to jurisdiction and recognition of judgments. Under Weller's interpretation, the Regulation could govern provisions found in both voluntary and judicially created trusts requiring the arbitration of trust-related disputes as long as the disputes involved appropriate issues "such as the interpretation of the disposition upon death by the settlor or the identification of the beneficiaries."⁴²

At this point, it is unclear how questions of jurisdiction, applicable law, and recognition of judgments will be handled in cases falling outside the Regulation.⁴³ In some cases, recourse may be had to the Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Trust Convention"), which allows settlors to choose the law governing their trusts, subject to certain mandatory rules of law and public policy.⁴⁴ Although no case has tested the issue yet, commentators suggest that the Hague Trust Convention is applicable to questions involving trust arbitration.⁴⁵

Unfortunately, the Hague Trust Convention has not yet been widely adopted,⁴⁶ which means that issues falling outside the Regulation are more likely to be determined by reference to national rules on choice of governing law.⁴⁷ The problem with this approach, at least within the European Union, is that national laws are normally pre-empted by European regulations.⁴⁸ According to Weller, if the national rules are effectively erased, then

either ad-hoc rules by case law will have to be applied or the [Regulation] could be applied by analogy. However, the applicable succession law may limit the testamentary dispositions to certain types of dispositions (*numerus clausus*) such as in Germany, France

41. Weller, *supra* note 37 ("For example, trusts emerging after the death of one of two testators who established a mutual will are not covered by the exception, at least not 'with respect to the devolution of the assets.'" (footnotes omitted)).

42. *Id.*

43. *See id.* at 103.

44. *See* Convention on the Law Applicable to Trusts and on Their Recognition arts. 6–7, 16, 18, July 1, 1985, 23 I.L.M. 1389 (applying the law of the state with the closest connection to the trust if no law is explicitly chosen); *see also* Weller, *supra* note 37, at 103.

45. *See* Georg von Segesser, *Arbitrating Trust Disputes: Effect of the Hague Convention on the Law Applicable to Trusts and on Their Recognition*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 435, 466.

46. *See* 30: *Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (last updated Sept. 19, 2017) (noting the United States has signed but not ratified the instrument).

47. *See* Weller, *supra* note 37, at 104 n.138.

48. *See id.*

or Spain. In that case, it appears adequate either to infer from the disposition an implied choice of law or to reinterpret the testator's will as aiming at the closest equivalent to a trust such as an execution of the will (*Testamentsvollstreckung; nomination d'un exécuteur testamentaire*). Whether such an interpretation is possible is a question of the interpretation of the will in its entirety and as such governed by the succession law as determined according to the [Regulation].⁴⁹

D. APPLICABLE LAW

The Regulation adopts a relatively straightforward approach to questions relating to choice of law and seeks to create a unity between the forum and applicable law.⁵⁰ As a general rule, matters that are subject to the Regulation are governed by the law of the decedent's habitual residence⁵¹ and heard in that particular forum.⁵² However, the Regulation allows a limited amount of autonomy with respect to both choice of law and choice of forum, as discussed in this and the following subsection.⁵³

Although the goal of unity between the applicable law and the forum might initially suggest that matters arising under the Regulation may only be governed by the law of the various Member States,⁵⁴ the Regulation specifically contemplates the possibility that foreign law, including U.S. law, could control.⁵⁵ Although any attempt by a testator to choose a law other than the state of his or her habitual residence is somewhat constrained, in that the choice must refer to the decedent's "succession as a whole" and may only refer to the law of the decedent's nationality,⁵⁶ the Regulation indicates that the chosen law "should be valid even if the chosen law does not provide for a choice of law in matters of succession."⁵⁷ This latter provision may prove quite

49. *Id.* at 104 (footnotes omitted); *see also id.* at 103 (noting that some techniques may lead to different governing law for trusts than is indicated under the Regulation).

50. *See* Maria Álvarez Torné, *Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills*, 14 Y.B. PRIV. INT'L L. 409, 412 (2013).

51. *See* Council Regulation 650/2012, art. 21(1), 2012 O.J. (L 201) 107, 120; *see also id.* art. 21(2), at 120 (noting that such rule shall apply unless "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").

52. *See id.* art. 4, at 118.

53. *See id.* arts. 5, 20–21, at 118, 120.

54. Normally, the governing law is that of the habitual residence of the decedent, though some exceptions may apply. *See id.* art. 21, at 120.

55. *Id.* art. 20, at 120 ("Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.").

56. *Id.* art. 22(1), at 120 (noting special rule for holders of multiple nationalities). Article 22 also describes various formalities regarding the choice of law. *See id.* art. 22(2)–(4), at 120.

57. *Id.* ¶ 40, at 111.

useful in cases involving trust arbitration, since it may minimize—if not eliminate—the anti-autonomy bias reflected in some national laws.⁵⁸

One important issue to consider is whether a U.S. national would have to choose the law of the state in which he or she was born. At this point, most questions involving trust arbitration have been decided as a matter of state rather than federal law, and treatment can vary according to jurisdiction.⁵⁹ According to the Regulation, the law referring to the nationality of the decedent shall be the law of the territorial unit with the closest connection to the decedent at death if the decedent is a national of a country (such as the United States) with multiple territorial legal systems but no internal conflict of laws rules regarding succession.⁶⁰ While this provision is relatively clear, it can create some problems for estate planners, since the place with the closest connection to the decedent at death cannot be determined until death occurs.

