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. 141-178
DOI: 10.37417/PILRIRUE/05
Marcial Pons Ediciones Jurídicas y Sociales

RIGHTS *IN REM* IN SPANISH PRIVATE INTERNATIONAL LAW

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SUMMARY: I. INTRODUCTION.— II. INTERNATIONAL JURISDICTION: 1. General aspects; 2. Institutional private international law: Regulation 1215/2012: 2.1. Corporeal property; 2.2. Incorporeal property; 3. Conventional private international law and autonomous private international law.— III. APPLICABLE LAW: 1. General aspects; 2. General rule; 3. Particular rules; 4. Scope of application of the rights *in rem* statute.— IV. RECOGNITION OF DECISIONS AND ACTS.

I. INTRODUCTION

1. It is surprising how such an important part of private law as that concerning rights *in rem* has had such limited development in the field of private international law (PIL). The apparent simplicity of the rules governing it and the relatively small volume of case law on the subject —compared with other areas of patrimonial law, such as contractual and non-contractual obligations— may partially explain this phenomenon, but do not fully justify it. Moreover, the occasional presence of rights *in rem* in international private relations has been a historically constant feature of conflict-of-laws legal studies. This could be perceived both when theories of statutes were at its peak —where the solution of con-

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flicts concerning rights *in rem* was often inseparable from that provided for *mortis causa* succession[1]— and in the codification period that led to modern PIL —during which the traditional differentiation between the regulation of rights *in rem* in movable and immovable property was maintained in some civil codes of the nineteenth century (including the Spanish one), but disappeared when these were revised during the twentieth century, because, in the recodification, pre-eminence was given to the *vis attractiva* of the territory (and territorial law) over all the assets located in it in order to submit them to the solutions of the *locus situs*[2].

2. This paper studies the specific rules of PIL for rights *in rem* (that is, non-personal rights or claim rights) in things or property (terms which are understood to be equivalent for these purposes), provided that they are capable of being appropriated and deemed to have individual status —*uti singuli*; that is, not having universal status or being integral parts of a legally separate estate (inheritance, matrimonial property regime, commercial establishment, etc.)—. Of the multiple classifications that can be established between the things or types of property that are the object of rights *in rem*, this paper will focus on two particularly significant distinctions: one differentiates movable property from immovable property, and another one separates corporeal (tangible or material) property from incorporeal (intangible or immaterial) property. The sections below will show that the first distinction is decisive in current PIL, especially in international jurisdiction. The second distinction contrasts corporeal property with incorporeal property and is also highly significant, as both types of property are subject to PIL regimes with substantial divergences.

3. A crucial fact for a correct understanding of the following pages is that the unifying efforts within European Union law have only partially taken place in the areas of the international jurisdiction and the recognition and enforcement of decisions, without yet reaching the applicable law. This has at least three consequences. Firstly, while the rules of jurisdiction and recognition and enforcement are those generally laid down by an EU instrument, as far as the applicable law is concerned, one must continue to have recourse to national conflict rules which, albeit similar, are not identical. Secondly, and as a consequence of the above, it will not be possible within the realm of rights *in rem* to appeal to a necessary «coherence» in the formulation and interpretation of the contemporary

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[1] A. Lainé, *Introduction au droit international privé contenant une étude historique et critique de la théorie des statuts. Et de rapports de cette théorie avec le Code civil*, t. II, Paris, Librairie Cotillon/F. Pichon, 1892, pp. 225-228.

[2] G. C. Venturini, «Property», *International Encyclopedia of Comparative Law*, vol. III, Lipstein, K. (ed.), *Private International Law*, ch. 21, The Hague/Tübingen, Mouton/Mohr (Siebeck), 1976, pp. 3-7.

rules of PIL[3]. This is because the observance of this principle is only enforceable with regard to European Union law and cannot be extended to the regulation of the Member States, since it is not possible to make a common interpretation of their provisions that is ultimately approved by the Court of Justice of the European Union (CJEU). Thirdly, the problem of characterisation remains to be solved, since the dual sources mentioned (European and national) mean that it is necessary to use different characterisation criteria to classify the various actions and claims: *ex lege fori* when Member States rules must be applied, and autonomous (that is, uniform) when EU rules of PIL must be applied.

II. INTERNATIONAL JURISDICTION

1. General aspects

4. In international disputes, including those relating to rights *in rem*, the first step to be taken is to establish the court that will adjudicate the dispute. Based on the order of preference of the sources in Spanish PIL, to specify the rules of PIL applicable in the area of the international jurisdiction, firstly it is necessary to resort to European regulations —unless these cede their primacy to a specific convention under rules of compatibility—. If the EU legal instruments are not applicable owing to the non-fulfilment of the requirements, recourse must be had to an international treaty, provided that it can be applied according to its particular scope of application. And lastly, in the absence of European regulations and international conventions, autonomous law must be called upon.

5. Once transferred to the issue at hand, the structure of the sources mentioned above leads to an analysis of the relevant rules of jurisdiction in Regulation 1215/2012[4], the Lugano II Convention (LC)[5] and the Spanish Organic Law on the Judiciary (LOPJ)[6], which are the

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[3] Concerning «coherence» in European PIL, see J. von Hein and G. Rühl (ed.), *Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union*, Tübingen, Mohr Siebeck, 2016; S. Sánchez Lorenzo, «El principio de coherencia en el Derecho internacional privado europeo», *REDI*, 70-2 (2018), pp. 17-47; and J. Forner Delaygua and A. Santos (ed.), *Coherence of the scope of application of EU private international legal instruments*, Zürich, Schultess, 2020.

[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (*OJEU*, L 351, 22 December 2012, pp. 1-32).

[5] Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJEU*, L 339, 21 December 2007, pp. 3-24).

[6] Organic Act 6/1985, of 1 July, on the Judiciary (*Ley Orgánica del Poder Judicial*), *BOE*, n. 157, 2 July 1985, pp. 20632-20678. It should be noted, however, that Art. 22 LOPJ was modified by the Organic Act 7/2015, of 21 July (*BOE*, n. 174, 22 July 2015, pp. 61593-61660), that contains the current Spanish autonomous regime of international jurisdiction (pp. 61600-61603).

regulatory exponents of the international jurisdiction in each of the three regulatory layers (European, conventional and national) available to legal operators.

2. Institutional Private International Law: Regulation 1215/2012

2.1. Corporeal property

6. In order to address the jurisdictional regime established by Regulation 1215/2012 for rights *in rem*, it is worth delving deeper into one of the classifications mentioned above (*supra*, § 2), that is, the one which separates movable from immovable property, as the instrument gives a deferential treatment to actions relating to rights *in rem* in immovable property. Since the applicable rules are different according to the type of property with which the matter in dispute is concerned, it is necessary to consider which of the two categories it relates to. Most often the distinction will be clear-cut; for example, in a case of an *actio communi dividundo* (action to divide common property), if the property to be divided is a house or flat[7], it is obvious that it is an action concerning immovable property, whereas, if it is a vehicle[8], the object of the partition is movable property. However, the separation between the two categories is not always so straightforward, as there is evidence of cases that may raise doubts or even result in contradictory assessments by the courts of the Member States. Examples of controversial property include prefabricated houses (which, depending on their degree of anchoring to the ground, can be deemed to be movable or immovable) and solar panel farms set in rural areas. According to the German Federal Court, the latter are movable property, because their installation on the ground does not allow them to be treated in the same way as the land itself[9]; whereas the District Court of Gelderland in the Netherlands considered them to be immovable property in 2016[10], as the installation of the solar farm on a plot of land shows a willingness to remain in the same location, which is a characteristic of immovable property. As the CJEU has repeatedly noted, a classification of this type made with regard to Regulation 1215/2012 should be based on an autonomous and consistent interpretation, which takes into consideration the wording

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[7] Judgment of the Court of Justice of 17 December 2015, *Komu* (C-605/14), ECLI:EU:C:2015:833.

[8] Order of the Court of Justice of 14 June 2017, *Iliev* (C-67/17), ECLI:EU:C:2017:459.

[9] *Bundesgerichtshof, Urteil vom* 22.10.2021 (V ZR 225/19), ECLI:DE:BGH:2021:221021UVZR225.19.0. On the same matter and in the same way, there are other BGH judgments of 22 October 2021 (V ZR 8/20, ECLI:DE:BGH:2021:221021UVZR8.20.0; V ZR 44/20, ECLI:DE:BGH:2021:221021UVZR44.20.0; V ZR 69/20, ECLI:DE:BGH:2021:221021UVZR69.20.0).

[10] Judgment of the *Rechtbank Gelderland* of 28 June 2016, ECLI:NL:RBGEL:2016:3469.

of the provisions concerned, their context and the objectives they seek to achieve.

7. The above paragraph is extremely important because, under the provisions of Regulation 1215/2012, disputes involving immovable property may be subject to a privileged system of jurisdiction, which is provided for in Art. 24(1) R1215/2012 on the following terms: «The following courts of a Member State shall have exclusive jurisdiction: […] 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». Nevertheless, it is not at all easy to specify the extent of this rule. It does not help that the provision fails to mention any procedural aspects (it does not use the word «action» at any point) and is worded by considering the matter at hand instead (by referring to «proceedings which have as their object rights *in rem* in immovable property»). It should be underlined, however, that Art. 8 paragraph 4 of Regulation 1215/2012 relates all this terminology to the combination of an action in matters related to a contract with «an action […] in matters relating to rights *in rem* in immovable property».

8. The emphasis that Art. 24(1) of Regulation 1215/2012 places on the object of the proceedings indicates that attention should be paid to the material scope of application of the instrument in order to refine the definition of «right *in rem* in immovable property». This requires delimiting the concept inwards and outwards, both in connection with this subject and with all those covered by the recast Brussels I Regulation («Brussels I *bis*»). Firstly, the category of «rights *in rem* in immovable property» included within «civil and commercial matters» (pursuant to Art. 1.1 of the Regulation 1215/2012) is defined *ad extra* by the fact that it is not among the matters excluded from the scope of action of Regulation 1215/2012 under Art. 1.2. This also applies to rights *in rem* in movable property. By way of illustration, reference can be made to cases decided by the CJEU in which the «Brussels I *bis*» Regulation [and, specifically, Art. 24(1) thereof] is not applicable, despite the presence of actions relating to (immovable) property. An example would be the *Schneider* case[11], in which, faced with a request for an authorisation by a person who had been placed under guardianship to sell his undivided share of a property, the European Court held that the dispute was directly linked to the legal capacity of natural persons, which is a matter placed outside the scope of the instrument by Art. 1.2(a) of Regulation 1215/2012. Leaving aside that the disputed object is a movable asset (a vehicle), another example would be the previously cited (*supra*, § 6) *Iliev* case, since the action brought by the claimant (the division of a car acquired by the spouses while they were married)

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[11] Judgment of the Court of Justice of 3 October 2013, *Schneider* (C-386/12), ECLI:EU:C:2013:633.

is part of the liquidation of their matrimonial property regime as a result of divorce proceedings, a matter also expressly excluded from the application of Art. 1.2(a) of Regulation 1215/2012[12].

