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. 443-468
DOI: 10.37417/PILRIRUE/18
Marcial Pons Ediciones Jurídicas y Sociales

CHOICE OF LAW IN LAND SECURITY RIGHTS – AN IMPOSSIBLE SOLUTION?

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SUMMARY: I. SCARCITY OF INTERNATIONAL MORGAGES IN THE EUROPEAN UNION.— II. LEGAL DISPARITY IN MORTGAGE LAW AND *SITUS RULE:* AN UNAVOIDABLE OBSTACLE TO THE EUROPEN MORTGAGE MARKET?— III. THE FOUR MAIN GROUNDS OF THE *SITUS RULE*: 1. *Lex rei sitae* as a consequence of territorial sovereignty: *1.1. Imposition of (public) international law; 1.2. Effectiveness reasons; 1.3 Economic sovereignty and economic policy reasons*; 2. The nature of things; 3. Third party protection: *3.1. Do third parties really need protection?; 3.2. Protection of third parties in mortgage: Land Registry, more than the applicable law;* 4. International Consistency.— IV. CONCLUSIONS.

I. SCARCITY OF INTERNATIONAL MORTGAGES IN THE EUROPEAN UNION

«*Less than 1% of European mortgage credit is cross-border*»[1]. It was these statistics that alerted me to the existence of an obstacle for the creation of a European market of land security rights. Within the European Union, which is supposed to guarantee free movement of capital, the volume of international mortgage credit is surprisingly low, contrary to what we would be led to believe by the progressive European integration (i) and by the importance of mortgage credit in

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[1] M. Jardim, «A euro-hipoteca e os diversos sistemas registais europeus, *Boletim da Faculdade de Direito da Universidade de Coimbra*, LXXXV, 2009, pp. 743-763, p. 743.

domestic transactions (ii). In fact, 99% of all mortgage-backed credit is *exclusively domestic*.

If mortgages are considered the most important security rights in internal transactions, for some reason they don't enjoy the same status when it comes to international transactions (even intra-European). Economic actors shy away from mortgages and prefer other security rights. To put it in concrete terms: if a Portuguese company wants to take out a loan from a German bank[2] and offers a mortgage on the premises of its head office (in Coimbra) as security, the most likely reaction from the German bank will be to *refuse* such security right; or, at the very least, to set the cost of the loan so high as to make the contract unviable. As a result, the company will either get finance from a national bank (creating internal mortgage credit); or it will offer the German bank a different security right; or it will be prevented from taking out the loan, perhaps giving up a certain investment it was planning to make.

This is unexpected, because of the quality of mortgages and hypothecs as security rights. If a loan is associated with the risk of debtor's failure, security rights have historically arisen in this context, giving the lender greater confidence. When it comes to long-term loans, Land security rights are usually preferred, because the durability and the stability of value of immoveable property tend to be greater than those of personal assets[3].

In fact, mortgages or hypothecs offer important advantages to both parties: for the debtor, it allows to keep possession, using the asset, enjoying its utilities and allowing it to be used in an economic activity; for the creditor, it provides the security of assigning immovable property (which tends to be perennial) to guarantee a certain sum, granting the right of being satisfied at cost of the property with preference over other creditors. The mortgage has thus taken on enormous social importance: it favours economic development by allowing access to credit for investments, since the property built or acquired will *itself* provide as a security right for the loan and, at the same time, the asset can be put at the debtor's control. For this reason, it is traditionally considered the «queen of security rights» and it is directly related to property investments[4].

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[2] In fact, most mortgages are held by banks — cfr. M. B. Aalberts, «The Globalization and Europeanization of Mortgage Markets», *International Journal of Urban and Regional Research*, vol. 33, n.º 2, 2009, pp. 389-410, p. 394.

[3] Cf. B.Foëx, «L'Eurohypothèque», *L'Européanisation du droit privé: Vers un Code civil européen?*, ed. F. Werro, Fribourg, Editions Universitaires Fribourg Suisse, 1998, pp. 481-496, p. 482 («*en raison de la stabilité de la valeur des biens qu'ils grèvent, les gages immobiliers sont des garanties particulièrement sûres*»).

[4] Cf. João Antunes Varela, "Constituição de Hipoteca a favor de bancos prediais", *Colectânea de Jurisprudência*, Ano XVI, Tomo III, 1991, pp. 47-54, p. 50; Laurent Aynès e Pierre Crocq, *Les Sûretés — La publicité foncière*, Editions juridiques associées, Paris, 2003,

This is not only an historical fact, but it is still a reality nowadays. Even though there is a setback of classic security rights since the second half of the 20th century, mortgages and hypothecs continue to play a key role in bank financing in the EU. By the end of 2013, the amount of mortgage credit for house purchase granted in EU was 46.2 per cent of the total GDP of these countries (rising to 51 per cent if we look only at the Eurozone), numbers that increase if we consider credit for other purposes secured by mortgage[5].

In an economically integrated market (the European Union) it would be expected that the statistical figures for international mortgage credit would be alike. However, if we look at the volume of mortgage credit in cross-border transactions, the result is clearly different. In fact, mortgage credit is almost exclusively a domestic reality, and the volume of cross-border bank financing in the EU backed by mortgages is practically irrelevant: less than 1% of all international credit granted, even when we consider relations between creditor and debtor from the same Member State: *"like Nessie, the famous Loch Ness dweller,*

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p. 241; G. C. Cheshire, E. H. Burn e J. Cartwright, *Cheshire and Burn's modern law of real property*, Oxford University Press, Oxford, 2006, p. 718; Isabel Menéres Campos, *Da hipoteca: caracterização, constituição e efeitos*, Almedina, Coimbra, 2003, pp. 11 e 21; Ulrich Drobnig, "Security Rights in Movables", *Towards a European Civil Code*, 3.ª Edição, ed. Arthur Hartkamp, et al., Kluwer Law International, Haia, 2004, pp. 741-755, p. 745 (*"the decisive advantage of a non-possessory security is that the debtor may retain the charged goods"*); Manuel B. Aalberts, "The Globalization…", *cit.,* p. 390 (*"Mortgage markets are not just important due to their sheer volume — € 4.7 trillion outstanding mortgage loans in the European Union at the end of 2004; €11.3 trillion worldwide (EMF, 2005) — but also because most homeowners depend on them, because they fuel the economy both directly and indirectly (through equity withdrawal)";* Dora Martins de Carvalho, "A comercialização da hipoteca", *Revista Forense*, Ano 79, vol. 282, 1983, pp. 43-65, p. 43; Andrea Bonomi, "La nécessité d'harmonisation du droit des garanties réelles mobilières", *L'Européanisation du droit privé: Vers un Code civil européen?*, ed. Franz Werro, Editions Universitaires Fribourg Suisse, Fribourg, 1998, pp. 497-515, p. 499; Jürgen Baur e Rolf Stürner, *Sachenrecht*, 17.ª Edição, Beck, Munique, 1999, p. 386 (*"Als Kreditsicherungsmittel bedeutsam sind schließlich Grundstücke. Auf sie bezieht sich das Grundpfandrecht"*).

[5] Cf. *HYPOSTAT 2014 — A review of europe's mortgage and housing markets,* disponível na internet via *http://www.hypo.org/PortalDev/Objects/6/Files/Hypostat_2014.pdf*, consultado em 9 de Julho de 2015, p. 88 (*vide* também a nota explicativa pp. 96-97); Grupo-Fórum relativo ao crédito hipotecário, *The Integration of the EU Mortgage Credit Markets — Report of the Forum Group on Mortgage Credit,* Comissão Europeia, disponível na internet via http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/2004-report-integration_en.pdf, consultado em 20 de Agosto de 2012, p. 11; Thomas Wachter, "La garantie de crédit transfrontalier sur les immeubles au sein de l'Union européenne — L'Eurohypothèque", *Notarius International*, vol. 4, n.º 4, 1999, pp. 174-188, p. 176; Comissão Europeia, *Livro Branco sobre a integração dos mercados de crédito hipotecário na UE — COM(2007)807 Final*, Bruxelas, 2007, p. 2; Pedro Pires Fernandes, *Da Euro-hipoteca: Exposição da proposta e suas características principais*, Dissertação de Mestrado apresentada à Faculdade de Direito da Universidade de Coimbra, (policopiado), Coimbra, 2008, p. 64; Armindo Saraiva Matias, *Garantias Bancárias Activas e Passivas*, Edições Scripto, Lisboa, 1999, p. 48; Álvaro Núñez Iglesias, "El préstamo hipotecario transfronterizo: la eurohipoteca", *Boletín del Centro de Estudios Registrales de Cataluña*, n.º 93, 2001, pp. 369-383, p. 369, nota n.º 2.

everybody speaks about cross-border residential mortgage financing but nobody has really seen anything" [6].

II. LEGAL DISPARITY IN MORTGAGE LAW AND *SITUS RULE*: AN UNAVOIDABLE OBSTACLE TO THE EUROPEAN MORTGAGE MARKET?

As explained elsewhere[7], there are several obstacles to the acceptance of a land security right on an asset located abroad. There is not much controversy about this problem: the reasons for the scant use of security rights in immoveable property in intra-European transactions

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[6] Cf. Eric Klesta, "Experience in Cross-Border Residential Mortgage Lending in the EU: Examples from Portugal and Greece", *Housing Finance International*, December 2003, 2003, pp. 15-20, p. 15.

