PRIVATE INTERNATIONAL LAW ON RIGHTS IN REM *IN THE EUROPEAN UNION*
DERECHO INTERNACIONAL PRIVADO SOBRE DERECHOS REALES EN LA UNIÓN EUROPEA
Maria Font-Mas (dir.)
ISBN: 978-84-1381-849-8
Madrid, 2024
pp. 291-311
DOI: 10.37417/PILRIRUE/11
Marcial Pons Ediciones Jurídicas y Sociales

APPARENT CONFLICTS IN THE CHARACTERISATION OF CROSS-BORDER TRANSFERS OF RIGHTS *IN REM* AND CONCEALED SUBSTANTIVE CONNECTING FACTORS FOR JURISDICTION OVER IMMOVABLE ASSETS

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SUMMARY: I. INTRODUCTION.— II. THE PROCESSES OF CHARACTERISATION (*QUALIFICATION)* IN PRIVATE INTERNATIONAL LAW: 1. Traditional and contemporary connecting factors for rights *in rem*; 2. «Characterisation» in the concrete subsumption process or in the development of new legal rules?: 2.1. The process of characterisation between the two characterisation processes in historical dimension; 2.2. The importance of the conceptual distinction for the interpretation of Article 24(1) of the Brussels I bis Regulation.— III. CROSS-BORDER TRANSFERS OF RIGHTS *In rem* AS A MATTER OF CONTRACT: 1. The undisputed contractual character of cross-border transfers of rights *in rem*; 2. Avoidance actions of cross-border transfer of rights *in rem* as a matter of contract: 2.1. The rationale of the exclusive character of the forum rei sitae in Reichert; 2.2. Good faith as a connecting factor in Feniks compared to the Italian case Corkran; 2.3. The principle of effectiveness in Reitbauer and Schmidt.— IV. NON-CONTRACTUAL TRANSFERS OF RIGHTS *In rem* FALLING WITHIN THE SCOPE OF THE RULE ON RIGHTS *In rem*: 1. The scope of the jurisdictional rule on rights *in rem*; 2 Examples of causes

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of action falling within the scope of Article 24(1) EU Regulation 1215/2012: 2.1. Subrogation in actions for damages; 2.2. The Right of pre-emption; 2.3. Common property; 3. *Vis attractiva* of the *forum rei sitae* in litigation on modification of inscriptions in national land registers— V. CONCLUSIONS: 1. The characterisation of cross-border transfers of rights *in rem*; 2. The use of good faith and effectiveness as connecting factors for avoidance actions.

I. INTRODUCTION

The purpose of our investigation is to consider how the two rules explicitly dealing with rights *in rem* in Regulation 1215/2012, Article 24 and Article 8(4), need to be coordinated with the rule applicable to Article 7(1) for contracts organising their cross-border transfer. The solutions offered by the Court of Justice of the European Union (CJEU) to this problem are also applicable to the corresponding rules of the 2007 Lugano Convention, namely Articles 22(1), 5(1) and 6(4)[1]. Despite the different source of the two instruments, they both form part of the EU system of private international law *in fieri*, which will be referred to, in this paper, as Brussels-Lugano system[2]. As of the entry into force of the 1971 Protocol on the interpretation of the 1968 Brussels Convention, the CJEU is building a system of EU private international law. Its quasi-legislative role has been constantly endorsed by the EU legislator, also by recognising the principles of its jurisprudence as part of an *acquis* capable of being «ratified» in subsequent reforms of the EU Regulations in private international law.

The rules of the Brussels-Lugano system are constantly being clarified, but they are also being developed by the CJEU in a creative and legislative mode. Clarifications on the rationale and the limits of the connecting factor designed for rights *in rem*, on its scope and application provide a good example of the structural importance of the Court of justice in the development of a uniform system of law. By proceeding to characterise, on the one hand, the facts presented by the case and, on the other hand, the national legal rules which have been selected to frame the case on the merits, the CJEU is able to act in this dual function of judge and legislator. Acting in its role of judge, the CJEU uses the «characterisation» process to decide the case at hands —minor premise of the judicial syllogism— but at the same time, acting in its «nomophylactic» function, the CJEU uses the «charac-

[1] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3–41.

[2] The CJEU has interpreted the rules of the 1968 Brussels Convention, of the subsequent Regulations as well as of the 1988 and 2007 Lugano Conventions while in force. The decisions interpreting these instruments are used as precedents for the interpretation of the rules in force —which are given, today, by the 2007 Lugano Convention and the 1215/2012 EU Regulation. It is therefore possible to refer to such uniform body of law as a system.

terisation» process to clarify the legal principle relied upon —major premise of the judicial syllogism and takes on a creative role (II). The quasi-legislative role of the CJEU in this respect is necessarily influenced —when not biased— by the construction of the case presented to the Court. Avoidance actions have offered an interesting arena for the debate on the most suitable connecting factors in case of cross-border transfers of immovable property. At the present stage, the Court seems to be using «good faith» as a concealed «forum-selection method» and as an expression of a principle which could be referred to as *favor probi.* This perspective may explain some decisions on avoidance actions concerning cross-border transfers of immovable property, the justification of which has been difficult to grasp by commentators (III). Against this background, it becomes possible to draw the scope of the exclusive jurisdiction rule for immovable property by reference to some national causes of action related to transfers of rights *in rem* (IV) and draw some conclusions (V).

II. THE PROCESSES OF CHARACTERISATION (QUALIFICATION) IN PRIVATE INTERNATIONAL LAW

1. Traditional and contemporary connecting factors for rights *in rem*

The 1968 Brussels Convention restates the very classical rules on rights *in rem*, according to which these are connected to their «situs» whenever attached to immovable property.

The traditional and contemporary rules attribute exclusive jurisdiction to the legal order in the jurisdiction of which the immovable property to which rights *in rem* are attached is located. Such exclusiveness is a direct consequence of the principle of effectiveness, as the legal order of the *rei sitae* is the only one capable of directly enforcing its own evaluations.