9. In addition to this external demarcation, the definition of the concept of «rights *in rem* in immovable property» in Art. 24(1) requires a fourfold internal demarcation within Regulation 1215/2012, which must be carried out by means of autonomous characterisations. Firstly, it is necessary to distinguish disputes «concerning rights *in rem* (in immovable property)» from those concerning other matters, in particular, «matters relating to a contract» [Art. 7(1) Regulation 1215/2012] and «matters relating to tort, delict or quasi-delict» [Art. 7(2) Regulation 1215/2012]. The case law of the CJEU has repeatedly demonstrated the difficulty involved in this interpretative task. However, at least two general guidelines can be drawn from the CJEU's judgments. On the one hand, as in the case of the other jurisdiction-related criteria (such as the special ones based on the subject matter) that alter the normal functioning of the defendant's domicile rule, the exclusive jurisdictions of Art. 24 Regulation 1215/2012 (among them, that relating to rights *in rem* in immovable property) must be restrictively interpreted; and on the other hand, there is a tendency to promote (and, if necessary, force) a «not rights *in rem* classification» in markedly complex cases. Let us look at some illustrative examples. Firstly, on the boundary between rights *in rem* and obligations[13], it seems quite clear that the *actio pauliana* falls within the contractual scope, as construed by the CJEU in its last two decisions on this issue[14], even though its allocation may be problematic in some cases. Secondly, the Luxembourg Court's approach to claims arising from the ownership of immovable property under a co-ownership regime has been much more arguable and less convincing. Despite their marked *in rem* character, these claims have ultimately been placed within the realm of contractual obligations[15]. Thirdly, in a seemingly debatable decision, the European Court held that an *actio negatoria*

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[12] Order of the Court of Justice of 14 June 2017, *Iliev* (C-67/17), ECLI:EU:C:2017:459. In this respect, see D. Marín Consarnau, «Derechos reales y litigios patrimoniales en las relaciones familiares: la delimitación en y entre instrumentos de Derecho internacional privado de la Unión Europea», AEDIPr, XXIII (2023), pp. 217-238.

[13] Despite referring to rights *in rem* in movable property, very representative of the problem is the case *AB-CD* (C-265/21), since, having exercised the plaintiffs an action to seek recognition of their right to property in some works of art in dispute, the Advocate General, in his Opinion of 16 June 2022, considered that this action «is covered by "matters relating to a contract" within the meaning of Article 5(1) of Regulation No 44/2001» (ECLI:EU:C:2022:476, par. 89). Although this classification is certainly debatable, we have been left without knowing the decision of the CJEU, because, by Order of 21 July 2022 (ECLI:EU:C:2022:637), the case has been removed from the Register of the Court.

[14] Judgments of the Court of Justice of 4 October 2018, *Feniks* (C-337/17, ECLI:EU:C:2018:805) and of 10 July 2019, *Reitbauer* (C-722/17, ECLI:EU:C:2019:577).

[15] Judgments of the Court of Justice of 8 May 2019, *Kerr* (C-25/18, ECLI:EU:C:2019:376) and of 11 November 2020, *Ellmes Property* (C-433/19, ECLI:EU:C:2020:900).

such as the action for cessation of a nuisance affecting land under Austrian law (*Eigentumsfreiheitsklage*) could be regarded as an action for non-contractual liability for damages under EU law[16]. A careful analysis of CJEU case law leads to the conclusion that, in the Court's opinion, the exclusive jurisdiction provided under Art. 24(1) can be invoked in cases in which the action is brought against everyone (*erga omnes*) in order to dispute the ownership of the right *in rem* or the powers deriving from it; but not, however, in those cases where the action is not based on the right itself or is not sufficiently connected with the property concerned, even if the lawsuit concerns the right *in rem*[17].

10. An accurate separation between disputes arising from proceedings concerned with rights *in rem* and those arising from actions *in personam*, as set out in the preceding paragraph, is not sufficient to fully define the category «rights *in rem* in immovable property» within the meaning of Art. 24(1) Regulation 1215/2012. As mentioned above, three additional filters are needed. One of them, the segregation of «rights *in rem* in movable property» (the object of which is movable property) from «rights *in rem* in immovable property» (which relate to immovable property) has already been mentioned above (*supra*, § 6) and will not be discussed further. However, nothing has been said so far about the distinction between, on the one hand, actions relating to rights *in rem* in immovable property covered by Art. 24(1) Regulation 1215/2012 (which the CJEU has always identified with those which, falling within the scope of the instrument, are «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»)[18]; and on the other hand, those actions relating to rights *in rem* in immovable property which are not identified in this way, fall outside the scope of the provision and, therefore, are subject to the general framework of jurisdiction of the Regulation. The third filter is concerned with the distinction between proceedings related to rights *in rem* in immovable property and those which strictly have as their object the validity of entries in public registers [covered by Art. 24(3) Regulation 1215/2012]. In the disputes decided to date, the Court of Justice has stated that actions aimed at removing entries relating to a right of ownership from the land register[19] or mortgage

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[16] Judgment of the Court of Justice of 18 May 2006, *ČEZ* (C-343/04), ECLI:EU:C:2006:330.

[17] R. Arenas García, «Competencia en materia de derechos reales sobre bienes inmuebles y competencia en materia contractual en la jurisprudencia del Tribunal de Luxemburgo. Sentencia TJ de 11 noviembre 2020, asunto. C-433/19», *La Ley Unión Europea*, 89, February 2021, pp. 1-24 (5).

[18] For the first time, the CJEU uses this formula in the Judgment of the Court of Justice of 10 January 1990, *Reichert-I* (C-115/90, ECLI:EU:C: 1990:3), par. 11.

[19] Judgment of the Court of Justice of 16 November 2016, *Schmidt* (C-417/15), ECLI:EU:C:2016:881.

rights[20] are proceedings 'which have as their object rights *in rem* in immovable property'. The rationale for this is that they do not seek to challenge the validity of entries in public registers, but to protect (against all) the prerogatives deriving from the right *in rem*, and therefore the courts of the Member State in which the property is situated shall have exclusive jurisdiction [Art. 24(1) Regulation 1215/2012][21].

11. Once the boundary of the «object» relating to «rights *in rem* in immovable property» referred to in Art. 24(1) R1215/2012 has now been effectively established, it is now necessary to explain its legal regime. As it has been recognised that the courts of the Member State where the immovable property is located have exclusive jurisdiction in these cases, the dispute cannot be heard by the courts of any other country of the European Union, even if they are the courts corresponding to the domicile of the defendant, or if there has been an agreement between the parties conferring them jurisdiction, because private autonomy is irrelevant. For cases where the immovable property is located in two or more Member States, unless there are exceptional circumstances, the CJUE seems to have opted for the separability of jurisdiction, i.e. it has held that the courts of each State have exclusive jurisdiction in claims concerning the part of the immovable property that is located in their territory[22]. On the other hand, the exclusive nature of the jurisdiction in «proceedings which have as their object rights *in rem* in immovable property» entails not only its absolute primacy over all other jurisdictional criteria (including the will of the parties, to which it is impervious), but also the obligation of the court of a Member State to declare *ex officio* that it has no jurisdiction (Art. 27 Regulation 1215/2012); the preference in cases of *lis pendens* despite having been invoked by the claim filed in second place[23]; and the fact that, if a judgment has been issued in another Member State without taking it into account [Art. 45.1(e)(ii) Regulation 1215/2012], this can be used as grounds for refusing recognition.

12. From a theoretical point of view, the exclusive jurisdiction provided for in Art. 24(1) Regulation 1215/2012 is justified by the interest of the Member State where the immovable property is located in fully regulating its legal affairs. This is given preference over the interest of the parties (especially the defendant's) in litigating before the courts

[20] Judgment of the Court of Justice of 14 February 2019, *Milivojević* (C-630/17), ECLI:EU:C:2019:123.

[21] Judgment *Schmidt*, par. 41; Judgment *Milivojević*, par. 103.

[22] Judgment of the Court of Justice of 6 July 1988, *Scherrens* (C-158/87), ECLI:EU:C:1988:370.

[23] Judgment of the Court of Justice of 3 April 2014, *Weber* (C-438/12), ECLI:EU:C:2014:212.

of the country of their domicile[24]. However, as this argument is linked to a medieval conception of sovereignty which is now anachronistic, practical reasons have been adduced to justify the exclusive jurisdiction of the place where the property is situated. The common thread of these reasons is the 'proximity' between the immovable property and the court of the place where it is located, as the court is better positioned to appreciate the factual and legal circumstances of the dispute in order to ensure the good administration of justice. Among them it is worth highlighting the requirement to enter in the register any significant acts and contracts which concern rights *in rem* in immovable property, the obligation for the sale procedure and the taking of evidence to be subject to the *lex situs*, and the frequent checks, inquiries and expert assessments which have to be carried out where the propriety is located[25]. These supposed advantages have not been exempt from criticism either, which has pointed out the inconsistency of, given their usefulness, not extending their scope of action to the closest legal fields, such as tort law; the reductionism of focusing only on them, when the benefits they provide could also be obtained through international cooperation; and the irrelevance that the particularities of the specific case have in their perception[26]. In this situation, it might be worth reconsidering the exclusive jurisdiction of the place of location for rights *in rem* in immovable property, at least in its current configuration. While its elimination is rejected as impracticable for the time being, it could be rendered more flexible, as was done in tenancies of immovable property[27], by incorporating into the European instrument a concurrent exclusive jurisdiction in favour of the courts of the State of domicile of the parties when the proceeding is very closely linked to it[28]. Nevertheless, the various proposals for revision of Regulation 1215/2012 that have been put on the table have not considered this possibility.

13. As the provision in Art. 24(1) Regulation 1215/2012 can only be applied when the property that is the object of the right *in rem* is located in a Member State, it makes perfect sense to ask what happens if the property in question is located in a third State. In light of the lack of legal provisions on this point, some interpretative suggestions have been made by the legal doctrine, although with somewhat dif-

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[24] J. C. Fernández Rozas and S. Sánchez Lorenzo, *Derecho internacional privado*, 12th ed., Cizur Menor, Thomson Reuters Aranzadi, 2022, pp. 809-810.

[25] The *Jenard Report* was a foundational document in this regard [P. Jenard, «Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968)», *OJEC*, C 59, 5 March 1979, pp. 1-70 (35)].

[26] D. P. Fernández Arroyo, «Compétence exclusive et compétence exorbitante dans les relations privées internationales», *Collected Courses*, vol. 323, 2006, pp. 9-260 (84-86).

[27] Judgment of the Court of Justice of 15 January 1985, *Rösler* (241/83), ECLI:EU:C:1985:6.

[28] J. M. Fontanellas Morell, «La erosión de la exclusividad del *forum rei sitae* en las acciones reales inmobiliarias», *AEDIPr*, XVI (2016), pp. 967-975.

fering views. While some advocate an application of the provisions of the Regulation (and of the Lugano Convention) by *analogia iuris,* admitting the so-called «reflexive effect» of Art. 24(1) Regulation 1215/2012[29], others prefer to resort directly to autonomous PIL[30]. Both interpretations entail the added problem of determining whether Spanish courts (or those of any other Member State) can hear the dispute on «rights *in rem* in immovable property» when the immovable property is located in a third country, and if so, on what ground of jurisdiction. The supporters of the first position mentioned above believe that the Member State (Spanish) court should decline jurisdiction of its own motion if the legislation of the State that is neither a member of the EU nor a party to the Lugano Convention recognises the exclusive jurisdiction of its courts. In contrast, those who uphold the second position disagree among themselves as to whether, once Art. 24(1) R1215/2012 has not been applied, the rest of the rules of jurisdiction set out in the Regulation can come into play[31] or whether, in cases such as the one under study, these are also displaced to the benefit of national rules[32]. Although it is not at all easy to take a stance for or against a question that remains open and is susceptible to answers that are as disparate as they are well constructed, the first of the solutions suggested seems preferable, since, apart from it being justified by reasons of cooperative reciprocity and procedural economy (as its advocates argue), it is the most clean-cut and coherent and, ultimately, the most effective.

14. When the object of a dispute is rights *in rem* in corporeal movable property, the rule studied so far [Art. 24(1) Regulation 1215/2012] vanishes, because it does not include them in its wording, which explicitly refers to «rights *in rem* in *immovable* property». Therefore, contrary to the initial intention of the European legislator [who, in the Proposal for reform of «Brussels I Regulation», envisaged the introduction of a special ground of jurisdiction for «rights *in rem* or possession in moveable property» in favour of the court of the place where the property was located (Art. 5.3)][33], Regulation 1215/2012

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[29] M. Virgós Soriano and F. J. Garcimartín Alférez, *Derecho procesal civil internacional. Litigación internacional*, 2nd ed., Cizur Menor, Thomson Civitas, 2007, pp. 257-258.

