Lex Rei Sitae and the Internal Market: towards mutual recognition of property relations

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1. Introduction

For as long as our modern legal systems exist they have operated on the basis of the *lex rei sitae* rule. As an expression of the principle of territoriality, the law of a country applies to all objects that are situated on the territory. In domestic cases, of course, the regular rules apply, but in international disputes a legal system uses its own rules to be able to apply its own domestic law.[1] The doctrine of *lex rei sitae* becomes relevant in a situation in which two legal systems come into contact with one another. A conflict of laws or *conflit mobile* arises when the law of one country is to be applied in the law of another country.[2] Over the last centuries an intricate system of rules has developed with which private international lawyers resolve conflict of laws by pointing towards one of these legal systems as the applicable law. They do so – at least in theory – blindfolded, so that they cannot favor one legal system over the other. Instead of choosing one system over another, a set of impartial and objective rules is used to determine what legal system is to be applied.[3]

1 See Bram Akkermans and Eveline Ramaekers, *Lex Rei Sitae* in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 125 and the literature mentioned there.

2 Hessel E. Yntema, 'The Historic Basis of Private International Law', 2 *American Journal of Comparative Law* 297 (1953), p. 311 *et seq*

3 J.E.J.Th. Deelen, *De blinddoek van von Savigny* (Amsterdam: Scheltema & Holkema 1966). See also J.E.J.Th. Deelen, *WPNR* 5571 (1981), p. 22. L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 9th edn. (Den Haag: Kluwer, 2008), p. 4; P.H. Neuhaus, 'Abschied von Savigny?', *Rabels Zeitschrift ausländisches und internationales Privatrecht* (1982), p. 4; Marc-

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Lex rei sitae, it is important to note, is not just an expression of territorial sovereignty, but, especially following the work of Ernst Rabel, should be seen as a rule that facilitates trade by connecting an object to the place where it has its physical and economic ties.[4] It is therefore traditionally not seen as a protective rule, but rather as a facilitative rule that helps ensure efficient trade. The rule refers to rules of national property law which are usually mandatory rules and as such are considered rules of public policy.[5] The dynamic of the lex rei sitae rule is therefore not only to mandatorily refer to a particular legal system, but also to mandatory subtantice rules that will follow. There is hardly room for influence in its application.

Private international law theory is, however, less facilitative in practice. In the European Union there is an internal market in which there is free movement of goods, persons, services and capital. This internal market is governed by principles and theory that are very different from the principles and theory underlying private international law.[6] EU law works on the basis of a market functionalism that seeks to allow legal relations to remain to be governed by their country of origin.[7] Property private international law rules are aimed to have legal relations governed by the host country. This tension between two opposite viewpoints is part of a larger tension between the unifying nature of EU Law and the procedural autonomy of the EU Member States.[8] Rather than having EU law decide what is to

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Philippe Weller, *Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der 'klassischen' IPR-Dogmatik?*, Praxis des Internationalen Privat- und Verfahrensrecht (IPRAX) (2011), p. 430; H.L.E. Verhagen, 'Kritische beschouwingen over het wetsontwerp voor een "Wet conflictenrecht goederenrecht"', 6711 *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* (2007).

4 Ernst Rabel, *The Conflict of Laws*, Volume IV (Ann Arbor: University of Michigan Law School 1958), p. 30; H.L.E. Verhagen, 'Kritische beschouwingen over het wetsontwerp voor een "Wet conflictenrecht goederenrecht", 6711 *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)* (2007). See, Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 127–128.

5 See Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia, 2008).

6 Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia 2008), p. 477 et seq., H.L.E. Verhagen, 'The tension between party autonomy and European Union law: some observations on Ingmar GB ltd. V Eaton Leonard technologies Inc', *International and Comparative Law Quarterly* (2002), p. 135 *et seq*.

7 See Bram Akkermans, The use of the functional method in European Union property law, in European Property Law Journal (2013), p. 95 *et seq*.

8 See, on this, Maciej Szpunar, Procedural Autonomy and Private Law, Zeitschrift für Europäisches Privatrecht (ZEuP) (2018), p. 1 *et seq*.

be the applicable law, in general private international law cases, the host country, i.e. the *lex fori*, decides this by itself. In the past decade, however, many private international law rules have become EU law to centralise the rule deciding on applicable law and jurisdiction. The EU has therefore claimed competence in the area of applicable law and jurisdiction. However, when property law has been concerned, mostly connection has been sought, also at the EU level to the traditional *lex rei sitae* rule. In practice however, also an EU *lex rei sitae* rule turns out to be difficult to apply. The best example of this is perhaps the EU Succession Regulation that allows one single legal system to be applied to an entire cross-border succession case.[9]

In this contribution, I explore the compatibility between the nationally oriented rule of *lex rei sitae* (section 2) and the principles underlying the EU internal market (section 3). I will investigate alternative connecting factors (section 4) before I come to my conclusion that the *lex rei sitae* cannot be maintained now that there are suitable alternatives (section 5).

2. *Lex rei sitae*

The law of property is traditionally perceived as national law. Apart from a few international instruments, such as the Cape Town Convention on international security rights on planes, trains and space shuttles, as well as some EU legislation, the law of property is national law.[10] Property law provides rules on what property rights can exist and provides an operating system in which these rights can be created, acquired and terminated.