Vide also Agnieszka Drewics-Tulodzieca, "Foreword", *Basic Guidelines for a Eurohypothec — Outcome of the Eurohypothec workshop November 2004/April 2005*, ed. Agnieszka Drewics-Tulodzieca, Mortgage Credit Foundation, Warsaw, 2005, pp. 3-4, p. 3 (*"there is no internal market of mortgage loans, it is mostly national one"*), apesar de a sublinhar que o volume total de crédito hipotecário ultrapassa *"more than four 3 trillion euros"*); Alfonso Luis Calvo Caravaca e Pilar Blanco-Morales Limones, "Las garantías contractuales (fianza, garantías autónomas y cartas de patrocinio en el comercio internacional)", *Contratos Internacionales*, ed. Alfonso-Luis Calvo Caravaca, Luis Fernández de la Gándara e Pilar Blanco-Morales Limones, Editorial Tecnos, Madrid, 1997, pp. 1186-1274, p. 1187 (*"Una de las especialidades más destacables del comercio internacional, en el plano fáctico, se concreta en la preferencia de los operadores internacionales por las garantías personales"*); Otmar Stöcker, "Real estate liens as security for cross-border property finance. The Eurohypothec — a security instrument with real prospects", *Revista Crítica de Derecho Inmobiliario*, N.º 703, 2007, pp. 2255-2277, p. 2267 (*"It is not yet possible to talk of a pan-European single market in mortgage loans, however; indeed, the mortgage market is mostly nationally orientated"*). Manuel Casero Mejías, "La Eurohipoteca", tradução de «Die Eurohypothek», Otmar Stöcker, *Revista Crítica de Derecho Inmobiliario*, n.º 620, 1994, pp. 91-182, p. 91 (*"No puede olvidar-se cómo el crédito hipotecario es el que mayor volumen de financiación genera, singularmente en la construcción y consiguiente adquisición de viviendas"*); Andreas Luckow, "Charts on business structures", *Basic Guidelines for a Eurohypothec — Outcome of the Eurohypothec workshop November 2004/April 2005*, ed. Agnieszka Drewics-Tulodzieca, Mortgage Credit Foundation, Warsaw, 2005, pp. 24-38, p. 25; Sergio Nasarre Aznar, "The Eurohypothec: a common mortgage for Europe", *The Conveyancer and the Property Lawyer*, 2005, pp. 32-52, p. 35 e *Looking for a model for a Eurohypothec,* European University Institute, disponível na internet via http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Background%20Paper%20Eurohypothec.pdf, consultado em 9 de Outubro de 2012, p. 2 (*"trans-national mortgage lending is practically non-existent"*) e "The Integration of the Mortgage Markets in Europe (part 1)", *Silesian Journal of Legal Studies*, vol. 3, 2011, pp. 39-57, p. 47; Gary Watt, "The Eurohypothec and the English Mortgage", *Maastricht Journal of European and Comparative Law*, vol. 13, n.º 2, 2006, pp. 173-193, p. 176 (*"The EU internal market for banks has been established since 1 January 1993, but cross border financing of real estate investments continues to be an exception"*); Bram Akkermans, *The Principle of Numerus Clausus in European Property Law*, Intersentia, Antuérpia, 2008, p. 506; Klesta, *cit.,* p. 16.

[7] Afonso Patrão, *Autonomia conflitual na hipoteca e reforço da cooperação internacional: removendo obstáculos ao mercado europeu de garantias imobiliárias*, Livros Horizonte, Lisboa, 2017, pp. 67ss.

are undisputed, so the quarrels are only about what the *main cause* is: legal disparity of mortgage law, associated with the *situs rule;* inflexibility of mortgage law; legal uncertainty on insolvency or enforcement rules; discrepancy of Land registry legal effects; difficulties on contracting a land security right outside the territorial State.

On the first problem, the fact that land security rights are subject to *lex rei sitae*, coupled with the profound disparity between national laws (both in substantive law and in registry protection) and the rigidity of their regulation, leads to very different levels of protection depending on what is the territorial state. Since mortgages and hypothecs tend to be governed by *mandatory rules*, there is significant variation in the legal position of the mortgage creditor depending on the law applicable to the legal relationship (which cannot be chosen by the parties).

Therefore, the lack of substantive uniformity and the compulsory application of *lex rei sitae*[8] discourages the use of international mortgages, since the creditor is hounded by uncertainty as to the protection afforded by a foreign jurisdiction. The creditor will need information and advice to assess the level of protection granted by foreign law, passing such costs to the debtor (which can be significant, as in the territorial state there can be several types of mortgages, difficult for a foreign operator to understand). Accepting a foreign mortgage means taking on the risk of accepting an *unknown security right*, which could be *"tan aleatoria que resultará no solo ineficaz sino gravosa"*[9].

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[8] Legal disparity would not in itself be an insurmountable obstacle, because it is a *fact of life* in several domains (A. V. M. Struycken, "Co-ordination and co-operation in respectful desagreement", *Recueil des Cours de l'Académie de Droit International*, Tomo 311, 2004, pp. 9-552, p. 55). The specificity is that this legal disparity is associated with a compulsory application of *lex rei sitae*, preventing the feasibility of opting for a law more suited to the claims of the parties (Afonso Patrão, *Hipoteca e Autonomia Conflitual*, Gestlegal, Coimbra, 2018,, p. 200).

[9] Cfr. Alfonso Luis Calvo Caravaca e Pilar Blanco-Morales Limones, "Las Garantías…", *cit.*, p. 1188. Emphasizing the disparity of mortgage law as an obstacle to cross-border mortgage credit, cfr. Alfonso-Luis Calvo Caravaca e Javier Carrascosa González, *Derecho Internacional Privado*, Vol. I, Ed. Comares, Granada, 2011, p. 77 (*"En efecto, si la Ley aplicable a una situación jurídica es más severa o, simplemente, es diferente en los distintos Estados miembros, los particulares pueden sentirse «desincentivados» a circular por la UE. La diversidad de Leyes aplicables a una misma situación privada internacional en los Estados miembros opera, en estos casos, como un auténtico obstáculo a las libertades de circulación de la UE"*); Jean-François Gojon, "Loi réelle et loi de la créance dans le crédit hypothécaire: un concours encore incertain", *Mélanges en l'Honneur de Mariel Revillard — Liber amicorum*, Defrénois, Paris, 2007, pp. 169-181, p. 170 (stating that Banks often regard the security right *"comme un «corps étranger» par rapport au reste du contrat"*); Sergio Nasarre Aznar, "The Eurohypothec: a common…", *cit.,* p. 32 (*"The main problems are the differences between the laws on mortgages in the different European countries"*); Elena Sánchez Jordán, "Garantías sobre Bienes Inmuebles: La Eurohipoteca", *Derecho Privado Europeo*, ed. Sergio Cámara Lapuente, Editorial Colex, Madrid, 2003, pp. 987-1007, pp. 990-993 (*"De entre todas ellas, hay una que destaca sobre el resto: las grandes diferencias que existen, por una parte, en la regulación de los derechos reales de garantía sobre inmuebles —en concreto, de las hipotecas — que se contemplan en los distintos Estados miembros y, por otra, en los sistemas de publicidad*

registral"); Ulrich Drobnig, "The law governing credit security", *The Private Law Systems in the EU: discrimination on grounds of nationality and the need for a European Civil Code*, ed. Parlamento Europeu — Directorate General for Research, Bruxelas, 2000, pp. 57-82, p. 57 (*"rooted in the strong traditions in the domain of land law and influenced by the close connection that exists between land law and the prevailing system of land registration, these provisions diverge very sharply"*); Thomas Wachter, "La garantie…", *cit.,* p. 174 (*"le marché commun européen des sûretés n'a pas encore pu être réalisé en raison des différences des systèmes hypothécaires qui sont traditionnellement marqués par les droits nationaux"*) and "Die Eurohypothek — Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt", *Zeitschrift für Wirtschafts- und Bankrecht (WM — Wertpapier Mitteilungen)*, vol. 53, n.º 2, 1999, pp. 49-70, p. 49; Gary Watt, "The Eurohypothec…", *cit.,* p. 176 (*"This is attributable in large part to differences between national laws governing security over immovable assets"*); London Economics, *The Costs and Benefits of Integration of EU Mortgage Markets — Report for European Commission, DG-Internal Market and Services*, London, 2005, p. 9 (*"lenders tend to be discouraged from lending across borders by the fact that they would be bound by the legal system of the borrowers' country"*); Mónica Jardim, "A euro-hipoteca…", *cit.,* p. 743; Luís Menezes Leitão, *Garantias das Obrigações*, 3.ª Edição, Almedina, Coimbra, 2012, p. 49; Armindo Saraiva Matias, "Obrigações Hipotecárias e Titularização de Créditos Hipotecários", *Boletim da Faculdade de Direito da Universidade de Coimbra*, Vol. LXXXV, 2009, pp. 621-637, p. 623; Isabel Menéres Campos, "O Direito Português da Hipoteca", *Boletim da Faculdade de Direito da Universidade de Coimbra*, vol. LXXXV, 2009, pp. 725-742, p. 725; Pedro Pires Fernandes, *Da Euro-hipoteca…, cit.*, p. 42; Agnieszka Drewics-Tulodzieca, "Foreword", *cit.*, p. 3; Andreas Luckow, "Charts…", *cit.*, p. 25; Andrés Domínguez Luelmo, "Derechos de Garantía sobre Bienes Muebles", *Derecho Privado Europeo*, ed. Sergio Cámara Lapuente, Editorial Colex, Madrid, 2003, pp. 967-985, p. 967; Eveline Ramaekers, *European Union Property Law — From Fragments to a System*, Intersentia, Cambridge — Antwerp, 2013, p. 5; , pp. 54 e 81; Roy Goode, "The Cape Town Convention on International Interests in Mobile Equipment", *Towards a European Civil Code*, 3.ª Edição, ed. Arthur Hartkamp, et al., Kluwer Law International, Haia, 2004, pp. 757-767, p. 757; Hendrik Ploeger e Bastiaan van Loenen, *Response to the Green Paper on Mortgage Credit in the EU,* disponível na internet via http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/comments/priv-nl_ploeger_vanloenen-en.pdf, consultado em 9 de Julho de 2015, p. 1; Bram Akkermans, "Property law and internal market", *The Future of European Property Law*, ed. Sjef van Erp, Arthur Salomons e Bram Akkermans, Sellier European Law Publishers, Munique, 2012, pp. 199-246, p. 223; Dominique Servais, *Intégration des marchés financiers*, Commentaire J. Mégret, 3.ª Edição, Editions de l'Université de Bruxelles — Institut d'Études Européennes, Bruxelas, 2007, p. 364; Nina Scherber, *Europäische Grundpfandrechte in der nationalen und internationalen Insolvenz im Rechtsvergleich*, Peter Lang, Frankfurt am Main, 2004, p. 152; Claudio Segré, *The Development of a European Capital Market,* Comissão Europeia, disponível na internet via http://aei.pitt.edu/31823/1/Dev_Eur_Cap_Mkt_1966.pdf, consultado em 9 de Julho de 2015, p. 177; Nuria Bouza Vidal, "Modalidades de unificación y armonización de legislaciones en la Comunidad Económica Europea", *Tratado de Derecho Comunitario Europeo*, ed. Eduardo García de Enterría, Julio González Campos e Santiago Muñoz Machado, Editorial Civitas, Madrid, 1986, pp. 551-570, p. 551; Andrés Rodríguez Benot e Alfonso Ybarra Bores, "La armonización del crédito hipotecario en la Unión Europea", *Revista Analuza de Derecho del Turismo*, n.º 5, 2011, pp. 115-145, p. 122; Wulf-Henning Roth, "Secured Credit and the Internal Market: The Fundamental Freedoms and the EU's Mandate for Legislation", *The Future of Secured Credit in Europe*, ed. Horst Eidenmüller e Eva-Maria Kieninger, De Gruyter Recht, Munique, 2008, pp. 36-67, p. 38; Oliva Rocío Diéguez, *La eurohipoteca: luces y sombras de la pretendida unificación en materia hipotecaria,* eScholarship, disponível na internet via http://escholarship.org/uc/item/2s48r5vn, consultado em 9 de Julho de 2015, p. 3; Alain Gourio, "Le nouveau cadre juridique juridique du crédit aux particuliers en Europe", *Revue de droit bancaire et financier*, vol. 4, n.º 2, 2003, pp. 128-147, p. 142; Eurohypothec Research Group, *Response*

