What is the value of my notarial deed in a foreign country? About the circulation of notarial deeds in the European Union.

1. Should Europe, the gorgeous daughter of the King of Phoenicia, so much desired by Zeus and abducted by the latter disguised under the form of a bull, return to earth, she would feel fairly pleased with the juridical harmonization on her continent.

More than anywhere else, there is a fierce need for juridical harmonization in Europe. It is the continent with the largest number of cross-border contacts between companies and natural persons. At the moment, twelve million Europeans do not live in the land of their nationality. They work in a country that is not their country of origin amongst other things for companies with a heterogeneous managers’, employees’ and workers’ staff. There is the exchange of officials within the European Union. There are the students in all kinds of study and work placement programmes (Erasmus, Grotius), who really like to breathe some fresh air in another country. Sometimes, they meet their partner or husband/wife there and settle definitively in the country of their studies. Because of the financial crisis, young people tend to go north. There it is easier to find a job for them. Older people, on the contrary, go in the opposite direction and go south looking for more sun-hours. Generally, life is cheaper there too. This makes that in Europe there are today each year 450,000 estates with an international aspect. Goods are situated abroad or heirs are living abroad. Each year, all those estates would concern a total inherited capital of over 23 billion.

When, at the time, the Frenchman Monnet and the German Hallstein ratified the Robert Schuman plan in Rome for the unification of Europe, they were only aiming at a mere economic purpose. They had set their sight on the creation of an internal market with a free market for coal and steel in the six countries that signed the European Treaty at that moment, viz. France, Germany, Italy and the three Benelux countries. Since the recent accession of Croatia, there are now 28 member states.

First of all, this brought along a long series of European Directives in the scope of company law. Cautiously, it mainly concerned laying down principles, some kind of framework acts to which the member states had to conform by harmonizing their national legislations to the adopted points. This summary form of juridical-economic unification would in the long term be advantageous to the commercial relations between the countries. In those days, publicity regulations were largely harmonized and it was laid down how a company should be represented with regard to third parties. Instructions on the protection of the capital of the company, and a regulation on fusions and splitting etc. were put in place. Then followed

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1 L.WEYTS, ‘De Europese verordening op Internationale Nalatenschappen. Denk er nu reeds aan bij het opmaken van een testament’, T.Not. 2013, 200
the *Rules* that had direct effect in the national legislations, amongst other things with the creation of the ‘Societas Europea’ according to the model of the limited liability company. Other European company structures followed, together with the European cooperation. In addition, the European Union also focused on *contract law* granting civilians to reconsider their approval of a contract within a period of seven days, except in the event of notarial deeds. In addition, there was also a Regulation regarding false advertising, abusive clauses, the use of faulty products in the construction sector, the electronic signature that created the possibility of a dematerialized notarial deed. *Criminal Law* also was subject to European directives concerning laundering of criminal money. One single field was largely kept beyond questioning, the law of persons and family law in the broad sense that was found too much locally-bound and in which the European legislator initially did not want to meddle.

In that same period of the first directive regarding companies, the *Brussels Convention* was ratified regarding recognition and enforcement of judicial decisions and notarial deeds in Europe. This was on 27 September 1968, extended by the Lugano Convention on 16 September 1980. It was limited to any commercial case, but also civil law cases except in the matter of family law (to the exception of maintenance obligations). On 1 March 2002, this Convention was converted into the decisive *Brussels I Regulation* of 22 December 2000.

As to the scope of application, the situation remained unchanged. All aspects regarding state and capacity of persons, matrimonial property, inheritances and last wills and testaments, was not dealt with.

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13 Extended by Switzerland, Sweden, Norway, Finland, Iceland and Austria.
Family Law in the broad sense and its property component were not treated by the European legislator. It was called ‘un droit de terroir’, a branch of law with a high regional character, highly culture-related, a branch of law that was closely related to national traditions and the private life of each individual. Europe did not want to interfere. That idea runs through our Private International Law Code\textsuperscript{15} as a real leitmotiv. Family law in the broad sense is governed by the law of the (last) place of residence of the persons involved. Other themes of a totally different kind also remained outside the scope of the Regulation, viz. fiscal matters, bankruptcy, social security and arbitrage.

The first signs of an opening towards the legal domain of persons and family had indeed been established in the Treaty of Amsterdam of 1 May 1997 \textsuperscript{16}. It launched the option to create one big juridical European space, with the intention to bring the different legal systems closer to one another, also the ones concerning family relations, and if possible, to coordinate these. Eventually, this European construction was finalized for family law with the Brussels II bis Regulation on 27 November 2003, which substituted for the original Brussels II.

