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. 423-441
DOI: 10.37417/PILRIRUE/17
Marcial Pons Ediciones Jurídicas y Sociales

HARMONISATION OF CONFLICT-OF-LAW RULES ON RIGHTS *IN REM*: A GUIDE TO THE PROPOSAL OF THE EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW (GEDIP)*

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I. INTRODUCTION

The purpose of this contribution is to analyse the proposal of the European Group for Private International Law (GEDIP) on the law applicable to rights *in rem* (the «Proposal»)[1]. The origin of the project dates back to 2017, when GEDIP approved the suggestion of one of its members to prepare a text on the law applicable to rights *in rem*. Private International Law is largely harmonised in the European Union. In civil

* This paper offers a reduced version of my contribution to the Tribute to Professor S. Symeonides (forthcoming in the *Willamette Law Review*).

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[1] The text is accessible at Documents – GEDIP (*gedip-egpil.eu*) (last visited May 6, 2024)

and commercial matters, there are four main regulations: (i) the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; (ii) the Rome I Regulation on the law applicable to contractual obligations; (iii) the Rome II Regulation on the law applicable to torts; (iv) and the Insolvency Regulation. In addition, the EU Commission has recently presented a Proposal on the law applicable to third-party effects of assignments of claims[2]. However, there is no instrument on rights *in rem* over corporeal assets. In 2017, GEDIP concluded that there was no justification for this gap and agreed to work on this issue. The Proposal was formally adopted in 2021. This first text excluded stolen goods and cultural objects, but in 2023 a consolidated text including a specific chapter on cultural objects was adopted. The intention is that this Proposal can be used by the European Commission as a basis for presenting a formal text in this area[3].

II. STRUCTURE OF THE PROPOSAL

The Proposal follows a relatively classical and simple structure based on other EU PIL instruments, in particular the Rome I Regulation. It contains 18 provisions, which are divided into five chapters. Chapter I sets out the material scope of the instrument and its universal character; it also includes some definitions. Chapter II contains the general provisions and includes an article on the scope of the applicable law and another on the *conflit mobile* problem. Chapter III lays down special rules for cultural objects (due to its particularities, this chapter is outside the scope of this paper). And Chapter IV and V contain some provisions dealing with the general problems of the application of the conflict-of-laws rules and the application in time of the proposal.

In this context, it may be important to draw attention to the footnotes that accompany the various operative provisions. These footnotes propose several recitals to be inserted in the text. Their purpose is to clarify the meaning and purpose of the various provisions and thus to provide a framework for their interpretation and application.

III. TERMINOLOGY: THE CONCEPT OF PROPRIETARY RIGHTS

The title of the Proposal uses the term «rights *in rem*» and the provisions refer to «proprietary rights» but with the term «right *in rem*»

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[2] Proposal for a Regulation on the law applicable to the third-party effects of assignments of claims COM/2018/096 final - 2018/044 (COD) («Proposal on assignments of claims»).

[3] It must be noted that the European Association of Private International Law (EAPIL) is also working on an EU instrument on rights *in rem*.

in brackets (see Art. 1(1)). In this respect, EU instruments use different concepts: property ownership[4], rights *in rem*[5], proprietary effects[6] or third-party effects[7]. Taking into account this background, the Proposal contains a definition and a non-exhaustive list of typical proprietary rights in an attempt to reduce the uncertainties caused by this concept when considered from different legal cultures. According to Art. 2(1), «Proprietary rights» means rights over corporeal assets that are effective against third parties (*erga omnes*), such as ownership, security interests (possessory or non-possessory), mortgages, usufruct or servitudes. This definition is inspired by the case-law of the CJEU which refers to rights *in rem* as opposed to rights *in personam*: the difference between a right *in rem* and a right *in personam* is that the former, existing in an item of property (corporeal right), is effective *erga omnes*, whereas the latter can only be claimed against the debtor[8]. It may also include rights of retention, pre-emption rights or statutory liens in so far as they may be effective *erga omnes*.

IV. SCOPE OF APPLICATION

1. Material scope

Article 1 defines the material scope of the Proposal: it determines the law applicable to proprietary rights (rights *in rem*) in corporeal assets. As stated above, this Article must be read in conjunction with Article 2 which defines property rights and also corporeal assets. And with Article 7, which determines the scope of the applicable law. The law designated by the Proposal governs in particular the matters listed in that provision (*infra*).

The Proposal only determines the law applicable to rights *in rem* in corporeal assets. These are defined as assets that are able to be physically possessed, i.e. that exist in the real world (*res quae sunt*). They can be seen and touched, and therefore physical possession can play a

[4] See Art. 345 Treaty on the Functioning of the European Union.

[5] See Arts. 8(4) and 24 (1) Brussels I, 4(1)(c), 6(4)(c) or Art. 11(5) Rome I; Art. 8 Insolvency Regulation; Art. 1(2)(k) or 31 of the Succession Regulation (Regulation (EU) No 650/2012 of the European Union and of the Council of 4 July 2012, 27 July 2012, O.J., 107); Arts. 1(2) (g) and 39 of Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

[6] Art. 9(2)(a) of Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

[7] Art. 1(1) of the Proposal on assignments of claims.

