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. 477-490
DOI: 10.37417/PILRIRUE/20
Marcial Pons Ediciones Jurídicas y Sociales

RETHINKING *CONFLIT MOBILE*: APPLYING THE LAW OF COMI TO RIGHTS *IN REM*

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I. INTRODUCTION

One of the major issues raised by the application of the *lex rei sitae* to *in rem* rights is that the connecting factor on which the choice of law rule relies can be unstable. If the relevant asset is moveable, it can be moved to another jurisdiction, which would result in the connecting factor designating another law. This is a traditional problem in the conflict of laws, that French scholars have labelled *conflit mobile*. It is not peculiar to property law, as many other connecting factors (nationality, residence, seat of companies, etc.) can change and trigger a change in the applicable law. But it is probably in property law that the problem is the most acute, because assets cross borders routinely, in particular in the context of international trade (goods and raw materials for instance), international transportation (planes, trains and trucks for instance) or workers commuting (cars).

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A change of the applicable law creates the need to delineate the respective scopes of the old and new applicable laws. In principle, this should mean that certain issues, which arose at the time when the old law applied, should be governed by the old law, and other issues, which arose after the change of applicable law, should be governed by the new law. Experience has shown, however, that this model can require a certain degree of similarity between the two laws and that, otherwise, the new law might simply ignore the prior applicability of the old law and claim exclusive application. In the context of *in rem* rights, the French Supreme court has famously held that a security interest unknown of French law could not produce effect in France after the relevant assets was moved to France[1]. While the court left open whether the law of the old *lex situs* might govern the validity and constitution of the security interest, it held that "French law alone governs *in rem* rights over property situated in France" and that, as a result, a foreign security based on the transfer of the ownership of the asset to the creditor, could not produce effect in France. In effect, the French supreme court had applied French law to determine whether such security interest could exist, and had denied any room to the old *lex situs*. The two laws were simply too different.

The purpose of this paper is to explore whether the problem of *conflit mobile* could be addressed by moving away from the *lex situs* and applying instead the law of the centre of the main interests of the owner of the relevant asset[2].

II. JUSTIFYING THE APPLICATION OF THE LAW OF COMI

1. Challenging the rationale for the application of the *lex situs*

The essential reason justifying the application of the *lex rei sitae* to *in rem* rights is to protect third parties. Unlike obligations, *in rem* rights produce effect *erga omnes* and thus directly affect third parties. This explains why, under the law of many jurisdictions, new *in rem* rights cannot be freely established by the parties to a particular transaction. Third parties should be able to determine which *in rem* right might

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[1] Cass. req., 24 May 1933, *Sirey* 1935, 1, p. 253, note Batiffol ; Cass. 1re civ., 8 July 1969, *Sté DIAC, Journal Droit International (JDI)* 1970, p. 916, note Derruppé ; *Rev. crit. DIP* 1971, p. 75, note Fouchard ; *JCP* G 1970, II, 16182, note Gaudemet-Tallon. – Cass. 1re civ., 3 mai 1973, *Sté hollandaise de Banque*, *JDI* 1975, p. 74, note Fouchard ; *Rev. crit. DIP* 1974, p. 100, note Mezger.

[2] This proposal was developed in the context of the EAPIL Working Group on international property law (which includes: Eva-Maria Kieninger (Chair), Janeen Carruthers, G. Cuniberti, Morten M. Fogt, Ivan Heredia, Teemu Juutilainen, Afonso Patrão, Jonathan Schenk, Teun Struycken, Anna Wysocka-Bar). The details of the proposal are still being discussed by the members of the working group. This paper expresses the views of the author alone.

have been constituted over a particular asset, because it would affect them. The types of *in rem* rights available to the parties should thus be limited (*numerus clausus* principle). In addition, most states require that third parties be offered the possibility to inform themselves about the constitution of *in rem* rights by requiring that the parties constituting such rights comply with certain publicity requirements. Again, third parties willing to inquire about the existence of a certain type of *in rem* right over a particular asset should be able to do so by trusting the publicity that their state might have organised for *in rem* rights constituted over this particular category of assets.

