

A EUROPEAN REGULATION FOR INTERNATIONAL PROPERTY LAW

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SUMMARY: I. INTRODUCTION.— II. DESIRABILITY OF A EUROPEAN REGULATION ON INTERNATIONAL PROPERTY LAW: 1. *Lex situs* as common principle but multiple differences in detail: 1.1 Traditional approaches: Spain and Germany as examples; 1.2 French draft PIL Act: traditional and unilateral; 1.3 Modern approaches: Dutch law as an example; 2. Interim Conclusions; 3. Greater visibility.— III. SOME CENTRAL POLICY ISSUES: 1. *Lex rei sitae* versus freedom of choice of law; 2. Security rights and mobile conflict: 2.1 Overview; 2.2 Theoretical level: transposition v acceptance and substitution; 2.3 Advantages of a European Regulation.— IV. STATE OF REGISTRATION AS CONNECTING FACTOR FOR REGISTERED MOTOR VEHICLES.— V. CONCLUSION.

I. INTRODUCTION

Although it is a well-known fact for every participant in the project on «International Rights *in rem*», it might still come as a surprise to many who are dealing with European Private International Law (EU-PIL) only occasionally: There is until today no European Regulation on the law applicable to property rights. The EU has enacted unified

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PIL rules on contractual obligations,¹ tort, unjust enrichment and negotiorum gestio,² divorce,³ maintenance obligations,⁴ succession⁵ and matrimonial property,⁶ and has recently published proposals on the law applicable to the protection of vulnerable adults⁷ and on parenthood.⁸ So why is international property law left out of the European harmonisation process? May-be the unification of International Property Law is regarded as superfluous because it is already uniform enough through spontaneous harmonisation? A short tour covering some national PIL Acts and one recent prominent proposal will show the contrary (below, II.). The paper will then discuss some core issues such as freedom of choice of law in proprietary matters and potential solutions to the long-lasting problem of mobile conflict (below, III. and IV.). In doing so, this contribution will be limited to tangible movables and immovables. In conformity with the two academic proposals, one of which (GEDIP)⁹ is already complete, the other (EAPIL)¹⁰ still under way, this contribution will not cover intellectual property rights, receivables, virtual property, tokens, and crypto currencies.¹¹

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

³ Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).

⁴ 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.

⁵ Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁶ Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

⁷ See the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of measures and cooperation in matters relating to the protection of adults, COM/2023/280 final.

⁸ Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM/2022/695 final

⁹ As to the GEDIP proposal see GARCIMARTÍN-ALFÉREZ, F. p. 423 in this volume.

¹⁰ <https://eapil.org/what-we-do/working-groups/group-on-property-law>. On various aspects of the EAPIL draft see CUNIBERTI, G., PATRÃO, A. and SCHENK, J. p. 477 in this volume.

¹¹ See on these subjects in this volume «Challenges of rights *in rem* in the digital era», p. 631.

II. DESIRABILITY OF A EUROPEAN REGULATION ON INTERNATIONAL PROPERTY LAW

1. *Lex situs* as common principle but multiple differences in detail

1.1. *Traditional approaches: Spain and Germany as examples*

Traditionally, the *lex situs* rule is enunciated in few and rather short rules. A good example is Spanish law¹² (Art.10 C.c.) which has three short paragraphs, one on the general applicability of the *lex situs*, a second on *res in transitu*,¹³ and a third on planes, ships and railway rolling stock. There are no explicit rules on the scope of the applicable law, except the descriptive terms, in Art. 10 s. 1 C.c., of «possession, ownership and other rights over immovable or movable property and their publicity», nor is there a definition of the «material time» for the ascertainment of the *situs* of the asset, or any other rule on mobile conflicts.

Another, much more recent but still rather traditional text can be found in Arts. 43 et seq. of the German PIL Act (EGBGB). The Act dates from 1986 but the chapter on property law was only added in 1999¹⁴. Just like its Spanish counterpart, the first section of Art. 43 EGBGB¹⁵ enunciates the classic *lex situs* principle, the second deals

¹² *Artículo 10. Código civil:*

1. *La posesión, la propiedad, y los demás derechos sobre bienes inmuebles, así como su publicidad, se regirán por la ley del lugar donde se hallen. La misma ley será aplicable a los bienes muebles.*

2. *A los efectos de la constitución o cesión de derechos sobre bienes en tránsito, éstos se considerarán situados en el lugar de su expedición, salvo que el remitente y el destinatario hayan convenido, expresa o tácitamente, que se consideren situados en el lugar de su destino.*

3. *Los buques, las aeronaves y los medios de transporte por ferrocarril, así como todos los derechos que se constituyan sobre ellos, quedarán sometidos a la ley del lugar de su abanderamiento, matrícula o registro. Los automóviles y otros medios de transporte por carretera quedarán sometidos a la ley del lugar donde se hallen.*

¹³ On *res in transitu* see in this volume p. 141.

¹⁴ Gesetz zum IPR für außervertragliche Schuldverhältnisse und für Sachen from 21st May 1999, BGBl 1999, pp. 1026-1028. On the history of Art. 43-46 EGBGB see Ch. WENDEHORST, *Münchener Kommentar zum BGB*, vol 13., 8th ed., C.H.Beck, München, 2021, pp. 1435 et seq.; H.-P. MANSEL, *J. von Staudingers Kommentar zum BGB, Art. 43-46 EGBGB*, Otto Schmidt – De Gruyter, 2015, pp. 40 et seq.

¹⁵ Art. 43: Rights *in rem*

(1) Interests in property are governed by the law of the State in which the property is situated.

(2) If an item, to which property interests attach, gets into another State, these interests cannot be exercised in contradiction to the legal order of that State.

(3) If a property interest in an item that is removed from another State to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another State are considered as if they took place in this country.