[8] See, for example, CJEU C-438/12, 30 January 2014, Irmengard Weber vs Mechthilde Weber ECLI:EU:C:2014:43; C-605/14, 17 December 2015, Virpi Komu vs Pekka Komu, ECLI:EU:C:2015:833; C-433/19, 11 November 2020, Ellmes Property Services Limited vs SP, ECLI:EU:C:2020:900

key role in protecting legal certainty and the circulation of assets (allocative efficiency). Of course, the term includes both movable and immovable property (see Art. 2(b)). As footnote 1 makes clear, stolen and illegally removed goods other than cultural goods are not covered by this instrument. So far, there has been no agreement within the Group as to whether the general provisions set out in the Proposal should also apply to stolen goods, in particular to the conflict between the original owner and a bona fide acquirer or collateral taker where the asset is stolen in State A and sold in State B. Personally, I see no reason to establish a special rule (as in the case of cultural goods) in this scenario. The *lex rei sitae* provides a balanced solution to the conflict between the original owner and a third party who, in good faith and relying on the *lex situs,* acquires the asset or obtains a security interest in it. The application of the *lex situs* should not depend on how the asset arrived at a particular place, regularly or irregularly[9]. The geographical origin of the asset may be unknown to third parties and therefore, any other solution would jeopardise legal certainty and the circulation of goods in international trade. It has been argued that this may encourage theft and the movement of goods to jurisdictions that are favourable to the protection of good-faith acquirors. In general, however, if theft is to be discouraged, it should not be at the expense of third parties acting in good faith. This is not the function of private law but of criminal law. Criminal law exists to deter theft and to protect property.

A particular problem arises in this respect where corporeal and incorporeal assets, e.g. claims or shares, are represented by a negotiable instrument, eg. a depository receipt, a bearer security or a bill of lading. Footnote 2 clarifies that the Proposal does not apply, in particular, to receivables, rights to the performance of obligations other than receivables, negotiable instruments or negotiable documents in electronic form, rights to payment of funds credited to a bank account, certificated and book-entry securities. This exclusion is merely a clarification as these assets are not corporeal. The only exception is "certificated securities" and negotiable instruments in the form of a certificate. These are corporeal asset that represent or in which a non-corporeal asset is "embodied". Although there are reasons to apply the provision of this Proposal to the property rights over the certificate as such (i.e. "the piece of paper"), the Proposal excludes them in order to simplify the text. Article 7 (b) also deals with this issue (*infra*).

Article 1 (2) clarifies the material scope of application and contains a list of excluded matters. Apart from the classic exclusions common to other EU instruments, such as the status and capacity of legal and

[9] Karl Kreuzer, *La propriété mobilière en droit international privé*, 259 Recueil des Cours, 13, 54 (1966-III) (*"How the asset has arrived at a place —...— has, in principle, no relevancy for a choice of law perspective"*).

natural persons, the main purpose of this paragraph and the accompanying recitals is to clarify the relationship with other EU instruments, i.e. Rome I, Rome II, the Insolvency Regulation, the Succession Regulation or the Matrimonial Property Regime Regulation.

With regard to these exclusions, three points are worth mentioning. First, the exclusion of legal capacity means that the law applicable under this Proposal does not govern the question of whether the lack of legal capacity affects the acquisition of a right *in rem* over the asset in question.

> Example: if a minor of State A grants a bona fide creditor a security interest in a movable asset situated in State B, the question of whether the creditor has acquired a right *in rem* in that asset due to the lack of capacity of the transferor falls outside the scope of this Proposal. The same applies to legal persons where the act of disposal has not been approved by the competent organ. The status or capacity and its consequences for the creation or transfer of property rights are therefore determined by the internal conflict-of-laws rules of each State (which may, of course, refer back to the *lex rei sitae*). In this respect, it should be noted that, probably inadvertently, the Proposal does not contain a rule similar to Article 13 of Rome I.

Second, footnote 3 seeks to clarify the application of the law designated by this instrument in the different legal systems on the transfer of property, in particular the German system based on the principles of abstraction and separation. The Proposal determines only the law applicable to the requirements for the transfer of proprietary rights, but not to the personal obligations of the parties arising from the underlying contract. According to this footnote, a recital should clarify that where the law applicable under the Proposal requires a valid contract as a condition for the creation, acquisition or transfer of a right *in rem*, the validity of the contract is governed by the law applicable under the Rome I Regulation. Thus, in jurisdictions such as Spain, where the transfer of a proprietary right over a corporeal asset requires both a valid title (e.g. a contract) and the delivery of the asset, the validity of the contract is not governed by this instrument but by the Rome I Regulation. However, this Proposal does determine the law applicable to the agreement transferring property («proprietary agreement» or Verfügungsgeschäft) in those jurisdictions where this is a condition independent from the underlying contract, that merely creates an *in personam* obligation.

Thirdly, several footnotes clarify the relationship between this Proposal, which deals with the law applicable to individual or single assets (*uti singuli*), and other EU instruments which determine the law applicable to a patrimony (estate) as a whole, i.e. a pool of assets and liabilities (*universitas rerum*). In particular, the relationships with the

Regulations on matrimonial property regimes, registered partnerships, succession or insolvency. Furthermore, Article 1 (2) (i) also excludes global transfers by operation of law as a consequence of corporate reorganisations, e.g. mergers or divisions.

