

CHOICE OF LAW FOR PROPERTY ISSUES: THE THIRD RESTATEMENT'S APPROACH IN COMPARATIVE PERSPECTIVE

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I. INTRODUCTION

In both Europe and the United States, the rules of private international law governing property-related issues are being reexamined¹. In addition to the Spanish Ministry of Science and Innovation-sponsored project on European private international law and property rights,²

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¹ See G. GARRIGA SUAU and C. A. WHYTOCK, «Choice of Law for Immovable Property Issues: New Directions in the European Union and the United States», *Revista Española de Derecho Internacional*, vol. 74, no. 1, 2022, pp. 81-108 (<http://dx.doi.org/10.17103/redi.74.1.2022.1b.01>).

² «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 (Ref. PID2020-112609GB-I00) (<https://www.dret-privat.urv.cat/en/conferences/international-seminar-on-rights-in-rem-in-the-ue/presentacion-1/>).

both the European Association of Private International Law³ and the European Group of Private International Law have undertaken projects on this topic⁴.

In the United States, the American Law Institute (ALI) launched its Restatement of the Law Third, Conflict of Laws (Third Restatement) project in 2014, marking the ALI's first comprehensive effort in the field of conflict of laws since the 1971⁵. Like its predecessors, the Third Restatement project will contain a chapter on choice of law for property issues. In addition, in 2020 the Uniform Law Commission (ULC) began work on a uniform Conflict of Laws in Trusts and Estates Act (Uniform Act) for consideration by U.S. state legislatures⁶.

This chapter discusses the Third Restatement's approach to choice of law for issues about property and offers some comparative observations⁷. Although the various European regulations and projects and the Third Restatement have different premises, they have significant similarities in content, thus raising the possibility of a modest degree of convergence between EU and U.S. approaches to these issues. In particular, by deemphasizing the distinction between personal property and real property⁸ and sharply limiting the scope of the traditional law-of-the-situs (*lex rei sitae*) rule, the Third Restatement's choice-of-law rules for property issues are much closer than the First Restatement's or Second Restatement's rules to those found in EU private international law⁹.

The chapter proceeds as follows. Section II provides an overview of choice of law in the United States, including the role of Restatements. Section III presents the overall approach of the 1934 First

³ European Association of Private International Law project on International Property Law (<https://eapil.org/eapil-activities/eapil-working-groups/eapil-working-group-on-international-property-law/>).

⁴ European Group of Private International Law project on the law applicable to rights *in rem* (<https://gedip-egpil.eu/en/2023/milan-2023/>).

⁵ See <https://www.ali.org/projects/show/conflict-laws/>.

⁶ See <https://www.uniformlaws.org/committees/community-home?CommunityKey=8c219179-daa7-4a25-a070-b11acd9e48f5>.

⁷ The Third Restatement project is not yet complete. Although portions of the Third Restatement have been approved by the ALI membership (Tentative Drafts), others have not (Preliminary Drafts and Council Drafts). I will specify the status of each portion I refer to when I cite it.

⁸ Consistent with the Third Restatement's usage, which also is the predominant usage in the United States, this chapter uses the terms «personal property» and «real property» rather than «movables» and «immovables» (which is used in EU private international law instruments). For most purposes, the distinction between personal property and real property is the same as the distinction between movables and immovables. One difference, however, is that leasehold interests are sometimes said to be immovables but not real property. See S. C. SYMEONIDES, *Choice of Law*, Oxford University Press, 2016, p. 581.

⁹ So far, the Uniform Act also has deemphasized the personal property-real property distinction and limited the scope of the situs rule.

Restatement and the 1971 Second Restatement to choice of law for property issues. Section IV explains the theory and design principles animating the Third Restatement. Section V provides some concrete examples of the Third Restatement's approach to property issues. Section VI concludes by offering some brief comparative observations.

II. CHOICE OF LAW IN THE UNITED STATES AND THE ROLE OF RESTATEMENTS

In the United States, choice of law is primarily a matter of U.S. state law, not U.S. federal law¹⁰. This means there is no singular U.S. approach to choice of law. Instead, each state of the United States has its own choice-of-law rules, which differ significantly¹¹. Moreover, choice of law rules in the United States are primarily common law rules developed by state court judges. Only two U.S. states have comprehensively codified choice-of-law rules¹²: Oregon¹³ (for torts and contracts) and Louisiana¹⁴.

Nevertheless, a certain degree of uniformity has been achieved among U.S. states due to the influence of two Restatements: The Restatement of the Law, Conflict of Laws (First Restatement), published in 1934, and the Restatement of the Law Second, Conflict of Laws (Second Restatement), published in 1971¹⁵. Restatements «aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court»¹⁶. Primarily addressed to courts, they «scan an entire legal field and render it intelligible by a precise use of legal terms...»¹⁷. The Third Restatement, like its two predecessors, tries to accomplish this for the field of conflict of laws.

¹⁰ See S. C. SYMEONIDES, *Choice of Law*, *op. cit.*, p. 3 («[C]onflicts law within the United States is de facto and for the most part state law rather than federal law»).

¹¹ Federal courts are required to apply the choice-of-law rules of the state in which they sit when federal jurisdiction is based on diversity of citizenship between the parties. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

¹² S. C. SYMEONIDES, *Choice of Law*, *op. cit.*, p. 8.

¹³ See OR. REV. STAT. §§ 15.300-380 (2017) for contracts and the OR. REV. STAT. §§ 15.400-460 (2017) for torts.

¹⁴ See Louisiana Civil Code, arts. 3515-3542.

¹⁵ See, e.g., S. C. SYMEONIDES, *Choice of Law*, *op. cit.*, p. 58 (noting that the first Restatement temporarily «unified American conflicts law, which until then had been scattered in the law reports» such that «[f]or the first time, it was possible to speak of a single American conflicts law, despite variations from state to state»).

¹⁶ *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work*, American Law Institute, Philadelphia, PA, 2015, p. 4 (https://www.ali.org/media/filer_public/2b/f8/2bf8b6aa-10b9-4be5-bb28-965451c40e2d/ali-style-manual.pdf) (ALI Handbook).

¹⁷ ALI Handbook, p. 5.

Restatements are produced by a non-governmental organization—the ALI—which was founded in 1923 «to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice and to encourage and carry on scholarly and scientific legal work»¹⁸. According to the ALI, its membership consists of more than 4,500 «eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries, selected on the basis of professional achievement and demonstrated interest in improving the law»¹⁹.

Restatements do not necessarily state the law strictly as it currently exists. To the contrary, as the ALI puts it:

A Restatement...assumes the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole. Faced with such precedent, an Institute Reporter is not compelled to adhere to what [Professor and former ALI Director] Herbert Wechsler called ‘a preponderating balance of authority’ but is instead expected to propose the better rule and provide the rationale for choosing it. A significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles²⁰.