Very differently, the classical rule governing rights *in rem* attached to movable property connects them to the personal law of their owner: *mobilia sequuntur personam*. This is not a pure image, as the rule stems from the medieval custom of lords and property owners moving their chattels from one castle to another in their routinary tours to supervise the good management of each of their feuds. Their estates were emptied upon their departures. All their movable possessions —including tapestries, all their furniture and beds, etc.— travelled with them in chests and trunks during this periodic transhumance to supervise the administration of the lands, herds and people living in their lands.

When rights *in rem* are attached to movable property, litigation on their content is not considered as requiring a special or exclusive head of jurisdiction. However, some of the solutions elaborated by the CJEU for rights *in rem* attached to immovable property may also apply, by analogy, to movable property[3].

In the present state of European private international law, the only rules on rights *in rem* of the Brussels-Lugano system and of the Rome I system[4] refer to rights attached to immovable property.

In the EU Regulation 1215/2012 rights *in rem* are governed by Article 8(4) and 24(1), in particular. The latter confirms the exclusive nature of the head of jurisdiction conceived for rights *in rem*. It states:

> The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: (1) in proceedings which have as their object rights *in rem* in immovable property […], the courts of the Member State in which the property is situated.

In addition to being exclusive, the head of jurisdiction of the *rei sitae* also has a certain *vis attractiva*. Litigation on a contractual transfer of a right *in rem* may be brought either: *i)* before the general head of jurisdiction of the domicile of the defendant (Article 4(1) on *forum rei*), or *ii)* before the alternative head of jurisdiction of the place of performance of the obligation in question in matters relating to a contract (Article 7(1) on the *forum destinatae solutionis* and taking into account the irrefragable presumptions given by the letters a), b), and c) of the first paragraph of Article 7); *iii*) as well as, as a third alternative,

> if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

as prescribed by Article 8(4) which allows the joinder of actions in matters of contract and in matters of right *in rem* before the *forum rei sitae*.

[3] The classical rule on rights *in rem* for movable property is designed for goods in transit. This rule has recently been considered by the prestigious Institute of International Law in its famous resolution of 4 September 2021 on «Human Rights and Private International Law» coordinated by Fausto Pocar. Its Article 18(2) states that a State, which cannot grant continuity in the enjoyment of property rights to a (former) owner because of a change in the applicable law, «shall grant the holder an equivalent right to the extent possible». For a comment see M.L. Padelletti, «Article 18 of the Institute of International Law Resolution on Human Rights and Private International Law: Property Rights», *Diritti umani e diritto internazionale*, 1/2023, pp. 155-168.

[4] The «Rome I system» refers both to the 1980 Rome Convention and the EU Regulation 593/5008, which sets rules in continuity with the previous regime.

2. «Characterisation» in the concrete subsumption process or in the development of legal rules?

It has already been argued that the process of characterisation, and thus its notion, is amphibological[5].

The autonomous nature of the definitions used in the EU Regulation requires a case-by-case approach for characterising a fact under a given EU notion so that it may be subsumed under the relevant EU norm. This is the first sense given to the word «characterisation» and the most commonly referred to (or, by analogy with the French term: *qualification*) [6]. In addition to this notion of characterisation *stricto sensu*, reference to a process of «characterisation» may also be understood in a broader and more theoretical perspective, disconnected from any factual reality. In this second sense the process consists in the attribution of a connecting factor conceived for a very general legal category (contract, successions, marital property) to single national causes of action, in order to progressively build an abstract taxonomy, with the aim of easing the interpreter's work[7].

This second perspective requires a creative act and not the mere interpretation of a rule. The CJEU, in its capacity of developer of EU law, uses the famous Rabel's method of characterisation according to comparative law.[8] A comparative perspective, cumulated with philosophical or fundamental rights considerations, allows the Court to define the boundaries between the scope of the rule on contracts and that of the rule on rights *in rem* by reference to specific national legal rules. Often biased by the need of confronting real facts with the rules of the Brussels-Lugano system[9] the CJEU defines the content and scope of «matters relating to a contract» and «matters relating to rights *in rem* in immovable property» by identifying the elements —comparatively present in the national rules of Member States— which allow to conclude that a national cause of action belongs to a contract or to a right *in rem*.

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[5] On the two different notions of characterisation used interchangeably by private international law scholars, see I. Pretelli, *Garanzie del credito e conflitti di leggi*, Napoli, 2010, pp. 18-29.

[6] *Ibid*.

[7] *Ibid*.

[8] In the wake of Savigny, E. Rabel, in *The Conflict of Laws: a Comparative Study*, 1958, and *Das Problem der Qualifikation*, 1931, pp. 241 ss., found in comparative law that «surrogate» of the *gemeines Recht*, which allowed him to frame the institutions of European civil law systems in a uniform manner. The author observes that the original identity of civil law institutions can be traced in the works of the glossators and statutists (*ibid*., p. 154). Therefore, the abstractly conceived conflict rule does not relate to a phenomenon of the *lex fori* with which to compare the phenomena of foreign law, but on the contrary directly to what is common to all these phenomena.

[9] *Supra*, note 1.

Both processes of characterisation have been studied but the traditional doctrinal discussion has targeted, as its focus, the «object» of characterisation[10]. Less attention has been paid to the fact that the process of characterisation may well have two «objects» or «functions» at the same time or, rather, that the word «characterisation» in private international law is used to describe two different legal reasoning and argumentations.