> Example: if a company of State A (the acquired company) is merged with a company of State B (the acquiring company), the transfer of all assets and liabilities takes place by operation of law (universal succession), and this includes all assets worldwide. In principle, the *lex situs* does not apply, since it only governs individual (or singular) transfers; in other words, the law applicable to the *universitas* prevails over the *lex situs*[10].

2. Universal scope

Article 3 establishes the universal scope of application of the Proposal in line with other EU PIL instruments. According to this provision, any law specified by this Regulation shall be applied whether or not it is the law of a Member State. Similarly, the special rules on cultural objects are of a universal application, and therefore not subject to any form of reciprocity: They protect the cultural heritage of third countries even if these countries do not have the same policy towards the EU's cultural heritage.

3. Temporal scope

Article 18 deals with the temporal scope of the Proposal. It is based on the principle of non-retroactivity: the Proposal applies only to proprietary rights created or acquired on or after the date of its application. However, it contains an exception. The law designated by the Proposal will determine the priority between a proprietary right acquired on or after the date of application of the Proposal and a competing proprietary right acquired before this date (see Art. 18.2).

> Example. Assuming that the conflict-of-laws rules are different, if a security interest was created under the law applicable before the Proposal is applied, it will continue to be valid and effective thereafter.

[10] See Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, O.J. 12 December 2019, 1, see Arts. 131 or 160r. According to the former provision, for example, «A cross-border merger […] shall, from the date referred to in Article 129, have the following consequences: (a) all the assets and liabilities of the company being acquired, including all contracts, credits, rights and obligations, shall be transferred to the acquiring company». The only exception to this principle of universal succession regards certain formalities that may be required by the *lex situs* (see. Art. 131 (3) or 160r (5)).

> However, if a new security interest is created under the conflict-of-laws rules established by the Proposal, the priority between the first security interest and the second security interest will be determined by the law designated by the Proposal.

It should be noted, however, that a similar rule was included in the Commission Proposal on the assignments of claims but was deleted by the Council[11].

V. GENERAL RULES

1. *Lex situs* principle

The Proposal adopts the classic solution in this area: the principle of *lex rei sitae (*or simply *lex situs*), and lays down a very standard formulation of this principle. According to Article 4: «The proprietary rights in an asset are governed by the law of the State within the territory of which the asset is located». The connecting factor is the physical location of the asset (*situs naturalis*).

It is a very simple and straightforward rule that provides predictability and legal certainty in a field where this is an essential value, particularly in relation to security interests[12]: A key question for any secured creditor in providing finance is whether its security interest is valid and effective against third parties, and any uncertainty in this regard will be factored into the cost of the credit. Legal certainty in this area thus contributes to the reduction of this cost. The *lex situs* is also the prevailing conflict-of-laws rule in the EU Member States: Article 43 (1) of the German Introductory Law to the Civil Code[13]; Article 10:127 (1) of the Dutch Civil Code[14]; Article 41 of the Polish Private International Law Act[15]; Article 51(1) of the Italian Private International

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[11] Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims - General approach, Interinstitutional File: 2018/0044(COD). According to the new provision: «This Regulation shall apply to assignments of claims where the assignment contract has been concluded on or after [date of application]» with no exceptions.

[12] See, for example, UNCITRAL Legislative Guide on Secured Transaction (2010) at 384: «[…] the law applicable to the property aspects of a security right should be easy to determine. Certainty is a key objective in the development of rules affecting secured transactions, both at the substantive and at the conflict-of-laws levels. Another objective is predictability».

[13] According to this provision: «(1) Interests in property are governed by the law of the State in which the property is situated».

[14] According to this provision: «Unless provided otherwise in paragraph 2 and 3, the real property regime for things shall be governed by the law of the State on the territory of which that thing finds itself».

[15] According to this provision: «1. Ownership and other property rights shall be governed by the law of the country in which the object thereof is situated».

Law Act[16]; Article 87 (1) of the Belgian Private International Law Act[17]; Article 46 (1) of the Portuguese Civil Code[18]; or Article 10 (1) of the Spanish Civil Code[19]; or outside the EU, Articles 99 and 100 of the Swiss Private International Law Act[20].

The *lex situs* is also very convincing from a functional perspective: since the rule deals with conflicting interests in a corporeal asset, it provides a common element —a focal point— for those interests. When different parties dispute a proprietary right in an asset, their common element is the asset and its location, and in this sense, the *lex situs* reflects the reasonable expectations of all potentially interested parties (owner, bona fide acquirer, creditor, grantor, debtor and third parties). The *lex situs* also facilitates the enforcement of formal and registration requirements; and the implementation of fundamental legal, social and economic policies: it protects the interest of States on determining the allocation of property rights over assets and the use of those assets within their own territory. Therefore, and after considering other possible alternatives (e.g. party autonomy or the closest connection), the Group did not find a sufficiently convincing reason to depart from the classical approach in this area. In particular, party autonomy is difficult to apply when it comes to effectiveness vis à vis third parties. For example, the grantor and the secured creditor are normally not allowed to choose the law applicable to the priority issue as this could not only affect the rights of third parties but could also result in a priority conflict between two competing security interests being subject to two different laws leading to contradictory results. The same may happen, *mutatis mutandis*, in the case of a double sale, i.e. where the same asset is sold to two different purchasers. If the law chosen in each case is different, the solution to the priority issue may be contradictory. Finally, no escape clause was included precisely in order to ensure the legal certainty and predictability that are essential in this area. In this respect, it may be worth mentioning that although escape clauses are common in other EU instruments (e.g

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16 According to this provision: «Possession, ownership and other real rights over movable and immovable property are regulated by the law of the State in which the property is located».

