The movement of notarial instruments in the European legal area

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SUMMARY

Europeans often need to use notarial instruments for successions. When a succession involves people or assets located in different Member States, there is an obvious need to use such instruments coming from another Member State. This note highlights the main difficulties arising from the cross-border movement of notarial instruments. It concludes by making some proposals concerning the contents of the proposal for a European regulation on international successions, with the aim of simplifying and clarifying the cross-border use of notarial instruments.
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SUMMARY

Article 34 (Recognition of authentic instruments) of the Proposal for a European regulation on successions (COM(2009)154 final) provides that: ‘Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.’

This rule has confused commentators, who have attacked both its clarity and its usefulness, and particularly criticised the fact that the ‘recognition’ of authentic instruments is referred to, although the concept is normally used only for court decisions. The issue is not new, but it is particularly important for successions, an area where the use of authentic instruments is frequent and important. It is sufficient to consider the need for court chancellors and notaries to inventorise an inheritance in several states, or the need for an interested party to reject or accept an inheritance in his Member State of residence. It therefore seems obvious that, for successions, it is often necessary to use authentic instruments across borders, and that this question needs to be explicitly regulated.

This problem is part of the wider issue of the international circulation of authentic instruments, an issue which has so far largely been left to the rules established by the various systems of private international law in force in each state and to the solutions provided by case law, but it should now be considered more directly and in greater detail.

In general, all legal systems are (more or less) open to incoming instruments and documents from other countries. This has been and is still an issue which the rules of private international law have always been concerned with, as shown by the quasi-universal applicability of the rule *locus regit actum* (the place governs the act) and the bilateral and multilateral international treaties which subject instruments intended to have effects in other states to the legalisation or similar formalities.

This issue is also know as ‘substitution’, a situation which arises when the applicable legal system has already been established using conflict rules, but the form and completeness of the document are assessed under a different legal system (or following a different procedure) than the legal system which applies to the relationship. Solutions can vary in different cases; the application of a similar solution (‘substitution’) is thus determined by the ‘equivalent’ nature of the ‘substituted’ procedure or document.

An important comparative study on authentic instruments was published by the European Parliament in early December 2008¹. The study is very interesting since, for the first time, an in-depth and researched study into authentic instruments has been carried out in various Member States which do not all have Romano-Germanic legal systems (namely Germany, England, France, Poland, Romania and Sweden). It contains some information of undeniable importance: in civil law systems (Germany, France, Poland and Romania), authentic instruments are defined in a very similar manner by legislation, which fully conforms to the EU definition referred to above. To a large extent, authentic instruments also have substantially equivalent effects there, whilst they are unknown in the English and Swedish legal systems. Their enforceability is already well regulated at EU level, but their

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validity as evidence is subject to strict limits set by the various Member States' procedural rules. The movement of instruments concerning immovable property is particularly complicated, since very specific rules apply both to the form and the content of instruments concerning immovable property rights in each Member State. This complexity is increased by the fact that these instruments are generally entered on public registers which are governed by purely ‘national’ mechanisms (for example, in some Member States these registers have declarative authority, and in others they have constitutive authority).

Following the publication of the comparative study, Parliament immediately adopted, on 18 December 2008, a Resolution ‘with recommendations to the Commission on the European Authentic Act’ (rapporteur Manuel Medina Ortega)\(^2\). This resolution addresses all the major aspects of the issue: the distinction between civil law authentic instruments (with characteristics now defined by the Unibank judgment) and common law documents, the need for the recognition of enforceability and evidential effect, whilst considering that a foreign act cannot have greater effects that the equivalent national act and the need to abolish legalisation and similar formalities (including the Hague Convention Apostille). The resolution of 18 December 2008 concludes by requesting the Commission to submit, on the basis of Article 65(a) and the second indent of Article 67(5) of the EC Treaty (now Article 81 TFEU), a legislative proposal establishing the mutual recognition of authentic instruments in the European legal area.

Successions following a death are probably the case in which Europeans most frequently need to use authentic instruments, in order to:

- submit copies of a will;
- document the acceptance or rejection of an inheritance;
- carry out an inventory;
- issue a power of attorney to administer inherited assets;
- obtain a notarial affidavit.

These are just some of the most common examples.

In the 21 EU Member States which have civil law notaries, the aforementioned documents are, in most cases, drawn up by notary – a public official vested with public authority, empowered by law to draw up instruments with special evidential status.

When a succession involves people or assets in several Member States, there is obviously a need to use these instruments across borders: to accept or reject an inheritance in an instrument signed before a notary at the place of residence, inventorise assets located in a Member State other than that where the succession was opened, use a notarial affidavit abroad, etc.

Today, all these cases are regulated differently by different legal systems and cannot always be easily fitted into the framework of national systems of private international law, whence the need to use empirical solutions, generally inspired by notaries' practical experience.

