

CONFLICTING RULES REGARDING PROPERTY AND REAL RIGHTS

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Abstract:

In the era of globalization and interconnectedness, international transactions and commercial relationships have become increasingly common. However, when it comes to property and real rights, conflicting rules often arise between different jurisdictions. The conflict rules regarding property and real rights in Romania are primarily governed by the provisions of the Romanian Civil Code. These rules determine the applicable law and jurisdiction in cases involving property and real rights with foreign elements. This article will focus on conflicting rules regarding property and real rights and will explore solutions to overcome these international legal divergences.

Keywords: *goods, real rights, private international law.*

The term "*goods*" is used in two distinct senses. In a narrow sense (*stricto sensu*), it refers to things that can be the subject of property rights and obligations, as well as intellectual creations and any form of energy, to the extent that they can be the objects of property rights and obligations. In a broad sense (*lato sensu*), "*goods*" encompass both things, intellectual creations, and any form of energy as objects of property rights and obligations, as well as property rights and actions relating to the goods mentioned in the narrow sense.

According to the Romanian Civil Code [1], the general principle is that the law applicable to property and real rights is the law of the country where the property is located, known as the *lex rei sitae* principle. This means that the rights and obligations arising from property and real rights are determined by the law of the country where the property is situated.

However, there are exceptions and special rules for certain situations. For example, the law of the country where the property is located may be disregarded if there is an agreement between the parties to apply the law of another country or if there are specific provisions in international treaties or EU regulations that dictate the applicable law. [2]

The conflict rules regarding property and real rights in the European Union (EU) are primarily governed by the private international law regulations established at the EU level. These regulations aim to harmonize the conflict of laws rules among EU member states to ensure consistency and legal certainty in cross-border situations involving property and real rights. [3]

The main regulation in this regard is the EU Regulation (EU) No 593/2008 [4], commonly known as the Rome I Regulation. This regulation sets out rules for determining the applicable law to contractual obligations, including contracts related to property and real rights.

According to the Rome I Regulation, the general principle is that the law chosen by the parties to a contract will govern the contractual obligations, including those related to property and real rights. If the parties have not made a choice of law, the regulation provides specific criteria to determine the applicable law, taking into account factors such as the characteristic performance of the contract and the habitual residence of the parties.

In addition to the Rome I Regulation, there are also specific EU regulations that address certain aspects of property and real rights, such as the Brussels I Regulation (recast), which governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters within the EU.

It's important to note that the conflict of laws rules within the EU are constantly evolving, and there may be additional regulations and case law that could impact the determination of applicable law in specific situations. Therefore, it is advisable to seek professional legal advice or consult the relevant EU regulations and case law for accurate and up-to-date information in a particular case.

Legal relationships concerning goods are governed by the law of the country where they are located. Therefore, the place where the goods are located serves as the connecting factor for these legal relationships. When applying the rule of *lex rei sitae*, which is recognized with certain nuances and variations in all legal systems, it is necessary to consider the different forms in which goods can be present. Hence, it is important to determine whether the good is considered individualized (*ut singuli*) or exists as a legal unity (such as the assets or business assets of a commercial company), whether the good is tangible or intangible, as the latter has different legal regimes.

Additionally, "special attention must be paid to the particularities that certain goods may have, such as vessels and aircraft in transit and those belonging to a foreign state." [5]

The determination of the applicable law to goods is an important aspect of private international law and involves establishing the legislation that governs the rights and obligations relating to goods in cross-border situations. There are different methods and criteria used to determine the applicable law to goods, and these can vary depending on the jurisprudence and legal system of each country.

The establishment of the legal regime of goods by the law of their location represents a universally accepted rule in all legal systems. However, given the distinct scope of application and interpretations provided, the rule does not have a uniform character.

Under our previous legislation, conflicts of laws regarding goods were regulated by a general norm. Movable goods were governed by the law of the domicile. This rule was formulated by the maxim *mobilia sequuntur personam*, meaning that movable corporeal goods of a person were considered to always be located at the owner's domicile.