However, the ALI «needs to be clear about what it is doing. For example, if a Restatement declines to follow the majority rule, it should say so explicitly and explain why»²¹.

Restatements have three main elements: so-called «black letter» provisions, Comments, and Reporters’ Notes²². The black letter, which is a Restatement’s operative language, is intended to be «a clear, precise, and succinct statement of the law»—in this case, clear, precise, and succinct statements of conflict-of-laws rules²³. The Comments «explicat[e], analyz[e], and illustrat[e] the black letter and its application»²⁴. A Restatement’s black letter and Comments are «intended to be...the official product of the Institute and to represent its institutional voice rather than the voice of the Reporter»²⁵. The Reporters Notes «explain[] the sources relied upon in formulating the provision and its attendant Comment and set[s] forth its relationship to current law»²⁶.

¹⁸ See «The Story of the ALI» (<https://www.ali.org/about-ali/story-line/>).

¹⁹ See «Membership» (<https://www.ali.org/members/>); «Who comprises ALI’s membership and leadership?» (<https://www.ali.org/about-ali/faq/>).

²⁰ ALI Handbook, pp. 5-6.

²¹ ALI Handbook, p. 6.

²² ALI Handbook, p. 34.

²³ ALI Handbook, p. 6.

²⁴ ALI Handbook, p. 34.

²⁵ ALI Handbook, p. 42.

²⁶ ALI Handbook, p. 34.

They may also «provide avenues for additional research» and allow the Reporters «to convey views not necessarily those of the Institute and to suggest related areas for investigation that may be too peripheral for treatment in the black letter or Comment»²⁷. Unlike the black letter and Comments, the Reporters' Notes represent the voice of the Reporters rather than the institutional voice of the ALI²⁸.

The drafting cycle for Restatements consists of four principal steps. First, the Reporters research and draft a portion of the Restatement, for example a chapter or subtopic of a chapter that addresses a particular set of issues. Second, they submit it as a Preliminary Draft to a group of specially appointed project Advisers and a group of other interested ALI members (called a «Members Consultative Group» or «MCG») — both of which consist of judges, lawyers, and legal academics — who comment on the draft. An Advisers and MCG meeting is held to discuss the draft, giving Reporters an opportunity to receive extensive feedback and «to explore issues, to solicit advice and counsel, and to test the appropriateness of the draft»²⁹. Third, the Reporters make revisions and send a Council Draft to the ALI Council, which consists of up to 65 judges, lawyers, and academics. Council members provide comments. If the Council approves the Council Draft, the Reporters make further revisions and, as a fourth step, they submit it as a Tentative Draft to the entire membership of the ALI. If the membership approves the Tentative Draft, it becomes the official position of the ALI and can be cited and relied upon by judges. This cycle continues until the entire Restatement is completed³⁰. Unsurprisingly, this is a very lengthy process. The Second Restatement took almost 15 years to complete. The Third Restatement project began in 2014, already 10 years ago, and I expect it will be at least five more years before it is complete.

Although similar in form to statutes³¹, Restatements are not legally binding³². As the ALI puts it, «An unelected body like The American

²⁷ ALI Handbook, p. 45.

²⁸ ALI Handbook, p. 45.

²⁹ ALI Handbook, p. 16.

³⁰ See ALI Handbook, pp. 15-19.

³¹ See ALI Handbook, p. 5 («Restatements—'analytical, critical and constructive'—... resemble codifications more than mere compilations of the pronouncements of judges. The Institute's founders envisioned a Restatement's blackletter statement of legal rules as being 'made with the care and precision of a well-drawn statute.'»); S. C. SYMEONIDES, «Restatement (First and Second) of Conflict of Laws», in Basedow, J., Rühl, G., Ferrari, F., and de Miguel Asensio, P. (eds.), *Encyclopedia of Private International Law*, Cheltenham, UK, Edward Elgar, 2017, pp. 1546-1553, 1546 («In the American legal lexicon, a Restatement of the Law is a document that resembles a code in the sense that it is a comprehensive and relatively systematic treatment of a legal subject...»).

³² See S. C. SYMEONIDES, «Restatement (First and Second)», *op. cit.*, p. 1546 (noting that «restatements are not binding authority»). For a different view, see F. SCHAUER, «The Restatements as Law», in GOLD, A.S. and GORDON, R.W. (eds.), *American Law Institute Centennial*

Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of law»³³. While courts are not legally required to follow a Restatement's rules, some Restatements are widely followed by courts in many states and, in some cases, courts adopt portions of a Restatement as common law rules, in effect giving them binding legal effect³⁴. The First Restatement once had a large judicial following, and the Second Restatement does today. It is hoped that the Third Restatement will also be influential in the courts.

III. THE FIRST AND SECOND RESTATEMENTS, THE SITUS RULE, AND RENVOI

The First Restatement has strict jurisdiction-selecting choice-of-law rules relying primarily on single, territorial connecting factors, and generally derived from vested rights theory³⁵. In line with this approach, the First Restatement calls for the application of the law of the situs state for virtually all issues related to real property, including the validity and effect of conveyances of real property³⁶, real property in marriage³⁷, and both intestate and testate succession to real prop-

History, Oxford University Press, 2023, pp. 425-440 (arguing that Restatements should, in some respects, be understood as «law»).

³³ ALI Handbook, p. 6.

³⁴ See S. C. SYMEONIDES, «Restatement (First and Second)», *op. cit.*, p. 1546 («Although the restatements are not binding authority in any state, they can be highly persuasive, depending on their intrinsic quality, and some of them enjoy wide judicial following»).

³⁵ See generally S. C. SYMEONIDES, «Restatement (First and Second)», *op. cit.*, pp. 1546-1547.

³⁶ See Restatement of the Law, Conflict of Laws, American Law Institute, 1934, § 215 (First Restatement) («The validity of a conveyance of an interest in land is determined by the law of the state where the land is»); § 216 («Capacity to make a valid conveyance of an interest in land is determined by the law of the state where the land is»); § 217 («The formalities necessary for the validity of a conveyance of an interest in land are determined by the law of the state where the land is»); § 220 («The effect upon interests in land of a conveyance is determined by the law of the state where the land is»). Cf. § 214 («(1) Words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, have a given operative effect irrespective of the intent of the conveyor, will be accorded such effect in any state. (2) Words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, have a given operative effect unless a contrary intent is shown by admissible evidence, will be accorded such effect in any state. (3) The meaning of words used in an instrument of conveyance of an interest in land which, by the law of the state where the land is, are accorded neither of the effects described in Subsections (1) and (2), is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the conveyor at the time of the conveyance»).

³⁷ See First Restatement § 238 («The effect of marriage upon an interest in land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is»).

erty³⁸. However, the First Restatement takes a different approach for issues about contracts to convey real property, providing that «[t]he law of the place of contracting determines the validity of a promise to transfer or to convey land»³⁹.

