

EN2BRIa

Enhancing Enforcement under Brussels Ia



This Project is funded by the European Union  
Justice Programme 2014-2020  
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Investigation conducted in the framework of  
"Enhancing Enforcement under Brussels Ia" –  
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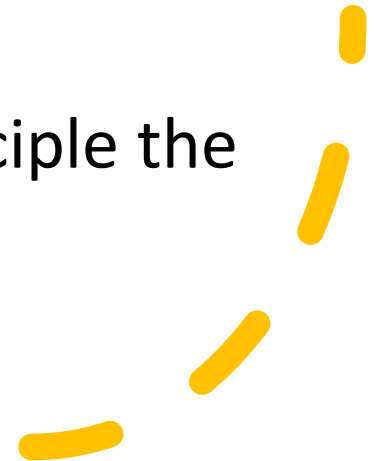
## *Art. 67 Brussels Ia and Directives in special matters: open issues in coordination and disconnection*

**Laura Carpaneto**

UniGe - DISPO

# Overview

- Art. 67: aim and scope of application
- Posting of Workers Directive
- Consumer Collective Redress Directive
- Is the *Lex specialis* principle the only way out?



# «Private law» v. «Private Int Law»

EU Substantive priv. law rules/PIL rules:

- a) Complement each other
- b) Collide (or simply in need of coordination) - *lex specialis principle* = way out

Brux Ia art.67

Rome I art.23

Rome II art. 27



Art. 67  
Brux Ia  
grants  
priority to  
...

- ...provisions governing jurisdiction and recognition and enforcement of judgments
- ... in specific matters
- ... contained in instruments of the EU or
- ... in national legislation harmonised pursuant to such instruments



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«*instruments  
of the EU*»  
art. 288 TFEU

- Decisions
- Directives
- Regulations

Express reference to «*provisions  
governing jurisdiction and  
recognition and enforcement of  
judgments*»

What about *recommendations*?

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# Decisions


- for the adoption and implementation of int. conv. in the EU legal order
- When an int. conv. provides rules on jurisdiction and/or recognition and enforcement «**interference**» with Brux Ia exists
- **Case-law: priority is granted** to the int. conv.' rules, not clear whether on the basis of the *lex specialis* principle under art. 67 or of the **non-affect clause** under art. 71 Brux Ia (see case-law concerning COTIF system)

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Directives and  
national  
legislation  
implementing  
them

«paradoxically»: art. 67 grants  
priority over a uniform set of rules  
to a **not uniform set of rules**  
deriving from the implementation  
of the directive system

**Rationale**: the assumption that  
the rules implementing the  
directive system are **more  
focused, more specialized**

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# Regulations

- Uniform regime

**of a mandatory character:** applying to all those who fall within their scope of application (example: reg on the rights of air passengers)

**of an optional character:** it is for the parties to choose to apply the model law, which does not therefore replace automatically national law (example: company law, intellectual property law)

Recommendations: *does art. 67 make reference also to them?*

- Not binding instruments of EU law (...provisions governing?)
- **In practice:** growing use by the Comm in order to provide *guiding principles* in the application of other EU instruments dealing with relevant procedural aspects interfering with Brux Ia

Example: 2013 for consumer collective redress Directive

**Not clear whether art. 67** (applying to the directive) **also applies to recommendation**

**Need for further investigation** (especially if the Comm keeps using them)

# Focus on (1) the Posting of Workers Directive 96/71

- **Posted workers:** those who, for a limited period of time, carry their work in the territory of a MS other than the one where they normally work
- Freedom to provide service v. protection of posted workers
- **PWD:** establishing min terms of employment and standard conditions for the host State/ social security and employment contract for the sending State (home State)

# PWD and the *lex specialis* principle

- **PWD and Rome I**: art. 3 PWD and the residual role of Rome I
- **PWD and Brux Ia**: art. 6 PWD **host State** jurisdiction rule – *«In order to enforce the right to the terms and conditions of employment guaranteed in art. 3, **judicial proceedings may be instituted in the MS in whose territory the worker is or was posted**, without prejudice, where applicable, to the right, under existing int conventions on jurisdiction, to institute proceeding in another State»*

## Art. 6 PWD Host State Jurisdiction

1. *ratione materiae* limited: proceedings on enforcement of the rights, terms and conditions of employment expressly enlisted by the PWD (max work periods and min rest periods, min paid annual leave, remuneration, health and safety at work...)