It is commonplace that international economic relations have increased dramatically in the last decades. This is particularly so in the European Union, where the internal market was established. Before this evolution, it is possible that most third parties only contemplated domestic economic relations, and would not expect that the assets that they might find within their jurisdiction could have been imported from another jurisdiction. In today's world, however, this is hard to believe. Many economic actors are involved in international trade, and all of them know that assets cross borders on a regular basis. It is very doubtful that they assume that an asset belonging to a foreign corporation is necessarily governed by local property law for the sole reason that it is found within their jurisdiction at any given moment. What is more likely is that the fact that they are dealing with a foreign actor will lead them to wonder about whether the law of origin of the foreign actor might apply. It will be obvious to them that it cannot be enough to just check local registers and that, if a security interest was constituted over the relevant asset, it might well have been registered in another country, whether the country of origin of the actor, or possibly the country where the asset was manufactured. If the transaction is worth it, they will incur the costs of consulting a lawyer to clarify the situation. Otherwise, they will just take the risk, or seek to secure the payment of their claim differently, for instance by asking for downpayments.

The justification for the application of the *lex rei sitae* is thus much less solid and obvious than it used to be. This is particularly so where the likelihood of the application of the law of another state is signalled to third parties. The most obvious signal of the potential applicability of foreign law could be that the fact that the owner of the asset would be a foreign actor, and that this foreign actor would have recently transported the asset from his home jurisdiction to the current situs, where the owner would be dealing with the third party. Arguably, however, a similar signal would also be sent by the mere fact that the owner of a moveable asset would be a foreign actor, irrespective of any additional information with respect to recent transportation of the asset from the home state of the owner to the current situs. The signal could also be sent by appropriate information appearing on the asset itself. If

the assets are bottles of champagne, or Bordeaux wines, one does not need to be a rocket scientist to realise that they were transported from France to the current situs. One could also imagine that an inscription could appear on an asset stating that it is subject to a security interest constituted under foreign law to the benefit of a particular creditor.

Even if alerted about the potential relevance of foreign law, one could wonder whether it would not be complicated for a third party to inquire about the status of a particular asset under foreign law. An argument could be made that third parties could be expected to know how to inquire about the existence of local *in rem* rights, but that they could not be expected to know how to inquire about foreign rights. This argument would be based on the assumption that third parties are generally knowledgeable about property law, but know only their own property law. The argument might be appealing for lawyers, who are knowledgeable in one system of property law, the one in which they are qualified to practice, and typically only that one. For them, whether the applicable law is their own or a foreign one makes a big difference. But the third parties themselves are not lawyers, but economic actors. They will typically not be knowledgeable in any system of property law, because they will not have studied law. They will thus seek advice from, and rely on, lawyers. While they will likely first turn to their habitual lawyers, those of their jurisdiction, this will not mean that the clients will expect to hear that the law of their jurisdiction applies. As already underscored, they will suspect that the situation is complicated, and that the law of the foreign actor with whom they are dealing might apply. If this is confirmed to them, they will turn to a foreign lawyer. If one does not look at this situation from the point of view of lawyers, who never like to advise their client to go and see another lawyer, but rather of economic actors, this will not create any issue.

It is submitted, therefore, that the rationale for the application of the law of the *situs* is not as strong as it might first appear. It could be replaced with another law which could equally advance the central purpose of property law, namely the protection of third parties. If such an alternative existed, the issue would then arise of whether it would have benefits which would justify preferring it over the traditional situs rule.

This paper will argue that the protection of third parties could be achieved by the application of the law of the COMI of the owner of the assets. Although a more extreme and far reaching system could be imagined, the proposal would be to make the competence of the law of the COMI conditional upon the registration of the existence of the relevant *in rem* right in a public registry maintained in the State of the COMI of the owner. As a result, third parties dealing with the owner in other jurisdictions (or their lawyers) could verify whether *in rem* rights were constituted under the law of the COMI over the relevant asset. As already

underscored, third parties dealing with a foreign actor should intuitively consider that his moveable assets might be subject to *in rem* rights which were constituted before the assets were moved to another jurisdiction. When turning to their lawyers, third parties would be advised that they should verify this in the public registry established in the State of the COMI of the owner of the asset.