The Regulation indicates that the governing law controls a wide variety of issues, including “the causes, time and place of the opening of the succession.”⁶¹ This language could be interpreted to include demands for arbitration of trust-related disputes, as well as other types of non-judicial dispute resolution (such as arbitration of wills and mediation of both trusts and wills) that are outside the scope of the current Article.⁶²

E. CHOICE OF FORUM

The Regulation also provides for autonomy with respect to choice of forum, although, as Fabrizio Marongui Buonaiuti has stated, “the role of party autonomy as regards the allocation of jurisdiction is conceived as strictly

58. See Galligan, *supra* note 28.

59. See Radford, *supra* note 14; Lee-ford Tritt, *Legislative Approaches to Trust Arbitration in the United States*, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 150, 165–71. Some commentators have suggested that the Federal Arbitration Act covers trust arbitration, which would unify the treatment of trust arbitration in the United States, but no court has weighed in on that issue yet. See David Horton, *Donative Trusts and the United States Federal Arbitration Act*, in ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1, at 203, 226–27.

60. Council Regulation 650/2012, art. 36(2)(b), 2012 O.J. 107, 124; Celia M. Caamiña Domínguez, *States with More Than One Legal System: Territorial Conflicts of Law*, in THE EU SUCCESSION REGULATION: A COMMENTARY, *supra* note 26, at 519, 521–29.

61. See Council Regulation 650/2012, art. 23(2)(a), 2012 O.J. at 120–21. Article 23(2) also identifies a number of substantive matters that could be resolved through arbitration or mediation. See *id.* art. 23(2)(b)–(j), at 120–21.

62. Arbitration of will disputes and mediation of both will and trust disputes have been discussed as a matter of U.S. law. See Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539, 543 (2008) (discussing mediation of will disputes); E. Gary Spitko, *The Will as an Implied Unilateral Arbitration Contract*, 68 FLA. L. REV. 49, 53 (2016) (discussing will arbitration); Strong, *supra* note 6, at 3 (discussing the applicability of the Regulation to will arbitration); Dara Greene, Note, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 679–81 (1999) (discussing mediation on probate proceedings).

complementary to the role it has been granted in respect of choice of law.”⁶³ As a result, the Regulation only permits a choice of forum within the E.U. and requires any choice of forum to correlate to the law chosen by the decedent under Article 22.⁶⁴ The choice of forum is also limited by the fact that the decision on where the matter is to be heard is not made directly by the deceased (although the decedent has indirect control over such matters through the choice of applicable law) but is instead made by “the parties concerned” in a writing that has been signed and dated.⁶⁵

This language initially suggests that trust arbitration may only be brought with the consent of the parties⁶⁶ and that the trustee, rather than the settlor, will likely be the motivating force behind the movement toward arbitration.⁶⁷ However, some jurisdictions may permit unilateral arbitration contracts, which would avoid the problem.⁶⁸ Furthermore, it may still be possible for testators to assert some “dead hand” pressure through an *in terrorem* clause or conditional gift that requires beneficiaries to agree to arbitration in a post-mortem writing,⁶⁹ although it is unclear whether such a clause would survive a challenge under the public policy provisions of the Regulation,⁷⁰ particularly in those countries (such as Germany) where the decedent’s property passes automatically to the beneficiaries so as to avoid any period of uncertainty about who owns title.⁷¹

Another way of addressing the writing requirement under the Regulation would be to have the concerned parties sign an antemortum choice of forum

63. Buonaiuti, *supra* note 26, at 149.

64. See Council Regulation 650/2012, art. 5, 2012 O.J. at 118 (including various formalities regarding the choice of forum).

65. *Id.* Commentators have characterized these provisions as “surprising” and noted that an earlier proposal supported by the Max Planck Institute for Comparative and International Law would have allowed the testator to make a unilateral choice of court. See Ornella Feraci, *Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters*, 16 Y.B. PRIV. INT’L L. 105, 125–26 (2015).

66. Arbitration of trust disputes has long been permitted in the United States with the consent of all parties. See David M. English, *Arbitration and the United States Uniform Trust Code*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 143, 143; Radford, *supra* note 14, at 176.

67. This approach has been adopted in some U.S. states. See English, *supra* note 66, at 146; Strong, *supra* note 2, at 1188–91.

68. See Wüstemann & Huber, *supra* note 19, at 405–06; see also generally Peter Mankowski, *Erbrechtliche Schiedsgerichte in Fällen mit Auslandsbezug und die EuErbVO*, 2014 ZEITSCHRIFT FÜR ERBRECHT UND VERMÖGENSVERWALTUNG 395 (discussing unilateral arbitration agreements and trust arbitration under German law).

69. See Strong, *Language*, *supra* note 8, at 293–94, 298–99 (noting such provisions are risky and may not be enforced); see also Spitko, *supra* note 62, at 49–50 (raising a challenge to “both the understanding that a will is not a contract and the opposition to enforcement of testator-compelled arbitration provisions that arises from that understanding”).

70. See Council Regulation 650/2012, art. 35, 2012 O.J. (L 201) 107, 124; *infra* notes 115–29 and accompanying text (discussing challenges under public policy provisions).

