Imperativeness in Private International Law

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A View from Europe

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Preface

"Imperativeness," from the Latin *in-paràre*, shares the same root of *imperio* and is the quality which characterizes an authoritative, peremptory command, an absolute order to be fulfilled. At the same time, it refers to something crucial or of vital importance. In the domain of the current study, we refer to "imperative norms" (sometimes also called "peremptory norms") and discuss about "imperativeness" as their intrinsic quality, looking at the rules or principles that protect interests and/or values of a state which are considered so fundamental as to require their application at any cost and without exceptions.

In private international law, imperativeness nowadays works either as a limit to the recognition of foreign decisions and deeds or as a limit to the application of foreign law, but also as a way of positively promoting the interests and values protected by imperative norms in transnational cases. The two main forms in which the concept of imperativeness has been expressed in private international law are: (*i*) international public policy (or *ordre public international*, according to the French definition), i.e., the sum of the fundamental principles expressing the identity of a state in a certain historical period whose respect must always be ensured; and (*ii*) overriding mandatory rules (or *lois d'application immédiate*), i.e., the cogent rules of a legal system which, in principle, must be applied to *all* cases, regardless of the applicability of private international law rules.

While several books, scientific articles, legislative practice and domestic, supranational and arbitral decisions have repeatedly dealt with this subject, opinions concerning the forms, functioning and content of imperative norms in private international law still differ significantly, so as it can be affirmed that the topic is still shrouded in ambiguity. In this regard, on the one hand, the subject is not only to be analyzed from the perspective of domestic systems of private international law, but also in light of EU legislative practice and case law. On the other hand, in recent times imperativeness has been facing another layer of complexity, given by the continuous interaction that private international law has with substantive obligations arising from international and EU law. Relatedly, the concept of imperativeness has been facing another challenge, i.e., the one concerning the diffused understanding that private international law cannot be considered anymore as a neutral subject—i.e., acting

as a mere *bridge* between different domestic legal systems—but as an area of the law which has significant substantive implications on the rights of individuals. As a consequence, as it has happened in the doctrinal analysis of various aspects of private international law (the reference applies, e.g., to the implications that connecting factors have on human rights), the concept of imperativeness too shall be related to the protection of modern constitutional rights, the respect of international obligations (mainly in relation to human rights) and, more generally, to the final goals—shared by the European legal systems—of the protection of the rights of individuals and the full realization of their personalities. In this regard, more than in other areas of the law, the application of imperative norms in private international law matters requires a significant interpretative work by adjudicators, who, within the borders set forth by the relevant national, EU and international sources of positive law—and in light of the dominant attitude of openness toward foreign values characterizing modern private international law systems—have the task of ensuring the best realization of the human rights involved. The ways in which this task is concretely carried out and the results to which this judicial interpretative work has conducted (mainly related to the emergence of a shared minimum content of imperativeness in the private international law of European countries), however, still deserve some further attention in scholarship.

This book is aimed at trying to shed some light on the aforementioned aspects.

Chapter 1 starts from an historical analysis relating to the development of private international law during time and focuses on how imperativeness has evolved in the various phases that private international law has faced. In this regard, particular attention will be devoted to explaining how and why the distinction between public policy and overriding mandatory rules emerged.

The analysis of the relevant sources clearly shows that the importance of imperative norms—seen as a safeguard of states' undeniable legal principles and rules—increased proportionally to the growth of the attitude of openness that domestic legal systems have shown toward the application of foreign laws and the recognition of foreign deeds and decisions. However, notwithstanding the fact that the relevance of imperative norms in private international law, as well as the difference existing between public policy and overriding mandatory rules, are today given as acquired, some issues emerged with regard to both these aspects.