In a large ensemble such as the European Union, the new rule, if adopted through EU legislation, could enter into force at the same time in all the Member States, and thus change at the same time the expectations of all economic actors. After the entry into force of such legislation, all EU commercial actors should know that commercial parties have the possibility of registering any interest that they grant in a registry established in the State of their COMI, and that this would result in full extra territorial application (as the case maybe) of the law of the State of the COMI throughout the EU. The EU could also assist in the establishment of an interconnected system of national registries which could be accessed from all Member States, as it has done in other fields of commercial law[3]. The new EU legislation could require or encourage[4] all Member States to either establish such registry, or indicate which existing national register could be used for that purpose. Each Member State would then be required to communicate which registry would be available for the purpose of the operation of the new rule and trigger the application of the law of the COMI.

2. The alternative choice of law rule in more details

The new choice of law rule would provide for the application of the law of the COMI of the owner of the relevant asset to all aspects of the regime of property rights registered in the designated registry in the State of the COMI of the owner of the asset. The law of the COMI of the owner would thus govern the acquisition, the creation, the content and third party effects of the property right constituted over the asset and registered in the designated registry. In principle, the choice of law rule could apply to all property rights. Experience has shown, however, that it is primarily security interests which have been jeopardised by the application of the *lex situs*, and that it is primarily creditors constituting security interests over moveable assets who suf-

[3] For instance, in the context of the insolvency: see Arts. 24-27 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ('EIR').

[4] Member States could be left free to establish such a registry to offer the possibility to local economic actors to benefit from the possibility to submit *in rem* rights to the law of COMI. In case they would not, they would report to the Commission that no registry has been established for the purpose of the rule, which would be advertised on the appropriate website of the Commission.

fer from the application of the *lex situs* as they face considerable legal uncertainty. It could thus be envisaged to limit the scope of the new choice of law rule to security interests.

The choice of law rule would provide for the application of the law of the COMI of the owner of the asset, who would typically be the grantor of the security interest, only for those property rights or security interests actually registered in the designated registry in the State of the COMI. In the absence of registration of the relevant property right, the law of COMI would not apply. The traditional rule would apply instead.

Registration of property rights in the relevant registry would thus be a possibility, but not an obligation. It would be for the parties to the relevant transaction, for instance the lender and the borrower, to decide whether the security interest granted by the borrower to the lender should be registered and benefit from the application of the law of COMI. This would be a commercial decision to be made by those parties, which would depend on the value of the transaction, and the chances that the assets might be moved to another jurisdiction.

The essential benefit for the parties would be to ensure that the law of the COMI would be the only law governing the property regime of the property right, and that this would not change for the sole reason that the asset would be transported or otherwise moved to another country. The law of the new *situs* would not apply, and it would thus not be necessary to coordinate its application with the law of the COMI. There would be no issue of «recognition» of the property right constituted under the law of COMI in the legal system of the new *situs*, because the law of the new *situs* would not apply. This is what would provide legal certainty to the parties who would have constituted the property right and cared to register it in the relevant registry in the State of the COMI.

Third parties operating in the State of the new *situs* would be protected by the possibility to inquire, from that State where they would presumably reside, into the relevant registry established in the State of the COMI, whether the foreign actor with whom they would be dealing would have already established property rights over the asset. The registries should thus be public registries, i.e. registries which would be publicly accessible. Critical to the protection of third parties would be that the relevant registries in all Member States would be clearly identified. The EU could require from all Member States that they declare which registry would be used for that purpose,[5] and would trigger the application of the law of the relevant State.

[5] Or, as the case may be, that a given Member State would have decided not to establish such registry.

As already underscored, the EU could also mandate that all national registries be interconnected[6].

