

## The law applicable to rights in rem: skeleton

### GEDIP

#### I. Introduction

1. The purpose of this paper is to offer a skeleton of the main issues, including conceptual aspects and fundamental policy choices, that should be analysed in the context of GEDIP's future work in the field of rights in rem.

#### II. The need for a future instrument on rights in rem

2. Theoretical and practical arguments:

- Study on *A European Framework for private international law*, the European Parliament concluded that one of the main gaps in the current framework was in the area of rights in rem (property law): “A number of gaps can be identified that concern generally accepted problems of private international law which are currently not regulated by community instruments [...] these gaps are: property law [...]”<sup>1</sup>
- “Stockholm Programme”, the EU Council requested the Commission to continue the process of harmonising conflict-of-law rules at Union level, including “[...] the area of [...] security interests”<sup>2</sup>.
- Recognition of a reservation of title created in a Member State in the other Members States where the asset may have been moved; eg, Spanish case-law concluding that a reservation of title created under German law is not recognised in Spain (ia, SAP Burgos 8.2.2011)

2. Nature of such an instrument: a Regulation

#### III. Scope

3. The future instrument will determine the law applicable to rights *in rem*, i.e. rights over an asset that are effective against third parties (*erga omnes*). Third parties include any competing

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<sup>1</sup> European Parliament, Directorate-General for Internal Policies, *A European Framework for private international law: current gaps and future perspectives*, 2012, p. 67.

<sup>2</sup> OJ EU 4.5.2010, C 115/1, p. 13.

claimant over the same asset, eg other secured creditors, a judgment creditor, subsequent transferees or the insolvency administrator<sup>3</sup>.

4. The instrument will apply to both tangible [and intangible assets, including IP rights]

5. The instrument will have universal scope of application

6. Excluded matters:

- Capacity
- Contractual obligations
- Torts
- Company law
- Insolvency
- Transfers of assets and liabilities *uti universi*

#### IV. Uniform rules

7. The list of conflict-of-laws rules should take Article 2 (9) EIR as a starting point to ensure consistency. Therefore:

8. **Tangible assets.** Rights in rem over tangible assets are governed by the laws of the country within the territory of which the asset is located at the relevant time. A definition of “relevant time” should be included, eg relevant time means the time of the creation with effects against third parties of the corresponding right *in rem*<sup>4</sup>.

9. Tangible assets **in transit or to be exported.** A special rule should be included for these assets allowing the parties to create a right in rem under the law of the State of destination.

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<sup>3</sup> See, *Proposal for a Regulation of the European Parliament and of the Council on the law applicable to third-party effects of assignments of claims*, COM (2018) 96 final. In this proposal, ‘third-party effects’ means proprietary effects, that is, the right of the assignee to assert his legal title over a claim assigned to him towards other assignees or beneficiaries of the same or functionally equivalent claim, creditors of the assignor and other third parties (*vid.* Art. 2 (e)). See also, Article 8 (2) EIR and ECJ case law on both the EIR (eg C-195/15, in particular Opinion of the Advocate General), and Brussels I (eg C-438/12).

<sup>4</sup> See Article (1) of the Proposal: “...the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence **at the material time**”.

10. **Registered assets.** However, rights in rem over tangible assets, ownership of or entitlement to which is entered into a public register, are governed by the law of the country under the authority of which the register is kept. This includes registered **IP rights**.

11. **European patents.** Rights in rem over European patents are governed by the law of the country for which the European patent is granted.

12. **European IP rights** with unitary effects. Rights in rem over EU IP rights are governed by the law of the Member State designated by Article 19 Regulation on EU trade mark<sup>5</sup>.

13. **Copyrights and related rights.** Rights in rem over copyrights and related rights are governed by the law of the country [within the territory of which the owner of such rights has its habitual residence or registered office, see Art. 2 (9) (vi) EIR] [for which protection is claimed, see Art. 8 (1) Rome II] [under which law the right arose]<sup>6</sup>.

14. **Registered shares.** Rights in rem over registered shares are governed by the law of the country within the territory of which the company having issued the shares has its registered office [central administration].

15. **Financial instruments.** Rights in rem over financial instrument the title to which is evidenced by entries in a register or account maintained by a financial intermediary (“book-entry securities”) are governed by the law of the country within the territory of which the register of account in which the entries are made is maintained.

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<sup>5</sup> Article 19 Dealing with EU trade marks as national trade marks

“1. Unless Articles 20 to 28 provide otherwise, an EU trade mark as an object of property shall be dealt with in its entirety, and for the whole area of the Union, as a national trade mark registered in the Member State in which, according to the Register:

(a) the proprietor has his seat or his domicile on the relevant date;

(b) where point (a) does not apply, the proprietor has an establishment on the relevant date.

2. In cases which are not provided for by paragraph 1, the Member State referred to in that paragraph shall be the Member State in which the seat of the Office is situated.

3. If two or more persons are mentioned in the Register as joint proprietors, paragraph 1 shall apply to the joint proprietor first mentioned; failing this, it shall apply to the subsequent joint proprietors in the order in which they are mentioned. Where paragraph 1 does not apply to any of the joint proprietors, paragraph 2 shall apply.”

<sup>6</sup> Note, however, that this solution may be problematic when different persons, with habitual residence in different countries, claim to be owners of the corresponding right. A possible alternative may be an “asset-centric” connecting factor (eg the location of the principle IP activity).

16. **Claims, including cash accounts.** See Commission's Proposal COM (2018) 96 final

17. **[Negotiable instruments]**

## **V. Registers**

18. The question of publicity and, in particular, registration is in principle governed by the law applicable to the corresponding right in rem. However, the establishment of (i) a EU centralized register and/or (ii), a mechanism of interconnection between registers should be considered.

## **VI. General problems**

19. Conflit mobile<sup>7</sup>. The Group should consider the possibility of having different solution for the different connecting factors.

20. Scope of the applicable law. Creation, effectiveness against third parties, priority between competing claimants and enforcement. The inclusion of a special rule on enforcement should be considered

21. Overriding mandatory rules [it should be limited to the OMR of the forum]

22. Public policy

23. Renvoi

24. State with more than one legal system

25. Relationships with other EU and non-EU instruments, eg Cape Town Conventions

26. Entry into force, application in time and transitional rules.

## **VII Other issues**

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<sup>7</sup> See Article 4 (1) of the Proposal: *"Unless otherwise provided for in this Article, the third-party effects of an assignment of claims shall be governed by the law of the country in which the assignor has its habitual residence at the material time. Where the assignor has changed its habitual residence between two assignments of the same claim to different assignees, the priority of the right of an assignee over the right of another assignee shall be governed by the law of the habitual residence of the assignor at the time of the assignment which first became effective against third parties under the law designated as applicable pursuant to the first subparagraph."*

27. The inclusion of a rule for cultural objects

28. Amendment of Brussels I bis to include a rule on jurisdiction for rights in rem over movable assets