17 According to this provision: «Real rights over property are governed by the law of the State in whose territory the property is located at the time they are invoked».

18 According to this provision: «The regime of possession, property and other real rights is defined by the law of the State in which territory where things are located».

19 According to this provision: «Possession, ownership and other rights over immovable goods and publicity thereof shall be governed by the law of the place where such goods are located. The same law shall apply to movable goods».

20 According to these provisions: «Rights *in rem* in immovable property are governed by the law of the place where the property is located» (Art. 99 (1)); «The acquisition and loss of rights *in rem* in movable property are governed by the law of the place where the property is located at the time of the event from which the acquisition or loss is derived» (Art. 11(1)). For more references, Karl Kreuzer, fn 17, 44-46; Dieter Martiny, *Lex rei sitae as a connecting factor in EU Private International Law*, 2 IPRax-Praxis des Internationalen Privat- und Verfahrensrechts, 119 (2012).

Rome I or Rome II), the Financial Collateral Directive or the Proposal on the assignments of claims do not include them[21].

2. Goods in transit or to be exported and means of transport

Apart from cultural goods, the Proposal contains only two special rules that depart from the *lex rei sitae* principle: one for goods in transit or to be exported (Art. 5 of the Proposal), and another for means of transport subject to registration (Art. 6 of the Proposal).

In the first case, the *lex rei sitae* rule does not apply, but the law of the State of destination does. This rule is based on the fact that the current physical location of the asset is temporary, i.e. is transitory, or may be a territory not subject to state sovereignty, and basically allows the transfer or creation of proprietary rights in accordance with the law of the State of destination even if the asset has still to reach that State. In practice, one of the main purposes of this rule is to facilitate the acquisition of an asset with a loan given by a third party since the secured creditor can benefit from the anticipated application of the law of the State of final destination[22]. This rule is also common in some European States, albeit in different formulations, such as: Article 88 of the Belgian Private International Law Act[23]; Article 52 of the Italian Private International Law Act[24]; Article 10:133 of the Dutch Civil Code[25]; Article 46 (2) of the Portuguese Civil Code[26]; or Article 101 of the Swiss Private

[21] Some EU national laws, however, allow for this possibility; for example Article 43 of the German Introductory Law to the Civil Code («If there is a substantially closer connection with the law of a State other than that which would apply under articles 43 and 45, then that law shall apply»).

[22] See Louis D'Avout, «Property and Proprietary Rights», in *Encyclopedia of Private International Law* 1428, 1432 (Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel, eds., 2017) («In export transaction, the future location can be anticipated by the parties. The seller and the buyer, acting under a reservation of tittle clause, may decide in advance to respect the rules of the future country of location and ignore those of the location at the time of the transaction»).

[23] According to this provision: «The rights and titles to goods in transit are governed by the law of the State of destination».

[24] According to this provision: «Rights *in rem* on goods in transit are governed by the law of the place of destination».

[25] According to this provision, which follows a more sophisticated formulation: «1. The real property regime for a thing which is transported under an international contract of carriage of goods, shall be governed by the law of the State of destination.

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

[26] According to this provision: «In everything that concerns the constitution or transfer of real rights over things in transit, these are considered to be located in the country of destination».

Internal Law Act[27]. The UNCITRAL Model Law on Secured Transactions[28] or the French Proposal of an Act on Private International Law also contain a similar rule[29]. There is, however, a minority of EU States that have opted for the application of the law of the State of origin[30].

In order to overcome some of the difficulties in understanding this rule, the Proposal contains a proviso: the right *in rem* is effectively created only to the extent that the asset reaches that State. Otherwise, the *lex rei sitae* rule applies. It also solves a problem where a conflicting right *in rem* has been created under the *lex rei sitae* principle: both rights *in rem* are effective, but the priority is governed by the *lex rei sitae* (see Art. 11 (2) of the Proposal).

> Example: The asset is being transported from State A to State C. A lender (Secured Lender X) can create and perfect a security interest on day 1 under the law of State C even though the asset has not yet reached that State, and once it reaches State C on day 30, the security interest is deemed to be perfected from day 1. However, if Secured Lender Y creates and perfects a security interest under the law of State B while the asset is temporarily in that State, the priority between Secured Lender X and Secured Lender Y will be governed by the law of State B.

The other special rule applies to means of transport. These assets are usually located in different States at different moments in time. The *lex rei sitae* rule therefore does not provide an adequate and functional solution in these cases. This explains why EU Member States have also established special rules for means of transport, albeit with different scopes. For example, Article 45 of the German Introductory Act to the Civil Code[31]; Article 89 of the Belgian Private International Law

[27] According to this provision: «The acquisition and loss, through legal transactions, of rights *in rem* in goods in transit are governed by the law of the state of destination».