An important consequence would thus follow, which would be quite revolutionary from a private international law perspective. The EU legislation adopting this system should expressly provide that the Member States would be prohibited to use the public policy exception or overriding mandatory provisions for the purpose of denying the recognition of property rights constituted under the law of COMI and registered into the designated registry of that State on the ground that the property right would not exist under the local property law (*numerus clausus* principle) or on the ground that the local publicity requirements would not have been fulfilled. The public policy exception would remain available, and the overriding mandatory provisions of the forum could still be applied for protecting other interests of the Member States, such as public law interests (protection of cultural property, environmental legislation, etc.). But it could not be used to reintroduce the application of the *lex situs* for the purpose of requiring the completion of local publicity requirements, or prevent a foreign *in rem* right unknown in the new situs from producing any effect.

The establishment of a registration system would only aim at addressing a choice of law issue, i.e. triggering the application of the law of the COMI to the property right throughout the EU. It would not aim at changing the substantive law of the Member States and, in particular, at requiring that certain property rights be registered to come into existence or produce third party effects. Registration would only trigger the application of the law of COMI, and any other effect that the substantive law of COMI would attach to such registration[7].

In Member States where the law requires that certain property rights be registered for either ensuring the continuing existence of the property right, or for that right to produce third party effects, the same registry used for those purposes could be designated by the relevant Member State to the European Commission for the purpose of the operation of the new choice of law rule, and thus for triggering the application of the law of the COMI. Registration would thus serve both the purpose of

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[6] The EU has done so in the context of insolvency: see art. 25(1) of the EIR: «*The Commission shall establish a decentralised system for the interconnection of insolvency registers by means of implementing acts. That system shall be composed of the insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system. The system shall provide a search service in all the official languages of the institutions of the Union in order to make available the mandatory information and any other documents or information included in the insolvency registers which the Member States choose to make available through the European e-Justice Portal*».

[7] See art. 24(5) of the EIR : «*The publication of information in the registers under this Regulation shall not have any legal effects other than those set out in national law and in [the EIR]*».

triggering the application of the law of the COMI and the purpose of producing any substantive effect provided by the property law of the State of the COMI.

In Member States where the law of property does not require any form of publicity for the relevant property right to be fully effective, this would not change. However, if grantors established in those States wanted to benefit from the new choice of law rule, they would have to register their property right in a registry for that purpose. Experience has shown that it is precisely such property rights, and in particular security interests fully effective without any form of publicity, which were denied recognition in other European States. The main example is probably the German *Sicherungsübereignung*, which is a property based security interest which is fully effective despite being non possessory and not subject to any form of publicity. German grantors of *Sicherungsübereignungen* would need to register them in a registry established for that purpose in Germany and declared as such to the European Commission. It would be for German grantors and their creditors to assess whether it would be worthwhile, or whether they would prefer to bet on the recognition of their right in other Member States under the *lex situs* rule. It would also be for the German State to assess whether offering this option to German grantors would be important enough to invest the resources to establish such a registry.

3. Comparing the merits of the two choice of law rules

3.1. Stability of Connecting Factor and Legal Certainty

The fundamental issue raised by the application of the *lex situs* to property rights is the potential instability of the connecting factor. The issue is not only that the situs of moveable assets can change. Other connecting factors used for other choice of law rules can also change. Natural persons can change nationality, residence or domicile. Companies can change their seat, or indeed their COMI. The real issue with the *situs* of moveable assets is that it can be changed very easily, by merely bringing physically the asset to another country. Changing nationality, residence or even the seat of a company is much more complicated and requires to take numerous steps, some of which are very burdensome. As a result, while certain persons change residence or nationality, they rarely do so, and even less do so frequently. In contrast, the *situs* of certain assets changes very frequently. Certain moveable assets cross borders on a daily basis.

The proposed choice of law rule would rely on a connecting factor, the COMI, which would be incomparably more stable than the *situs*

of moveable assets[8]. It is true that the COMI of a company can be changed. But this is very burdensome. It requires that numerous steps be taken, in particular to ensure that the decisional organs meet in a new country, and that these change be verifiable by third parties. As a result, while it can happen, it does not happen frequently. Resorting to the COMI instead of the situs of moveable assets would thus bring much more stability to the connecting factor, and much more legal certainty to economic actors. This being said, a rule addressing the possibility of change of COMI should be included in a future EU legislation adopting the choice of law rule advocated in this paper.