Currently, the rule of *lex rei sitae* is provided for in the provisions of the Civil Code. According to Article 2613, possession, ownership rights, and other real rights over goods, including real security rights, are governed by the law of the place where they are situated or located, unless otherwise provided by special provisions.

The current regulation applies to both immovable property and movable property. Furthermore, the expression "place where they are located" is used for movable goods, while "place where they are situated" is used for immovable property [6].

For the application of the law of the location of goods, it is necessary, first of all, to consider whether the goods are regarded *ut singuli* (individually) or as a *universitas juris* (legal unity) or as a *de facto* unity, whether the goods are corporeal or incorporeal, and finally, the particular regime of vessels and aircraft in transit.

For the application of the law of the location of goods, it is necessary, first and foremost, to observe whether the good is regarded *ut singuli* (individually) or is seen as a *universitas juris* (legal unity) or as a *de facto* unity, whether the good is corporeal or incorporeal, and finally, the specific regime of vessels and aircraft in transit.

The law of the actual location of the asset regulates several aspects. They form the real status, which constitutes the content of the conflict rule *lex rei sitae*.

The nature of movable or immovable property is determined according to the law of the place where it is located or situated. In derogation from the rule of qualification according to *lex fori*, Article 2558 paragraph (3) of the Civil Code provides that these elements are subject to the law of the place's situation.

Regarding the notion of immovable property, the provisions of Article 2613 paragraph (2) of the Civil Code also include a legal qualification. According to the law, platforms and other durable installations for the exploitation of submarine resources located on the continental shelf of a state are considered immovable property.

Based on the regime of their legal circulation, goods can either be the subject of civil legal acts or not. Goods that are in commercial circulation move freely or under certain conditions. "If they are withdrawn from civil circulation, goods become inalienable". [7]

The law of the situation primarily regulates the right of ownership and other real rights over property, including the various forms of ownership rights, which are the main real rights. The law of the situation also governs, in particular, real guarantees, which constitute accessory real rights.

Regarding the modes and conditions of establishment, transfer, and extinction of real rights, a differentiation is necessary between specific (original) modes of acquisition or transfer of real rights and non-specific modes.

Specific or original modes of acquisition, transfer (occupation, accession, expropriation, acquisition by prescription, registration in the land register), and extinction (extinctive prescription, expropriation, requisition, confiscation) of real rights are subject to the law of the location of the property. Similarly, non-specific modes of acquisition and transfer (e.g., contract or will) of real rights are also subject to the law of the property's location. For example, aspects related to the real status concerning the conditions for the birth of a real right, the moment of transfer of ownership, and the assumption of the risk of the thing.

On the other hand, aspects that are not of a real nature are not governed by the law of the situation. They constitute limitations to the rule of *lex rei sitae*.

Regarding tangible movable property, a conflict of laws may arise due to a change in the connecting factor. This situation is resolved in accordance with the provisions of Article 2617 of the Civil Code. According to the text, the establishment, transfer, or extinction of real rights over a property that has changed its location is governed by the law of the place where it is located at the time when the legal fact that generated, modified, or extinguished the respective right occurred. Depending on the location of the property at the time of the legal fact, either the old law or the new law will be applied.

Another situation concerns movable property. The acquisition of a real right through prescription will be subject to the law of the state where the property was located at the beginning of the possession period established for this purpose. If the property has been brought to another state, where the duration of the prescription period is fulfilled, the possessor may request the application of the law of that state, provided that all conditions required by that law are met from the date of the property's relocation (Article 2616 of the Civil Code). Since prescription has retroactive effect, the law of the property's location at the start of the prescriptive period applies, i.e., the previous law. However, upon the possessor's request, the new law may also be applied, provided that the legal conditions are met.