[30] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, p. 811.

[31] In this sense, already Jenard, P. and Möller, G. [«Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on16 September 1988», *OJEC*, C 189, 28 July 1990, pp. 57-121 (76)]. In the Spanish doctrine, see, especially, J. Carrascosa González, «Litigios en España sobre bienes inmuebles situados en otros países», *Accursio DIP Blog*, 1 November 2022, *http://accursio.com/blog/?p=1579*; also *in extenso*, J. Carrascosa González, «Derechos reales», in Calvo Caravaca, A.-L. and Carrascosa González, J. (dir.), *Tratado de Derecho internacional privado*, vol. III, 2nd ed., Valencia, Tirant lo Blanch, 2022, pp. 3600-3604.

[32] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, p. 811.

[33] «Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)», *COM(2010) 748 final*, p. 24.

does not contain any specific provision addressed to this type of rights *in rem*, which means that any proceedings which have them as their object must be brought before the courts of the country of the defendant's domicile, unless the parties have expressly or tacitly conferred jurisdiction to the courts of another Member State.

15. Regulation 1215/2012 contains two provisions that should also be highlighted in connection with actions relating to rights *in rem*. The first one, Art. 7(3), sets out that claims for damages or restitution based on an act giving rise to criminal proceedings should be heard in the court seised of those proceedings, provided that that court has jurisdiction under its own law to entertain civil proceedings. The importance of this *forum* lies in the fact that, as claims related to movable tangible property are often the consequence of a criminal offence (theft or robbery), it is more practical and convenient for the victim of the offence (who is also the claimant of the stolen property) to add the civil action to the criminal action heard by the court that has jurisdiction for the latter than litigating before the courts of the defendant's domicile, which still do not lose their general jurisdiction status as an alternative to the special jurisdiction provided for in Art. 7(3) Regulation 1215/2012[34]. On the other hand, given the lack of a specific *forum* for rights *in rem* in movable property based on the place where the property is located, the jurisdiction rule established by the instrument for provisional, including protective measures (Art. 35 Regulation 1215/2012), becomes particularly significant. Indeed, as the claimant is obliged, in the absence of a jurisdiction agreement between the parties, to bring the action related to rights *in rem* in movable property in the courts of the State in which the defendant is domiciled, the claimant may have a more pressing need to request that the courts of the country where the assets are located take protective measures to ensure their integrity and preservation until such time as a possible decision on the merits favourable to him can be enforced[35].

16. Regulation 1215/2012 also considers another category of goods—which are not necessarily, but are usually, movable—namely, «cultural objects», defined by Directive 93/7/EEC[36] (replaced by the later 2014/60/EU[37]). Pursuant to Directive 93/7/EEC, a «cultural object» is «an object which is classified, before or after its unlawful removal from the territory of a Member State, among the "national

[34] F. J. Garcimartín Alférez, *Derecho internacional privado*, 7th ed., Cizur Menor, Aranzadi, 2023, p. 123.

[35] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, P. 813.

[36] Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (*OJEC*, L 74, 27 March 1993, pp. 74-79).

[37] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) (*OJEU*, L 159, 28 May 2014, pp. 1-10).

treasures possessing artistic, historic or archaeological value" under national legislation or administrative procedures within the meaning of Article 36 of the Treaty»[38]. Pursuant to Art. 6 of Directive 2014/60/EU[39] (Art. 5 of Spanish Act 1/2017[40], which transposes it), if the claim is within the EU, proceedings may be brought by a public authority against the possessor of a cultural object which has been unlawfully removed from its territory with the aim of securing its return. However, when a civil claim is initiated based on ownership of cultural objects by a private individual against a person domiciled in a Member State, in addition to the general *forum* and to those designated by the agreements between the parties, special jurisdiction is given to the courts of the place where the property is located at the time of bringing the proceedings[41]. Obviously, if the defendant is domiciled in a third State, the provision is inapplicable.

2.2. Incorporeal property

17. Without a doubt, rights over incorporeal, immaterial or intangible property (and the claims related to them) have acquired outstanding importance in private law transactions in contemporary society. This has been due, on the one hand, to the exponential increase of this type of «assets», which are susceptible to appropriation and exploitation; and on the other hand, to the incessant advancement of the so-called new information and communication technology, which has left the door wide open to the possibility that these «intellectual» property rights may be violated with relative ease. For today's scholars[42], incorporeal property —that which cannot be perceived by the senses— comprises three categories of «assets»: on the first level, individual creations protected by copyright, industrial inventions and utility models, and trademarks, as well as one's own image or company shares; on the second level, credit rights; and on the third level, rights

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[38] Art. 1 of Directive 93/7/EEC (*OJEC*, L 74, 1993, p. 75).

[39] Art. 6 of Directive 2014/60/EU (*OJEC*, L 159, 2014 p. 5).

[40] Art. 5 of Act 1/2017, of 18 April, on restitution of cultural goods illegally removed from Spanish territory or from another Member State of the European Union, by which Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 is incorporated into Spanish law (*Ley 1/2017, de 18 de abril, sobre restitución de bienes culturales que hayan salido de forma ilegal del territorio español o de otro Estado miembro de la Unión Europea, por la que se incorpora al ordenamiento español la Directiva 2014/60/UE, del Parlamento Europeo y del Consejo de 15 de mayo de 2014*), *BOE*, n. 93, 19 April 2017 pp. 30456-30463 (30460).

[41] See E. Veleiro Couto, «Artículo 7.4», in Blanco-Morales Limones, P. *et al.* (coord.), *Comentario al Reglamento (UE) nº 1215/2012 relativo a la competencia judicial, el reconocimiento y la ejecución de resoluciones judiciales en materia civil y mercantil. Reglamento Bruselas I refundido*», Cizur Menor, Thomson Reuters Aranzadi, 2016, pp. 223-233.

[42] A. Carrasco Perera, «Las cosas y el patrimonio», in Carrasco Perera, A. (dir.), *Derecho civil. Introducción. Fuentes. Derecho de la persona. Derecho subjetivo. Derecho de la propiedad*, 9th ed., Madrid, Tecnos, 2021, p. 229.

in things —both corporeal and incorporeal— and even rights in rights. Regarding this class of assets and the determination of the courts that have jurisdiction to hear disputes with cross-border repercussions for them, several types of lawsuits must be distinguished, depending on whether they affect the ownership of rights in incorporeal property, their violation, the validity of entries in the relevant public registers or the entries or validity of patents, trademarks, designs or models, and other similar rights required to be deposited or registered[43].

18. This paper is only concerned with the first type of actions described at the end of the previous paragraph, since the other three fall outside the scope of the study. Indeed, we are interested in disputes related to the ownership of rights in intangible property, since those involving intellectual and industrial property rights violations are covered by the rules on non-contractual liability of Regulation 1215/2012 [party autonomy —Arts 25 and 26—, general jurisdiction —Art. 4— and special jurisdiction —Art. 7(2)], unless the violation of these rights takes place under a contract, due to the breach of the agreed obligations, in which case the applicable jurisdiction regime is that of the contractual liability (voluntary submission —Arts 25 and 26—, general jurisdiction —Art. 4— and special jurisdiction —Art. 7(1)][44]. The scope of this analysis also excludes those claims relating to the validity of entries in public registers of rights in incorporeal property, as they are provided for in Regulation 1215/2012 [Art. 24(3) attributes exclusive jurisdiction to the courts of the Member State where the register is kept], and those referring to the registration or validity of industrial property rights required to be deposited or registered [which, regardless of whether the issue is raised by way of an action or as a defence, Art. 24(4) leaves solely in the hands of the courts of the Member State in which the deposit or registration has been applied for or has taken place]. This rule is completed by the second paragraph of the provision, whereby the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State, without prejudice to the jurisdiction of the European Patent Office under the Munich Convention on the Grant of European Patents, signed in 1973. In order to distinguish proceedings related to rights *in rem* in intangible property from those that are related to intangible property but have contractual, non-contractual or register-related features, it is necessary to characterise the actions at issue, a task which can be more or less difficult depending on the case, as case-law has sometimes shown[45].

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[43] For an even more detailed categorisation, see J. Carrascosa González, «Propiedad intelectual e industrial», in Calvo Caravaca, A.-L. and Carrascosa González, J. (dir.), *op. cit.*, p. 3733.

[44] F. J. Garcimartín Alférez, *op. cit.*, p. 178.

[45] Two very illustrative cases ruled by the CJEU can be cited in this regard: the Judgment of 5 October 2017, *Hanssen Beleggingen* (C-341/16, ECLI:EU:C:2017:738) and the Judgment

19. Having distinguished the actions relating to rights *in rem* in intangible property from those that are concerned with intangible property but are of a contractual, non-contractual or register-related nature, it is now necessary to establish the jurisdictional regime under Regulation 1215/2012. This is not at all complicated because, in the absence of any specific *forum* —exclusive or concurrent— that takes into account actions relating to the ownership of intellectual and industrial property rights, only the grounds of jurisdiction stipulated in general terms in the Regulation remain available to the litigants, i.e., on the one hand, the express or tacit submission of the parties, and, on the other hand, the defendant's domicile (Arts 25, 26 and 4 of Regulation 1215/2012).

3. Conventional Private International Law and Autonomous Private International Law

20. When Regulation 1215/2012 is not applicable to matters relating to rights *in rem*, in order to find the jurisdiction regime, one must turn to the rules contained in international treaties and in national law, following the structure of sources of the Spanish PIL system. Regarding conventions, the Lugano Convention, of 2007, is particularly important and most of the comments made in the preceding pages in relation to Regulation 1215/2012 can be applied to it, as both instruments contain twin provisions for the matters concerning us here. In the case of «rights *in rem* in immovable property», the Lugano Convention gives exclusive jurisdiction to the courts of the place where the property is located; therefore, if a property is located in Switzerland, Norway or Iceland, a Spanish court cannot hear a dispute relating to this type of rights even if the defendant is domiciled in Spain or the parties have agreed that any disputes should be subject to the courts of Spain. If the matter at issue concerns «rights *in rem* in movable property», the absence of an *ad hoc forum* under the Lugano Convention —as in Regulation Brussels I *bis*— means that, in order to determine the jurisdiction under the Convention, the available grounds shall be either the domicile of the defendant in Switzerland, Norway or Iceland or the courts of Switzerland, Norway and Iceland as voluntarily agreed to by the parties, provided that (and the treaty and the European instrument differ on this requirement) at least one of the parties is domiciled in a State bound by the Convention. The same explanation applies to claims concerning ownership of intellectual and industrial property rights brought under the Lugano Convention. Apart from this treaty, there are some others (such as the 2001 Cape Town Convention, in force since 2013) which contain rules of jurisdiction over international interests in

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of 8 September 2022, *IRnova* (C-399/21, ECLI:EU:C:2022:648).

certain categories of mobile equipment (aircraft objects, railway rolling stock and space assets) and ancillary rights thereto[46].

