SCRITTI DI DIRITTO PRIVATO EUROPEO
E INTERNAZIONALE

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SCRITTI DI DIRITTO PRIVATO EUROPEO E INTERNAZIONALE

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The present Volume has been published with the financial support of the University of Genoa, FRA 2018 of the Department of Political Science, of the PhD course in Law, and of the PhD course in Political Science of the School of Social Science.

Private (International) Law in an Evolving Transboundary Society

Selected Issues

edited by
Bettina Heiderhoff
Ilaria Queirolo

Contributions by
Clara Isabel Cañero Lois
Stefano Dominelli
Jan-Willem Koldehofe
Daniel Nickisch
Francesco Pesce
Pietro Sanna
Tomasz Tomczak
Clara Schulze Velmede

Aracne editrice

www.aracneeditrice.it
info@aracneeditrice.it

www.gioacchinoonoratieditore.it
info@gioacchinoonoratieditore.it

via Vittorio Veneto, 20
00020 Canterano (RM)
(06) 45551463

ISBN 978-88-255-3828-1

I[st] edition: October 2020

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Privare (international) Law in an Evolving Transboundary Society
ISBN 978-88-255-3828-1
DOI 10.4399/97888255382811
pp. 9-10 (October 2020)

Preface

The aim of the Series of *Essays of Private European and International Law* (Scritti di diritto privato europeo ed internazionale) is to foster critical and interdisciplinary reasoning on legal problems to explore the growing interconnections among the fields of Private, European and International law.

The coordinated approach to common legal issues by professors, researchers and legal experts from different fields of specialisation, with different backgrounds and methodologies is nowadays felt as an added value to the study of all subjects that experience the influence of supra-national regulation over domestic legal systems.

By bringing together PhD candidates from different EU Member States to attend four seminars of advanced learning in a *Programme in European Private Law for Postgraduates* (PEPP), the PEPP is playing an active role in moulding law practitioners and scholars with an international and comprehensive approach. The Programme is coordinated by the University of Münster and involves Partners amongst the best law Universities and Research Centres in Germany (University of Münster, Bucerius Law School, the Max Planck Institute for Comparative and International Private Law Hamburg), Belgium (Catholic University of Leuven), Italy (University of Genoa), Poland (Silesian University at Katowice, University of Wroclaw, Jagiellonian University in Kraków), Spain (University of Valencia) and the United Kingdom (University of Cambridge). PEPP attendants deal with a whole variety of topics in the field of private law and private international law, and the Programme's aim is to boost knowledge and understanding of the emerging legal system, and to build up a network among academics and lawyers addressing similar issues.

Sharing the same interdisciplinary approach, a cooperation between the PEPP Programme and the Series of Essays is the natural follow up of the European network created by PEPP. It is with the idea to further disseminate the positive results of the Programme that this *Volume* has been conceived.

In every round of the seminars, the PEPP lectures were characterized by the active participation of all students, who gave their own

contribution to the discussion and made it possible to start de-bates and critical assessments that have been taken into consideration by the Authors in their writings.

This *Volume* comprises contributions from Lecturers PhD candidates who participated in the 2018-2019 PEPP Session. The works of the Authors focus on their own research topics, connected to various aspects of contract law, international and EU commerce, private international law and the protection of human rights in the European Union.

All contributions were subject both to a double-blind referee procedure and to revision by an English native speaker.

Bettina Heiderhoff
Ilaria Queirolo

Index of Authors

Clara Isabel Cañero Lois, Scholar of the Spanish Ministry of Science, Innovation and Universities and Predoctoral Researcher in the Commercial Law Department 'Manuel Broseta Pont' at the University of Valencia.

Stefano Dominelli, Phd, is Researcher in international law and reader in Public and Private international law, in International Law of armed conflicts at the Department of Political Science of the University of Genoa, and in EU Conflict of Laws at the Department of Law.

Jan-Willem Koldehofe is a PhD candidate at the University of Münster.

Daniel Nickisch is Research assistant at the Institute for German and International Family Law, University of Münster.

Francesco Pesce, PhD, is Associate professor in international law at the University of Genoa where he teaches Public and Private international law, Advanced private international law, EU law, and EU public policies.

Pietro Sanna, PhD Candidate at the University of Genoa; Lawyer in Genoa.

Tomasz Tomczak, PhD, LL.M., LL.M, Opole University, Poland.

Clara Schulze Velmede is currently completing her PhD at the University of Münster, where she worked as a research assistant at the Forschungsstelle für Versicherungswesen, headed by Prof. Dr. Petra Pohlmann, until 2019.