2.1. The original process of characterisation in historical dimension

In Savigny's system only the second operation made sense because there was no written rule of private law. The legal reasoning at the time of *common law* (*gemeines Recht*) did not consist in comparing social reality with written law, with the *ius positum*, but in analysing social reality in order to deduce its legal features by means of logical stratagems to achieve new knowledge from old one: analogy, arguments *a contrario*, *a fortiori*, *a maiore ad minus*, etc. These logical devices were used to build legal solutions from general principles. Lawyers tailored and adapted the latter to actual legal needs. In the realms of private law and private international law of Savigny's system, each relation between individuals had to be analysed with the legal tools provided by the «contemporary roman system». The legal and logical reasoning paved the way to the construction of the best legal solution to a problem and to the definition of the rights and powers attached to the relation between one and other parties[11]. In this conception of law as a pure science, where the principles and rules of Roman law were considered of scientific nature, any national codification of private law appeared futile, misleading and ultimately an obstacle to legal scientific development. Against this background, Savigny sought the appropriate connecting factor for each kind of legal relationship. Thus, his basic problem of private international law was that of possible «conflicts of categories», which happened when legal relations had elements of more than one category. A classic example is the case of the Maltese rule ensuring a portion of the estate of the deceased to the surviving spouse in need. In the famous «Bartholo case»[12], before analysing the facts of the case, the French *Cour de cassation* had to decide whether this Maltese abstract rule fell within the category of marital property or within that of successions[13].

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[10] B. Ancel, «L'objet de la qualification», *Clunet,* 1980, pp. 227 ss., B. Ancel, *Les conflits de qualifications*, 1977, p. 222 s.; p. 244, p. 249, e p. 256.

[11] I. Pretelli, *Garanzie del credito e conflitti di leggi*, Napoli, 2010, p. 20.

[12] Cour d'Appel d'Alger, December 24, 1889, *Clunet* 1891, p. 1171. See E. Bartin, «De l'impossibilité d'arriver à la suppression définitive des conflits de loi», *Clunet*, 1897, p. 225.

[13] B. Ancel, B., Les conflits de qualifications *à l'épreuve de la donation entre époux,* Paris, 1977, p. 551 demonstrates that the outcome of the characterisation process changes according

2.2. The importance of the conceptual distinction between the two characterisation processes for the interpretation of Article 24(1) of the Brussels I bis Regulation

Examples of characterisation in this historical meaning —where the object of characterisation is an abstract rule instead of a given fact— are mainly given, today, by the explanatory reports that accompany supranational bodies of laws and the by the commentaries which explain legislation. The CJEU's lines of cases represent an exception due to its specific and creative role in forging the Brussels-Lugano system. The process of characterising abstract national institutions with the aim of finding the appropriate connecting factor is also part of the CJEU's role and may be traced in its decisions.

In ensuring the role of interpreter of the written rules, the CJEU has taken an active part in the construction of a European system of private international law. The CJEU «characterises» national rules as part of the major premise of the judicial syllogism that forms the motivation of its decisions. The major premise of the judicial syllogism —the scope of Article 24(1) in this case— may need to be developed rather than merely described. This operation confronts the CJEU with a problem of characterisation in comparative perspective. The legal principle in which the facts need being subsumed is clarified by the CJEU by means of a «characterisation» of the elements of a national cause of action allowing to classifying it as either a matter of rights *in rem* or not.

III. CROSS-BORDER TRANSFERS OF RIGHTS *IN REM* AS A MATTER OF CONTRACT

1. The undisputed contractual character of cross-border transfers of rights *in rem*

There is no doubt on the contractual characterisation of cross-border transfers of rights *in rem* in the Brussels-Lugano system. One of the first decisions by the CJEU on this matter dates back to 1977, when the then CJCE excluded from the scope of Article 16(1) of the 1968 Brussels Convention the Dutch «*verpachting vaneen winkelbedrijf*». The question concerned the agreement by which a party, named Sanders, would take over the running of a florist's business in a shop which the other party, named Van der Putte had rented at Wuppertal-Elberfeld (Federal Republic of Germany)[14]. The Court analysed the Dutch con-

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to the «project» of the parties, i.e. it is the outcome sought by the parties who advocate a right or power on the basis of precise facts which influences the characterisation process.

[14] CJCE, 14 December 1977, *Theodorus Engelbertus Sanders v Ronald van der Putte*, Case 73-77, ECLI:EU:C:1977:208.

tract and considered it to be «an agreement to rent under a usufructuary lease a retail business carried on in immovable property rented in Germany».[15] Already on that first occasion, the Court made it crystal clear that the cause of action determined the object of litigation whilst the object of the disputed contract —whether it concerned rights *in rem* or other kind or rights— was irrelevant in the determination of the applicable head of jurisdiction. This conclusion was confirmed as regards an action for rescission of a contract for the sale of land and consequential damages, which the Court decided by a simple order delivered in 2001.[16]

2. Avoidance actions of cross-border transfer of rights *in rem*

The scope of the rule on exclusive jurisdiction in matters of rights *in rem* has been more thoroughly discussed on the occasion of avoidance actions. In general, avoidance actions encompass all kinds of legal instruments which allow a creditor to challenge any economic operation of their debtor —and often the transfer of immovable property— on the basis of its fraudulent character, whenever it appears that it was done with the aim of avoiding the payment of the existing debt. Already with reference to Article 16(1) of the 1968 Brussels Convention the CJEU had stated that an action challenging the transfer of a right *in rem* attached to an immovable property, without seeking the immediate protection of such right, does not need to be brought before the *forum rei sitae*. Subsequent decisions confirmed that avoidance actions —i.e. actions rooted in the roman *actio pauliana* or the Elizabethan remedy for fraudulent conveyances— do not fall into the scope of the exclusive jurisdiction for rights *in rem* even when they seek at seizing an immovable to secure a debt.

2.1. The rationale of the exclusive character of the forum rei sitae *in Reichert*

In the well-known Reichert I case[17], the Dresdner Bank AG had asked the French judges to set aside the donation of an immovable property located in Antibes, in the French *Alpes-Maritimes*. The donation had been made by a couple, Hans Heinz Reichert and Ingeborg Kockler, in favour of their son Mario, by a notarial instrument drawn up by a French notary at Creutzwald, Moselle. The bank, which was the couple's creditor by virtue of a loan, invoked the protection granted

[15] *Ibid*.

[16] CJEU, 5 April 2001, C-518/99, *Richard Gaillard and Alaya Chekili*, ECLI:EU:C:2001:209.

[17] CJCE, 10 January 1990, *Mario P. A. Reichert and others v Dresdner Bank*, Case C-115/88, ECLI identifier: ECLI:EU:C:1990:3.

to creditors by the French «action paulienne» *action paulienne*[18] and had asked the French judge to set aside the donation in order to sell the property for the extinguishment of the debt.