The regime of formalities regarding property publicity is provided for in Article 2626 of the Civil Code. Additionally, Article 2621 letter d) and Article 2630 contain provisions regarding the forms of publicity for acts concerning real rights and guarantees over ships and aircraft, as well as movable mortgages.

The formalities for the enforceability of real rights against third parties are subject to the law applicable at the time and place of compliance. Since publicity measures involve the intervention of a public authority, the applicable law will be that of the country where the publicity is carried out. Therefore, the law of the place where the publicity form is fulfilled is identified with the law of the property's location.

The formalities of publicity concerning immovable property are subject to the law of the state where the immovable property is located. The same solution is accepted for the formalities of publicity with constitutive effects on real rights over immovable property, even if the legal basis for the birth, transfer, restriction, or extinction of the real right or guarantee was established by the application of another law.

Due to their specific nature or the position, they occupy, some goods are not subject to the law of their location. The following goods, to which another law will apply, are: means of transportation, goods in transit, goods belonging to a foreign state, claims, negotiable instruments, securities, intellectual property rights.

According to Article 2620 of the Civil Code, the legal regime of these goods depends on the purpose of the means of transportation.

For ships and aircraft, as stated in Article 2620(1)(a), the law of the flag they fly applies, known as *lex pavilionis* or *lex banderae*. Since it represents the nationality of the means of transportation, the law of the flag is applied as the *lex patriae*. This law can be easily known, it is stable, and provides reliable information about the legal status of ships and aircraft.

Considering that ships and aircraft can move from one place to another as movable property, typically and very quickly, if the law of their location were applied, their legal regime would change frequently in relation to the country they are in. The transfer of such goods from one owner to another would be complicated, and the security of legal transactions would be compromised. It would not be possible to secure loans or create mortgages on them if they were successively governed by the law of the country they are in, without considering the fact that there is no law of the location in the open sea. Only by subjecting ships to a stable and permanent law can the certainty of legal operations regarding them be ensured. In addition, it should be noted that ships and aircraft are goods of particular importance to the national economy, and therefore, the legal regime of these goods is not a matter of indifference to the state. "In general, systems of private international law acknowledge that ships and aircraft are governed by the law of the state under whose flag they navigate or the law of the state where they are registered". [8]

Res in transitu - goods in the course of transportation are subject, according to Article 2618 of the Civil Code, to the law of the state from which they were dispatched. Since these goods pass through multiple countries until they reach their destination, they could be successively subjected to different laws. During the transportation period, the goods can be sold, pledged, mortgaged, or be the subject of other legal acts. If the goods are represented by a negotiable instrument, the debtor can be changed simply by the delivery of the transport object. Avoiding complications and ensuring the certainty of legal

operations is achieved through a single law, with the law of the place of dispatch being known from the beginning and not changing during the transportation.

Goods belonging to a foreign state - in this situation, the principle of state immunity applies, [9] and the status of the goods is governed by the law of that state. "State immunity and its property" refers to the principle that a state, in terms of its legal status and its property, cannot be subjected to the law or jurisdiction of another state. This situation also applies to most international organizations. Goods belonging to a foreign state cannot be subject to enforcement measures, requisitioned, or seized. Jurisdictional immunity [10] can be waived or modified through specific regulations contained in international treaties.

The securities issued by commercial companies are represented by titles. The most important securities are shares and bonds [11]. They certify complex rights that arise from being a member of a collective entity. In the matter of securities, the provisions of the Civil Code address the following aspects: the applicable law to the issuance of securities, the applicable law to the transfer of securities, and the applicable law to the representative title of the goods.

According to Article 2622(1) of the Civil Code, the issuance of shares or bonds, whether nominative or bearer, is subject to the law applicable to the organic status of the issuing legal entity.