There was a first major breakthrough in that matter of family law on 20 December 2010 with Rome III. It allows spouses with an international component in divorce to choose a specific law to effect the divorce\textsuperscript{17}. It concerns spouses of different nationalities, or who are domiciled in different member states, or finally, of whom at least one of them is not a citizen of a European member state and therefore comes from outside the union. The law they can choose, is the law of the state where the spouses have their usual place of residence, or had their last usual place of residence in as far as one of them still resides there at the moment the divorce agreement is entered into. They can also choose the right of the state of which one of them has the nationality at the moment the agreement is entered into. Finally, they can choose ‘lex fori’, viz. the right of the state where the divorce is brought before court (clause 5 first paragraph). They can also lay down these in advance in their marriage contract or nuptial agreement and thus further determine under which legal system they would divorce, if the occasion might arise.

\textsuperscript{15} About the consequences of marriage: clause 48 Code PIL: there, preference is given to the law of the country where the spouses have integrated, viz. the law of the country of their usual common place of residence predominates. For the applicable matrimonial property regime: clause 51 Code PIL: as a rule, the law of the first usual place of residence upon celebration of the marriage always comes first, and according to 49 and 50 Code PIL, the spouses can always make a choice of law and opt for a Belgian matrimonial property regime, but this regarding their entire property, without prejudice to the rights of third parties. The choice can also be made for the local law on inheritances, by clause 78 Code PIL. For real estate property the law of the last place of residence is applicable and for immovable property the law of the country where the property is situated. Since the European Regulation on International Estates of Deceased Persons this will no longer be possible as from 17 August 2015, date of entry into force. The estate will be considered and dealt with as one, under one legal system. A choice of law is also in this matter provided for in clause 79 Code PIL, with the obligation to anyhow respect the reserve reserved to the heirs.

\textsuperscript{16} Followed by the Treaty of Nice of 26 February, the Tampere and The Hague Action Plan.

\textsuperscript{17} In effect since 21 June 2012; K.DE VOLDER, ‘Rome III-verordening : wanneer de ‘grenze(n)loze’ liefde eindigt in en echtscheiding …’, Nieuwsbrief Notariaat 2011, no. 14, p. 1 e.v.
Then followed the regulation regarding international estates of deceased persons on 4 July 2012. This will only take effect as from 17 August 2015, and therefore offers enough time to prepare oneself to it. As for yet, citizens can anticipate it by choosing in their last will and testament their national laws instead of the law of their last place of residence (which will become the rule), in case their property (especially the real estate part) would mainly be situated in their country of origin. That choice survives the date of 17 August 2015. This Regulation also regulates the existence in the future of a European certificate of inheritance that can be used abroad. This will allow proofing one’s inheritance right and claiming these rights all over Europe.

In the pipeline, we find the draft of Regulation of 16 March 2011 regarding the recognition and enforcement of judicial decisions and notarial deeds in the domain of the marital systems in an international context. This will be good in combination with the existing regulation regarding international estates of deceased persons. On the occasion of the decease of a spouse, the liquidation of both will be dealt with together, and it is recommended that both are treated according to an identical legal system. Here again the emphasis is put on the choice for the law of the state where both spouses have their usual place of residence (clauses 5 and 16-17). In that draft, European notarial deeds are recognized more than ever before (clause 32) and can be enforced, provided however the procedure of the ‘exequatur’ is observed (clause 33). In the same line lies on the table another draft of Regulation of the same date that deals with the patrimonial consequences of registered partnerships, of legal cohabitants (clauses 5 and 28-29). As regards the applicable law on the consequences as to property ownership, the choice is here made for the law of the state where the cohabitation has been registered and apparently, there is no further choice (clause 15).

2. As regards the actual procedure of recognition and implementation of notarial deeds, the regulation for the 28 member states at present is as follows.

According to clause 56 of the Brussels I Regulation the recognition of notarial deeds is guaranteed, except in the rule for deeds in the family domain. Within the Union, neither legalization nor Apostille is required any longer for those deeds.

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18 Published on 27 July 2012
22 B. REYNIS, ‘Le certificat successoral européen, un acte européen’, Defrénois (F) 2012, no. 15, p. 767
For some time, legalization has not been necessary any more in the member states\(^\text{23}\), as they all signed the Hague Convention regarding the abrogation of the legalization and the introduction of the ‘Apostille’.\(^{24}\) Leaves us with the ‘apostille’, but this one too is no longer necessary in Europe, as far as it does not concern a case regarding the state and the capacity of parties, their marital system, their legal inheritance right or last will and testament.