21. In those cases in which neither Regulation 1215/2012 nor the Lugano Convention —or any other international instrument— can come into play, the regime of jurisdiction applicable to matters relating to rights *in rem* must be provided by domestic PIL. When the dispute refers to immovable property, the applicable rule is Art. 22.a) LOPJ; however, it is quite evident that this provision is impossible to apply, as it resorts to the same (exclusive) jurisdiction criterion (the place where the property is located) that is used in Art. 24(1) Regulation 1215/2012, and, since when the property is located in Spain (and, therefore, in the EU), the location-related applicability requirement under the Regulation that must be preferentially observed is met, Art. 22.a) LOPJ has no real option of governing the issue. Nevertheless, what could be argued (as was done *supra*, in § 13) is whether it would be feasible to resort to other provisions of the LOPJ, such as Art. 22 *bis*, to assert the jurisdiction of the Spanish courts in actions relating to rights *in rem* in immovable property located in a third State; but, as mentioned above, the fact that the judgments issued by the courts of Spain are likely to be neither recognised nor enforceable in other States suggests that this interpretation of the Spanish system of international jurisdiction should be discarded. As regards rights *in rem* in movable assets, Art. 22 *quinquies* f) of the LOPJ (in contrast to 'Brussels I *bis*' Regulation and to the Lugano Convention) provides for a special *forum* for actions *in rem* in movable property that confers jurisdiction to the Spanish courts when the property that is the object of the disputed rights is located in Spain at the time the action is brought. As an equivalent rule has not been established for disputes relating to the ownership of incorporeal property, when neither Regulation 1215/2012 nor the Lugano Convention are applicable to these claims (essentially, where the defendant is not domiciled in a Member State or in a State that is party to the Convention) and the jurisdiction of the Courts of Spain must be determined pursuant to the LOPJ, it can only be done based on either the explicit or tacit agreement by the parties to do so (Art. 22 *bis*) or on the defendant's domicile in Spain (Art. 22 *ter*)[47].

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[46] *https://www.unidroit.org/wp-content/uploads/2021/07/Cape-Town-Convention_English.pdf*. Particular attention should be paid to the Arts 5 and 42-45.

[47] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, pp. 810-813.

III. APPLICABLE LAW

1. General aspects

22. There is an almost universal rule (deemed to be a «quasi-natural law»[48]) regarding the law applicable to rights *in rem*, that consists in observing the law of the country where the property to which the rights relate is located[49]. This rule is inveterate with respect to immovable property, but not with respect to movable property, as shown by Art. 10.1 of the original edition of the Spanish Civil Code (CC) of 1889, which, following the guidelines of the Piedmontese Code of 1865, submitted movable property to the law of the owner's nation, while applying the *lex situs* to immovable property. However, this dual regulatory structure ended in Spain in 1974, when the Preliminary Title of the Civil Code was redrafted, including a new Art. 10, which continues to be in force today on the same terms as it was fifty years ago.

23. The predominant reliance on autonomous sources of law to govern this matter to this day is due to the fact that, unlike in the areas of international jurisdiction and the recognition and enforcement of foreign decisions, there has not been any Europe-wide harmonisation (not even any institutional attempt) to unify the conflict-of-laws regime applicable to rights *in rem*. Nevertheless, two private initiatives have arisen in recent times, promoted by PIL experts, which aim to ensure that a legal instrument on the subject will be available continent-wide in the not-too-distant future. The first one has come from the European Group for Private International Law (EGPIL), which, since its 2017 meeting in Hamburg, has been working on a draft European Regulation on the law applicable to rights *in rem*. The latest consolidated version of the draft, produced at a session held in Milan in 2023, only refers to rights *in rem* in corporeal assets. The draft outlines a series of provisions that regulate the material scope of the instrument, its universal application, the general rule and the special rules for *res in transitu*, means of transport and cultural objects (to which a specific chapter is devoted), the scope of the applicable law and the protection of acquired rights in the event of a *conflit mobile*[50]. The second initiative has been undertaken by the European Association of Private International Law (EAPIL), which has

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[48] F. J. Garcimartín Alférez, *https://www.youtube.com/watch?v=inOSVTI47mQ*&t=751s, 6:54.

[49] For a comparative general overview of the application of the *lex rei sitae* to rights *in rem*, especially in relation to immovable property, 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», *REDI*, 74 (2022-1), pp. 81-108.

[50] EGPIL, 33rd meeting, Milan 2023, «The law applicable to rights *in rem* in corporeal assets. Consolidated version», *https://gedip-egpil.eu/wp-content/uploads/2023/06/The-law-applicable-to-rights-in-rem-in-corporeal-assets-%E2%80%93-Consolidated-version.pdf*.

set up a Working Group in 2021 with the aim of shaping and drafting a Proposal for a Regulation on International Property Law. The aspects that the resulting text should encompass (which are comparable to those outlined by the EGPIL) include the *lex situs* principle, the possibility of introducing party autonomy in certain cases, the hypothetical acceptance of a general escape clause, the list of topics covered by the regulation, the *conflit mobile*, the specific rules for cars and other vehicles, goods in transit, assets with a fortuitous *situs*, assets without a *situs*, assets in orbit in space, stolen property, cultural goods and the protection of the *bona fide* purchaser[51].

2. General rule

24. As noted above, the current Art. 10.1.1 CC states that «possession, ownership, and other rights [*in rem*] in immovable property and publicity thereof shall be governed by the law of the place where such property is located», a provision that is completed by Art. 10.1.2 CC, which adds that «the same law shall apply to movable property». When the two provisions are combined, it can be deduced that, as a general rule, the conflict-of-laws regime relating to rights *in rem* in Spanish PIL establishes that they are all subject to the *lex rei sitae*, whether they are in immovable property or in movable property. There are many arguments that justify the observance of this law; in particular, examined from the perspective of the «jurisprudence of interests»[52], no other solution can compete with it. Indeed, if one thinks about it at all, the fact that actions related to rights *in rem* are governed by the *lex situs* serves a number of interests. Firstly, it serves the interest of the State, in the sense that transactions relating to exploitation rights over property situated in its territory comply with its own rules (a reflection of the principle of sovereignty). Secondly, it serves the interests of *all* the parties, because, while the parties to an international private relation are often more familiar with their respective personal laws, when it comes to a dispute over the ownership of an asset, it makes no sense to appeal to personal law that has little or no connection with the dispute and it may not be the same for all the intervening parties. When rights

[51] The Working Group created by EAPIL has held six meetings so far. The last one in Coimbra (Portugal) from March 14 to 16, 2024 (*https://eapil.org/what-we-do/working-groups/group-on-property-law/*).

[52] Concerning the «jurisprudence of interests» in general, see P. Heck, «Gesetzesauslegung und Interessenjurisprudenz», *AcP*, 112 (1914), pp. 1-318. With regard to PIL, see G. Kegel, «Begriffs- und Interessenjurisprudenz im internationalen Privatrecht», in Universität Basel - Juristische Fakultät (ed.), *Festschrift Hans Lewald bei Vollendung des vierzigsten Amtsjahres als ordentlicher Professor im Oktober 1953*, Basel, Helbing & Lichtenhahn, 1953, pp. 259-288; also G. Kegel and K. Schurig, *Internationales Privatrecht. Ein Studienbuch*, 9th ed., München, Beck, 2004, pp. 128-160.

in rem that are enforceable against everyone are in dispute, the unifying element of the claims —which concentrates the interests of all the parties— is the territorial element corresponding to the location of the property that is the object of the *litis*. Ultimately, it serves the interests of commerce and its organisation. On the one hand, these interests demand that legal transactions be facilitated, simplified and secured; goals which can best be achieved through compliance with the *lex rei sitae* —especially when property, in particular immovable property, is involved—; on the other hand, the idiosyncrasy of our discipline means that, for the correct functioning of a PIL system, a series of needs —which do not exist or are less pronounced in other areas of law— must be met. These notably include predictability of outcomes; internal and international harmony of solutions (to provide the same responses to questions raised on legal issues relating to rights *in rem* and to do so in the same way as the other conflict-of-laws systems concerned); coincidence between *forum* and *ius* (the court that has jurisdiction applies its own law); and priority search for extraterritorial effectiveness of judgements in order to ensuring its recognition and enforcement. The application of the law of the State where the property is located allows these interests to be satisfied.

25. The fact that the conflict-of-laws rules contained in Arts 10.1.1 and 10.1.2 of the CC use the place where the property is situated as a connecting factor can cause different problems when it comes to locating it. One of these problems is linked to those assets located in an area outside the sovereignty of the State (land space, international waters or air space), for which the rule concerning rights in ships and aircraft that will be explained later (*infra*, § 28) can be used, where feasible; if this solution is not viable either, an alternative will have to be found that yields an acceptable result (personal law of the interested party, applicable law to the contract, if there is one, etc.)[53]. Another problem, which can only arise with regard to immovable property, is that caused when it is located across both sides of a border, that is, when it is cross-border immovable property. On the subject of jurisdiction, it has already been noted (*supra*, § 11) that the predominant line of thought is in favour of the separability of property, so that each part is treated as distinct property subject to the exclusive jurisdiction of the courts where each is located. There is no objection to exporting this solution to the area of applicable law, so that, in matters relating to rights *in rem*, the *lex situs* of each of the States concerned applies[54] (it

[53] M. Virgós Soriano, «Las cosas y los derechos reales», in González Campos, J. D. *et al.* (ed.), *Derecho internacional privado. Parte especial*, Madrid, Eurolex, 6th ed., 1995, pp. 241-285 (246-247).

[54] Thus A. Ortega Giménez [«Resolución de problemas de competencia judicial internacional y de determinación de la ley aplicable en materia de derechos reales en España», *Revista Vasca de Derecho Procesal y Arbitraje*, XXXIV (2022-4), pp. 207-230 (221)], who, in such

should not be forgotten, however, that, even if a cross-border property constitutes a physical unit, it cannot be a single one from a legal point of view, because the border prevents it). There remains a third problem, that of the *conflit mobile*. As this is the most important one, it will be elaborated on in the next two paragraphs.

26. The *conflit mobile*, which remains a general problem in conflict-of-laws rules, is remarkably peculiar in the area of rights *in rem*, as it is based on the change linked to a territorial connection, unlike a change in personal status, which is usually the case. In the case of rights *in rem* in movable property[55], a change in the location of the object of the right *in rem* may result in the latter being subject to two different laws, that of its original location (before the transfer) and that of its current location (after the change). In the absence of legislative provisions, doctrinal scholarship has traditionally accepted a distributive application of the controversial regulations, to the effect that the creation, modification, transfer or termination of the right *in rem* is subordinated to the law of the place where the property is located at the time when the right *in rem* was created, modified, transferred or terminated; while the legal regime of the property, the rights acquired over it, as well as their effects and exercise are determined by the law of the place where the property is located at each given point in time. This distribution of spheres of influence between legal systems must be complemented by the observance of two principles, the «principle of continuity» and the «principle of adequacy», which should help to ensure that the transition from one hegemonic situation to another is not detrimental to legal certainty or to the necessary fluidity of international private traffic[56]. The «continuity principle» expresses the idea of stability in legal relations involving rights *in rem*, which boils down to the purpose that the rights acquired in accordance with one rule should be respected as far as possible when the property to which they relate is subject to a different rule due to a change of location. In this way, a period of possession for the purpose of gaining ownership through continuous possession over a prolonged period of time that starts in the territory of one country —under its national law— may be added to the time spent in another State until the possessed thing is acquired by acquisitive prescription —according to the law of the latter State—. However, sometimes this guideline must be applied in combination with the «adequacy principle», which should allow a right *in rem* in movable property —created under a certain law— *to oper-*

situations and whenever possible, is even in favor of an exclusive application of the law of the State where the 'most relevant part' or 'main part' of the property is located.

[55] Exceptionally, also, in immovable property, for example, by destination, as in a comparable succession case, the Judgment of the *Chambre civile 1* of the French *Cour de cassation* of 3 May 1973, *Stroganoff* (*https://www.legifrance.gouv.fr/juri/id/JURITEXT000006990244*).

[56] M. Virgós Soriano, *loc. cit.,* pp. 262-271.

ate —adapting it as far as possible— under a different law, to which it must be shaped by the fact of having moved the property from one State to another (one might wish to think of a machine owned by a company over which a security right *in rem* was created in Germany, later the asset is transferred to Spain, where it is seised by a creditor of the company, so that the right *in rem* created in Germany survives in Spain, but, as it is not registered in a Spanish public register, it is not enforceable against third parties).