The First Restatement also has a situs rule for issues about conveyances of personal property⁴⁰. However, under the First Restatement, contracts to convey personal property are governed by the law of the state where the contract was made⁴¹, issues about personal property in marriage are governed by the matrimonial domicile⁴², and issues about intestate and testate succession to personal property are governed by the law of the state of the decedent's domicile at the time of death⁴³.

For a certain period, the First Restatement was widely followed by courts, and it continues to be followed by a small but significant number of states⁴⁴. However, it was criticized from the beginning⁴⁵. On the one hand, its rigid rules were said to produce frequently arbitrary

³⁸ See First Restatement § 245 («The law of the state where the land is determines its devolution upon the death of the owner intestate»); § 249 («The validity and effect of a will of an interest in land are determined by the law of the state where the land is»). Cf. § 251 («(1) Words used in a devise of an interest in land which, by the law of the state where the land is, have a given operative effect irrespective of the intent of the testator, will be accorded such effect in any state. (2) Words used in a devise of an interest in land which, by the law of the state where the land is, have a given operative effect unless a contrary intent is shown by admissible evidence, will be accorded such effect in any state. (3) The meaning of words used in a devise of an interest in land which, by the law of the state where the land is, are accorded neither of the effects described in Subsections (1) and (2), is, in the absence of controlling circumstances to the contrary, determined in accordance with usage at the domicile of the testator at the time when the will was made»).

³⁹ First Restatement § 340.

⁴⁰ § 255 («Capacity to make a valid conveyance of an interest in a chattel is determined by the law of the state where the chattel is at the time of the conveyance»); § 256 («The formal validity of a conveyance of an interest in a chattel is determined by the law of the state where the chattel is at the time of the conveyance»); § 257 («Whether a conveyance of a chattel which is in due form and is made by a party who has capacity to convey it is in other respects valid, is determined by the law of the state where the chattel is at the time of the conveyance»).

⁴¹ See First Restatement § 332.

⁴² § 290 («Interests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired»).

⁴³ § 303 («The movables of one who died intestate which remain in the state after the estate is fully administered are distributed to the persons who are entitled to take by the law of the state of his domicile at the time of his death»); § 306 («The validity and effect of a will of movables is determined by the law of the state in which the deceased died domiciled»); § 308 («The meaning of words used in a will of movables, in the absence of controlling circumstances to the contrary, is determined in accordance with the usage at the domicile of the testator at the time of making the will»).

⁴⁴ See S. C. SYMEONIDES, *Choice of Law*, *op. cit.*, p. 60 (noting that the First Restatement at one point had been «adopted with varying degrees of enthusiasm in virtually all states in the United States» and «dominated American conflicts law for more than a generation»).

⁴⁵ See K. ROOSEVELT III, *Conflict of Laws*, 2nd. ed., St. Paul, Minnesota, Foundation Press, 2015, p. 35 («Almost from its inception, the First Restatement was subjected to fierce criticism»).

results. On the other hand, these rules were applied in ways that produced uncertainty and lack of transparency in legal reasoning, because judges dissatisfied with those results tended to avoid them by using a variety of “escape devices” (such as characterization and the public policy exception)⁴⁶.

Influenced by the so-called «American conflicts revolution» that proposed various «modern» approaches in lieu of the First Restatement’s choice-of-law rules, the Second Restatement generally avoids rules. Instead, Section 6 of the Second Restatement enumerates a variety of factors that judges are to consider when making choice-of-law decisions⁴⁷. Its issue-specific choice-of-law sections typically call on courts either to apply the law of the state which, with respect to that issue, has «the most significant relationship to the occurrence and the parties under the principles stated in § 6»⁴⁸, or identify the state that presumptively has that relationship and calls on courts to apply that state’s law «unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied»⁴⁹. Thus, under the Second Restatement approach, «courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them»⁵⁰.

However, the Second Restatement’s approach to choice of law for real property issues is more rule-like, similar to the First Restatement’s approach. Under the Second Restatement, the law of the state where real property is located presumptively governs those issues for conveyances⁵¹

⁴⁶ See generally S. C. SYMEONIDES, «Restatement (First and Second) of Conflict of Laws», *op. cit.*, p. 1547.

⁴⁷ See Restatement of the Law Second, Conflict of Laws, American Law Institute, 1971, § 6(2) (Second Restatement) («[T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied»).

⁴⁸ See, e.g., Restatement Second, § 145(1) («The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6»).

⁴⁹ See, e.g., Restatement Second § 146 («In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied»).

⁵⁰ Restatement Second, § 6, cmt. c.

⁵¹ See Second Restatement § 223 («(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions»); § 224 («(1) An instrument of conveyance of an interest in land is construed in

and in the contexts of marriage⁵² and succession⁵³. Nevertheless, some differences between the two Restatements stand out. For example, unlike the First Restatement, the Second Restatement extends the situs rule to contracts to convey real property⁵⁴. In addition, unlike the First Restatement, the Second Restatement incorporates renvoi into most of its real property choice-of-law rules. Rather than directly referring to the law of the state where real property is located, these rules refer to «the law that would be applied by the courts of the situs» and state that «[t]hese courts would usually apply their own local law in determining such questions»⁵⁵. In practice, however, it appears that courts purporting to follow the Second Restatement have applied renvoi in this context only exceptionally rarely⁵⁶ and have instead generally followed a simple situs rule.

The Second Restatement's choice-of-law approach to personal property issues is somewhat eclectic, varying depending on the particular issue. For issues about conveyances of personal property, it favors the law of the state where the property was located at the time of the conveyance⁵⁷; for issues about contracts to convey personal property,

accordance with the rules of construction of the state designated for this purpose in the instrument. (2) In the absence of such a designation, the instrument is construed in accordance with the rules of construction that would be applied by the courts of the situs»).

⁵² See Second Restatement § 234 («(1) The effect of marriage upon an interest in land acquired by either of the spouses during coverture is determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions»).

⁵³ See Second Restatement § 236 («(1) The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions»); § 239 («(1) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions»); § 240 («(1) A will insofar as it devises an interest in land is construed in accordance with the rules of construction of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the situs»).

⁵⁴ See § 189 («The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied»).

⁵⁵ See, e.g., §§ 223, 234, 236.

⁵⁶ See C. A. WHYTOCK and M.-Y. CHANG, «Au Renvoi, Renvoi? An Analysis of the Renvoi Doctrine in State and Federal Courts», *Willamette Law Review* (forthcoming) (manuscript on file with author).

⁵⁷ See § 244 («(1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6. (2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group

it favors the law of the state where the seller is to deliver the property⁵⁸; for issues about personal property in marriage, it favors the law of the state where the spouses were domiciled at the time the property was acquired⁵⁹; and for issues about intestate and testate succession to personal property, it favors the law of the state where the testator was domiciled at the time of death⁶⁰.