Basically, the rigidity of *lex rei sitae* throws creditors to an *unidentified security right*, ruled by foreign law (written in a language not understandable to the creditor) and which contours are unfamiliar. This security right (intended, after all, to reassure the creditor's fears) will necessarily be different from the one idealised by the creditors on the basis of the law of the state where they usually do business: it will provide different powers, different deadlines, different allocations to the secured obligation, unequal admissibility of covenants that shape the security, inclosing the foreign mortgage in the haze of a truly unknown legal figure. All this is aggravated by the mandatory nature of mortgage rules throughout Europe, restricting private autonomy and the feasibility of adapting the institute to the interests of the parties.

It is this context that brought me to a simple question: would it be impossible to allow a *different connecting factor* in mortgage law? Would it be possible for mortgagor and mortgagee to *choose* the applicable law to a Land security right? The question brought is, in simple terms, whether the application of *lex rei sitae* is truly inevitable. Or, differently, if it is possible to foster the European mortgage market by allowing *party autonomy* — the possibility for creditor and owner to *choose* the applicable law to a land mortgage.

In fact, some legal literature stresses out the answer to that question is not as obvious as anticipated. Is it debatable whether the grounds of the *situs rule* for rights *in rem* are always transposable to *security rights*. In fact, the application of *lex rei sitae* to security rights was as

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to the Green Paper on Mortgage Credit in the EU, disponível na internet via http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/comments/priv-es_eurohypothec-es.pdf, consultado em 24 de Março de 2015, p. 9.

The widespread conviction that this disparity *exists* seems to justify a huge contrast between the vast number of comparative law studies in the field of obligations and the rarity of works dedicated to comparing property law in the EU (cfr. Sjef van Erp, "A Comparative Analysis of Mortgage Law: searching for principles", *Land Law in Comparative Perspective*, ed. Elena Sánchez Jordán e Antonio Gambaro, Kluwer Law International, Haia, 2002, pp. 69-86, p. 69). In fact, disparity in applicable law associated with the situs rue is precisely one of the problems in the field of security interests in movable assets (cfr. Eva-Maria Kieninger, "Securities in Movable Property within the Common Market", *European Review of Private Law*, vol. 4, n.º 1, 1996, pp. 41-66, p. 47; Roth, *cit.,* p. 39).

On land registry disparity, *vide* Adriano Vaz Serra, "Hipoteca", *Boletim do Ministério da Justiça*, n.o 62 e 63, 1957, pp. 5-364 e 193-396, p. 7; Mónica Jardim, *Efeitos substantivos do Registo Predial — Terceiros para efeitos do Registo Predial*, Almedina, Coimbra, 2013, pp. 175ss; Jaap Zevenbergen, *Systems of Land Registration — Aspects and Effects*, NGG — Nederlandse Commissie voor Geodesie, Delft, 2002, p. 6; Otmar Stöcker, "Real…", *cit.,* p. 2257; Grupo-Fórum relativo ao crédito hipotecário, *The Integration…,* p. 29; Hendrik Ploeger e Bastiaan van Loenen, *Response…,* p. 1; Sjef van Erp, "A Comparative…", *cit.*, p. 86; Oliver Remien, "Immobiliarsachenrecht in Europa — Skizze eines unvermessenen Gebiets", *Festschrift Tuğrulansay zum 75. Geburtstag*, ed. Sabih Arkan e Yongalik Aynur, Kluwer Law International, Alphen aan den Rijn, 2006, pp. 307-321, p. 309.

only a consequence of the creation of creating a *general rule* for all property rights, prior to the *dépéçage* trend[10].

Therefore, the question arises: is it *really* an impossible solution to allow (limited) party autonomy on the applicable law to land security rights?

III. THE FOUR MAIN GROUNDS OF THE *SITUS RULE*

As explained elsewhere[11], there are four main reasons sustaining the *situs rule* in property rights on immoveable property: (i) public law requirements — possible imposition from international law; effectiveness reasons; public policy and articulation with public law; (ii) the nature of the things; (iii) third party protection; (iv) international consistency.

The purpose of this article is to test if, with the aim of favouring a European mortgage market, those reasons make impossible to replace the *situs rule* by *limited party autonomy*, through a European regulation, limiting the choice do Member States laws.

1. *Lex rei sitae* as a consequence of territorial sovereignty

Territorial sovereignty is one of the grounds for applying the *lex situs* to rights *in rem*. This idea is supported by three lines of reasoning.

1.1 Imposition of (public) international law

The necessary application of *lex rei sitae* can be rooted in the *internationalist theses* of the late 19th century, according to which the rules on the conflict of laws are national expressions of general commands deriving from international law. According to these arguments, the *situs rule* is mandatorily imposed by norms of (public) international law, but the authors differ as to its basis — obligation to guarantee security

[10] Cfr. Dominique Bureau e Horatia Muir Watt, *Droit international privé*, Vol. II, Partie spéciale, 2.ª Edição, Presses Universitaires de France, Paris, 2010, p. 38 (*"le fondement historique du rattachement du statut réel à la* lex rei sitae, *du moins dans sa configuration contemporaine, est largement discutable»*); Roel Westrik e Jeroen van der Weide, "Introduction", *Party Autonomy in International Property Law*, ed. Roel Westrik e Jeroen van der Weide, Sellier, European Law Publishers, Munich, 2011, pp. 1-7, p. 6 (*"It is doubtful wether traditional objections to the idea of party autonomy in [international] property law stil hold"*).

On the application of *lex rei sitae* to security rights as a consequence of a *general rule* for all property rights, cfr. Giulio Diéna, "Les conflits de lois en matière de droits réels à l'Institut de Droit International", *Revue de Droit International Privé et de Droit Pénal International*, vol. VII, 1911, pp. 561-586, p. 562; Anna Gardella, *Le garanzie finanziarie nel diritto internazionale privato*, Giuffrè Editore, Milão, 2007, pp. 20ss.

[11] Afonso Patrão, *Hipoteca e Autonomia…, cit.,* pp. 174ss.

(MANCINI), existence of a true connection (FRANKENSTEIN) or social purpose of the rules (PILLET)[12].

These theses are overcome. There are no longer those who support the existence of an international obligation on establishing *lex rei sitae* as a connecting factor and who claim there is state liability if a national lawmaker decides on a different rule. In fact, this has been confirmed by international law itself, while some international conventions hamper the scope of application of *lex rei sitae*[13]. Furthermore, the supposed existence of *ius gentium* rules establishing a comprehensive system of private international law is clearly contradicted by the divergence of national jurisdictions on private international law[14].

The thesis according to which the *situs rule* has become a customary norm of public international law — the modern reasoning sustaining an *international obligation* of applying *lex rei sitae* — is also unfounded. The mere fact that certain rules are widely used does not turn them into commandments of public international law[15]: the existence

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[12] *Vide* Afonso Patrão, *Hipoteca e Autonomia…, cit.,* pp. 179ss.

[13] Consider, for example, the 2006 Hague Convention on the law applicable to securities held by intermediaries.

[14] Cf. Luís de Lima Pinheiro, *Direito Internacional Privado*, Vol. I, Introdução e Direito de Conflitos — Parte Geral, 3.ª Edição, Almedina, Coimbra, 2014, p. 201; Otto Kahn-Freund, "General Problems of Private International Law", *Recueil des Cours de l'Académie de Droit International*, 1974-III, Tomo 143, 1974, pp. 139-474, p. 170; Jürgen Basedow, "The Law of Open Societies — Private Ordering and Public Regulation of International Relations", *Recueil des Cours de l'Académie de Droit International*, Tomo 360, 2012, pp. 9-516, p. 108; Roberto Barsotti, "Diritti reali nel diritto internazionale privato", *Digesto delle Discipline Privatistiche — Sezione Civile*, Tomo V, UTET, Torino, 2002, pp. 409-436, p. 416.

The universalist theses began to be questioned at the very beginning of the 20th century. *Vide* Franz Kahn, *Die einheitliche Kodifikation des internationalen Privatrecths durch Staatsverträge*, Duncker & Humblot, Leipzig, 1904, pp. 11ss (arguing that the international negotiations in The Hague prove that it is the state lawmaker that diplomatically exercises the conflictual options) and, *Gesetzeskollisionen — Ein Beitrag zur Lehre des internationalen Privatrechts*, Vol. I, Abhandlungen zum internationalen Privatrecht, org. por OTTO LENEL e HANS LEWALD, Duncker & Humblot, München und Leipzig, 1928, pp. 15ss; e Étienne-Adolphe Bartin, *Principes de Droit International Privé*, Tomo I, Éditions Domat-Montchrestien, Paris, 1930, pp. 24ss; Roberto Ago, *Lezioni di Diritto Internazionale Privato*, Giuffrè, Milano, 1955, pp. 39ss.

It should be that some legal authors state there is an international obligation for States not to refuse to apply foreign law (António Ferrer Correia, *Lições de Direito Internacional Privado*, Almedina, Coimbra, 2000, p. 24; Martin Wolff, *Das Internationale Privatrecht Deutschlands*, 3.ª Edição, Springer-Verlag, Berlin, 1954, p. 10), an idea that dates back to the 17th century - BASEDOW*, cit.* p. 107. This is not in conflict with what we are dealing with here: we are only realising the failure of the theses that developed a complete system of conflict of laws, from a customary source.