This proposal for a regulation on successions therefore seems the right opportunity to take action to simplify and clarify the cross-border use of authentic instruments, since such
Instruments are widely used in such circumstances. Ways of regulating this already exist, and some of them are already part of the **acquis communautaire**:

- the concept of ‘authentic instrument’ contained in the *Unibank* judgment (Court of Justice, 17 June 1999, C-260/97) has been reiterated, as stated above, by Regulation No 805/2004 creating a European Enforcement Order for uncontested claims and Regulation No 4/2009 relating to maintenance obligations;
- the rules on the use of authentic instruments as enforcement orders in another Member State, laid down by the original Brussels Convention of 1968 (Article 50) and reiterated in Regulation 44/2001 (Brussels I, Article 57), Regulation 2201/2003 (Brussels II bis, Article 46), Regulation 805/2004 (EEO) and Regulation 4/2009 (relating to maintenance obligations);
- the proposals contained in the Parliament resolution of 18 December 2008, with the invitation to consider the advisability of recognising the evidential value of authentic instruments in the European legal area and abolishing legalisation and *Apostille* formalities.

Today, the time seems to have come to take another step forward, by regulating not only the enforceability of authentic instruments (Article 35 of the proposal), but also their evidential value, which is important for successions (it is sufficient to consider the case of inventories of inheritances). Happily, this is a solution which the Commission’s proposal seems favourable towards, since Recital 26 states that: ‘In order to take into account the different methods of settling the issues regarding successions in the Member States, this Regulation should guarantee the recognition and enforcement of authentic instruments. Nevertheless, the authentic instruments cannot be treated as court decisions with regard to their recognition. The recognition of authentic instruments means that they enjoy the same evidentiary effect with regard to their contents and the same effects as in their Member State of origin, as well as a presumption of validity which can be eliminated if they are contested. This validity will therefore always be contestable before a court in the Member State of origin of the authentic instrument, in accordance with the procedural conditions defined by the Member State’.

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2 European Parliament resolution of 18 December 2008 with recommendations to the Commission on the European Authentic Act (2008/2124(INI)).
The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind.
Gaius, Inst., 1, 1

1. ARTICLE 34 OF THE PROPOSAL FOR A EUROPEAN REGULATION ON SUCCESSIONS

Article 34 (Recognition of authentic instruments) of the Proposal for a European regulation on successions (COM(2009)154 final) provides that: ‘Authentic instruments formally drawn up or registered in a Member State shall be recognised in the other Member States, except where the validity of these instruments is contested in accordance with the procedures provided for in the home Member State and provided that such recognition is not contrary to public policy in the Member State addressed.’

This rule has confused commentators, who have attacked both its clarity and its usefulness, and particularly criticised the fact that the ‘recognition’ of authentic instruments is referred to, although the concept is normally used only for court decisions. The issue is not new, but it is particularly important for successions, an area where the use of authentic instruments is frequent and important. It is sufficient to consider the need for court chancellors and notaries to inventorise an inheritance in several states, or the need for an interested party to reject or accept an inheritance in his Member State of residence. It therefore seems obvious that, for successions, it is often necessary to use authentic instruments across borders, and that this question needs to be explicitly regulated.

This problem is part of the wider issue of the international circulation of authentic instruments, an issue which has so far largely been left to the rules established by the various systems of private international law in force in each state and to the solutions provided by case law, but it should now be considered more directly and in greater detail.

2. THE ISSUE OF ‘SUBSTITUTION’

In general, all legal systems are (more or less) open to incoming instruments and documents from other countries. This has been and is still an issue which the rules of private international law have always been concerned with, as shown by the quasi-universal applicability of the rule locus regit actum (the place governs the act) and the bilateral and multilateral international treaties which subject instruments intended to have effects in other states to the legalisation or similar formalities.

However, it should be noted that the international movement of instruments, contracts, commercial documents, etc. is first of all governed by the general conflict rules laid down by the private international law of each state and which determine the legal system
applicable to formal and substantive aspects of the legal relationship in question. However, the situation is different for instruments and documents drawn up by public authorities which contain, for example, authentications or certifications which prove the existence of a fact, a qualification or a status, such as birth records, marriage certificates, university degrees, etc. In such cases, in principle, more specific rules apply, which lay down – often in international treaties – the necessary conditions for the instruments and documents in question to be useable and enforceable (with their special force and characteristics) in another country, provided that they have this special force and these characteristics.