71. See Galligan, *supra* note 28, at 326–27.

agreement containing an arbitration provision, since “there is no obstacle, in principle, preventing the parties from entering into a choice-of-court agreement, even before the opening of the succession.”⁷² There are some risks to this technique, including the choice of an ineligible forum⁷³ and the failure to join all the relevant parties,⁷⁴ but alert estate planners and trustees should be able to overcome most, if not all, potential problems.⁷⁵ A similar technique would be to place an arbitration provision in or seek to establish an arbitration agreement as a succession agreement, which is defined as “an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement.”⁷⁶

When considering whether arbitration is permitted under Article 5 of the Regulation, courts will likely focus on how the term “choice-of-court agreement” is to be construed.⁷⁷ Reliance on an argument by analogy to this provision is necessary because the Regulation is silent as to the availability of arbitration.⁷⁸ However, the absence of any provision regarding arbitration is not itself fatal, since the European Court of Justice has been known to adopt a teleological approach to the interpretation of legislative silence, as long as

72. See Buonaiuti, *supra* note 26, at 152.

73. Because the choice-of-court agreement only becomes effective after the opening of the succession, the governing law cannot be confirmed until the moment of death. Thus, the concerned parties could choose a forum based on an incorrect presumption about what the governing law will be. *See id.*

74. *Id.* at 156. While it may not be possible to identify all interested parties prior to death (for example, some creditors of the succession may not be fully identifiable until after death occurs), some of those difficult-to-identify individuals may not be actual parties to the dispute that arises. See Esperanza Castellanos Ruiz, *The Scope of the Applicable Law, in THE EU SUCCESSION REGULATION: A COMMENTARY, supra* note 26, at 351, 360 (defining the Regulation’s “debts under the succession,” Council Regulation 650/2012, art. 23(2)(g), 2012 O.J. at 121, as “debts which exist prior to the death of the deceased and the debts originated by the opening of the succession itself, including taxes”). For example, creditors of the trust may be fully paid off by the trustee, leaving only the beneficiaries to contest the disposition of the assets under the trust.

75. See Strong, *supra* note 2, at 1233–34.

76. Council Regulation 650/2012, art. 3(1)(b), 2012 O.J. at 117. According to Article 25:

An agreement as to succession . . . shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties . . . by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

Id. art. 25(1), at 121. Succession agreements may be used in the context of family businesses, although statistics suggest that most transfers on death in Europe are controlled by wills rather than succession agreements. See Susana Navas Navarro, *Freedom of Testation Versus Freedom to Enter into Succession Agreements and Transaction Costs, in THE LAW OF SUCCESSION: EUROPEAN PERSPECTIVES, supra* note 6, at 105, 113.

77. See Council Regulation 650/2012, art. 5, 2012 O.J. at 118.

78. See Weller, *supra* note 30, at 122.

that technique does not result in an outcome that is contrary to the wording of the instrument as a whole.⁷⁹

As it turns out, support for a pro-arbitration interpretation can be found in the terms of the Regulation itself. For example, the text states that

the term ‘court’ should [] be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court.⁸⁰

Weller interprets this language to mean that courts should not be considered the exclusive means of resolving disputes involving succession law. To the contrary,

any other authority or even a legal professional—this is a true novelty in European private international law—with competence in succession matters qualifies as a court as long as these bodies or persons (a) exercise judicial functions or (b) act pursuant to a delegation of power by a judicial authority or (c) act under the control of a judicial authority. Further condition is that (d) impartiality and (e) the right of all parties to be heard is guaranteed. Finally, the decisions of such ‘courts’ must (f) be subject to appeal or otherwise judicial review and (g) have a similar force and effect as a decision of a judicial authority on the same type of matter.⁸¹

Although Weller claims that “[i]t appears to be an open question whether arbitral tribunals may count as ‘courts,’”⁸² he also recognizes that “[n]either ‘arbitration’ as such nor arbitration agreements are expressly

79. See Koen Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, in *JUDGING EUROPE'S JUDGES: THE LEGITIMACY OF THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE* 13, 22 (Maurice Adams et al. eds., 2013) (citing *Sturgeon and Others* as interpreting regulatory silence in a manner that allowed consistency with superior rules of European law, such as equal treatment); Albertina Albers Llorens, *The European Court of Justice, More Than a Teleological Court*, in 2 *THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES* 373, 393–94 (Alan Dashwood & Angela Ward eds., 1999) (discussing *Schouten v. Hoofdproduktchap voor Akkerbouwprodukten* [1977] E.C.R. 1291).

80. Council Regulation, 650/2012, ¶ 20, 2012 O.J. (L 201) 107, 109; see also *id.* art. 3(2), at 117.

81. Weller, *supra* note 30, at 122 (noting that “Member States are obliged to notify the Commission of” the authorities that fall within the scope of this provision).

