Queen Lex Rei Sitae – Off with her head?

Editorial

Bram Akkermans and Caroline S. Rupp*

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The *lex rei sitae* is generally considered the cornerstone of international property law. The basic concept behind it, namely that each thing is to be governed by the legal rules of the country it is situated in, is one of the easiest rules of private international law to grasp, or at least seems so at first sight. The *situs* rule itself is accepted as the foundation of international property law by nearly every legal system, making it the private international law rule with probably the highest degree of consensus world-wide. The undisputed reign of this queen of private international law rules has been unbroken from the beginnings of modern private international law to the end of the 20th century. The widespread acceptance of the *lex rei sitae* has limited the critical debate on its flaws and merits. Many jurisdictions developed exceptions for specific situations (e.g. for goods in transit), but the supremacy of the *situs* rule as the underlying concept of international property law was never questioned seriously.

The image of the *lex rei sitae* as the ideal private international law rule for all property issues truly came under scrutiny with the turn of the 21st century. With the dawn of the new millenium, private international law has started to experience a general shift in its paradigms: nationality is increasingly replaced by habitual residence as a connecting factor for personal matters like family or succession law, the recognition of rights acquired under a foreign legal system is coming more and more to the forefront. In today's world – especially within the European Union – people and things move across borders more frequently than ever before, information flows freely and easily, and the significance of territorial sovereignty is viewed ever more critically. Under such circumstances the strict application of the *situs* rule seems less self-evident and less ubiquitously suitable than some years ago. This is not only mirrored in the increasing number of exceptions from it, such as the Dutch rules that offer a limited choice of law for

***Corresponding author: Bram Akkermans,** Associate Professor at the Maastricht European Private Law Institute (MEPLI), Faculty of Law, Maastricht University,
E-Mail: b.akkermans@maastrichtuniversity.nl
Caroline S. Rupp, Junior Professor, Faculty of Law, University of Würzburg, Germany,
E-Mail: rupp@jura.uni-wuerzburg.de

goods that are to be exported.[1] In addition, these new developments have instigated a debate on the advantages and disadvantages of the *lex rei sitae* as a general rule and potential alternative models for international property law. This debate has been contributed to from various angles in previous issues of this journal.[2]

This special issue of the EPLJ shines the spotlight on the *lex rei sitae* – its tradition, its current state, its interplay with other legal rules and its potential future. It has its roots in a panel discussion "Beyond the *lex rei sitae*?" that took place in September 2016 at the Max Planck Institute for Comparative and International Private Law in Hamburg. As a kick-off event for the 7th Young Property Lawyers Forum, some of the EPLJ's editors and other eminent scholars kindly agreed to present and debate their thoughts on the *situs* rule, its traditional role as an unalterable principle and potential developments and alternatives. Their lively discussion highlighted some of the most urgent issues the *lex rei sitae* faces today. It informed many of the discourses of the following YPLF conference as many of these questions are not limited strictly to the *lex rei sitae*, but reflect topics and developments concerning the whole of (international) property law.

The debate continued after these events and this EPLJ special issue reflects its current state. Its contributions approach the *situs* rule from different angles and explore its function in various contexts.

Wian Erlank highlights the issues that arise when the location of the object in question cannot be determined with certainty: how can the *lex rei sitae* function in cyberspace? Its application regarding digital and virtual *res* encounters specific difficulties, both regarding jurisdiction and applicable law. A variety of these – for the time being, unsolved – questions are posed in the contribution, along with potential approaches to an updated *lex rei sitae digitalis*.

Although it has not (yet) been the focus of EU legislation as such, the *lex rei sitae* is playing an increasingly important role in the context of EU private (international) law. Property and property law are closely connected to the fundamental freedoms guaranteed by EU law. Is the *situs* principle compatible with the internal market the EU strives to create, or does it need to be replaced? In recent years, it has been suggested that the tendency of EU PIL towards choice of law should be extended to encompass international property law. Eva-Maria Kieninger reflects critically on the arguments in favour of party autonomy, analyzing its

1 Article 10:128 Burgerlijk Wetboek (Dutch Civil Code).

2 Sjef van Erp, The new Succession Regulation: The *lex rei sitae*rule in need of a reappraisal?, EPLJ 2012, 187 et seq.; George Gretton, Quaedam Meditationes Caledoniae: The Property/Succession Borderland, EPLJ 2014, 109 et seq.; Jan von Hein, Conflicts between International Property, Family and Succession Law – Interfaces and Regulatory Techniques, EPLJ 2017, 142 et seq.

relationship with the fundamental freedoms guaranteed by the EU, the role an asset's location plays in determining the interests of the parties involved, and the ties between dispositions and other property and insolvency law mechanisms.

The implications of the European integration process on the *lex rei sitae* are thoroughly scrutinized by Bram Akkermans. His contribution questions whether the fundamental freedoms of the EU Internal Market bring the traditional *situs* rule into trouble, and looks at the principle of mutual recognition, choice of law, and EU citizenship as alternative approaches in the European spirit.

As property law can only rarely be viewed on its own, but is frequently closely connected to other areas of law, the *situs* rule often interlinks with "neighbouring" PIL rules, some of which have already been harmonized by EU regulations. Taking German PIL as an example, Caroline Rupp traces the impact of Europeanization on the relationship of the *lex rei sitae* with succession and matrimonial property law and the potential consequences following from the ECJ's recent *Kubicka* judgement[3] for delineating the borderline between property and other matters and the future of the *lex rei sitae*.

While the articles in this special issue can only discuss some of the many questions and challenges the *lex rei sitae* faces, it illustrates the multitude of issues to be considered and the variety of approaches and opinions in creating an international property law fit for the 21st century. One of the main tasks of this ongoing debate will be to re-evaluate the *lex rei sitae*: it certainly has lost its position as a proud and unchallenged queen – but should it be honored as a dowager or led to the scaffold of the guillotine?

We are very grateful to the Board of Editors of the EPLJ for the chance to edit this special issue and welcome all remarks, questions and further contributions to the debate.

3 Jan Peter Schmidt, Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (Kubicka)), EPLJ 2018, 4 et seq.