27. While this is the most widespread view among scholars, it has been challenged by part of doctrinal scholarship[57], which considers that the dominant position takes the wrong approach to the problem because it is typically used in conflicts of laws in time (transitional law) and is not appropriate to resolve a spatial dispute. Moreover, doctrinal scholarship finds that the thesis set out in the preceding paragraph has two serious shortcomings: on the one hand, it is too generalist, since it barely takes into account the particular cases; on the other hand, linked to the above, in cases where the parties are bound by a contract it does not give their expectations the importance they deserve, as the applicable law cannot be that of the place where the property was located at the time the right *in rem* was created, but the *lex situs* at the time the title was created —that is, when the contract was entered into—, which is the only location that the parties were able to foresee. If the right *in rem* created according to the law of the place where the contract was executed is a right unknown to the legal system of the country in which the property is currently situated, the contractual relationship between the parties can also shield them against an alleged non-recognition of the right, since the effect of characterisation can only be asserted against third parties and not between the contracting parties, who cannot invoke it in their relationship. Naturally, the situation changes when third parties come into play; the above solutions are of no use for them, and therefore, if one wishes to enforce a right *in rem* that is not recognised by the country in which the property is currently situated, one must resort to transposition, so that only those rights *in rem* that can be conformed to one of the rights *in rem* categorised by the *situs* system can have binding effects[58]. Beyond highlighting some shortcomings of the classical position, it cannot be said that this new approach significantly changes the existing situation. The extremely complex subject matter still showcases a stark separation between brilliant theoretical exercises, such as the one just presented, and practice, where courts make an effort to simplify dispute resolution as much as possible by applying the *lex rei sitae* of the property at the time when the claim is submitted to them and it is then, and on the basis of this

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57 J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, pp. 822-828.

58 *Id.*, pp. 827-828.

law, that they decide which of the alleged holders of interests in the disputed property should have priority[59].

3. Particular rules

28. For some categories of property with certain features, merely using location as a criterion may not be appropriate, because it may no longer be functional. For this reason, the Civil Code establishes that these types of property shall be subject to special rules. The first category is means of transport, provided for in Art. 10.2, which specifies that «vessels, aircraft and trailway transport vehicles, and all rights created thereon, shall be subject to the law of the place of their flag or registration»; while «cars and other road transport vehicles shall be subject to the law of the place where they are located». It is logical to wonder that these assets, which by their very nature aim to be constantly moving, should be subject to the law of a place —that of their location—, which lacks stability. However, the existing regulation differentiates the treatment of some means of transport which are still subject to the *lex situs* —road transport— from the treatment of others —maritime, aircraft and railway transport— that have a different regime, by setting out that they shall be subject to the law of the country of their flag or registration. Given that all these means of transport are inherently intended to be used for traffic purposes, but it is only in some cases that they diverge from the general rule, the intrinsic mobility of the assets cannot be the reason for the regulatory disparity, which must have other causes. Based on the opinion of the Spanish Council of State, issued as a result of the reform of the Preliminary Title in 1974, doctrinal scholarship[60] has pointed to two causes. One of these is quantitative: the number of vehicles used in road transport is incomparably greater than that of other means of transport. This means that there are many legal transactions related to rights *in rem* in road vehicles that should be subject to Spanish law as far as the place of location is concerned, especially taking into account that a non-negligible part of the operations includes vehicles with foreign registration plates which are driven on Spanish roads, whether for tourism or *en route* to North Africa. The second reason is qualitative: unlike car number plates, which are relatively easy to change, altering the flag of a ship or the registration of an aircraft is much more complicated. These identifying features

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[59] See, for example, in France, the very didactic Judgment of the *Chambre civile 1* of the *Cour de cassation* of 3 February of 2010, *Arman* (*https://www.legifrance.gouv.fr/juri/id/JURITEXT000021787325*).

[60] M. Virgós Soriano, *loc. cit.,* pp. 248-249; N. Bouza Vidal, «Artículo 10, apartados 1 y 2», in Albaladejo, M. and Díaz Alabart, S. (ed.), *Comentarios al Código civil y compilaciones forales*, vol. I-2, *Artículos 8 a 16 del Código civil*, Madrid, Edersa, 2nd ed., 1995, pp. 525-563 (544-545).

are therefore more reliable and stable, which makes it difficult to commit fraud (without forgetting, however, that some cases of fraudulent change of a ship's flag can be found in comparative jurisprudence[61]).

29. The second particular rule included in the Civil Code is the one that refers to «goods in transit», that is, those transported internationally. They need not be physically moving, as what matters is that they are *involved* in transport operations, even if they are still in the State of origin ready to be exported (and, therefore, they are identified with the so-called «goods intended for export»[62]) or they may be momentarily at a stopping place on their journey. However, these *res in transitu* are neither the means of transport mentioned in the previous section, nor the belongings of the persons transported, nor the «goods transported» for the mere fact of being so, since «goods in transit» are only important in our discipline when they are disposed of or are the object of an act of real nature while being transported. In such circumstances, it is understood that applying «provisional» status to these goods is not the best solution and, for this reason, some alternatives have been sought. Of the two most reasonable ones, the place of dispatch of the goods and their place of destination, the first option is preferred in the Spanish Civil Code (in contrast with the Portuguese Code, which does the opposite: Art. 46.2). Art. 10.1.3 of the Spanish Civil Code provides that «for the purposes of creating or assigning of rights over goods in transit, such goods shall be deemed to be located at the place of dispatch, unless the sender and the recipient should have explicitly or implicitly agreed to deem them to be located at the place of destination». The solution adopted is to follow the law of the State of dispatch of the goods. This has two advantages: certainty —it is always known where the goods that are internationally dispatched come from— and an effective link to the goods —it was the latest truly operational connection in relation to them—. However, this solution also has some disadvantages: it is an outdated rule —the goods are no longer subject to it—, and it fails to meet the expectations of the parties —who seek to ensure that their transaction will be fully effective in the State to which the goods are being dispatched—. These drawbacks explain why, whereas applying the law of the place of destination of the goods has inadequacies in some cases —successive transfers of the goods during the journey, transport being interrupted, change of the intended point of arrival—, it may also be worthy of consideration. Therefore, even the law of the State of dispatch is favoured under

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[61] See, for example, the *Salduende* case, decided on 6 May 2004 by the *Cámara Nacional de Apelaciones de Trabajo* (Argentinean National Chamber of Labour Appeals), in which the change of the flag was intended to ensure that seamen's employment contracts would be subject to legislation that was much less protective of their interests (*http://fallos.diprargentina.com/2007/08/salduende-hctor-c-shel-capsa.html*).

[62] F. J. Garcimartín Alférez, *op. cit.*, p. 447.

Spanish law, the parties are entitled to choose the law of the place of destination of the transport to govern the creation or assignment of rights over the goods in transit. As can be seen, at this point the Code introduces, as a complement to the objective connection, the private autonomy that, in the rule, has three characteristics: it must be exercised by both parties (therefore, bilaterally); it can be exercised either expressly or tacitly; and it consists in a purely bipolar option, namely in favour of the law of the country of dispatch or of the law of the State of destination. Through this secondary provision, party autonomy is (almost symbolically) featured in the realm of rights *in rem*, from which it is ordinarily kept at a distance. Apart from contributing to constructing a spatially fairer arrangement, invoking the will of the parties can help to ensure that the law governing the rights *in rem* and the law of the contract are aligned. This outcome should be seen as a starting point for what, *de lege ferenda*, should be the major objective in the matter: to ensure that relations *inter partes* in connection with rights *in rem* are subject to the *lex contractus*[63].

30. Art. 10 CC contains two additional conflict-of-laws rules of a special nature regarding rights *in rem* which, unlike those set out in the previous paragraphs, affect intangible property, instead of tangible property. The first of these rules, Art. 10.3 CC, is concerned with securities. According to the prevailing legal scholarship, a security, understood in a restricted sense, is a document on a private right, the exercise and transfer of which is conditional upon possession of the document[64]; it is, therefore, a physical document (a tangible movable asset) that embodies a right (an incorporeal right), and possession of the document usually implies possession of the right that is embodied within it. This overlapping of levels means that, in order to resolve conflicts of law relating to securities, three distinct objects need to be regulated[65]. Firstly, the underlying right, embodied in the title, which arises from a legal relationship (normally a contract) the discipline of which generally falls under Regulation 593/2008; however, it excludes from its material scope of application any obligations arising from bills of exchange, cheques and promissory notes, as well as other instruments insofar as they arise from their negotiable character [Art. 1.2(d)][66]. Secondly, legal rights *in rem* in the instrument as a physical document —for example, the effects of possession, the transfer of own-

[63] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, p. 831.

[64] In the original Spanish, the definition says «*documento sobre un derecho privado cuyo ejercicio y cuya transmisión están condicionados jurídicamente a la posesión del documento*» [J. Garrigues, «Los títulos-valores», *Revista de Derecho mercantil*, 36 (1951), pp. 305-370 (308)].

[65] F. J. Garcimartín Alférez, *op. cit.*, p. 451.

[66] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [*OJEU*, L 177, 4 July 2008, pp. 6-16; Art. 1.2(d) in p. 10)].

ership and the protection of the *bona fide* purchaser— are subject to the general rule of the *lex rei sitae*, which in this context is called the *lex carta sitae.* However, securities representing goods, mainly maritime bills of lading, pose a particular problem; while the *lex situs cartae* must govern how and when the document is delivered to its recipient, the effects of delivery on the goods depend on the law of the place where the goods are located (Art. 10.1), which shall determine whether the transfer of the security involves the transfer of the goods and, if so, the related conditions and limits[67]. Ultimately, the formal requirements to be met by the security in order to embody the original right and have the effects resulting from its negotiable nature must comply with the law of the place of issue, as required by Art. 10.3, which is understood as the place where the security was first delivered or put into circulation. It is worth mentioning negotiable instruments which, due to their unique character, have a specific conflict-of-laws regime under Spanish PIL contained in the 1985 Negotiable Instruments Act[68]. Formally separated, albeit with some points in common, the regulation of the bill of exchange and promissory note (Arts 98-105) and that of the cheque (Arts 162-167) essentially govern the capacity to be bound, the form of obligations and their effects, as well as the matters covered by the law of the place of payment of the bill of exchange, promissory note or cheque. The solutions adopted are an adapted version of what is known as the «Geneva Uniform Law» on negotiable instruments, approved in 1931, to which Spain never adhered.

31. In order to delve into the second rule contained in Art. 10 CC on incorporeal property, two ideas should be recalled at this point that were set out in the analysis of their regime of jurisdiction (*supra*, § 17). On the one hand, the notion that this category includes very diverse «assets» that range from rights relating to intellectual and industrial property to rights in rights, including shares in companies and credits; and on the other hand, the idea that the disputes concerning them may deal with matters as divergent as their ownership, the infringement of exploitation rights in them, the validity of entries in the relevant public registers or the registrations or validity of patents, trademarks, designs, drawings, models and other similar rights required to be deposited or registered. As the provision at stake here is Art. 10.4 CC, the object of analysis will be limited to two points of view. Firstly, attention will be focused on intellectual and industrial property rights. This will leave aside other important intangible assets such as rights of pledge and assignments of claims [whose effectiveness against third parties is not covered by Regulation 593/2008, but by Art. 17.3 of Spanish Royal Decree-Law 5/2005, on contractual

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[67] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, pp. 836-837.