[15] A careful analysis of the alleged existence of impositions from public international law on private international law was drawn up by por Kurt Lipstein, *Principles of the Conflict of Laws National and International*, Martinus Nijhoff Publishers, The Hague, 1981, pp. 64. Lipstein found, in literature and case law, *eight* putative impositions of international law: the obligation for each state to have a system of private international law (i); the prohibition on states refusing to apply foreign law in all situations [an international obligation recognised by Ferrer Correia,

of similar connecting factors in different jurisdictions is the outcome of a choice of lawmakers (national, conventional or European) and not any customary obligation. At the very least, the subjective element of *custom* is missing, which can me demonstrated by the significant discrepancy of the scope of *lex rei sitae* in different jurisdictions, without any state liability arising to the states that chose *not to apply lex rei sitae* to certain rights *in rem* (such as trusts or financial security rights)[16].

But even if one were to accept the universalist theory of Zitelmann (which find some support in the ICJ *Lotus* judgement)[17], it wouldn't

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cit., p. 24, and Martin Wolff, *Das Internationales..., cit.*, p. 10]; (ii); the possibility of excluding foreign law for reasons of public policy (iii); the impossibility of applying *lex fori* to people who are occasionally in the State of the forum (iv); the submission of real estate to *lex rei sitae* (v), of the form of contracts, to *lex loci* (vi), of procedural law to *lex fori* (vii) and of contractual obligations to the law chosen by the parties (viii).

Lipstein notes that the first four are linked to the position of the legal order with regard to multi-localised relationships: we will not discuss their validity as it is not linked to the subject of our study. The last four, on the other hand, impose conflict rules and their possible existence directly constrains the conflict legislator. The conclusion is that they do not constitute commands of the law of nations, since on the one hand, they are not universally accepted with the same scope (just think that the notion of procedural law is not univocal and that *lex rei sitae* is not uniformly applied to real estate, especially with regard to the succession of real estate, the capacity to transfer and the form of contracts om immoveables) and on the other hand, the international responsibility of the State has never arisen when it does not follow them (Lipstein, *cit.*, p. 65; Kahn-Freund, *cit.*, p. 170.

A similar study, focusing on analysing the German doctrine on this problem, was developed by Roberto Ago, "I principi generali del diritto internazionale privato nella più recente dottrina germanica", *Rivista di Diritto Internazionale*, Anno XXVI — Serie III, vol. XIII, 1934, pp. 197-232, pp. 197ss.

[16] Cfr. A. V. M. Struycken, "Co-ordination…", *cit.,* p. 180 (*"There is not such a rule saying that international contracts are governed by the law designated by the parties nor a rule saying that property issues are governed by the* lex rei sitae *nor a rule saying that issues of procedure are governed by the* lex fori. *Such rules are widely adhered to but nobody will pretend that a rule of public international law is infringed upon by a State that departs from such rules or restricts their scope");* António Ferrer Correia, *Lições de Direito Internacional..., cit.*, p. 23; Isabel de Magalhães Collaço, *Direito Internacional Privado — Lições*, Vol. I, Associação Académica da Faculdade de Direito, Lisboa, 1958, pp. 211 e 216; Henri Batiffol e Ph. Francescakis, "L'arrêt Boll de la Cour internationale de Justice et sa contribution à la théorie du droit international privé", *Revue Critique de Droit International Privé*, vol. 48, 1959, pp. 259-276, p. 260; Marc Fallon, "Les conflits de lois et de juridictions dans un espace économique intégré — L'expérience de la Communauté Européenne", *Recueil des Cours de l'Académie de Droit International*, Tomo 253, 1995, pp. 9-282, p. 25 (*"le droit international public n'impose aux États une limitation de leur compétence en matière de droit privé»);* J.-P. Niboyet, *Traité de Droit International Privé Français*, Tomo IV, La Territorialité, Recueil Sirey, Paris, 1947, p. 199; Roberto Ago, "Règles Générales des Conflits de Lois", *Recueil des Cours de l'Académie de Droit International*, 1936-IV, Tomo 58, 1936, pp. 243-469, pp. 276 e 291, nota n.º 1 (*"Il ne s'agirait donc jamais de l'existence de cette norme coutumière internationale concernant directement le droit international privé»)*; Ulrich Drobnig e Alexander Makarov, "Chapter 2: Sources", *International Encyclopedia of Comparative Law*, Vol. III — Private International Law, ed. Kurt Lipstein, Martinus Nijhoff Publishers, Dordrecht, 2011, pp. 3-34, p. 34; Roberto Barsotti, "Diritti…", *cit.*, p. 416.

[17] On the *Lotus* decision, cfr. Pascal de Vareilles-Sommières, *La compétence international de l'État en matière de droit international privé*, LGDJ, Paris, 1997, pp. 199ss.

explain the mandatory application of *lex rei sitae*. According to Zitelmann, the *situs rule* on immovable property would be the only connecting factor compatible with the international principle of *state sovereignty*: this standard allows states to enact laws either on personal criteria or on tangible connection; since property law supposes a power to exclude anyone not owning a right on the same asset, only *territoriality* satisfies the principle of sovereignty[18].

Firstly, this thesis only considers mandatory rules excluding *non-owners*. However, rights *in rem* go far beyond this scope: their main dimension is the satisfaction of an individual interest through a certain asset (regardless of any inter-subjective legal relationship) and encompasses positive obligations committed to the holders (obligations *propter rem*)[19].

Secondly, the claim that the applicable rules are necessarily *territorially enforceable* does not imply that these rules have inevitably been issued *by the territorial state.* Even if we accept that sovereignty implies the duty of each state to exercise power over assets, this would be granted by exclusive jurisdiction of the territorial authorities. There is no reason why a state could not, if it wanted to, use its authority to apply foreign law. In fact, this argument would prevent the application of foreign law in any subject[20].

Finally, it should be noted that the scope of *lex rei sitae* embraces not only rules on the legal status of the assets, but also the system of creation, transferral and extinction of property rights —a topic which cannot be understood as *rules of conduct that are necessarily committed to the territorial state*[21].

In the specific case of mortgages, the inadequacy of this thesis as a justification of an international obligation to apply *lex rei sitae* is clearer, since there is no necessity of ensuring the *physical* exclusion

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[18] *Vide* Afonso Patrão, *Hipoteca e Autonomia…, cit.,* pp. 179ss, for a deeper analysis.

[19] Cfr. Luís de Lima Pinheiro, *A venda com reserva de propriedade em Direito Internacional Privado*, McGraw-Hill, Lisboa, 1991, pp. 110-112; M. Henrique Mesquita, *Obrigações Reais e Ónus Reais*, Almedina, Coimbra, 2000, pp. 55-56; Mónica Jardim, *Efeitos substantivos…, cit.*, p. 31; Orlando de Carvalho, *Direito das Coisas*, Coimbra Editora, Coimbra, 2012, pp. 128-129 e 183-184.

[20] Javier Carrascosa González, "Derechos Reales (Capítulo XXIX)", *Derecho Internacional Privado*, Vol. II, 12.ª Edição, ed. Alfonso-Luis Calvo Caravaca e Javier Carrascosa González, Ed. Comares, Granada, 2011, pp. 863-912, p. 871; Pietro Franzina, "The proposed new rule of special jurisdiction regarding rights *in rem* in moveable property: a good option for a reformed Brussels I Regulation?", *Diritto del Commercio Internazionale*, vol. 25, n.º 3, 2011, pp. 789-808, p. 271; Robby Alden, "Modernizing the Situs Rule for Real Property Conflicts", *Texas Law Review*, vol. 65, 1986-1987, pp. 585-633, p. 594; José Carlos Fernández Rozas e Sixto Sánchez Lorenzo, *Derecho Internacional Privado*, Thomson — Civitas, Madrid, 2004, p. 560; Roberto Barsotti, "Diritti…", *cit.*, p. 416.

[21] Cfr., Luís de Lima Pinheiro, *A venda…, cit.*, p. 111.

of third parties. In fact, mortgage only grants powers to the holder *at the time of foreclosure*, allowing the right to be enforced against any parties who acquire rights on the same asset. To that extent, there is no need for territoriality, since the powers conferred by the security right do not involve physical contact with the asset and therefore do not imply the physical removal of third parties.

Thus, *situs rule* does not appear to be an imposition from public international law, a thesis that seems to have disappeared from the doctrinal landscape[22].

1.2. Effectiveness reasons

The second justification of the *situs rule* deriving from *state sovereignty* is based on the principle of effectiveness: opting for any another applicable law would provoke *non recognition* in the state where the effects are sought. In fact, *lex rei sitae* is in the best position to decide the solution to a given dispute involving assets located in a certain state; choosing any other law would embrace the risk of the mortgage to be void in the state where the property is located[23].

It isn't necessarily like that.

Firstly, concerning immoveable property located within the European Union, the assessment of a different applicable law in a European regulation would not influence the recognition of judicial decisions, because of the exclusive jurisdiction of territorial courts. Only Member State courts —bound by such private international law instrument— would exercise jurisdiction over property within the EU. In fact, effectiveness is more related to *jurisdiction* (it is important that the case is judged by a court with the necessary means to enforce the judgement) than to what is the *applicable law*: *«sob o manto da efectividade, o que se esconde é a tendência para maximizar o âmbito de aplicação da lei do foro»*[24].

On the other hand, the possibility of party autonomy in *mortgages* must not be confused with freedom of choice *in all property rights* and

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[22] In contemporary literature, we found only one author supporting the customary nature of the *sitys rule:* Louis Perreau-Saussine, *L'immeuble et le droit international privé — Étude des méthodes*, Defrénois, Paris, 2006, pp. 123ss.

[23] Cfr. references Afonso Patrão, *Hipoteca e Autonomia…, cit.*, pp. 186ss.

[24] Luís de Lima Pinheiro, *A venda…, cit.*, p. 113; Russel J. Weintraub, "An inquiry into the utility of «situs» as a concept in conflicts analysis", *Cornell Law Quarterly*, vol. 52, 1966, pp. 1-42, p. 4 (*"If the situs courts believed that a more rational result would be reached in such a case by applying the law of some other state, they would be free to apply that other law"*); Pierre Lalive, *The Transfer of Chattels in the Conflict of Laws: a comparative study*, Clarendon Press, Oxford, 1955, p. 105.