In summary, both the First Restatement and the Second Restatement make a strict distinction between issues about real property and issues about personal property. The Second Restatement generally calls for the application of the law of the situs to issues about real property—even in the context of contracting, marriage, and succession—and uses a variety of different connecting factors, including domicile, for personal property issues. As one commentator puts it, «By and large, the Conflicts Revolution simply never made it to property»⁶¹.

IV. THE THIRD RESTATEMENT: THEORY

The Third Restatement is more rule-oriented than the Second Restatement and, in that sense, it is similar in form to the First Restatement. However, the principles used to derive the Third Restatement's rules—what I call its «design principles»—are very different from the First Restatement's animating vested rights theory. In fact, the Third

of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law»).

⁵⁸ See § 191 («The validity of a contract for the sale of an interest in a chattel and the rights created thereby are «etermined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied»).

⁵⁹ See § 258 («(1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in § 6. (2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law»).

⁶⁰ See § 260 («The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death»); § 263 («(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death. (2) These courts would usually apply their own local law in determining such questions»); § 264 («(1) A will insofar as it bequeaths an interest in movables is construed in accordance with the local law of the state designated for this purpose in the will. (2) In the absence of such a designation, the will is construed in accordance with the rules of construction that would be applied by the courts of the state where the testator was domiciled at the time of his death»).

⁶¹ J.Y. STERN, «Property, Exclusivity, and Jurisdiction», *Virginia Law Review*, vol. 100, 2014, p. 113.

Restatement's design principles resemble some of the choice-of-law principles in Section 6 of the Second Restatement, discussed above.

Specifically, the Third Restatement's rules are designed to «select[] the most appropriate relevant law to govern particular issues»⁶² taking into account two sets of considerations:

First, choice-of-law systems should generally seek to provide sensible, rather than arbitrary, answers to choice-of-law questions so that states' policies are not needlessly thwarted and parties are not subject to unfair surprise. Whether it is sensible to choose a particular state's law to govern a particular issue is affected by the policies underlying the relevant laws, the connections between the relevant states and the particular issue under consideration, and the reasonable expectations of the parties. The considerations relevant to this analysis could be called «right answer» considerations....

Second, choice-of-law systems should generally seek to provide answers in an easy, predictable, and uniform fashion so that the litigation process is streamlined and parties can structure their out-of-court behavior with confidence as to what law will govern. The considerations relevant to this analysis could be called “systemic” considerations⁶³.

For some property choice-of-law issues, these considerations imply that the law of the situs is the most appropriate law. For other issues involving property, right answer and systemic considerations imply that the law of a state other than the situs state is the most appropriate law, such as the law of the state of a relevant party's domicile.

As these observations suggest, the scope of the Third Restatement's situs rule is not deduced from a particular concept of rights *in rem* and a presumption that situs law should govern those rights. Rather, it is based on an assessment of case law in light of right answer considerations and systemic considerations on an issue-by-issue basis to determine the most appropriate connecting factor for each choice-of-law rule.

The Third Restatement's approach also takes into account the extensive criticism of the earlier Restatements' categorical situs rule, according to which virtually all issues related to real property are governed by the law of the state where the real property is located. These critiques are based largely on the proposition that a state is unlikely to have the strongest interest in having its law govern an issue about, say, property in marriage or succession to property merely because the property is located within its territory. Instead, because these issues are more fundamentally about the rights and relationships of individuals

⁶² Restatement Third, Conflict of Law § 5.01 (Tentative Draft No. 3, 2022) (Third Restatement T.D. 3).

⁶³ Third Restatement T.D.3 § 5.01, Comment d.

rather than about property as such, and because the relevant policies are above all the policies underlying the law of marriage and the law of succession, the state with the strongest interest will generally be the domicile state⁶⁴.

V. THE THIRD RESTATEMENT: EXAMPLES

How does this theory translate into the Third Restatement's actual choice-of-law rules? To illustrate, I will offer several examples from the current drafts of the Third Restatement's chapter on property.

1. Core Property Issues

Some issues related to property are governed by distinct fields of law that are based on substantive policies specific to those fields, such as the law of matrimonial property, succession law, and the law of trusts⁶⁵. The Third Restatement calls those issues «property-related issues» to recognize the distinctive policies underlying the law that governs them, to recognize that those policies are an important factor in determining which state's law is most appropriate, and to recognize that different underlying policies may therefore imply distinctive choice-of-law rules⁶⁶. As illustrated below, those choice-of-law rules generally do not require a distinction between real property and personal property.

⁶⁴ See, e.g., W. M. RICHMAN, and W. L. REYNOLDS, «Prologomenon to an Empirical Restatement of Conflicts», *Indiana Law Journal*, vol. 75, 2000, p. 424 (referring to the situs rule as «one of [the] most dysfunctional» choice-of-law rules and explaining that «[t]he problem with the situs rule ... is an imbalance between its scope and rationale. The scope of the rule extends to nearly all questions involving title to real property, but its rationales work in only a fraction of those cases»); J. W. SINGER, «Property Law Conflicts», *Washburn Law Journal*, vol. 54, 2014, p. 160 (arguing that «[t]he situs rule is a good one in many cases, but in other cases it promotes perverse or destructive results»); S. C. SYMEONIDES, «The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)», *Indiana Law Journal*, vol. 75, 2000, p. 443 («Today no sound policy reason can be offered for inexorably subjecting all issues involving land to the law of the situs. While the situs state has a legitimate interest in matters of land utilization and issues involving clarity and security of title, it has no interest in controlling issues such as the capacity of the disposer, the capacity or worthiness of an heir or legatee, the interests of the surviving or non-owning spouse, the order of succession, or the formal validity of a will or a transaction involving land»); R. J. WEINTRAUB, *Commentary on the Conflict of Laws*, 6th ed., New York, Foundation Press, 2010, §§ 8.1–8.22, pp. 573–627 (systematically critiquing the situs rule); C. A. WHYTOCK, «“Situs and Domicile in Choice of Law for Succession Issues», *Tulane Law Review*, vol. 97, 2023, pp. 1181–1221 (critiquing situs rule for succession choice-of-law issues).

⁶⁵ The Third Restatement's property chapter will also include choice-of-law rules for issues about trusts. These rules have not yet been approved by the ALI Council or the ALI Membership and will not be discussed.

⁶⁶ See Restatement Third, Conflict of Law, Chapter 7, Introductory Note a (Tentative Draft No. 4, 2023) (Third Restatement T.D. 4).

Other issues about property—which the Third Restatement calls «core property issues»—do not so directly implicate the field-specific substantive policies of matrimonial property law, succession law, or the law of trusts, but they do implicate fundamental policies underlying the substantive law of property, such as clarity and security of title and the efficient operation of markets for property. As discussed here, right-answer and systemic considerations suggest that the most appropriate law for core real property issues, but not necessarily all core personal property issues, generally will be the law of the situs state.