The French court questioned its jurisdiction on grounds of Article 16(1) of the Brussels Convention, which contains the applicable ground for exclusive jurisdiction later transposed in Article 24 of EU Regulation 1215/2012[19].

The exclusivity of the head of jurisdiction is not only grounded on the principle of effectiveness but also to the principle of good administration of justice in terms of economic efficiency. The local judge will address more promptly than any other judge issues as: *i)* the extent of the property in terms of size; *ii*) the content of the property rights, prerogatives and duties (*ius excludendi etc.*) as recognised by the local law; *iii)* the type of rights, prerogatives and duties which may be held for the enjoyment of the asset (property, possession, etc.); *iv)* the continuity in the protection of the powers of the holder of the asset (*la protección de las facultades vinculadas a sus títulos*).

The object of *actio pauliana* encompasses two *inter partes* legal relationships: the one between the creditor and the debtor and the one between the debtor-seller (or donor) and the buyer of the (fraudulently transferred) item.

As the main source of the cause of action relies on the *inter partes* and pre-existing relation between the creditor and its debtors —without which the transfer would have never been possibly challenged— the CJEU has logically excluded the *forum rei sitae.* In Reichert, the Court did not see any necessity of anchoring in France the proceedings for the declaration of non-opposability of the transfer, by the debtors. of the holiday house in Cap d'Antibes to the bank. The particular characteristics of the immovable are completely irrelevant for the decision here, since the plaintiff only seeks the immovable's transformation in a sum of money sufficient to recover its credit. The judge merely needs to assess if its actual value is sufficient to repay the defendant's debt and not its specific characteristic and location.

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[18] Article 1341-2 (as of 1 octobre 2016, by virtue of the Ordonnance n°2016-131 du 10 février 2016): «*Le créancier peut aussi agir en son nom personnel pour faire déclarer inopposables à son égard les actes faits par son débiteur en fraude de ses droits, à charge d'établir, s'il s'agit d'un acte à titre onéreux, que le tiers cocontractant avait connaissance de la fraude*».

[19] CJCE, 10 January 1990, *Mario P. A. Reichert and others v Dresdner Bank*, Case C-115/88, ECLI identifier: ECLI:EU:C:1990:3. In excluding the application of Article 16(1), the CJEU explains that: «the exclusive jurisdiction of the State in which the property is situated encompasses only those actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest».

Therefore, the investigation of the judge is limited by the object and source of the legal action («*petitum*» and «*causa petendi*», respectively). The judge verifies if the transfer realised the debtor's intention to evade responsibility for its debts by preventing the bank from seizing the asset and proceeding with a forced sale of the property. The role of the judge is to decide on the existence of a causal link between the transfer and the unpaid debt.

When the main object of the judge's investigation is the fraudulent character of the transfer, the immovable or movable nature of the asset transferred becomes irrelevant. It is therefore logical to characterise avoidance actions as contractual in nature.[20] Consequently, the CJEU ruled that such actions do not fall under the rule on the exclusive ground of jurisdiction for rights *in rem* attached to immovable property.

2.2. Good faith as a connecting factor in Feniks compared to the Italian case Corkran

After excluding the application of the *forum rei sitae* to such kind of avoidance actions, the CJEU, as well as, earlier, the Italian *Corte di cassazione*[21], have included these causes of action in the scope of the rule on contracts, provided today by Article 7(1) of the EU Regulation 1215/2012. In Feniks, the avoidance action had been introduced in Poland —where this action enables creditors acting individually and outside collective proceedings to neutralise the effects of transactions carried out by their debtor in fraud of their rights (as do the French *action paulienne* and the Italian *azione revocatoria ordinaria*).

The solutions found by the Italian Supreme Court and the CJEU, respectively, confirm that the *pauliana* and many other avoidance actions are «contractual in nature»[22]. However, the two courts use different cri-

[20] Doubts on the possibility to conclude on the contractual character of the action are expressed by U. Göranson, «*Actio pauliana* outside bankruptcy and the Brussels Convention», in Sumampouw M and others (ed), *Law and Reality, Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil*, Martinus Nijhoff, 1992, pp. 89, 90 who advocates for a «case by case» approach. See also T. Linna, «Actio pauliana and res judicata in EU insolvency proceedings» (2015) 11 *Journal of Private International Law*, p. 568; A. Vaquer, «Traces of Paulian Action in Community Law», in Schulze, R., *New Features in Contract Law*, Sellier, 2003, pp. 421 ss.

[21] P. Biavati, «Azione revocatoria e criteri italiani di competenza giurisdizionale», nota a Cass. sez. un. 7 maggio 2003 n. 6899, Corkran c. Casa Napoleone Ltd e Cashin"*, Int'l Lis*, 2004, pp. 88 ss.

[22] OGH 23.5.1984, 3 Ob 507/84, JBl 1985, p. 299, *ZfRV* 1986, p. 290, B. Verschraegen, Die internationale Gläubigeranfecthung ausserhalb des Konkurses, *ibi*, p. 272 decided, on the basis of art. § 1 Abs. 1 IPRG, which enshrines the rule of the strongest connection (stärkste Beziehung). Despite the parties' nationality, domicile and residence in Germany, it was the location of the *res litigiosa* (einer in Österreich gelegenen Liegenschaft) and the place of enforcement (in

teria to identify «the place of performance of the obligation» challenged with the action. In the Italian case, reference is made to the place of performance of the characteristic obligation of the contract transferring the immovable which was in Italy; whereas in the CJEU case, reference is made to the place of performance of the repayment of the debt, which was in Poland, whereas the immovable transferred was in Spain.

Whilst waiting for a clarification from the Court, a possible explanation of the apparent divergence of these two interpretation of the *forum destinatae solutionis* for avoidance actions is its translation in a (concealed) connecting factor based on good faith. This explanation stems from a reflection on the function of the avoidance actions in national laws and its inevitable influence on the solutions proposed in private international law[23]. As observed elsewhere, the preference given to the creditor who acts at home, reflects the choice of enhancing the protection of the party in good faith to the detriment of the assumed fraudulent buyer of the immovable asset, a third party unrelated to the creditor[24]. In other words, good faith plays here the role of a connecting factor.