On the foundations of the exclusive jurisdiction of the territorial courts on immoveable property, cfr. Afonso Patrão, *Autonomia Conflitual…, cit.*, footnote n.º 597.

to *the full extent of the scope of property law*: differently, the question I ask is whether it is impossible to sustain limited *professio iuris* for a single right *in rem* that does not confer dominion over the property, and only allowing for the choice of application of the law *of another Member State*. Therefore, there is no risk for *effectiveness* difficulties: party autonomy would be implemented *centrally* throughout the EU (by European regulation), so that in all Member States, *professio iuris* would be allowed in mortgage law —and, therefore, the mortgage being recognised in accordance with the designated law. All other subjects of property law (nature and classification of the property; physical limits; powers of the owner; etc) would remain within the scope of *lex rei sitae,* which is simultaneously the law of the forum.

1.3. Economic sovereignty and economic policy reasons

The last publicist line of reasoning sustaining the mandatory application of *lex rei sitae* lies in the political interests of the territorial state: the application of the law of situs is necessary to fulfil the territorial state's interests in economic organisation. The sovereign choice of the economic system is attached to the organisation of property; specifically regarding mortgage law, there are political choices on credit and indebtedness which are followed by mortgage rules. Furthermore, the exercise of rights *in rem* is fundamentally connected to branches of public law (town planning, territorial organisation, protection of cultural heritage, tax law), so any other connecting factor would jeopardise the smooth application of public law, implying a loss of control by the state over its own territory[25].

The validity of these arguments has been questioned. Louis D'avout claims that sovereignty is not really expressed in the application of territorial law to real estate, but *"en choisissant librement la règle de rattachement":* although the hypothesis is merely theoretical, true sovereignty lies in the fact that the territorial state can, if it wishes, submit rights *in rem*, for example, to the personal law of the owner. Similarly, Daniela Caruso points out that few aspects of the law of property are really linked to any legal-constitutional dimension (the definition of assets that can be the subject property rights; the definition of private property and public property; the requirements for exercising rights) while the rest would be technical rules submitted to the discretion of the lawmaker[26].

[25] *Vide* Afonso Patrão, *Hipoteca e Autonomia..., cit.*, pp. 188ss.

[26] Cfr., Louis d'Avout, *Sur les solutions du conflit de lois en droit des biens*, Economica, Paris, 2006, p. 143; Daniela Caruso, "Private Law and Public Stakes in European Integration: the Case of Property", *European Law Journal,* vol. 10, n.º 6, 2004, pp. 751-765, p. 759.

In any case, even without questioning the validity of those foundations of the *situs rule*, the idea of *professio iuris* in mortgages is not put aside. In fact, the only conclusion that follows from such claims is that territorial law shall rule rights *in rem*. However, this is not what I am asking: the idea I am testing is limited party autonomy in the strict scope *of mortgage law*. Therefore, it is not true that any another law ruling the powers of the holder would hinder the political and economic organisation of property or its interaction with public law.

In fact, the mortgagee has no physical powers over the land; this circumstance turns the security right neutral to any limitations imposed by public law in terms of town planning, territorial organisation or protection of cultural heritage. Even if the exercise of public prerogatives were to affect the value of the estate, the law applicable to the mortgage (that could be chosen by the parties) would provide for the consequences of the reduction of the asset's value. And even if tax law of a certain European state were to levy tax on the mortgage, it doesn't seem that submitting the security right to a different applicable law would create any additional obstacle, since mortgage is a security right known to all Member States[27].

As far as economic policy is concerned, the state's interest is governing property rights on immoveable property is somewhat different in mortgages from that of other rights *in rem*. In fact, in the discipline of security rights, territoriality is not so much aimed at the political and economic organisation of property, but rather at protecting transactions, which will depend on the characteristics of the security rights[28]. Therefore, since I am only discussing the ability to choose one of the Member States' laws to be applicable to mortgages, a problem here is not foreseeable. Firstly, because mortgage requires Land registration in all Member States, which ensures publicity; secondly, because, by establishing a freedom of movement of capitals, Member States have recognised the position of the laws of other Member States, just like in the scope of other European freedoms; finally, because the only question I am asking is whether it is possible for *situs rule* to be derogated in *international transactions*, maintaining the absolute power of the domestic lawmaker in internal relations.

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[27] In fact, as Carlo Angelici, "Garanzie Reali — II", *Enciclopedia giuridica*, Vol. XV, Roma, 1989, pp. 1-10, p. 1, puts it, these claims are designed to support *lex rei sitae* to rights *in rem* which grant *enjoyment* of the property, and do not necessarily serve to justify the same rule in the area of security rights.

On the existence of mortgage in the law of all Member States, cfr. Afonso Patrão, *Autonomia Conflitual..., cit.*, p. 206.

[28] Cf. Anna Gardella, *Le garanzie..., cit.*, pp. 20ss; Michel Grimaldi, "Le garanzie reali in Francia. Problemi e prospettive", *Rivista Critica del Diritto Privato*, Anno XVII, n.º 3, 1999, pp. 391-414, p. 391.

It is true that the possible removal of some mortgages from the scope of *lex rei sitae* could weak the influence of national lawmaker on credit regulation. But this consequence doesn't seem to be a decisive obstacle to changing the connecting factor: on the one hand, because in the scope of personal security rights (which are now more important in international trade) this control no longer exists, as they can be submitted to foreign law; on the other hand, because accepting the legitimacy of the laws of other Member States is a transversal consequence of European integration.

2. The nature of things

Another reasoning usually mobilised for the *situs rule* is the idea that rights *in rem* are independent of any intersubjective relationship (they are only linked to the asset), a thesis that stems from objectivist theories on the nature of rights *in rem*. Basically, this branch of law would be aimed at ruling the status of assets — and that is why there are rules excluding certain assets from commerce; and there are norms disciplining the existence of several rights on the same asset.

Of course, for those who don't follow the objectivist theory of rights *in rem* (and take them as ruling relationships between the holder and third parties, burdened with a *general duty of abstention*) this thesis loses its meaning and, as a result, the claim falls apart. In fact, there are, within a *right in rem,* intersubjective relationships that are not "naturally" comprised in the asset, since it is not particularly relevant to the external side of the right[29].

However, it is possible to dismiss the thesis of the *natural territoriality* of rights *in rem*, *even within the framework of the objectivist doctrine of property rights*. According to this reasoning, since the powers included in the content of the right *in rem* can only be exercised in the state where it is located — and the asset (the object of the rules) is physically located —, it must be the law of that state that defines its

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[29] Cfr. Louis d'Avout, *Sur les solutions…, cit.*, pp. 69ss.

On the (controversial) concept of right *in rem*, cfr., among others, M. Henrique Mesquita, *Direitos Reais*, (policopiado), Coimbra, 1967, pp. 7ss, e *Obrigações…, cit.*, pp. 41ss; José de Oliveira Ascensão, *Direito Civil — Reais*, 5.ª Edição, Coimbra Editora, Coimbra, 1993, pp. 38ss e 597ss; Orlando de Carvalho, *Direito…, cit.*, pp. 95ss; Carlos A. da Mota Pinto, *Direitos Reais — Segundo as prelecções do Prof. Doutor C. A. Mota Pinto ao 4.º Ano Jurídico de 1970-71 (por Álvaro Moreira e Carlos Fraga)*, Almedina, Coimbra, 2009, pp. 27ss; António Menezes Cordeiro, *Direitos Reais*, Lex, Lisboa, 1991, pp. 188ss; Luís Carvalho Fernandes, *Direitos Reais*, 6.ª Edição, Quid iuris, Lisboa, 2010, pp. 39ss; António Santos Justo, *Direitos Reais*, 4.ª Edição, Coimbra Editora, Coimbra, 2012, pp. 14ss; Rui Pinto Duarte, *Curso de Direitos Reais*, 3.ª Edição, Princípia, Cascais, 2013, pp. 17ss; Mónica Jardim, *Efeitos substantivos…, cit.*, pp. 29ss, e "Os direitos reais e os direitos pessoais: distinções e aproximações", *Cadernos do CENoR — Centro de Estudos Notariais e Registais*, n.º 1, 2013, pp. 45-82, pp. 47ss.

extent and scope. There would be a *natural territoriality* of property law, because its object *"occupies a certain place in space"* and such rules are directed at its organisation, abstracting from the persons of its holders. Assets would, *by nature*, be submitted to the sovereignty of the territorial state, since it is the latter that clearly and inescapably organises the things located in its territory (i) and since it is the place where the holder of the right *in rem* acts materially (ii)[30].

The claim is not decisive.

On the one hand, (and even considering the *objective theory* of rights *in rem*), property law always involves intersubjective relationships, governing people's behaviour. In fact, the attribution of powers over assets is aimed at social coexistence and the rules on its legal status are premises of personal rights. This means that the link to tangible assets would not, *by nature*, exclude another connecting factor. Basically, the aim of this branch of the law is to rule people's access to *assets*, so a subjective dimension to its rules cannot be ignored. Consequently, as Lima Pinheiro puts it, *"o Direito das Coisas não é «naturalmente»*