Art. 45: Means of transport

with mobile conflict, albeit in a very general way, and the third relates to the situation where the acquisition of a property right requires more than one step and where some but not all steps have been fulfilled while the asset was in a foreign state. If the asset subsequently enters German territory (note that the rule is unilateral), acts that have already been performed while the asset was still abroad are deemed to have taken place at the new situs. This rule goes back to the famous *Strickmaschinenfall*¹⁶ in which the BGH had to deal with a retention of title that had been agreed upon while the goods (knitting machinery) were still in Italy, and which, according to Italian law as the applicable *lex situs*, only had effect *inter partes* for lack of a “data certa” (certain date) of the contract.¹⁷ Although German law does not have such a formal requirement and hence regards retention of title clauses which are concluded orally or in simple writing as perfectly opposable, the German Supreme Court had difficulties holding the retention of title as effective *erga omnes* once the goods had entered Germany. The court held that transposition of the formerly acquired right to its counterpart under the new *lex situs* could not create more rights in the hands of the secured party than which it had held prior to the move. In the case at hand, the BGH resorted to a very complex solution: it reinterpreted the contactual arrangements as a security re-transfer of the mere relative retention of title plus a new —retroactive— full retention of title, all under German law as the new *lex situs*. In order to prevent this kind of “judicial mental gymnastics”, the legislator, in 1999, introduced the (unilateral) rule in Art. 43 (3) EGBGB, which, today, can also be found as a multilateral rule in Art. 8 (4) of the GEDIP proposal. There is, in addition, a general escape clause in Art. 46 EGBGB.¹⁸ It has been tried to use it for the introduction of some degree of party autonomy¹⁹ but this has not been approved by the courts.²⁰

(1) Interests in airborne, waterborne and rail borne vehicles are governed by the law of the State of origin. This is 1. as to aircrafts the State of their nationality, 2. as to watercrafts the State where they are registered, otherwise the home port or home location, 3. as to rail vehicles the State of registration.

(2) The coming into existence of statutory security interests in these vehicles is subject to the law applicable to the underlying claim. The ranking among several securities follows Article 43 paragraph 1.

¹⁶ BGH, 02.02.1966 – VIII ZR 1535/64.

¹⁷ Art. 1524 (1) Codice civile.

¹⁸ This provision has recently been applied by the OLG Saarbruecken to claims under §§ 987 et seq. BGB (so-called owner-possessor relationship), ECLI:DE:OLG-SL:2023:0405.5U54.21.00. These rather special rules give the owner a right to claim compensation for the use, damage or destruction of an asset which another party has possessed without having a contractual or legal right to possession. The OLG held that those rights were governed by the former *lex contractus* rather than by the *lex situs*.

¹⁹ See H. STOLL, «Zur gesetzlichen Regelung des internationalen Sachenrechts in Artt. 43 – 46 EGBGB», in *IPRax*, vol. 4, 2000, pp. 264, 265.

²⁰ BGH 25.09.1996 – VII ZR 76/95.

Like the Spanish codification, the German Act does not contain any special rules for *res in transitu* or goods that are being exported. Moreover, it neither says anything on the exact scope of “property law” or on the material time at which the *situs* of the asset is to be determined, nor does the legislative text oblige the new *lex situs* to protect or transpose a right that has been created before. All these matters are left to the jurisprudence of the courts and to academic writing.²¹

1.2. French draft PIL Act: traditional and unilateral

The international property law section in the draft French PIL code currently under discussion²² is more elaborate than its Spanish or German counterpart, but no less traditional. Moreover, its rules are heavily influenced by French substantive law and in some important parts only unilateral. As a general rule, the French draft sticks to the *lex rei sitae*, see arts. 98,²³ 100²⁴ and 101²⁵. It tries to fix the time at which the *lex situs* is to be determined: For rights created by operation of law, it shall be the *situs* of the asset at the time when the right in question is invoked, see Art. 98. Likewise, art. 100 covering the powers (*prérogatives*) of the holder of a real right, and Art. 101, dealing with the opposability of a real right, point to the law at the moment in which the property right is exercised or the priority contest takes place. In distinguishing between the relationship among the parties to the transaction (Art. 99)²⁶ which is submitted to the law governing the transaction, for example a sales contract,²⁷ and the opposability of this

²¹ See H.-P. MANSSEL, *Staudinger, Art. 43-46 EGBGB, op.cit.*, pp. 17-20.

²² Projet de code de droit international privé, as published in March 2022, cf. D. BUREAU, H. MUIR WATT, «Codifier à contretemps», in *La semaine juridique, éd. G.*, 2022, No. 46, pp. 1309 et s.; H. MUIR WATT, D. BUREAU, S. CORNELOUP, «De codice ferendo?», in *Rev. crit. DIP*, 2022, No. 3, pp. 473-476; D. FOUSSARD, M.-L. NIBOYET, C. NOURISSAT, «Réflexions méthodologiques sur le projet de code de droit international privé», in *Rev. crit. DIP*, 2022, No. 3, pp. 477-501; P. LAGARDE, «Quelques remarques sur le projet de codification du droit international privé français», in *Rev. crit. DIP*, 2022, No. 3, pp. 515-520. On the property law section see E. SCHICK, S. NOYER, «Eigentumserwerb nach Vertragsstatut?», in *IPRax*, 2024, No. 2, pp. 161 et seqq.

²³ Article 98: Les modes d'acquisition ou de constitution d'un droit réel par l'effet de la loi sont régis par le droit du lieu de situation du bien au jour où ce droit est invoqué.

²⁴ Article 100: Les prérogatives du titulaire d'un droit réel sont régies par la loi de situation du bien au jour de leur exercice.

²⁵ Article 101: L'opposabilité aux tiers d'un droit réel est régie par la loi du lieu de situation du bien au jour où un tiers élève une prétention contraire ou concurrente.

²⁶ Article 99: Lorsque l'acquisition ou la constitution d'un droit réel résulte soit d'un acte soit des

conséquences d'un fait, soumis à une loi propre déterminée en application du présent code, les rapports entre les parties sont régis par cette loi.

²⁷ See E. SCHICK, S. NOYER, „Eigentumserwerb nach Vertragsstatut?“, in *IPRax*, 2024, No. 2, pp. 160-166, 161 et seq.

contract as against third parties (Art. 101), which is submitted to the *lex situs*, the PIL rules closely mirror French substantive law. These rules work well in a consensual system but are difficult to apply to a property law system like the German one, where the dividing line is between the contractual and property law aspects of a transaction and where there are property law aspects also *inter partes*. This proprietary inter-partes-relationship cannot be governed by a jurisdiction (e.g. a chosen law) which is different from the one governing the third party effects or *opposabilité*, which is determined by the *lex situs*.

Moreover, a number of rules are only drafted unilaterally, for example the rule on recognition, art. 102,²⁸ or the rule on *res in transitu*, art. 104.²⁹ The rule on recognition only contemplates the situation that the collateral was brought to France, but does not provide a solution if, for example, a movable asset is moved from France to another state. Therefore, if an asset was pledged by a French company to a French bank while the asset was in France but was subsequently brought to Belgium: Which law should a French court apply in the event of default, if the bank wants to claim repossession from the pledgor? Under art. 101 it seems to be Belgian law, but art. 102 and art. 103³⁰ say nothing about the treatment of the security right under Belgian law. It is evident that French Private International law cannot prescribe how Belgian courts should treat a French security right, but if the case comes in front of a French court:³¹ why should it not uphold the rights of the original French pledgee as far as they are not contrary to Belgian law or at least transpose those rights to their Belgian equivalent? To these shortcomings one may add the fact that the French draft has no special rule on means of transportation (aircraft, vessels and trains) which puts it out of step with practically all EU Member States who submit real rights in such highly mobile assets to the state of nationality or registration.³² By way of conclusion, it seems that property law was not in the forefront of the drafters' attention. As a result, the French draft cannot serve as a blueprint for a European regulation.