[28] See Art. 85.4: «A security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a State other than the State in which it is located at that time may also be created and made effective against third parties under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time to be specified by the enacting State] after the time of the putative creation of the security right)».

[29] According to Article 104 of the Proposal: «Goods in transit in France are subject to the law of the state of destination».

[30] See, Art. 43 of the Polish Private International Law Act («Property rights to the goods in transportation shall be subject to the law of the country from which they were sent. Where it follows from the circumstances that these rights are more strictly connected with the law of another country, this latter law shall apply»); or Art. 10. II Spanish Civil Code («For the purposes of creating or assigning rights over goods in transit, the latter shall be deemed to be located at their place of dispatch, unless the sender and the recipient were to have explicitly or implicitly covenanted to deem them to be deemed located at their place of destination»).

[31] According to this provision: «(1) Interests in aircraft, watercraft and rail vehicles are governed by the law of the State of origin. This is:

1. as to aircrafts the State of their nationality,

Act[32]; Article 10:127 (3) of the Dutch Civil Code[33]; Article 42 of the Polish Private International Law Act[34]; Article 46 (3) of the Portuguese Civil Code[35]; or Article 10(2) of the Spanish Civil Code[36]. However, and in order to ensure legal certainty, the special rules do not apply to all means of transport, but only to those subject to registration. In this case, the publicity provided for by the registration may be the "functional equivalent" of the publicity, and consequent legal certainty, provided for by physical possession. Thus, when the means of transport is subject to registration, the applicable law is «the law of the State under the authority of which the registered is kept» (this wording is taken from Art. 14 of the Insolvency Regulation[37]). A footnote clarifies what is meant by the phrase «is subject to registration». Not any register will suffice, but only those that evidence proprietary rights. Typically, registries that establish or prove a presumption of ownership or the existence of security interests in the registered asset. Purely administrative registers do not qualify as such since they cannot be considered as «functionally equivalent» to physical possession.

The Group discussed the inclusion of other special rules, in particular where a corporeal asset is functionally linked to a business, i.e. it is part of a production unit carrying out a professional or economic activity. Article 87(2) of the Belgium Private International Law Act,

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2. as to watercrafts the State where they are registered, otherwise the home port or home location,

3. as to rail vehicles the State of registration».

[32] According to this provision: «Rights to an aircraft, ship, boat or other means of transport registered in a public register are governed by the law of the State in whose territory the registration took place».

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

[34] According to this provision: «Property rights to the aircraft or to the ship, as well as to the rail vehicle shall be subject to the law of the country in which this aircraft, ship or rail vehicle is registered, and in the absence of the register or registration – to the law of the country where the mother harbour, rail station or any similar place is situated».

[35] According to this provision: «The constitution and transfer of rights over means of transport subject to a regime of registration are regulated by the law of the country where the registration was carried out».

[36] According to this provision: «Property rights to the aircraft or to the ship, as well as to the rail vehicle shall be subject to the law of the country in which this aircraft, ship or rail vehicle is registered, and in the absence of the register or registration – to the law of the country where the mother harbour, rail station or any similar place is situated».

[37] According to this provision: «The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept».

for example, provides for such a rule[38]. However, because of the uncertainties that such a rule may create in determining the functional link between an individual asset and a business, or in identifying the relevant connecting factor in these cases, the idea was ultimately rejected.

VI. SCOPE OF THE APPLICABLE LAW

Article 7 of the Proposal contains a rule on the scope of the applicable law. It is a non-exhaustive list of six issues. Four of them are undisputable. The law designated by the Proposal governs (i) the creation, transfer and acquisition, and (ii) the extinction of property rights in corporeal assets, (iii) the nature and content of those rights; and (iv) the priority between competing property rights over the same asset, for example the priority between two secured lenders or a secured lender and a bona fide purchaser.

There are, however, two issues that deserve further explanation: the incorporation of assets into a certificate or a negotiable instrument (letter (b)), and the enforcement of a security interest (letter (e)).

This first issue has already been mentioned above. In order to understand the scope of the Proposal in this respect, it may be helpful to recall briefly the conflict-of-laws problems raised by the so-called «incorporation» or «embodiment» of an asset in a negotiable instrument. In the case of corporeal assets, the law of their physical location (*lex situs*) determines whether title to the relevant assets can be embodied (or «incorporated») in a document —e.g. a receipt or a bill of lading— and transferred by delivery or endorsement of such a document. The negotiable document of title is thus assimilated to a tangible asset and may be possessed and delivered. In such a case, the transfer of ownership or the creation of security interests in the underlying assets would then be governed by the law of the place where the document is located and not by the law where those assets are located. The reasoning is similar in relation to non-corporeal assets. The *lex causae* (e.g. the *lex societatis* for shares or the *lex contractus* for bonds or other instrument that embodied an obligation of payment) will govern the "incorporation" of the underlying non-corporeal asset into a corporeal asset, i.e. the document. This law is the *lex creationis*, i.e. the law under which the negotiable instrument is created. Once the non-corporeal asset is embodied in a document, it is assimilated to a corporeal asset and therefore, the non-corporeal asset circulates through the delivery of the document. It is "as if" the underlying

