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# MISCELÁNEA/*MISCELLANY*

# CHOICE OF LAW FOR IMMOVABLE PROPERTY ISSUES: NEW DIRECTIONS IN THE EUROPEAN UNION AND THE UNITED STATES

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**ABSTRACT**

CHOICE OF LAW FOR IMMOVABLE PROPERTY ISSUES: NEW DIRECTIONS IN THE EUROPEAN UNION AND THE UNITED STATES

In both the European Union and the United States, it is a dynamic period for private international law regarding immovable property issues. The predominant approach has been that these issues are governed by the *lex rei sitae* —that is, the law of the State where the immovable is located. However, through a comparative examination of recent EU Regulations on succession, matrimonial property regimes, and the property consequences of registered partnerships, and of the new Third Restatement of Conflict of Laws project in the United States, this article shows that on both sides of the Atlantic there is a trend toward reducing the scope of the *lex rei sitae* rule. It explores both the reasons for and the challenges posed by this trend. It also reveals that despite this trend, the *lex rei sitae* rule nevertheless persists in relation to certain «core» immovable property issues.

**Keywords:** immovables, property rights, Conflict rules, Conflict-of-laws Restatements, European Union, United States, Rome I Regulation, Succession Regulation, Matrimonial Property Regulation, Registered Partnership Property Regulation.

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**RESUMEN**

LEY APLICABLE EN MATERIA DE BIENES INMUEBLES: NUEVAS DIRECCIONES EN EL ÁMBITO DE LA UNIÓN EUROPEA Y ESTADOS UNIDOS

En el ámbito de la Unión Europea y de Estados Unidos, el Derecho internacional privado en materia de bienes inmuebles está en transformación. Hasta el momento, la regla general ha sido que la *lex rei sitae*, esto es, la ley del país en el que el bien inmueble se localiza, rige este sector material. Sin embargo, desde un análisis en perspectiva comparada de los recientes Reglamentos de la Unión Europea en materia de sucesiones, régimen económico matrimonial y de los efectos patrimoniales de las uniones registradas, y de la nueva propuesta *Third Restatement of Conflict of Laws* en Estados Unidos, este trabajo demuestra que en ambos lados del Atlántico existe una tendencia dirigida a reducir el ámbito de aplicación de la regla *lex rei sitae.* En este sentido, este estudio explora tanto las razones de ello como los desafíos que esta tendencia plantea. También pone de relieve que, sin perjuicio de ello, la regla *lex rei sitae* continúa persistiendo en relación con ciertas cuestiones consideradas el núcleo central de los bienes inmuebles.

**Palabras clave:** inmuebles, derechos reales, normas conflictuales, *Restatements* de conflicto de leyes, Unión Europea, Estados Unidos, Reglamento Roma I, Reglamento Sucesiones, Reglamento Régimen económico matrimonial, Reglamento Efectos patrimoniales de las parejas registradas.



## 1. INTRODUCTION

In both Europe[1] and the United States[2], much has been written about the *lex rei sitae* conflict-of-law rule, according to which the law of the state

[1] See, *e. g.,* AKKERMANS, B. and RAMAEKERS, E., «*Lex rei sitae* in perspective: national developments of a common rule?», in AKKERMANS, B. and RAMAEKERS, E. (eds.), *Property Law Perspectives,* Intersentia, 2012, pp. 123-151; CARRUTHERS, J. M., *The Transfer of Property in the Conflict of Laws: Choice of Law Rules concerning Inter Vivos Transfers of Property*, Oxford, Oxford University Press, 2005; RUPP, C. S., «The *lex rei sitae* and Its Neighbours-Debates, Developments, and Delineating Boundaries Between PIL Rules», *European Property Law Journal*, vol. 7, 2018, p. 267.

[2] See, *e. g.,* SINGER, J. W., «Property Law Conflicts», *Washburn Law Journal,* vol. 54, 2014, p. 129; STERN, J. Y., «Property Exclusivity, and Jurisdiction», *Virginia Law Review,* vol. 100, 2014, p. 111; WEINTRAUB, R. J., *Commentary on the Conflict of Laws*, 6th ed., Foundation Press, 2010, pp. 573-627; HAN-

where immovable property is located governs issues related to that property[3]. Moreover, on both sides of the Atlantic, it is a dynamic period for this aspect of private international law. In the EU, regulations governing choice of law in fields related to immovable property, including succession, matrimonial property, and the property consequences of registered partnerships have been adopted over the last decade[4]. In the US, work is underway on a new Third Restatement of Conflict of Laws that will address choice of law for immovable property issues.

In light of these developments, it would seem timely and beneficial to have a comparative EU-US perspective on these matters. As one of the Reporters for the Third Restatement project has argued, comparative law can and should play a productive role in the development of the new Conflict of Laws Restatement[5]. A familiarity with current developments in the United States may likewise be informative for current initiatives in the European Union. However, little recent work has been done to develop such a perspective[6]. European Union private international law scholarship is already highly comparative, but has so far not substantially engaged with the most recent U.S. developments in the field of immovable property[7]. Therefore, in this ar-

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cock, M., «Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantage of Disingenuousness», *Stanford Law Review*, vol. 20, 1967, p. 1.

[3] Following the standard European usage, we use the term «immovable property» or «immovables» to refer to land and those things so attached to the land as to be deemed legally part of it. Generally, this term has the same meaning as «real property», which is the more common usage in the United States. One difference, however, is that leasehold interests are sometimes said to be immovables, but not real property. See Hay, P., Borchers, P. J., Symeonides, S. C. and Whytock, C. A., *Conflict of Laws*, 6th ed., Hornbook Series, 2018, § 19.2, pp. 1199-1200.

[4] See, Regulation (EU) 650/2012 of the European Parliament and of Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (the «Succession Regulation») (*OJ* L 201, 27 July 2012); Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (the «Matrimonial Property Regulation») (*OJ* L 183, 8 July 2016) and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (the «Registered Partnership Property Regulation») (*OJ* L 183, 8 July 2016). It is worth noting, though, that the two latter Regulations only apply to the Member States participating in the enhanced cooperation as established by the regulations themselves (see Recitals 11 of both Regulations).

[5] Michaels, R. and Whytock, C. A., «Internationalizing the New Conflict of Laws, Restatement», *Duke Journal of Comparative & International Law*, vol. 27, 2017, p. 349 and p. 356.

[6] A very notable exception is Hay, P., «The Situs Rule in European and American Conflicts Law», in Rasmussen-Bonne, H. E. and Khachidze, M. (eds.), *Selected Essays on Comparative Law and Conflict of Laws*, C. H. Beck, 2015, p. 541 et seq.

[7] Immovable property is generally understood as consisting of land and things so attached to the land —such as a building— that they are considered immovable property, too. See Second Restatement, chapter 8, topic 2, intro. note. The Third Restatement uses the terms «real property» and «personal property», which is the more current usage in the United States. See Restatement of the Law Fourth, Property § 2.1.a (Preliminary Draft No. 3, 2017) [«Real property ("realty" or "real estate") is land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property includes all land and buildings on the land, all things permanently attached to the land and its buildings, and any interest existing in, issuing out of, or dependent

ticle we aim to analyze current developments in choice of law for immovable property issues in the European Union and the United States.

We begin our analysis in Section 2 by examining the *lex rei sitae* rule in context, highlighting the role of the Restatements of Conflict of Laws in the United States, and the respective roles of Member State law and EU regulations in Europe. We show that in both the United States and the European Union, the predominant conflict-of-law rule for issues about immovable property has been that the *lex rei sitae* governs those issues. In Section 3, we shift our focus to current developments, highlighting the trend in both US and EU private international law toward reducing the scope of the *lex rei sitae* rule and explaining the rationales for and the challenges posed by those trends. In Section 4, we draw out our principal conclusions. Our hope is that even the preliminary comparative perspective we offer here will be helpful to those engaged in conversations about these issues in both the European Union and the United States, and perhaps stimulate interest in further EU-US comparative work on choice of law for issues about immovables.

## 2. THE *LEX REI SITAE* RULE IN CONTEXT

In both the United States and the European Union, the predominant choice-of-law rule for issues about immovable property has been that the applicable law is the *lex rei sitae* —the law of the place where the property is located[8]. In the United States this rule is expressed primarily in state common law and in Restatements, whereas in the European Union it is largely codified in the national law of Member States.

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upon the land and its buildings, including everything above and below the land»]. For most purposes, the distinction between personal property and real property is the same as the distinction between movables and immovables. One difference is that leasehold interests are said to be immovables but not real property. See Restatement of Conflict of Laws § 208, Special Note (American Law Institute 1934).

From an EU perspective, the distinction movable/immovable is the prominent distinction to handle the process of characterization (Carruthers, J. M., *op. cit.,* p. 19). Although the law applicable to property rights is the law that must govern whether an object is movable or immovable (see, for instance, art. 64.2 of the Bulgarian Private International Law Code; art. 10:127 (4) of the Dutch Civil Code (Book 10: Private International Law) and art. 40 of the Hungarian Act No. XXVIII of 2017 on Private International Law.