²⁸ Article 102: Les droits du titulaire d'une sûreté réelle, soumise à une loi étrangère et grevant un

meuble corporel ultérieurement introduit en France, sont reconnus en France s'il existe une sûreté française comparable.

²⁹ Article 104: Les biens en transit en France sont soumis au droit de l'État de destination.

³⁰ Article 103: L'opposabilité de la sûreté est subordonnée à l'accomplissement des formalités requises pour la sûreté française comparable.

Le constituant qui introduit en France un bien gagé doit en informer le titulaire de la sûreté afin de lui permettre d'accomplir utilement ces formalités. À défaut, il encourt les peines prévues par l'article 314-5 du code pénal et il est déchu du bénéfice du terme.

³¹ The exclusive head of jurisdiction in Art. 24 Nr. 1 Brussels Ibis-Regulation is limited to litigation concerning real rights in immovables.

³² V. par ex. Art. 45 EGBGB (Germany); Art. 89 Belgian PIL Code; § 33 IPRG (Austria); Art. 10:127 B.W. (Netherlands).

1.3. *Modern approaches: Dutch law as an example*

Many Member States have rather recent codifications of PIL, including International Property Law, among others Belgium (2004),³³ Romania (2011)³⁴ and the Netherlands (2011). The limited space does not permit me to give an overview of all of them.³⁵ Therefore Dutch law which stems from 2011 shall serve as a prominent example for a modern codification of international property law.³⁶ It is far more able to serve as a starting point and source of inspiration for a European Regulation than the French draft, since the Dutch approach is comprehensive, multilateral, not directed at a specific national substantive property law system, and contains some interesting deviations from the *lex situs* principle.

Art. 10:127 B.W. starts in section (1) with the *lex situs* as the principal connecting factor,³⁷ from which sections (2) and (3) exempt registered ships and aircraft whose property regime is submitted to the state of registration.³⁸ Section 4 describes in a non-exclusive manner the scope of international property law,³⁹ whereas section 5 defines

³³ Art. 87 et seq. Wetboek Internationaal Privaatrecht 16. juli 2004.

³⁴ A French translation can be found in C. AVASILENCEI, L. PICARCA «Nouveau Code Civil Roumain. – Livre VII, traduction», in *Rev.crit. D.I.P.* 2012, No. 2, pp. 459 et seqq.

³⁵ See in greater detail E.-M., KIENINGER; „Das internationale Sachenrecht als Gegenstand eines Rechtsakts der EU – eine Skizze“, in K. HILBIG-LUGANI, D. JAKOB, G. MÄSCH, G. (eds.), *Festschrift für Dagmar Coester-Waltjen*, Gieseking, Bielefeld, 2015, p. 469.

³⁶ Wet van 19 mei 2011, Staatsblad 2011, no. 272. For a general overview see A.V.M. STRUYCKEN, «The Codification of Dutch Private International Law: A Brief Introduction to Book 10 BW», in *RebelsZ*, vol. 78, 2014, No. 3, 592.

³⁷ Article 10:127 Law applicable to things and real property rights in things
1. Unless provided otherwise in paragraph 2 and 3, the real property regime for things shall be governed by the law of the State on the territory of which that thing finds itself.

³⁸ 2. Except where it concerns the application of Article 10:160, the real property regime for registered ships and vessels shall be governed by the law of the State where that ship or vessel is registered.

3. The real property regime for registered aircraft and aircraft only registered in a nationality register as referred to in Article 17 of the Convention on International Civil Aviation, concluded at Chicago on 7 December 1944 (Government Gazette 1947, H 165), shall be governed by the law of the State where the aircraft is registered or is registered in the nationality register.

³⁹ 4. The law applicable pursuant to the previous paragraphs shall in particular govern:
a. whether a thing is movable or immovable;
b. what the components of a thing are;
c. whether the right of ownership of a thing can be transferred or whether the thing can be encumbered with a limited real property right;
d. the requirements set out for such transfer or encumbrance;
e. the real property rights that can be vested in a thing, and the nature and content of such rights;

f. the manner in which real property rights in a thing may come into existence, may be changed or passed on, or cease to exist, and the mutual relations between those rights.

the material time.⁴⁰ Furthermore, the Dutch code has specific rules for retention of title (Art. 10:128), which provides for a limited freedom of choice of law (country of destination instead of *lex situs* at the time of delivery)⁴¹ and for rights of retention which are governed by the law of the legal relationship on which right of retention is based.⁴² The change of the applicable law following a change of the *situs* is addressed in Art. 10:130⁴³ which preserves the rights acquired under the old *lex situs* and only submits their exercise to the new *lex rei sitae*. Art. 10:131 on acquisition from a non-owner unsurprisingly submits *bona fide* acquisition to the *lex situs* at the relevant time.⁴⁴ Of greater interest is Art. 10:133⁴⁵ on “things transported under an international contract of carriage of goods”, which, in section (1), adopts the classical *res in transitu* rule (country of destination) but in section (2) exempts goods

⁴⁰ 5. Where it concerns the acquisition, encumbrance (establishment), passage, changing or ending of real property rights in a thing, decisive for the purpose of the previous paragraph shall be the moment on which the legal facts, required for such action, take place.

⁴¹ Article 10:128 Retention of title

1. The real effects of a retention of title shall be governed by the law of the State on the territory of which the thing finds itself at the moment of its legal delivery to the buyer. This does not affect the obligations which according to the law that is applicable to the stipulation of a retention of title, may result from that stipulation.

2. In derogation from the first sentence of paragraph 1, parties may agree that the real effects of a retention of title for a thing intended to be exported, shall be governed by the law of the State of destination if according to that law the seller's right of ownership shall not be lost until the price has been paid fully to him. A designation (choice of law) agreed as such shall have effect only if the thing actually is imported in the designated State of destination.

3. The previous paragraphs apply accordingly to the real effects of financial and operational leasing of things that are intended to be used abroad.