This distinction is obvious and unremarkable, and nobody doubts that significantly different rules apply to the international use of a contract for the supply of goods than to birth records. However, there is often uncertainty regarding the movement of notarial instruments, which are subject to conflict rules regarding the content of the agreement (*negotium*), but are also subject to other rules (such as legalisation or an *Apostille*), since they are intended to be used as special-status evidence of a fact, to be entered on a public register (land register, commercial register, etc.), or to be enforced. It follows that, in order to study the mechanism of the movement of notarial instruments, it is necessary not only to use the general conflict rules laid down by private international law systems, but also to attempt to establish under which conditions a given legal system will allow a foreign document to be used as a substitute for the equivalent national document or, at least, to have its specific effects (enforceability, for example, or special evidential status) in that legal system. For notarial instruments, the validity and effectiveness of the declarations made or agreements reached between private parties are not the only important issue, as it is also necessary to take into account the added value lent by the notary’s involvement in his quality as a delegate of public authority and thus an expression of the sovereignty of the state.

This issue is also know as ‘substitution’, a situation which arises when the applicable legal system has already been established using conflict rules, but the form and completeness of the document are assessed under a different legal system (or following a different procedure) than the legal system which applies to the relationship. Solutions can vary in different cases; the application of a similar solution (‘substitution’) is thus determined by the ‘equivalent’ nature of the ‘substituted’ procedure or document. This principle is particularly important for EU law, owing to its obvious close relationship with the principle of ‘mutual trust’ which has contributed and still significantly contributes to the development of the internal market and the European legal area.

### 3. Authentic Instruments in EU Law

EU law has considerably contributed to establishing an efficient and comprehensive system for the movement of notarial authentic acts which constitute enforcement orders.

Article 50 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded by the Member States of the European Community, stipulated that: ‘A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application

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made in accordance with the procedures provided for in Article 31 et seq. The application may be refused only if enforcement of the instrument is contrary to public policy in the State addressed. The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin. The provisions of Section 3 of Title III shall apply as appropriate.’ This EU-level treaty thus provided that authentic instruments should be treated in the same manner as judicial decisions and merely required an exequatur in order to be enforced, in accordance with the aforementioned Articles 31 and following. Authentic instruments have a major advantage over judicial decisions in that an exequatur can only be refused if it would be contrary to public policy, whereas the list of exceptions for judicial decisions is longer: see Articles 27 and 28 of the Convention.

With regard to the interpretation and application of the rule contained in the aforementioned Article 50, the judgment of the Court of Justice of the European Communities of 17 June 1999, Case C-260/97 (Unibank), is particularly important. The case concerned a request by a Danish bank to enforce in Germany, under Article 50 of the Convention, three acknowledgements of indebtedness which constituted private instruments and were enforcement orders under Danish law. The Court (and, more comprehensively, the Advocate General, whose conclusions were followed in all points) refused to apply Article 50 to this category of instruments since the rule only applied to enforceability of ‘authentic instruments’ (defined as instruments drawn up with the involvement of a public authority or a delegatee of public authority, who not only certifies the signature but also ascertains the legality of the content of the instrument), owing both to the wording of the article itself and to its essential purpose, which was to equate the rules on the enforcement of authentic instruments with those applying to judicial decisions, meaning that they needed to be of particularly trustworthy and certain origin, and not be merely private instruments.

In EU law, this principle was reinforced by Council Regulation (EC) No 44/2001 of 22 December 2000 (‘Brussels I’, Article 57) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (which replaced the Brussels Convention), Article 25 of Regulation No 805/2004 creating a European Enforcement Order for uncontested claims (EEO) and Article 46 of Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (‘Brussels II bis’), which equates the recognition and enforcement of authentic instruments to those of judicial decisions in this area also.

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4 Article 57 – 1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed. 2. [...] 3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin. 4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation’.

5 'Article 25 – Authentic instruments – 1. An authentic instrument concerning a claim within the meaning of Article 4(2) which is enforceable in one Member State shall, upon application to the authority designated by the Member State of origin, be certified as a European Enforcement Order, using the standard form in Annex III. 2. An authentic instrument which has been certified as a European Enforcement Order in the Member State of origin shall be enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its enforceability. 3. The provisions of Chapter II, with the exception of Articles 5, 6(1) and 9(1), and of Chapter IV, with the exception of Articles 21(1) and 22, shall apply as appropriate’.

6 'Article 46 – Documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments’.
Regulation 805/2004 (EEO) followed legal doctrine and the Unibank judgment in providing a definition of authentic instruments. Article 4(3) thus defines an authentic instrument as a document which has been drawn up by a public authority or other authority empowered for that purpose by the Member State in which it originates and the authenticity of which relates to the signature and also the ‘content’ of the instrument (thus expressly and clearly referring to the legality check which the public authority must carry out, as the Unibank judgment already established). In accordance with the legal systems which follow the Romano-Germanic legal tradition, which already have and use this form of document, authentic instruments are thus defined in EU law: the instrument is thus directly connected with the public authority status of its author in the Member State of origin and his involvement must not be restricted to certifying the authenticity of the signature, but must include checks on the legality of the instrument.