Privare (international) Law in an Evolving Transboundary Society
ISBN 978-88-255-3828-1
DOI 10.4399/97888255382812
pp. 13-38 (October 2020)

Free Movement of Judgments in Succession Matters: Assessing the "Survival" of the Exequatur Procedure through the Focal Lens of Public Policy

Francesco Pesce, Stefano Dominelli*

1. Free movement of decisions in the European judicial space

Recognition and enforcement of decisions is connected to sovereignty[1], as a legal system accepts results taken abroad that may be – or are

* The present work includes and further elaborates upon the findings of the research carried out by the Authors within the Project "Towards the Entry into Force of the Succession Regulation: Building Future Uniformity upon Past Divergencies", JUST/2013/JCIV/AG/4666, with financial support from the Civil Justice Programme of the European Union. The work is unitary in nature, and only for academic purposes para. 2 is attributed to Francesco Pesce and paras. 1, and 3 to Stefano Dominelli.

[1] TUO C.E., *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti e reciproca fiducia*, Padova, 2012, p. 1 f.; VON MEHREN A.T., *Recognition and Enforcement of Foreign Judgments. General Theory and the Role of Jurisdictional Requirements*, in *Recueil des Cours*, 1980, t. 167, p. 13, at p. 51; ADOLPHSEN J., *Europäisches Zivilverfahrensrecht*, Heidelberg, 2011, p. 159; MICHAELS R., *Recognition and Enforcement of Foreign Judgments*, in WOLFRUM R. (ed), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2012, VIII, p. 672 ff; MORELLI G., *Diritto processuale civile internazionale*, Padova, 1954, p. 1 ff; HODD K.J., *"International" Rules in an Internal Setting*, in ABOU-NIGM V.R., MCCALL-SMITH K., FRENCH D. (eds), *Linkages and Boundaries in Private and Public International Law*, Oxford, 2018, p. 53, at p. 62 ff, and ZEYNALOVA Y., *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, in *Berkeley Journal Of International Law*, 2013, p. 150. More recently, on the general subject of the relationship between public and private international law, see FRANZINA P., *The Integrated Approach to Private and Public International Law - A Distinctive Feature of Italian Legal Thinking*, in BARTOLINI G. (ed), *A History of International Law in Italy*, Oxford, 2020, p. 262.

– inconsistent with its views[2]. Even though under international law States are generally not believed to be obliged to recognize foreign decisions[3], EU Member States are bound by a number of Regulations that provide for a regime of automatic recognition of decisions and, in some instances, even for direct enforceability[4].

Under Art. 81 TFEU[5] the European Union has concurrent competence to develop judicial cooperation in civil matters with cross-border implications, competence based on the principle of mutual and automatic recognition of decisions[6].

[2] In these terms, VON MEHREN A.T., *Recognition and Enforcement of Foreign Judgments. General Theory and the Role of Jurisdictional Requirements*, cit., p. 20.

[3] MICHAELS R., *Recognition and Enforcement of Foreign Judgments*, cit., para. 11.

[4] Without mentioning "optional instruments", see Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19; with some specificities see also Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, 23.12.2003, p. 1; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1, and Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJ L 7, 10.1.2009, p. 1.

[5] On which see for all, CLERICI R., *Art. 81*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 500; CARBONE S.M., TUO C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 1 ff, and SALERNO F., *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione). Evoluzione e continuità del "sistema Bruxelles-I" nel quadro della cooperazione giudiziaria in materia civile*, Milano, 2015, p. 8 ff.

[6] Tampere European Council 15 and 16 October 1999, Presidency Conclusions, point 33 f ("*Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of ju-*

Automatic recognition of acquired rights is a necessary condition to ensure free movement of people, goods, services and capital within the Union[7].

When rights acquired in one Member State are not adequately respected in another one, the right to free movement is impaired by the lack of certainty of the legal status of the right. Automatic recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given[8]. This also means that free movement of judgments that are not final in their State of origin should also be allowed, even if domestic provisions on recognition usually require the foreign decision to be final[9].

dicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law").

[7] BRAND R.A., *Evolving Competence for Private International Law in Europe: The External Effects of Internal Developments*, in VENTURINI G., BARIATTI S. (eds), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar, Vol. II*, Milano, 2009, p. 163, at p. 165.