3.2. Insolvency

A second advantage of the application of the law of the COMI of the owner of the asset is that it will typically coincide with the law governing insolvency proceedings. The main choice of law rule in the EU and in many other countries is that the law applicable to insolvency proceedings is the law of the State where the debtor has its COMI. This is because the law applicable to insolvency proceedings and their effects is the law of the State within the territory of which such proceedings are opened (*lex concursus*),[9] and the court of the COMI of the debtor has exclusive jurisdiction to open main insolvency proceedings against the debtor.[10]

In practical terms, the main reason why creditors are granted security interests over the assets of their debtor is to ensure payment where the debtor is confronted with financial difficulties. The opening of insolvency proceedings is thus likely, and the *lex concursus* would apply to determine "the assets which form part of the insolvency estate"[11] and "the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem*".[12]

The advantage, however, is limited within the scope of EU insolvency law. Full European integration could not be achieved in the context of insolvency. The political compromise which was reached instead is that of 'modified universalism',[13] which allows for the opening of secondary insolvency proceedings and insulate *in rem* rights over assets

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[8] As will be developed below, this means that the application of the new choice of law rule to immoveable assets is much harder to justify.

[9] See art. 7(1) of the EIR.

[10] See art. 3(1) of the EIR.

[11] See art. 7(2)(b) of the EIR.

[12] See art. 7(2)(i) of the EIR.

[13] See, e.g., A. Leandro, in Cuniberti, G. and Leandro, A. (eds), *The Insolvency Regulation and Implementing Legislations – A Commentary*, Edward Elgar, 2024, para. 3.001.

situated in Member States other than the State of COMI from the reach of the *lex concursus*.[14]

Although the European Insolvency Regulation does not govern the law applicable to *in rem* rights, which is an issue outside of its scope, it seems clear that part of the compromise which lead to the adoption of the model of 'modified universalism' was based on the same assumption which justifies the application of the lex situs. Local creditors assume that the law of the situation of the asset will apply, and their expectations should be protected. If it was recognised that this rationale is not really convincing, and if the law governing *in rem* rights became the law of the COMI of grantor of security interests, one could then reflect on whether the political compromise could be revisited, and whether what is essentially a failure of European integration could be remedied.

III. SCOPE OF THE PROPOSED CHOICE OF LAW RULE

1. Assets

It should first be underscored that in many legal systems, the *lex rei sitae* has already been replaced by another more appropriate choice of law rule for certain specific categories of assets which are subject to registration. This is the case, for instance, of property rights in ships and in aircrafts, which are governed by the law of the country where the relevant asset is registered.

There are several reasons why these assets should be left outside of the scope of the new rule proposed in this paper.

The first reason is that the application of the law of the country where the asset is registered already offers the advantages that the new rule is purporting to offer. It is a stable connecting factor which offers legal certainty to economic actors. The registration of the relevant rights allows third parties to inquire about the existence of the rights by consulting the relevant registries. These advantages explain why the application of the law of the country of registration is often used for means of transportation which frequently cross borders (and often circulate beyond any national sovereignty). Indeed, one could reverse the discussion and make the argument that the existence of this rule and its rationale demonstrate that the shift from the *lex situs* to the law of a place where the relevant asset could be registered is an appropriate solution.

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[14] See art. 8 of the EIR. For a critical assessment of art. 8, see T.H.D. Struycken, in Cuniberti, G. and Leandro, A. (eds), *op. cit.*, paras 8.072 – 8.108.

The second reason is that the competence of the law of the place of registration is recognised by widely ratified international conventions[15]. It is also indirectly recognised by Article 14 of the EU Insolvency Regulation, which provides that 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.*" It would thus be complex and probably unrealistic to change the rule on such a large scale, and changing it only at regional level would introduce confusion and legal uncertainty.

The exclusion should also cover property rights in immoveable assets, for three reasons. The first is that, because immoveable assets cannot move, the application of the *lex rei sitae* does not raise the issues that it raises for moveable assets. The second reason is that most property rights in immoveable assets are typically subject to registration. The third reason is that the competence of the *lex rei sitae* to immoveable property has traditionally been perceived as a matter of course, possibly justified by sovereignty arguments.