[38] According to this provision: «When the property referred to in § 1 consists of an asset composed of a set of assets assigned to a particular destination, in particular a business, it is deemed to be located on the territory of the State with which the asset presents the closest connection».

asset were incorporated into the document, merely a legal fiction. Thus, in both cases, the process of incorporation raises three main questions: (i) which law governs whether an asset, corporeal or non-corporeal, is validly embodied or incorporated in a negotiable instrument; (ii) if incorporation has occurred under that law, which law governs the creation and transfer of negotiable instruments; (iii) and thirdly, which law would apply to resolve a priority dispute between, e.g., a creditor with a security interest in the document, and another creditor to whom the debtor may have granted a possessory security right in the tangible asset itself, where the document and the tangible asset are not held in the same State.

In order to keep the text as simple as possible, the Grupo opted to exclude the creation and transfer of rights in negotiable instruments from the scope of the Proposal (see footnote 13). The Proposal applies only to the first question and, of course, only in relation to corporeal assets. Conversely, questions (ii) and (iii) are not covered by the scope of the Proposal. However, since the function of this «incorporation fiction» is to treat the underlying asset «as if» it were embodied in a negotiable instrument which is in fact a corporeal asset, the conflict-of-laws rules for corporeal assets should generally apply to them.

The second paragraph of this provision, which is worth highlighting, addresses a problem that is very relevant in practice. Laws vary considerably as to the enforcement of security interests, e.g. by appropriation, private sale, public auctions, or the need for enforcement by a public notary or judicial authority. The means of enforcement is therefore of great importance to any secured lender as not all methods will maximise the price of the encumbered asset in the same way. In principle, Article 7 establishes the natural solution: that this issue is governed by the *lex rei sitae*. However, if there is a change of location, the relevant time is when the security interest is to be enforced (see Art. 8 *infra*).

Finally, a reference to statutory liens may be appropriate. Unlike an attachment or a consensual security interest, a statutory lien is a preference granted by operation of law. These preferences fall upon an asset and are generally effective *erga omnes*. The Proposal makes no express reference to these liens and they should therefore, in principle, be governed by the *lex situs* or, as the case may be, by the law designated by Articles 5 o 6[39].

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[39] This, however, may require a further analysis. See, for example, Article 45 (3) of the German Introductory Act to the Civil Code with regard to means of transport: «The coming into existence of statutory security interests in these vehicles is subject to the law applicable to the underlying claim. The ranking among several securities follows Article 43 paragraph 1».

VII. CHANGE OF APPLICABLE LAW (*CONFLIT MOBILE*)

Article 8 of the Proposal deals with the problem of *conflict mobile*, i.e. a change in the location of the assets and hence of the *lex situs*. This provision has been particularly problematic, and understandably so, since the main difficulty with the *lex situs* in relation to movable assets is its mutability. Traditionally, this problem has been solved by referring to a moment in time, but in a neutral way: e.g. the law of the State where the asset was located «*at the relevant moment*» applies. And, indeed, Article 10 on cultural goods somewhat follows this approach, but expressly defines the relevant time. Paragraph 1 (b) refers to the law of the State where the object was located at the time of acquisition of possession by the defendant, and paragraph 3 establishes that this is the place the cultural object was delivered on the basis of a legal relationship underlying the acquisition. The Proposal on the assignments of claims referred to the «material time». According to Article 4 (1) «Unless otherwise provided for in this Article, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the material time». During the negotiations in the Council, the reference to the «material time» has changed to the «time of the conclusion of the assignment contract».

In principle, it is true that a reference to the «relevant» or «material» time is ambiguous and circular. Thus, for example, the reference to «[…] the law of the place where the property is located at the time of the event from which the acquisition or loss is derived» (see Art. 100 Swiss Private International Law Act or, in similar terms, Art. 42 of the Polish Private International law Act[40]) leads to a circular reasoning. The *lex situs* is determined by the «event from which the acquisition is derived», i.e. by an act which gives rise to a legal consequence, but this act is in turn determined by the *lex situs*: it is not possible to determine whether a legal consequence has materialised without first identifying the applicable law. The approach reminds what mathematicians call iterated functions. Morevoer, the reference to the «conclusion of the contract» or the «delivery of the asset based on a legal relationship» does not work well in all circumstances, e.g. when a property right is acquired by adverse possession or usucapion.

In view of these difficulties, Article 8 of the Proposal adopts a different approach, based on the «recognition method». In a different

[40] According to this provision: «The acquisition and the loss of the ownership, as well as the acquisition, the loss, the change of the content, or of the priority, of other rights *in rem* shall be subject to the law of the country in which the object of these rights was situated at the time when the fact causing the above-mentioned legal effects occurred».

context, this is also the approach taken by the HCCH Convention on Intermediated Securities (see Art. 7) or by the International Law Institute Resolution on human rights and private international law of 2021 (see Art. 18[41]). Article 8 has four paragraphs. The first is simply an obligation to recognise a right *in rem* validly created and perfected under the law of the former location of the asset (=old law). This rule also applies when there is a change of country of registration, where the applicable law is determined by Article 6. This is why the provision refers generally to a «change of the applicable» and not to a change of location. The obligation to recognise «a proprietary right» acquired abroad entails the recognition of its effectiveness *vis à vis* the current holder and third parties in general (e.g. the general body of creditors or the insolvency practitioner), and it covers ownership and security interests. This obligation is particularly relevant within the EU market since the non-recognition of a proprietary right created in another Member State may constitute an infringement of the fundamental freedom of movement of goods[42]; at a universal level, it protects the free circulation of goods.