Therefore, the definition of «immovable property» must be found in the rules of the Member States' legal systems that follow, in general terms, the definition put forward earlier in the text of this paper. In this sense, see, among others, art. 511-2 of the Civil Code of Catalonia (*Llei 5/2006, 10 de maig*); art. 334 of the Spanish Civil Code (*Real Decreto de 24 de julio de 1889*); arts. 517 to 526 of the French Civil Code (*Loi 24 mars 1804*); art. 812 of the Italian Civil Code (*Regio Decreto 16 marzo1942, N. 262*); art. 204 of the Portuguese Civil Code (*Decreto-Lei N. 47, de 25 novembro 1966*) and arts. 3.47 to 3.49 of the Belgium Civil Code (*Loi portant le Livre 3 «Les biens» du Code Civil, 4 Fevrier 2020*).

[8] D'Avout, L., «Property and proprietary rights», in Basedow, J., Rühl, G., Ferrari, F. and de Miguel Asensio, P. (eds.), *Encyclopedia of Private International Law,* Edward Elgar Publishing, 2017, p. 1429.

## 2.1. The U.S. Context

### 2.1.1. *The Role of the Restatements*

In the United States, choice of law is primarily a matter of U.S. State law, not U.S. federal law[9]. This means there is no singular U.S. approach to choice of law. Instead, each State of the United States has its own conflict-of-law rules, which differ significantly[10].

Moreover, conflict-of-law rules in the United States are primarily common law rules developed by State court judges. Only two U.S. States have comprehensively codified conflict-of-law rules[11]: Oregon[12] (for torts and contracts) and Louisiana[13].

Nevertheless, a certain degree of uniformity has been achieved among U.S. States due to the influence of two Restatements: The Restatement of the Law, Conflict of Laws (the «First Restatement») and the Restatement of the Law Second, Conflict of Laws (the «Second Restatement»)[14]. Symeon Symeonides succinctly describes Restatements as follows:

> «In the American legal lexicon, a Restatement of the Law is a document that resembles a code in the sense that it is a comprehensive and relatively systematic treatment of a legal subject, but also differs in many respects, not the least of which is that it is not a statute. It is promulgated not by a governmental authority, but rather by the American Law Institute (ALI), a non-governmental organization of up to 4,000 lawyers, judges and academics, which was founded in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs". In addition to systematically restating and clarifying the common law, a restatement may also pre-state what the law ought to be, at least when judicial precedents are lacking, conflicting or ambiguous. Although the restatements are not binding authority in any state, they can be highly persuasive, depending on their intrinsic quality, and some of them enjoy wide judicial following»[15].

Restatements are researched and written by legal experts called «reporters», and they are advised by a group including state and federal judges, practicing lawyers, and other legal academics[16]. Some Restatements —in-

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[9] See Symeonides, S. C., *Choice of Law,* Oxford University Press, 2016, p. 3.

[10] Federal courts are required to apply the conflict-of-law rules of the State in which it sits when federal jurisdiction is based on diversity of citizenship between the parties. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

[11] Symeonides, S. C., *Choice of Law, op. cit.,* p. 8.

[12] The Or. Rev. Stat. §§ 15.300-380 (2017) for contracts and the Or. Rev. Stat. §§ 15.400-460 (2017) for torts.

[13] Louisiana Civil Code, arts. 3515-3542.

[14] See, *e. g.*, Symeonides, S. C., *Choice of Law, op. cit.,* p. 58.

[15] Symeonides, S. C., «Restatement (First and Second) of Conflict of Laws», in Basedow, J., Rühl, G., Ferrari, F. and de Miguel Asensio, P. (eds.), *op. cit.,* p. 1546.

[16] Restatements are developed according to an extensive five-stage process. First, legal experts appointed by the ALI called «reporters» research and draft «Preliminary Drafts». Second, each Preliminary Draft is submitted to the project's Advisers and Members Consultative Group (or «MCG»)

cluding the First and Second Restatements of Conflict of Laws— have been relied upon extensively by judges and played an important role in the clarification and development of common law in the United States[17].

### 2.1.2. *The* lex rei sitae *rule in the First Restatement*

The First Restatement was drafted by Reporter Joseph H. Beale and published in 1934. It contains strict jurisdiction-selecting conflict-of-law rules relying primarily on single, territorial, connecting factors. In line with this general territorial approach, the First Restatement calls for the application of the *lex rei sitae* for virtually all issues related to immovable property. These include what might be called «core» immovable property issues, such as the validity and effect of conveyances of interests in land and mortgages in land[18]. But it also extends much further, so as to cover issues about capacity to convey or take land[19], as well as immovable property-related succession[20] and matrimonial property issues[21]. However, the First Restatement takes a different approach for issues about immovable property contracts, providing that «[t]he law of the place of contracting determines the validity of a promise to transfer or to convey land»[22].

For a certain period, the First Restatement was widely followed by courts, and it continues to be followed by a small but significant number of States[23].

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for review and comment. The Advisers are lawyers, judges and legal scholars appointed by the ALI. They typically have some expertise in the field covered by the Restatement. The MCG is open to any member of the ALI who wishes to review and comment on a given project's Preliminary Drafts. Third, the Reporters revise the draft, and either resubmit it to the Advisers and MCG for further review and comment, or they submit the revised draft to the ALI Council. At that stage, the draft is called a «Council Draft». The Council is the ALI's governing body. It consists of approximately 50 lawyers, judges, and academics. Fourth, if the Council approves the Council Draft, it is then submitted as a «Tentative Draft» to be considered for approval by the ALI membership at one of the ALI's annual meetings. There are at any given time up to 3,000 elected ALI members. Each part of a proposed Restatement goes through these stages until all parts of the project has been approved by both the Council and the membership, at which point, fifth and finally, it is published by the ALI in complete form.

[17] See Silver, Ch. and Barker, W. T., «The Treatment of Insurers' Defense-Related Responsibilities in the Principles of the Law of Liability Insurance: A Critique», *Rutgers University Law Review*, vol. 68, 2015, p. 83; Stempel, J. W., «Hard Battles Over Soft Law: The Troubling Implications of Insurance Industry Attacks on the American Law Institute Restatement of the Law of Liability Insurance», *Cleveland State Law Review*, vol. 69, 2021, p. 605.

[18] See, *e. g.*, First Restatement § 215 («The validity of a conveyance of an interest in land is determined by the law of the state where the land is»). See also First Restatement §§ 214, 217, 218, 220, 221, and 225.

[19] First Restatement §§ 216 and 219.

[20] See, *e. g.*, First Restatement § 245 («The law of the state where the land is determines its devolution upon the death of the owner intestate») and § 249 («The validity and effect of a will of an interest in land are determined by the law of the state where the land is»).

[21] See, *e. g.*, First Restatement § 238 («The effect of marriage upon an interest in land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is»).

[22] First Restatement § 340.

[23] See Symeonides, S. C., *Choice of Law*, *op. cit.*, p. 60.

However, it was criticized from the beginning[24]. On the one hand, its rigid rules were said to produce frequently arbitrary results. On the other hand, these rules were applied in ways that produced uncertainty and lack of transparency in legal reasoning, because judges dissatisfied with those results tended to avoid them by using a variety of «escape devices» (such as characterization and the public policy exception)[25].

### 2.1.3. *The* lex rei sitae *rule in the Second Restatement*

Work on the Second Restatement began in 1952. Drafted by reporter Willis Reese and associate reporter Austin Scott, it was published in 1971. Influenced by the so-called «American conflicts revolution» that proposed various «modern» approaches in lieu of the First Restatement's conflict-of-law rules, the Second Restatement generally avoids rules altogether. Instead, Section 6 of the Second Restatement enumerates a variety of factors that judges are to consider when making conflict-of-law decisions[26]. Its issue-specific conflict-of-law sections typically call on courts either to apply the law of the State which, with respect to that issue, has «the most significant relationship to the occurrence and the parties under the principles stated in § 6»[27], or identify the state that presumptively has that relationship and calls on courts to apply that State's law «unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied»[28]. Thus, under the Restatement Second's approach, «courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them»[29].

In contrast to its general multi-factor approach, the Second Restatement provides specific conflict-of-law rules for issues about immovable property. Those rules select the *lex rei sitae* not only for core immovable property issues[30],

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[24] See Roosevelt III, K., *Conflict of Laws*, 2d ed., Foundation Press, 2015, p. 35.

[25] See generally Symeonides, S. C, *Restatement (First and Second) of Conflict of Laws, op. cit.*, p. 1547.

[26] See Restatement Second § 6(2) («[T]he factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied»).

[27] See, *e. g.*, Restatement Second, § 145(1).

[28] See, *e. g.*, Restatement Second § 146.

[29] Restatement Second, § 6, cmt. c.