An open question is whether the exclusion should extend to cars. Cars are assets registered through a matriculation system. They are also highly mobile assets, and some cars (and trucks) cross borders on a daily basis. Many of the most famous cases on *conflit mobile* were concerned with property rights in cars which had crossed borders[16]. Yet, it has rarely been proposed to submit the property regime of cars to the law of the country where they are matriculated, as evidenced by, inter alia, Article 14 of the EU Insolvency Regulation. There are no international convention on point, and national PIL legislations have rarely provided a special regime for cars. There are exceptions, however. Article 46(3) of the Portuguese Civil Code, for instance, provides for the application of the law of the State under the authority of which the register is kept to all means of transport submitted to a registration regime. And it is indeed hard to see why the rationale justifying the application of the law of the country of registration to ships and aircrafts should not apply to cars[17].

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[15] See, e.g., for ships, Protocol No. 1 concerning rights *in rem* in inland navigation vessels to the UN Convention on the registration of inland navigation vessels of 25 January 1965; UN Maritime Liens and Mortgages convention of 6 May 1993, and for aircrafts, UN Convention on the International Recognition of Rights in Aircraft of 19 June 1948.

[16] In France, see Cass. 1re civ., 8 July 1969, *Sté DIAC*, supra n. 1. In Germany, see BGH, 11 March 1991, II ZR 88/90. In the Netherlands, see Hoge Raad, 17 September 2016 (Daytona), ECLI:NL:HR:2016:2118 (for a report in English, see T.H.D. Struycken, «Daytona (a cross-border story on acquiring Ferraris)», in Faber, D., Schuijling, B. and Vermunt, N. (eds.), *Trust and Good Faith Across Borders (Liber Amicorum for prof.dr. S.C.J.J. Kortmann)*, Kluwer Legal Publishers, 2017 p. 239-255).

[17] A justification which is sometimes offered for the application of the law of the country of registration is that registration under the applicable substantive law has far reaching effects, such as creating the relevant *in rem* right. Against this background, cars could be excluded on

2. Actors

Another issue is whether the scope of the proposed new rule should be limited to cases involving certain categories of actors.

An argument could be made that the new rule could only benefit sophisticated actors. One could argue that only sophisticated actors would understand globalisation and its consequences. Only such actors might understand that the assets that foreign actors would hold might have been recently imported from the country of origin of the foreign actor, and might be subject to foreign property rights constituted abroad. Additionally, sophisticated actors would also have the financial resources to consult a lawyer if alerted about the possibility that a given asset belonging to a foreign actor might be subject to a foreign property right. In contrast, the argument would go, a consumer could not be expected to understand globalisation. He might simply assume that an asset situated on the territory of his country of residence could only be subject to local property law. In other words, consumers might be surprised by the application of the law of the COMI instead of the *lex rei sitae*.

If one was convinced by this argument, one way to address it would be to limit the scope of the proposed COMI rule to transactions involving professional actors, and exclude its application where one of the parties involved, for instance a third party who would benefit from a competing property right over the asset created under the *lex rei sitae*, would be a consumer. An alternative view, however, would be that the issue could be addressed by the applicable substantive law. If a consumer deserved special protection in such a case scenario, this protection should be afforded by the applicable substantive law, and there is no reason to believe that the law of the COMI would necessarily offer a lower protection in this respect. Indeed, international consumer law has traditionally posited that consumers expect the application of the law of their habitual residence[18], not of the *lex rei sitae*.

The argument in favour of excluding consumers from the COMI rule, and the problem that it identifies, are not very convincing, however. The main reason is that they assume that unsophisticated parties have expectations about the law governing their property rights in an international context. As argued above, it does not seem realistic to expect from

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the ground that matriculation of cars is only administrative in nature, and has no impact on their property regime. The justification, however, is flawed. It is based on a confusion between substantive law and private international law. And it posits that the substantive law of all States will associate the relevant effects to the registration of the relevant assets. But this is not the case: under French law, registration of *in rem* rights in immoveable assets only triggers third party effect of the right, and does not impact their existence.