[30] Cfr. Giulio Diéna, "Les conflits…", *cit.,* p. 566 (*"La nécessité d'observer en principe la* lex rei sitae *en matière de droit réels résulte de la nature même des rapports juridiques dont il s'agit»*); Armand Lainé, *Introduction au Droit International Privé*, Tomo II, Librairie Cotillon, Paris, 1892, p. 221 (*«il n'est rien dit de la condition des immeubles. Il n'en est rien dit parce qu'il n'y avait rien à dire»);* J.-P. Niboyet, *Traité…, cit.*, Tomo IV, pp. 200-203, and *Des Conflits de Lois relatifs à l'acquisition de la propriété et des droits sur les meubles corporels à titre particulier*, Recueil Sirey, Paris, 1912, p. 18; Étienne-Adolphe Bartin, *Principes de Droit International Privé*, Tomo III, Éditions Domat-Montchrestien, Paris, 1935, p. 9; Ernst Zitelmann, *Internationales Privatrecht*, Dunker & Humblot, Leipzig, 1897, p. 134; Ernst Frankenstein, *Internationales Privatrecht*, Vol. I, Dr. Walther Rothschild, Berlim, 1926, p. 50, and vol. II, p. 4; Álvaro Machado Villela, *Tratado Elementar (teórico e prático) de Direito Internacional Privado*, Livro II, Aplicações, Coimbra Editora, Coimbra, 1922, p. 62; Herbert F. Goodrich, "Two States and Real Estate", *University of Pennsylvania Law Review*, vol. 89, n.º 4, 1941, pp. 417-429, p. 419; Eva-Maria Kieninger, "Securities…", *cit.,* p. 47 (*"it is both natural and practical to apply the law of the country where the piece of land is situated"*); Trevor C. Hartley, *International Commercial Litigation — Texts, Cases and Materials on Private International Law*, Cambridge University Press, Cambridge, 2009, p. 696 (*"the application of the lex situs to land is so obvious that almost nothing needs to be said about it"*); Bernard Audit, "Le caractère fonctionnel de la règle de conflit (sur la «crise» des conflits de lois)", *Recueil des Cours de l'Académie de Droit International*, 1984-III, Tomo 186, 1984, pp. 219-397, p. 282 (*«du fait que les biens occupent une place dans l'espace s'offre une localisation matérielle évidente et il faudra de bonnes raisons pour ne faire coïncider la localisation juridique avec elle»*); Andreas Bucher e Andrea Bonomi, *Droit International Privé*, 2.ª Edição, Helbing & Lichtenhahn, Zurique, 2004, p. 229; Stefan Leible, "La importancia de la autonomía conflictual para el futuro de los contractos internacionales", *Cuadernos de Derecho Transnacional*, vol. 3, n.º 1, 2011, pp. 214-233, p. 219; Max Gutzwiller, *Internationalprivatrecht*, Das Gesamte Deutsche Recht in Systematischer Darstellung (org. por Rudolf Stammler) — vol. VIII, Stilke, Berlin, 1931, p. 1593; Eveline Ramaekers, *European…, cit.*, p. 203.

This thesis is criticised by Luís de Lima Pinheiro, *A venda…, cit.*, p. 108; Louis d'Avout, *Sur les solutions…, cit.*, p. 39; Anna Gardella, *Le garanzie…, cit.*, p. 17; Leo Raape, *Internationales Privatrecht*, 5.ª Edição, Franz Vahlen G. m. b. H., Berlim, 1961, pp. 586ss; Louis Perreau-Saussine, *L'immeuble…, cit.*, p. 2.

territorial. Se ele tem um domínio de aplicação territorial, tal deve-se a uma norma de conflitos que emprega um elemento de conexão que aponta para um dado lugar no espaço"[31]. From the assumption that the powers of sovereignty are only exercised over things located in the territory of the state, a *natural territoriality* of legal cannot be inferred[32].

Secondly, the argument proves too much: to say that rights *in rem* are subject to the law of the state where the assets are located because assets are located in a certain state would lead to the absurdity that the law of the state where the people are located applies to personal status, because they are also located in a certain area. However, it is not the place where the addressee of a legal rule is located that determines its applicability: Private International Law is guided by its own interests underpinning the selection of the applicable law — which are not "naturally" indicated by the place where the object of the legal relationship is located.

Thirdly, the foundations of this thesis are not unassailable, since it assumes that the Law of Things exclusively rules the legal status of assets. On the one hand, the rules on the existence and interaction of several property rights on the same asset discipline relationships between *rights*, not exclusively with *in rem* kind (as in the context of two tenants or lessees). On the other hand, the rules excluding the possibility of individual appropriation of certain goods (*res extra commercium*) can be seen not as the impossibility of any rights *in rem* over such assets but creating *public property law* which determine their own scope of application. Finally, the direct and immediate power over an asset (a right *in rem*) enacts a general duty of abstention; an intersubjective relationship that, although consequential, is decisively ordered by property law[33].

Fourthly, the thesis of the *nature of things* leaves several problems unresolved: when faced with a certain asset located in an international area (not submitted to the sovereignty of any state) which law is "naturally" appropriate? In fact, if the *situs rule* is physically defined (with no possibility of considering any other option), it would not be admissible to establish other criteria in these cases[34]. These connecting factors which have always been accepted, show that in this field (as in all others) there is only a question of *choosing of the law with the closest connection* — and not some kind of inevitability.

[31] Cf. Luís de Lima Pinheiro, *A venda..., cit.*, p. 109.

[32] Cf. António Ferrer Correia, "A venda internacional de objectos de arte e a protecção do património cultural", *Revista de Legislação e de Jurisprudência*, Anos 125 e 126, n.o 3823 a 3831, 1993-1994, pp. 289-293, 321-325, 353-357 (Ano 125); pp. 288-212, 234-237, 266-270, 296-103, 162-166 (Ano 126), n.º 3827, p. 36.

[33] Cfr. Louis d'Avout, *Sur les solutions..., cit.*, pp. 56-58 ; M. Henrique Mesquita, *Obrigações..., cit.*, pp. 57ss; Mónica Jardim, *Efeitos substantivos..., cit.*, p. 31; Luís Carvalho Fernandes, *Direitos..., cit.*, p. 47.

[34] Louis d'Avout, *Sur les solutions..., cit.*, p. 85.

The nature of mortgages makes the inadequacy of such arguments even more evident: neither are mortgage rules aimed at the physical ordering of things, nor does the holder is granted any physical power over the asset. In fact, looking at the purpose of the mortgage, it would even be more *natural* to submit it to the law governing the secured credit, given the accessory nature that characterises the security right in most national laws.

3. Third party protection

The most impressive claim supporting the *situs rule* lies is the protection of general interests of a plurality of people. The protection of third parties (specifically, of all persons who deal with the owner or who wish to acquire rights on the asset) will imply the choice of a purely *objective* and *easily ascertainable* connecting factor: it is necessary for any third party to be able to inform themselves quickly and reliably about the status of the asset they wish to acquire or over which they wish to create a property right. The *situs rule* is expression, within private international law, of the principle of publicity of property rights: it allows any third party to know the legal status of the asset and it is based on the same reasoning justifying the *numerus clausus* principle in domestic law.

Given this need, it seems that only the *situation of the property* fulfils such goal: the location of a plot is easily recognisable and determinable, and, in immoveable property, it also has the advantage of immutability. Any other connecting factor would affect legal transactions, because the interested party *"teria de suportar o ónus de se informar acerca da espécie e características peculiares do regime legal"*[35].

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[35] Cfr. António Ferrer Correia, "Conflitos de leis em matéria de direitos sobre coisas corpóreas", *Revista de Legislação e de Jusrisprudência*, Ano 117 e Ano 118, n.o 3728 a 3732, 1985-1986, Vol. 117: pp. 298-302, 325-329, 357-361; Vol. 118: pp. 115-119, 138-142 e 165-169, n.º 3727, p. 300, and *Lições de Direito Internacional…, cit.*, pp. 42 e 197; Luís de Lima Pinheiro, *A venda…, cit.*, p. 115; Eva-Maria Kieninger, "Securities…", *cit.,* p. 63 (*"Private International Law thus mirrors the principles of domestic property law of each jurisdiction");* Julio González Campos, "Diversification, Spécialisation, Flexibilisation et Matérialisation des Règles de Droit International Privé", *Recueil des Cours de l'Académie de Droit International,* Tomo 287, 2000, pp. 9-426, p. 347.

For this reason, Karl Kreuzer, "La propriété mobilière en droit international privé", *Recueil des Cours de l'Académie de Droit International*, Tomo 259, 1996, pp. 9-317, p. 123, stresses out that most of the proposals for conflictual autonomy in the statute *in rem* that we have analysed above (see the list on p. 81) restrict the application of the law applicable to relations between parties or maintain *lex rei sitae* as a limit, protecting third parties from a law that they could not know about.

And that is also why some authors refuse party autonomy in the field of security rights *on property* — cfr. A. Curti Gialdino, "La volonté des parties en droit international privé", *Recueil des Cours de l'Académie de Droit International*, 1972-III, Tomo 137, 1972, pp. 743-938, p. 840;

Therefore, if a foreign law was to be applicable to a mortgage, how could third parties be assured that the security right *exists* (under foreign law, can a mortgage be recognised as a mere effect of the contract?) and what are secured credits? How can an third party assess the specific meaning of a security right created under foreign law[36]?

3.1. Do third parties really need protection?

This claim (which I believe is the strongest in justifying the *situs rule*) has been questioned. Some authors have been arguing that the protection of third parties does not justify the application of *lex rei sitae* to rights *in rem*.

On the one hand, it is argued that choosing a connecting factor because of third-party interests gives prominence to the position of those who are not connected to the relationship, imposing an *inconvenient law* on the parties. This is more obvious in cases that do not involve any third parties, still forbidding the parties to conform the relationship to their will. Basically, the hypothetical interests of *potential* third parties are overestimated, to the detriment of the *real parties* to the deal[37].

Secondly, it is argued that the *situs rule* does not always fulfil the purpose of protecting third parties: if the creation of rights *in rem* is submitted to a law (such as the French, Portuguese, Polish, Italian) that enshrines the *consensus principle*, the fact that rights *in rem* are transferred and created *secretly* (without any registration or possession)

Michel Deschamps, "Conflict-of-Laws Rules for Security Rights: What Should Be the Best Rules?", *The Future of Secured Credit in Europe*, ed. Horst Eidenmüller e Eva-Maria Kieninger, De Gruyter Recht, Munique, 2008, pp. 284-296, pp. 285-286.

[36] These are, in essence, the reasons compiled by Bernd von Hoffmann e Kartsten Thorn, *Internationales Privatrecht*, 9.ª Edição, C. H. Beck, Munique, 2007, p. 515, *against* parrty autonomy in property rights: *"Gegen die Zulassung einer solchen unbeschränkten Rechtswahl spricht aber, wie auch die Befürworter der Parteiautonomie einräumen im Internationalen Sachenrecht das Verkehrsinteresse. Publizitätserfordernisse (Traditionsprinzip, Registereintragung) der jeweiligen lex rei sitae sollen bestehende Rechte an einer Sache auch für Dritte insbesondere Gläubiger (Zwangsvollstreckung, Insolvenz), offenlegen. Dies gebietet die zwingende Anknüpfung sachenrechtlicher Fragen an die lex rei sitae; Für die Parteiautonomie bleibt kein Raum"*.