At first sight, the idea of entrusting good faith with the task of directing the interpreter to a competent forum may seem theoretically incompatible with the classical method of private international law. However, such conclusion holds only to the extent that private international law is conceived as an axiologically neutral legal discipline. The assumed neutrality of private international law is a centuries old idea, consistent with Savigny's system of «contemporary roman law», but clearly outdated at least since the consolidation of positivism and the following critical observations by Bartin[25].

Hence, the rigour of a deductive system which would exclude any empirical assessment of reality has been gradually abandoned by the proven need to rebalance the powers of the parties in asymmetrical relationships, which led to the development of connecting factors of a material nature[26].

Österreich Exekution führen zu müssen) that led to the Austrian court's jurisdiction being asserted. Austria's connection with the case was a stronger link than its connection with Germany.

[23] I. Pretelli, «La bonne foi dans la pondération de la proximité et la fonction résiduelle du for spécial en «matière contractuelle » dans le règlement Bruxelles I – À propos de l'arrêt Feniks», *Revue critique de droit international privé*, 2020/1 (N° 1), pp. 61-82.

[24] I. Pretelli, «note sous Cass. sez. un. 7 maggio 2003 n. 6899, Corkran c. Casa Napoleone Ltd e Cashin», *Revue critique de droit international privé*, 2003, pp. 612 ss.

[25] E. Bartin, «De l'impossibilité d'arriver à la suppression définitive des conflits de loi», *Clunet*, 1897, p. 225. See now P. Kinsch, « Le rôle du politique en droit international privé», *Recueil des cours*, vol. 402, 2019, pp. 91 ss. A. Ehrenzweig *A Treatise on Conflicts of Laws*, 1962; H. Muir Watt, *Discours sur les méthodes du droit international privé (des formes juridiques de l'inter-altérité)*, Brill Publishers, 2019; H. Muir Watt, «Aspects économiques du droit international privé (réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)», *Recueil des cours*, t. 307, 2004, *passim*.

[26] *Ibid*.

The promotion of the constitution of a *status* or the disfavour of the extinction of certain states or situations (*favor filiationis; favor divortii;* or the *statuta odiosa su*ch as *repudiation* etc.) does not deny the nature of private international law as *Recht über Recht* but merely introduces material elements in the search for spatial justice. These encompass connecting factors ensuring the protection of categories of persons considered to deserve an enhanced protection (worker, consumer, insured, injured). Once the axiological value of rules of private international law has been accepted, the admission of alternative fora in contractual matters, being based on the objective assessment of the good faith of the defendants (the debtor and the third party, i.e. the buyer of the debtor's property) in the *action paulienne* becomes coherent. The idea of a «*favor probi*» promotes the protection of parties assumed in good faith in avoidance actions, already at the stage of deciding the appropriate connecting factor and to the same extent as protection at this stage is granted to parties which are assumed damaged (*favor laesi*) or assumed sons and daughters (*favor filiationis*), etc.

In asserting its jurisdiction, the Italian Court must have also considered: that it was effectively capable of enforcing its evaluations on the avoidance action; that it was certainly better placed to ensure protection to the creditor, in particular because the two defendants summoned by the plaintiff were her ex-husband, domiciled in Singapore, and a commercial company based in the British Virgin Islands; that the immovable property —a luxury hotel residence in the Tuscan municipality of Castiglion Fiorentino— had been sold by means of a contract concluded in Italy before the Italian notary; that the seller owed the claimant a sum of money, the amount of which had been decided by several English court orders issued at the time of the divorce.

On the other hand, in Feniks, the economic transaction carried out by the debtor and suspected of constituting a fraud involved companies either incorporated and governed by Polish law —i.e. the creditor company, named Feniks, and the debtor company, named Coliseum 2101— or controlled by a Polish company. Even though the immovable property was in Spain and its buyer was a Spanish company formally incorporated in Spain, it appeared that it was administered by the same management body as the Polish company Coliseum 2101. Thus, notwithstanding the different geographical locations and legal personalities of the two companies, it is possible to imagine that the two companies had a fairly close and lasting link with each other and undoubtedly with the Polish legal system.

These circumstances would explain why Coliseum 2101, following a natural instinct and basic economic rules, had preferred to satisfy its Spanish sister company to the detriment of Feniks. At any rate, the principle of effectiveness did not require, in this case, a Spanish enforcement of the decision on the avoidance, because both of the defendants were —one directly, the other indirectly— within the reach of the Polish jurisdiction.

In both cases, the connecting factor offered as an alternative to the *forum rei* on grounds of "proximity" is the *forum destinatae solutionis*. Similarly to the *forum damni* in cross-border cases, this criterion may translate in multiple fora where the plaintiff can introduce a legal action[27]. This solution was subsequently confirmed in the *obiter dictum* contained in paragraph 59 of the *Reitbauer* decision of the Court of Justice of 10 July 2019[28].

2.3. The principle of effectiveness in Reitbauer and Schmidt

In Reitbauer, the owners of an immovable property located in the Austrian region of Villach were pitted against the workers who had been employed to renovate it[29]. The property was part of a wider project involving the sentimental relationship between two Italian residents, Mr. Casamassima and Ms. C. After their breakup and the loss of meaning of the project of renovation, none of them honoured the payments for the renovation due to the company «Reitbauer and Others» and its subcontractors. The action for damages was brought in Austria against Ms. C. who appeared as the sole owner in the Austrian Land Register.

Meanwhile, in Italy, the broken couple had introduced proceedings to settle their reciprocal patrimonial claims. As part of their court settlement, Ms C. acknowledged a debt to Mr. Casamassima, securing it with a mortgage on the Villach property. The European Enforcement Order that followed was brought before a notary in Austria and the latter issued a notarial act which was entered in the Austrian land register as a pledge on the immovable property in favour of Mr Casamassima on 18 June 2014.