[30] See, *e. g.*, Second Restatement § 223 [«(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions»]. As this Section illustrates, the Second Restatement's *lex rei sitae* rules generally are not as categorical as the First Restatement's *lex rei sitae* rules, insofar as they refer not directly to the State where the immovable property is located, but rather to the «law that would be applied» by the courts of that State, which «would usually apply» their own local law.

but also —like the First Restatement— for succession[31] and matrimonial property issues involving immovables[32]. The Second Restatement's *lex rei sitae* rule reaches even further than the First Restatement's, extending even to issues about contracts for the transfer of immovable property interests[33]. As one commentator puts it, «By and large, the Conflicts Revolution simply never made it to property»[34]. For a variety of immovable property-related issues, there is a trend away from a categorical *lex rei sitae* approach in the common law of some States, but the *lex rei sitae* rule remains the predominant approach in the United States today.

## 2.2. The EU Context

### 2.2.1. *The* lex rei sitae *in EU Member State Law*

Although choice of law is increasingly a matter of EU private international law, choice of law for immovable property issues remains largely a matter of Member State law. The predominant rule is that the *lex rei sitae* governs these issues. This rule is embraced by law of all Member States that have codified choice of law on this topic[35].

There is, however, some variation in detail across Member States. Some codifications refer to the *lex rei sitae* specifically for issues about rights in the immovable property (as distinguished from movable property), while others do so for issues about «things or objects» generally without distinguishing between immovables and movables. In this regard, art. 64.1 of the Bulgarian Private International Law Code illustrates the first category of conflict-of-law rules: «Possession, ownership and other rights in rem in movable and immovable property shall be governed by the law of the State in which the property is situated (*lex loci rei sitae*)»[36].

As for the second category of conflict-of-law rules, art. 39.1 of the Hungarian Act No. XXVIII of 2017 on Private International Law offers an example: «Unless provided otherwise in this Act, ownership and other in-rem rights, including lien and possession shall be governed by the law of the place where the thing is located»[37]. For its part, art. 3 of the French Civil

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[31] See, *e. g.*, Second Restatement §§ 236 and 239.

[32] See, *e. g.*, Second Restatement § 234.

[33] See Second Restatement § 189.

[34] Stern, J. Y., *op. cit.*, p. 113.

[35] See Kieninger, E. M., «Immovable property», in Basedow, J., Rühl, G., Ferrari, F. and de Miguel Asensio, P. (eds.), *op. cit.*, p. 891.

[36] Other examples are: art. 15.1 of the Italian Act on the *Riforma del Sistema italiano di Diritto internazionale privato* (*Legge 31 maggio 1995, n. 218*); art. 1.48 (1) of the Civil Code of the Republic of Lithuania of 18 July 2000, No. VIII-1864 and art. 10. of the Spanish Civil Code, of 1974.

[37] Hungarian Act No. XXVIII of 2017 on Private International Law (*Magyar Közlöny*, 2017-04-11, vol. 54, pp. 6527-6552). In the same token, see art. 87 of the *Loi Belge portant le Code de Droit international privé, 16 juillet 2004*; art. 10:127 (1) of the Dutch Civil Code (Book 10: Private International Law); art. 69.1 of the Czech Private International Law Act of 25 January 2012; art. 41 of the Polish Act of 4

Code[38] uses a unilateral conflict-of-law rule insofar as this provision extends French law to property rights in immovables located in France[39].

### 2.2.2. *The Property Gap in EU Private International Law*

As we will see, EU law governs choice of law for a number of important immovable property-related issues. So far, however, there is no EU regulation that comprehensively addresses choice of law for core immovable property issues (or, for that matter, movable property issues). In the late 1960s, the Commission of the European Economic Community encouraged the creation of a group of Government experts aimed to unify conflict-of-law rules in the framework of the ECC. Although the initial proposal covered property issues[40], the final draft only embraced contractual and non-contractual obligations. Thus, the working group adopted the 1972 ECC Draft of a Convention on the law applicable to contractual and non-contractual obligations[41].

Since then, no other initiative on the law applicable to rights in immovables has resulted in action at the EU level —although, as we will see, some academic and research initiatives on this topic are underway[42]. Consequently, choice of law for issues about immovables remains subject to Member States law, illustrating the saying that «[p]roperty law is perhaps the most national field of law»[43].

## 3. DYNAMISM IN US AND EU PRIVATE INTERNATIONAL LAW

Despite the force of the *lex rei sitae* rule, it is a dynamic period for private international law as it relates to immovable property issues in both the United States and the European Union. The general trend is toward reducing the scope of the *lex rei sitae* rule to more closely align private international law with the policies and practicalities of related areas of substantive law, including the law of succession, matrimonial property, registered partnerships, and, in the United States, contracts. In the United States, this trend

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February 2011, Private International Law; art. 18.1 of the Estonian Private International Law Act, of 27 March 2002 and art. 46 of the Portuguese Civil Code, of 25 November 1966.

[38] *Loi 1803-03-05 promulguée le 15 mars 1803.*

[39] In the same vein, see art. 3 of the Luxembourg Civil Code (*Décrété le 5 mars 1803*).

[40] Nadelmann, K. H., «The ECC Draft of a Convention on the law applicable to contractual and non-contractual obligations», *The American Journal of Comparative Law,* vol. 21, 1973, pp. 584-585.

[41] Rapport Giuliano, Lagarde et van Sasse van Ysselt, *Riv. dir. inter. priv. e proc.,* núm. 1, 1973, pp. 198-260.

[42] As some have suggested, the lack of an EU regulation with respect to the law applicable to proprietary rights in immovables may be precisely due to how uniformly the law of Member States embraces the *lex rei sitae* rule. Kieninger, E. M., *Immovable property, op. cit.,* p. 891.

[43] Verstijlen, F. M. J., «General Aspects of Transfer and Creation of Property Rights including Security Rights», in Drobnig, U., Snijders, H. and Zippro, E.-J. (eds.), *Divergences of property law, an obstacle to the internal market?,* München, Sellier, 2006, p. 17.

is reflected by the current drafts of a new Third Restatement of Conflict of Laws[44]. In the European Union, it is evident in EU regulations governing issues related to immovable property, such as matrimonial property, registered partnerships, and succession[45].

### 3.1. The Third Restatement of Conflict of Laws

As Professor Symeon Symeonides has put it, «for better or worse, the Restatement (Second) appears to dominate the American methodological landscape»[46]. Although followed by courts in many States, critics argue that the Second Restatement gives judges «virtually unlimited discretion», and thus merely provides a «convenient, and authoritative-sounding, rationalization for results that the court would have reached under any other modern methodology»[47]; that «it has elements that should make everyone happy, but nothing that ties those elements into a coherent whole»[48]; and that it is «easy to misinterpret» and is thus applied by different courts in a multitude of different ways[49]. Meanwhile, to a significant extent, judicial practice under the Second Restatement has started to «converge in particular categories of cases, producing decisions that could be restated in the form of rules»[50].

With these considerations in mind, in October 2014, the Council of the American Law Institute approved the initiation of the Restatement of the Law Third, Conflict of Laws (the «Third Restatement») project and appointed Professor Kermit Roosevelt III as the Reporter, and Professors Laura E. Little and Christopher A. Whytock as Associate Reporters. Rather than the multi-factor approach of the Second Restatement, the Third Restatement aims to provide «clear and predictable rules» that will lead to the most sensible results in most cases «in light of party expectations and the relative interests of the states»[51].

#### 3.1.1. Lex rei sitae *Governs Core Immovable Property Issues*

Under the current Third Restatement drafts, the *lex rei sitae* governs issues that directly implicate policies underlying the substantive law of immovable

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[44] See Restatement of the Law Third, Conflict of Laws, Council Draft No. 5 (Sept. 20, 2021); Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021); Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 (Oct. 23, 2019).

[45] See above footnote 4.

[46] Symeonides, S. C., *Choice of Law, op. cit.,* p. 152.

[47] *Ibid.,* pp. 152-153.

[48] Roosevelt III, K., *op. cit.,* p. 90.

[49] Richman, W. M., Reynolds, W. L. and Whytock, C. A., *Understanding Conflict of Laws*, 4th ed., Lexis Nexis, 2013, pp. 228-229.

[50] American Law Institute, Restatement of the Law Third, Conflict of Laws, Tentative Draft No. 2 (March 25, 2021), approved at 2021 Annual Meeting.

[51] See Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021), § 5.01, Comment d.

property. The Third Restatement calls these «core» immovable property issues. By doing so, it intends to distinguish them from issues that more directly implicate policies underlying other fields of substantive law, such as the substantive laws of marriage and other domestic relationships, succession, and contractual obligations —even when they happen to arise in relation to immovable property.

Core immovable property issues that are governed by the *lex rei sitae* include issues about the permissible types of interests in immovable property, the transfer of immovable property interests by deed, the recording (or registration) of immovable property interests, and the effect of recording or failing to record an immovable property interest on the priorities of interests in that property[52]. In addition, the *lex rei sitae* governs whether a contract results in an actual transfer of an immovable property interest, and it will likely govern immovable property leases[53].

### 3.1.2. *Reduced Scope of* lex rei sitae *rule*

One of the reasons given by academics for a Third Restatement was to reduce the scope of the earlier Restatements' *lex rei sitae* rule[54]. Although still a work in progress and not yet approved by the American Law Institute, the current drafts of the Third Restatement do indeed propose a substantial reduction of the scope of the *lex rei sitae* rule, applying it to core immovable property issues but generally not extending it to other issues.