In the same vein, the more recent 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 also puts judicial decisions and authentic instruments on an equal footing for enforcement purposes, and uses the definition used in the Unibank judgment and Regulation No 805/2004, which is reiterated in Article 2(3) (Definitions) of the regulation: ‘3. the term ‘authentic instrument’ shall mean:
(a) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which: (i) relates to the signature and the content of the instrument, and (ii) has been established by a public authority or other authority empowered for that purpose;’.

Article 48 provides, with regard to the application of the regulation to court settlements and authentic instruments, that ‘1. Court settlements and authentic instruments which are enforceable in the Member State of origin shall be recognised in another Member State and be enforceable there in the same way as decisions, in accordance with Chapter IV. 2. The provisions of this Regulation shall apply as necessary to court settlements and authentic instruments. 3. The competent authority of the Member State of origin shall issue, at the request of any interested party, an extract from the court settlement or the authentic instrument using the forms set out in Annexes I and II or in Annexes III and IV as the case may be.’

In all the above cases, enforcement – which depends on a claim shown in an authentic instrument – is in principle carried out in accordance with the rules applicable to judicial decisions, with a simple exequatur being issued by the relevant authority in the Member State where the instrument is to be enforced (the same applies to Regulations 44/2001 and 2201/2003 and to some cases covered by Regulation 4/2009), and with no need for an exequatur for the European Enforcement Order (Regulation 805/2004) or specific cases of maintenance obligations (Regulation 4/2009). In all cases, it is obviously impossible to oppose enforcement relying on infringements of rights of defence or any other infringement of procedural rules, which would make no sense if an authentic instrument has been signed. In the EU context, authentic instruments are thus easier to use as enforcement orders than judicial decisions.

On this basis, EU law has long governed the use of notarial instruments as enforcement orders between EU Member States. The numerous rules contained in EU law which permit
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this are based on the principle that authentic instruments which are enforcement orders in the Member State of origin must be accepted as such in all EU Member States. There has long been an EU definition of authentic instruments (ECJ, 17 June 1999, C-260/97 – Unibank): an instrument drawn up with the involvement of a public authority or any other authority empowered for that purpose by the state, acting not only to certify the signature but also to check the entire contents of the instrument (definition reiterated in Regulations 805/2004 and 4/2009).

Whilst the EU rules on authentic instruments which are enforcement orders are clear and complete, the same cannot be said for the movement of instruments intended to have an effect other than enforceability, in particular admissibility as evidence or use in relation to public registers. For these cases, there are no specific EU rules and reliance on general principles, including mutual trust, does not seem sufficient. The basic reason is that the legal systems of the various EU Member States are still too different, and even the most closely related legal systems maintain significant regulatory differences, concerning both the contents of the instruments and the operation of the public registers which the instruments are intended to affect.

There are no specific rules, and the EU’s legal principles do not allow a complete system of rules governing the movement of notarial instruments (which are not enforcement orders) to be sketched out either. In this respect, the principle of ‘mutual trust’ or ‘mutual recognition’ should be highlighted, which appeared in EU law to govern the movement of consumer goods, but was soon extended to other sectors. This principle consists in the rule that, in the absence of specific EU rules which provide for different minimum criteria or different checks, a product legitimately sold in one Member State (and thus conforming with the applicable rules there) may circulate and be offered for sale in all other Member States, in the hope that the law of the Member State of origin provides for sufficient minimum rules to ensure its quality and trustworthiness, save in exceptional cases (Article 36 TFEU).

The same principle was largely applied to the recognition and enforcement of judicial decisions in other Member States. The abandonment of approval formalities for foreign judgments (replaced by a much simpler and much faster exequatur procedure, under the Brussels I and Brussels II bis Regulations, and abolished completely by the EEO Regulation), was precisely based on the idea that a judicial decision coming from a Member State provides sufficient guarantees in itself for it to have effect across the entire EU.

The criterion of ‘mutual recognition’ or ‘mutual trust’, however, cannot itself provide a complete set of rules for the movement of notarial instruments. These rules are, above all, subject to intrinsic limits. In other words, there are cases, accepted by case law and legal doctrine, where the rules established by the various Member States have to be followed. This applies when faced with interests which mean that particularly strict national rules must prevail. This applies to rules on health protection, environmental protection, consumer protection, the efficiency of tax controls and restrictions justified on grounds of public morality, public policy or public security, the protection of national treasures or the protection of industrial and commercial property (Article 36 TFEU). These restrictions must remain exceptional and must comply with criteria relating to the congruity and proportionality of the interest protected. Nevertheless, the movement of notarial instruments cannot be based only on the principle of mutual recognition. On the contrary, it must be subject to national rules which may be stricter. Not only can these national rules be equated to rules on consumer protection, the efficiency of tax controls and the
protection of industrial and commercial property, but they also ensure greater legal certainty for some transactions, a legal principle in which EU law places great importance.