> Example: If a property right is created under the law of State A in favour of X (an owner or beneficiary of a security interest) and is subsequently moved to State B by Y, X may invoke its proprietary right against Y, but also against its general creditors (e.g. an attaching creditor on the basis on an unsecured loan) or the insolvency practitioner if Y enters into insolvency proceedings in State B.

The second paragraph of Article 8 nuances this principle in two ways. The law of the new location («new law») governs (i) the extent and exercise of the proprietary right, (ii) and its priority *vis à vis* another proprietary right created and perfected under the new law. A similar rule, albeit with a different wording, may be found in the law of some European States; for example, Article 43 (2) of the German Introductory Act to the Civil Code[43]; Article 100 (2) of the Swiss Private International Law Act[44]; or Article 10:130 of the Dutch Civil Code[45].

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[41] According to this provision: «States shall respect private property and other proprietary rights encumbering tangible goods acquired in a foreign State in accordance with its laws».

2. Where a change of the applicable law resulting from private international law is conducive to the loss of rights referred to in paragraph 1, the forum State shall grant the holder an equivalent right to the extent possible».

[42] See Eva M Kieninger, Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (1996).

[43] According to this provision: «If an asset, to which property interests attach, gets into another State, these interests cannot be exercised in contradiction to the legal order of that State».

[44] According to this provision: «The scope and exercise of rights *in rem* in movable property are governed by the law of the place where the property is located».

[45] According to this provision: «Real property rights in a thing that have been acquired or established in conformity with the present Title (Title 10.10), remain vested in that thing, also

The «extent» of the proprietary right may be relevant if, for example, the new law is based on a *numerus clausus* system into which the proprietary right created under the old law does not fit exactly. But, in such a case, the third paragraph of Article 8 establishes an obligation to transpose the proprietary right in question. According to this paragraph, where a person invokes a proprietary right to which he or she is entitled under the old law and the new law does not know the proprietary right in question, that right shall, if necessary and to the extent possible, be transposed into the closest equivalent proprietary right under the new law, taking into account the aims and the interests pursued by the specific right and the effects attached to it. The wording of this provision is inspired by the rule on adaptation contained in other EU instruments[46], but the Group concluded that the term «"*transposition*" was technically more correct than "*adaptation*"»[47].

On the other hand, priority is also governed by the new law. The Proposal refers to a conflict between the proprietary right created under the old law, which must be recognised, and a proprietary right created under the new law. The term «competing proprietary right created under the new law» is intended to convey the idea that the effectiveness of a proprietary right against third parties in general (an attaching creditor or the insolvency administrator) is not covered by this paragraph but by the first one. A priority issue arises only where there is a new act of disposal, e.g. a transfer of property under the new law or a security interest perfected under the new law[48].

> Example. If a proprietary right is created under the law of State A in favour of X (i.e. X is the owner of the asset or the beneficiary of a non-possessory security interest) and the asset is subsequently transferred by Y to State B, X may invoke its proprietary right against Y, but also against its general creditors (for example an attaching creditor under an unsecured loan) or the insolvency practitioner if Y falls bankrupt in State B. However, if Y creates a second security interest under the law

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when that thing is moved to another State. These real property rights cannot be exercised in a way which is incompatible with the law of the State on the territory of which that thing finds itself at the moment that these rights are exercised».

[46] See, for example, Article 31 of the Succession Regulation («Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *vis à vis* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *vis à vis* and the effects attached to it»); or Article or 29 of the Matrimonial Property Regimes Regulation, in similar terms.

[47] See H. Lewald, *Règles générales des conflits de lois (Contribution à la technique du droit international privé)*, 69 Recueil des Cours (1939) 1.

[48] The term is used with the same meaning as in Art. 7.4 and 7.5 HCCH Securities Convention or Recommendations 76-109 of the UNCITRAL Legislative Guide on Secured Transactions.

of State B in favour of Z, the priority (conflict) between X and Z will be governed by the new law. This paragraph is based on the rationale that the protection afforded by the new law requires an act of disposal in State B: only in such a case is the protection of a legitimate interest of a third party, who has paid or granted credit relying on that law, justified. Conversely, in the case of a simple attaching creditor or the insolvency practitioner there is no sufficient reasons to depart from the principle of recognition laid down in paragraph 1[49]. Moreover, there may also be reasons to qualify the application of this rule where the acquisition of the proprietary right under the new law has been based on the mere passage of time, i.e. where it has taken place by liberative prescription or adverse possession.