82. *Id.*; see also *id.* at 123 (“One may also hold that these jurisdictional rules do not apply *ratione materiae*. Alternatively, one may take the view that arbitral tribunals are not meant to be courts at all but that ESR implicitly establishes a fully mandatory system that excludes the derogation of the jurisdiction of (Member) State courts.” (footnote omitted)).

excluded from the material scope of the [Regulation].”⁸³ Certainly the first set of criteria regarding the need to “exercise judicial functions . . . act pursuant to a delegation of power by a judicial authority or . . . act under the control of a judicial authority” are easily met by arbitration, which is subject to legislative and judicial control and provides final, binding awards pursuant to a jurisdictional grant of authority from the state.⁸⁴

Weller also writes that “[a]rbitral tribunals will regularly fulfill the procedural minimum standards” described in Article 3(2) of the Regulation.⁸⁵ This, too, appears indisputable, although some concerns might be raised as to whether awards are capable of being “made the subject of an appeal to or review by a judicial authority.”⁸⁶ However, this argument does not carry much weight, since arbitral awards are currently subject to judicial review, albeit of a limited procedural nature, and are considered final and binding to the same extent as judicial decisions.⁸⁷ Even if an appeal on the merits is required under the Regulation, arbitration can provide a suitable mechanism through arbitral appeals, since several arbitral organizations offer specialized rules for arbitral appeals, including the American Arbitration Association (“AAA”), which also offers specialized rules for will and trust arbitration.⁸⁸ Furthermore, some jurisdictions, most notably England, offer judicial review of the merits of an arbitral award.⁸⁹

83. *Id.* at 122–23 (comparing Article 1.2(d) of the Brussels I Recast and Article 1.2(e) of Rome I).

84. *Id.*; see also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 71–82 (2003) (discussing theoretical basis of arbitration); S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 323–50 (2013) (discussing jurisdictional grants). Arbitrators are capable of wielding the same powers as a judge in trust arbitration. See Trustee (Amendment) Act, 2011 § 18 (Bah.) (inserting § 91B(2) into the Bahamas Trustee Act 1998 to provide arbitrators with “all the powers of [a] Court”); Strong, *supra* note 2, at 1204–08 (discussing U.S. law).

85. Weller, *supra* note 30, at 123; see also Council Regulation 650/2012, art. 3(2), 2012 O.J. at 117.

86. Council Regulation 650/2012, art. 3(2)(a), 2012 O.J. at 117.

87. See LEW ET AL., *supra* note 84, at 627.

88. See S.I. Strong, *Institutional Approaches to Trust Arbitration: Comparing the AAA, ACTEC, ICC, and DIS Trust Arbitration Regimes*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 99, 101–02 (discussing different arbitral rules on wills and trusts); S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT’L L. 1, 17–18 (2015) (discussing arbitral appeals under various rules); see generally AM. ARBITRATION ASS’N, *OPTIONAL APPELLATE ARBITRATION RULES* (2013), <https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf> (highlighting the requirements, process, and effect of appellate arbitration); AM. ARBITRATION ASS’N, *WILLS AND TRUSTS ARBITRATION RULES* (2009), <https://www.adr.org/sites/default/files/Wills%20and%20Trusts%20Arbitration%20Rules%20Jun%2001%20C%202009.pdf> (providing procedure for arbitration of trusts and wills).

89. See Arbitration Act 1996, c. 23 § 69 (Eng.).

Weller has some questions about the seat of the arbitration. He believes it would be “strange” if arbitral tribunals were restricted by the Regulation’s rules on jurisdiction such that an arbitration could only proceed in locations described in Chapter II of the Regulation.⁹⁰

Buonaiuti makes a similar observation in his discussion of out-of-court settlements, suggesting that

an out-of-court settlement by definition takes place outside the purview of the courts. The place where such a settlement is concluded is therefore hardly relevant in terms of forum. The place where an out-of-court settlement is actually concluded would come up for consideration, in terms of the applicable law, only in respect of issues related to its formal validity.⁹¹

Buonaiuti’s conclusion seems equally applicable to arbitration, which frequently operates on a transnational basis. Indeed, Buonaiuti has even suggested that amicable out-of-court settlements (defined in Article 3(1)(h) as “a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings”) could include arbitration agreements under the Regulation.⁹² Under this approach, arbitration of a matter that falls within the scope of the Regulation need not take place in the place contemplated by the governing law.

This perspective has a number of benefits, not the least of which is that allowing the arbitration to take place at a location determined by the concerned parties may increase the likelihood that those parties will sign an arbitration agreement, since the seat can be made in a place that is more convenient to them. Furthermore, this technique respects the substantive concerns of the Regulation’s drafters, since, as Weller notes, even “[i]f the

90. Weller, *supra* note 30, at 123. Chapter II of the Regulation deals with questions of jurisdiction. See Council Regulation 650/2012, arts. 4–19, 2012 O.J. at 118–20.

91. Fabrizio Marongiu Buonaiuti, *Closing of Own-Motion Proceedings in the Event of a Choice of Law*, in THE EU SUCCESSION REGULATION: A COMMENTARY, *supra* note 26, at 177, 178.

92. Council Regulation 650/2012, art. 3(1)(h), 2012 O.J. at 117; see also Buonaiuti, *supra* note 91, at 177 n.1 (expressing some skepticism on the issue and noting split in German commentary). Out-of-court settlements are discussed throughout the Regulation. See, e.g., Council Regulation 650/2012, ¶¶ 29, 36, arts. 3(1)(h), 61, 2012 O.J. 107, 110–11, 117–18, 128. Notably, Paragraph 43 states that certain actions “should be without prejudice to any choice made by the parties to settle the succession amicably out of court in another Member State where this is possible under the law of that Member State,” which appears to support Buonaiuti’s view that out-of-court settlements are not restricted by choice of forum agreements. See *id.* ¶ 43, at 111; see also *id.* ¶ 29, at 110 (“Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State.”).