For example, unlike the First Restatement and the Second Restatement, issues about matrimonial property are generally governed by the law of the State of the marital center, even when those issues arise in relation to immovable property[55]. The «marital center» is defined as the State of the spouses' common domicile, if they are domiciled in the same State, and otherwise

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[52] Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 (Oct. 23, 2019), §§ 7.03, 7.05, and 7.06. Core immovable property issues governed by the *lex rei sitae* also include issues about servitudes (§ 7.04) and the transfer of immovable property interests by adverse possession (§ 7.07), as well certain others.

[53] Restatement of the Law Third, Conflict of Laws, Council Draft No. 5 (Sept. 20, 2021) § 8.09(b). See id. at Comment c («Generally, a contract for the sale of real property interests does not itself transfer those interests but instead merely creates an obligation on the part of the seller to take the steps necessary to transfer those interests to the buyer, typically by delivering a deed. The effect of a transfer by deed is a separate issue, governed by the law of the state where the real property is located. In some cases, however, the sales contract itself may operate as a transfer of an interest if, for example, it contains words of conveyance and other formal requirements for a valid deed»).

[54] Hay, P., Borchers, P. J., Symeonides, S. C., and Whytock, C. A., *Conflict of Laws,* 6th ed., West Hornbook Series, 2018, p. 77; Symeonides, S. C., *Choice of Law, op. cit.,* p. 700; Richman, W. M. and Reynolds, W. L., «Prolegomenon to an Empirical Restatement of Conflicts», vol. 75, *Indiana Law Journal*, 2000, p. 424; Singer, J. W., *op. cit.,* p. 160; Weintraub, R. J., *Commentary on the Conflict of Laws,* 6th ed., 2010, §§ 8.1-8.22.

[55] See, *e. g.,* Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 § 7.19 (Oct. 23, 2019) («The matrimonial property rights of spouses upon divorce are governed by the law of the marital center at the time of divorce»).

the State with which the spouses jointly have the closest connection, taking into account all of the circumstances[56]. These conflict-of-law rules apply by analogy to property rights arising from legally recognized non-marriage domestic relationships[57].

Also unlike the First Restatement and the Second Restatement, issues about succession are governed by the law of the State of the decedent's domicile at the time of death, not the *lex rei sitae*, even when those issues arise in relation to immovable property[58]. In addition, unlike the Second Restatement, issues about contracts for the sale of immovable property interests are governed by the law selected by the drafts' contract conflict-of-law rules, rather than by the *lex rei sitae*[59].

### 3.1.3. *Reasons for Reducing the Scope of the* lex rei situs *rule*

There are several reasons for the Third Restatement drafts' rejection of a broad and categorical *lex rei situs* rule. One reason is that a State is unlikely to have the strongest interest in having its law govern a matrimonial property, succession, or contract issue related to immovable property solely because the immovable property is located there. The policies underlying the substantive law of matrimonial property, succession, and contracts are not policies about immovables as such.

For example, the policies underlying the law governing matrimonial property rights are primarily policies about the spouses and their marriage relationship. These policies include recognition of the contributions of both spouses to the relationship, equitable distribution of property between the spouses, and protection of an economically dependent spouse. In light of these policies, a State is unlikely to have the strongest interest in having its law govern matrimonial property rights related to immovable property solely because the property is located in that State. Rather, the State that has the closest connection to the spouses and the marriage relationship —that is, the marital center— will ordinarily have the strongest interest in having its law govern[60].

The policies underlying the law of succession are primarily policies about the rights of persons to dispose of their property as they wish when they die.

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[56] Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 (Oct. 23, 2019) § 7.16. This definition is inspired by the Matrimonial Property Regulation's reference to the law of the state of the common habitual residence of the spouses and the fallback reference to «the State [...] with which, taking all circumstances into account, [the spouses' matrimonial property regime] is most closely connected». Art. 26.1 of the Matrimonial Property Regulation.

[57] Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 (Oct. 23, 2019) § 7.24.

[58] See, *e. g.*, Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021) § 7.25 («The law of the state of the testator's domicile at the time of death governs the formal validity of a will») and § 7.29 («The law of the state of the decedent's domicile at the time of death governs the transfer of property by intestate succession»).

[59] Restatement of the Law Third, Conflict of Laws, Council Draft No. 5 (Sept. 20, 2021) § 8.09.

[60] See Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 5 (Oct. 23, 2019), § 7.19, Comment b.

A natural person's domicile is the place where their life is centered and where they are physically present. The State of a person's domicile usually will be the State with the closest connection to the person. Therefore, in most cases, a State is likely to have a stronger interest than other States in governing its own domiciliaries' rights to dispose of property upon death. States with weaker connections to a person are in most cases unlikely to have a stronger interest in governing those rights than the State where that person is domiciled. In general, a nondomicile State is unlikely to have a stronger interest than the domicile State in having its law govern a succession solely because the succession relates to real property that happens to be located there[61].

The policies underlying the law governing contracts for the sale of immovable property interests are essentially the same policies that underlie the law of contracts generally, which are primarily about the parties to contracts, the rights and obligations between them, and their justified expectations, rather than about the subject property itself. Therefore, the State of the parties' domicile or the place of their contracting activity (negotiation, making, and performing the contract) will ordinarily have the strongest interest in having its law govern a contract for the sale of immovable property interests. A State is unlikely to have a stronger interest solely because the subject immovable property is located there[62].

To be sure, the situs State does have a strong interest in ensuring clarity of title to immovable property and protecting *bona fide* purchasers. However, that interest can be satisfied by requiring recordation of an immovable property interest that arises under the applicable marriage or succession laws. Under the current drafts of the Third Restatement, issues about recordation and the consequences of recording or failing to record an immovable property interest on the priorities of interests are governed by the *lex rei sitae*, as are other core immovable property issues. As Professor Joseph Singer puts it:

> «The situs state's only real interest in such cases is in clarity of title. Since it is possible to completely satisfy *that* situs interest while applying the law of the domicile to determine who owns what, these cases represent false conflicts that should deviate from situs law, all other things being equal [...]. The situs state does have very strong interests in clarifying who owns real property within the state but any judgment about property title at the domicile can be implemented by requiring the relevant party to grant a deed of real property to the appropriate person who then can record the deed at the situs, thereby satisfying any interest the situs has in its title system»[63].

There are several other important reasons for the Third Restatement's rejection of a broad and strict *lex rei situs* rule. In the fields of matrimonial property and succession, the Third Restatement's approach avoids the pro-

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[61] Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021), Introductory Note, Comment c.

[62] Restatement of the Law Third, Conflict of Laws, Council Draft No. 5 (Sept. 20, 2021) § 8.09, Comment b.

[63] SINGER, J. W., *op. cit.*, pp. 135-136.

blems associated with scission, and instead makes it more likely that a single state's law will govern issues related to all matrimonial property issues as to a particular couple, and all succession issues as to a given decedent's estate. Moreover, the substantive law of matrimonial property, succession, and contracts —at least in the United States— generally does not treat movable property and immovable property in systematically different ways. It thus would seem to make little sense for the corresponding conflict-of-law rules to be systematically different for these issues depending on whether they arise in relation to movable or immovable property[64].

Overall, if the current Third Restatement drafts' conflict-of-law rules for matrimonial property, succession, and contracts issues are approved by the American Law Institute and followed by judges, they would represent a significant departure from the broad and categorical *lex rei sitae* rules of the First Restatement and the Second Restatement. It is also significant that by rejecting the *lex rei sitae* rule and adopting a unitary rather than a scissionist approach for issues about matrimonial property and succession related to immovable property, the Third Restatement would move U.S. private international law closer to EU private international law, as will be discussed next.

## 3.2. Developments in the European Union

### 3.2.1. *The Succession, Matrimonial Property and Registered Partnership Property Regulations: Beyond* lex rei sitae

As already explained, choice of law for issues about immovable property rights is primarily a matter of Member State law (as is also the case for issues about tangible movables and intangibles)[65]. The substantive law of property may itself give rise to the creation, acquisition, or transfer of property rights, and in these cases the *lex rei sitae* approach reflected in Member State law determines the applicable law.

In many cases, however, the creation, acquisition, or transfer of property rights occurs in a derivative way, based on other «titles» of substantive law, such as the law governing contractual obligations, marriage, registered partnerships, or succession upon death. This explains the inextricable connection that exists between, on the one hand, property rights and, on the other hand, other fields of private law[66]. Although the EU legis-

[64] For an application of these and other reasons to choice of law for succession issues, see Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021), Introductory Note.

[65] However, in relation to intangibles, see the *Proposal for a Regulation of the European Parliament and the Council on the law applicable to the third-party effects of assignments of claims*, whose last version dates back to 28 May 2021. The text of the Proposal is available at: *http://data.consilium.europa.eu/doc/document/ST-9050-2021-INIT/en/pdf*.