As to the relationship existing between public policy and mandatory rules, two main criticisms have been put forth. Firstly, some authors have argued that overriding mandatory rules are a redundant category which does not have any ontological foundation which allows a real distinction with public policy. Relatedly, and secondly, other authors pointed out that the functioning of overriding mandatory rules unduly penalizes the openness that currently characterizes private international law systems. Indeed, an undue proliferation of overriding mandatory rules identified by means of judicial interpretation may risk to too often prejudice the applicability of foreign law, and, for this reason, some authors, again underlying the openness inspiring modern conflict of laws systems, claimed for the possibility for adjudicators to always look at the content of foreign law even in the presence of overriding mandatory rules. Chapter 2 will be, thus, devoted to the analysis and discussion of the

various theories relating to the foundation of the distinction between public policy and *lois d'application immédiate* and will try, on the one hand, to find an explanation for the continuous recourse that states' legislative practice makes to the category of overriding mandatory rules and, on the other hand, to investigate the actual margin of discretion that adjudicators have in the identification of an overriding mandatory rule.

As to the second criticism mentioned above, the reference applies to the opinion (mainly arisen in the EU institutional context) which—arguing on the basis of the principle of mutual trust, that should inspire the relationships between the legal systems composing the EU—tried to deny (or, at least, significantly reduce) the role of imperativeness in private international law. This opinion found some echo in certain EU Regulations, i.e., Regulation 2201 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 (and now replaced by regulation 1111 of 25 June 2019, which shall apply to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022) and Regulation 4 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (known as Regulation 4/2009). In the former of these Regulations, in the context of judgments concerning the return of a child, there is no reference to public policy and overriding mandatory rules, while, in the latter, there is only reference to public policy in relation to the enforcement of foreign decisions given in a member state not bound by the 2007 Hague Protocol to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (but not in relation to applicable law issues or for decisions given in states bound by the protocol). Finally, reference to imperativeness has been also excluded in the context of Regulation (EC) N. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure and of Regulation (EC) N. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. However, this approach has been strongly rejected by member states in other contexts, such as, e.g., the negotiations leading to the enactment of Regulation 1215 of December 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The vast majority of EU Regulations on private international law, therefore, still recognize the possibility that the circulation of foreign laws, deeds and decisions can be limited by the imperative norms of the Member state involved. Chapter 3 will therefore be aimed at testing the findings of Chapter 2 through the prism of EU law and at discussing the functioning of imperative norms in the specific context of EU private international law, by mainly focusing on the EU legislative practice and on the case law of the Court of Justice of the European Union (CJEU), continuously oscillating in the tension between the necessity to reduce the recourse to imperativeness in intra-EU relationships and the states' persisting need to ensure the protection of the principles and rules expressing the identity of their legal systems.

Chapter 4 will, finally, be focused on the mentioned phenomenon concerning the interaction that imperativeness in private international law has with substantive obligations arising from international and EU law. It will investigate whether there are certain principles and rules grounded in EU and international law that may be, as of today, respectively, considered as the sources of EU and "truly international" imperative norms, as well as whether and how these forms of imperative norms are repeatedly implemented in domestic legal systems so as to constitute a "minimum content" of imperativeness which is shared by European countries and integrates their domestic conceptions of imperativeness. We will try therefore to analyze what happened in the case law dealing with foreign laws, deeds and decisions running against this minimum content of imperativeness and, on the other hand, facing the unlikely cases where the application of these principles and rules grounded in international and EU law may concretely result in an injustice for the parties and in a prejudice to the functioning of other fundamental principles of the forum.

In conclusion of this preface, I wish to thank the staff of the Max Planck Institute for Comparative and International Private Law of Hamburg, where the most significant part of this research has been conducted and where Professors Jurgen Basedow and Ralf Michaels welcomed me very warmly and provided me with significant suggestions. Thanks also to Giuliana Lampo, Donato Greco, Gustavo Minervini and Giulia Ciliberto for their friendship and their precious support in the research and in the editorial work. Thanks to Rosanna for having encouraged me to never give up, even when faced with the difficulties that characterized the last two years.

This book is dedicated to my father, for the strength he showed with extreme sobriety in recent, difficult, times, and to Eleonora, who is going to revolutionise my life.

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