Under the Third Restatement, core real property issues governed by the law of the situs state include the transfer of real property interests by deed and the recordation and priorities of real property instruments. Section 7.04 covers choice of law for issues about the transfer of real property interests by deed: «(a) The transfer of an interest in real property by deed is governed by the law of the state where the real property is located. (b) The construction or interpretation of a deed for the transfer of a real property interest is governed by the law of the state designated in the deed for that purpose or, in the absence of such a designation, by the law of the state where the real property is located». The stated rationale for the rule is based on the right-answer considerations discussed above:

The law of the state where real property is located has a strong interest in having its law govern the validity and effect of a transfer of an interest in that property by deed and the nature of the interest transferred, as well as the construction or interpretation of the deed. This interest flows from that state's broader interests in both ensuring certainty and clarity of title and the integrity of its real property records and supporting the operation of its market for real property interests. A state is unlikely to have a strong interest in having its law govern these issues as to real property located in another state's territory.

If the deed designates the law of a state to govern the interpretation and construction of the deed, a court will apply the designated law for that purpose. A third party examining title records must be able to determine the law governing the interpretation and construction of a deed. Therefore, this Section refers only to the law of the state designated in the deed itself for that purpose, and not to a designation in a related document (such as a contract for the sale of real property interests) that will not necessarily be recorded or understood by a third party to be associated with the deed. If the designation is not in the deed itself, then the law of the state where the real property is located will govern the interpretation and construction of the deed⁶⁷.

The Third Restatement, like its predecessors, distinguishes between transfers by deed and contracts for a transfer by deed. Transfer by deed

⁶⁷ Third Restatement T.D. 4, § 7.04, Comment c.

is a method for transferring real property interests, whereas a related contract determines the rights and obligations of the transferor and transferee of those interests. For example, contracts for the sale of real property interests typically obligate the seller to execute and deliver a deed upon the satisfaction of certain conditions in order to transfer the interests to the buyer⁶⁸. A contract for the sale of real property is governed by the law applicable to contract issues, covered by Chapter 8 of the Third Restatement.

Section 7.05 covers recording and priorities of real property interests (which is used in most U.S. states to serve a function roughly analogous to the registration of such interests): «(a) A state's real property recording system, the real property documents that are eligible for recording, and the required formalities for recording are governed by that state's law. (b) The law of the state where real property is located governs the effect that recording or failing to record a real property document has on the priorities of interests in that real property.» The Restatement's rationale for this rule is as follows:

[A] state has a strong interest in ensuring the integrity of its real property records and promoting clarity of title to real property located within its territory, and therefore in having its law govern the recording and priorities of interests in real property located within its territory. A state other than the state where the real property is located is unlikely to have such an interest. Therefore, this Section's choice-of-law rule should result in the application of the law of the most interested state. This Section's choice-of-law rule should also protect the reasonable expectations of persons concerned with issues about the recording and priorities of real property interests. There appears to be no reason to expect one state's law to govern issues about another state's real-property-recording system or for one state's law to govern issues about the effect that recording or failing to record has on the priorities of interests in real property located in another state⁶⁹.

The Third Restatement also extends the situs rule to some core property issues generally (including those involving personal property), such as adverse possession (§ 7.06) and leases (§ 7.08(b)), but not to others such as restraints on alienation (§ 7.07(b)) and, following the Uniform Commercial Code, certain issues about security interests in personal property (§ 7.08(d))⁷⁰. Hence, for core property issues, it remains necessary under the Third Restatement to distinguish between real property and personal property to determine the appropriate choice-of-law rule.

⁶⁸ See Third Restatement T.D. 4, § 7.04, Comment b.

⁶⁹ Third Restatement T.D. 4, § 7.05, Comment b.

⁷⁰ Section references are to Third Restatement T.D. 4.

2. Property in Marriage and Other Domestic Relationships

The Third Restatement provides that issues about property in marriage and other domestic relationships are governed by the law of the state of the marital domicile, determined as of the time specified in choice-of-law rules for particular issues. For example, under Section 7.13, «(a) Management and control rights between spouses during marriage as to property owned by a spouse before marriage are governed by the law of the marital domicile at the time of marriage. (b) Management and control rights between spouses during marriage as to property acquired by a spouse during marriage are governed by the law of the marital domicile at the time of acquisition.» Under Section 7.14, «The matrimonial property rights between spouses upon divorce are governed by the law of the marital domicile at the time of divorce.» And under Section 7.15, «The matrimonial property rights of spouses upon the death of a spouse are governed by the law of the marital domicile at the time of death.» These rules apply regardless of whether the property is real property or personal property.

According to Section 7.12, «[t]he ‘marital domicile’ is: (a) the state of the spouses’ common domicile, if the spouses are domiciled in the same state; or (b) the state where the spouses last had a common domicile and where one spouse remains domiciled or has reestablished domicile, if the spouses do not have a common domicile; or (c) if neither subsection (a) nor subsection (b) applies, the state with which the spouses jointly have the closest connection, taking into account all the circumstances.»

There are three main reasons why the Restatement uses marital domicile as the primary connecting factor in its choice-of-law rules for issues about property in marriage and other domestic relationships⁷¹. First, in most cases, the state where the marital domicile is located is the state that is most likely to have the strongest interest in having its law govern the matrimonial property rights of spouses. The policies underlying matrimonial property rights are about the marriage relationship and the spouses. These policies include economic protection of the spouses, protection of their reasonable expectations about property in marriage, fairness and equity between spouses, and the recognition of both spouses’ contributions to the marriage. Therefore, the state that has the closest connection to the spouses and the marriage relationship—that is, the marital domicile—will ordinarily have the strongest interest in having its laws govern issues about the spouses’ matrimonial property rights.

⁷¹ See Third Restatement T.D. 4, § 7.12, Comment e.

Second, the application of the law of the marital domicile to govern matrimonial property rights should in most cases protect reasonable expectations of spouses and third parties dealing with them. It is reasonable to expect matrimonial property rights to be governed by the state that is most closely connected with the spouses and the marriage relationship rather than a state lacking such connections. By making the marital domicile the principal connecting factor, this Topic promotes the reasonable expectation that the law of the marital domicile governs issues about matrimonial property rights, thus helping parties plan their out-of-court behavior with confidence as to what law will govern.

Third, the application of the law of the marital domicile to govern issues about matrimonial property rights promotes the efficient resolution of disputes about those rights. Under the traditional approach—which is sometimes referred to as «scission»—the governing law depends on how property is classified: issues about matrimonial property classified as real property are governed by the law of the state where the real property is located, whereas issues about matrimonial property classified as personal property are governed by the marital domicile at a specified time. This approach, which may require the determination and application of the law of multiple states to issues about the matrimonial property rights of a single married couple, is unnecessarily complex and difficult for the parties, their lawyers, and the court, and risks frustrating both the interests of states and the reasonable expectations of the spouses.

These three reasons apply to choice of law for issues about matrimonial property regardless of whether the property is real property or personal property. Therefore, this Restatement's choice-of-law rules for issues about matrimonial property take a «unitary» approach: they do not distinguish between the two types of property and use the marital domicile as the principal connecting factor for matrimonial property issues involving both real property and personal property.