Only after that date, Reitbauer obtained a mortgage to secure the payment of their work, but Mr Casamassima's pledge ranked before it. Thus, when the house was sold via an auction ordered by the Austrian

[27] CJEU, 7 March 1995, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61.

[28] CJEU, 10 July 2019, Causa C-722/17, Norbert Reitbauer, Dolinschek GmbH, B.T.S. Trendfloor Raumausstattungs-GmbH,Elektrounternehmen K. Maschke GmbH,Klaus Egger,Architekt DI Klaus Egger Ziviltechniker GmbH v, Enrico Casamassima ECLI:EU:C:2019:285 at 59 «In the present case, [Reitbauer] sought a declaration that the pledge created in favour of Mr Casamassima by Ms C. — the common debtor to whom each of those creditors was contractually bound — was invalid in respect of Reitbauer and Others, the courts for the defendant's domicile could be supplemented by the courts on which jurisdiction is conferred under Article 7(1)(a) of Regulation No 1215/2012».

[29] *Ibid*.

judge at the request of Mr. Casamassima, the price obtained was adequate to satisfy his credit towards Ms. C. but remained insufficient to cover the company Reitbauer and Others and led them to contest the distribution of the proceeds.

In a first attempt, an action for avoidance of the court settlement was introduced before the Landesgericht Klagenfurt (Regional Court, Klagenfurt, Austria) but was dismissed assessing the lack of Austrian jurisdiction. Secondly, Reitbauer and Others filed an opposition, under Paragraph 213 of the Austrian EO, regarding the distribution of the auction proceeds.

Reitbauer and Others claimed that the Austrian inscription of Mr. Casamassima's pledge in the land register had been the result of a fraudulent operation aimed at evading the responsibility of the couple for their common debts.

Here too, the CJEU confirms the irrelevance of the place in which the immovable is located for avoidance actions and reiterates the availability of the *forum destinatae solutionis* as these actions fall within the contractual matter. The solution would have been different, if the object of the action introduced by Reitbauer had been a request for removal from the land register of the registration of the invalid pledge, as this kind of action does fall within the scope of Article 24(1) EU 1215/2012 Regulation, and may attract, in that forum, any related contractual action under Article 8(4) of the same Regulation[30].

The Austrian Courts represented, in the Reitbauer scenario, both the *forum rei sitae* and the *forum destinatae solutionis*.

The CJEU refers explicitly to the latter, which it identifies in «the place where, under those contracts, that renovation work was provided, namely Austria»[31], thereby again suggesting that the creditor can rely on its forum whereas the third party (the party who earned rights *in rem* attached to the immovable) can be attracted to the *forum destinatae solutionis* of a contract to which she did not participate (the renovation contract between Ms. C., the formal owner of the immovable, and Reitbauer).

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[30] See CJEU, 14 February 2019, Case C-630/17, Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen, ECLI:EU:C:2019:123, pt.102, *infra* sub 3.3.

[31] *Ibid*. pt. 61: «It would, therefore, be open to the holders of enforceable claims arising from a contract to bring an action for avoidance before the courts for the 'place of performance of the obligation in question', as authorised under Article 7(1)(a) of Regulation No 1215/2012. In the present case, by the second ground, Reitbauer and Others seek to preserve their interests in the enforcement of the obligations arising from the contracts for renovation work concluded with Ms C. It follows that the 'place of performance of the obligation in question' would be, in accordance with Article 7(1)(a) of that regulation, the place where, under those contracts, that renovation work was provided, namely Austria».

It is thus here via Article 7(1)(a) that the CJEU confirms the availability of Austrian courts to the Austrian-based plaintiff, whereas if the object of Reitbauer's action had been the removal of the (invalid) pledge from the land register, the same forum could have become available via a combination of Articles 24(1) and 8(4) of the Regulation[32]. The *erga omnes* effect with which the pledge gives exclusive precedence, in the sale of the immovable, to the pledge's beneficiary could have also led to the jurisdiction of Austrian Courts in force of the exclusive rule of jurisdiction of Article 24(1) Regulation 1215/2012.

This solution was adapted from *Schmidt* where the different characterisation of the parties legal action —as a question related to the removal of an entry in the land register— allowed the Court to adopt a different perspective on the scope of the *forum rei sitae* (and without mentioning the dedicated article 24(3) of the same regulation).

This was also a case of invalid pledge[33], but the focus was put, by the parties, on the entry in the land register, made on the basis of Article 61(1) of the Austrian GBG. The CJEU clarified that if the avoidance of a gift of immovable property on the ground of the donor's incapacity to contract was contractual in nature and therefore fell within the scope of Article 7(1)(a) Regulation (EU) No 1215/2012. However, the contextual action seeking the removal from the land register of notices evidencing the donee's right of ownership fell within the exclusive jurisdiction of the *forum rei sitae* and Article 8(4) of the same regulation provides, in these cases, for a joinder of the two actions.

IV. NON-CONTRACTUAL TRANSFERS OF RIGHTS *IN REM* FALLING WITHIN THE SCOPE OF THE RULE ON RIGHTS *IN REM*

1. The scope of the jurisdictional rule on rights *in rem*

To date, the Court of Justice of the European Union has given several clarifications on the scope and exclusive character of the *forum rei sitae* in cases of cross-border transfers of rights *in rem*.

The Court explains that:

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[32] See CJEU, 14 February 2019, Case C-630/17, Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen, ECLI:EU:C:2019:123, pt.102, infra sub-3.3.

[33] CJEU, 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881. A gift of land from a father to his daughter was the object of a notarial act, concluded in Vienna and entered in the land register. However, it later appeared that the father had been previously placed under guardianship by a decision. The guardian sought the avoidance of the contract of gift and, accordingly, the removal of the entry in the land register.

> the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the *locus rei sitae* are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated[34].

It is thus a question of good administration in terms of economic efficiency, given that the obtaining of evidence is facilitated in the locus rei sitae as the disputes may require checks, inquiries and expert assessments which have to be carried out there[35]. Furthermore, the Court limits the operation of the criterion establishing the exclusive jurisdiction of the courts of the State in which the property to legal action which aim at determining.