The application of the principle of ‘mutual recognition’ to the movement of notarial instruments is also opposed by an important EU legal instrument, Directive No 2006/123/EC of 12 December 2006 on services in the internal market, which aims to liberalise services in the EU. Article 16 of Chapter IV (on the free movement of services) states that: ‘Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory’. However, the following Article 17 provides for an exception according to which: ‘Article 16 shall not apply to: […] 12) acts requiring by law the involvement of a notary’. The rule is not very clear since it is contained in a directive of the free provision of services, but it would seem to confirm that there is no freedom to ‘provide’ notarial instruments from one Member State to another.

It would therefore seem that neither the applicable EU legislation nor the basic rules underlying the EU system are sufficient to regulate the movement of notarial instruments (with the obvious exception of those which constitute enforcement orders). This therefore requires much more detailed, specific rules affecting the private international law of all Member States.

4. THE EUROPEAN PARLIAMENT’S ANALYSIS

In 2008, an important comparative study on authentic instruments was commissioned by Parliament. It was carried out by a working group constituted by the Council of the Notariats of the European Union (CNEU) and was published in early December 2008. The study is very interesting since, for the first time, an in-depth and researched study into authentic instruments has been carried out in various Member States which do not all have Romano-Germanic legal systems (namely Germany, England, France, Poland, Romania and Sweden). It contains some information of undeniable importance: in civil law systems (Germany, France, Poland and Romania), authentic instruments are defined in a very similar manner by legislation, which fully conforms to the EU definition referred to above. To a large extent, authentic instruments also have substantially equivalent effects there, whilst they are unknown in the English and Swedish legal systems. Their enforceability is already well regulated at EU level, but their validity as evidence is subject to strict limits set by the various Member States’ procedural rules. The movement of instruments concerning immovable property is particularly complicated, since very specific rules apply both to the form and the content of instruments concerning immovable property rights in each Member State. This complexity is increased by the fact that these instruments are generally entered on public registers which are governed by purely ‘national’ mechanisms (for example, in some Member States these registers have declarative authority, and in others they have constitutive authority).

Following the publication of the comparative study, Parliament immediately adopted, on 18 December 2008, a Resolution ‘with recommendations to the Commission on the European Authentic Act’ (rapporteur Manuel Medina Ortega). This document will probably guide the way for the movement of authentic instruments in the European legal area. This

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resolution addresses all the major aspects of the issue: the distinction between civil law authentic instruments (with characteristics now defined by the Unibank judgment) and common law documents, the need for the recognition of enforceability and evidential effect, whilst considering that a foreign act cannot have greater effects that the equivalent national act, the need to abolish legalisation and similar formalities (including the Hague Convention Apostille), and the need to exclude instruments concerning immovable property rights from the rules on movement. The resolution of 18 December 2008 concludes by requesting the Commission to submit, on the basis of Article 65(a) and the second indent of Article 67(5) of the EC Treaty (now Article 81 TFEU), a legislative proposal establishing the mutual recognition of authentic instruments in the European legal area. This launched a particularly interesting legislative procedure. The experience and research of legal doctrine in the past, as well as notarial practice, will allow us to recall certain fundamental principles.

5. AUTHENTIC INSTRUMENTS AND THE RECOGNITION METHOD

Generally, notarial instruments are required by law in civil law Member States not in order for the contract to be valid (except for certain limited cases, particularly concerning family law and donations), but as a formal requirement with an effect or effects going beyond the mere validity of a private agreement: often in order to be entered on a public register, which is valid evidence against third parties and also a special form of evidence in court. Alongside ad substantiam and ad probationem formalities, this is considered an ad regularitatem formality.

Owing to the special effects of the instrument, the legitimacy, parties’ understanding and conformity to the law of the contractual agreement between the parties must be checked at the outset. The notary thus checks the legality of the content of the instrument and the legitimacy and capacity of the parties and provides them with the necessary information and advice.