[8] BERGQUIST U., *Art. 39*, in BERGQUIST U., FRIMSTON R., ODERSKY F., DAMASCELLI D., LAGARDE P, REINHARTZ B. (eds), *Commentaire du règlement européen sur les successions*, Paris, 2015, p. 162, at p. 163 and MARTÍN MAZUELOS F.J., *Artículo 39. Reconocimiento*, in IGLESIAS BUIGUES J.L., PALAO MORENO G. (dir), *Sucesiones Internacionales. Comentarios al Reglamento (UE) 650/2012*, Valencia, 2015, p. 311. In the case law, in these terms, Case C-456/11 *Gothaer Allgemeine Versicherung AG and Others v Samskip GmbH* [*electronic Reports*] para. 34. See also Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645. Cf. WAUTELET P., *Art. 33*, in MAGNUS U., MANKOWSKI P. (eds), *Brussels I Regulation* (2nd edn), Munich, 2012, p. 635, at p. 636.

[9] Cf. SCHLOSSER P., *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice* [1979], in OJ C59/71, at p. 126. For example, the Italian domestic law on Private international law

However, automatic recognition requires a high degree of mutual trust and, possibly, direct uniform rules on the allocation of international jurisdiction[10].

The need of legal certainty connected to the free movement of judgments is also evidently felt in the field of cross-border succession, in particular in an area of freedom, security, and justice where persons, under given conditions, are encouraged to move between Member States.

This clearly bears as consequences that individuals can have assets in more than one Member State and the court competent to rule on the succession might thus deliver decisions to be enforced in another Member State, in particular if one takes into consideration that, as widely known, the rules adopted by the European Union for the allocation of jurisdiction in succession matters[11] are such that there is only one competent court[12], which has competence over all the succession – hence the lack of rules on connected claims or *lis alibis pendens*.

(Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, in GU n.128 del 03-06-1995) provides for a regime of automatic recognition subject to a number of conditions, amongst which the circumstance that the foreign decision is *res judicata* according to the *lex fori* of the State of origin of the decision (art. 64(1)(d).

[10] See thoroughly HEIDERHOFF B., *Mobility of Judgments in the EU: Reality, or Just a Dream?*, in HEIDERHOFF B., QUEIROLO I. (eds), *European and International Cross-Border Private and Economic Relationships and Individual Rights*, Rome, 2016, p. 15 ff.

[11] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in OJ L 201, 27.7.2012, p. 107. On the necessity of uniform rules of private and procedural international law in succession *mortis causa* matters, see DAVÌ D., *Riflessioni sul futuro diritto internazionale privato europeo delle successioni*, in *Rivista di diritto internazionale*, 2005, p. 297, at p. 304. For a study on the main problems related to the regulation, see DUTTA A., *Die europäische Erbrechtsverordnung vor ihrem Anwendungsbeginn: Zehn ausgewählte Streitstandsminiaturen*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2015, p. 32 ff.

[12] On which see in scholarly writings, LAGARDE P., *Les principes de bases du nouveau règlement européen sur les successions*, in *Revue critique de droit internatinal privé*, 2012, p. 691; BALLARINO T., *Il nuovo regolamento europeo sulle successioni*, in *Rivista di diritto internazionale*, 2013, p. 1116; BONOMI A., WAUTELET P. (eds), *Le droit européen des successions: commentaire du Réglement n. 650/2012 du 4 juillet 2012*,

To ensure the free movement of judgments[13], the Succession Regulation wishes to foster the "*proper functioning of the internal market* [by facilitating and removing] *the obstacles to the free movement of persons who* [...] *face difficulties in asserting their rights in the context of a succession having cross-border implications*"[14].

Harmony of private international law solutions in an extended judicial space encourages people to move across Europe, knowing that their succession will be ruled according to a unique applicable law and that the pertinent judgments will also be recognised in all Member States.

The Succession Regulation – the first one in this field[15] – thus aims, amongst other things, at promoting mutual recognition of deci-

Bruxelles, 2013; DAMASCELLI D., *Diritto internazionale privato delle successioni a causa di morte (dalla l. n. 218/1995 al reg. UE n. 650/2012)*, Milano, 2013; FRANZINA P., LEANDRO A. (eds), *Il diritto internazionale privato europeo delle successioni* mortis causa, Milano, 2013; DAVÌ A., ZANOBETTI A., *Il nuovo diritto internazionale privato europeo delle successioni nell'Unione europea*, Torino, 2014; CLERICI R., *I principi del diritto internazionale privato europeo delle successioni*, in PALCHETTI (a cura di), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, Napoli, 2016, p. 241; FUMAGALLI, *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni : spazi residui per la legge interna?*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 779; QUEIROLO I., *Drafting normativo e competenza giurisdizionale nel regolamento (UE) n. 650/2012 in materia di successioni mortis causa*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 870, and RE J., *Where Did They Live? Habitual Residence in the Succession Regulation*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 978.