Finally, the last paragraph of Article 8 deals with cases where the acquisition of a right *in rem* requires successive acts or a certain period of time, e.g. adverse possession, and the asset is moved from one State to another before the definitive acquisition of the proprietary rights has materialised, i.e before the crystallization of the property right in accordance with the old law. In such a case, the rule makes it clear that the facts that took place under the old law are to be considered as if they had taken place under the new law. There is a similar provision is the laws of some European States: for example, and both formulated as unilateral rules, in Article 43 (3) of the German Introductory Act to the Civil Code[50]; or Article 102 (1) of the Swiss Private International Law Act[51]. This rule is of a material-law nature, and this explains its unilateral formulation in the national laws, but since the Proposal is to be applied at supranational level, there is no objection to its bilateralisation, at least within the EU.

Example 1. The asset is transferred from State A to State B by the current holder (Y) who is not its legal owner. Under the law of State B, Y can acquire ownership by adverse possession for 15 years. This rule applies, but the period during which Y possessed the asset in State A is also counted for this purpose[52].

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[49] See, for a critical view on this approach and advocating for a «grace period», Rocio Caro Gandara, La fiducia como garantía en el comercio internacional 152-199 (2023).

[50] According to this provision: «If a property interest in an asset that is removed from another State to this country, has not been acquired previously, as to such acquisition in the country, facts that took place in another State are considered as if they took place in this country».

[51] According to this provision: «When movable property arrives in Switzerland and the acquisition or loss of a right *in rem* has not yet taken place abroad, the events that have occurred abroad are deemed to have occurred in Switzerland».

[52] It is debatable, however, whether the rule would apply in this other example: The asset is located in State A, whose law requires a valid contract and the physical delivery of possession for the transfer of ownership over it to occur. X (seller) and Y (buyer) concludes a sale contract when the good is in State A, but before its physical delivery, the good is transferred to State B, where the property is acquired by a mere agreement (a valid sale contract or *nulo consensu*). Under the literal meaning of this provision, since the asset enters State B, Y will be considered

VIII. OTHER PROVISIONS

Apart from the special rules on cultural goods, the Proposal contains six additional provisions dealing with (i) overriding mandatory rules (Art. 12), (ii) public policy (Art. 13), (iii) exclusion of renvoi (Art. 14); (iv) application in States with more than one legal system (Art. 15); (v) relationships with other EU instruments (Art. 16); and (vi) international conventions (Art. 17).

These provisions follow a traditional formulation common to other EU instruments[53]; only the article dealing with overriding mandatory rules or provisions (OMP) has given rise to some discussion within the Group and is in fact not entirely closed. Article 12 contains the standard definition of OMP in EU instruments but refers only to the application of the OMP of the *lex fori*. Unlike the Rome I Regulation, it does not provide for the possibility of giving effect to the OMP of third countries (see Art. 9.3). Personally, I think this is the right approach. Firstly, a parallel provision to that in the Rome I Regulation does not make sense in this context. Article 9.3 Rome I imposes very strict conditions for its application which by definition cannot be met in the field of proprietary rights: they should be provisions of «the law of the country where the obligations arising out of the contract have to be or have been performed», and «in so far as those overriding mandatory provisions render the performance of the contract unlawful». It should also be noted that Article 9.3 of Rome I largely compensate for the fact that this Regulation is based on a principle of almost unlimited party autonomy to determine the applicable law, at least in contracts between professionals (see Art. 3.1). As the parties may select any law, irrespective of whether or not it has a connection with the contract, the possibility of giving effect to third-country OMPs may be justified. Conversely, the Proposal on rights *in rem* is based on an objective connecting factor which leaves no room for party autonomy. The *lex situs* provides a balanced and neutral focal point, and there seems to be no reason to interfere with its application by giving effect to another law.

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the owner. See, on this issue, Kreuzer, fn 17, 60, 116-134. A similar conclusion may be reached if it qualifies as a good in transit or to be exported.

[53] The Proposal excludes renvoi (see also UNCITRAL Legislative Guide, at 386: «The doctrine of renvoi (under which a State's law includes its conflict-of-laws rules) is excluded, for the sake of predictability and also because renvoi may lead to results that run contrary to the expectations of the parties»). As regards multi-unit States, it makes a direct reference to the applicable law in the case of States with more than one legal system. These two provisions were not extensively discussed, and, in principle, they have the advantage of simplifying the application of the instrument. However, in the case of multi-unit States, the approach may require some additional considerations (see UNCITRAL Legislative Guide, at 409).

Second, and more importantly, in the area of rights *in rem*, predictability, legal certainty and the protection of validly acquired proprietary rights over an asset are of paramount importance. In particular, as noted above, the proper functioning of the credit market requires the protection of security interests. In a secured transaction, the secured creditor will normally want to ensure that its rights will be recognised in all jurisdictions where enforcement might take place, including a jurisdiction that is administering insolvency proceedings in respect of the grantor and its assets. Indeed, sophisticated secured lenders typically require legal opinions on the validity, effectiveness and enforceability of security interests. Regulators insist on risk management and compliance measures to assess and manage market, credit and liquidity risk. An open-ended clause allowing for the potential application of third-country OMP may jeopardise these objectives, and the costs associated with this uncertainty are likely to be passed on to debtors[54].

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[54] See UNCITRAL Legislative Guide, p. 384.