[Regulation] allows derogation in favour of arbitration it will presumably require the arbitral tribunal to apply the [Regulation's] choice-of-law rules."⁹³

Because "[a]rbitrability will be a matter of the applicable national law," Weller believes, with others, that the state whose law has been chosen to govern by the Regulation will retain control over the question of whether and to what extent trust arbitration will be permitted.⁹⁴ While this outcome is by no means assured, given a certain amount of confusion relating to the law governing questions of arbitrability, Gary Born has argued that questions relating to arbitrability are often best resolved by reference to the law governing the substantive dispute, at least if that law promotes arbitration rather than restricts it.⁹⁵

At this point, it is somewhat unclear whether trust arbitration is governed by substantive trust law (which will likely "travel" with the governing law) as opposed to procedural law (which will likely not travel outside the territory of the forum). All existing legislation on trust arbitration appears within the relevant trust code, which initially suggests that the provisions will travel.⁹⁶ However, some jurisdictions (namely the Bahamas, Paraguay, Florida, Idaho, and South Dakota) also refer to the national or local arbitration law, which suggests trust arbitration may only be allowed within the territory in question.⁹⁷

93. Weller, *supra* note 30, at 123. Although conflict of laws analyses can be complicated in international arbitration, it appears likely that this conclusion is correct. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2643–61 (2d ed. 2014).

94. Weller, *supra* note 30, at 123; see also Wüstemann & Huber, *supra* note 19, at 400. The question of whether and to what extent trust disputes are arbitrable varies according to jurisdiction. See Strong, *Arbitrability*, *supra* note 8, at 604–12; Strong, *supra* note 2, at 1236–44.

95. See BORN, *supra* note 93, at 604 (noting exceptions). Courts enforcing arbitral awards under the New York Convention may also look at arbitrability from their own perspective. See New York Convention, *supra* note 20, art. V(2)(a).

96. The proposed New Zealand law is the exception to the rule, since the bill suggests placing the trust arbitration provision in New Zealand's arbitration law, which strongly suggests that the provision would not travel. See Arbitration Amendment Bill 2017 (explanatory note) (N.Z.).

97. See FLA. STAT. ANN. § 731.401(2) (West 2017); IDAHO CODE §§ 15-8-101, 15-8-103 (2009); S.D. CODIFIED LAWS § 55-1-54 (Supp. 2017); Trustee (Amendment) Act, 2011 § 18 (Bah.) (inserting § 91A(2) into the Trustee Act of 1998); Arbitration Act, 2009 § 4(1) (Bah.); Brownbill, *supra* note 15, at 324. The UTC is somewhat ambiguous on this issue. See UNIF. TRUST CODE § 111 (UNIF. LAW COMM'N amended 2010). The Paraguayan provision is found in article 44 of Law 921 entitled "Negocios Fiduciarios" and reads:

En el acto constitutivo podrá estipularse que los conflictos surgidos entre el fideicomitente y el fiduciario o el beneficiario, según el caso, por razón de la existencia, interpretación, desarrollo o terminación del negocio fiduciario se sometan a la decisión de árbitros. A estos efectos, en el acto constitutivo del negocio fiduciario se determinarán expresamente las normas sustantivas y adjetivas a que se someterá la solución arbitral y, en su defecto, se aplicarán las normas que en materia arbitral establece la ley.

This provision can be translated as:

Similar concerns would also arise in cases where trust arbitration has been authorized by a judicial decision, since courts cannot exercise their powers extraterritorially.⁹⁸ Other jurisdictions (namely Panama, Arizona, Missouri, New Hampshire, and Washington) do not refer to the relevant arbitration statutes in their trust arbitration provisions, thereby suggesting that the arbitrability of trust disputes will travel with the substantive law.⁹⁹ Guernsey goes even further and indicates that its provision on trust arbitration applies regardless of where the proceedings take place.¹⁰⁰

The Regulation has other positive attributes, including a mechanism by which the courts can respect an arbitration agreement. According to Article 6, courts of the Member State where the decedent was habitually resident may decline jurisdiction if the decedent has chosen to have the law of his or her nationality govern the succession, thereby allowing the court whose law has been chosen to accept the matter.¹⁰¹ This provision could also be used to decline jurisdiction in cases involving an arbitration agreement. Indeed, the

In the deed it can be stipulated that conflicts arising between the trustee (*fideicomitente*) and the *fiduciario* or beneficiary, as the case may be, involving the existence, interpretation, administration or termination of the business trust may be submitted to the decision of arbitrators. Consequently, the deed creating the business trust will expressly set out the substantive norms and corollary matters which shall be submitted to an arbitral resolution and, in the absence of such provisions, the norms established in the arbitral law will be applied.

L. 921 De Negocios Fiduciarios, 11 Julio, 1996 art. 44 (Para.) (available at http://www.avalon.com.py/downloads/Ley_921_de_Negocios_Fiduciarios.pdf) (translation by author).

98. See *Rachal v. Reitz*, 403 S.W.3d 840, 842 (Tex. 2013) (referring to the Texas Arbitration Act); *Fitzpatrick v Emerald Grain Pty. Ltd.* [2017] WASC 206, at [90]–[91], [99] (Austl.) (allowing arbitration of trust disputes even over the objection of one of the parties); *Rinehart v Welker* [2012] NSWCA 95, at [173]–[177] (Court of Appeal NSW) (Austl.) (Bathurst, C.J.) (allowing arbitration of trust dispute when all the parties and beneficiaries agreed).