⁴² Article 10:129 Right of retention

Without prejudice to Article 10:163, beginning and under (a), the arising (coming into existence) and content of a right of retention shall be determined by the law governing the legal relationship on which that right of retention is based.

⁴³ Article 10:130 Real property rights in things moved to another State
Real property rights in a thing that have been acquired or established in conformity with the present Title (Title 10.10), remain vested in that thing, also when that thing is moved to another State. These real property rights cannot be exercised in a way which is incompatible with the law of the State on the territory of which that thing finds itself at the moment that these rights are exercised.

⁴⁴ Article 10:131 Acquisition from a person without a right of disposition
The legal effects of the acquisition of a thing acquired from a person without any right of disposition, shall be governed by the law of the State on the territory of which that thing finds itself at the moment of that acquisition.

⁴⁵ Article 10:133 Thing transported under an international contract of carriage of goods

1. The real property regime for a thing which is transported under an international contract of carriage of goods, shall be governed by the law of the State of destination.

2. If the transport meant in paragraph 1 takes place in the performance of a sale contract or another contract containing an obligation to transfer the transported thing, or in the performance of a contract containing an obligation to establish a real property right in that thing, then the designation of the law which is applicable to that contract, as inserted in that contract, is deemed to be, in derogation from paragraph 1, also to relate to the real property regime applicable to the transported thing.

transported with a view to fulfil a contract of sale, in which case the *lex contractus* shall apply to the proprietary aspects as well.

2. Interim Conclusions

Even after this short and superficial *tour d'horizon*, it is quite clear that autonomous International Property Law in the EU Member States is far from uniform. Differences relate first of all, to the fundamental question of what exactly is «property law»: Let us take the simple example of a transfer of ownership following a contract of sale: is property law only the third-party effectiveness (opposability) of the contract? Or do we mean a separate legal relationship that is added to the contract, and may even exist independent of the validity of the contract? This is a rather important question: under the first approach, there are no «property law relationships» between the parties —everything is governed by the contract and hence, under Art. 3 Rome I—Regulation, by freedom of choice of law. Under the second approach, there are «propriety relationships» even among the parties to the contract. The lack of awareness of these fundamental differences on the level of substantive law (which are so much more prominent in property law than in contract law) can lead to severe misunderstandings, see the famous Recital (38) of the Rome I regulation.⁴⁶ Another potential issue are statutory rules that seek to protect certain groups of creditors whose claims are privileged by the legislator such as, e.g. a vendor with respect to the price or a repairer with respect to his salary. These rights can take various forms: retention rights, *privileges spéciaux*, statutory liens or pledges etc. Are these property rights or are they more closely connected with the contractual claim which they seek to protect?

Apart from such fundamental differences of conception, there are many differences in detail. Should special situations like transactions over goods in transit or rights of retention be left to a general escape clause (and therefore to case law)? If not, should one opt, with regard to goods in transit, for the law of the state of dispatch⁴⁷ or of the state of destination? Should the latter only govern under the condition that the goods reach this state? As regards retention of title or goods to be exported: should freedom of choice of law be able to play a (limited) role like in the Dutch codification? As to means of transportation —are they submitted to the state of registration? Should the rule be extended beyond aircraft, vessels and railway rolling stock also to motor vehicles generally (see below, IV.)?

⁴⁶ See in greater detail E.-M. KIENINGER, „Die Vereinheitlichung des Kollisionsrechts der Abtretung“, in BASEDOW, J./REMIEN, O./WENCKSTERN, M. (eds.), *Europäisches Kreditsicherungsrecht*, Mohr Siebeck, Tübingen, 2010, pp. 147-171 (152 et seq.).

⁴⁷ This is the solution under Polish PIL, see M. PAZDAN, „Das neue polnische Gesetz über das internationale Privatrecht“, in *IPRax* 2012, No. 1, p. 81.

Last, but certainly not least, the Dutch codification includes special rules for the acquisition *a non domino* whereas German law or the French draft rely on the general *lex situs* rule and leave the protection of cultural goods to internationally mandatory rules. By way of contrast, GEDIP has adopted a special proposal for stolen or illegally exported goods,⁴⁸ giving the claimant the right to choose between (a) the law of the State in which the object was located at the time of its theft or illegal removal from that State; (b) the State in which the object was located at the time of the acquisition of possession by the defendant subsequent to the theft or illegal removal; or (c) the State in which the object was located at the time of the filing of the action.⁴⁹

From the perspective of the Common Market, probably the most pressing issue is the treatment of security interests after a change of the situs.⁵⁰ Here again, we can find divergent rules and approaches: some codifications have no statutory rules and leave the problem to case law and general principles such as the protection of acquired rights, international mandatory rules in the public interest or *ordre public*. Other texts include rules on mobile conflict, some of which are of limited practical value such as the draft French Art. 102 which demands recognition if there is a comparable French security right, but subordinates the third-party effectiveness to the completion of the formalities under French law without contemplating a grace period or a retroactive effect. We will come back to this issue under III.

3. Greater visibility

But even if there was greater harmony, visibility and therefore legal certainty could still be enhanced by creating a European regulation. In most Member States, conflicts rules are to be applied «*ex officio*».⁵¹ Nevertheless, there are numerous cases in which parties or even the courts themselves⁵² tended to overlook that the fulfilment of a contract often has a property law side, too. Perhaps the most prominent and

⁴⁸ <https://gedip-egpil.eu/wp-content/uploads/2023/06/The-law-applicable-to-rights-in-rem-in-corporeal-assets-%E2%80%93-Special-rules-for-cultural-objects-1.pdf>.

⁴⁹ See on the GEDIP proposal GARCIMARTÍN-ALFÉREZ, in this volume ###

⁵⁰ See also G. CUNIBERTI, «Rethinking Conflict Mobile – Applying the Law of the COMI to Rights *in rem*» (in this volume).

⁵¹ Cf. E.-M., KIENINGER, «Ascertaining and Applying Foreign Law», in LEIBLE, S. (ed.), *General Principles of European private Law*, 2016, pp. 357-373; S. CORNELOUP, «Rechtsermittlung im Internationalen Privatrecht der EU: Überlegungen aus Frankreich», in *RabelsZ*, vol. 78, 2014, no. 4 pp. 844-862; C. ESPLUGUES MOTA, «General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe», in ESPLUGUES MOTA, C./ IGLESIAS BUHIGUES, L./PALAO MORENO, G. (eds.), *Application of Foreign Law*, Sellier, Munich, 2011, pp. 3 et seq.; T. C. HARTLEY, «Pleading and Proof of Foreign Law: The Major European Systems Compared», in *ICLQ* vol. 45, 1996, No. 2, pp. 282 et seq.