Not included in the clause: issues concerning employment contract (conclusion and termination) obligations of social protection

Excluded from the PWD: the merchant navy undertaking as regards seagoing personnel (art. 1.2 PWD)

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## Art. 6 PWD Host State Jurisdiction

*2. razione spatii limited*: workers posted in the territory of a MS

Coincidence between *Jus* and *Forum*, limited to the EU judicial space

What about the posting of EU workers *outside* the EU?

*Brux Ia* applies and all its rules protecting employees

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# Brux Ia and «high(er) level» protection for employees

- **Scope of application:** No need for the employer to be in the EU
- **Connection** (extended to employment contracts art. 20): employee may start an action against more employers at the domicile of one of them (VIP for multiple posting of workers to multiple employers)
- **Jurisdiction:** forum of the respondent employer, habitual place of work, place of business and also party autonomy
- **Recognition and execution of decisions:** art. 45 specific limits if safeguards rules on jurisdiction are not respected

*High(er) level of protection as compared to the PWD? Lex specialis principle?*


# Focus on (ii) the Consumer Collective Redress Directive

- **Collective redress:** variety of mechanisms for the resolution of mass disputes, where numerous claimants bring a single action or procedure
- **Legal framework:** Directive 2009/22 on injunctions for the protection of consumers' interests, **Comm recommendation** 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the MSs concerning violations of rights under EU law

Directive  
2009/22  
«not  
affecting»  
PIL

Recital 7 and art. 2.2 - no  
prejudice shall occur with PIL  
rules - **no need to apply the *lex  
specialis* principle**

...however **special procedural  
needs** arise: collective redress  
mechanisms are not traditional  
two-party conflict cases (as those  
considered under Brux Ia)



# Ongoing recast of Directive 2009/22

- COM (2018) 184 – second reading
- Proposal take into account Recommendation 2013 however  
*«The principles in the Recommendation are self-standing and **this proposal does not reproduce all procedural elements addressed by the principles** (...) due to its **more targeted scope**, which is limited to infringements that may affect the collective interests of consumers»*

# In view of the next Brux Ia Recast ...

- Need to **avoid forum shopping** (already existing)
- **Special ground of jurisdiction:** domicile of the representative entity
- **Special rule on *lis pendens*:** not perfect coincidence of the actors (representative entity and single represented consumer), more than one representative actions

...and on **applicable law**: no specific provision for mass claims – art. 6 Rome I  
mandatory rules of the HR of each of the consumers

Is the *lex specialis* principle really the way out?

Given (i) the 2 cases considered, (ii) the EU activism in judicial coop in civil matters, (iii) the trend towards materialization of PIL rules...

... granting a clear-cut priority to EU (substantial private law) acts by virtue of the *lex specialis* principle  
may not be the way out

What about a more nuanced solution, able to keep «*the best of the 2 worlds*»?

*Thank you for your kind attention*





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# *Testing Art. 67 Brussels Ia: The Cases of GDPR; International Treaties concluded by the EU, and ‘Optional Regulations’*

*23 November 2020, Univ. of Nice  
Online session*

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Investigation conducted in the framework of “Enhancing Enforcement under Brussels Ia” – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598

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# Overview: Three (practical and ‘political’) issues from the En2Bria Project

- General Data Protection Regulation (GDPR) = its rules on jurisdiction and Brussels I bis. *What about the relationship?*
- Are ‘International treaties’ concluded by the EU, ‘treaties’ which prevail under art. 71 Brussels I bis, or ‘other EU instruments’ which prevail under art. 67 Brussels I bis?
- After Brussels I bis, are ‘second generation regulations’ (such as EU enforcement order) still useful?



# GDPR and Brussels I bis

- Recital 147 GDPR: Where specific rules on jurisdiction are contained in this Regulation ... *general jurisdiction rules such as those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council should not prejudice the application of such specific rules*
  - Redundant = we already have art 67 Brussels I bis



## ... continues

- Art 79 GDPR
- (1) ... each data subject shall have the right to an effective judicial remedy ...
- (2) Proceedings *against a controller or a processor* [started by the weak party only?] *shall be brought* before the courts of the Member State where the *controller or processor has an establishment*. Alternatively, such proceedings may be brought before the courts of the Member State where the *data subject has his or her habitual residence*...