99. See ARIZ. REV. STAT. ANN. § 14-10205 (2012); MO. ANN. STAT. § 456.2-205.1 (West 2017); N.H. REV. STAT. ANN. § 564-B:1-111 (West 2018); WASH. REV. CODE §§ 11.96A.010, 11.96A.030 (2016). The Panamanian provision is found in the second paragraph of Article 41 of Law 1 of 1984, and reads, “Podrá establecerse en el instrumento de fideicomiso que cualquier controversia que surja del fideicomiso será resuelta por árbitros o arbitadores, así como el procedimiento a que ellos deban sujetarse.” (“It can be established in the trust that whatever controversy that arises regarding the trust may be resolved by arbitrators, as well as the procedure that the arbitrators should adopt.” (translation by author)). See Ley 1 de Enero de 1984 (Pan.), <http://ima.gob.pa/wp-content/uploads/2015/09/LEY-1-de-5-DE-ENERO-DE-1984.pdf>. “Por la cual se regula el Fideicomiso en Panamá y se adoptan otras disposiciones.” (“By which the trust in Panamá is regulated and other dispositions are adopted.” (translation by author)). *Id.*

100. See The Trusts (Guernsey) Law 2007, § 63 (allowing for arbitration, mediation and other alternative dispute resolution *mechanisms* in cases involving “breach of trust” and stating “[f]or the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey”).

101. See Council Regulation 650/2012, ¶ 35, arts. 6, 17, 2012 O.J. (L 201) 107, 110, 118, 120 (noting a *lis pendens* rule under the Regulation); Torné, *supra* note 50, at 422 (noting the Regulation’s approach is based on the Brussels I Regulation).

New York Convention would appear to require courts to respect arbitration provisions regarding trust disputes as a matter of international law.¹⁰²

F. RECOGNITION

The Regulation also provides for recognition and enforcement of decisions from E.U. Member States relating to succession matters.¹⁰³ Although Weller believes that “[r]ecognition and enforcement of the arbitral award will not fall within chapter IV of the [Regulation],”¹⁰⁴ the Regulation does provide a similarly simple mechanism for enforcement of arbitral awards arising out of trust arbitration: Article 75, which states that “[the] Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of [the] Regulation.”¹⁰⁵ All of the Member States of the E.U. are currently signatories of the New York Convention, which provides a predictable and well-established means of recognizing and enforcing arbitral awards.¹⁰⁶ In fact, the New York Convention provides additional support for arbitration of disputes falling within the scope of the Regulation, given mandatory language in the New York Convention that

[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.¹⁰⁷

While there is no case yet confirming that the New York Convention applies to trusts, numerous commentators have supported that position.¹⁰⁸ One of the biggest potential obstacles to trust arbitration involves the need

102. See New York Convention, *supra* note 20, art. III; Moses, *supra* note 20, at 493.

103. See Council Regulation 650/2012, ¶¶ 39–58, 2012 O.J. at 111–13.

104. Weller, *supra* note 30, at 123. Chapter IV of the Regulation deals with recognition and enforcement of decisions on succession issues. See Council Regulation 650/2012, arts. 39–58, 2012 O.J. at 124–27.

105. Council Regulation 650/2012, art. 75(1), 2012 O.J. at 132; see also *id.* ¶ 73, at 115. *But see id.* art. 75(2), at 132 (giving precedence to the Regulation in matters involving two Member States).

106. See New York Convention, *supra* note 20, art. III; see also *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNITED NATIONS COMMISSION ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Apr. 5, 2018) [hereinafter New York Convention Status] (listing Contracting Parties, which includes the United States).

107. See New York Convention, *supra* note 20, art. II(1).

108. See Ganz, *supra* note 20, at 494–95; Moses, *supra* note 20, at 493; Strong, *supra* note 2, at 1213–19; Wüstemann & Huber, *supra* note 19, at 405–06.

for a writing under Article II (2) of the Convention,¹⁰⁹ but that requirement also exists under the Regulation and can be met through a variety of means.¹¹⁰

Some questions may arise whether the New York Convention would apply to matters arising under the Regulation, given that some states have indicated that the Convention applies only to commercial matters and succession law may in some cases be considered to fall within family rather than commercial law.¹¹¹ Commentators considering this issue in the context of trust arbitration have concluded that many jurisdictions use a sufficiently broad definition of commerciality that would include trust-related concerns.¹¹² A similar determination appears appropriate in cases falling under the Regulation, given that the Regulation excludes matters that are quintessentially associated with family law, such as those relating to “the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects”¹¹³ and routinely refers to economic and social considerations every time family issues are noted.¹¹⁴

G. PUBLIC POLICY

Although the decision to proceed in arbitration is most often considered a choice of forum rather than a choice of law, the two concepts are linked under the Regulation.¹¹⁵ Because all existing laws authorizing trust arbitration are found in trust codes, any attempt to adopt trust arbitration could be framed in terms of a choice of law as much as a choice of forum. Considering the connection between choice of law and trust arbitration is important because Article 35 states that “[t]he application of a provision of the law of any State specified by this Regulation may be refused” by a court with jurisdiction over the matter.¹¹⁶ Although the choice of law should be denied “only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum,”¹¹⁷ the trust bench and bar have traditionally

109. New York Convention, *supra* note 20, art. II(2).

110. See Council Regulation 650/2012, art. 5, 2012 O.J. at 118; Strong, *supra* note 2, at 1208–18; Wüstemann & Huber, *supra* note 19, at 405–06; see also *supra* notes 63–102 and accompanying text (discussing choice of forum and how to address the writing requirement).