3. Succession

Like the Third Restatement's approach to property in marriage and other domestic relationships, its choice-of-law rules for issues about succession use domicile as its principal connecting factor and take a unitary approach by not distinguishing between real property and personal property. While this portion of the Third Restatement has been approved by the ALI Council, it has not yet been approved by the ALI Membership. I therefore will not provide specific examples of its choice-of-law rules for succession.

Nevertheless, it may be useful to note some of the rationales for taking a unitary domicile-based approach to succession choice-of-law

issues⁷². First, the state of the decedent's domicile will usually have a stronger interest in having its law govern succession issues than a non-domicile state where real property of the decedent is located. The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property in accordance with their intent when they die. A natural person's domicile is the place where their life is centered and where they are physically present. The state of a person's domicile usually will be the state with the closest connection to that person. Therefore, in most cases, a state is likely to have an interest in governing issues about succession as to its own domiciliaries. In general, a nondomicile state is unlikely to have a stronger interest than the domicile state in having its law govern succession issues solely because the decedent's estate includes real property located there. Those issues are more about the decedent's freedom of disposition than about real property as such.

Second, in most cases, application of the law of the state of a decedent's domicile is more likely to be consistent with the decedent's expectations and intent than application of the law of a nondomicile state where real property of the decedent is located. Insofar as a person has expectations regarding the law that would govern issues about succession to their property when they die, they would probably be more likely to expect the law of their state of domicile to govern than the law of some other state with a weaker connection to them. A fundamental policy of the substantive law of succession is to favor the disposition of a person's property as they intend when they die. A person is unlikely to intend the law of different states to govern their succession as to different items of property merely because those items of property are characterized as personal property rather than real property, or vice versa, and are located in different states. For example, a testator is unlikely to expect their will to be considered valid as to personal property (under the law of their state of domicile) but invalid as to real property (under the law of the state where that property is located), or vice versa. Similarly, a testator is unlikely to intend their will to be construed as having one meaning as to personal property (under the law of their state of domicile) but another potentially contradictory meaning as to real property (under the law of the state where that property is located). For these reasons, a unitary domicile-based choice-of-law approach is more consistent with persons' usual expectations and with succession law's fundamental policies than the traditional fragmented approach.

Third, a unitary approach is simpler and more efficient for estate planning and probate than the traditional scissionist approach. For

⁷² See Restatement Third, Conflict of Law, Chapter 7, Topic 4, Introductory Note (Council Draft No. 9, 2023) (Third Restatement C.D. 9). These and other reasons are developed more systematically in C. A. WHYTOCK, «Situs and Domicile», *op. cit.*, pp. 1181-1221.

estates that include personal property and also real property located in states other than the state of the testator's domicile, scission requires estate planners, administrators, and courts to characterize property in the estate as either personal property or real property—which is not always a straightforward exercise—and to determine and apply the law of multiple states (including law that is foreign to the courts of the domicile state, where primary probate proceedings are likely to occur). Sophisticated estate planners can—and often do—circumvent the situs rule by conveying real property to a separate legal entity (such as a limited liability company) so that the decedent's estate will include securities of that entity, which are personal property, rather than the real property itself. Insofar as this practice reflects a general interest among estate planners in avoiding scission (and, perhaps, avoiding situs law), it would seem more desirable to have a default domicile choice-of-law rule for both personal property- and real property-related succession issues than to require estate planners to use devices like securitization to achieve those results.

Fourth, the Third Restatement's unitary approach to choice of law for issues about succession is more consistent with the structure of substantive succession law today than the traditional scissionist approach. The substantive common law of succession once distinguished between chattels and land, and that distinction helps explain the historical emergence of the situs rule and scission. Today, however, the substantive law of succession has a unitary structure, providing a single set of rules that apply to testate and intestate succession as to both personal property and real property. A unitary domicile-based approach brings the choice-of-law rules for succession issues into structural alignment with the substantive law of succession.

V. COMPARATIVE OBSERVATIONS

In this Section, I consider the Third Restatement's approach to choice of law for property issues as compared to the EU private international law approach, taking into account the Succession Regulation, the Matrimonial Property Regulation, the Registered Partnerships Regulation, and the current version of the European Group of Private International Law's (EGPIL) proposal on «The law applicable to rights *in rem* in corporeal assets»⁷³. Across multiple dimensions of com-

⁷³ 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 (Succession Regulation); 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

parison, the Third Restatement is closer to the European approach to choice of law for property issues than either the First Restatement or the Second Restatement. To be clear, convergence toward EU private international law is not among the Third Restatement's goals. Instead, as explained above, the Third Restatement's choice-of-law rules are based on issue-by-issue analysis of U.S. caselaw and legislation in light of right answer considerations and systemic considerations. And important differences obviously remain between the approaches of the Third Restatement and EU private international law. Yet, as the following examples suggest, one outcome of the Third Restatement process has been a move in the general direction of EU private international law in the area of choice of law for property issues.

First, the Third Restatement, unlike the First Restatement and the Second Restatement, but like the relevant EU regulations, adopts a unitary approach that does not rely on a personal property-real property distinction in its choice-of-law rules for issues about succession and property in marriage and other domestic relationships⁷⁴.

Second, the Third Restatement, unlike the First and Second Restatements, but like the relevant EU regulations, deemphasizes the *situs* and instead uses personal connecting factors in its choice-of-law rules for issues about real property in succession and in marriage⁷⁵. There are,

(Matrimonial Property Regulation); Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (Registered Partnerships Regulation); Proposal of the European Group of Private International Law on "The law applicable to rights *in rem* in corporeal assets," 17 September 2023 (<https://gedip-egpil.eu/wp-content/uploads/2023/06/The-law-applicable-to-rights-in-rem-in-corporeal-assets-Consolidated-version.pdf>) (EGPIL Proposal). I do not consider Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), although it, too, addresses certain choice-of-law issues regarding property.

⁷⁴ Regarding the Third Restatement, see Sections V(2) and V(3) above. Regarding EU private international law, see Succession Regulation art. 21(1) («Unless otherwise provided for in this Regulation, the law applicable to the succession *as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death*»), Matrimonial Property Regulation art. 21 («Unity of the applicable law. The law applicable to a matrimonial property regime...shall apply to *all assets falling under that regime, regardless of where the assets are located*»), and Registered Partnerships Regulation art. 21 («Unity of the applicable law. The law applicable to the property consequences of a registered partnership shall apply to *all assets that are subject to those consequences, regardless of where the assets are located*») (emphasis added). Due to lack of space, I do not discuss party autonomy regarding the applicable law under these regulations or choice of law for issues about the rights of third parties.