[66] See, among others, Rupp, C. S., *op. cit.*, pp. 267-291; von Hein, J., «Conflicts between International Property, Family and Succession Law - Interfaces and Regulatory Techniques», *European Property Law Journal*, vol. 6, 2017, Issue 2, pp. 142-157.

lator has yet to regulate choice of law for immovable property issues (and other property issues) in a comprehensive way[67], it has in recent years codified conflict-of-law rules for most of these titles as they relate to property rights.

Three main EU regulations deserve special attention here[68]: the Regulation (EU) No. 650/2012 (the «Succession Regulation»); Council Regulation (EU) 2016/1103 (the «Matrimonial Property Regulation») and Council Regulation (EU) 2016/1104 (the «Registered Partnership Property Regulation»). The two latter Regulations, though, only apply to the Member States participating in the enhanced cooperation as established by the Regulations themselves.

Together, these three Regulations mark an important departure from the *lex rei sitae* rule. None of them adopt that rule, even when the issues covered by them arise in relation to immovable property. The EU Succession Regulation applies to succession to the estates of deceased persons[69], and as a general rule provides that «the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death»[70]. The EU Matrimonial Property Regulation applies to matrimonial property regimes[71] —that is, «rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution»[72]— and as a general rule refers to the law of the State of the spouses' first common habitual residence after the conclusion of the marriage, absent a choice-of-law agreement[73]. The EU Registered Partnership Property Regulation, which applies to matters of the property consequences of registered partnerships[74], as a general rule refers to the law of the State under whose law the registered partnership was created, absent a choice-of-law agreement[75].

All three of these Regulations favor the unity of the applicable law, extending their conflict-of-law rules to the issues that are within their scope regard-

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[67] There are, however, some immovable property issues that are covered by EU private international law, including, as noted above, contracts relating to immovable property interests, and also in the field of jurisdiction and recognition of foreign judgments. As for this latter matter see the so-called Brussels regime dating back to the 1968 Brussels Convention until the current applicable Regulation N. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (*OJ* L 351, 20 December 2012).

[68] See above footnote 4.

[69] Art. 1.1 of the Succession Regulation.

[70] Art. 21.1 applies unless the citizen chooses the law of the State of his/her nationality (art. 22).

[71] Art. 1.1 of the Matrimonial Property Regulation.

[72] *Id.* art. 3.1.*a)*.

[73] *Id.* art. 26.1.*a)*. There are fallback references to the law of the State of the spouses' common nationality at the time of the conclusion of the marriage and, failing that, to the law of the State «with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances». *Id.* art. 26.1.*b)* and *c)*.

[74] Art. 1.1 of the Registered Partnership Property Regulation.

[75] *Id.* art. 26.1.

less of the property's location and regardless of whether it is characterized as movable or immovable property[76]. Indeed, ensuring unity of the applicable law is one of the main reasons for the approach taken. As Recital 37 of the EU Succession Regulation explains:

> «The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State»[77].

A person's power to organize their succession could be frustrated if the law governing the transfer of property rights in immovables were subject to a law different from the law chosen by the same person[78] or from the law of the habitual residence of the deceased at the time of death[79]. In the same vein, the coincidence between the *forum* and the *ius*[80] that is sought by the EU Succession Regulation would be at risk if the *lex rei sitae* governed the transfer of property rights.

Similarly, both the EU Matrimonial Property Regulation and the EU Registered Partnership Property Regulation seek to guarantee the application of the closest law to the common life of the couple, ensuring that this law is predictable for the spouses or partners as well as for third parties. A *lex rei sitae* rule would have undermined these objectives (and been an obstacle to the party autonomy that is protected by these Regulations)[81].

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[76] See art. 23.1 of the Succession Regulation; art. 21 of the Matrimonial Property Regulation; and art. 21 of the Registered Partnership Property Regulation. One implication of this approach is that for the Member States' legal systems that follow the doctrine of title and mode (*e. g.* Austria and Spain), the mode will be subject to the same law that governs the title.

[77] See also Recital 43 of the Matrimonial Property Regulation and Recital 42 of the Registered Partnership Property Regulation.

[78] See Recital 37 and art. 22 of the Succession Regulation that enables the deceased to choose the law of a Member State of which he/she is a national.

[79] See art. 21 of the Succession Regulation.

[80] Álvarez González, S. (author of the translation and adaptation to the Spanish legal system) and Bonomi, A. (author of the original text), «Introducción» in Bonomi, A. and Wautelet, P., *El Derecho europeo de sucesiones, Comentario al Reglamento (UE) Nº 650/2012, de 4 de julio de 2012,* Thomson Reuters Aranzadi, 2015, pp. 51-52.

[81] See art. 22 of the Matrimonial Property Regulation and art. 22 of the Registered Partnership Property Regulation. See also art. 22 of the Succession Regulation. On party autonomy in international family law and, in particular, in the field of property consequences of marriages and registered partnerships see, among others, González Beilfuss, C., «La autonomía de la voluntad en los reglamentos europeos sobre régimen económico matrimonial y efectos patrimoniales de las parejas registradas» in Serrano de Nicolás, A. (coord.), *Los Reglamentos UE 2016/1103 y 2016/1104 de regímenes económicos matrimoniales y efectos patrimoniales de las uniones registradas,* Madrid, Marcial Pons, 2020, pp. 104-119, and González Beilfuss, C., «Party Autonomy in International Family Law», *Recueil des Cours*, vol. 408, 2020, pp. 93-361.

### 3.2.2. *A Different Approach: Contractual Obligations and the Rome I Regulation*

In the domain of contract law, there is also a scission between the law that applies to whether a contract results in an actual transfer (acquisition or creation) of an immovable property interest, which is governed by the *lex rei sitae* [82], and the law governing the aspects associated to the law of obligations, which is the *lex contractus* [83]. In spite of such a scission, though, most of the time both laws will converge in the *lex rei sitae*, since under the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [84] (the «Rome I Regulation») the law governing contracts relating to a right *in rem* in immovable property is the law of the country where the property is situated [85], unless the escape clause applies (art. 4.3 of the Rome I Regulation). Although the Rome I Regulation's usual reference is to the law of the country where a particular party (*e. g.* seller, service provider, franchisee, distributor, etc.) has their habitual residence, it provides that in the absence of a choice of law agreement «a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated» [86].

Thus, as to contractual obligations, the Rome I Regulation's *lex rei sitae* approach perpetuates disparate treatment of movables and immovables under EU private international law, and in that sense stands out in comparison to the more recent EU Succession, EU Matrimonial Property, and EU Registered Partnership Property Regulations, which have rejected that approach. One scholar has thus questioned the necessity of the Rome I Regulation's special rule for contracts related to immovable property [87].

For its part, the *lex rei sitae* remains the law governing a contract's effects on rights *in rem* in immovables (including whether the contract results in the transfer, acquisition, or creation those rights), as distinguished from the contractual obligations of the parties under the contract.

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[82] It should be noted though that the *lex rei sitae* should govern the contract that in some legal systems, like in Germany (*Einigung*), is required to transfer property rights. On this point, see footnote 3 of the Third Draft for a legal instruments on «The law applicable to rights in rem in tangible assets» available at: *https://gedip-egpil.eu/wp-content/uploads/2021/02/Rights.inRem-Doc.Final-ENG-3.pdf*.

[83] See the *Council Report on the Convention on the law applicable to contractual obligations* by M. Giuliano and P. Lagarde, *OJEC* C 282, 31 October 1980, p. 10. However, the voluntary assignment of a claim against the debtor illustrates an exception in the sense that the law governing the contract between the assignor and the assignee will also govern the property aspects of the assignment «in legal orders where such aspects are treated separately from the aspects under the law of obligations», Recital 38 of the Rome I Regulation.

[84] *OJ* L177, 4 July 2008.

[85] See art. 4.1.*c)* of the Rome I Regulation.

[86] Art. 4.1.*c)* of the Rome I Regulation This rule is subject to an exception for short-term tenancies of immovable property. See art. 4.1.*d)*.

[87] See Rupp, C. S., *op. cit.,* p. 290.

### 3.2.3. *Defining Core Immovable Property Issues in the EU Context: The Problem of Characterization*

While the EU Succession, EU Matrimonial Property, and EU Registered Partnership Property Regulations reject the *lex rei sitae* rule for the issues covered by them, they at the same time allow for the continued operation of the *lex rei sitae* rule in accordance with Member State conflict-of-law rules as to certain core immovable property issues. This is accomplished by excluding from the scope of the Regulations «the nature of rights *in rem*» and «any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register» [88].

These exclusions pose difficult characterization issues, due to the close connection between property rights and titles. These issues necessarily arise at the beginning of the process of analyzing choice-of-law issues, since an issue must be characterized before determining whether the issue falls within the scope of a particular EU Regulation, which would then provide the conflict-of-law rule, or whether it instead falls within the scope of one of the core immovable property exclusions and is left to the conflict-of-law rules of a Member State [89]. What is needed is an «autonomous interpretation» [90] of the concept «property rights» or, to use what seems to be the preferred term, «rights *in rem*» [91], that can guide in the first place the selection of the appropriate EU legal instrument or, as a default rule, the appropriate Member State's conflict-of-law rule.