111. See New York Convention, *supra* note 20, art. I(3); Pataut, *supra* note 7, at 109 (suggesting succession law is a mix of several disciplines); New York Convention Status, *supra* note 106 (indicating states that have made the commercial declaration).

112. See Ganz, *supra* note 20, at 498–500; Moses, *supra* note 20, at 492–93; Strong, *supra* note 2, at 1186.

113. Council Regulation 650/2012, art. 1(2)(a), 2012 O.J. at 116.

114. See *id.* ¶ 54, at 113; see also *id.* ¶ 24, at 109.

115. See *id.* art. 22, at 120; see also *supra* Parts III.D., III.E.

116. Council Regulation 650/2012, art. 35, 2012 O.J. at 124.

117. *Id.*

evinced a somewhat hostile attitude towards arbitration, suggesting that some jurisdictions may seek to bar trust arbitration based on Article 35.¹¹⁸

Interestingly, any attempt to preclude trust arbitration under Article 35 may need to rely on *ordre public* rather than public policy, since,

[i]n the Anglo-Saxon legal tradition, the meaning of “public policy” is relatively narrow, referring to “matters of public morals, health, safety, welfare, and the like” and is distinguishable from matters related to due process. In the continental European tradition public policy, or *ordre public*, refers to a wider range of judicial concerns, a range that “encompasses breaches of procedural justice.”¹¹⁹

At this point, it is unclear what procedural objections might be made, since neither the Regulation nor the commentators discussing Article 35 have identified any specific concerns that might create difficulties for trust arbitration.¹²⁰ However, one possibility might involve the Charter of Fundamental Rights of the European Union (“European Charter”).¹²¹ Article 47 of the European Charter recognizes the right to a public trial in language that is somewhat analogous to that used in Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”),¹²² and some commentators have questioned

118. See Strong, *supra* note 2, at 1162 n.16 (discussing the “blinding prejudice” of some members of the succession law community toward arbitration (quoting AM. COLL. OF TR. & ESTATE COUNSEL, ARBITRATION TASK FORCE REPORT 5 (2006), <https://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf>)).

119. Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 ARB. INT’L 333, 334 (2004) (footnotes omitted).

120. See Council Regulation 650/2012, art. 35, 2012 O.J. at 110; Bonomi, *supra* note 33, at 36–38; Fabrizio Marongiu Buonaiuti, *Limitation of Proceedings*, in THE EU SUCCESSION REGULATION: A COMMENTARY, *supra* note 26, at 209, 217; Gianluca Contaldi & Cristina Grieco, *Public Policy (ordre public)*, in THE EU SUCCESSION REGULATION: A COMMENTARY, *supra* note 26, at 505, 512–13 (claiming other public policy concerns might include situations “where the governing law contains provisions that are discriminatory”). However, the perception of arbitration does not always match reality. See S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 U. ILL. L. REV. 533, 533–34.

121. See Council Regulation 650/2012, ¶¶ 58, 81, 2012 O.J. 107, 113, 116; see also Charter of Fundamental Rights of the European Union, art. 47, 2012 O.J. (C 326) 391, 405 (“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.”).

122. Article 6.1 states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the

whether Article 6.1 precludes trust arbitration on the grounds that the European Convention guarantees parties the right to a public trial.¹²³ While that argument has been raised in various contexts over the years, a wide variety of courts have held that arbitration is indeed consistent with the European Convention.¹²⁴ As a result, objections to trust arbitration based on Article 47 of the European Charter will likely be equally unavailing, as long as the parties can be found to have consented to arbitration in some manner.¹²⁵

Although arbitration is not generally incompatible with the European Charter or the European Convention, certain types of procedures may nevertheless be barred as being procedurally unfair.¹²⁶ One issue that may arise under the Regulation involves language stating that “[t]he rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.”¹²⁷ At this point, it is unclear whether and to what extent courts will consider arbitration to be considered sufficiently protective of the rights of the designated class of persons, particularly if some of those persons are unborn or unascertained at the time a choice of forum agreement is signed.¹²⁸ However, those matters can and likely should be addressed on a case-by-case basis.¹²⁹

court in special circumstances where publicity would prejudice the interests of justice.

European Court of Human Rights, European Convention on Human Rights art. 6.1 (2010), www.echr.coe.int/Documents/Convention_ENG.pdf.

123. See Mark Herbert, *Trust Arbitration in England and Wales: The Trust Law Committee*, in *ARBITRATION OF TRUST DISPUTES: ISSUES IN NATIONAL AND INTERNATIONAL LAW*, *supra* note 1, at 228, 246–52.