> The extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with protection for the powers which attach to their interest[36].

In the second place, the CJEU, considers the *erga omnes* or *inter partes* nature of a right or power attached to an immovable as decisive for the inclusion of litigation concerning it within the scope of Article 24(1).

> The difference between a right *in rem* and a right *in personam* lies in the fact that the former, existing in corporeal property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor [37].

If the aim of the action is to ensure that the holders of rights attached to immovable property can protect the powers inherent to such rights *erga omnes* the action may be classified as being *in rem* and this allows to conclude that

> An application, seeking the enforcement of powers arising from a right *in rem*, falls under the exclusive jurisdiction of the courts of the Member State in which the property is situated, pursuant to the first subparagraph of point 1 of Article 24 of Regulation No 1215/2012[38].

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[34] CJEU, 3 April 2014, Irmengard Weber v Mechthilde Weber,C 438/12, EU:C:2014:212, paragraph 41.

[35] CJEU, 18 May 2006, *ČEZ*, C 343/04, EU:C:2006:330, paragraph 29.

[36] CJEU, 14 February 2019, Case C-630/17, Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen, ECLI :EU:C:2019:123, pt. 99.

[37] CJEU, 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881, paragraph 30. See also the Schlosser Report on the association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59/71, p. 166).

[38] *Ibid*. paragraph 29 ss.

When it comes to mixed actions based on a right *in personam* and seeking to obtain a right *in rem*:

> Such actions are predominantly actions in personam […] the fact that the contract […] concerns immovable property is irrelevant […], the immovable nature of the subject matter of the contract being only of marginal significance[39].

On the basis of these statements, it is possible to conclude that cross-border transfers of rights *in rem*, including avoidance actions targeting cross-border transfers of rights *in rem*, are a matter of contract, *a priori*. However, if the transfer is non-contractual and stems from subrogation, a right of pre-emption, concerns the division of common property or influences the content of entries in a national land register, it falls within the scope of Article 24(1) of the Brussels I bis Regulation.

2. Examples of causes of action falling within the scope of Article 24(1) EU Regulation 1215/2012

2.1. Subrogation in actions for damages

In Dansomer, the CJEU examined a case of subrogation on the basis of contracts subject to German law[40]. Dansommer, a professional tour operator, had acted as an intermediary to enable a Mr Götz to rent a holiday house in Denmark owned by a private individual resident in Denmark. Mr Götz was then sued for damages by his contractual partner, acting *in lieu* of the owner of the property in question, for «taking poor care of premises and causing damage to the accommodation» by «failing to clean the house properly before his departure and damaging the carpeting and the oven safety mechanism»[41].

The CJEU describes subrogation as an institution by which «one person steps into the shoes of another in order to enable the former to exercise rights belonging to the latter»[42]. In this case, the right to claim damages which belongs to the owner of the property had been transferred to the subrogee. The Court establishes the principle according to which it is not the contractual relationship between the plaintiff and the defendant which determines the characterisation of the cause of action but the object of the dispute. When the plaintiff exercises rights *in rem* attached to the property and having erga omnes effects, altough

[39] *Ibid*. paragraph 36.

[40] CGCE, 27 January 2000, C-8/98, *Dansommer A/S and Andreas Götz*, ECLI:EU:C:2000:45.

[41] *Ibid*. paragraph 12.

[42] *Ibid*. paragraph 37.

on the basis of a contractual relationship and by means of subrogation, the cause of action lies within the scope of the rule on the exclusive jurisdiction on rights *in rem*. The action for damages to a property, even where not brought directly by its owner but by a professional tour operator subrogated to the rights of the owner of the property owner, remains an action in matters of rights *in rem* as it aims at ascertaining the damages affecting an immovable property. The contractual relationship between the tour operator and the tenant does not affect the *in rem* nature of the tenancy nor it changes the need of on-site inspections to assess the economic value of the asserted damages.

The transfer of rights *in rem* by means of subrogation does not change their *in rem* nature, regardless whether the right of subrogation arose by operation of law or by agreement.

2.2. Right of pre-emption

Most rights of pre-emption are attached to immovable property and have *erga omnes* effects when registered with the national land register, which ensures that not only the debtor, but any third party may be informed of their existence. As a consequence of mention on the register, the sale of an immovable property to which a right of pre-emption is attached, is without effect with respect to holders of such a right and enables them to claim the property on the same conditions as those agreed between the seller and the buyer.

The *in rem* nature of a right of pre-emption has been confirmed by the CJEU as regards the right provided for by Paragraph 1094 of the German BGB[43].

According to the CJEU, as the right of pre-emption attaching to a property produces effects with respect to all parties, any action seeking to determine its validity or invalidity falls within the scope of the rule on rights *in rem* since the object of the judge's analysis needs to consider if the holder is, or isn't, enabled to transfer the ownership of the immovable property subject to the dispute[44].

2.3. Common property

Clearly, an action for termination, by way of sale, of co-ownership of immovable property constitutes proceedings which have as their object rights *in rem* in immovable property in comparative law. It also

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[43] CJEU, 3 April 2014, Case C-438/12, *Irmengard Weber v Mechthilde Weber*, ECLI:EU:C:2014:212.

[44] The CJEU quotes paragraph 166 of the Schlosser Report in paragraphs 43 *et seq*.

falls, as recognised by the CJEU within the meaning of the jurisdiction rule designed for rights *in rem* in the Brussels and Lugano systems[45].

The transfer of a right of ownership in immovable property concerns rights *in rem* which have effect *erga omnes*. The aim of the action is to ensure that the holders of rights attached to immovable property can protect the powers inherent to such rights.[46]

Differently, if a co-owner seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, on the basis of the co-ownership agreement, the matter needs to be characterised as contractual, with the result of making applicable the special forum of Article 7(1) instead of the exclusive one of Article 24(1). In the case Ellmes Property Services Limited [47] the Court ruled that the two fora may frequently coincide in the place where the property is situated, because that is the place of performance of the obligation on which that action is based.