However, neither these EU Regulations nor the Court of Justice of the European Union have established a single definition of «property rights» or «rights *in rem*» for purposes of characterization, which leaves such a definition to the law of the Member States. Indeed, for purposes of the EU Insolvency Regulation [92], the Court of Justice stated that the «the issue of the qualification of the right concerned as a right "*in rem*" [...] is to be examined

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[88] Art. 1.2.*k)* and *l)* of the Succession Regulation; art. 1.2.*g)* and *h)* of the Matrimonial Property Regulation and art. 1.2.*g)* and *h)* of the Registered Partnership Property Regulation.

[89] Fontanellas Morell, J. M., «La coherencia entre los Reglamentos 650/2012 y 2016/1103 (2016/1104)», in Serrano de Nicolás, A. (coord.), *op. cit.*, pp. 210-211.

[90] By autonomous interpretation the Court of Justice of the EU refers to an independent interpretation of the concepts by reference to the EU regulation at stake's «scheme and purpose, in order to ensure that it is applied uniformly in all the Member States. Those concepts cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law» (*e. g.*, see judgment *Brogsitter*, C-548/12, ECLI:EU:C:2014:148, para 18).

[91] At the EU level, the term «rights *in rem*» is preferred to the term «property rights» as used by the European Union legislator and the Court of Justice. On this point, see Ramaekers, E. and Akkermans, B., «European Autonomous Property Rights: Does the EU Operate Its Own *Numerus Clausus*?», *European Review of Private Law*, vol. 4, 2019, p. 757.

[92] The Regulation 1346/2000 on insolvency proceedings (*OJ* L 160, 30 June 2000) replaced by the Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (*OJ* L 141, 5 June 2015).

having regard to national law»[93], namely, the law of the country where the asset concerned is located. Moreover, as the Court of Justice declared in its judgment in *Condominio di Milano, via Meda,* insofar as the European Union does not legislate on property rights[94], Member States remain free to legislate in this sector[95].

Nonetheless, the EU legislator and the Court of Justice have, to some extent, attempted to clarify the concept of property rights (rights *in rem*). In this regard, the EU legislator has opted for compiling a non-exhaustive list of rights that are deemed to be *in rem,* as it was first established in art. 21 of the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganization and winding up of credit institutions[96] and then in art. 8 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)[97] (former art. 5 of the Regulation 1346/2000)[98]. Additionally, as far as insolvency proceedings are concerned, art. 8.3 of the Regulation 2015/848 (former art. 5.2 of the Regulation 1346/2000) calls for further requirements in order for a right to be considered as a property right in terms of this EU Regulation[99]. These further requirements constitute an exception, though, to the general rule that the characterization of property rights depends exclusively on the *lex causae*, as the Reporters of the Convention on insolvency proceedings indicated when they asserted that «the only departure from the above statement[100] is found in art. 5(3), which for the purposes of art. 5, directly and independently of national law, considers as a right *in rem* any right entered in a public register and enforceable against third parties, allowing a right *in rem* to be obtained»[101].

For its part, the Court of Justice of the European Union has shed light on the concept by distinguishing rights *in rem* and rights *in personam*, and pointing out that «a difference between a right *in rem* and a right *in personam* is that the former, existing in an item of property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor»[102]. This difference rein-

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[93] Judgment *Senior Home*, C-195/15, ECLI:EU:C:2016:804, para. 19.

[94] On this issue, it is controversial whether the EU can legislate on property law due to art. 354 of the Treaty on the Functioning of the European Union whereby «The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership». This provision has been referred as «the infamous article 345 Treaty on the Functioning of the European Union (TFUE) that may or may not prevent the EU from legislating in the area of property law», Ramaekers, E. and Akkermans, B., *op. cit.,* p. 782.

[95] C-329/19, ECLI:EU:C:2020:263, para. 28.

[96] *OJ* L 125, 5 May 2001.

[97] *OJ* L 141, 5 June 2015.

[98] *OJ* L 160, 30 June 2000.

[99] See Ramaekers, E. and Akkermans, B., *op. cit.,* pp. 763-764.

[100] The above statement consists in affirming that the Convention adopts a *lege causae* characterization, *Report on the Convention on Insolvency Proceedings* by Virgós, M. and Schmit, E., The Council of the European Union, 6500/96, Limite, DRS 8 (CFC), Brussels 3 May 1996, p. 73.

[101] *Ibid.,* p. 73.

[102] *Weber*, C-438/12, ECLI:EU:C:2014:212, para. 43.

forces the Report by P. Schlosser on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg on the 9 October 1978[103].

Consequently, the determination of the EU legal instrument or the Member State's conflict-of-law rule applicable to a property issue will depend on a combination of two main factors: the definition of a property right provided by the *lex causae* (most of the time equivalent to the *lex rei sitae*) coupled with the subject-matter scope of application of the EU legal instrument at stake for whose interpretation the policies underlying these legal instruments are essential. Not only does this latter factor imply considering the initial provisions delineating the subject-matter scope of application[104] but also any non-exhaustive lists of rights deemed to be property rights that the EU legal instruments involved in the given situation may contain[105] as well as the extension of the applicable law as established by the EU legal instrument itself[106].

In the context of the EU Succession Regulation, the Court of Justice in the *Kubicka* case[107] has helped to illuminate the meaning of rights *in rem* by providing interpretive guidance regarding two exclusions from the Regulation's scope of application. First, the Court of Justice has narrowly interpreted art. 1.2.*k)*'s exclusion of «the nature of rights *in rem*» from its scope of application, ruling that it covered «the classification of property and rights, and the determination of the prerogatives of the holder of such rights», as well as «the existence and number of rights *in rem*», but not modes of transfer[108]. Hence, the general estate (succession law) takes priority over the single estate (property law)[109].

The Court also clarified that art. 1.2.*l)*'s exclusion of issues regarding recording of immovable property rights[110] does not include «the conditions un-

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[103] *OJEC* C 59, 5 March 1979, p. 120.

[104] See, *e. g.*, art. 1 of the Succession Regulation, art. 1 of the Matrimonial Property and art. 1 of the Registered Partnership Property Regulation.

[105] For instance, see art. 21 of Directive 2001/24/EC and art. 8 of Regulation (EU) 2015/848 (former art. 5 of Regulation 1346/2000).

[106] See, *e. g.*, art. 23 of the Succession Regulation, art. 27 of the Matrimonial Property and art. 27 of the Registered Partnership Property Regulation.

[107] C-218/16, ECLI:EU:C:2017:755. On this judgment, see, among others, the following commentaries: Álvarez González, S., «*Legatum per vindicationem* y Reglamento (UE) 650/2012», *La Ley Unión Europea*, enero 2018, pp. 15 *et seq.*; Tereszkiewicz, P. and Wysocka-Bar, A., «Legacy by Vindication Under the EU Succession Regulation No. 650/2012 Following the Kubicka Judgment of the ECJ», *European Review of Private Law*, vol. 4, 2019, pp. 875-894; Crespi Reghizzi, Z., «Succession and property rights in EU Regulation No 650/2012», *Riv. dir. inter. priv. e proc.*, vol. 3, 2017, pp. 633-661; Schmidt, J. P., «Challenged Legacies - First Decision of the European Court of Justice on the EU succession Regulation», vol. 7, *European Property Law Journal*, vol. 1, 2018, pp. 4-31.

[108] C-218/16, ECLI:EU:C:2017:755, paras. 47-49.

[109] Rupp, C. S., *op. cit.*, p. 283.

[110] By contrast, art. 1.2.*l)* of the Succession Regulation excludes from its scope of application «any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register». On this

der which such rights are acquired» [111]. As a result, the *lex successionis* takes precedence over the *lex registrationis* (the *lex rei sitae* as for immovables) [112] in relation to the recording aspects required for the conveyance [113]. However, the concurrence of the above-mentioned laws may still give rise to other problems in the field of succession law and register law, such as those concerning the effects of registration as to *bona fide* third parties since this issue is dependent on the *lex registrationis* [114]. The Court linked its narrow interpretation of both exclusions to the principle that «the law governing succession should govern the succession as a whole» in order to preserve the unity of succession, consistent with the policies underlying the EU Succession Regulation [115].

Like the EU Succession Regulation, the EU Matrimonial Property Regulation and the EU Registered Partnership Property Regulation exclude from their respective scopes of application the «nature of rights *in rem* relating to a property» and «any recording in a register of rights in immoveable or moveable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register» [116]. The EU Matrimonial Property Regulation also provides that the law applicable to the matrimonial property regime governs, *inter alia*, the classification of property of either or both spouses into different categories during and after marriage and the dissolution of the matrimonial property regime and the partition, distribution or liquidation of the property [117]. The EU Registered Partnership Property Regulation has corresponding provisions for partners in registered partnerships [118].

The same interpretation confirmed by the Court of Justice for the EU Succession Regulation's exclusions should also apply to the same exclusions in the EU Matrimonial Property Regulation [119], and presumably to the EU Registered Partnership Property Regulation, too. Thus, while the *lex rei sitae* should govern «the limited number ("*numerus clausus*") of rights *in rem* known in the national law of some Member States» [120], as an issue included in

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exclusion see, among others, Álvarez González, S., «*Legatum per vindicationem* y Reglamento (UE) 650/2012», *op. cit.,* p. 10; Rupp, C. S., *op. cit.,* pp. 283-284.