[13] A topic that, as noted by BONOMI A., *Successions internationales: conflits de lois et de juridictions*, in *Recueil des Cours*, 2010, t. 350, p. 71, at p. 402, was not significantly addressed at the international level, because of the different – scarcely ratified – international multilateral (existing some bilateral) treaties in succession matters covering other aspects, such as the formal validity of the will, and the administration of the estate.

[14] Succession Regulation, Recital 7. Cf. HEIBEL C., *Some Remarks on Inheriting Shares in German Partnerships: The Delineation of Partnership and Succession Law with Regard to German Special Succession Rules under Regulation (EU) No 650/2012*, in DE MAESTRI M.E., DOMINELLI S. (eds), *Party Autonomy in European Private (and) International Law, Tome II*, Rome, 2015, p. 127, at p. 168 f.

[15] The adoption of the Regulation is consistent with the 2009 Stockholm Programme, in which the European Council considered that mutual recognition of decisions had to be extended to the field not yet covered by already existing Regulations. Cf. BONOMI A., *Il regolamento europeo sulle successioni*, in *Rivista di diritto internazionale privato e pro-*

sions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings[16].

The Regulation creates rules related to the recognition, enforceability and enforcement of decisions[17], similar to those of *some other*[18] Union instruments in the area of judicial cooperation in civil matters[19].

cessuale, 013, p. 293, at p. 294. In general, on the Stockholm Programme, see WAGNER R., *Die politischen Leitlinien zur justiziellen Zusammenarbeit in Zivilsachen im Stockholmer Programm*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 97 ff.

[16] Succession Regulation, Recital 59. Cf. FRANZINA P., LEANDRO A., *Il nuovo diritto internazionale privato delle successioni per causa di morte in Europa*, in *Nuove leggi civili commentate*, 2013, p. 275, at p. 331. See also VIGUER SOLER P.L., *Artículo 43. Fuerza ejecutiva*, in IGLESIAS BUIGUES J.L., PALAO MORENO G. (dir), *Sucesiones Internacionales. Comentarios al Reglamento (UE) 650/2012*, Valencia, 2015, p. 338, noting that the executive force can be recognised to contentious and non-contentious decisions if they have executive force in their state of origin.

[17] According to Article 3 (1) (g) Succession Regulation, only a judgment given in a Member State shall be recognised without any special procedure being required. This provision applies as long as the judgment, whatever this may be called, is given by a court or tribunal of a Member State (Denmark, the United Kingdom and Ireland should not be considered as Member States for the purposes of the Succession Regulation; on the position of the United Kingdom, with particular regard to common provisions for the recognition and enforcement of decisions, see House of Lords, European Union Committee, *6th Report of Session 2009-10, The EU's Regulation on Succession, Report with Evidence*, London, 2010, 31 ff. Cf. HOLLIDAY J., *Reconciling the European Union Succession Regulation with the Private International Law of the UK*, in BERGÉ J-S., FRANCQ S., GARDEÑES SANTIAGO M. (eds), *Boundaries of European Private International Law*, Bruxelles, 2015, p. 297 ff. and HARDING M., *Conflict of Laws*, Oxon, 2014, p. 208, arguing that decisions are automatically recognised in those Member States that have not opted out of the system). Matters indirectly linked to succession, such as claims of the heir against third parties based on inheritance, may fall within the scope of application of other instruments, most probably under the Brussels I bis Regulation. Cf. ex multis, DUTTA A., *Succession Law (International)*, in BASEDOW J., HOPT K.J., ZIMMERMANN R., STIER A. (eds), *The Max Planck Encyclopedia of European Private Law*, Oxford, 2012, p. 1621, at p. 1622. On Art. 3 FRIMSTON R., *Art. 3*, in BERGQUIST U., FRIMSTON R., ODERSKY F., DAMASCELLI D., LAGARDE P., REINHARTZ B. (eds), *Commentaire du règlement européen sur les successions*, Paris, 2015, p. 45.

