Inheritance Tax

The United Kingdon-France Double Taxation Convention: Interaction with the Succession Regulation

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Cross-border succession seems to generate more than its fair share of questions, practical as much as academic and theoretical, and therefore more than its fair share of learned articles in specialist journals. The present journal has carried at least three, mainly concerned with an assumed British desire to avoid the concept of "fixed heirship".[1] *But none of those truly explored the complexities of the interaction between French law, the EU Succession Regulation and the double tax treaty which has been in force for more than six decades between France and Great Britain. That lacuna is filled now by the present even more learned (and even more practical) article, as clearly headlined in its title.*

Introduction

1. The introduction of the EU Succession Regulation (EU 650/2012), originally known as Brussels IV ("the Regulation"), was greeted with a mixture of joy and relief.
2. The Regulation marked a major departure from the schismatic, often messy private international law systems of many member states (such as the one that still exists in England and Wales). Instead, the Regulation adopts a single connecting factor to determine the law applicable to a person's succession. The normal connecting factor is the deceased's habitual residence at the time of their death. However, art.22 of the Regulation also provides citizens of Member States with the flexibility and certainty of choosing their national law to apply to their succession (the so-called *professio juris*).
3. Nationals of common law countries, where testamentary freedom is a core principle of succession law, saw (and continue to see) this possibility to choose the law applicable to their succession as a chance to escape the confines of continental, civil law "forced heirship"

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[1] In Private Client Business alone, please see: P. Delas, "Jurisdiction and proper law under the Succession Regulation" [2019] 4 P.C.B. 25; P. Delas, "Reserved rights for European citizens under French law" [2022] 1 P.C.B. 4; A. Giannakopoulos, "Limits on the professio juris in the EU Succession Regulation" [2024] 1 P.C.B. 39; P. Delas, "Forced heirship is not a human right" [2024] 3 P.C.B. 126; H. Peisse and M. Rutili, "UK/France cross-border successions—not always an entente cordiale" [2024] 5 P.C.B. 101.

regimes.[2] Solicitors, notaries and other practitioners around Europe looked forward to untangling the web of renvoi and conflict-of-laws woven by cross-border estates and replacing it with a single governing law.

4. Much has been written about the Regulation, particularly whether a testator with a suitable nationality can simply bypass forced heirship altogether or whether disinherited heirs and continental, civil law jurisdictions can stop them from doing so. At the time of publication, a series of challenges to the Regulation on *ordre public* (or public policy) grounds has sprung up around Europe, which in the short term undermines the certainty and simplicity that the Regulation was intended to bring. In France, those challenges were quashed by the *Cour de cassation*, which (in 2017, i.e. after the Regulation came into effect, but based on pre-Regulation facts) refused to hold that "forced heirship" rules formed part of French international *ordre public*.[3] Nevertheless, the French legislature intervened in 2021 to introduce the "compensatory rights" mechanism (under an amendment to art.913 of the French Civil Code), which, in certain circumstances, can lead to the application of forced heirship rules by the backdoor, even in situations where the deceased's ties to France are weak.

5. By contrast, fuelled no doubt by tax being outside the competence of the Regulation, relatively little has been said about the tax implications of applying the Regulation. One such implication is the unexpected interaction of the Regulation with the 1963 double tax convention on inheritance taxes between the UK and France (the "Convention").[4] This interaction will be of particular concern for individuals with significant ties to both countries and who hope to elect under the Regulation for English law to govern their succession. However, as this article will discuss, the Regulation remains a useful tool in the practitioner's cross-border estate planning kit, provided that care is taken when it comes to UK inheritance tax.