In order to fulfil these objectives, the legal system requires the documents or contracts in question to be drawn up by qualified persons (public officials) in accordance with special rules and safeguards (laid down by the law) in order to be valid. When one of these documents comes from abroad, the Member State of destination – if it intends to allow use on its territory – will have to establish its own rules regarding checks on authenticity, the contents of the document and the status of its author. The situation is similar to that regarding the movement of judicial decisions, which can also be enforced or relied upon in a Member State other than the Member State of origin, for example to consolidate an issue which has already been decided or to obtain enforcement. Such cases are cases of ‘recognition’. This method is thus a special technique which differs from that which normally applies, requiring the use of rules on applicable law (and particularly on formal requirements for instruments). These rules determine the law which applies to the existence of a relationship, an instrument or a contract, generally choosing the law most likely to be in the interest of the involved parties or the law which will give a reasonable, predictable result easily acceptable for all the legal systems potentially involved. The various rules on conflict also include rules on formal requirements, which basically, as we have already said, establish requirements in accordance with which the parties’ will needs to be shown or documented in order for an instrument or agreement to be valid.
The mechanism established by the rules which govern the recognition of judicial decisions is different. These rules merely establish that a decision already made by a given authority must be ‘recognised’ as such by the legal system of the forum. They establish minimum conditions and effects. The ‘recognition method’ can thus be compared to the normal use of conflict rules since, in this case, the legal system of the forum opens itself up, in a general and abstract manner, to rules coming from another system and, in doing so, accepts their equal validity and applies them accordingly. When recognising the effects of a judicial decision which has already been made, however, the legal system of the Member State of destination does not accept the rules of another system in general, but rather the imperative decision on the relevant rules as already applied to the specific case by the judge. In both cases, the legal system of destination thus ‘abdicates’ its sovereignty, allowing both (general and abstract) rules and judicial decisions (the specific application of a given rule) – issued by a foreign sovereign power – to produce effects in its area of applicability.

This method, which is established on a judicial level, provides the best example for working out a specific doctrine on the international movement of notarial documents. Above all, it is based on the concept of a ‘judgment’ (or ‘judicial decision’), and uses the ‘recognition’ mechanism. For this reason, therefore, international treaties, legal doctrine and case law have focused on the definition of the concept of ‘judgment’, identifying a series of indispensable requirements. It has to be the pronouncement of a body which is the expression of state authority and which acts independently, respecting both parties’ right to be heard, to information and to be represented. Only if these minimum requirements are fulfilled can it be considered a ‘judgment’ liable to be recognised in a Member State other that the Member State of origin and thus capable of producing procedural and substantive effects outside the legal system which issued it.

Basically, the same applies to notarial instruments: an instrument coming from abroad is allowed to produce the effects is has under the law of its Member State of origin, and even replace a national instrument, if the law of the Member State of destination so permits. However, this is under the condition that they comply with the rules and principles on the special status of the public document in question, which can only be considered public if it is drawn up by an empowered authority and complies with the legal rules governing his or her powers and actions. As stated above, the solution is in principle clear for judicial decisions: if they fulfil the required conditions, the legal system of destination will agree to stand back and allow the entry of a judgment which was originally issued by another sovereign power. The same applies to notarial instruments: the system of destination can accept instruments coming from another Member State if they fulfil (minimum) conditions, making them equivalent to national instruments. This brings us to another principle: a notarial instrument can substitute a notarial instrument from another Member State if it meets the conditions allowing it to fulfil the required functions and provide the guarantees expected of notarial instruments in the Member State of destination (in other words, if it is functionally ‘equivalent’ to them)\(^9\).

In view of the above, we should consider the feasibility and advisability of the ‘recognition’ of notarial instruments, allowing them to enter a legal system other than their system of origin on condition that they fulfil minimum conditions ‘equivalent’ to notarial instruments in that system. The Parliament resolution of 18 December 2008 also speaks out in favour of

\(^9\) On this aspect, see the aforementioned resolution of the Institute of International Law, and the clear formulation of the Bundesgerichtshof quoted in the aforementioned comparative study on authentic instruments (p. 104 and footnote 304).
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this. Using this method means avoiding the use of private international law rules on formal requirements, which have a very different function. However, it will be necessary to establish the essential conditions which allow an instrument to become an ‘authentic instrument’ according to the law of its Member State of origin (actor regit actum), whilst checking its function and conformity in accordance with the requirements of the system of destination. This also allows another principle to be observed – a principle which clearly figures in the Parliament resolution of 18 December 2008: the need to prevent the instrument from producing greater effects in the Member State of destination than it does under the law of its Member State of origin, and prevent it from producing greater effects than the equivalent national instrument of that Member State. This concept is a double restriction on the transnational effectiveness of authentic instruments.

The fact that the ‘recognition method’ comes from and is mostly used in relation to judicial decisions does not constitute an obstacle to its adoption. In particular, the fact that notarial instruments – obviously – cannot become res judicata is not an obstacle. On the one hand, even judicial decisions which can be appealed against (and are thus not yet res judicata) are generally recognised. On the other hand, the ‘recognition method’ is also used for non-litigious court proceedings, which can generally not become res judicata. At the same time, the ‘recognition method’ is not limited to judicial decisions which are judgments having universal effects. Indeed, judicial decisions generally only affect the litigants, their successors and other interested parties.