⁵² See e.g. BGH Urteil v. 10.6.2009, *NJW* 2009, No. 38, pp. 2824-2826.

exceptional case⁵³ concerned Uranium, which was stored by a German subsidiary of Siemens in Germany throughout the whole time, and was the subject of various contracts governed by foreign law with different parties from all over the world involving several millions of Euros. None of the parties, including a large Swiss bank, realised that the contracts also had to be fulfilled through proprietary transactions, and that, given the German situs of the uranium storing facilities, German law was applicable throughout. The German Highest Civil Court (BGH) had to reinterpret the contractual arrangements retrospectively, based on German law, to find out what property rights were created or transferred.

This lack of awareness is enhanced by the fact, already mentioned in the beginning, that nearly all areas of Private International law, including family law are europeanised, therefore contributing to the false impression that property law was somewhat less relevant.

III. SOME CENTRAL POLICY ISSUES

If the European legislator will attempt to unify International Property Law, two central policy questions stand out of the plethora of issues:

1. *Lex rei sitae* versus freedom of choice of law

Granting more freedom of choice of law seems to be one of the cornerstones of the development of European PIL, especially in areas that traditionally seemed rather hostile to the idea such as divorce or succession.⁵⁴ Yet, with respect to property law, discussion seems to have moved away from free choice.⁵⁵

In essence, property law is about the solution of priority conflicts. This fact is very well visible in those legal systems, where property rights, including ownership, are regarded as relational rights: the question is not so much, whether X or Y own a certain asset, but rather, whether X or Y have a better or prior right to a certain asset. Examples for this approach can be found in the US and in the Scandinavian coun-

⁵³ BGH, Urteil v. 20.7.2012 - V ZR 135/11, note. T. RAUSCHER, *JZ*, vol. 68, 2013, No. 6, 305-308.

⁵⁴ See K. KROLL-LUDWIGS, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Mohr Siebeck, 2013 passim; J. BASEDOW, «The Law of Open Societies – Private Ordering and Public Regulation of International Relations», in *The Hague Academy of International Law Monographs*, vol. 9, Brill Nijhoff, Leiden, 2015, p. 164 et seq.

⁵⁵ For a discussion of the pros and cons of freedom of choice in property law see E.-M. KIENINGER, «Freedom of Choice of Law in the Law of Property», in *European Property Law Journal*, vol. 7, 2018, No. 3, pp. 221-245.

tries.⁵⁶ But also in continental European systems, property law can be regarded as the solution of priority conflicts: The question whether and under which conditions Y has become the owner of an asset through bona-fide acquisition from the non-owner X at the expense of the true owner A, can also be coined in the term of a priority conflict: whose rights are prioritised by a given legal system, those of Y, the person, who trusts the apparent powers of X to transfer ownership, or those of A?

If property law is about solving priority conflicts between two parties who are not related by a contract but by the fact that they assert rights in the same asset, it is evident that this conflict must be solved through the application of a single law which is determined objectively. Hence, the law governing each of the conflicting transactions (i.e. freedom of choice of law) is not able to solve the priority conflict.⁵⁷ This is the lesson that can be drawn from the (still ongoing)⁵⁸ negotiations of the draft regulation on the third-party effectiveness of assignments:⁵⁹ It has been argued in the past that the time-sequence of the events should provide for a kind of meta PIL rule:⁶⁰ One could first examine the first assignment, and then the second assignment. If the first assignment already transferred the claim, there is nothing left to be transferred to the second assignee. The problem is clearly evidenced by a recent German case, which involved a double assignment of the same claim, first, to a German and, second, to a Luxemburg bank under German and Luxemburg law

⁵⁶ See in greater detail E.-M. KIENINGER „Sachenrechtliche Prinzipien und Grundbegriffe als Gegenstände der Rechtsvergleichung“, ZIMMERMANN, R. (ed.), in *Zukunftsperspektiven der Rechtsvergleichung*, Mohr Siebeck, Tübingen, 2016, 139-166.

⁵⁷ On the „unsurmountable“ difficulties to solve priority conflicts of multiple assignments of the same claim through applying Art. 14 (1) Rome I-Regulation see P. MANKOWSKI, «Proprietary aspects of assignments of claims in private international law», in *NIPR* 2018, No. 1, pp. 26 - 49 at 35 with multiple references.

⁵⁸ On the current status see H.-P. MANSEL, K. THORN, R. WAGNER, „Europäisches Kollisionsrecht 2023: Zeit der Trilogie“, in *IPRax*, vol. 2, 2024, pp. 82.

⁵⁹ See Commission Proposal COM (2018) 96 final; cf. A. DICKINSON, «Tough Assignments: the European Commission's Proposal on the Law Applicable to the Third-Party Effects of Assignments of Claims», in *IPRax*, 2018, No. 4, pp. 337-345; P. MANKOWSKI, «Der Kommissionsvorschlag zum Internationalen Privatrecht der Drittwirkung von Zessionen», in *RIW*, 2018, pp. 488-502.; L. HÜBNER, «Die Drittwirkungen der Abtretung im IPR – Ein weiterer Schritt zur Fortentwicklung des Europäischen Kollisionsrechts», in *ZEuP*, 2019, No. 1, pp. 41-71; H. KRONKE, «Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's Proposal», in *Oslo Law Review*, vol. 6, 2019, No. 1, pp. 8-18; E.-M. KIENINGER, «European rules on the law applicable to third-party effects of assignments: a never-ending story?», in *Uniform Law Review*, vol. 24, 2019, No. 4, pp. 633-648; the most comprehensive discussion of the pros and cons of the various solutions can be found in: P. MANKOWSKI, in *NIPR op. cit.*, 2018, pp. 26 - 49.

⁶⁰ See A. FLESSNER, VERHAGEN, in *Assignment in European Private International Law*, Sellier, Munich, 2006; A. FLESSNER, „Privatautonomie und Interessen im Internationalen Privatrecht, am Beispiel der Forderungsabtretung“, in HELDRICH, A. et al. (eds.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, Munich, C.H. Beck, 2007, p. 545.

respectively.⁶¹ The question is the following: What makes the claim disappear from the patrimony of the assignor? Is it the mere contract of assignment (German law) or is the transaction only opposable once it has been notified to the third-party debtor (Luxemburg law)? If one applies German and Luxemburg law in the order of time in which the assignment contracts were concluded, it is true that the German bank wins because German law requires no more than the mere conclusion of the contract of assignment. However, it is clear that this meta rule (sequence of timing) is in itself a rule of substantive law (unsurprisingly that of German law): the agreement as such suffices. The simple truth that freedom of choice of law is no solution for the third party effects of assignments has already been voiced nearly 70 years ago by Ernst Rabel: «The domicile of the assignor should be competent to determine priority in all cases. this is the true reason behind the situs doctrine.»⁶²

Just as much as freedom of choice of law is not a solution for the priority conflict between two assignments of the same claim, freedom of choice of law cannot govern the priority conflict between two different transactions relating to the same tangible movable. Instead, legal certainty and foreseeability of the applicable law, which are the cornerstones of PIL, need a connecting factor which is verifiable for all parties who assert real rights in the same asset. However, even such an objective connecting factor, i.e. the situs of the asset, can become unstable, which leads us directly to the second fundamental issue, the treatment of mobile conflicts (*conflict mobile*).

2. Security rights and mobile conflict

2.1. Overview

The question really is whether there is a PIL solution to the problem of mobile conflict especially when it comes to security rights in movables which is the main «battleground» for conflicts mobiles through a change of the situs.⁶³ The problem is not so much one of choice of law but of fundamental differences in substantive secured transaction

⁶¹ OLG Saarbrücken 8.8.2018 – 4 U 109/17, BeckRS 2018, 20145. The CJEU (unsurprisingly) held that Art. 14 Rome I Regulation was not applicable to the third-party effects of assignments, see ECLI:EU:C:2019:848 (note KIENINGER, E.-M., “Das auf die Drittwirkungen der Abtretung anwendbare Recht – Der EuGH spielt den Ball zurück nach Deutschland”, in *NJW*, 2019, No. 46, pp. 3353-3356).

⁶² E. RABEL, *The Conflict of Laws, A Comparative Study*, 2nd ed. Ann Arbor, 1958, p. 443.

⁶³ An innovative solution (COMI of the secured debtor as connecting factor) is presented by G. CUNIBERTI in this volume, p. 477. However, even if the European legislator were to adopt this innovation, its practical use would be limited to grantors domiciled in those Member States (and third states) which make the perfection of security rights dependent on some kind of registration. It can be doubted whether states which so far have no registration system will introduce one for the sole purpose of a PIL rule.

law.⁶⁴ Let us take Germany and Spain as examples: For 140 years,⁶⁵ German law has allowed the use of formal ownership as security and hence has a non-possessory security right without registration or any other form of publicity or formality;⁶⁶ even when it comes to remedies, there is great contractual freedom to circumvent the restrictions of pledge law as, for example, the prohibition of the *pacte comissoire* (§ 1229 BGB). Only the Insolvency Act (§ 51 No. 1, 165 et seq. InsO) and case law based on general rules of contractual fairness (§§ 138, 307 BGB)⁶⁷ provide some restrictions and safeguards. Spanish law, by way of contrast, has fairly strict statutory rules on the *prenda sin desplazamiento* and the *hipoteca mobiliaria* which both involve public registration.⁶⁸ It is evident, that Spanish law will have difficulties to simply accept a non-possessory security right constituted in an asset while it was in Germany, if a priority conflict takes place after the asset has been moved to Spain.⁶⁹

The best and most straightforward solution for the EU would be a harmonisation of substantive secured transactions law,⁷⁰ but prospects seem to be poor despite the recent and comprehensive work of the Study Group on a European Civil Code.⁷¹ The whole esprit that has supported the work on a European civil code has evaporated. The Draft Common Frame of Reference (DCFR) was reduced to the proposal for a Common European Sales Law,⁷² and after that failed for political reasons,⁷³

⁶⁴ See e.g. B. GRAHAM-SIEGENTHALER, *Kreditsicherungsrechte im internationalen Rechtsverkehr*, Stämpfli, Zürich 2005; E.-M. KIENINGER, *Security Rights in Movable Property in European Private Law*, Cambridge, Cambridge University Press, 2004; H. C. SIGMAN, E.-M. KIENINGER, *Cross-Border Security over Tangibles*, Sellier, München, 2007; FABER, W. *Entwicklungslinien und Entwicklungsperspektiven im Mobiliarsicherungsrecht*, Jan Sramek Verlag, Wien, 2023, pp. 5 et seqq.

⁶⁵ See Reichsgericht 10.1.1885, RGZ 13, 200.

⁶⁶ On the concept of publicity of mobile objects in German law see L. KAHL, *Publizitätswirkungen im Fahrnisrecht*, Tübingen, Mohr Siebeck, 2024.

⁶⁷ BGH 27.11.1997 – GSZ 1 and 2/97.

⁶⁸ Ley de 16 de diciembre de 1954 sobre hipoteca mobiliaria y prenda sin desplazamiento de posesión.

⁶⁹ On the refusal of French courts to accept a German Sicherungsübereignung see CUNIBERTI, G., op.cit. p. 477.

⁷⁰ As to possible ways ahead cf. M. BRINKMANN, *Kreditsicherheiten an beweglichen Sachen und Forderungen*, Tübingen, Mohr Siebeck, 2011, p. 468 et seqq.; T. JUUTILAINEN, *Secured Credit in Europe*, Oxford, Hart, 2018, p. 37 et seq.; E.-M. KIENINGER, *Security Rights in Movable Property* op. cit., pp. 664 et seq.

⁷¹ See C. VON BAR, E. CLIVE, H. SCHULTE-NÖLKE, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Munich, Sellier, 2009.

⁷² COM (2011) 635 final. For a critical appraisal see H. EIDENMÜLLER, N. JANSSEN, E.-M. KIENINGER, G. WAGNER, R. ZIMMERMANN, «The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law», in *Edinburgh LR* vol. 16, 2012, pp. 301-357.

⁷³ The proposal was withdrawn by the Commission on Dec. 16, 2014, cf. <https://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law> (13.5.2024).

it seems that interest was also fading for the other books although book IX on security rights in movable property⁷⁴ could have become the blueprint for a European substantive law harmonisation.⁷⁵

So, for the foreseeable future, private international law practice will have to live with the marked differences in the approach to security rights, differences which relate to rather fundamental principles of property law such as publicity (through possession, registration or notice-filing)⁷⁶, specificity⁷⁷ and *numerus clausus*.⁷⁸

2.2. *Theoretical level: transposition v acceptance and substitution*

Art. 8 of the GEDIP Proposal⁷⁹ is an example of a classic conflict mobile rule: The existence of the right continues to be governed by the *lex situs* under which it was created or acquired, whereas the new *lex situs* “governs the extent and the exercise of that proprietary right, and the priority between that proprietary right and a competing proprietary right created under the new law”. Material differences shall be overcome through “transposition” into the “closest equivalent proprietary right” under the new *lex situs* “if necessary and to the extent possible”. Transposition, a doctrine that goes back to *Hans Lewald*, was also the doctrine used by the German Supreme Court in the classic case in which a car, pledged in France with a “gage sùr véhicule” was brought to Germany and became attached on behalf of a German bank. In its reasoning, the court upheld the gage as a non-possessory pledge and

⁷⁴ See U. DROBNIG, O. BÖGER, «Proprietary Security in Movable Assets: Security Rights in Movables», in *Principles of European Law*, vol. 11, München, Sellier, 2015.

⁷⁵ Cf. T. JUUTILAINEN, *op. cit.*, p. 43 et seq. It has been a source of inspiration for the work of the group on security rights within the Henri Capitant Project on a Code Européen de Droit des Affaires. This draft has just been published (<https://www.henricapitant.org/actions/projet-de-code-europeen-des-affaires-2/>) and it remains to be seen to what extent the proposals will be taken up by Member states and/or the European institutions.

⁷⁶ Cf. T. JUUTILAINEN, *op. cit.*, p. 158 et seq.; on these publicity devices in the context of the DCFR see FABER, W. *Entwicklungslinien und Entwicklungsperspektiven im Mobiliarsicherungsrecht*, Wien, Jan Sramek Verlag, 2023, pp. 578 et seqq.; D.J.Y. HAMWIJK, *Publicity in secured transactions law: Towards a European public notice filing system for non-possessory security rights in movable assets?*, Thesis University of Amsterdam, 2014.

⁷⁷ The principle of specificity figures less prominently in the discussion on the cross-border recognition of security rights compared to those of publicity and *numerus clausus*. Yet, it can come into play with respect to the recognition of enterprise mortgages such as the floating charge of English law or the *nantissement de fonds de commerce* in French law, see F. DAHAN, *La floating charge dans les rapports internationaux de droit privé: essai sur la reconnaissance d'une institution étrangère*, Thèse Paris I, 1995.

⁷⁸ B. AKKERMANS, «The Principle of *Numerus Clausus* in European Property Law», in *Ius Commune Europaeum*, vol. 75, Antwerp-Oxford, Larcier-Intersentia, 2008.

⁷⁹ <https://gedip-egpil.eu/wp-content/uploads/2023/06/The-law-applicable-to-rights-in-rem-in-corporeal-assets-Consolidated-version.pdf>.

referred to *Lewald's* doctrine of transposition⁸⁰ without actually using this notion;⁸¹ it was only in a later case that the BGH retrospectively utilized the term “transposition” for the solution adopted nearly 30 years earlier.⁸²

Another theoretical possibility is acceptance and substitution.⁸³ Here, the foreign security right is not translated into a domestic right under the new *lex situs*; rather the foreign right continues to exist as such. If a new real right has been acquired under the new *lex situs* and hence a priority conflict needs to be solved applying the new *lex situs*, the latter will accept the previously acquired foreign right as a substitute of a right under the new *lex situs*. Substitution may be a less severe inroad into the recognition of acquired rights; it may lend itself better to a more generous acceptance of foreign rights. In German doctrine, it seems that the majority view is today in favour of acceptance and substitution as a theoretical foundation, rather than transposition.⁸⁴

2.3. *Advantages of a European Regulation*

Whatever the solution will be, a European Regulation on international property law cannot take away the marked differences of substantive law. It can try to introduce some innovations such as the one presented by *Gilles Cuniberti* in this volume. But the least it can achieve is an autonomous and uniform interpretation of the future European rules by the CJEU which in its turn will be influenced by the fundamental freedoms of the Common Market.

This is no small advantage as a rather recent case decided by the Austrian Supreme Court can demonstrate:⁸⁵ In a departure from its previous case law,⁸⁶ the Supreme Court ruled in January 2019, that a

⁸⁰ H. LEWALD, «Règles générales des Conflits de lois», in *Rec de Cours*, vol. 69, Brill/Nijhoff, 1939, pp. 129 et seq.

⁸¹ BGHZ 39, 173.

⁸² BGH NJW 1991, 1415.

⁸³ See J. RAKOB, *Ausländische Mobiliarsicherungsrechte im Inland*, Universitätsverlag C. Winter, Heidelberg, 2001, p. 42 et seq.;

⁸⁴ H.-P. MANSSEL, *Staudinger, Art. 43 EGBGB, op. cit.*, para. 1264 et seq.

⁸⁵ OGH 3 Ob 249/18s; cf. W. FABER, „In Deutschland publizitätslos begründetes Sicherungseigentum nach Grenzübertritt doch nicht unwirksam?“, in *ÖBA (Zeitschrift für das gesamte Bank- und Börsenwesen)* 2019, pp. 401-410; B. LURGER, „Aus einem hypothetischen Verstoß gegen die Grundfreiheiten folgt: Besitzloses (deutsches) Sicherungseigentum überlebt den Grenzübertritt nach Österreich nun doch“, in *IPRax*, vol. 6, 2019, pp. 560-565; E.-M. KIENINGER, „Grenzüberschreitende Kreditsicherung an Mobilien 2019: Pretoria, Wien, Brüssel“, in BENICKE, C./HUBER, S. (eds.) *Festschrift Herbert Kronke*, Giesecking, Bielefeld, 2020, p. 967 at 972 et seq.

⁸⁶ Vgl. OGH 3 Ob 126/83 SZ 56/188, JBl. 1984, 550; cf. F. SCHWIND, „„Hinkendes Eigentum“ im österreichisch-deutschen Rechtsverkehr – Ein juristischer Alptraum“, in MUSIELAK, H.-J./SCHURIG, K., *Festschrift Gerhard Kegel*, Stuttgart, Kohlhammer, 1987, p. 599.

German transfer of ownership by way of security remains effective as against third parties even after the collateral has been transferred to Austria. The case was based on the following facts: The defendants, domiciled in Germany, levied attachment against the debtor's movable assets. The debtor ran a restaurant in Austria, where a cash register and a car were seized. The plaintiff filed an action against the attachment stating that the collateral had been pledged to him as security for a private loan, whereby he had also obtained possession of those assets. Subsequently, he had handed them back to the debtor for use. According to the findings of the lower courts, it remained unclear whether the assets were located in Germany or Austria at the time of the transfer. However, from the point of view of the lower courts, this question was irrelevant because, after the change of location, only Austrian law was applicable, and, due to the publicity principle in § 451 ABGB, ownership by way of security was to be regarded as a non-possessory and hence invalid pledge. These findings of the lower courts were perfectly in line with the previous jurisprudence of the OHG: Section 31 para. 2 IPRG ('The legal category of the property and the content of the rights referred to in para. 1 are to be assessed in accordance with the law of the country in which the property is located.') was previously interpreted to mean that the publicity requirements of Austrian law must be met as a permanent requirement if the collateral comes to Austria.