[68] Act 19/1985, of 16 July, on Negotiable Instruments (*Ley Cambiaria y del Cheque*), *BOE*, n. 172, 19 July 1985, pp. 22936-22949.

compensation agreements and financial guarantees[69], which, generally[70] subjects them to the law governing the pledged or assigned credit]; or rights *in rem* in company shares, which, depending on whether they are embodied in a security, registered in accounts or neither of these, will be governed by the law of the place in which the security is located (*lex carta sitae*), the law of the place of the account (*lex conto sitae*) or the law of the company's domicile (*lex societatis*)[71]. Secondly, of the types of disputes listed, only those that refer to the ownership of intellectual and industrial property rights will be discussed here, thus excluding purely register-related aspects, such as which securities can be registered and the requirements to do so, subject to the law of the register (*lex registri*); and disputes arising from the infringement of these rights (which, in view of their non-contractual nature, are relocated within the scope of Art. 8 of Regulation 864/2007[72], whereby they shall be subject to the law of the place where their exploitation, in the event of being interfered with, requires protection (*lex loci protectionis*)[73].

32. Having defined the field of play of Art. 10.4 CC, it should be noted at the outset that this is a domestic legal provision. It will therefore only be applicable in the absence of institutional or conventional regulations, as the 1974 CC itself recognises with regard to treaties. However, supranational law is highly relevant in this realm and has so many instruments that it would be almost interminable to list them and outline their content (which, moreover, would go beyond the scope of this study). In an attempt to provide an extremely general and succinct overview of the existing regulatory scenario, it is necessary to speak first of all of the legislative activity of the European Union, which has operated in two different but complementary directions. On the one hand, it has tried to harmonise, through a series of directives, national legislation on the subject which, given that they are territorially application and have different subject matters, may be an obstacle to the free movement of goods and services or a hindrance to the development of free competition in the internal market. On the other hand, in view of the fact that the previous initiative mitigated but did not eradicate the discrepancies between the substantive laws of the Member States (which remained within a strictly territorial approach and continued

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69 Royal Decree-Law 5/2005, of 11 March, on urgent reforms to boost productivity and improve public procurement (*Real Decreto-ley de reformas urgentes para el impulso a la productividad y para la mejora de la contratación pública*), *BOE*, n. 62, 14 March 2005, pp. 8832-8853. However, par. 3 of Art. 17 was added to the text by the Act 7/2011, of 11 April, on modification of the Royal Decree-Law 5/2005, *BOE*, n. 87, 12 April 2011, pp. 37491-37502 (37500).

70 F. J. Garcimartín Alférez, *op. cit.*, p. 449.

71 *Id.*, p. 450.

72 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (*OJEU*, L 199, 31 July 2007, pp. 40-49; Art. 8, p. 45).

73 J. Carrascosa González, *loc. cit.,* pp. 3769-3773.

to prevent legislative homogeneity in this field), the institutions of the European Union, determined to transform «national territoriality» into «Community territoriality»[74], opted to «create» industrial property rights that apply throughout the European Union, subject to an effectively standardised set of rules. The most notable outcomes of this new focus were notions such as the 'European Union trade mark» (Regulation 2017/1001)[75], originally called «Community trade mark» in Regulation 40/94[76]; «Community designs» (Regulation 6/2002)[77]; and «the European patent', although the latter is not an EU industrial property right, because it is governed by the 1973 Munich Convention[78], which establishes a system for granting a patent valid in one or more Member States of the European Patent Organisation, of which all EU countries are members. However, on 1 June 2023, the so-called «Unitary Patent Package» came into force for the participating States (Spain not being one of them)[79]. It comprises Regulation 1257/2012 (referring to the creation of unitary patent protection)[80], Regulation 1260/2012 (related to translation arrangements for patents) [81] and the Agreement on a Unified Patent Court[82], which allows a Unitary Patent to be obtained provided that a European patent has been previously granted. This Unitary Patent is characterised by having «unitary effects» (the patent is valid or invalid at the same time in all the participating Member States), the lack of a translation obligation (once the European patent has been granted, no translation is required for the unitary patent to be legally in force in the participating Member States) and the requirement that any claims relating to the infringement and invalidity of Unitary Patents shall be subject to the Unified Patent Court (a newly created international body

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[74] E. Fernández Masiá, «Protección internacional de la propiedad industrial e intelectual», in Esplugues Mota, C. (dir.), *Derecho del comercio internacional*, 10th ed., Valencia, Tirant lo Blanch, 2022, p. 129.

[75] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (*OJEU*, L 154, 16 July 2017, pp. 1-98).

[76] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (*OJEC*, L 11, 14 January 1994, pp. 1-36).

[77] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (*OJEC*, L 3, 5 January 2002, pp. 1-24).

[78] Convention on the Grant of European Patents (European Patent Convention), Concluded at Munich on 5 October 1973 (United Nations, Treaty Series, No 16208, vol. 1065, pp. 255-509).

[79] About the «Unitary Patent Package», see L. Desaunettes-Barbero *et al.* (ed.), *The Unitary Patent Package & Unified Patent Court. Problems, Possible Improvements and Alternatives*, Milano, Ledizioni, 2023.

[80] Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (*OJEU*, L 361, 31 December 2012, pp. 1-8).

[81] Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (*OJEU*, L 361, 31 December 2012, pp. 89-92).

[82] Agreement on a Unified Patent Court (*OJEU*, C 175, 20 June 2013, pp. 1-40).

solely responsible for resolving these claims)[83]. As long as Spain does not join this regulatory package —if it does—, it will continue to be governed by the current European patent system established by the Munich Convention.

33. In addition to the European legal instruments in this area, the numerous existing treaties must also be taken into consideration. The best way to introduce them is by relying on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994[84], required to be signed by all States that are part of the World Trade Organisation. The TRIPS, which aims to increase the protection of intellectual and industrial property rights worldwide, is based on three main aspects[85]: the incorporation by reference of the updated regulations of the Paris Convention for the Protection of Industrial Property of 1883[86] and the Berne Convention for the Protection of Literary and Artistic Works of 1886[87]; the inclusion of additional provisions aimed at the protection of 'goods' which may give rise to property rights not provided for in the earlier texts, such as computer programmes and databases, well-known service marks or geographical indications; and a corollary consisting in procedures that allow civil, administrative, customs or criminal measures to be adopted to ensure the enforcement of the property rights in question against any action aimed at infringing them. The fact that the first axiom of the TRIPS is to refer to 'unionist' law shows that, more than a hundred years after its adoption (albeit greatly revised) the Paris Convention of 1883 and the Berne Convention of 1886 are still key texts for the international regulation of incorporeal property. Among the treaty provisions that are invoked by the TRIPS, there are 'implicit conflict-of-laws rules'[88], such as Art. 2.2 of the Paris Convention and Art. 5.2 of the Berne Convention, which lead to the application of the law of the country where protection is sought (*lex loci protectionis*). At this point it is necessary to briefly explain how this system works[89]. These conventions are based on the 'principle of national treatment', which means that it is left to

[83] Regarding the main characteristics of the system, see the «The Unitary Patent Package and the Unified Patent Court: a short presentation», in editors' «Introduction» to Desaunettes-Barbero, L., *et al.* (ed.), *op. cit.,* pp. 31-38.

[84] The Agreement on Trade-Related Aspects of Intellectual Property Rights («the TRIPS Agreement») is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994. For the full text: *https://www.wto.org/english/docs_e/legal_e/27-trips.pdf*.

[85] E. Fernández Masiá, *loc. cit.,* pp. 127-128.

[86] Paris Convention for the Protection of Industrial Property of 20 March 1883 (full text with revisions and amendments: *https://www.wipo.int/wipolex/en/text/288514*).

[87] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (full text with revisions and amendments: *https://www.wipo.int/wipolex/en/text/283698*).

[88] M. Virgós Soriano, «Artículo 10, apartado 4», in Albaladejo, M. and Díaz Alabart, S. (ed.), *op. cit.,* pp. 587-608 (595).

[89] M. Virgós Soriano, *loc. cit.* in fn. 88*,* pp. 592-599.

the contracting States to protect intellectual and industrial property rights, and this protection will be provided in accordance with their own rules. Nevertheless, the contracting States commit to give foreigners, citizens of other Member States of the Union —which results from the convention—, the same protection on their territory as they give to their own nationals. It is worth mentioning that the TRIPS applies this principle together with the 'most favoured nation' principle, —whereby the privileges granted to the nationals of a State party to the agreement must also be applied to the nationals of any other signatory country—[90]. Since this approach, which is based on national rights, can lead to disparate levels of protection depending on the country, the conventions guarantee a minimum standard of protection in all contracting States (for example, with regard to the duration of protection; in intellectual property, with regard to the rights of translation, transmission or reproduction; and, in industrial property, regarding the mention of the inventor of the patent, of the designs or of the trade name). This level of protection can be increased in each of them. As can be seen, the system of protection outlined above is based on the «territoriality principle», which, from the point of view of conflict of laws and through the underlying conflicting rules mentioned above, leads to the application of the law of the State for whose territory a given intellectual or industrial property right is claimed, asserted or defended. Apart from the above, there are a number of treaties in this field, notably including: the 1952 Geneva Universal Copyright Convention (regarding intellectual property)[91]; the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations[92]; the 1996 Geneva Copyright Treaty[93]; the Madrid Treaty concerning the International Registration of Marks of 1891 and its Protocol of 1989 (concerning industrial property)[94]; the Hague Agreement Concerning

[90] Concerning the Most-Favoured Nation Treatment in the TRIPS Agreement, see K. Elfring and K. Arend, «Article 4. Most-Favoured Nation Treatment », in Stoll, P.-T. *et al.* (ed.), *WTO – Trade-Related Aspects of Intellectual Property Rights*, Leiden, Nijhoff, 2009, pp. 159-167; also C. M. Correa, *Trade-Related Aspects of Intellectual Property Rights. A Commentary on the TRIPS Agreement*, 2nd ed., Oxford, Oxford University Press, 2020, pp. 59-64.

[91] Universal Copyright Convention, signed at Geneva on 6 September 1952 (*https://www.wipo.int/wipolex/en/text/172836*).

[92] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961 (*https://www.wipo.int/wipolex/en/text/289757*).

[93] WIPO Copyright Treaty (WCT), adopted in Geneva on December 20, 1996 (*https://www.wipo.int/wipolex/en/text/295157*).

[94] Madrid Agreement Concerning the International Registration of Marks of 14 April 1891 (full text with amendments: *https://www.wipo.int/wipolex/en/text/283529*); Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989 (full text with amendments: *https://www.wipo.int/wipolex/en/text/283483*).

the International Registration of Industrial Designs of 1925[95]; and the Washington Patent Cooperation Treaty of 1970[96].

34. When none of the supranational instruments mentioned in the preceding paragraphs is applicable, as a last resort, recourse may be had to Art. 10.4 CC, which provides that «intellectual and industrial property rights shall be protected within Spanish territory in accordance with Spanish law, without prejudice to the provisions of international treaties and conventions to which Spain is a party». Several considerations can be made about this provision[97]. Firstly, it reflects the «territoriality principle», which, as mentioned *supra* (§§ 32-33), is hegemonic in this field. Secondly, derived from the above, the regulatory technique used is the unilateral conflict-of-laws rule, because the legislator was only concerned with the cases territorially linked to the *forum* (Spain) in order to be able to subject them to its own law as *lex loci protectionis*. Thirdly, the provision as worded leaves open three questions that need to be clarified: its material scope of application, its personal scope of application, and the possibility of using the Spanish PIL system to protect these rights when they are in dispute outside Spain. In relation to the first consideration, if we look at the words of the rule, it refers to «intellectual and industrial property rights» without specifying anything else. This means that, in order to discern the exact subject matter of the regulation, Art. 10.4 CC must be linked to Art. 8 of Regulation 864/2007, to make it clear that, while the latter provision deals with the compensation aspects resulting from non-contractual obligations arising from an infringement of intellectual and industrial property rights, Art. 10.4 CC governs the creation, validity, modification, transfer and termination of these property rights, their modalities and the legal regime to which they are subject, especially as regards their content and effects, above all *vis-à-vis* third parties[98]. On the issue of the personal scope of application of the rule, Art. 10.4 CC must be complemented by the so-called «internal delimitation rules»[99], namely, those rules which, once the law of jurisdiction has been rendered applicable, determine the persons who can benefit from the protection offered by Spanish law (see, for example, Arts 199-203 of the revised text of the Intellectual

[95] The Hague Agreement Concerning the International Registration of Industrial Designs, first adopted on 6 November 1925, and later revised at London in 1934 and at The Hague in 1960. It was completed by an additional Act signed at Monaco in 1961 and by a complementary Act signed at Stockholm in 1967, which was amended in 1979. A further Act was adopted at Geneva on 2 July 1999, the text of which is on *https://www.wipo.int/wipolex/en/text/285198*.