6. As readers will be aware, on 6 March 2024, the British government (then formed by the Conservative Party) announced its intention to replace domicile with residence as a connecting factor for the purposes of determining an estate's liability to inheritance tax. As part of the campaign for the election on 4 July 2024, the Labour party confirmed that it intended to do the same. Until Budget papers were published by HM Treasury on the afternoon of 30 October 2024, it was unclear from this gnomic pronouncement how the new system would interact with the double tax conventions generally or with the Convention. It had been surmised that the Labour Chancellor would introduce a deeming provision to the UK's inheritance tax legislation providing that anyone within the scope of inheritance tax under the new much shorter residence-based regime (apparently to be defined "long-term UK residents" under a new s.6A of the IHTA 1984) will be treated as UK-domiciled for the purposes of the relevant conventions. However, the Budget papers cryptically announce that "there are no changes to the treaties or how these operate".[5] This appears to be a reference to the provisions in the very last paragraph of the Draft Finance Bill Measures published the same day: Sch.6 Pt 2, para.48(1)(b) provides that the general repeal of the deemed domicile section of the IHTA 1984 (s.267) designed to abolish the old rules and build the long-term UK resident architecture is disregarded for double taxation arrangements. This leads to an inference that the new law will have a particular impact on conventions where

[2] Also known as "reserved portion" regimes.

[3] 27 September 2017, judgment no.16-17.198. The authors note that this judgment was recently cited approvingly by the European Court of Human Rights in *Jarre v France* (Application No.14157/18).

[4] Signed in Paris on 21 June 1963 and enacted in the UK as the Double Taxation Relief (Estate Duty) (France) Order 1963 (SI 1963/1319).

[5] *Technical Note: Reforming the taxation of non-UK domiciled individuals* (published 30 October 2024), para.158.

deemed domicile is relevant, which is not the case for the Convention, as discussed below. It also appears that mismatches will occur where someone is a long-term UK resident (10 years) but not yet deemed domiciled (15 years) … Watch this space! We may see some more arguments around the more purposive manner in which the OECD model commentary interprets the D word. The rest of this article was written prior to the publication of the Draft Finance Bill Measures.

Background and analysis

General tax position under English and French law

7. Under both UK and French tax law, the general position is (broadly) that if a person dies "domiciled" in that country, their worldwide estate is subject to that country's taxes on death. If they die domiciled outside that country, only their assets situated in that country are subject to that country's tax.[6] France also subjects to succession tax assets (wherever situated) received by a beneficiary domiciled in France for at least six years out of the 10 years before the death of the deceased.

The Convention

8. The Convention determines each country's taxing rights primarily by reference to the notion of domicile. The basic provisions as to taxing rights in arts V and VI are as follows:
   (1) Where the deceased was domiciled in France, UK inheritance tax shall (crucially, subject to para.16 below) not be imposed on assets situated outside Great Britain;[7]
   (2) Where the deceased was domiciled in Great Britain, French succession tax shall not be imposed on assets situated outside France;
   (3) Where the deceased was domiciled in one country and the asset is situated in the other country, the country of domicile retains its taxing rights and the other country retains its situs taxing rights; and
   (4) Where double taxation occurs as set out at para.(3) above, the country of domicile must give credit for the tax imposed by the country in which the asset is situated.[8]
9. Complications can arise where the deceased dies domiciled in Great Britain under the general law of England and Wales[9] *and* at the same time domiciled in France under French law. This is a common occurrence where an individual has links to both countries, owing to the broad and asymmetrical nature of the two concepts of domicile.

Domicile

10. In English law, domicile is primarily a "connecting factor" to a home legal system for "civil" purposes, from which a tax conclusion may derive. The ingredient of residence for tax or civil purposes may play no or only an insignificant role in the determination of domicile.

[6] The situs rules of the Convention are outside the scope of this article, but it suffices to say that to add to the challenges of the analysis, in both countries an asset can be "situated" in the country for the purposes of the Convention even if it is physically located abroad. The rules differ from the UK's domestic rules on situs for the purposes of inheritance tax.

[7] Note that the Convention refers to Great Britain rather than the United Kingdom in these provisions. This is for historical reasons; Northern Ireland had a different taxing regime (from estate duty, which only applied to Great Britain) at the time of the Convention. The application of the Convention to assets situated in Northern Ireland adds another layer of complexity and is outside the scope of this article.

[8] Note that the Convention only provides relief in respect of tax payable on death (not on lifetime gifts, so lifetime chargeable transfers and failed potentially exempt transfers are outside the scope of the Convention).

[9] Technically speaking Scots law is relevant here too, but the authors understand that domicile under Scots law is substantially the same as domicile under English law, so this article will only refer to the English law of domicile from this point on.

Domicile is the factor whose identification enables a conclusion to be drawn as to (inter alia) the succession rules applying to the person under consideration.

11. Under English law, everyone is born with a "domicile of origin", which is the domicile of their father (if their parents were married) or their mother (if their parents were unmarried) at the time of their birth. It is possible for a person to acquire a different domicile later in life, but the domicile of origin will never truly be "lost" and is relatively easy to revive. Someone who is born to a relevant parent with an English domicile but who then severs their ties to the UK and fully integrates into their new home (even to the point where they intend to remain in that new home indefinitely) can revert to their English domicile of origin if they abandon that new home.[10]

12. Under French law, a person's domicile is a question of fact with far less psychological and past historical involvement than in the UK. For French tax purposes, an individual will be domiciled in France if their *foyer* or their primary place of residence is in France, if they carry out a professional (but not ancillary) activity in France, or if the centre of their economic interests is located in France. Finally, it is worth noting that, from a French standpoint, the "connecting factor" is different for tax and civil purposes. That is to say that an individual can be domiciled in France for tax purposes without necessarily having their habitual residence in France under the Regulation.

13. Given the almost total lack of overlap between the English and French concepts, it is easy to imagine how a person might die domiciled in both countries under their respective laws (a "double domicile"): for example, it is easy to acquire a French domicile under French law through residence and difficult to lose an English domicile of origin under English law by absence alone. The asymmetric aspect is illustrated by someone born with an English domicile of origin who moves to France (thus moving their *foyer* to France and acquiring a French domicile under French law) but potentially retains their English domicile under English law indefinitely. By contrast, a French domiciliary moving to the UK will sever a French link for French purposes, while perhaps retaining it (or not acquiring an English one) in English eyes.

14. To determine a person's domicile for the purposes of the Convention, a series of tests (which will be familiar to practitioners) must be applied sequentially, starting with the person's permanent home and their centre of vital interests, then their habitual abode and their nationality, with mutual agreement between the two countries' tax authorities as a last resort.[11]

Double domicile and a professio juris

15. Where an individual dies double domiciled, the tax consequences are as set out at para.8 above, save that "domiciled" is to be interpreted in accordance with the tie-breaker tests.

16. However, there is one critical provision in art.V(1) that only bites in the case of a double domiciled person who, following the application of the tie-breaker tests, is French-domiciled

[10] An individual who is resident in the UK for 15 of the previous 20 tax years will be "deemed domiciled" in the UK for tax purposes. However, under s.267(2) of the Inheritance Tax Act 1984 (IHTA), the deemed domicile rules do not apply to the interpretation of a double inheritance tax convention where the deceased was domiciled under the general law of both countries. Deemed domicile is similarly (to varying degrees) irrelevant for the purposes of other double inheritance tax conventions which predate the invention of the concept (as is the case with the French treaty, which was signed before "estate duty" was replaced by capital transfer tax, now inheritance tax under the IHTA).

[11] The sequence in which the tests are applied is not straightforward. For example:

(1) The centre of vital interest test is only applied if the deceased "had a permanent home available to him in the territory of each of the Contracting Parties" and not if the deceased had a permanent home in neither state; and

(2) The habitual abode test is only applied if: (i) the deceased had a permanent home in neither state; or (ii) the centre of vital interests "cannot be determined", an unusual formulation given that a French or English court could surely in almost all circumstances determine the point on the basis of the evidence before it.

for the purposes of the Convention. The general rule for such a person (resulting from the application of the Convention) remains that French succession tax and not UK inheritance tax will be imposed on their assets outside Great Britain. In other words, the UK's internal taxing rights are partly disapplied—essentially, they are geographically limited to the UK. The Convention predates by over 20 years the creation of the notion of "deemed domicile" (through long residence) for UK inheritance tax purposes so in appropriate cases this effect of the Convention is powerful.

17. But there is an exception to this general rule for assets outside Great Britain passing "under a disposition or devolution regulated by the law of some part of Great Britain".[12] In other words, assets outside the UK passing under a will governed by (for the sake of argument) English law will be subject to UK inheritance tax (as well as French succession tax), therefore reinstating the usual position which would apply absent the rule described in para.16. In addition, if the assets are situated in Great Britain, both the UK and France will have taxing rights but a tax credit will be available as set out at para.8(4) above. However, if the assets are situated outside the UK, no tax credit will be available under art.VI, so these assets will prima facie be subject to double taxation.

18. This is where the impact of the Regulation comes into play. If a will (of whatever form) contains a *professio juris* for English law under art.22 of the Regulation, then any assets covered by it will—arguably at least—pass under a disposition or devolution regulated by the law of some part of Great Britain and not benefit from the exclusion from UK inheritance tax which otherwise applies.[13] This is a troubling prospect for clients with cross-border estates and for their advisers, who have sought to rely on the Regulation for various reasons, including simplification or to avoid forced heirship regimes, but who, in the process, may have inadvertently exposed themselves to double taxation without relief under the Convention.

Is this startling conclusion correct?

19. Some leading English commentary suggests that such an outcome "seems contrary to the intention of the Convention and it is understood that the argument will not be officially taken [by HMRC]".[14] However, little has been written about the subject and the authors are not aware of any practice by HMRC to disregard the UK's taxing rights under art.V(1). While unilateral relief would be available in respect of French tax paid, credit for the full amount (up to a ceiling of 40%) would only be available in respect of property situated in France. For property situated in third countries, only partial relief would be available under the formula contained in IHTA s.159(3), so some tax leakage may be unavoidable.

20. Another argument against the imposition of UK tax in such circumstances is the fact that English private international law (domestically) remains schismatic and has no concept of a *professio juris*, preferring to refer back to the laws of domicile (for movables) and situs

[12] This carve-out is derived from Finance Act 1949 s.28(2), in force at the time of the Convention, which provided that the governing law of the relevant "disposition or devolution" was, together with the nature of the property (realty versus personalty), situs and domicile, one of the connecting factors for determining liability to estate duty. The words "disposition" and "devolution" were interpreted by Lord Denning in the case of *Philipson-Stow* (discussed at para.29 below) as follows:

> "When section 28(2) speaks of the 'devolution' of property, it means a devolution by operation of law, such as heirship or kinship. When it speaks of a 'disposition', it means a disposition by instrument, such as a will".

The governing law is understood to be a question of substance (i.e. substantive validity) not form (i.e. formal validity or recognition of the relevant instrument as a will). Note that there are similar exceptions to the same general rule in the UK double inheritance tax conventions with India and Pakistan.

[13] Note that British nationals (including those who made their wills before 17 August 2015) may also be deemed to have made an election of English (or Scots or Northern Irish) law under the Regulation.

[14] C. Bradley and E. Chamberlain (eds) *Dymond's Capital Taxes* (London: Sweet & Maxwell, 2022), para.31.931.

(for immovables). A *professio juris* therefore only has an impact in the UK under the terms of a foreign law received in England under the renvoi mechanism.[15]

21. The argument might be developed as follows: while English law has been invoked, it has been invoked exclusively in reliance upon the foreign law; in other words, it is effectively the Regulation (a foreign law) which governs the instrument, rather than English law per se. Or to put it another way, the Regulation is an upstream sine qua non for the invocation of English succession law. This "Trojan horse" point is believed to be untested. It may also carry less weight where the continuing English domicile of the deceased can be substantiated; in other words, where, under English private international law, English law may be one of the governing laws anyway.

Double domicile and intestacy

22. A *professio juris* may, however, not be the only situation in which this trap arises. The intermeshing of the Regulation and the Convention also poses difficulty where there is no *professio juris* because the deceased died intestate. Per art.3(1)(a), the Regulation applies to devolutions on intestacy, not only where the deceased died leaving a will. In the absence of a *professio juris*, the general rule under art.21 will apply to the deceased's succession: the law of the state of their habitual residence will apply (including its rules of *renvoi*), unless they were manifestly more connected with another state at the time of their death.

23. Taking the example of a double domiciled individual set out at para.13 above, their moveable and immoveable assets in relevant member states would all devolve under French law (including its conflict-of-laws rules) as France would be the state of their habitual residence. However, here there is a clash with English conflict-of-laws rules, which (for intestate as well as testate successions) look to the law of domicile for moveables (i.e. English law in the example) and the law of situs for immoveables.

24. It is unclear how the Convention would deal with this clash. Returning to art.V(1) and our double domiciled individual, the question is whether their assets situated outside Great Britain (so prima facie not subject to UK tax) would pass "under a devolution regulated by the law of some part of Great Britain" (and thereby subject to double taxation). Taking a few examples:

    (1) A painting situated in Ontario, Canada: on the understanding that the Ontario conflict-of-laws rules (like English law) look to the law of the deceased's domicile in determining the succession to moveables, this painting would devolve under English law and would be subject to both UK and French tax (and possibly Canadian tax).

    (2) If, before their death, the deceased had sold the painting and used the proceeds to buy real estate in Ontario, then on the understanding that the Ontario conflict-of-laws rules look to the law of situs in determining the succession to immoveables, then the property would devolve under the law of Ontario and would be subject to French tax (and possibly Canadian tax).

    (3) Cash held in a bank account situated in Germany: theoretically, the English conflict-of-laws rules would apply English law to the devolution of the cash in the bank account. However, given that: (i) the Regulation would apply French law;

[15] By contrast, if the testator elects under the Regulation for English law to apply to their succession, then English law will apply to all of their assets in all Member States to which the Regulation is applicable, regardless of whether such assets are moveable or immoveable. The Regulation has abolished the distinction between movable and immovable assets, opting for the principle of unity of succession and art.34(2) of the Regulation disapplies renvoi to Member States in respect of an election under art.22.

and (ii) the bank account is located in a state subject to the Regulation, in reality, disregarding the English perspective, the cash will *pass* (being the word used in the Convention) under French law rather than English law. Therefore, in the authors' view, a plain reading of the text of the Convention could not result in the cash being subject to UK tax (although it is not known what position HMRC might take).[16]

Double domicile issues outside the scope of the Regulation

25. Although they are not the main focus of this article, dispositions or devolutions that are not governed by the Regulation can also be caught by the art.V(1) trap. Trusts are one example, excluded from the scope of the Regulation by art.3(2)(j).[17]

26. Our double-domiciled individual might be the life tenant (i.e. a beneficiary entitled to trust income, but not trust capital) of a "qualifying interest in possession" trust in the UK (a type of trust whose assets are treated, for UK inheritance tax purposes, as belonging to the life tenant)—perhaps their late spouse created this trust by their will, a common UK estate planning strategy. On the life tenant's death, trust assets will pass according to the terms of the trust rather than according to the life tenant's will. So, if the governing law of the trust is English law, then assets will pass under a disposition or devolution regulated by English law (subject to the complicating factors below).

27. If the trust held moveable assets outside the UK, then provided that the jurisdiction in question recognised the trust, those assets would pass under English law (as the law of the trust). (If the jurisdiction in question did not recognise the trust, then we would need to consider what disposition or devolution effectively governed the succession to that asset in the relevant jurisdiction—there is an overlap here with the distinction between "effective" applicable law versus theoretical governing law, as discussed at para.24(3) above).

28. There is therefore scope for double taxation on non-UK moveable assets held in the life interest trust (as the life tenant will be treated as owning the assets under both UK and French tax law).

29. For the disposition of immoveable assets, it appears from the House of Lords case of *Philipson-Stow v IRC* that English law would look to the law of situs as the governing law.[18] There are various permutations:

    (1) An Ontario law trust holds immovable assets in England, in which case these assets pass under English law as the law of situs.

    (2) An English law trust holds immovable assets in (solely for the sake of argument) Germany, in which case these assets pass under German law as the law of situs. However, HMRC might argue (wrongly in the authors' view) that because the governing law of the trust is English law, then notwithstanding *Philipson-Stow*, the assets in fact pass under English law (and would therefore be subject to UK inheritance tax).

    (3) The trustees of the same English law trust hold additional immoveable assets in Germany on a trust for sale (i.e. a trust in which the trustees have an obligation to sell the property and hold the proceeds of sale in trust for the beneficiaries). *Philipson-Stow* confirms that the overlay of a trust for sale does not alter the nature

[16] In theory, HMRC could apply the same argument in the context of a testate succession where the deceased made a *professio juris* in favour of (say) French law: because the UK is not bound by the Regulation, theoretically HMRC could still assert its taxing rights over moveable assets in (say) Germany. However, given that the deceased would have made an explicit *professio juris*, notwithstanding the fact that English law does not recognise the concept (other than via the *renvoi* mechanism), the authors consider it even less likely that HMRC would take the point in this context.

[17] Although testamentary and statutory trusts are within scope—see recital 13.

[18] *Philipson-Stow v Inland Revenue Commissioners* [1961] A.C. 727; [1960] 3 W.L.R. 1008 (HL).

of the underlying property within the trust: the immovable assets remain immoveable assets notwithstanding the trust for sale, so they pass according to German law as the law of situs (although again, query whether HMRC might take a contrary view).[19]

Possible options

30. For an individual who: (i) is likely to be double domiciled; and (ii) might be domiciled in France for the purposes of the Convention, various options exist, some more bullish and some more conservative.

31. In an ideal world, assuming forced heirship issues drive the choice of a law other than that of France, a client would be a national of a territory without forced heirship rules other than the UK. The client could make a single worldwide will electing under the Regulation for the law of their alternative (not British) common law nationality (or any other nationality whose laws do not provide for forced heirship) to apply. They could then dispose of their estate as they wished and avoid the double taxation provided for by the Convention, as only their assets in Great Britain would be subject to UK inheritance tax (unavoidably). Of course, the interaction between the succession taxes of that third country and those of France would need to be considered, to say nothing of a possible criticism of lack of nexus to that jurisdiction.[20]

32. However, for the majority of clients, who have no alternative common law nationality, this will obviously not be a suitable option. If they wish to make a *professio juris* (including a deemed *professio juris*, as to which see para.33(3) below) for another law, they might have no choice other than to elect for French law. While this avoids the trap in art.V(1), the result for the testator's succession might be unsatisfactory.

33. A cautious client might consider the two following options:

    (1) They could attempt a geographical separation of their assets and ensure that their will in respect of assets in Great Britain was limited in scope to those assets, with a French will not containing a *professio juris* for English law sweeping up all other assets (or individual wills for some/all other jurisdictions). As with the last paragraph, double taxation would be limited but, to the extent that their assets passed under a French will or the laws of another jurisdiction with forced heirship rules, the client's testamentary freedom would be restricted.

    In any event, this "territorial split" or "divide and conquer" approach may be undermined if a *professio juris* were still desired by the need for it to apply to the "succession as a whole" to avoid questions over the (French) will's substantial validity or over the validity of the *professio juris*.

    (2) Alternatively, they might make a worldwide will which contains no *professio juris* at all. Returning to the earlier example of a client born in England (with an English domicile of origin) and who dies in France (having acquired a French domicile for French purposes, but retaining their English domicile of origin for English purposes), art.21(1) of the Regulation would apply French law (as the law of the deceased's habitual residence) to their succession as a whole. Therefore, assets of all types situated in France (and other member states bound by the Regulation) would pass according to French law (including any *renvoi*) and would be subject to French tax only.

[19] The same principle from *Philipson-Stow* should also apply to immoveable property subject to a contract for sale.

[20] See recital 38, which states that the *professio juris* "should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen".

For an individual who remained domiciled in England in the English sense, there would be a risk that art.21(2) would provide that they were "manifestly more closely connected" with the UK and therefore that English law should apply (leading to possible double taxation).[21]

The UK is not bound by the Regulation, so art.21(1) would have no effect in relation to UK assets. Instead, moveable assets in England would pass in accordance with the law of the deceased's domicile (England). Immoveable assets in England would also pass under English law, again as the law of situs. In either case, they would be subject to both UK and French tax, with a credit available for UK tax paid.

Assets in third countries not bound by the Regulation would pass according to the private international law of the relevant jurisdictions. Where the law of the relevant country looks, for example, to its own substantive law (as the law of situs) or the law of the deceased's last habitual residence, then the property will not pass under a disposition governed by English law, and so the UK will not have taxing rights.

A risk of double taxation remains where (as highlighted at para.24(1) above) the deceased owned assets in third countries whose private international law looks to the country of domicile and whose definition of domicile is identical or similar to that in English law. In such a case, English law would govern the disposition of those assets, meaning that the exception in art.V(1) is tripped again.

(3) An additional complicating factor is that, even if the will does *not* contain a *professio juris* for English law, it is possible that one could be implied (or "demonstrated by the terms" of the will, as art.22(2) of the Regulation puts it).

Firstly, while English law does not recognise the concept of a *professio juris*, under English law a will may contain a governing law clause. Specifically, a testator may choose the law that should apply to: (a) the interpretation of the will; and (b) the governing law of any trusts created under the will. Such a provision may be deemed an implicit *professio juris* under the Regulation despite not addressing (strictly) the substantive succession law (although a testator may choose as the governing law the law of a jurisdiction with which they have no connection whatsoever and in particular no nationality connection, which would fail the requirements of a deemed *professio juris* under the Regulation).

Secondly, even if there is no governing law clause, any statutory references to English law in the boilerplate of a will could be considered an implicit *professio juris*. For example, many English-form wills explicitly state that s.32 of the Trustee Act 1925 (which gives trustees a power to apply trust capital) applies to any trusts created by the will; many English-form wills also refer to UK taxing provisions. The inclusion of such statutory references in a will, especially if the rest of the will is in English "form" too, could be used to support an argument that the testator has made an implicit *professio juris*.

34. Before committing to any of these options, it is worth trying to model the forecast tax bill, to try to assess the likely impact of exemptions and reliefs and whether the twin goals of unity of succession and forced heirship avoidance are worth the price. A bullish client might be tempted to make a worldwide will with an election of English law under the Regulation and rely on a combination of: (i) the Trojan horse argument; (ii) HMRC not asserting the UK's taxing rights; and (iii) (perhaps partial) unilateral relief, particularly if they feel that they are more likely to be domiciled in England under the tie-breaker tests. Those whose

[21] Note that *renvoi* does not apply with respect to an applicable law determined by art.21(2).

main concern is ensuring their testamentary freedom and who would accept some possible tax leakage in order to achieve it (or who are eligible for higher tax reliefs under UK inheritance tax) might also take the same approach.

35. A summary of the possible permutations follows at the end of this note.

Conclusion

36. The prospect of potential double taxation under the Convention does make the use of an English *professio juris* under the Regulation a less obviously attractive estate-planning tool. That said, the number of cases in which difficulties arise, while significant enough to warrant reflection, are still relatively few: an individual must be domiciled in both Great Britain and France, with assets outside the UK, with no other helpful governing law that they can elect under the Regulation, and their family circumstances must be such that forced heirship does not provide the desired estate or tax planning result.

37. Given the limited evidence available of how HMRC will apply the Convention in such circumstances, it will be essential to watch this space. In the meantime, clients (and their advisers) will need to carefully consider their current position and their priorities: even for those who might be affected, the ability to dispose of their assets as they please might be a price worth paying.

38. A further layer of complexity and uncertainty is added by the *ordre public* debate and by developments such as the enactment of new compensatory rights in the French Civil Code conclusively. As alluded to at the beginning of this article, the extent to which a testator can avoid forced heirship rules through a *professio juris* made under the Regulation is not yet settled. The relationship between the Convention and the Regulation must be looked at as part of a broader picture, not just in isolation.

39. Finally, as alluded to at the beginning of this article, the impact on the UK's double inheritance tax treaties of the upcoming reforms to UK inheritance tax will need to be closely monitored.

40. The authors wish to acknowledge Bertrand Savouré and Eugénie Guichot of Althémis Paris and thank them for their contribution to this article.

Summary of possible outcomes

There are several different factors that will determine how the Convention and the Regulation interact: domicile under English law, domicile under French law, Convention domicile, the territorial extent of the testator's property and the governing law pursuant to which assets pass.[22]

Single or double domiciled?	**Double domiciled**				**Single domiciled**			
Domicile under English/French general law	England (under English law)	France (under French law)	England (under English law)	France (under French law)	England (under English law)[23]	Not France (under French law)	Not England (under English law)	France (under French law)

[22] For the sake of simplicity, this analysis does not consider the taxation of beneficiaries domiciled in France on assets they receive.

[23] Including deemed domicile in the UK for inheritance tax purposes, since the deemed domicile rules apply (in a limited way to UK assets) where there is no double domicile under the Convention.

Single or double domiciled?	**Double domiciled**		**Single domiciled**	
Domicile for the purposes of the Convention	England[24]	France[25]	England	France
Tax treatment of Great Britain situs assets	Subject to UK tax.	Subject to UK tax and French tax *but* a credit is available against French tax for UK tax paid.	Subject to UK tax.	Subject to UK and French tax *but* a credit is available against French tax for UK tax paid.
Tax treatment of French situs assets	Subject to UK and French tax *but* a credit is available against UK tax for French tax paid.	Under a will containing an election for English law under the Regulation:	Subject to UK and French tax *but* a credit is available against UK tax for French tax paid.	Subject to French tax.
		Subject to UK and French tax *but* no credit available under the Convention.		
		Unilateral relief should be available.		
		Under a will with no election, covering (at a minimum) non-Great Britain situs assets:		
		Subject to French tax *only*.[26]		
Tax treatment of assets situated in other Member States bound by the Regulation[27]	Subject to UK tax.	Under a will containing an election for English law under the Regulation:	Subject to UK tax.	Subject to French tax.
		Subject to UK and French tax *but* no credit available under the Convention.		
		(Partial) unilateral relief should be available.		
		Under a will with no election, covering (at a minimum) non-Great Britain situs assets:		
		Subject to French tax *only*.[28]		

[24] Assuming that the application of the tie-breaker tests results in a domicile of England.
[25] Assuming that the application of the tie-breaker tests results in a domicile of France.
[26] Assuming that French law applies under art.21(1).
[27] Ignoring any tax that might be charged in those jurisdictions.
[28] Assuming that French law applies under art.21(1).

Single or double domiciled?	**Double domiciled**		**Single domiciled**	
Tax treatment of assets situated in other jurisdictions[29]	Subject to UK tax.	Subject to French tax *only* (although with potential for UK tax as well if those jurisdictions make a *renvoi* to English law; (partial) unilateral relief should be available).	Subject to UK tax.	Subject to French tax.

[29] Ignoring any tax that might be charged in those jurisdictions.