124. See European Court of Human Rights, *supra* note 122; *Tabbane v. Switzerland* 41069/12 Eur. Ct. H.R. (2016); *Streford v. The Football Association Ltd.*, [2007] EWCA (Civ) 238, [45] (Eng.); LEW ET AL., *supra* note 84, ¶¶ 5-57 to 5-67 (discussing cases); Adam Samuel, *Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights*, 21 J. INT’L ARB. 413, 416–19, 426–33 (2004) (stating that parties consenting to arbitration waive their rights under Article 6(1) of the European Convention); Press Release, European Court of Human Rights, *The Impossibility of Appealing Against a Verdict Issued by the International Court of Arbitration Was Not in Breach of the Convention* (Mar. 24, 2016), http://www.humanrights.ch/upload/pdf/160324_Entscheid_Tabbane_v._Switzerland_-_challenge_to_the_resolution_of_a_dispute_by_the_International_Court_of_Arbitration.pdf.

125. See Charter of Fundamental Rights of the European Union 326/2012, art. 47, 2012 O.J. at 405.

126. See *id.*; European Court of Human Rights, *supra* note 122.

127. Council Regulation 650/2012, ¶ 7, 2012 O.J. (L 201) 107; see also Ruiz, *supra* note 74 (“[D]ebts under the succession” under Article 23.2(g) means “debts which exist prior to the death of the deceased and the debts originated by the opening of the succession itself, including taxes.”).

128. See Strong, *supra* note 2, at 1210–11.

129. Contaldi & Grieco, *supra* note 120, at 511 (making such a recommendation in cases involving reserved shares).

IV. CONCLUSION

The increasing interest in trust arbitration suggests that it is only a matter of time before the viability of a trust arbitration provision is considered under the Regulation. When that issue is raised, courts will doubtless need to parse the specific provisions discussed above. However, it will also be important to remember that arbitration fulfills one of the major goals of the Regulation, namely predictability in estate planning, particularly in cases that involve persons or property located outside the E.U.¹³⁰ or that involve a variety of trust-related disputes, some of which fall within the terms of the Regulation and some of which do not. Arbitration not only allows the consolidation of all matters and all parties into a single forum (thereby making the process more time- and cost-efficient and avoiding the possibility of inconsistent outcomes), it also allows the parties to ensure that the decision-making body has competence in the governing law or laws, since an arbitral tribunal can include experts in several different laws, particularly laws of countries other than European Member States.¹³¹ This flexibility in expertise is particularly important because some trust-related matters could involve different laws governing different aspects of the disputes, and the Regulation values techniques that unify the substantive competence of the adjudicator and the law governing the issue.¹³² Thus, arbitration can be said to fulfill the purposes of the Regulation better than litigation in some cases.

Arbitration also promotes autonomy, another clear goal of the Regulation with respect to both substantive matters (as illustrated by provisions allowing for choice of law) and procedural matters (as illustrated by provisions allowing for choice of forum, out-of-court settlements and succession agreements).¹³³ Support for succession agreements and out-of-

130. See Lein, *supra* note 6, at 111.

131. For example, if a trust dispute was to be governed in part by English law and in part by French law, the tribunal could include one arbitrator who was an expert in English law and one who was an expert in French law, something that would be impossible to do in the judicial setting.

132. For example, questions regarding the devolution of beneficiary shares could be subject to the law chosen by the testator, pursuant to the Regulation, while questions relating to the validity of the trust could be subject to a different law, pursuant to different conflict of laws rules. See Weller, *supra* note 37, at 103–04; see also Lein, *supra* note 6, at 139–40 (distinguishing the law concerning a trust and the law concerning a will that creates a testamentary trust).

133. See Council Regulation 650/2012, arts. 5–8, 22, 25, 2012 O.J. (L 201) 107, 118, 120–21; see also *supra* notes 50–102 and accompanying text. A succession agreement (or, more properly, an “agreement as to succession”) is defined as “an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement.” Council Regulation 650/2012, art. 3(1)(b), 2012 O.J. at 117. E.U. Member States currently contemplate a variety of types of succession agreements. See Bonomi, *supra* note 33, at 34. Succession or inheritance agreements made prior to death are occasionally used in the United States. See Michael W. Galligan, *International Estate Planning for U.S. Citizens: An Integrated Approach*, 36 EST. PLAN. 11, 15 (2009). Some of these agreements may be mediated rather than negotiated. See Greene, *supra* note 62, at 679–80.

court settlements is particularly noteworthy, since it is unclear why procedural autonomy should prevail in matters involving negotiation or mediation but not arbitration. While it is true that such settlements require the approval of a court before they can be considered binding, the only time a court can deny cross-border enforcement is if the “settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.”¹³⁴ Arbitral awards are similarly subject to non-enforcement on public policy grounds, both domestically and internationally, so arbitration should be considered on par with negotiation and mediation under the Regulation.¹³⁵

While it is unfortunate that the drafters of the Regulation did not explicitly consider arbitration, such an omission is understandable given the complexity of the issues reflected in the Regulation. Hopefully this Article has shed some light on how trust arbitration can and should be considered by courts when the time comes.

134. Council Regulation 650/2012, art. 61(3), 2012 O.J. at 128. The Regulation is silent as to the grounds for non-recognition of a settlement agreement, which suggests the matter is decided under the national law of place where the agreement is made. *See id.* art. 8, at 118; *see also id.* ¶ 29, at 110 (“Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State.”).

135. *See, e.g.*, New York Convention, *supra* note 20, art. V; U.N. Comm’n on Int’l Trade Law, Res. 40/72, U.N. Doc. A/40/17, arts. 34–35 (Dec. 11, 1985), revised in 2006, G.A. Res. 61/33, U.N. Doc. A/61/33 (Dec. 4, 2006), (available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf).