PRIVATE INTERNATIONAL LAW ON RIGHTS IN REM *IN THE EUROPEAN UNION*
DERECHO INTERNACIONAL PRIVADO SOBRE DERECHOS REALES EN LA UNIÓN EUROPEA
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WHAT ROLE FOR OVERRIDING MANDATORY PROVISIONS OF THIRD COUNTRIES IN CONFLICTS OF LAWS RELATING TO RIGHTS *IN REM* IN MOVEABLE NON-CULTURAL PROPERTY?

Pietro Franzina[*]
Catholic University of the Sacred Heart, Milan

I. THE CURRENT REFLECTION ON A POSSIBLE EU INSTRUMENT ON THE LAW GOVERNING RIGHTS *IN REM*

Two scientific projects are currently being carried out to reflect on the articulation and contents of a possible legislative measure of the European Union that would deal with the law applicable to rights *in*

[*] Full Professor of International Law at the Catholic University of the Sacred Heart, Milan (*pietro.franzina@unicatt.it*). This study has been conducted in the framework of the research Project I+D+i PID2020-112609GB-I00 «Property rights system over tangible goods in the field of European Private International Law: aspects of international jurisdiction and applicable law» funded by the Spanish Ministry of Science and Innovation (MICIU/AEI/10.13039/501100011033). Websites mentioned in this study were visited on May 2024.

rem over tangible property. One project is led by the European Group of Private International Law (GEDIP)[1], while the other unfolds in the framework of the European Association of Private International Law (EAPIL)[2].

The experts involved in both projects agree that the main rule in this area should be that rights *in rem* are governed by the law of the country where the assets are located, that is, the law of the situs, or *lex rei sitae*. They also agree, albeit with some nuances, that special rules are needed to complement, or deviate from, the situs rule, as regards particular kinds of assets or situations, such as goods in transit, goods to be exported and means of transport subject to registration. Cultural property, the experts further agree, should also be dealt with under special rules, aimed to combat illegal removal and preserve the national heritage to which the concerned assets belong.

The texts that the two team are preparing are expected to address, among other things, the issue of the role that overriding mandatory provisions should be permitted to play in this area. According to a generally accepted definition, codified in Article 9(1) of the Rome I Regulation on the law applicable to contractual obligations[3], overriding mandatory provisions are substantive provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the situation under the pertinent conflict-of-laws rules[4]. Overriding mandatory provisions are allowed to interfere, in appropriate circumstances, with the normal operation of conflict-of-laws rules. This way, the substantive policies served by such provisions are thus implemented in the forum, whatever the law specified under the applicable conflict-of-laws rules.

The latest draft released by GEDIP specifies that nothing in the proposed conflict-of-laws rules would restrict the application of the overriding mandatory provisions of the law of the forum. In addition, but only as regards claims for the recovery of stolen or illegally removed cultural objects, the court seized «may give effect» to the overriding mandatory provisions adopted for the protection of the national

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[1] Information on the project is available in the «Documents» section of the Group's website, under the heading 'Goods —Intellectual Property — Insolvency': *https://gedip-egpil.eu*.

[2] See further, within the website of the Association, the page of the working group charged with project, in the «What we do» section: https://eapil.org.

[3] Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, p. 6.

[4] On the notion of overriding mandatory provisions, as understood in EU law (and the law of Member States), see, generally, in the vast literature, F.M. Wilke, *A Conceptual Analysis of European Private International Law* (Intersentia 2019), p. 135 ff.

treasures by a foreign State other than the one whose law governs the matter, and with which the situation has a close connection.

This paper aims to contribute to the reflection on whether, in which circumstances and subject to which conditions, the overriding mandatory provisions of a law other than the *lex fori* and the *lex causae* (hereinafter, the law of a third country) should be allowed to interfere with the operation of a possible set of EU conflict-of-laws rules relating to rights *in rem*, as regards corporeal moveable property other than cultural property.

II. THE UNILATERALIST FLAVOUR OF THE *LEX REI SITAE* RULE: IS THERE ANY ROOM LEFT FOR OVERRIDING MANDATORY PROVISIONS IN THE FIELD OF RIGHTS *IN REM*?

Conflict-of-laws rules are shaped by multiple factors. These may include a concern for the realisation of the substantive policies of the State, or States, that the legislator regards as the most affected by the situation, or the most interested in governing the social or economic reality considered. The *lex rei sitae* rule fits into this description, insofar as it reflects an understanding that the policies of the State of the situs carry a special weight when proprietary rights are at issue[5]. The situs rule may be clothed in bilateral words, but it reflects a logic that rather reminds of unilateralism[6].

Things could hardly be otherwise. The regulation of proprietary rights reflects a combination of individual and collective interests. Due to their *erga omnes* effect, ownership and other rights *in rem* in tangible property have a crucial role to play in the functioning of the market where the property is sold, leased or used as a security. Thus, to effectively govern that market, a State must be able to shape, by its rules, the legal entitlements that individuals are granted over the items exchanged in that market. It follows that the State of situation of property, that is, the State whose economy and society are primarily or immediately concerned with the property in question, has a special title to determine the form and content of the rights in such property, the ways in which those rights may be created or transferred, and the remedies available for their protection.

Against this background, one may wonder whether there is any need, in practice, to accord any weight to the substantive policies of

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[5] See extensively on this topic L. d'Avout, *Sur les solutions du conflit de lois en droit des biens* (Economica 2006), p. 417 ff.

[6] S. Francq, «Unilateralism», in J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio (eds.), *Encyclopedia of Private International Law* (Edward Elgar 2017), p. 1779 ff.

a State other than the State where the assets are located, unless it is the State of the forum[7].

It is hard to see how the law of that State which is not the State of the situs could claim a strong title to regulate the rights over an item of property, so strong that its mandatory provisions would be able to override the law of the situs.

A similar alteration might be conceivable, in particular, where the assets concerned have acquired, in their State «of origin», a special status, one that the right holder, or any interested third party, may want to claim after the situs of the property, and the law applicable thereto, has changed. In other words, reference is made to a situation where, pursuant to the law of State A, ownership in an item of property, connected with that State, entails special rights and obligations, the enforcement of which is regarded as crucial by State A for safeguarding its public interests. The question, then, is whether, and to what extent, those rights and obligations may still be enforced at a time when the item of property concerned is found in State B, in circumstances where, having regard to the rules on *conflit mobile*, the form and content of the rights in that item, and the remedies available to ensure their enforcement, are governed by the law of State B in accordance with the situs rule.

Two situations will be considered below for the purposes of analysing the described scenario.

III. THE RECOVERY OF ILLEGALLY TRANSFERRED NON-CULTURAL OBJECTS

The transfer of moveable assets located in a State, and/or their removal from that State's territory, may be restricted on a variety of grounds. These include, but are not limited to, a concern for the preservation of the national heritage of the latter State, on account of the cultural value of the assets concerned. Restrictions may also be justified on the ground that the availability of the property in question on the territory of the State is regarded as important for the State's national security (as it may occur, for example, with armaments) or for reasons of public health (as may be the case with medical devices).

These restrictions are normally enforced through «contractual» remedies. Contracts that purport to transfer the assets concerned by such restrictions are null and void, under the law of the State which

[7] The forum State has an inherent interest in seeing its substantive policies enforced. The unrestricted application of the overriding mandatory provisions of the forum highlights in this respect the similarities that exist between overriding mandatory provisions and the public policy exception: A. Bonomi, «Article 9», in U. Magnus, P. Mankowski (eds), *Rome I Regulation – Commentary* (Otto Schmidt, 2017), p. 614.

enacted the restrictions, unless they comply with the conditions set out for this purpose. Their nullity entails that the transferee has no title retain the assets.

The rules that provide for the nullity of these contracts would be enforced by the courts of the enacting State regardless of the law applicable to the contract. According to Article 9(2) of the Rome I Regulation, nothing in that Regulation limits the application of the overriding mandatory provisions of the law of the forum. Restrictions affecting the validity of contracts for the transfer of the goods in question may also be given effect — again, whatever the law applicable to the contract— in all other Member States. Article 9(3) of the Rome I Regulation stipulates that effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract are to be performed, in so far as such provisions render the performance of the contract unlawful. The latter conditions are fulfilled in the case considered, since the performance of a contract aimed at transferring an asset is obviously unlawful if effected in breach of the provisions that restrict such a transfer.

While the described approach is likely to be effective in a number of cases, situations might arise where contractual remedies are unavailable (e.g., because the removal did not occur on the basis of a contract, but rather by accident or theft), or prove insufficient.

Other avenues may then be explored, depending in the circumstances, to recover the property in question. The remedies provided under the rules on non-contractual obligations will likely be sufficient in a broad range of cases, although their effectiveness could be questioned in some scenarios, due to the fact that, unlike the Rome I Regulation, the Rome II Regulation on the law applicable to non-contractual obligations is silent as regards the effect, if any, that may be given to the overriding mandatory provisions of third States.

What about recovery based on proprietary remedies, assuming that the recovery itself is sought before the courts of State other than the State that enacted the restrictions? The availability of proprietary remedies will then likely depend on the law applicable to the rights *in rem* in the assets concerned. It will depend, in other words, on whether the governing law is the law of the State that enacted the restrictions, or the law of a different State. In the latter case, the enforcement of the restrictions may not be ensured unless the court seised is ready to give effect to the restrictions in questions, either as a set of local data, if appropriate, or on the ground that the restrictions in question are overriding mandatory provisions of the State with which the assets concerned have a close connection.

If a future regulation on rights *in rem* were to contemplate this possibility, this would arguably need to be accompanied by a proviso to the one found in Article 9(3) of the Rome I Regulation. In considering whether to give effect to the provisions of the third country in question, the court should have regard «to their nature and purpose and to the consequences of their application or non-application». One key element that the court would assess is the degree by which the policies served by the restrictions concerned may be deemed to be consonant with the policies of the forum (or those of the applicable law).

IV. THE ENFORCEMENT OF DUTIES PERTAINING TO THE MOVEABLE ASSETS IN QUESTION

Under the classical liberal conception of ownership, property may essentially form the object of rights, i.e., entitlements to a benefit. Those rights are limited only by the rights of others and the public interest. The idea that ownership may involve a social function, and entail as such duties and responsibilities, while not new, is still seen by some as something close to an aspiration, rather than a principle capable of practical applications[8].

In fact, rules are found in domestic legal orders whereby ownership entails certain duties for the owner, including duties the observance of which may be sought, in appropriate circumstances, by other individuals. Reference is made, here, to duties imposed on the owner because of ownership itself, not on some other grounds, such as negligence in the use of the assets. They are thus «proprietary» duties, for they relate to the property concerned in the same way as proprietary rights do[9]. Arguably, the law applicable to the proprietary rights in an asset should also determine the duties that pertain to that asset, provided they

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[8] See generally M. Mirow, «The Social-Obligation Norm of Property: Duguit, Hayem, and Others», 22 *Florida Journal of International Law* (2010), p. 191 ff., and B. Akkermans, «Sustainable Ownership – New Obligations towards Achieving a Sustainable Society», 10 *European Property Law Journal* (2021), p. 277 ff. See also, skeptically, C. Von Bar, *Foundations of Property Law* (Oxford University Press 2023), p. 15-16. The idea that proprietary rights may entail duties and responsibilities rests on an understanding whereby the regulation of property, if property itself is viewed as a relational concept, calls for appropriate consideration of the interest of relevant non-owners. See generally on the debate surround this topic, E. Van Wagner, «Notes from the Periphery», in N. Graham, M. Davies, L. Godden (eds.), *The Routledge Handbook of Property*, Law and Society (Routledge, 2023), p. 217 ff., and J. Nedelsky, «A Relational Approach to Property», *ibid*., p. 325 ff.

[9] The Louisiana Civil Code, for instance, includes provisions dealing with «real obligations», to be understood as duties «correlative and incidental to a real right» (Article 1763). A real obligation, as stated in Article 1764 of the Code, «is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect».

are also capable of *erga omnes* effects (which should be assessed on a case-by-case basis).

Duties of this kind are found, *inter alia*, in the Member States' legislation regarding liability for environment damage. Directive 2004/35/EC, for example, requires an undertaking whose activity is carried out on a plot of land to remedy such environmental damage as may occur on that land[10]. In some Member States, like Italy, legislation enacted to implement the Directive provides that, where the undertaking concerned fails to take the required remedial measures, the person who owns the site, whether he contributed to the pollution, or not, must bear the costs of the measures taken by the competent authorities, as a last resort, on the land in question. The duty arises because of the person's status as owner, not because the pollution is to be attributed to that person on grounds of negligence or otherwise, and is considered by the Italian legislation to constitute an encumbrance («onere reale») on the site[11].

The legislation on waste management also contemplates situations where the owner of an item of property has duties that inherently relate to the item in question. Relevant here is Directive 2008/98/EC on waste[12]. Its purpose, as stated in Article 1, is to protect the environment and human health by preventing or reducing the generation of waste, the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use. According to Article 3, point 1, of the Directive, «waste» means «any substance or object which the holder discards or intends or is required to discard». There is little doubt that waste, as understood by the Directive (and EU law, generally), is in fact a special kind of moveable property. Now, items of waste are not only the object of proprietary rights. They also entail proprietary duties, insofar as the owner is responsible of their management. While those duties are imposed, literally, on the «holder of waste», the Court of Justice acknowledged that the latter expression, as used in Directive 75/442/EEC of 15 July 1975 on waste[13], the predecessor of Directive 2008/98/EC, is to be construed broadly, as referring not just to the possessor but also to the owner of the waste[14].

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[10] Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, p. 56.

[11] For an analysis of the Italian legislation in question, against the backdrop of Directive 2004/35/EC, see Court of Justice, 4 March 2015, *Fipa Group*, Case C-534/13, ECLI:EU:C:2015:140.

[12] Directive 2008/98/EC of 19 November 2008 on waste, OJ L 312, p. 3.

[13] Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39.

[14] Court of Justice, judgment of 7 September 2004, *Van de Walle*, Case C-1/03, ECLI:EU:C:2004:490, para 55. In her Opinion, Advocate General Kokott had suggested that the term ought to be referred to the owner, rather than the possessor. The duties in question, she argued, are such that they «can only be met if there is not only actual possession of the waste but

All in all, the owner of an item of waste (which can consist, incidentally, of excavated contaminated soil), may have, as such, both rights and duties that pertain to that item.

And while his proprietary rights in the waste in question do not display any peculiar feature, his duties reflect a concern for the protection of the environment and human health. The provisions that contemplate the duties in question may fit, on this ground, into the definition of «overriding mandatory provisions» examined above.

If they do, situations might arise where the property in question, encumbered by the said duties when it was on the territory of State A, was later transferred to State B. Insofar as the law applicable to the proprietary rights (and duties) is the law of State B, the observance of the duties stipulated in the law of State A may not be ensured (in a State other than A) unless the court seised is permitted to give effect to the overriding mandatory provisions of a third State (State A, in the circumstances).

V. CONCLUDING REMARKS

The *lex rei sitae* rule, if complemented by a set of special rules dealing with particular kinds of assets, is likely to ensure in the vast majority of cases a balanced consideration of the different substantive policies underlying property rights in cross-border cases. The room left for overriding mandatory provisions is accordingly very limited, in practice, especially as regards the mandatory provisions of a State that is neither the forum nor the State whose law is to govern the situation pursuant to the applicable conflict-of-laws rules.

Situations may nevertheless arise where it would make sense to permit the seised court to give effect to the latter provision. This would only occur rarely, and the usual safeguards that surround recourse to the overriding mandatory provisions of a third State would apply.

It is open to debate whether such a rare occurrence would justify the introduction of a provision similar to Article 9(3) of the Rome I Regulation in a future EU instrument on the law applicable to rights *in rem*. Admittedly, further analysis is needed on the topic.

also an entitlement to dispose of it»: Opinion of 29 January 2004, *Van de Walle*, Case C-1/03, ECLI:EU:C:2004:67, para 56.