GEDIP – subgroup "Rights in rem"
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The law applicable to rights *in rem* in corporeal assets

Chapter IV. Other provisions
Article 12. Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable pursuant to this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
[3. Without prejudice to paragraph (2), in relation to claims for the recovery of stolen or illegally removed cultural objects, the court seized may give effect to the overriding mandatory provisions adopted for the protection of cultural objects by a State other than the one whose law governs under this Regulation, and with which the situation has a close connection.]

Comment: The text of Article 12 was adopted in the GEDIP meeting in Milan with the addition of paragraph 3. It is to be noted that the **'**Lignes directrices : Lois de police' adopted in the Oslo meeting admits the application of overriding mandatory provisions of laws other than that of the forum and the *lex causae* more broadly:[1]

> *8. Loi de police étrangère ne faisant pas partie de la lex causae.* – L'application dérogatoire, dans l'Etat du for, d'une loi de police étrangère ne faisant pas partie de la *lex causae* est possible lorsque le tribunal saisi décide qu'elle se justifie au regard des objectifs de la loi de police, notamment lorsque ces objectifs sont communs aux deux Etats ou mettent en œuvre des valeurs communes, ainsi que des liens de la situation avec l'Etat étranger.
> Entre Etats membres de l'Union, il sera tenu compte en particulier du principe de coopération loyale énoncé à l'article 4(3) TUE et de l'objectif de promotion de la solidarité entre les Etats membres visé à l'article 3(3), alinéa 3 TUE.
> Pour décider si effet doit ainsi être donné à une loi de police étrangère, il sera tenu compte des conséquences qui découleraient de son application ou de sa non-application.

The GEDIP Proposal on the law applicable to rights *in rem* in corporeal assets is based on objective connecting factors without admitting a choice of law by the parties. Therefore, unlike in contract law,[2] there is no need for limiting this choice through giving effect to overriding mandatory provisions of the law other than the *lex fori* and the *lex causae*.[3] A restrictive approach towards overriding mandatory norms is also justified by legal certainty, predictability, respect for already acquired proprietary rights and the protection of the validity of security interests.

[1] GEDIP - sous-groupe « Principes généraux » document adopté à la réunion d'Oslo 2022 11.9.2022 « Lignes directrices : Lois de police » para 8. Footnotes are omitted from the quoted text.
[2] Rome I Regulation, art. 9(3).
[3] Francisco J. Garcimartín Alférez, Harmonisation of Conflict-of-Law Rules on Rights *in rem*: A Guide to the Proposal of the European Group for Private International Law (GEDIP). In Maria Font-Mas (ed.), Private International Law on Rights *in rem* in the European Union – Derecho internacional privado sobre derechos reales en la Unión Europea. Marcial Pons, Madrid, 2024, 440-441.

However, an exception may be recognised for cultural objects. Paragraph 3 introduces such an exception by enabling courts to give effect to overriding mandatory provisions of a foreign state other than the one whose law governs under this Proposal. The reasons for allowing courts to give effect to such overriding mandatory rules were expounded earlier in the explanatory memoranda prepared for the Oslo and Milan meetings of GEDIP.
Concerns were expressed in the subgroup whether such a possibility would negate or undermine the choice granted for the claimant in Article 10. It is to be stressed that giving effect to such overriding mandatory provisions is not an obligation, but a possibility for the court and that paragraph 3 should be applied only when dictated by the public interest in protecting cultural heritage. Consequently, paragraph (3) should be used only in support —not against— the claimant's choice under Article 10 and only if overriding mandatory provisions of the 'third' state leads to the protection of the object constituting part of the cultural heritage. The Proposal is in accordance with the '*Lignes directrices: Lois de police*' to the extent that giving effect to overriding mandatory provisions which are not part of the *lex fori* and the *lex causae* can contribute to the protection of cultural heritage as a common value and the objective of protecting cultural objects is shared by the state of the forum and the 'third' state.

Article 13. Public policy of the forum

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Comment: The formulation of the public policy clause corresponds to the wording of the existing EU private international law regulations.[4] The GEDIP subgroup on the general principles of EU private international law continues to work on the topic of public policy.

Article 14. Exclusion of renvoi

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State other than its rules of private international law.