## GDPR Issues

- Is Art 79 exclusive or can the actor choose between GDPR and Brussels I bis (e.g., *forum contractus*; *forum commissi delictii*)?
  - *Shall* be brought (GDPR) / *May* be brought (Posting of workers directive)
  - Recital 147 GDPR promotes autonomy of GDPR or mere non-interference of Brussels I bis with policy goals of GDPR (ie., protection of data subject)?
  - Is it desirable to have severability of actions if GDPR relates to tort or to breach of contract?
  - Can parties derogate to art 79 by way of choice of court agreement under art 25 Brussels I bis Regulation?
- Can art 79 be used by a data processor to start proceedings against a data controller? [effect: stay of proceedings under art 82]

# International treaties concluded by the EU

- International treaties in special matters to which Member States are (already) party to = Art 71
  - Nippoanka and TNT case law
  - Intra-EU application must conform to fundamental Brussels I principles
- Other 'EU instruments' = Art 67
  - No need to super-impose Nippoanka and TNT (in theory)
  - All rules are adopted by one single legislator who has 'control' both over the *lex generalis* and the *lex specialis* – no need for *practitioners* to check on a case by case approach respect of unclear benchmark



## ... continues

- 1999 Montreal Convention on air transport = acceded by the EU: is now part of EU law by way of a 2001 Council decision
- What is the proper “disconnection clause”
- Is the “convention” EU law *stricto sensu*, in the sense that it can be unilaterally changed by the EU?
- Is it a pure international convention over which the EU has no control at all?
- Are there any useful indications from the CJEU (C-213/18)?
- Could we use a new third “disconnection clause” – a *tertium genus* – in Brussels I bis?



# Optional regulation and Brussels I bis

- Art 67 is triggered when concurring provisions are mandatory (by provision of law, or by operation of law playing together with party autonomy)
- Second generation regulations – optional in nature – abolished exequatur (in 2004, etc...); provided for limited grounds to refuse recognition and enforcement; or granted competence to review the decision only to the court of origin
- Special status after application or following harmonised civil procedure standards
- Should we keep them after Brussels I *bis*? YES – *less grounds to refuse recognition; leeway to harmonization of procedural law*



# Conclusions

An analysis on Art 67 Brussels I bis Regulations shows

- Practical coordination complexities
- Necessity (or opportunity) for normative changes in the current legal framework
- Policy-making value oriented considerations on the emergence on the possible emergence of an “*EU optional civil procedure*”

Certainly, not all such elements were foreseeable at the beginnings of the research.



Thank you for your attention!

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# *Enhancing Enforcement under Brussel Ia Regulation*

**Final Conference, 23rd November 2020, (Nice, France)**

Jessica SANCHEZ

Chirouette ELMASRY

Paula-Carmel ETTORI

Investigation conducted in the framework of "Enhancing Enforcement under Brussels Ia" – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598

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Directed by :

- Professor Giulio  
Cesare GIORGINI

-Professor Jean-  
Sylvestre BERGE

## 3 themes :

- Topic IV : Connections, disconnections and fragmentation in international civil procedure : the case of intellectual property rights (Paula ETTORI)
- Topic VIII : Enforcing and coordinating Brussels Ia and international law : future perspectives (Jessica SANCHEZ)
- Topic IX : Enforcing and coordinating Brussels Ia with “other” Brussels Regulations (Chirouette ELMASRY)