The applicable law to the issuance of securities encompasses the following areas: substantive and formal conditions of shares and bonds, the substantive conditions and effects of the subscription contract between the issuing company and the titleholder. The law of the issuing company will also determine the rights of shareholders and bondholders. However, in certain cases, the issuance of the title has a special nature, and the formalities of publicity are governed, for example, by the law of the place of publication, which is the place of issuance of the title. "The accelerated development of commercial relations, the need for rapid interconnection and the collection of information in real time are realities of recent years that have proved the need for digitization, simplification of procedures in commercial matters and more". [12]

Rights over works of intellectual creation - in this regard, there are international regulations that have established a uniform law, both regarding the legal status of

foreigners and regarding conflicts of laws in this field (copyright, industrial property rights, designs, models, and trademarks).

Conclusions

The conflict rules regarding property and real rights in Romania represent an important component of the legal system, particularly in the context of international relations. By adopting clear approaches and specific solutions, the aim is to ensure a fair and coherent resolution of legal divergences in these matters. It is essential for Romanian legislation to be in line with international standards and developments in the field of private international law in order to facilitate cross-border commercial relationships and investments in a predictable and equitable manner.

References:

- [1] Law no. 287 of July 17, 2009, regarding the Civil Code, with subsequent amendments and supplements, rectified in the Official Gazette no. 246/29 Apr. 2013.
- [2] Emilian Ciongaru (2020). *The Science of Law in Postmodernism Period - General Considerations*. In International Journal of Research in Humanities and Social Studies Volume 7, Issue 10, 2020. p.15.
- [3] Emilian Ciongaru. (2016). *Historic evolutions of the effects of the European Union political instruments in the Romanian legal order – effects of the mechanism for cooperation and verification*. In Volume 6, Issue 2, December 2016. Juridical Tribune. p. 91.
- [4] 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)
- [5] Ion Filipescu, Andrei Filipescu, *Treaty of Private International Law*, Universul Juridic Publishing House, Bucharest, 2008, p. 298.
- [6] Ioan Macovei, *Private international law*, Universul Juridic Publishing House, Bucharest, 2017, p. 169.
- [7] Nicoleta Diaconu, *Private international law*, Universitara Publishing House, Bucharest, 2013, p.263.
- [8] I. Filipescu, A. Filipescu, *idem*, p. 308
- [9] Gabriel Micu, *Diplomatic Law*, Pro Universitaria Publishing House, 2017, p. 187
- [10] Gabriel Micu, *idem*. p. 191
- [11] Cristian Drăghici, *Some considerations on free movement of capitals*, Journal of Law and administrative sciences, no. 16/2021, Ploiesti, p. 148
- [12] Cristian Drăghici, *Some considerations on digital tools in the field of company law*, Journal of Law and Administrative Sciences, no. 19/2023.

Bibliography

- Law no. 287 of July 17, 2009, regarding the Civil Code, with subsequent amendments and supplements, rectified in the Official Gazette no. 246/29 Apr. 2013.
- 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)
- Emilian Ciongaru. (2016). *Historic evolutions of the effects of the European Union political instruments in the Romanian legal order – effects of the mechanism for cooperation and verification*. In Volume 6, Issue 2, December 2016. Juridical Tribune
- Ion Filipescu, Andrei Filipescu, *Treaty of Private International Law*, Universul Juridic Publishing House, Bucharest, 2008.
- Ioan Macovei, *Private international law*, Universul Juridic Publishing House, Bucharest, 2017.
- Nicoleta Diaconu, *Private international law*, Universitara Publishing House, Bucharest, 2013.

Emilian Ciongaru (2020). *The Science of Law in Postmodernism Period - General Considerations*. In International Journal of Research in Humanities and Social Studies Volume 7, Issue 10.

Gabriel Micu, *Diplomatic Law*, Pro Universitaria Publishing House, 2017

Cristian Drăghici, Some considerations on digital tools in the field of company law, Journal of Law and Administrative Sciences, no. 19/2023. Ploiesti.

Cristian Drăghici, *Some considerations on free movement of capitals*, Journal of Law and administrative sciences, no. 16/2021, Ploiesti.