[18] See, e.g., Rome I Regulation, art. 6(1).

unsophisticated parties any knowledge of property law, and even less any knowledge of private international law. In other words, consumers have no clear idea about the property rights that they might have over a certain asset, and even less of the applicable law to these rights.

3. Conflicts

The main purpose of the new rule would be to designate the law of the COMI of the owner of the asset, or the grantor of the security right, to all aspects of the property regime of the relevant property right. The law of the COMI would thus govern the acquisition, the creation, the content and the third party effects of the property right constituted over the asset and registered in the designated registry of the State of COMI.

The law of the COMI of the grantor of a security interest should also govern priority conflicts with any security interests created after the registration of the security interest in the designated registry in the State of COMI. It should, in particular, govern priority conflicts with security interests created subsequently on the territory of another State and thus, in principle, pursuant to the law of that other State. Any person dealing with the debtor should be aware that his assets might be subject to security interests, and thus ready to accept that such security interest might take precedence to the new security interest if so provided by the law of COMI. Before taking a new security interest over the relevant asset, creditors in the State of the new *situs* should inquire whether a prior security interest was constituted in the State of COMI.

Imagine, for instance, that company A grants and registers a security interest in an excavator pursuant to the law of COMI. The excavator is used in another Member State, where it is brought to a garage for repair. The law of the *situs* grants a statutory interest over the asset to the garage for payment of the repair services. The priority conflict between the security interest granted by company A under the law of COMI and the subsequent statutory interest arising under the *lex situs* should be governed by the law of COMI.

It should be noted that the resolution of the priority conflict would require that the new security interest be adapted for the purpose of characterization under the priority rule of the COMI. In this example, the statutory interest afforded under the *lex situs* should be adapted and characterized under the law of COMI for the purpose of application of the rule of the law of the COMI on priority conflicts.

Another type of conflict could arise between the holder of a security interest constituted under the law of the COMI of the grantor of the security interest and third parties claiming new property rights over the asset pursuant to general rules of property law. For instance, the

asset could be affected by certain operations such as commingling, accession or incorporation into an immoveable asset. Likewise, the asset could be sold to a good faith purchaser. For instance, to come back to the previous example, the excavator could be sold in another Member State than the COMI at the end of the project. It would be necessary to determine whether the effect of the sale on the security interest constituted under the law of COMI and the conditions under which the purchaser might be protected as a good faith acquirer are governed by the law of the *situs* or the law of the COMI. One could conceive that these conflicts be governed by the law of the COMI, or that they be considered outside the scope of the new rule and thus subject to the traditional choice of law rule. A related issue would be that of the law applicable to the determination of whether the creditor who had taken the security interest over the asset under the law of COMI would be entitled to assert his right over the claim for the payment of the price owed by the debtor to the acquirer, or over the proceeds of the sale.

4. Third States

Finally, the geographical scope of the new choice of law rule should be determined.

In principle, EU regulations establish choice of law rules of universal application. They apply irrespective of the connections between the parties and the relevant legal relationship to Member States of the EU. The proposed choice of law rule, however, would rely on a registration system that the EU would mandate, or at least encourage. It would seem, therefore, that the rule could only apply as between the Member States of the EU which would have established the relevant registries and declared them to the European Commission for the purpose of the determination of the applicable law.

Limiting the scope of the rule to owners of assets, or grantors of security interests, established in the EU would be one possibility. It would be perfectly conceivable, however, for the EU to recognise registries established in third States as functionally equivalent to the registries established for the purpose of the new rule in the Member States, and thus to grant the benefit of the new rule to parties established in those States. One could also imagine that the EU invites declarations of third States willing to participate in and benefit from the rule to inform the EU of the registries that they would consider as equivalent to the designated registries in the EU. This would not be the first time that EU legislation produces indirectly effects in third States[19].

[19] See generally A. Bradford, *The Brussels Effect – How the European Union Rules the World*, Oxford, 2019.