To benefit from the exclusive forum, the protection sought for the designated use may of the property needs being relied on not only against the co-owners of that property, but also erga omnes[48].

3. *Vis attractiva* of the *forum rei sitae* in litigation on modification of Land registers

It is sufficient to characterise a cause of action as a request for the removal of a right *in rem* from a land register to anchor jurisdiction before the courts of the legal order which keeps the register. The precedent here is the Croatian case introduced by Ms Milivojević against Raffeisenbank, in the aftermath of the real-estate operation aimed at creating apartments to be let[49]. Among the several causes of actions introduced against the lender —a declaration of invalidity of the credit agreement and of the subsequent notarised act relating to the creation of a mortgage guaranteeing the debt— she had asked the Croatian courts to erase the inscription of the mortgage from the Croatian land register.

Once more, the *erga omnes* nature of the mortgage is decisive for the inclusion of litigation concerning it within the scope of Article 24. When the request for removal from the land register on an entry is

[45] CJEU, 17 December 2015, Case C-605/14, *Virpi Komu, Hanna Ruotsalainen, Ritva Komu v Pekka Komu, Jelena Komu*, ECLI:EU:C:2015:833.

[46] *Ibid*. pt. 29.

[47] CJEU, 11 November 2020, C-433/19, *Ellmes Property Services Limited v SP*, ECLI:EU:C:2020:900.

[48] *Ibid*. paragraph 32.

[49] CJEU, 14 February 2019, Case C-630/17, *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen*, ECLI:EU:C:2019:123, pt.102.

accompanied by other causes of action, those action may be brought before the court of the Member State in which the immovable property is situated. In that case, the exclusive forum *rei sitae* also has a non-exclusive jurisdiction based on related actions, pursuant to Article 8(4) of Regulation No 1215/2012[50]. The principle was clarified in Milivojević, where the claims seeking annulment of the credit agreement and the notarised deed related to the creation of a mortgage were brought against the same defendant and capable of being joined[51].

V. CONCLUSIONS

The Court of Justice of the European Union has given a detailed description of the EU rules on jurisdiction over cross-border transfers of rights *in rem* in immovable property and contributed to the construction of a system of characterisation. In analysing its decisions, it is possible to consider both the question of characterisation *stricto sensu*, which allows to subsume the concrete and current problem in the existing rules, and the question of characterisation of foreign national rules, by means of their classification into the regulation's broader categories, with the aim of identifying the preferable or most elegant connecting factors, from a scientific point of view.

As regards characterisation in the broad sense, this paper formulates five conclusions.

In the first place, it is undisputed that cross-border transfers of rights *in rem* attached to immovable property by contract necessarily fall within the scope of the special forum provided for by Article 7(1) EU Regulation 1215/2012, including when litigation on the contractual matter is prompted by the introduction of avoidance actions.

Secondly, the characterisation of avoidance actions related to rights *in rem* in immovable property by the CJEU remains contractual.

Thirdly, the precise translation of the connecting factor encompassed by the *forum destinatae solutionis* remains uncertain but is *in fieri*. To reconcile apparently problematic solutions and drawing from previous research, this article explains the decisions on the *forum destinatae solutionis* in avoidance actions by reference to good faith which may be the real, albeit concealed, connecting factor. It may also be used as an explicit connecting factor in future statements.

In the fourth place, the use of good faith as a connecting factor requires a certain anticipation of the substantive analysis of the case at the stage of characterisation which may express a certain «*favor probi*».

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50 *Ibid*.
51 *Ibid*.

On this methodology, this article has observed that all the alternative or substitute fora of the forum rei involve a look at the merits of the case, the extent of which depends on the complexity of the connecting factor. An example of this is the mosaic rule developed to clarify the vector needed to identify the place of the damage: also, in this case the court is allowed to venture into the merits to determine the competent forum. Another example is provided by the rule on the choice of court. Here, we face a similar paradox which needs to be solved by allowing a *prima facie* analysis of the merits when determining the competent forum. If, on the one hand, it seems abusive to decide a dispute for which the parties had agreed to give jurisdiction to a foreign court or to an arbitrator, on the other hand, faced with a purported choice which is in reality manifestly non-existent, or faced with a choice prejudicial to the weaker party, in asymmetrical relationships, the abstention of the court abusively chosen prevents the risk of a denial of justice. This risk of exposing the parties to a denial of justice explains the breadth of the exceptions set out in Art. 6 of the Hague Convention of 30 June 2005 on Choice of Court Agreements[52].

Lastly and overall, case law shows that the alternative use of Article 24(1), 7(1) and 8(4) of the regulation often serves to grant jurisdiction to the *forum actoris* in cases of avoidance actions in relation to immovable property. In the two Austrian cases examined in paragraph 2.3., jurisdiction was adjudicated by the CJEU to the Austrian courts by developing different lines of reasoning. The CJEU has referred to different norms which were eventually leading to an identical outcome in a very similar scenario: in Austria was the immovable and Austrian residents were the plaintiffs who had introduced the avoidance action.

In the light of this cherry or «raisin picking»[53], it may be easily acknowledged, along with the analysis brought by the «American conflict's revolution»[54], that the CJEU uses alternative «escape devices». However, on this side of the Atlantic, the principles of effectiveness and good faith may offer a sufficiently convincing explanation. A future explicit disclosure of the substantial influence of an underlying *favor probi* may well testify of the natural inclination of jurists, in the highest sense of the term, to focus on preventing misuses of the existing loopholes in the law.

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[52] E. Gaillard, *Prima Facie* Review of Existence, Validity of Arbitration Agreement, *TDM* 2 (2006), *www.transnational-dispute-management.com*; F. Ferrari, D. P. Fernández Arroyo, *Private International Law Contemporary Challenges and Continuing Relevance*, Elgar, 2019, p. 467 ss.

[53] See Gerhard Kegel, «Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers», 27 *A M. J. Comp. L.* 615, 621–22 (1979)

[54] D. Cavers, *The Choice of Law Process*, Ann Arbor: University of Michigan Press, 1965, p. 38 ss.