Comment: The formulation of the rule on *renvoi* corresponds to the approach and wording of the existing EU private international law regulations[5] (with the exception of the Succession Regulation[6]). The UNCITRAL Legislative Guide on Secured Transactions also excludes *renvoi* in order to ensure predictability and respect for the parties' expectations.[7]
The application of the *lex rei sitae* rule is widespread in determining the law applicable to rights *in rem* concerning immovable as well as movable objects. Having regard to this, the admission of *renvoi* is often not considered necessary.[8] Additionally, very often claims are submitted in the courts of the state where the object is located, and thus the application of the *lex rei sitae* principle enables the forum to apply its own substantive rules.
In the legal literature, not ignoring the differentiation in the conflict-of-laws rules concerning movable objects, sometimes it is suggested that the *renvoi* may have a role if the object is located in a state

[4] Rome I Regulation art. 21; Rome II Regulation art. 26; Succession Regulation art. 35; Matrimonial Property Regulation art. 31; Registered Partnership Regulation art. 31; similarly, Rome III Regulation art. 12, which refers to the 'Application of a provision of the law designated by virtue of this Regulation…'.
[5] Rome I Regulation art. 20; Rome II Regulation art. 24; Rome III Regulation art. 11; Matrimonial Property Regulation art. 32; Registered Partnership Regulation art. 32.
[6] Succession Regulation, art. 34.
[7] UNCITRAL Legislative Guide on Secured Transactions 386 and 408 (Recommendation 221).
[8] See in particular Haimo Schack, Was bleibt vom renvoi? IPRax 2013, 315-320.

other than the forum. Accordingly, it is asserted that if the *lex rei sitae* rule is applied by the court where the object is located, *renvoi* must be excluded and the substantive rules of the state of the location apply; if, however, the *lex rei sitae* is applied by another forum (outside the state of the location of the object), the reference must be interpreted broadly and the conflict-of-laws rules of the state of the location of the object must be applied.[9] The underlying reason is to ensure certainty in property relations and to avoid any conflict with the position of the courts of the location of the object.[10] From this, it would follow that the position of the private international law of the state of the location of the object should be accepted. In particular the question of the application of *renvoi* may arise in relation to registered goods or registered rights *in rem*.[11] In their case, it can happen that the law of the forum refers to the law of the location of the object and the law of this state refers to the law of the place of registration.

The subgroup takes the position that *renvoi* should not be admitted regarding the determination of the law applicable to rights *in rem* in corporeal assets. First, this view is based on reasons related to legal certainty and predictability. Second, the subgroup is of the opinion that the existing rules of the GEDIP Proposal on the law applicable to rights *in rem* in corporeal assets can respond to most situations where *renvoi* would have a significance (see in particular art. 6 on registered means of transport and art. 8 on the protection of acquired rights).

Article 15. States with more than one legal system

Option 1

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of proprietary rights, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Regulation.
2. A Member State which comprises several territorial units each of which has its own rules of law in respect of proprietary rights shall not be required to apply this Regulation to conflicts of laws arising between such units only.

Option 2

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of proprietary rights, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.
2. In the absence of such internal conflict-of-laws rules, any reference to the law of the State referred to in paragraph 1 shall be construed as referring to the law of the territorial unit in which the relevant element underlying the connecting factor referred to in this Regulation is located.

Comment: Where the conflict-of-laws rules designate the law of a state with more than one legal system, further specification is necessary to determine the territorial unity whose law will govern the matter. For such situations, we find two solutions in the existing EU private international law

[9] Pierre A. Lalive, The Transfer of Chattels in the Conflict of Laws, Clarendon Press, Oxford, 1955, 116-120; Janeen M. Carruthers, The Transfer of Property in the Conflict of Laws, OUP, Oxford, 2005, 29-30; Dicey, Morris, Collins on the Conflict of Laws, Vol. 1, Sweet & Maxwell, London, 2012, 88-89.
[10] Lalive 117.
[11] Lalive 117-118. From English judicial practice, see Blue Sky One [2010] EWHC 631 (Comm). The English case involved an aircraft registered in the UK. The aircraft was mortgaged. But this happened when the plane was in the Netherlands. English private international law refers to the *lex rei sitae*. The aircraft was in the Netherlands at the relevant time, so Dutch law should have been applied. However, Dutch law referred to the law of the place of registration of the aircraft, English law. The question of the admission of renvoi was important because under Dutch law the mortgage was invalid (in the absence of registration in the Netherlands), whereas under English law the security interest was valid. The English judge dismissed *renvoi* and found that the mortgage was invalid.

regulations. Since both approaches have their merits, the subgroup decided to put them forward as alternative options.

Option 1
The formulation in Option 1 corresponds to the approach of some existing EU private international law regulations and Hague Conventions, which directly designate the applicable law even if a state with more than one legal system is concerned.[12] The advantage of this solution is its simplicity and that avoids a reference to internal conflict-of-laws rules which can be considered to be in line with the approach of the proposal to exclude *renvoi* (Article 14).