From another point of view, it is obvious that ‘recognition’ does not mean that the authentic instrument in question cannot be contested, with regard to both its notarial form and its contents. For these cases also, the way forward is shown by judicial decisions. The effects of any recognition will be cancelled or modified if the decision itself is cancelled or modified. The issue to be decided in relation to authentic instruments is to identify the judge competent to rule on challenges to the instrument. For challenges concerning the regularity of the ‘notarial procedure’ establishing the instrument (in other words, checking that the public official who drew up the instrument complied with the law), the judge of the Member State where the instrument was drawn up should be competent, in accordance with the procedures established there. On the other hand, if the challenge concerns the contents of the agreement documented in the instrument, the competent judge should be determined in accordance with the common rules on jurisdiction applying to the kind of act in question. The concept should be clear: ‘recognition’ of an authentic instrument cannot and should not mean that all means of challenging the form and content of the instrument are barred. For authentic instruments, ‘recognition’ means that their special status (connected with the legality check carried out by the notary when the instrument is drawn up, which also covers the instrument’s contents) can produce effects beyond the borders of their Member State of origin. This concept can be found in recent legislative texts, in particular in Articles 27 and following of the Belgian Private International Law Code and Article 96 of the Swiss Federal Code on Private International Law.

10 Law establishing a Private International Law Code, 16 July 2004 – Article 27(1): ‘A foreign authentic instrument is recognized by any authority in Belgium without the need for any procedure if its validity is established in accordance with the law applicable by virtue of the present code, with special regard to articles 18 and 21. The instrument must satisfy the conditions necessary to establish authenticity under the law of the State where it was drawn up. [. . . ]; – Article 28(1): ‘A foreign authentic instrument is evidence in Belgium of facts noted by the authority that drew up the instrument, if the authentic instrument cumulatively satisfies: 1° the conditions required by the present code for the form of instruments; 2° the conditions required, under the law of the State where the instrument was drawn up, for the authenticity thereof [. . . ]’.

11 Swiss Federal Code on Private International Law of 18 December 1987, Article 96(3) (Foreign decisions, measures, legal instruments, and rights): ‘Foreign decisions, measures, and instruments concerning a succession,
6. OBSERVANCE OF PUBLIC POLICY AND MANDATORY RULES (‘OVERRIDING MANDATORY PROVISIONS’)

The observance of various categories of mandatory rules of the Member State of destination is another important issue, particularly concerning rules governing the transfer of immovable property and access to public registers – a problem also highlighted by the Parliament resolution. In this respect, it is necessary to immediately clarify that, in private international law, there are several types of rules which cannot be departed from under the law of the Member State of destination, even when foreign law is applicable. The most common restriction concerns public policy, but restrictions also apply to overriding mandatory provisions and provisions which cannot be derogated from by agreement. Today, this type of classification can be clearly found in the recent, important Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I): see Recital 37, Article 21 (public policy of the forum), Article 9 (overriding mandatory provisions) and Article 11(5)(b) (regarding formal requirements which cannot be derogated from by agreement).

Such restrictions are capable of affecting the movement of notarial instruments, affecting not only the content of the agreement but also its entry on a public register or its status as a public document with special evidential value. It is obvious that, in order to be able to move, the contents of the notarial instrument may not depart from public policy or other mandatory rules of the Member State of destination. In the same manner, the ‘vehicle’ conveying the content of the agreement, i.e. the notarial instrument itself, cannot depart from these rules either. Obviously, these restrictions apply to instruments concerning immovable property or immovable property rights which are destined to be entered on public registers, since these are closely connected with the legal requirements which each state considers predominant on its territory (the same applies to restrictions on the use of immovable property, requirements concerning specific documentation for their transfer, pre-emptive acquisition rights for local authorities, the use and classification of data on public registers and many other cases). At the moment, it is difficult to conceive the ‘free’ movement of instruments from one Member State to another (and Parliament’s resolution of 18 December 2008 excludes this) without the authorities of the Member State of destination carrying out further checks at a later stage. It would be possible to have a kind of ‘certificate of conformity’ issued to the instrument by the authorities of the Member State of destination, with the possibility for that instrument to be endorsed by that authority, provided that this endorsement is compatible with the relevant rules on the precise contents or formalities.

With regard to the language of the instrument, or the requirement for legalisation or an Apostille, the time would seem to have come to allow parties a greater choice concerning the language to be used, which will, in any case, have to be known by the parties themselves and the notary (with the possibility of attaching official translations into other languages to the instrument) and to abandon the requirement for ‘second-degree as well as rights which are derived from a succession processed abroad, shall be recognised in Switzerland: a. If they were issued, taken, drawn up, or established in the State of last residence of the deceased or pursuant to the law chosen by the deceased or if they are recognised in one of those States; or b. in the case of decisions concerning immovable property, if they were issued, taken, drawn up, or established in the State in which the property is located or if they are recognised in that State [. . . ]’.