# THE MAIN OBJECTIVES OF THE PROJECT:

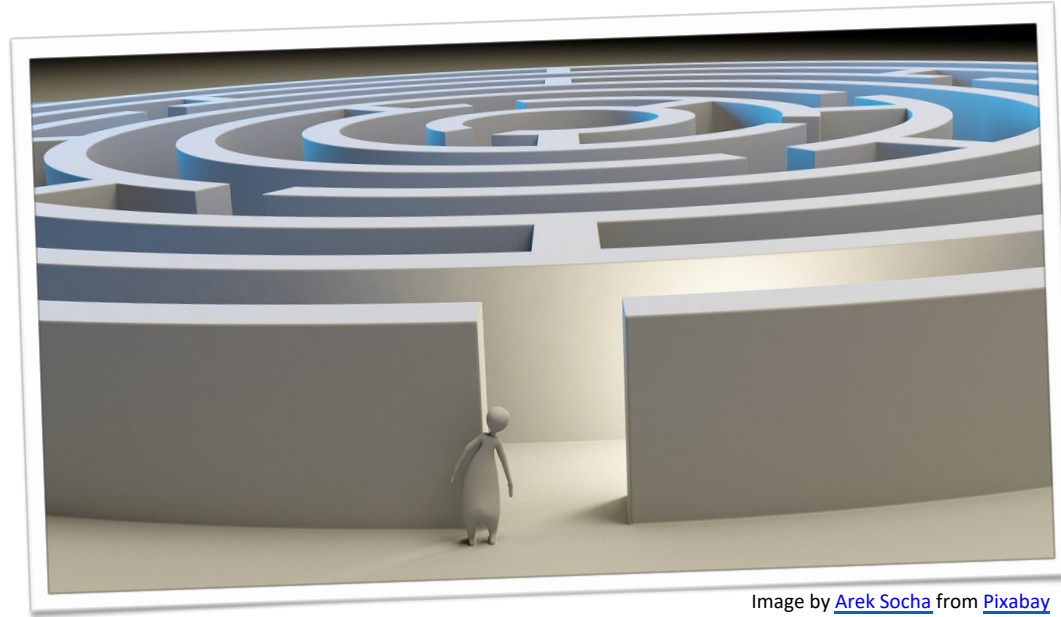


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- To create a database listing a selection of decisions concerning the application of art. 67 of Brussels Ia regulation
- To shed light on the terms whereby the relationship between the Brussels Ia and other EU or international instruments is to be handled

# I. METHODOLOGY







































# I. METHODOLOGY : COMMON STEPS



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- Collection of published French language decisions concerning Brussels and Brussels Ia Regulation from Belgium, France and Luxembourg
- Creation of a shared file on One Drive to list, by date and country of jurisdiction, the decisions which mentioned Brussels regime.
- Cross-referencing the used databases (national, European and international databases)
- Regular meetings for the team with the supervisors

	Nom 	Modifié 	Modifié par 	Taille du fichier 	Partage
	ECJ	15 juin	Giulio-Cesare Giorgini	3 éléments	 Partagé
	Luxemburg	2 mai	Giulio-Cesare Giorgini	10 éléments	 Partagé
	France	2 mai	Giulio-Cesare Giorgini	15 éléments	 Partagé
	Belgium	2 mai	Giulio-Cesare Giorgini	4 éléments	 Partagé

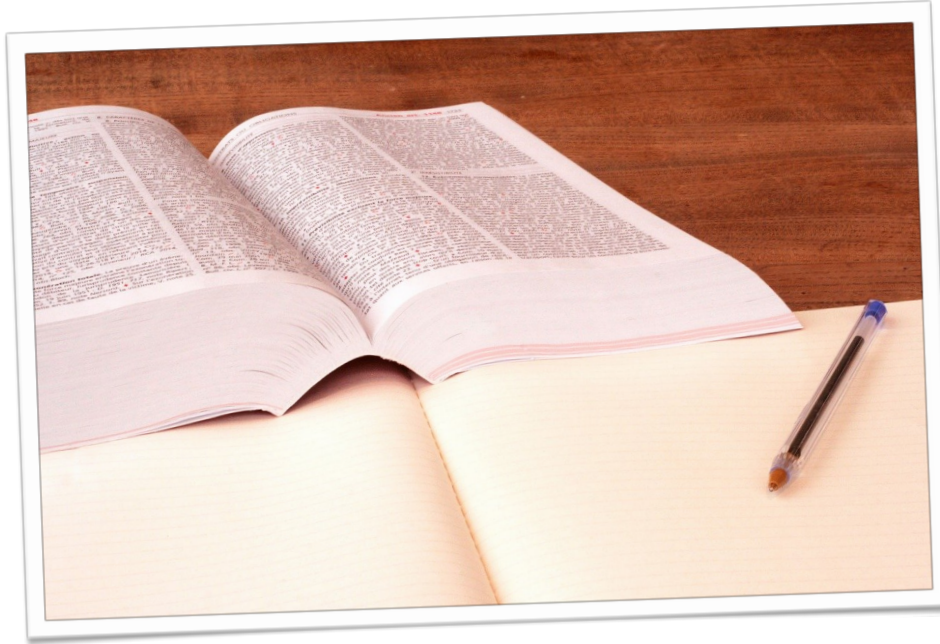
	Nom 	Modifié 	Modifié par 	Taille du fichier 	Partage
	2020	25 mai	Paula-Carmel Etti	4 éléments	 Partagé
	2010	25 mai	Paula-Carmel Etti	4 éléments	 Partagé
	2009	25 mai	Paula-Carmel Etti	3 éléments	 Partagé
	 2008  	25 mai	Paula-Carmel Etti	3 éléments	 Partagé
	2007	25 mai	Paula-Carmel Etti	4 éléments	 Partagé
	2006	25 mai	Paula-Carmel Etti	5 éléments	 Partagé
	2011	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé
	2012	4 mai	Giulio-Cesare Giorgini	2 éléments	 Partagé
	2013	4 mai	Giulio-Cesare Giorgini	1 élément	 Partagé
	2014	4 mai	Giulio-Cesare Giorgini	1 élément	 Partagé
	2015	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé
	2016	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé
	2017	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé
	2018	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé
	2019	4 mai	Giulio-Cesare Giorgini	3 éléments	 Partagé