[18] It does seems appropriate to dwell upon the different existing models of recognition and enforcement within the European judicial space (for which see FRACKOWIAK-ADAMSKA A., *Time for a European "Full Faith and Credit Clause"*, in *Common Market Law Review*, 2015, p. 191), yet it suffices to remember that fragmentation of acts and the

Nonetheless, it appears fundamental to keep in mind that the Succession Regulation is a very innovative by-product of a traditional cooperation regiment. In other words, it is a coin with both a "new" and an "old" side.

In the first sense, it has already been mentioned that this instrument is the first of its kind within the context of the EU judicial space. There are no historical precedents within or even outside the borders the Union competences, as could have been the case for some international conventions that have been later been subject to "communitarisation"[20]. Whereas States have tried to conclude some treaties, either bilateral or multilateral, covering some aspects of cross border succession matters, such instruments never found significant acceptance[21].

lack of a general part of private international law at the EU law level bears as consequence that any act adopts its own regime of free movement of decisions that is consistent with the general policy of the Union.

[19] For the autonomous definitions on which the judicial cooperation rests upon, see BONOMI A., *Prime considerazioni sulla proposta di regolamento sulle successioni*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 877, at p. 912; RAUSCHER T., *Internationales Privatrecht. Mit internationalem Verfahrensrecht*, Heidelberg, 2012, p. 563; STONE P., *EU Private International Law*, Cheltenham, 2014, p. 514; LAGARDE P., *Les principes de bases du nouveau règlement européen sur les successions*, in *Revue critique de droit international privé*, 2012, p. 691, at p. 731; DAMASCELLI D., *Diritto internazionale privato delle successioni a causa di morte (dalla l. n. 218/1995 al reg. UE n. 650/2012)*, cit., p. 113, and SCHWARTZE A., SOLETI P.F., *Art. 32*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento «Bruxelles I». Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Munich, 2012, p. 689, at p. 692 f.

[20] Cf. only the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in OJ L 299, 31.12.1972, p. 3, and the 80/934/EEC Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, p. 1.

[21] Cf. Convenzione di stabilimento e consolare italo - svizzera del 22 luglio 1868; HccH Convention on the conflicts of laws relating to the form of testamentary dispositions, concluded 5 October 1961; HccH Convention abolishing the requirement of legalisation for foreign public documents, concluded 5 October 1961; HccH Convention concerning the international administration of the estates of deceased persons, concluded 2 October 1973; Convention providing a uniform law on the form of an international will (Washington, D.C., November 7th 1973); HccH Convention on the law applicable to succession to the estates of deceased persons, concluded 1 August 1989.

In the second sense, and with little surprise, the Succession Regulation shows a lower degree of trust between Member States if compared with other areas.

As this is the first attempt in the subject matter, there is no wonder that the instrument is an "ode" to the written law[22]: it has 83 recitals to guide interpreters in its application and rests upon a regime of free movement of decisions that *is not one* amongst those that can be ranked as the "newest". In 2012 the abolishment of *exequatur* procedure in the context of the Brussels I was widely discussed (and direct enforceability was already known in some fields[23]).

Yet the choice for cross-border succession matters was to start with a more "traditional" procedure that still kept the *exequatur* procedure as modelled on the Brussels I Regulation (Art. 43 Succession Regulation[24]).

Moreover, the difference in material law between Member States is so strong that the Republic of Ireland and the United Kingdom (the latter, for what matters after Brexit[25]) have chosen not to be bound by

[22] CLERICI R., *I principi del diritto internazionale privato europeo delle successioni*, cit., p. 241, referring to the "monumental nature" of the instrument.

[23] These being certified decisions rendered on access rights and trumping orders under the Brussels II *bis* Regulation, and decisions in maintenance obligations rendered by those courts whose State has unified conflict of laws by way of ratification of the 2007 Hague Protocol. Additionally, some decisions rendered under optional instruments, such as the European Enforcement Order (Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, in OJ L 143, 30.4.2004, p. 15, as amended), also provided for a stronger regime – compared to that of Regulation 44/2001 – for the free movement and enforcement of decisions.

[24] According to which "*Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for*…".

[25] On Brexit and private international law, see BASEDOW J., *Brexit und das Privat- und Wirtschaftsrecht*, in *Zeitschrift für Europäisches Privatrecht*, 2016, p. 567; CRAWFORD E.B., CARRUTHERS J.M., *Brexit: The Impact on Judicial Cooperation in Civil Matters Having Cross-Border Implications – A British Perspective*, in *European Papers*, 2018, p. 183; SONNENTAG M., *Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht*, Tübingen, 2017;TUO C.E., *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some*