Option 2
It is to be noted, however, that the Succession Regulation,[13] the Matrimonial Property Regulation[14] and the Registered Partnership Regulation[15] contain a different rule giving priority to interlocal conflict-of-laws rules. This solution avoids any conflict with the law of the state concerned and promotes decisional harmony. Although a reference is made to the internal conflict-of-laws rules of the state concerned, this cannot be seen as inconsistent with the approach of the proposal excluding *renvoi* (Article 14) because the reference does not pertain international (but internal) conflict-of-laws rules aiming at designating the law of a territorial unit within that state only; whether *renvoi* is accepted for conflicts of laws arising between various territorial units is a matter of internal law. Some Hague Conventions[16] and the UNCITRAL Legislative Guide on Secured Transactions[17] follow a similar approach.
If this alternative wording is accepted, a separate new article should contain the current Article 15(2) under the title 'Non-application of this Regulation to internal conflicts of laws'.

Article 16. Relationship with other provisions of Union law

This Regulation shall not prejudice the application of provisions of Union law which, in relation to particular matters, lay down conflict-of-laws rules relating to proprietary rights.

Comment: The formulation of the rule corresponds to the approach of some existing EU private international law regulations.[18]

Article 17. Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-laws rules relating to proprietary rights.

[12] Rome I Regulation art. 22; Rome II Regulation art. 25; Hague Convention of 14 March 1978 on the Law Applicable to Agency art 19; Hague Convention of 2 October 1973 on the Law Applicable to Products Liability art 12; Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents art 12. See also Proposal for a Regulation of the European Parliaments and of the Council on the law applicable to the third-party effects of assignments of claims COM(2018) 96 final, art 9.
[13] Succession Regulation art. 36.
[14] Matrimonial Property Regulation art. 33.
[15] Registered Partnership Regulation art. 33
[16] See Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes art 16; Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons art 20; Hague Convention of 13 January 2000 on the International Protection of Adults art 46.
[17] UNCITRAL Legislative Guide on Secured Transactions 409 (Recommendation 225.).
[18] Rome I Regulation art. 23; Rome II Regulation art. 27.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Comment: The formulation of the rule corresponds to the approach of most existing EU private international law regulations.[19]

Chapter V
Final provisions

Article 18. Application in time

Option 1

1. This Regulation shall apply to proprietary rights created or acquired on or after [date of application].

Option 2

[2. The law applicable pursuant to this Regulation shall determine the priority between a proprietary right acquired on or after the date of application of this Regulation and a competing proprietary right acquired before this Regulation becomes applicable.]

Comment: In the subgroup, different views were formulated as to the way of determining the temporal application of the proposed rules. Accordingly, it was decided that the subgroup puts forward two options for GEDIP.

Option 1
The temporal applicability of the proposed regulation should only concern proprietary rights created or acquired on or after its commencement date of application. It is therefore sufficient to include paragraph 1 in the proposal. This is in line with the approach of the EU private international law regulations.[20]
The inclusion of paragraph (2) would raise concerns as it provides for the retroactive effect of the proposed rules. In certain situations, the current text would be beneficial, for example, by protecting the original owner of a stolen cultural object. However, an EU private international law regulation cannot establish rules for proprietary rights which came to existence not only before the commencement date of the application of the regulation but in a given case also before the EU acquired legislative competence in the field of private international law (Article 65 TEC). For these reasons, it is proposed that paragraph (2) should be deleted. Under this option, deciding the priority between a proprietary right acquired on or after the date of application of the proposed regulation and a competing proprietary right acquired before this date falls outside the scope of application of the proposed rules; instead, the priority of such competing proprietary rights should be decided under the conflict-of-laws rules applicable to the matter prior to the commencement date of application of the proposed regulation.

Option 2
In another opinion, it is necessary to settle explicitly the potential conflict between a proprietary right acquired on or after the starting date of application of the regulation and a competing proprietary right

[19] Rome I Regulation art. 25; Rome II Regulation art. 28; Rome III Regulation art. 19; Succession Regulation art. 75(1)-(2); Matrimonial Property Regulation art. 62 (1)-(2); Registered Partnership Regulation art. 62.
[20] See, for example, Rome I Regulation art. 28; Rome II Regulation art 32.

acquired before the commencement date of the regulation. Option 2 makes it clear by inserting paragraph 2 that the rules of the proposed regulation should decide priority in such situations. This may not be deemed to be a retroactive application of the proposed regulation since one of the proprietary rights in competition is acquired on or after the commencement date of application of the regulation. A similar paragraph was found in the Commission Proposal on the law applicable to the third-party effects of assignments of claims,[21] but the Council proposed deleting it.[22]

[21] Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims, COM(2018) 96 final art. 14(2).

[22] See Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims – 4 column table 2018/0044(COD), Brussels, 3 December 2021, 166.