[96] Patent Cooperation Treaty (PCT), done at Washington on June 19, 1970 (full text with modifications and amendments: *https://www.wipo.int/export/sites/www/pct/en/docs/texts/pct.pdf*).

[97] For an overview, see M. Virgós Soriano, *loc. cit.* in fn. 88, pp. 600-603.

[98] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, p. 846.

[99] In the original Spanish, «*normas de delimitación interior*» (J. Carrascosa González, *loc. cit.,* pp. 3762-3766).

Property Act, approved by Royal Legislative Decree 1/1996[100], or Art. 4 of the Act 20/2003 on the Legal Protection of Industrial Design[101]). The third issue to be addressed is the protection by Spanish courts of intellectual and industrial property rights outside Spain, despite the fact that the provision analysed uses a unilateral construction and is designed for limited protection in Spanish territory. It is not implausible to imagine a claim brought before Spanish courts for which they have jurisdiction (for example, if the defendant is domiciled in Spain) in which the plaintiff claims ownership of a copyright that is disputed in another State. Within this hypothesis, doctrinal scholarship unanimously agrees that it seems logical and coherent to cover the legal vacuum concealed in Art. 10.4 by making the rule bilateral. This would protect intellectual and industrial property rights in accordance with the law of the country for whose territorial scope judicial protection is sought. In favour of this solution (observing the *lex loci protectionis*) it can be argued that it is easy to apply, that it is aligned with the legislative policy objectives behind the provision of the Spanish Civil Code and that it coincides with that adopted by other regulations (Regulation 864/2007 and the unionist Paris and Berne Conventions) when faced with the conflict-of-laws treatment of this type of incorporeal goods[102].

35. Given the peculiarities of some goods, a dedicated regulation is needed which is not provided for in the Civil Code but in other legislation. This is the case of «cultural goods», which were dealt with above (*supra*, § 16) from a jurisdictional point of view. With regard to the applicable law, it seems obvious that determining that they must be subject to the general rule of the law of the place of location may be totally inappropriate, because these works of art have often been plundered and their current location is the result of theft or illegal sale in the country where the goods were originally located. For this reason, having ruled out recourse to the *lex rei sitae*, the protection of artistic, historical, palaeontological, archaeological, ethnographic, scientific, technical, documentary or bibliographical heritage (following the terminology of the Spanish 1985 Historical Heritage Act[103]) requires a regulatory framework that discourages illicit trafficking in this type of property.

[100] *Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia* (*BOE*, n. 97, 22 April 1996, pp. 14369-14396). Nevertheless, the Arts 199 to 203 have had various numbering over the years, the current one having been established on the occasion of the regulatory reform carried out by the *Real Decreto-ley 2/2018*, of 13 April (*BOE*, n. 91, 14 April, pp. 38590-38644 (38636-38638).

[101] Art. 4 of the Act 20/2003, of 17 July, on on the Legal Protection of Industrial Design (*Ley de Protección Jurídica del Diseño Industrial*), *BOE*, n. 162, 8 July 2003, pp. 26348-26368 (26351).

[102] M. Virgós Soriano, *loc. cit.* in fn. 88*,* p. 603, fn. 27.

[103] Art. 1.2 of the Act 16/1985, of 25 June, on Spanish Historical Heritage (*Ley del Patrimonio Histórico Español*), *BOE*, n. 155, 29 June 1985, pp. 20342-20352 (20342).

Various provisions from institutional, conventional and autonomous sources contribute to this. As for EU law, it is worth mentioning Directive 2014/60/EU (which repealed 93/7/EEC) on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012[104]. This Directive was transposed by Act 1/2017, of 18 April[105], which aimed to stipulate both the conditions for the return of goods unlawfully removed from Spanish territory and located in another Member State, and the actions to be brought before the Spanish authorities with respect to goods located in Spanish territory that unlawfully originated from another Member State (Art. 1). For cases in which return has taken place, Art. 12 (which is a conflict-of-laws provision) states that ownership shall be governed by the law of the requesting Member State[106]. At the EU level, reference should also be made to Regulation 116/2009[107], which establishes the requirement to present a licence for the export of cultural goods outside the customs territory of the EU; and to Regulation 2019/880[108], which prescribes how and when cultural goods of non-EU origin can be introduced and imported, and creates a regime that differentiates goods which (having been removed from the country of origin in breach of the laws and regulations of that country) are prohibited from entering, from those cultural goods which must obtain an import licence to access the EU. If we move from institutional law to conventional law, some particularly relevant treaties are worth mentioning. On the one hand, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[109], which establishes some international claims (Art. 1) for the restitution and return of these goods that do not deprive the *bona fide* possessor of fair and reasonable compensation (Arts 4 and 6). The mechanism created by the Convention does not prevent the contracting States from resorting to more favourable rules for the return of their goods (Art. 9.1), nor does it prevent the preferential application of European instruments (Art. 13.3). Therefore, as regards Spain and the other EU Member States, the Convention finds its *raison d'être* in relations with third States. On the other hand, there is the 1970 UNESCO Convention on the means of prohibiting and preventing the

[104] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) (*OJEU*, L 159, 29 May 2014, pp. 1-10).

[105] See, *supra*, fn. 40.

[106] *BOE*, n. 93, 19 April 2017, pp. 30456-30463 (Art. 1, p. 30458; Art. 12, p. 30462).

[107] Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods (codified version) (*OJEU*, L 39, 10 February 2009, pp. 1-7).

[108] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods (*OJEU*, L 151, 7 June 2019, pp. 1-14).

[109] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, done at Rome on 24 June 1995 (*https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf*: Art. 1, p. 2; Art. 4-6, pp. 3-5; Art. 9, p. 6; Art. 13, p. 7).

illicit export, import and transfer of ownership of cultural property[110]. Its operation is based on the undertaking of the States parties to prohibit the removal from their territory of cultural property unless it is accompanied by a certificate whereby the State concerned authorises the export of the property in question, which will then be considered to have been appropriately exported (Art. 6); if these provisions are not complied with, the transaction will be deemed to be illicit (Art. 3). In a similar sense, UNESCO's 2001 Convention on the Protection of the Underwater Cultural Heritage[111], aimed at the preservation of human remains of a cultural, historical or archaeological nature which have been partially or totally, periodically or continuously, under water for at least 100 years (Art. 1.1.a), should also be mentioned. Finally, a domestic piece of Private International Law legislation remains to be discussed, namely, the Spanish Historical Heritage Law of 1985. It contains two peremptory rules (Arts 5 and 29) which, if interpreted jointly[112], lead to the conclusion that the export of goods of cultural interest is prohibited, as is the export of those which have been declared to be non-exportable by the state administration (Art. 5.3), because they are a part of Spain's historical heritage; when these non-transferable goods, which are not subject to statute of limitations, are movable and have been exported without authorisation, they become the property of the Spanish State (Art. 29.1). It should be noted that, since the aforementioned regulation is mandatory and unilateral, it is not intended to protect foreign cultural goods, even if they are located in the territory of Spain. If these were to be claimed before Spanish courts, in the absence of an international convention in force, the solution in terms of conflict of laws would have to be provided by Art. 10.1 CC, with the consequent application of Spanish substantive law, which does not provide them with special protection, although ways can be found to achieve this. This demonstrates the need, repeatedly defended by doctrinal scholarship, for a replacement of the existing solution (*lex rei sitae)* by the law of the State of origin of the goods, from which they were plundered (*lex originis*). In fact, reputable opinions[113] have shown that the presence of overriding mandatory provisions in this field should be understood as a sign that the regulation of cultural property is undergoing a transition between

[110] The UNESCO 1970 Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, done in Paris on 17 November 1970 (*https://unesdoc.unesco.org/ark:/48223/pf000013337*8: Art. 3, pp. 6-7; Art. 6, pp. 8-10).

[111] The UNESCO 2001 Convention on the protection of the underwater cultural heritage, done in Paris on 6 November 2001 (*https://unesdoc.unesco.org/ark:/48223/pf0000126065*: Art.1.1.a, p. 2).

[112] See J. C. Fernández Rozas and S. Sánchez Lorenzo (*op. cit.*, P. 834); also F. J. Garcimartín Alférez (*op. cit.*, p. 447).

[113] A. Bucher, «L'ordre public et le but social des lois en droit international privé», *Collected Courses*, vol. 239 (1993), pp. 9-116 (72).

the old conflict-of-laws regime, that has not quite been abandoned, and a new one, that has not quite imposed itself.

4. Scope of application of the statute governing rights *in rem*

36. The scope of application of the «real statute» —or of the «law governing rights *in rem*», which is a synonymous expression— tackles the range of matters regarding rights *in rem* which are governed by the *lex situs*. The selection of matters that fall within «real statute» entails a classification problem; however, according to Spanish material law (Art. 12.1 CC), it is possible to discern when the claim strictly concerns rights *in rem*, and when it deals with a contractual, non-contractual or register-related claim —only to mention three of the most significant border areas—. Characterisation, which is based on the fact pattern of the conflict-of-laws rule (Art. 10.1 CC), must be completed by an internal exercise of delimitation or construction (implicit in the classification) that defines the specific scope of the applicable law. This is why, concerning rights *in rem*, it is accepted in Spanish PIL that it is necessary to distinguish between features (such as capacity, form, substantive validity) pertaining to the title or legal transaction producing the acquisition of the right *in rem* —usually, but not always, a contract—, which are ruled by the law governing the title or legal transaction (*lex contractus*, *lex successionis*, etc.), to be determined by the appropriate conflict-of-laws regulations (Regulation 593/2008, Regulation 650/2012, etc.); and features related to the *traditio*, the content and the effects of the right *in rem* [114].

37. It is not always easy to distinguish these two aspects. The interregional law case decided by the Resolution of the Spanish Directorate General for Registries and Notary Affairs (DGRN) of 29 August 2019 [115], provides an excellent example. The Land Registrar No. 3 of Granollers refused to register a deed of sale of several immovables located in Catalonia (two in Granollers) concluded by two companies (Sareb and Talismán) with registered offices in Madrid. The deed —which derived from a previous one concluded by the same parties including the terms for the acquisition by Talismán of a portfolio of more than 400 immovables owned by Sareb— included several agreements, three of which were particularly important. One set out that the payment of part of the price was deferred, under a resolutory condition in accordance with Art. 1504 CC (also Art. 11 of the Spanish Mortgage Act [116] and Art. 59 of the

[114] F. J. Garcimartín Alférez, *op. cit.*, pp. 441-442.

[115] *Resolución de la Dirección General de los Registros y del Notariado* of 29 August 2019 (*BOE*, n. 261, 30 October 2019, pp. 120202-120256).