However, in its 2019 decision, the Supreme Court performed a complete U-turn: Based on the principle of protection of acquired rights (Art. 7 PIL-Act) and without mentioning overriding mandatory provisions, the court held that the German security ownership now was to remain valid and effective *erga omnes* even after the collateral had been brought to Austria. The domestic requirement of dispossession could no longer be applied to a property right validly created under another, foreign *lex situs*. In an *obiter dictum*, the court considered a potential violation of the free movement provisions of the TFEU through non-recognition of foreign security rights, but since it decided the case solely on the basis of its interpretation of the Austrian PIL Act, it felt no need to refer the case to the CJEU.

In this case, the Austrian court decided on the bases of autonomous law. Elevating these principles to the European level, will have major consequences: Whether a future regulation will coin the continuous existence of previously acquired property rights in the rather traditional «transposition» terms of Art. 8 of the GEDIP proposal, or whether it will use a wording that is closer to the method of acceptance and substitution, whether it will restrict the grounds for non-recognition to matters of publicity or will continue to accept *numerus clausus* or specificity as grounds for non-recognition, whether it will impose a stricter obligation on Member States to «recognise» security rights created under the laws of other Member States (as opposed to rights created

under the law of third states): *all these provisions* will have to be interpreted in a uniform way by the courts and ultimately by the CJEU. The Luxembourg Court will have the possibility to control any restrictions on the continuous existence of property rights after a change of the situs within the EU in the light of the text of the regulation and, moreover, in the light of the fundamental freedoms and will thus be able to apply the threefold test of mandatory requirements in the public interest (existence of such requirements, suitability and proportionality) to any ground for non-recognition.⁸⁷ This by itself will be a major step forward and will prevent Member States' courts from resorting to purely formal constraints to the recognition of foreign security rights.

IV. STATE OF REGISTRATION AS CONNECTING FACTOR FOR REGISTERED MOTOR VEHICLES

As mentioned in the previous paragraph, publicity issues such as the major differences between the register-based system of Spanish law and the complete lack of publicity for security ownership under German law will remain problematic even if, under a future regulation, the CJEU can watch over the interpretation and application of the rules on mobile conflict. It is far better to avoid mobile conflicts altogether.

One possibility which would solve a large number of practically relevant cases, consists in expanding the rules on means of transportation already present in many Member States' international property laws to motor vehicles in general. The GEDIP proposal already moves in this direction and chooses the state of registration as the connecting factor for all means of transport (Art. 6) but the accompanying recital restricts the notion of «registration» to «registers that evidence proprietary rights». The EAPIL proposal intends to go beyond and propose the state of registration as connecting factor for all motor vehicles registered for the purpose of allowing their circulation in public roads. This rule already exists in Portuguese and Belgian PIL.⁸⁸ 33 years ago, when discussing the reform of the German EGBGB, the German Council of Private International Law dismissed this solution (which had pre-

⁸⁷ See already E.-M. KIENINGER, *Mobiliarsicherheiten im Europäischen Binnenmarkt*, Baden-Baden, Nomos, 1996; P. VON WILMSKY, *Europäisches Kreditsicherungsrecht*, Tübingen, Mohr Siebeck, 1996; Cf. T. JUUTILAINEN, *op. cit.*, p. 77 et seq.; W.-H. ROTH, „Secured Credit and the Internal Market“, EIDENMÜLLER, H./KIENINGER, E.-M. (eds.), *The Future of Secured Credit in Europe*, De Gruyter, Berlin, 2008, p. 36 et seq.

⁸⁸ Both jurisdictions apply the general rule on means of transport also to motor vehicles, see for Portugal Art. 46 (3) C.c., for Belgium Art. 89 PIL Act. In Belgium this is somewhat controversial. In favour of the inclusion of automobiles see e.g. F. RIGAUX, M. FALLON, *Droit International Privé*, Brussels, De Boeck & Larcier, 2005, p. 681; opposing C. CLIJMAN, *Het wetboek internationaal privaatrecht becommentarieerd*, Antwerp – Oxford/Brussels, Intersentia/Bruylant, 2006, pp. 458.

viously been proposed by *Drobnig*) as impractical because most if not all foreign PIL Acts at the time still adhered to the *lex situs* also with respect to motor vehicles; a solo effort by the German legislator would not enhance international cooperation and would not be of any use if German cars were sold or pledged abroad.⁸⁹ It goes without saying, that these arguments are no longer viable once a European regulation is on the table. Quite to the contrary, submitting real rights in motor vehicles to the state of registration would present a much more stable connecting factor compared to the *lex situs* and one which is visible for all interested parties through the number plate and the car licence. It would solve a larger part of concrete cases since motor vehicles are both highly valuable and highly mobile and often the subject of secured transactions.

V. CONCLUSION

It seems that the time has come to attempt a unification of international property law on the level of the EU. Like the previous PIL regulations, such act should take the form of a regulation of universal application. GEDIP has already submitted a concrete proposal, a second proposal will hopefully be on the table in the not too distant future. Although private international law cannot bridge gaps which are too wide to fill,⁹⁰ a European regulation can adopt some innovations such as the state of registration as connecting factors for rights in cars, and it will—most importantly—be uniformly interpreted by the Luxembourg court on the background of the fundamental freedoms of the TFEU.

⁸⁹ See K. KREUZER, „Gutachtliche Stellungnahme zum Referentenentwurf eines Gesetzes zur Ergänzung des Internationalen Privatrechts“, in HENRICH, D. (ed.), *Vorschläge und Gutachten zur Reform des deutschen internationalen Sachen- und Immaterialgüterrechts*, Tübingen, Mohr Siebeck, 1991, p. 37 at 125 et seq.

⁹⁰ See ULRICH DROBNIG, „Entwicklungstendenzen des deutschen internationalen Sachenrechts“, in: LÜDERITZ, A. (ed.), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts. Bewahrung oder Wende, Festschrift für Gerhard Kegel*, Frankfurt a.M., Metzner, 1977, pp. 141 et seq., 150: «*Stimmen die [beteiligten] Rechtsordnungen inhaltlich nicht überein, so vermag das Kollisionsrecht nur noch die Parole des Brückenbaus auszugeben, jedoch fehlt in seinem Arsenal das notwendige Baumaterial*».