⁷⁵ Regarding the Third Restatement, see Sections V(2) and V(3) above. Regarding EU private international law, see Succession Regulation art. 21(1) («*habitual residence at the time of death*») and Matrimonial Property Regulation art. 21(1) («In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State: (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection

however, significant differences. One is that the Third Restatement uses the decedent's domicile (for succession) and the marital domicile (for property in marriage) while the EU succession and matrimonial property regulations use the decedent's habitual residence (for succession) and the spouses' common habitual residence (for property in marriage) as the primary personal connecting factors⁷⁶. Another is that, for issues about property in marriage, the relevant time of personal connection is the time of divorce or death in the Third Restatement but the time of marriage in the EU matrimonial property regulation⁷⁷. The Third Restatement's Reporters had initially proposed a habitual residence concept inspired by EU private international law and the work of the Hague Conference on Private International Law, but that proposal was rejected by the project's advisers on the ground that both the term and the concept of «domicile» were too firmly established in American common law to be abandoned⁷⁸. However, it is worth noting the Third Restatement's fallback definition for marital domicile was partly inspired by the Matrimonial Property Regulation's fallback provision regarding the applicable law⁷⁹.

Third, the Third Restatement, unlike the Second Restatement, but like the relevant EU regulations and like the EGPIIL Proposal, takes a rule-oriented approach to choice of law for issues about property, while also including exceptions to avoid the arbitrary results that rules sometimes produce in particular factual circumstances. The Third Re-

at the time of the conclusion of the marriage, taking into account all the circumstances»). The Registered Partnership Regulation does not use the situs of property as a primary connecting factor, either, but it refers to «the law of the State under whose law the registered partnership was created» rather than the state of the partners' habitual residence (art. 26(1)).

⁷⁶ Regarding the Third Restatement, see Sections V(2) and V(3) above. Regarding EU private international law, see Succession Regulation art. 21(1) and Matrimonial Property Regulation art. 21(1).

⁷⁷ Regarding the Third Restatement, see Sections V(2) and V(3) above. Regarding EU private international law, see Matrimonial Property Regulation art. 21(1).

⁷⁸ Under Section 2.05 of Restatement Third, Conflict of Law (Tentative Draft No. 2, 2021) (Third Restatement T.D. 2), a natural person's domicile is «the place where the person's life is centered and the person is physically present,» determined based on «objective evidence of the person's domestic, familial, social, religious, economic, professional, and civic activities.» Under Section 2.08, the domicile for juridical persons depends on «the center of its activities relevant to the particular conflict-of-laws matter to be resolved,» but is presumed to be where it has its principal place of business. In my personal capacity, I have argued in favor of an important role for comparative analysis in the Restatement process and I continue to refer to comparative materials in my Restatement work. See R. MICHAELS, and C. A. WHYTOCK, «Internationalizing the New Conflict of Laws Restatement», *Duke Journal of Comparative & International Law*, vol. 27, no. 3, 2017, pp. 356-359.

⁷⁹ Compare Third Restatement T.D. 4 § («the state with which the spouses jointly have the closest connection, taking into account all the circumstances») with Matrimonial Property Regulation art. 26(1)(c) (referring to the law of the state «with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances»).

statement has two primary exceptions: a public policy exception⁸⁰ and a manifestly-more-appropriate-law exception⁸¹. The Succession Regulation, the Matrimonial Property Regulation, the Registered Partnerships Regulation, and the current version of the EGPII Proposal all contain a public policy exception⁸². The Matrimonial Property Regulation, the Registered Partnerships Regulation, and the EGPII Proposal also contain an exception relating to overriding mandatory provisions⁸³. In addition, the Succession Regulation provides that «[w]here, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State»⁸⁴.

A fourth dimension of comparison is *renvoi*. The Second Restatement embraced the use of *renvoi*, particularly for property-related choice-of-law issues⁸⁵. Unlike the Second Restatement, but like the Matrimonial Property Regulation, the Registered Partnerships Regulation, and the current version of the EGPII Proposal⁸⁶, the current ver-

⁸⁰ See Third Restatement T.D. 3, § 5.04 («A court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy»). As the Comment to Section 5.04 clarifies: «For invocation of the public policy exception to be justified, two conditions must be met. First, the foreign law must be offensive to a deep-rooted public policy of the forum. Second, the use of the law to govern a particular issue must actually injure the forum policy. Offensiveness in the abstract is not enough.»

⁸¹ See Third Restatement T.D. 3, § 5.03 («The law selected by the rules of this Restatement will not be used if a case presents exceptional and unaccounted-for circumstances that make the use of a different state's law manifestly more appropriate. In such cases, the court will select the manifestly more appropriate law.»). The Comment to Section 5.03 explains: «Whether a result is manifestly more appropriate is to be determined by considering factors including the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue—determined in light of the strength and relevance of the contacts between the states and the issue, and the protection of justified expectations. These «right answer» considerations determine whether a choice of law is sensible or arbitrary, and the exception should be used to avoid arbitrary outcomes.» Third Restatement T.D. 3, § 5.03, Comment c.

⁸² See Succession Regulation art. 35 («The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.»). See also Matrimonial Property Regulation art. 31, Registered Partnerships Regulation art. 31, and EGPII Proposal art. 13.

⁸³ See Matrimonial Property Regulation art. 30 («Overriding mandatory provisions. 1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. 2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State 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 matrimonial property regime pursuant to this Regulation»). See also Registered Partnership Regulation art. 30 and EGPII Proposal art. 12.

⁸⁴ Succession Regulation art. 21(2).

⁸⁵ See Second Restatement § 8 (2).

⁸⁶ See Matrimonial Property Regulation art. 32 («Exclusion of *renvoi*. The application of the law of any State specified by this Regulation means the application of the rules of law

sion of the Third Restatement's chapter on choice of law for property declares that renvoi is unnecessary under its rules⁸⁷. Interestingly, the EU Succession Regulation provides for renvoi under certain circumstances⁸⁸. In the United States, renvoi has only been used by courts exceptionally rarely, despite the Second Restatement's embrace of it, and it has been extensively criticized by judges and scholars alike⁸⁹.

Both the Third Restatement and EU private international law cover choice of law for issues about succession and property in marriage and other domestic relationships. However, unlike the Third Restatement and its predecessors, EU private international law currently does not extend to choice-of-law issues relating to what the EGPIIL Proposal calls «proprietary rights»⁹⁰. The EGPIIL Proposal offers a model to fill that gap⁹¹. The current drafts of the Third Restatement and the EGPIIL Proposal are similar in at least two ways. Neither of them adopts renvoi⁹² and both of them adopt a general situs rule for proprietary rights

in force in that State other than its rules of private international law»). See also Registered Partnerships Regulation art. 32 and EGPIIL Proposal art. 14.