This implies that e.g. a Belgian Notary Public no longer must have legalized nor apostilled his notarial powers of attorney for a European member state. His colleague abroad cannot require him to do so either. Legalization or apostille is still necessary when the power of attorney has to serve outside Europe. This formality also remains required if it concerns a family case. Think of a deed of amendment of nuptial agreement signed in Belgium, for which an additional deed has to be executed in another country. The latter shall be subject to the formality of the ‘apostille’.

But even in family matters some things are no longer required for 8 countries that signed and ratified the Brussels Convention of 25 May 1987 in which all formalities were averted.\(^{25}\) For the moment, it concerns France, Italy, Ireland, Belgium, Lithuania, Estonia, Denmark and Cyprus.\(^{26}\) For those countries, the requirement of applying for an ‘apostille’ in recognition of the notarial deed abroad is no longer required.

For the other 20 countries of the European Union we have to wait for the definitive ballot of the proposal of Regulation no. 1024/2012 of 24 April 2013 that lays down the use, the acceptance or recognition (the terminology is quite confusing) of amongst other things all notarial deeds, so also in family matters, in Europe. For divorces we have in addition already Rome III and for the international estates of deceased persons we have the Regulation of 4 July 2012 regarding the recognition of mutual deeds (for international estates of deceased persons strictly spoken as from 17 August 2015).

According to clause 27 §1 of the Belgian Code PIL our country anyhow recognizes a foreign notarial deed, surely a European one (with or without apostille), and it has the same effects as the Belgian authentic deed.

\(^{23}\) In our country clause 30 code PIL; J.ERAUW, ‘Toelichting op art. 30 WIPR’, in Erauw e.a., Het wetboek van Internationaal Privaatrecht becommentarieerd, Antwerpen, Intersentia, 2006, 164

\(^{24}\) As from 5 October 1961, ratified in our country by the law of 5 June 1975, Belgian law gazette - B.S. 7 February 1976, err. B.S. 10 March 1976.

\(^{25}\) F.BOUCKAERT, Notarieel Internationaal Privaatrecht, Mechelen, Kluwer, 2009, no.1.4, p. 4

\(^{26}\) Germany, Greece, the Netherlands, Luxembourg, Great-Britain and Portugal also signed the Brussels Convention, but the national ratification did not follow.
Nevertheless, there are two appropriate restrictions. The foreign deed is not accepted in case the deed is induced by *evasion of law* according to clause 18 Code PIL, or conflicts with the Belgian *international public order* according to clause 21 Code PIL.\(^{27}\)

By way of example: a foreign notarial affidavit executed before some South-American Notary Public, accompanied by the declaration of a Belgian that he is the alleged father of an illegitimate child and the declaration of the mother that he is not the biological father, will probably not be accepted here.\(^{28}\) The danger of *evasion of law* is too big. It should be left to the Judge to decide on this matter, not to the Notary Public.\(^ {29}\) Inside Europe, it seems impossible that such a situation presents itself.

Much more important is the aspect of *public order*. In that way, even a foreign notarial deed falls if it apparently does not respect the Belgian reserve regulation.\(^ {30}\) In spite of the new regulation regarding International Estates of Deceased Persons, no foreign European deed will be accepted if it is not in accordance with the international public order of the member state where it has to be recognized.\(^ {31}\) Angle-Saxon law e.g. does not know the notion of reserve. A Belgian who goes to England at the end of his life to take away the reserve of his heirs by last will and testament, will surely draw a blank.\(^ {32}\) Even if he establishes a trust there in order to make the goods unavailable for a longer period for the children, he will not succeed in his intention.\(^ {33}\)

Secondly, the legal act, entered in the foreign notarial deed, shall be *lawful according to the law of the state where it is drawn up* (clause 27 § 1 second paragraph Code PIL).\(^ {34}\)

*Clause 26 Code PIL* deals with the *probative value* of amongst other things foreign notarial deeds. Here it only concerns the proof of facts, both legal facts and ordinary facts, which are entered in a notarial deed. To that end, the foreign deed shall be legally valid in form and meet the requirements as to authenticity in accordance with the law of the state where it is drawn up. In principle, this includes legalization or an ‘apostille’, to the extent it is not abrogated, as laid down above. Findings in a notarial deed are not taken into account in as far as they also have a consequence that is apparently incompatible with the Belgian public order.\(^ {35}\)