## I. METHODOLOGY : COMMON STEPS



- Documentation of the decisions in an Excel spreadsheet
- Listing and analysis of pertinent decisions by chapters
- Summarizing of the the solutions and translation in English
- Synthesis in preparation of the published work (book)

# I. METHODOLOGY : TOPIC VIII



2 different drafts:

- The first one to highlight all issues and stakes of the subject
- The second one to get answers and to analyse the precedents that I found

For that :

- articles, reviews, books
- careful use of keywords
- techniques of interpretation of case law (*technique de cassation*, etc.)
- several exchanges with my tutor Prof. BERGÉ.

## I. METHODOLOGY : TOPIC IV



- Print researches to develop a global perspective
- Classify the results in tables
- Scholar process for redaction

# I. METHODOLOGY : TOPIC IX

- Analysis and summary of pertinent case law
- 2 notes related to the precedents issued
- Further research regarding the identified issues
- Focus on the reconciliation between the Brussels Ia Regulation and other instruments within the EU
- Highlighting of the effects of identified issues on Private International law
- Discussions with my supervisor Prof. GIORGINI about different ideas



## II. DIFFICULTIES

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- Personal / psychological difficulties:
  - ✓ Teleworking
  - ✓ Lack of socialisation
  - ✓ Repetitive phases

## II. DIFFICULTIES



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- Technical difficulties:
  - ✓ Excel spreadsheets
  - ✓ Mass of decisions
  - ✓ Foreign jugements
  - ✓ Legal loopholes
  - ✓ Restrictive access to sources

# III. CONCLUSIONS OF THE RESEARCH

### III. CONCLUSIONS : TOPIC IV

- *Does their application of the Regulation effectively resolve jurisdictional conflicts and problems related to the recognition of foreign legal decisions regarding intellectual property?*
  - 4 notable difficulties
  - Various responses of national judges within the EU
- Propose some potential solutions in order to improve the way the Brussels Ia Regulation is applied to intellectual property matters

### III. CONCLUSIONS : TOPIC VIII

- The practical application of the Brussels Ia Regulation does not cause any insurmountable difficulties when it overlaps with international conventions.
- The interactions between the Brussels I bis Regulation and international conventions are not limited only to instruments that discuss jurisdiction, recognition, and enforcement of judgments.
- No relevant judgments have mentioned certain International conventions (Hague conventions from 2005 and 2019).
- For the future, three main areas deserve the full attention of legislators, judges, and legal scholars.