[116] Art. 11.2 of Mortgage Act (*Ley Hipotecaria*), promulgated by Decree of 8 February 1946, *BOE*, n. 58, 27 February 1946, pp. 1518-1532 (1519-1520). The current location of the

Spanish Mortgage Regulation[117]). The second was related to a penalty clause according to which, if the resolutory condition was effective due to non-payment of the deferred price, the seller company would retain the amounts paid up by the purchaser, without reduction of the agreed payment as provided for in Art. 1154 CC. The third one stated that the Spanish Civil Code ruled the entire contract. The Registrar suspended the registration of the deed because he held that, despite the parties being subject to the *Derecho común*, since the resolutory condition was undoubtedly related to rights *in rem*, pursuant to Art. 10.1 CC it should be governed by Art. 621-54 of the Civil Code of Catalonia, which contains mandatory provisions. As the condition was not in accordance with the provisions of Catalan law, the Registrar did not register it. Sareb lodged an appeal against the Registrar's refusal before the DGRN, which, in the Resolution of 29 August 2019, shifted the focus by considering that the resolutory condition was not a right *in rem* upon immovable property but was 'unquestionably contractual in nature'. The rationale for this argument was that it was merely a way of terminating the contract for breach of contract and, therefore, it should be subject to the law applicable under Art. 10.5 CC. In this case, there was a clear contrast between the Registrar's «right-in-rem classification» of the resolutory condition —based on the understanding that, once included in a public deed and entered in the register, it becomes a security interest— and the DGRN's 'contractual classification' —which considered it a cause of extinction of a contract, on the understanding that its publication in the register does not change its contractual nature—[118].

38. Consequently, the *lex situs* mainly covers the system of acquisition of rights *in rem* (i.e., the moment of transferring the right), its content, the subjective rights of the holder, the assets subject to the right *in rem*, the conditions of its protection, as well as the requirements for register publicity[119]. However, when it comes to specifying the scope of the statute governing rights *in rem*, doctrinal scholarship has been even more exhaustive and unanimously has placed four subject matters under the authority of the law of the State of location[120].

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provision in the second section of Art. 11 was established by Act 13/2005, of 24 June, *related to the reform of the Mortgage Act*, *BOE*, n. 151, 25 June 2015, pp. 52565-52597 (52571).

[117] Art. 59 of Mortgage Regulation (*Reglamento Hipotecario*), approved by Decree of 14 February 1947, *BOE*, n. 106, 16 April 1947, pp. 2238-2239; and annex to the n. 106, pp. 1-71 (6).

[118] For comments on this Resolution, see A. Font i Segura, «Una necesaria calificación por la función de la norma de conflicto en derecho interterritorial», *AEDIPr*, XIX-XX (2019-2020), pp. 600-614.

[119] Very clear about this, the *Resolución de la Dirección General de los Registros y del Notariado* of 22 February 2012 [*BOE*, n. 62, 13 March 2012, pp. 23504-23510 (23507-23508, par. 2)].

[120] J. C. Fernández Rozas and S. Sánchez Lorenzo, *op. cit.*, pp. 818-822.

Firstly, tradition and tradition-like mechanisms, separately from the title (*supra*, § 36). Nevertheless, there is a close interrelation between these two aspects. The valid acquisition of the right *in rem* may depend on the existence of a transferring title; then, the contractual effects of the title —governed by the law regulating it— must be distinguished from the *in rem* effects, bearing in mind that the latter sometimes encompass —in addition to the formal and substantial validity of the title— the substantial conditions (i.e., the exact date of the transfer) and form conditions (typically, the issuing of a public deed). Only when all these requirements are met, the «*in rem* effect» —that is the creation, modification, transfer or termination of the right—, can be produced; and all of them are ruled by the *lex rei sitae*. This is way such law applies, in particular, when the transfer of the right *in rem* requires the title plus tradition (Spanish law), when the transfer is operative *solo consensu*, because the title —usually a contract— is enough (French law), and when an abstract transfer agreement —unconnected to the validity of the title— is necessary, together with the delivery of the movable property or the registration of the immovable property (German law). Secondly, the 'real statute' embraces the content of the right, i.e., the powers granted to the holder and their limits, as well as his obligations and procedural actions —although exercising them before the courts is subject to the *lex fori*—. Thirdly, the *lex situs* governs the opposability of rights *in rem*, i.e. the conditions under which it is enforceable against third parties. This raises a number of particularly difficult questions. In relation to possessors who acquired the property on an *a non domino* basis, is their possession protected? If so, according to what possession, evidence and acquisition regime? Concerning individual creditor seizing the property to which the right *in rem* relates, which law applies to third party claims (including types, object, legitimation, periods, priority, proof of title, etc)? As for collective creditors involved in insolvency proceedings, the possible convergence of the *lex concursus* and the *lex rei sitae* leads to *in rem* claims being subject to (the authorities and) the law of the State where the insolvency proceedings were opened (Regulation 2015/848 on insolvency proceedings[121] applies to collective proceedings provided that the debtor has no establishment in the country where the property concerned is located); yet, if the European Regulation does not apply because the *right in rem* is located in a third State, it is the *lex situs* the one that rules the opposability of the *right in rem* to the creditors (art. 723.1 Spanish Insolvency Act[122]). Lastly, as explicitly sets out Art. 10.1 CC, the statute governing rights *in rem* includes publicity.

[121] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (*OJEU*, L 141, 5 June 2015, pp. 19-72).

[122] Art. 723.1 of the *Real Decreto Legislativo 1/2020, de 5 de mayo, por el que se aprueba el texto refundido de la Ley Concursal* (*BOE*, n. 127, 7 May 2020, pp. 31518-31706 (31699).

Publicity is not only an indispensable component of the enforceability of the right *in rem* against third parties in good faith —as mentioned above—, but, more broadly, the need or appropriateness of resorting to means that facilitate the knowledge by third parties of legal acts related to rights *in rem*. Register publicity is undoubtedly the most significant means of disclosure, but Art. 10.1 CC does not close the door on others that fulfil the same role. All of them remain under the aegis of the law of the place where the —movable or immovable— assets are located, which determines whether there is a requirement of publicity and also whether publicity has a constitutive nature —in an absolute sense: the right *in rem* does not exist without it; or in a relative sense: unless that requirement is fulfilled, the right *in rem* does not produce some effects, such as the enforceability against third parties—; or merely a declaratory nature —it informs of a change in the right *in rem*—. It must be remembered that even if the «law governing rights *in rem*» regulates the aforementioned aspects, the 'law of the Register' decides which documents are eligible for registration, their requirements of form and substance, and the registration procedure.

IV. RECOGNITION OF DECISIONS AND ACTS

39. The jurisdictional regime in matters related to rights *in rem* is always exclusive in terms of institutional law (Regulation 1215/2012), conventional law (Lugano Convention, bilateral conventions) and autonomous law (LOPJ). Hence, one of the definite causes of refusal to recognise and enforce a foreign judgment in Spain is the unawareness, by the issuing court, of the exclusive jurisdiction of Spanish judges when the decision affects immovable property located in Spain [Art. 45.1(e)(ii) in relation to Art. 24(1) Regulation 1215/2012; Art. 35.1 in relation to Art. 22.1 LC; Art. 46.1.c of the Spanish Act on *international legal cooperation in civil matters*[123]]. The reasons that justify the existence of exclusive jurisdiction in relation to rights *in rem* in immovable property (see, above, § 12), both from a theoretical and practical point of view, also explain the inadmissibility of foreign decisions relating to them. However, it must be borne in mind that this rule only aims at protecting the exclusive jurisdiction of the courts of the country of the *forum* or, in the institutional or conventional framework, of the courts of the member or contracting States, but it is not a general safeguard clause in the supranational context, as it does not prevent the recognition —in a State that is a member of the Union or in one that is party to a treaty— of decisions made in another country bound by the instru-

[123] Art. 46.1.c of the Act 29/2015, of 30 July, on *international legal cooperation in civil matters (Ley de cooperación jurídica internacional en materia civil)*, *BOE*, n. 182, 31 July 2015, pp. 65906-65942 (65928).

ment that have been rendered in disregard of the exclusive jurisdiction of third States over property located in their territory.

40. In international property law there is a specific problem —which does not occur in any other area of PIL— that concerns the extraterritorial repercussions of confiscation, nationalisation and expropriation[124]. These acts of public authority allow States to deprive individuals of assets and resources they own for political, social or economic reasons based on public utility or national security. The legal grounds for these types of interventions is the economic aspect of principle of sovereignty, which attributes to the State the prerogative to appropriate *ex iure imperii* all property located in its territory, either actually or, in the case of incorporeal property, fictitiously (for example, intellectual or industrial property rights are considered to be located in the country where they are registered and shares are regarded to be situated in the State of nationality of the company that issued them). By their very nature, these acts are effective on a strictly territorial basis and, from the point of view of PIL, do not pose a problem concerning the competence of authorities —which undeniably corresponds to those of the expropriating State— or applicable law —because the act is subject to the provisions, substantive and mandatory, of the public law of the State whose authorities carry it out—; however, some issues can be raised in terms of the extraterritorial recognition of these acts of sovereign power[125]. Under Spanish law, where the problem has recently arisen in the context of an interlocutory issue for preliminary adjudication[126], there are no rules that explicitly regulate the requirements that such a decision must meet in order to be effective in Spain. However, doctrinal scholarship, inspired by the regulation on the recognition of judgements, requires that for a confiscation, nationalisation or expropriation order made by a foreign authority to be effective in Spanish territory, it must comply with two main criteria. The first is that the expropriating administration actually has the power to adopt the measures

[124] There is an abundance of legal literature on this subject, see, for instance, B. A. Wortley, «Problèmes soulevés en droit international privé par la législation sur l'expropriation», *Collected Courses*, vol. 67 (1939), pp. 341-428; I. Seidl-Hohenvelden, «Extraterritorial Effects of Confiscations and Expropriations», *Michigan Law Review*, vol. 49 (1951-6), pp. 851-868; S. Petrén, «La confiscation des biens étrangers et les réclamations internationales auxquelles elle peut donner lieu», *Collected Courses*, vol. 109 (1963), pp. 487-576.

[125] For an updated view of the problem in the Spanish doctrine, see J. Carrascosa González, *loc. cit.* in fn. 31, pp. 3705-3715.

[126] Melià case, in relation to which the Provincial Court of Palma de Majorca has confirmed, in May 2024, the decision of first instance [Order of 24 Court of Palma of 3 May 2021 (ECLI:ES:JPI:2021:32A)], which had estimated the jurisdictional immunity of the Cuban State in a lawsuit brought before the Spanish courts against Melià Hotels for unjust enrichment derived from an act of nationalisation carried out in 1960. About the first step of the case, see A. Hernández Rodríguez, «El asunto Central Santa Lucía contra Meliá Hoteles. Reflexiones en torno al Auto JPI núm. 24 Palma de Mallorca, de 3 mayo de 2021 (continuará)», *CDT*, 13 (2021-2), pp. 761-777.

of State control of the assets —which calls for a sufficient personal or territorial connection between the nationalising State and the owner of the nationalised assets—; the second is that the expropriation action is in accordance with Spanish public order, i.e. that it does not violate any of the basic principles of the legal system in Spain, as contained in Arts 33 —regarding private property—, 38 —enshrining freedom of enterprise— and 128 —subordination of the country's wealth to the general interest— of the Spanish Constitution —without forgetting Art. 17.1 of the Charter of Fundamental Rights of the European Union (CFREU)—. For what concerns us here, these principles are specifically reflected in the requirement that the expropriation be motivated by a cause of general interest —without involving any discrimination or sanction—; that the expropriation procedure be compliant with the legislation in force —according to which those affected have the right to an adequate legal defence at all times—; and that the dispossession of the property be accompanied by fair and equitable compensation [127].

[127] Conditions traditionally required by Spanish Law, as the doctrine has pointed out for decades. See, especially, A. Quiñones Escámez, *Eficacia internacional de las nacionalizaciones: nombre comercial y marcas*, Madrid, Montecorvo, 1988.