[111] *Kubicka,* C-218/16, ECLI:EU:C:2017:755, para. 54.

[112] However, the synchronization between the *lex registrationis* and the *lex rei sitae* does not always operate van Erp, S., «The New Succession Regulation: The *lex rei sitae* rule in need of a reappraisal?», *European Property Law Journal*, vol. 1, 2012, Issue 2, p. 188; Rupp, C. S., *op. cit.,* p. 270.

[113] See C-218/16, ECLI:EU:C:2017:755, para. 54.

[114] See Recital 19 of the Succession Regulation.

[115] See C-218/16, ECLI:EU:C:2017:755, para. 55. See also Rupp, C. S., *op. cit.,* p. 289.

[116] Art. 1.2.*g)* and *h)* of the Matrimonial Property Regulation and art. 1.2.*g)* and *h)* of the Registered Partnership Property Regulation. Regarding the delineation between these Regulations, on the one hand, and the Succession Regulation, on the other hand, see Fontanellas Morell, J. M., «La coherencia entre los Reglamentos 650/2012 y 2016/1103 (2016/1104)», in Serrano de Nicolás, A. (coord.), *op. cit.,* pp. 201-220.

[117] Art. 27.*a)* and *e)* of the Matrimonial Property Regulation.

[118] Art. 27.*a)* and *e)* of the Registered Partnership Property Regulation.

[119] See Rupp, C. S., *op. cit.,* p. 286.

[120] Recital 24 of both the Matrimonial Property Regulation and the Registered Partnership Property Regulation.

the category of the core immovable property issues, the law applicable to the matrimonial property regime and to the property consequences of the registered partnership will govern the transmission of such rights. As is the case for the EU Succession Regulation, the narrow interpretation of these exclusions broadens the scope of application of the EU Matrimonial Property and EU Registered Partnership Property Regulations, furthering their underlying policy of ensuring the unity of the law applicable to matrimonial property regimes and the property consequences of registered partnerships [121].

Taken together, the EU Succession Regulation, the EU Matrimonial Property Regulation, and the EU Registered Partnership Property Regulation have significantly reduced the scope of application of the *lex rei sitae* rule in relation to the transfer of immovable property rights upon any of these titles. These Regulations exclude from their scope certain core immovable property issues- namely, the nature of rights in rem (*numerus clausus*) and the recording of immovable property rights in a register, including the legal requirements for recording and the effects of recording or failing to record. As we have seen, the Court of Justice has narrowly construed these exclusions. In contrast, these three Regulations do not exclude from their scope of application any further conditions that such recording procedures may require for the validity of the transfer, acquisition, or creation of property rights as a result of succession upon death [122], dissolution of marriages or registered partnerships. However, there are of course immovable property issues entirely outside the scope of these Regulations, for which choice of law remains a matter of Member State private international law, and which therefore will typically be governed by the *lex rei sitae*. What is missing so far from EU private international law is a clear definition of precisely what those issues are.

### 3.2.4. *Addressing the Problems of Gaps and Coherence: Some Academic Initiatives*

EU private international law now extends to a wide range of matters involving immovable property. The EU Succession, EU Matrimonial Property, and EU Registered Partnership Property Regulations together represent an important step towards the harmonization of private international law in the European Union and toward assuring unity of the law applicable to successions, matrimonial property regimes, and the property consequences of registered partnerships —without regard to whether the relevant property is movable property or immovable property [123]. For its part, the Rome I Regulation covers choice of law for contracts relating to immovable property (and

[121] Art. 21 of the Matrimonial Property Regulation and art. 21 of the Registered Partnership Property Regulation.

[122] See C-218/16, ECLI:EU:C:2017:755, para. 54 interpreting art. 1.2.*l)* of the Succession Regulation.

[123] See above.

also movable property)[124]. Beyond choice of law, the Brussels I Regulation *recast* addresses jurisdiction in civil and commercial matters in proceedings «which have as their object rights *in rem* in immovable property or tenancies of immovable property»[125] (and again, movables as well).

Nevertheless, problems remain, which have prompted some legal scholars to begin working on potential solutions. One such problem is the property rights gap in EU private international law. While existing EU regulations largely cover choice of law for the various titles under which immovable property rights may be acquired or transferred (*e. g.* succession, marriage, registered partnerships, contracts), they do not yet extend to issues about immovable property as such —which we have been calling «core immovable property issues». This gap —which also exists as to movable property— has led to proposals for EU legislation on private international law for matters involving property rights in tangible movables and immovables[126]. For example, the study on *A European Framework for private international law: current gaps and future perspective,* requested by the European Parliament's Committee on Legal Affairs, pointed out the systematic property gap in EU private international law and declared that this gap (among others) should be addressed before further legislation is contemplated at all[127].

In this regard, two ongoing initiatives deserve special attention. The most advanced project so far is the one being carried out by the European Group of Private International Law (EGPIL). Its origin dates back to the meeting held at Hamburg, from the 22 to the 24 September 2017 in which Francisco J. Garcimartín Alférez presented a working paper on «Rights in rem - Future EU Instrument»[128]. Later, as a result of the meeting held virtually on the 17 and 18 September 2021, the Third Draft of a proposed EU regulation on the law applicable to rights in rem in tangible assets[129] was adopted by the EGPIL. This draft has three chapters. Whereas the first one addresses the material scope of application of the EU Regulation and the definitions of the expressions: «property rights», «tangible assets», «asset in transit», and «asset to be exported», the second chapter starts with the general rule based on the *lex rei sitae*. Two specific choice-of-law rules are set out, the first concerning assets in transit

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[124] Art. 4.1.*c)* of the Rome I Regulation.

[125] See, *e. g.,* art. 24 of the Brussels I Regulation *recast*.

[126] For instance, see Akkermans, B., «The *numerus clausus* of property rights», in Graziadei, M. and Smith, L. (eds.), *Comparative Property Law, Global Perspectives,* Edward Elgar Publishing, 2019, p. 118; Kieninger, E. M., «Freedom of Choice of Law in the Law of Property», *European Property Law Journal,* 2018, pp. 244-245; Rupp, C. S., *op. cit.,* p. 291. In relation to intangibles, see the *Proposal for a Regulation of the European Parliament and the Council on the law applicable to the third-party effects of assignments of claims*. See above footnote 65.

[127] Kramer, X., de Rooij, M., Lazic, V., Blauwhoff, R. and Frohn, L., *A European Framework for private international law: current gaps and future perspective*, 2012, p. 92. The document is available at: *https://www.europarl.europa.eu/RegData/etudes/STUD/2012/462487/IPOL-JURI_ET(2012)462487_EN.pdf.*

[128] The working paper is available at: *https://gedip-egpil.eu/wp-content/uploads/2017/09/Rights-in-rem.pdf.*

[129] The Third Draft is available at: *https://gedip-egpil.eu/wp-content/uploads/2021/02/Rights.inRem-Doc.Final-ENG-3.pdf.*

and the second one referring to means of transport. Art. 7 sets out the scope of the applicable law and art. 8 refers to the protection of acquired rights. Finally, the third chapter addresses the general provisions The Group intends to continue working on this proposal in order to achieve a final draft in its future meetings. Additionally, the European Association of Private International Law has appointed a working group to work on the law applicable to tangible movable and immovable property[130], although no draft has been reported yet.

Another challenge is how to achieve coherence among different EU regulations, in order to improve «consistency of interpretation between and among the relevant instruments»[131]. Perhaps most fundamentally, the concept of «rights *in rem*» appears in various EU regulations, and would be an important concept in any future EU regulation on this topic —but there is so far no single autonomous concept of «rights *in rem*» in EU private international law—. A new regulation could help improve coherence, by offering a definition of rights *in rem* that is consistent with existing regulations and the interpretations of the Court of Justice of the European Union, discussed above[132]. An EU private international law definition of this concept would also improve coherence by overcoming variation in how Member States define rights *in rem* or similar concepts.

Those working on initiatives for a new EU regulation on choice of law for property rights could consider two mechanisms to help ensure coherence with the existing regulations. One would consist in excluding from its scope of application the «creation, acquisition, encumbrance or transfer of proprietary rights resulting from matrimonial property regimes», «the proprietary consequences of registered partnerships», or «by succession», as proposed by the European Group for Private International Law (EGPIL) in its third Draft for a legal instrument on «The law applicable to rights *in rem* in tangible assets»[133]. These exclusions would help avoid application of a new

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[130] On this working group see: *https://eapil.org/eapil-activities/eapil-working-groups/eapil-working-group-on-international-property-law/*.