12 On this aspect, the Parliament resolution is clear and firm: see Recital N, paragraph 5, paragraph 4 of the annex and paragraph II, point 1, of the justification.
certifications’ of the authenticity of the instrument's origin, such as legalisation and Apostilles.  

**7. OPPORTUNITIES PROVIDED BY THE REGULATION ON SUCCESSIONS**

Successions following a death are probably the case in which Europeans most frequently need to use authentic instruments, in order to:
- submit copies of a will;
- document the acceptance or rejection of an inheritance;
- carry out an inventory;
- issue a power of attorney to administer inherited assets;
- obtain a notarial affidavit.

These are just some of the most common examples.

In the 21 EU Member States which have civil law notaries, the aforementioned documents are, in most cases, drawn up by notary – a public official vested with public authority, empowered by law to draw up instruments with special evidential status. The reason for this is clear: the various national legislations desire – in the interest of the parties and of interested third parties (relatives, creditors, entry on public registers) – such important instruments to be drawn up and signed with the greatest possible assurance of conformity with applicable law and the will of the parties. The notary thus plays his most traditional role: legal advisor to the parties and guarantor of the instrument’s public authenticity and legality.

When a succession involves people or assets in several Member States, there is obviously a need to use these instruments across borders: to accept or reject an inheritance in a instrument signed before a notary at the place of residence, inventorise assets located in a Member State other than that where the succession was opened, use a notarial affidavit abroad, etc.

Today, all these cases are regulated differently by different legal systems and cannot always be easily fitted into the framework of national systems of private international law, whence the need to use empirical solutions, generally inspired by notaries' practical experience.

This proposal for a regulation on successions therefore seems the right opportunity to take action to simplify and clarify the cross-border use of authentic instruments, since such instruments are widely used in such circumstances. Ways of regulating this already exist, and some of them are already part of the acquis communautaire:

- the concept of ‘authentic instrument’ contained in the Unibank judgment (Court of Justice, 17 June 1999, C-260/97) has been reiterated, as stated above, by Regulation No 805/2004 creating a European Enforcement Order for uncontested claims and Regulation No 4/2009 relating to maintenance obligations;
- the rules on the use of authentic instruments as enforcement orders in another Member State, laid down by the original Brussels Convention of 1968 (Article 50).

13 See, again, the Parliament resolution of 18 December 2008: Recital L, paragraph 1, paragraph 1 of the annex, and paragraph II, point 1, of the justification.
and reiterated in Regulation 44/2001 (Brussels I, Article 57), Regulation 2201/2003 (Brussels II bis, Article 46), Regulation 805/2004 (EEO) and Regulation 4/2009 (relating to maintenance obligations);

- the proposals contained in the Parliament resolution of 18 December 2008, with the invitation to consider the advisability of recognising the evidential value of authentic instruments in the European legal area and abolishing legalisation and Apostille formalities.

Today, the time seems to have come to take another step forward, by regulating not only the enforceability of authentic instruments (Article 35 of the proposal), but also their evidential value, which is important for successions (it is sufficient to consider the case of inventories of inheritances). Happily, this is a solution which the Commission’s proposal seems favourable towards, since Recital 26 states that: ‘In order to take into account the different methods of settling the issues regarding successions in the Member States, this Regulation should guarantee the recognition and enforcement of authentic instruments. Nevertheless, the authentic instruments cannot be treated as court decisions with regard to their recognition. The recognition of authentic instruments means that they enjoy the same evidentiary effect with regard to their contents and the same effects as in their Member State of origin, as well as a presumption of validity which can be eliminated if they are contested. This validity will therefore always be contestable before a court in the Member State of origin of the authentic instrument, in accordance with the procedural conditions defined by the Member State’. This provides a specific concept of ‘recognition’ applicable to authentic instruments, concerning their evidential effect. As stated above, this concept is useful in order to understand that authentic instruments can produce effects even in legal systems other than the legal system of origin and can replace equivalent authentic instruments in the Member State of destination. Naturally, the difference to the ‘recognition’ of judicial decisions could be clarified by an in-depth amendment to the current Article 34 of the proposal, stating that authentic instruments can still be challenged before a judge in the Member State of origin if there is a dispute concerning the procedure and formalities followed by the public official who drew them up, whilst its contents can be challenged before the judge competent under the proposal for a regulation (in other words, normally the judge dealing with the succession itself).

With regard to more practical matters which often give rise to complex problems which need to be solved, rules could usefully be introduced to abolish legalisation and Apostille formalities, and also give the parties more freedom to choose the language or languages to be used in the instrument.
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