\(^{28}\) Example taken from F.BOUCKAERT, *o.c.*, no.1.9, p. 7

\(^{29}\) F.BOUCKAERT, *o.c.*, no. 1.30, p. 19

\(^{30}\) F.BOUCKAERT, *o.c.*, no. 3.19, p. 92


\(^{32}\) L.WEYTS, *o.c.*, *T.Not.* 2013, 205

\(^{33}\) F.BOUCKAERT, *o.c.*, no. 3.40, p. 103


\(^{35}\) F.BOUCKAERT, *o.c.*, no. 1.6, p. 5
An insight, if possible, in the bilateral conventions can be useful as long as we cannot proceed to an integral recognition and enforcement of the deeds of one another. Our country has entered into treaties with France, the Netherlands and Germany, but also with Great-Britain, Italy, Austria, Morocco, Romania and India.

Deeds can also be executed by Belgian diplomatic or consular agents. They are accepted without legalization, as they are made equal before the law with Belgian authentic deeds. Nevertheless, the deeds are transmitted to the Ministry of Foreign Affairs for verification in order to check whether the official indeed had the notarial competence to sign.\(^{36}\)

3. The matter of the enforcement of a notarial deed abroad is much more delicate. The Brussels II bis Convention requires the application of an ‘exequatur’ in the European country where the deed shall be implemented with enforceable force.\(^ {37}\)

There is one remarkable exception to the requirement of the ‘exequatur’ in which the formality cannot be required. It concerns the EEO, the European Enforcement Order, which only exists for undisputed claims that one wishes to recuperate abroad.\(^ {38}\) The authenticity thereof shall be certified; and in our country this is done for authentic deeds by the Notary Public who executed the deed (clause 25). This requires the issue of a certificate, which in our country can be drawn up by a Notary Public, in which he certifies the authenticity of the deed and the existence of that undisputed claim. Claims recognized by authentic deed, cannot be disputed by the debtor. Furthermore, it only concerns debts made as a consumer; company or professional debts are excluded. They shall relate to the recuperation of a sum of money, not an engagement to an execution in kind.\(^ {39}\)

For the other implementations, we have to wait for the abrogation of the ‘exequatur’, with the adaptation to the Brussels I Convention, already voted on 9 January 2013. As from the beginning of 2015, the latter will also cancel that formality and replaces it by the much simpler one of the certificate, such as is the case for the T.E.E., in which the local Notary Public himself guarantees the authenticity and asks for the implementation of his deed abroad. In the other country where the implementation has to be effected, nothing has to be done anymore. The adaptation to the Convention does not state anything on the content of the deeds themselves.

Clause 27 § 3 Belgian Code PIL deals with the executability of the foreign notarial deed in our country and refers to the procedure to be followed before the Belgian court according to the procedure stipulated in clause 23 Code PIL. Clause. 27§2 intends the ‘exequatur’. This

\(^{36}\) F. BOUCKAERT, o.c., no. 1.33, p. 20
\(^{38}\) European Regulation Rome I of 21 January 2005; I. SAMYN, ‘De EET verordening: belang voor de Belgische notaris’, Waarvan Akte 2007, 44; F. BOUCKAERT, o.c., no.1.21, p. 14
\(^{39}\) Fall outside the scope of the EEO regulation: fiscal debts, debts with regard to the state and the capacity of natural persons, marital property regime, last wills and testaments and estates of deceased persons, social security and arbitrage.
supposes that the notarial deed meets the required conditions as to authenticity in the country of origin. Therefore, the Belgian deed shall be valid if it has to be executable in France.

This clause will move to the history books as soon as the European Regulation Brussels I ‘overrules’ this and the ‘exequatur’ will no longer be needed.

4. Europe is progressively, in the juridical field at least, growing into one big space of free circulation of judicial decisions and notarial deeds. This is extremely beneficial to both companies and citizens. It implies liberation of too many formalities that are sometimes, wrongfully, imputed to the notarial world in comparison to the Anglo-Saxon system. But it was not the notarial world, but rather the national and European governments that were responsible hereof. The World Bank, which emphasizes this and indicts this with regard to the Latin notarial world hereby points its arrows at the wrong responsible party.

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40 L.WEYTS, ‘L’Europeanisation, une entreprise positive pour une bonne globalisation’, Notarius International, 2001, 147; This can serve as a model for other continents, amongst other things in South America de Mercosur : L.WEYTS, ‘Modernizacion y avance del sistema notarial mirando lo que existe en los paises vecinos : modelo europeo con sus directivas y reglamentos, Revista International del Notariado (RIN), no.117, 2012, 49