[131] Crawford, E. B. and Carruthers, J. M., «Connection and coherence between and among European instruments in the private international law of obligations», *International and Comparative Law Quarterly,* vol. 63, 2014, Issue 1, p. 2. «Horizontal coherence» refers to «cross-fertilization between instruments dealing with related subjects» whereas «vertical coherence» refers to coherence «among consecutive instruments dealing with and refining the rules relative to a given topic». *Id.* Following this dual terminology «horizontal coherence» *versus* «vertical coherence», see Sánchez Lorenzo, S., «El principio de coherencia en el Derecho internacional privado europeo», *Revista Española de Derecho internacional*, vol. 70, 2018/2, p. 21; Fontanellas Morell, J. M., «La coherencia entre los Reglamentos 650/2012 y 2016/1103 (2016/1104)», in Serrano de Nicolás, A. (coord.), *op. cit.,* pp. 193-194; *id.,* «Coherence between European Instruments of Private International Law on Matters concerning Succession and Matrimonial Property Regimes», in Forner Delaygua, J. J. and Santos, A. (eds.), *Coherence of the Scope of Application, EU Private International Legal Instruments,* Schulthess, 2020, pp. 123-133; Bonomi, A., «Coherence and Coordination among the EU Private International Law Regulations in Family and Succession Matters», in Forner Delaygua, J. J. and Santos, A. (eds.), *op. cit.,* pp. 29-31.

[132] See above section 3.2.3.

[133] On the Third Draft see, above, footnote 129. In particular, see art. 1.2 letters *e)* and *f)* for matrimonial property regimes and property consequences of registered partnerships respectively and art. 1.2.*g)* for successions.

regulation to issues that are within the scope of EU Matrimonial Property, EU Registered Partnership Property, and EU Succession Regulations[134]. To ensure coherence, the exclusions must also be drafted in a manner that does not conflict with the Court of Justice's narrow interpretation of «the nature of rights *in rem*» in its *Kubicka* judgment, so that the new regulation is not applied to the methods of transfer of those rights by succession (or by operation of a matrimonial property regime or as a consequence of a registered partnership)[135].

The second mechanism that a future EU regulation could use in order to take into account the EU legislation on immovable property-related issues would be a certain level of flexibility in the conflict-of-law rule dealing with immovables (which would be extended over movables as well). However, this would be coupled with a third-party protection as established, for instance, by art. 104.2 of the Swiss Federal Act on Private International Law[136] whereby «*L'élection de droit n'est pas opposable aux tiers*». In turn, this second approach could adopt two different designs. One could reproduce the classic example of an accessory connection based on the underlying relationship between the parties. In the case of property rights, the underlying relationship would consist in the one creating or transferring the controversial property rights such as a succession upon death, a marriage or a registered partnership. In that case, the law governing such titles would take priority over the *lex rei sitae*. The second design would refer directly to the underlying relationship as it could be either the matrimonial property regime, the proprietary consequences of a registered partnership, or a succession upon death. Art. 51.2 of the Italian Act on the «*Riforma del Sistema italiano di Diritto internazionale privato*»[137] may offer some guideline for this mechanism. Under this provision: «*2. La stessa legge* [legge dello Stato in cui i beni si trovano][138] *ne regola l'acquisto e la perdita, salvo che in materia successoria e nei casi in cui l'attribuzione di un diritto reale dipenda da un rapporto di famiglia o da un contratto*». This second mechanism, in either of its two distinct designs, would ensure the application of the law of the general statute, namely, either the law governing the succession or the law applicable to matrimonial property regime or to the property consequences of registered partnerships.

Nevertheless, the first proposed option, whereby a future EU regulation on the law applicable to property rights would exclude from its scope of application the aforementioned immovable property-related areas, would guarantee, in a more clear-cut manner, the objective of ensuring the application of the law governing these latter immovable property-related areas to the

[134] The EGPIL draft also includes exclusions for contractual obligations, to respect the scope of the Rome I Regulation. *Id*. art. 1.2.*c)*.

[135] See above section 3.2.3.

[136] *Loi fédérale sur le Droit international privé du 18 décembre 1987.*

[137] *Legge 31 maggio 1995, n. 218.*

[138] Art. 51.1 states that the *lex rei sitae* will apply to possession, ownership and other property rights over movables and immovables.

creation, acquisition, encumbrance and transfer of property rights resulting from them. At the same time this solution would also minimize the risk of incoherence among EU legal instruments[139].

## 4. CONCLUSIONS

In both the United States and the European Union, the predominant conflict-of-law rule for issues about immovable property has been that the *lex rei sitae* governs. However, as this article has illustrated, the trend in both US private international law and EU private international law has been away from a broad and categorical *lex rei sitae* rule for these issues.

The trend is more advanced in the European Union, where EU regulations have established habitual residence as the primary connecting factor for issues about immovable property in the context of succession, marriage, and registered partnerships[140], with a limited incursion of party autonomy. In the United States, the weight of academic opinion quite clearly favors the trend, but progress is more modest in the courts. If the American Law Institute approves and courts follow the approach of the Reporters' current drafts of the Third Restatement, which would significantly reduce the scope of the *lex rei sitae* rule, the trend may accelerate in the United States. However, unlike the EU context, where the trend has been driven by EU-wide regulations, in the US it depends primarily on the evolution of common law in each state, which is likely to be a slower, more incremental, and less harmonized process, even if the current approach of the Third Restatement project is approved.

Importantly, this trend is not in the direction of a wholesale rejection of the *lex rei sitae* rule, so as to replace an old categorical approach with a new one. To the contrary, private international law in both the United States and the European Union is holding quite firmly to the *lex rei sitae* rule for certain immovable property issues, which we have been calling core immovable property issues. Our analysis suggests that these issues include, at a minimum, issues about permissible interests in immovable property (the *numerus clausus*) and about the requirements for and effects vis-à-vis third parties of recording immovable property transfers in immovable property registries. Private international law recognizes others, too, with some variation across states.

We have already noted the difficulty of defining the category of core immovable property issues with precision, and we do not attempt to do so here. But the intuition is that there are, on the one hand, certain legal rules that are foundational to a system of immovable property and animated by policies about how that system should operate, whereas, on the other hand, there

[139] The accessory connection could still play a role in the process of characterization.

[140] See Akkermans, B. and Rupp, C. S., «Queen *lex rei sitae*-Off With Her Head?», *European Private Law Journal*, vol. 7, 2018, p. 209.

are other legal rules that are foundational to other socio-legal systems —such as those surrounding death, marriage, registered partnerships, and, perhaps, contracting— that are animated by different policies. It is far from clear that conflict-of-law rules should assume that the former necessarily have priority over the latter merely because of the type of property involved and the location of that property. To the contrary, it would seem preferable to design conflict-of-law rules that respect and are adapted to these different systems and policies. Further refinement of these categories would be desirable, to more clearly specify which of them should be governed by the *lex rei sitae*, and which should be governed by the law of a different State.

Our analysis also indicates that in both the European Union and the United States, the reasons for moving away from the *situs* rule for immovable property-related issues are similar, and include avoiding scission (or «fragmentation») of a corpus of property in the case of matrimonial property and succession issues, and in those contexts as well as in the context of contract issues, avoiding the need to characterize issues as involving either immovable property or movable property[141]. In the United States, and to a more limited degree in the European Union, another commonly advanced reason is based on interest analysis: a State is unlikely to have the strongest interest in governing an issue about matrimonial property, succession, or contractual rights and obligations merely because related *property* is located there. The policies underlying these other areas of law are different, which means another state —such as the State where the related *people* are (*e. g.* where they are domiciled or have their habitual residence)— is likely to have the strongest interest in having its law govern. For all of these reasons, we believe the trend away from a broad and categorical *lex rei sitae* rule is a desirable one.

In the US context, perhaps the main question is whether the force of common law tradition will ultimately defeat the movement toward reducing the scope of the *lex rei situs* rule, as proposed in the current drafts of the Third Restatement. Perhaps the EU example will help the United States avoid that fate, by demonstrating that a strict and categorical *lex rei situs* rule for all issues related to immovable property is not inevitable, and that the Third Restatement's approach is, from this comparative perspective, very plausible. Meanwhile, in the EU context, the trend away from the *situs* rule entails challenges regarding the «property gap» in EU private international law and coherence among the relevant EU regulations[142]. These challenges could be addressed by a new EU regulation on choice of law for rights *in rem* in tangible movable and immovable property, perhaps along the lines of some of the academic initiatives we have highlighted[143].

It is hoped that this comparative investigation of problems of private international law relating to immovable property issues might benefit those

[141] See VON HEIN, J., *op. cit.,* pp. 143-144.
[142] See above section 3.2.4.
[143] *Ibid.*

working on these problems in both the United States and the European Union. Insofar as a comparative perspective can identify common ground, perhaps it might also contribute modestly to efforts to further harmonize private international law rules globally[144].

[144] The Reporters of the Third Restatement have noted this potential benefit. See, *e. g.,* Restatement of the Law Third, Conflict of Laws, Preliminary Draft No. 7 (Oct. 2021), Chapter 7, Introductory Note, Comment (noting that by taking an approach to choice-of-law for succession issues that is similar to the approach of the Succession Regulation and the Hague Succession Convention, the Third Restatement «may modestly foster more uniformity of choice-of-law approaches to issues about successions in international contexts and, in turn, help simplify estate planning and administration of estates in international contexts»).