[37] Cfr. Louis d'Avout, *Sur les solutions…, cit.*, pp. 191ss; Robby Alden, "Modernizing…", *cit.,* p. 592; Laura Carballo Piñeiro, "Acción Pauliana e Integración Europea: Una proposta de ley aplicable", *Revista Española de Derecho Internacional*, vol. LXIV, n.º 1, 2012, pp. 43-72, p. 60; Ilaria Pretelli, "Cross-Border Credit Protection Against Fraudulent Transfers of Assets — *Actio Pauliana* in the Conflict of Laws", *Yearbook of Private International Law*, vol. 13, 2011, pp. 589-640, p. 624]; James Fawcett, Jonathan Harris e Michael Bridge, *International Sale of Goods in the Conflict of Laws*, Oxford University Press, Oxford, 2005, p. 1091; Axel Flessner, "Choice of Law in International Property Law — New Encouragement from Europe", *Party Autonomy in International Property Law*, ed. Roel Westrik e Jeroen van der Weide, Sellier, European Law Publishers, Munich, 2011, pp. 11-39, p. 22.

leaves third parties more unprotected than if the applicable law requires publicity. In other words, *lex situs* does not fulfil its supposed goal of protecting third parties[38].

I disagree from these ideas. To my understanding, in most rights *in rem*, third party protection demands for the application of *lex rei sitae*: it is a connecting factor that ensures that the content of the holder's powers and the nature of property can be easily *known*, protecting the security of transactions. The *erga omnes* effects of rights *in rem* and the universal passive obligation will always imply that third parties must be aware of the powers that oppose them.

To my view, the argument according to which *«if there are no third parties, the real parties are harmed»* is not impressive. As it is well known, a right *in rem* implies the exercise of powers over an asset and, consequently, the prerogative to remove any other person from the object of the right. To that extent, it is illusory to sustain that there are rights *in rem* with no third parties to protect.

This conclusion is not challenged by the fact that, in certain jurisdictions, a *consensus* system applies to the creation and transferral of property rights, allowing for *hidden transactions*: it is precisely the fact that publicity is not always required for the transaction of property rights that demands a connecting factor which allows any interested party to enquire about the legal status of the asset and about the system of creatin and transferral of rights *in rem*. The fact that third parties are easily aware of the system gives them the tools they need to avoid being surprised, even if such applicable law allows for *hidden transactions*[39].

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[38] Cfr. Louis d'Avout, *Sur les solutions..., cit.*, pp. 191ss; Georges Khairallah, *Les sûretés mobilières en droit international privé*, Economica, Paris, 1984, p. 20; Axel Flessner, "Choice…", *cit.*, p. 26.

[39] I disagree from Rolf Weber, "Parteiautonomie im internationalen Sachenrecht?", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 44, 1980, pp. 510-530, pp. 521ss, who favours party autonomy in security rights on the grounds that many legal systems do not concern themselves with publicising the right - as is the case with pledges without dispossession. To my understanding, it is precisely because such jurisdictions do not publicise security rights that third parties must be sure of the applicable law to the status of the asset and, therefore, foresee any hidden rights *in rem*.

Accepting this line of reasoning, although recognising in the *situs rule* an overprotection of third parties, cfr. Axel Flessner, "Choice…", *cit.*, p. 23.

3.2. Protection of third parties in mortgage: Land Registry, more than the applicable law

Therefore, I believe it is necessary to submit rights *in rem* on immovable property to *lex rei sitae*, since this is required for the protection of third parties, to whom rights *in rem* are enforceable[40].

However, in the strict scope of mortgages[41] there are no obstacles ruling out the possibility of other connecting factors. In fact, in mortgage law, it is possible for third parties to be effectively aware of the applicable law.

As a starting point, it should be recognised that third parties' interests are somehow different in mortgages from those of rights *in rem* granting the use of the property. In fact, third parties (purchasers or creditors) worry primarily whether the property is liable for a certain credit. Basically, third parties just need to be aware of the existence of the encumbrance and the aspects of the mortgage that may influence the property's ability to ensure payment[42].

But it is not this conclusion that supports the admissibility of party autonomy. What really makes party autonomy viable in mortgage law is *the system of publicising the mortgage*. In fact, in all the laws that could be eligible for choice (the laws of the Member States), mortgage must be registered, otherwise it will have no effect[43]. Thus, the recog-

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[40] According to Rolf Weber, "Parteiautonomie…", *cit.,* p. 520, this is the most serious argument *against* party autonomy in the field of rights *in rem*.

[41] Basically, security rights are not *all the same* and therefore require differentiated treatment from private internacional law — cfr. Georges Khairallah, *Les sûretés..., cit.*, p. 5.

[42] For third parties, the legal regime on the admissibility of *lex comissoria*, inalienability clause, right to demand the reinforcement or replacement of the security right is of little importance: they just need to be certain of the *existence* of the security right and of the *accessory* or *independent* nature of the security right. Their interest lies, firstly, in knowing for sure what is the secured credit; secondly (of particular interest to holders of other mortgages on the same asset) whether the extinction of the first mortgage means that the following mortgages will be extended (accessory or independent nature of the guarantee); thirdly, the existence of *lex commissoria*, since common creditors are interested in knowing whether the property is liable for the owner's other debts in the event of default on the mortgaged debt; fourthly, the regime for *reduction* of the security right, should the third party decide to acquire the mortgaged property. Cfr. Anna Gardella, "La legge applicabile alle garanzie finanziarie tra localizzazione e autonomia privata: una prima ricognizione dopo l'attuazione della Direttiva 2002/47/CE", *Banca Borsa e Titoli di Credito*, vol. LXVIII (Nuova Serie), n.º 5, 2005, pp. 583-625, p. 597; Anna Veneziano, "Attachment/Creation of a Security Interest", *The Future of Secured Credit in Europe*, ed. Horst Eidenmüller e Eva-Maria Kieninger, De Gruyter Recht, Munique, 2008, pp. 113-134, p. 130.

[43] Cfr. Afonso Patrão, *Autonomia Conflitual..., cit.*, pp. 136ss. Even in France, the mortgage is an exception to the regular effects of Land Registry: "*De même, en droit français, alors que le système de publicité foncière n'est pas généralement constitutif des droit réels mais seulement confortatif, il semblerait pourtant que les hypothèques sont prétoriennement soumises à un régime d'enregistrement constitutif*». Cfr. Louis d'Avout, *Sur les solutions..., cit.*, p. 628.

nisability of the aspects of the mortgage that concern third parties *is not ensured by possession,* nor by *the applicable law*; but, instead, by the very function of Land Registry —which publicises the legal status of property—. Basically, the principle of publicising rights *in rem* (which has its conflict-of-laws expression in the *lex rei sitae* criterion) is not achieved by traditional means (like possession) but *by Land Registry*[44].

This feature makes the *situs rule* disposable, when it comes to the protection of third parties: registration will protect them *better* and *more efficiently* than subjecting the mortgage to *lex rei sitae*, making its application unnecessary.

In fact, in *internal transactions*, registration ensures there is no hidden mortgage (despite the lack of possession) and safeguards the holder that an incompatible or conflicting right with no prior registration is not enforceable against him(even in mere opposability registry systems). Registration is an essential tool for security because any interested party can quickly be aware of the encumbrance on the property.

If this is the case domestically, the same is true in international transactions: the ability of the property's value to pay for debts and the legal regime of the encumbrances on the property are publicised *by Land registration*, much more than by the applicable law. If opting for the *lex situs* is *"uma projecção conflitual do princípio da publicidade dos direitos reais"*[45]*,* there is no such need in the case of mortgages: the fact that all Member States require registration for its creation means that submitting it to a foreign law does not create uncertainty. In fact, in each Member State, registration is a prerequisite for its creation, ensuring that the mortgage is fully publicised in a particularly effective way[46].

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[44] Comparing the publicising capability of *possession* and *Land Registry,* cfr. Margarida Costa Andrade, "(Alguns) Aspectos Polémicos da Posse de Bens Imóveis no Direito Português", *Cadernos do CENoR — Centro de Estudos Notariais e Registais*, n.º 1, 2013, pp. 83-120, p. 111.

[45] Luís de Lima Pinheiro, *A venda…, cit.*, p. 115. Also, Dorothee Einsele, "Rechtswahlfreiheit im Internationalen Privatrecht", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 60, n.º 3, 1996, pp. 417-447, p. 436; Jürgen Basedow, "Spécificité et coordination du droit international privé communautaire", *Travaux du Comité Français de Droit International Privé*, 2002-2004, pp. 275-305, p. 279; Bernd von Hoffmann e Kartsten Thorn, *Internationales…, cit.*, p. 515.

[46] Cf. Laurent Aynès e Pierre Crocq, *Les sûretés…, cit.*, p. 245; Abraham Bell e Gideon Parchomovsky, "Of Property and Federalism", *The Yale Law Journal*, vol. 115, 2005, pp. 72-115, p. 108; Dora Martins de Carvalho, "A comercialização…", *cit.,* p. 46; Axel Flessner, "Choice…", *cit.,* p. 37.

This is why, in the field of security rights on moveables, the establishment of a registration system is advocated — cfr. Anna Veneziano, "The DCFR Book on Secured Transactions: Some Policy Choices made by the Working Group", *The Future of European Property Law*, ed. Sjef van Erp, Arthur Salomons e Bram Akkermans, Sellier European Law Publishers, Munique, 2012, pp. 123-135, p. 130; Christian Mouly, "La publicité des sûretés réelles mobilières", *European Review of Private Law*, vol. 6, n.º 1, 1998, pp. 51-70, p. 55.

On the other hand, the publicity offered by registration (compared to other forms of publicity) is not only more effective *but also more functional*. In addition to identifying the holder of a right, registration allows access to *more information* (physical characteristics of the property, history of the rights that have been levied on it, etc.), which can overcome any disadvantages of subjecting the mortgage to a foreign law. Thus, the aspects of the mortgage regime that need to be known *can be publicised in Land Registry* (accessory or independent nature of the mortgage; consequences of the extinction of the first mortgage for the degree of the remaining mortgages; reduction or purge regime; existence of *lex commissoria* and its terms). Although informing interested parties about the applicable law is less intuitive than the traditional way (applying the *lex situs*), the Registry counterweighs by offering greater clarity, quality and depth of information[47].

What is being said is not new. There are plenty of authors who, in several subjects, accept the abandonment of the *situs rule* when this is offset by an effective publicity mechanism. Thus, Von Bar defended the necessary imposition of *lex rei sitae "unless each particular article is accurately registered by authority"*; Bell and Parchomovsky's proposal for party autonomy in rights *in rem* is associated with the necessary registration of rights submitted to a foreign law; Lima Pinheiro approves the party autonomy in the 2006 Hague Securities Convention *"contanto que seja assegurada a publicidade da escolha";* Bonomi congratulates *professio iuris* in securities held by an intermediary, given the publicity given by the financial intermediary; Roth explains that the protection of third parties through the obligation to register satisfies the public order concerns inherent to publicity; Anna Gardella states that it is publicity (rather than the application of *lex rei sitae*) that protects third parties in the field of security rights *in rem*; Lurger argues that the transparency of rights *in rem* is ensured by registration and not by the rules of *lex rei sitae*[48].