⁸⁷ Third Restatement T.D. 4, Chapter 7, Property, Introductory Note d («This Chapter's choice-of-law rules refer to the 'law' of a designated state. This reference is to the 'internal law' of the designated state, which does not include its choice-of-law rules.... Thus, this Chapter's choice-of-law rules do not require a court to determine and apply a foreign state's choice-of-law rules...»). The Third Restatement does, however, contemplate that «a court may find foreign states' choice-of-law rules relevant to an assessment of the relative interests of states for purposes of determining whether this Restatement's manifestly-more-appropriate-law exception applies.» Third Restatement T.D. 4, Chapter 7, Property, Introductory Notes, Reporters Note b. It also so far retains a general renvoi provision similar to that of the Second Restatement. See Third Restatement T.D. 3 § 5.06(2).

⁸⁸ See EU Succession Regulation Article 34(1) («The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a renvoi: (a) to the law of a Member State; or (b) to the law of another third State which would apply its own law»).

⁸⁹ See C. A. WHYTOCK and M.-Y. CHANG, *op. cit.* See also J. W. SINGER, *op. cit.*, pp. 159–160 (criticizing renvoi); In re American Suzuki Motor Corp., 494 B.R. 466, 490 n.14 (Bankr. C.D. Cal. 2013) (stating that «[t]he Ninth Circuit is clear that renvoi is generally dead-letter»); Chang-Williams v. Dep't of the Navy, 766 F. Supp. 2d 604, 628 n.23 (D. Md. 2011) (stating that «no Virginia court has ever employed renvoi»).

⁹⁰ See EGPIIL Proposal art. 2(a) (defining «proprietary rights» as «rights over corporeal assets that are effective against third parties (*erga omnes*), such as ownership, security interests, mortgages, usufructs or servitudes»). The Third Restatement generally classifies these issues as «core property issues.»

⁹¹ See generally F. GARCIMARTIN, «The Law Applicable to Rights *in rem*: A Proposal of the European Group for Private International Law», *Willamette Law Review* (forthcoming; manuscript on file with author).

⁹² Regarding the Third Restatement, see Third Restatement T.D. 4, Chapter 7, Property, Introductory Note d («This Chapter's choice-of-law rules refer to the 'law' of a designated state. This reference is to the 'internal law' of the designated state, which does not include its choice-of-law rules.... Thus, this Chapter's choice-of-law rules do not require a court to determine and apply a foreign state's choice-of-law rules...»). Regarding the EGPIIL proposal, see art. 14 («The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law»).

issues involving real property⁹³. Interestingly, the two projects have used different methods to determine the scope of the situs rule. For the Third Restatement, the scope of the situs rule is derived from a critical analysis of caselaw (an inductive aspect) in light of right answer and systemic considerations (a deductive aspect). For the GEDIP Proposal, the scope of the situs rule is derived from an a priori definition of «proprietary rights»⁹⁴. One consequence of those different paths is that while the scope of the situs rule for proprietary rights issues involving real property so far appears similar in the two projects⁹⁵, its scope for proprietary rights issues involving personal property so far appears broader in the EGPIIL Proposal than in the Third Restatement.⁹⁶

Limited space precludes examination in this chapter of many other interesting dimensions of comparison between the Third Restatement's and EU private international law's respective approaches to choice of law for property issues, such as their treatment of the question of party autonomy to select the governing law and choice of law governing the rights of third parties as to matrimonial property. Moreover, although this chapter has highlighted certain similarities between the

⁹³ See Section V(1) above and EGPIIL Proposal art. 4 («General rule. The proprietary rights in an asset are governed by the law of the State within the territory of which the asset is located»). The general situs rule is subject to exceptions in both projects. Regarding the Third Restatement, see Third Restatement T.D. 3, § 5.04 (public policy) and § 5.03 (manifestly more appropriate law). Regarding the EGPIIL proposal, see art. 12 (overriding mandatory provisions) and art. 13 (public policy exception).

⁹⁴ See EGPIIL Proposal art. 2 («For the purpose of this Regulation: (a) 'Proprietary rights' means rights over corporeal assets that are effective against third parties (*erga omnes*), such as ownership, security interests, mortgages, usufructs or servitudes; (b) 'Corporeal assets' means assets able to be physically possessed and includes both movable and immovable...»).

⁹⁵ Similar, but not the same. Compare, for example, Third Restatement T.D. 4, Chapter 7, Property, adopting situs rule for permissible interests in real property (§ 7.02), servitudes on real property (§ 7.03), transfer of real property interests by deed (§ 7.04), recording and priorities of real property interests (§ 7.05), while excluding from the situs rule's scope issues about contracts for the transfer of real property interests (§ 7.04, comment b), with EGPIIL art. 7 («[T]he law applicable pursuant to this Regulation [which is generally the law of the situs under art. 4] shall govern, in particular: (a) the requirements to create, transfer, encumber[] or acquire a proprietary right over an asset; (b) the question of whether the ownership of the corresponding asset may be embodied in a title certificate and transfer by delivery or endorsement of such a certificate; (c) the priority between competing proprietary rights over the same asset; (d) the nature and content of the proprietary rights over an asset; (e) the enforcement of security interest over an asset; or (f) the extinction or loss of a property right.») and art. 1(2)(c) (excluding contractual obligations from proposal's material scope).

⁹⁶ Compare Third Restatement T.D. 4, Chapter 7, Property, which extends the situs rule to some core property issues generally (including those involving personal property), such as adverse possession (§ 7.06) and leases (§ 7.08(b)), but not to others such as restraints on alienation (§ 7.07(b)) and, following the Uniform Commercial Code, certain issues about security interests in personal property (§ 7.08(d)), with the EGPIIL Proposal, which more generally uses the situs rule for choice-of-law issues about proprietary rights issues involving personal property, albeit with special provisions that would apply only as to personal property, such as assets in transit or to be exported (art. 5), protection of acquired rights (art. 8), and recovery of cultural objects (Chapter III).

Third Restatement and EU private international law, it is important not to exaggerate the similarities or to neglect the many, and often very subtle, differences. Nevertheless, perhaps the examples offered here are sufficient to make plausible the claim that the Third Restatement, if followed by courts in the United States, could lead to a significant degree of convergence with EU private international law regarding choice of law for property issues. This, in turn, might contribute in at least some small ways to the enhancement of choice-of-law uniformity in EU-U.S. transnational contexts, thereby simplifying planning and dispute resolution in areas related to property⁹⁷. Even modest steps in that direction might be welcome.

⁹⁷ For example, this might help simplify estate planning and administration of estates in international contexts. C. A. WHYTOCK, «Situs and Domicile», *op. cit.*, p. 1200. See also D.W.M. WATERS, *Explanatory Report on the Convention on the Law Applicable to Succession to the Estates of Deceased Persons*, The Hague, Permanent Bureau of the Hague Conference on Private International Law, 1988, par. 18, p 21 («A single approach [to choice of law for issues about successions] would both simplify the winding up of deceased persons' estates and also reduce costs and the chances of error») (<https://assets.hcch.net/docs/7bfd5915-bf1b-4f9f-9b93-61f979bf8e61.pdf>).