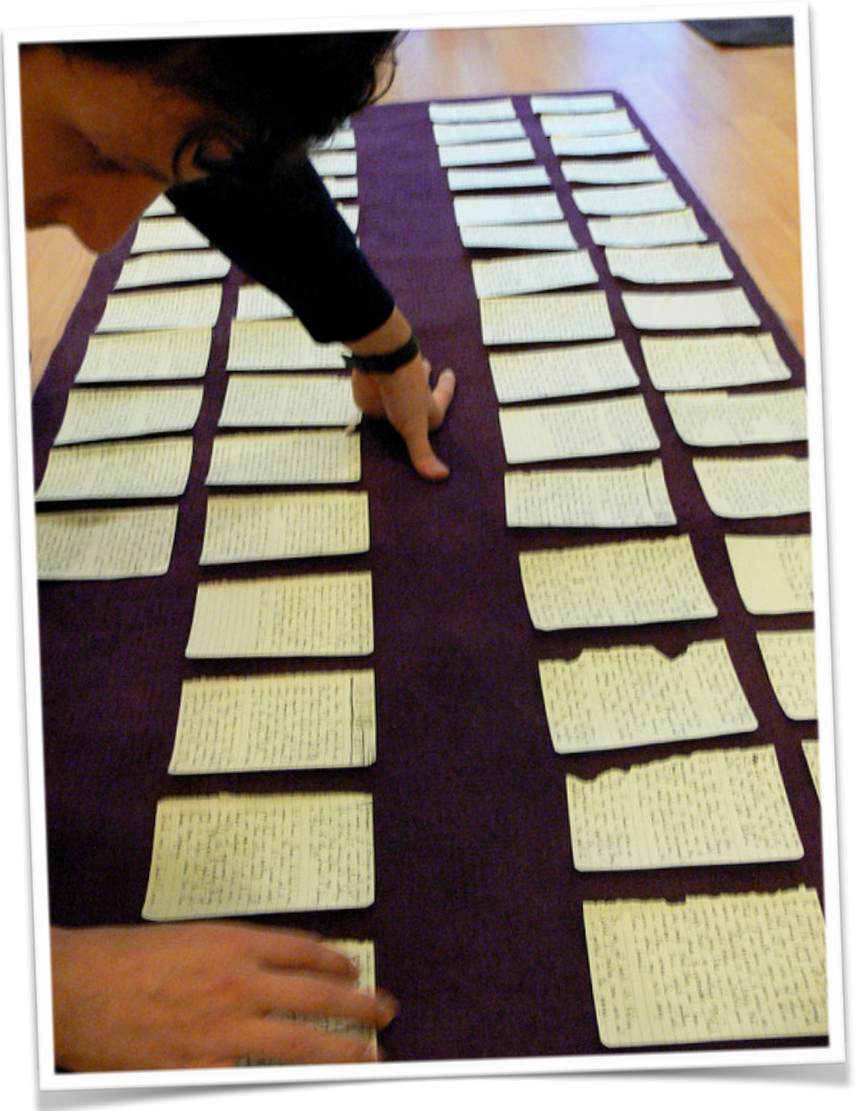
### III. CONCLUSIONS : TOPIC IX

- The case law collected provides useful indications as to the concrete challenges of reconciling the Brussels Ia Regulation with special instruments
- Most of the decisions revolve around two subjects: family matters and handling insolvency
- Reconciling Brussels Ia Regulation with other instruments is a complex matter given legal actions that have different grounds
- The reconciliation of instruments have significant effects on the material objectives pursued by European Private international law such as :
  - the protection of weak parties
  - the allocation of transaction costs

# IV. THE FUTURE

## IV. THE FUTURE : TOPIC IV

- Use of « *Soft Law* »
- «*Consolidation*» and «*specialization*» of national judges
- Expand the exclusive jurisdiction of Article 24.4 Brussels Ia Regulation



## IV. THE FUTURE : TOPIC VIII

- The Brussels regime should be able to adapt to fundamental changes in society.
- Questions about the future relationship between the EU and the United Kingdom because of the Brexit : consequences for the application of Brussels regime.
- The potential codification of the European private international law.



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## IV. THE FUTURE : TOPIC IX



- Proposed solutions to improve the application of the Brussels I bis Regulation
- Propositions to facilitate the work of judges
- Involving easier access to information, through the widespread creation of national databases extending the initiative of research group En2Brla
- Enriching the existing EUR-Lex database
- Revision of the Brussels I bis Regulation



Thanks for your attention

Jessica SANCHEZ

Chirouette ELMASRY

Paula-Carmel ETTORI