And these registration systems are being created (cfr. Eva-Maria Kieninger, "Introduction: security rights in movable property within the common market and the approach of the study", *Security rights in Movable property in European Private Law*, ed. Eva-Maria Kieninger, Cambridge University Press, Cambridge, 2004, pp. 6-37, p. 10).

[47] Cfr. Abraham Bell e Gideon Parchomovsky, "Of Property…", *cit.,* p. 108.

[48] Cfr. Ludwig von Bar, *The Theory and Practice of Private International Law*, tradução de GILLESPIE, 2.ª Edição, William Green & Sons Law Publishers, Edimburgo, 1892, p. 485; Abraham Bell e Gideon Parchomovsky, "Of Property…", *cit.,* p. 108; Luís de Lima Pinheiro, *Direito aplicável às operações sobre instrumentos financeiros*, Vol. II — Contratos, Obrigações Extracontratuais, Insolvência, Operações Bancárias, Operações Sobre Instrumentos Financeiros e Reconhecimento de Decisões Estrangeiras, Estudos de Direito Internacional Privado, Almedina, Coimbra, 2009, p. 388; Andrea Bonomi, "La Convention de la Haye sur les titres, une nouvelle avancée de l'autonomie des parties en droit international privé", *La loi applicable aux titres intermédiés: La Convention de la Haye du 5 juillet 2006 — une opportunité pour la place financière suisse?*, ed. Andrea Bonomi, Eleanor Cashin Ritaine e Bart Volders, Schulthess, Genebra, 2006, pp. 9-13, p. 12; Wulf-Henning Roth, "Secured…", *cit.*, p. 52; Anna Gardella,

Moreover, this is precisely the reasoning behind the abandonment of *lex rei sitae* in the scope of means of transport: if there is another connecting factor capable of effectively publicising the legal status of the asset (registration, pavilion, etc.), the *situs rule* is no longer necessary[49]. In the case of mortgages, it is indisputable that publicity is ensured by land registry — and not by the situation of the property —, and it is therefore possible to disregard the traditional connection.

Finally, the critics of the 2006 Hague Securities Convention (which established party autonomy in rights over securities held by an intermediary), argue that *professio iuris* should not be applied *in the absence of publicising the choice*[50]. *A contrario*, it seems that an effective publicity mechanism (such as the Land Registry) ensures third party protection

4. International Consistency

The widespread choice of *lex rei sitae* creates a new basis for the traditional connecting factor: if the *situs rule* is in force in *all* countries, the lawmaker has really no choice but to enshrine the same rule, in order to achieve stability. The use of any other connecting factor would undermine international consistency, jeopardising the stability of relationships and contradicting one of the most important principles of private international law (especially in the field of credit) — in an

"La legge…", *cit.,* p. 597; Brigitta Lurger, "The Unification of Property Law in the European Union", *Festschrift Tuğrulansay zum 75. Geburtstag*, ed. Sabih Arkan e Yongalik Aynur, Kluwer Law International, Alphen aan den Rijn, 2006, pp. 167-187, p. 186; Marc Fallon, Patrick Kinsch e Christian Kohler, *Le droit international privé européen en construction — Building European Private International Law*, Vingt ans de travaux du GEDIP — Twenty Years' Work by GEDIP, Intersentia, Cambridge, 2011, p. 92, e Marc Fallon, "Groupe européen de droit international privé — Quatrième réunion, Barcelone, 29septembre - 1er octobre 1994", *Revue Belge de Droit International*, vol. XXVII, n.º 2, 1994, pp. 717-721, p. 720.

Also, cfr. Hans-Jürgen Lwowski, "«Quiet» Creation of Security Interests or Filing", *The Future of Secured Credit in Europe*, ed. Horst Eidenmüller e Eva-Maria Kieninger, De Gruyter Recht, Munique, 2008, pp. 174-179, pp. 174ss

[49] Cfr. Michel Cabrillac, "La reconnaissance en France des sûretés réelles sans dépossession constitués à l'étranger", *Revue Critique de Droit International Privé*, vol. 68, 1979, pp. 487-505, p. 491; Afonso Patrão, *Hipoteca e Autonomia…, cit.*, pp. 67ss..

[50] Cfr. Antonio Leandro, "La legge regolatrice degli effetti reali del trasferimento di strumenti finanziari tramite intermediari", *Rivista di Diritto Internazionale*, vol. LXXXIX, n.º 2, 2006, pp. 383-404, pp. 403ss; Herbert Rögner, "Inconsistencies between the Hague Securities Convention and German Law", *Zeitschrift für Bankrecht und Bankwirtschaft*, n.º 2/06, 2006, pp. 98-106, p. 104; Maisie Ooi, "The Hague Securities Convention: a critical reading of the road map", *Lloyd's Maritime and Commercial Law Quarterly*, n.º 4, 2005, pp. 467-490, p. 471; Pascale Bloch e Hubert de Vauplane, "Loi applicable et critères de localisation de titres multi-intermédiés dans la Convention de la Haye du 13 décembre 2002", *Journal du Droit International*, Ano 132, n.º 1, 2005, pp. 3-40, pp. 25-40; Jean-Pierre Deguée e Diego Devos, "La loi applicable aux titres intermédiés: l'apport de la Convention de la Haye de décembre 2002", *Revue de Droit Commercial Belge*, n.º 1 (Janeiro), 2006, pp. 5-32, p. 24.

area where *uniformity of applicable law* has already been sought[51]. Admitting choice of law could lead to disastrous results if the creditor, at the moment he wants to enforce the mortgage created under law X, sees the security right being void, because in that country *lex rei sitae* is mandatorily applied.

First of all, the claim must be put in context: international consistency, although a structuring purpose of private international law, *"não resume em si toda a axiologia do DIP"* [52], and other interests must be valued. In fact, considering mortgages, the uniform valuation of international relationships through the *situs rule* is hindering the creation of international mortgages. There is no point in establishing a universal connecting factor if international mortgages disappear as a result. The law must find *"um sistema que facilite tanto quanto possível o desenvolvimento da sua vida jurídica e lhes conceda inclusive o direito de escolher, em certos domínios, a lei aplicável às relações que constituem"*[53].

However, even without accepting this reasoning, an affirmative answer to the question I am asking would not jeopardise international consistency (stability of legal relations and uniformity of applicable law). In fact, because European rules stipulate exclusive jurisdiction of the courts of the location of the property for rights *in rem*, the party autonomy idea I am testing (decided in a European Regulation and limited the choice for mortgages on estate located inside the European Union) prevents the risk of disharmony[54].

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[51] Cfr. Wilhelm Wengler, "The General Principles of Private International Law", *Recueil des Cours de l'Académie de Droit International*, 1961-III, Tomo 104, 1961, pp. 279-469, p. 365, *"if a single car driver saw that most other car drivers keep to the left hand side of the street, it would certainly be unwise for him to keep to the right"*. P.

On the principle of international consistency, cfr. António Ferrer Correia, *Direito Internacional Privado — Alguns Problemas*, Almedina, Coimbra, 1997, p. 111; Paolo Picone, "Caratteri ed Evoluzione del Metodo Tradizionale dei Conflitti di Leggi", *Rivista di Diritto Internazionale*, vol. LXXXI, n.º 1, 1998, pp. 5-68, p. 28; Wilhelm Wengler, "The General…", *cit.,* pp. 364ss.

[52] António Ferrer Correia, *Lições de Direito Internacional…, cit.*, p. 34; and *Direito Internacional… (1997), cit.*, p. 112; Pierre Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille", *Revue Critique de Droit International Privé*, vol. 81, n.º 3, 1992, pp. 425-454, pp. 450ss.

In addition, differences of the applicable law do not necessarily endanger international consistency, since in Private International Law there are mechanisms for resolving the conflict (like *renvoi* or *vested rights theory*).

[53] António Ferrer Correia, *Lições de Direito Internacional…, cit.*, p. 41. Accordingly, Luís de Lima Pinheiro, *Direito Internacional…, cit.*, Vol. I, p. 354.

[54] In other words, it should be emphasised that party autonomy would only be an option in a context of private international law unification Cfr. Francisco Garcimartín Alférez, "Regulatory Competition: A Private International Law Approach", *European Journal of Law and Economics*, vol. 8, n.º 3, 1999, pp. 251-270, p. 256: *"The benefits derived from parties' autonomy (choice-of-law rule) […] can only be ensured if the rules are uniform for all the states connected with a transaction"*.

Establishing party autonomy for mortgages on properties situated in a Member State, there is absolute certainty on who has jurisdiction to hear cases about the validity of the mortgage or its foreclosure: the court of the Member State where the property is located. Given that *professio iuris* would be endorsed in a European Regulation, there would be no diversity, since all Member States would uniformly allow freedom of choice: in the State where the property is located, the choice of law would be allowed[55].

IV. CONCLUSIONS

The answer to the question asked in this article is, therefore, necessarily this: the *situs rule* in mortgages is not *unquestionable.* Notwithstanding if it *best* to keep the application of *lex rei sitae* to mortgages, the connecting factor is not undisputable.

In fact, within the European Union — and considering the *intelligent* publicity that Land Registry provides — it would be possible to have party autonomy in the *content* of immoveable security rights: registration would inform third parties of the applicable law and of the characteristics of the hypothec governed by foreign law.

This opens a new question: if party autonomy is *possible,* we must discuss if it is *preferable* to the *situs rule.*

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[55] In fact, as explain Peter Hay, Ole Lando e Ronald Rotunda, "Conflict of Laws as a Technique for Legal Integration", *Integration Through Law — Europe and the American Federal Experience*, Vol. I, Tomo II, ed. Mauro Cappelletti, Monica Seccombe e Joseph Weiler, Walter de Gruyter, Berlin, 1986, pp. 161-258, p. 163, the major problem with the stability of legal relationships lies in the fact that the parties do not know where a case will be heard, in which case the options for conflict are not foreseen. This is not the case with the question I am testing, as the courts of the country where the property is located have *exclusive jurisdiction*.