When property law systems come into contact with each other, usually a conflict between these arises. Nationally developed and oriented rules are not designed to deal with rules that are equally developed and oriented, but originate from a different national perspective. The rules of property law, as well as *lex rei sitae* are therefore a manifestation of a nationalist design principle. However, there is a choice when it comes to how to deal with foreign rules that do not necessarily favor the own regime: the traditional method is to favour the own national rules over those of another country. This is the primary aim of the current international property law rules. These rules will always prefer the applicable

9 See below in section 4, Case C-218/16 of 12 October 2017 *Kubicka v Przemysława Bac (Notary)* 2017/755.

10 See Sjef van Erp and Bram Akkermans, European Union Property Law, in Christian Twigg-Flesner (Ed.), The Cambridge Companion to European Union Private Law (Cambridge: Cambridge University Press, 2010), p. 173 *et seq*.

law/rules of the own legal system over that of a foreign system, hardly without any exception.[11] However, it is also possible to take the opposite as the starting point: once a (property) right is validly created under the law of one country, it can be recognised and applied as such in any host country. The latter approach is not part of leading private international law theory, but has been discussed by private international lawyers for a long time under the name vested rights theory.[12]

The *lex rei sitae* rule is complementary to the rules of property law. It functions in a complex system of rules of private international law (PIL) to determine first *if* it is to be applied and then *how* it is to be applied. An example can illustrate this.[13] A has a car in Germany and drives his car into France, where the car is stolen by T. A finds the car in the hands of T and wishes to use his action for revindication of the car. A's ownership of the car is a right of ownership under German law, but the car is situated in France. What legal system governs the action for revindication?

In order to solve this question, we must first look at French law as this is the legal system in which the action for revindication is brought. French law will claim jurisdiction and therefore French PIL rules will apply here. Second, the French legal system must establish that A has a valid property right, i.e. that he validly acquired a right of ownership of his car. French law may apply the *lex fori* and pretend the car as in France at this moment and apply French law or the *lex rei sitae* rule will determine the applicable law at the moment of acquisition of the right of ownership. As A acquired ownership of his car in Germany, French law points to German law as the applicable law for the acquisition of the right (the *lex causae*). The outcome of this investigation should be a classification of the right of A as a property right. If not, another rule of private international law must be applied. If so, a property relation is discovered and recognised.[14] The effect, however, is not that of applying the property right in French law, rather a conflict of laws arises by the recognition of the foreign property right: the German right of ownership

11 One, well known exception, comes from Article 10:127 Dutch Civil Code on the proprietary effects of a retention of title clause.

12 See, on this, Ralph Michaels, 'EU Law as Private International Law? Reconceptualising the country-of-origin principle as vested-rights theory', *Journal of Private International Law*, 2/2 (2006), 195–242, p. 199 *et seq*.

13 This example was also used in Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 123 *et seq*.

14 See, on the difficulty of this terminology, Ralph Michaels, 'EU Law as Private International Law? Reconceptualising the country-of-origin principle as vested-rights theory', *Journal of Private International Law*, 2/2 (2006), 195–242, p. 199, 204–205.

conflicts with the French system of property law that does not know a German property right. The *lex rei sitae* rule here plays a decisive role and will point to French law as the car is currently located on French territory. As a result French law can take preference over German law. The *conflit mobile* is then subsequently solved in French law by transforming the German property right into a national property right, in this case a French right of ownership, allowing A to use a French action of revindication of his car against T. French law, as the receiving country, has other options. It can also decide to recognize the foreign property right as such, so to apply German law on French territory, or it can refuse recognition, meaning that under French law A is without any property right. Especially the latter is considered a failure of the rules of private international law.[15]

The approach in which a foreign right is recognised as such is also known as the doctrine of *droits acquis* or the vested rights doctrine.[16] The vested rights doctrine is a – at the moment mostly – rejected theory in modern private international law, but one that assumes that rights are recognised on the basis that they have lawfully come into existence under the law of another country.[17] Applied to the law of property that would mean that property rights are recognised based on the fact that they have been acquired or created under a foreign legal system and then subsequently applied in the host legal order.

Three approaches therefore are possible, which can be classified as follows: (1) the vested rights approach refers to the idea that you apply the law of the country of origin, (2) the transformation approach in which the receiving legal system takes preference, but gives effect to the foreign legal relation by transforming it into the closest national equivalent and (3) the refusal to recognize and therefore give effect to a foreign legal relation.[18]

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15 Hessel E. Yntema, 'The Historic Basis of Private International Law', 2 *American Journal of Comparative Law* 297 (1953), p. 299 *et seq.*; L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 9th edn. (Den Haag: Kluwer, 2008), p. 14 *et seq*.

16 Ralph Michaels, 'EU Law as Private International Law? Reconceptualising the country-of-origin principle as vested-rights theory', *Journal of Private International Law*, 2/2 (2006), 195.

17 The theory of vested rights is gaining grounds in family law in respect to the recognition of names, introduced in cases such as Case C-353/06, *Grunkin and Paul* [2008] ECR I-07639, see Ralph Michaels, 'EU Law as Private International Law? Reconceptualising the country-of-origin principle as vested-rights theory', *Journal of Private International Law*, 2/2 (2006), 195, p. 205 *et seq*, Jan-Jaap Kuijpers, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 66 *et seq*.

18 See, on this classification, Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 130.

The doctrine of *lex rei sitae* is therefore more than a simple application of the own national aw, it is part of a complex set of questions that eventually lead to the recognition of a foreign property relation and the application of the national rules of property law.[19] The rules of PIL themselves do not lead to the actual solution of the matter, but merely point towards the substantive law that will do so.[20]

3. *Lex rei sitae* and the EU Internal Market

The internal market in the EU, also referred to as the common market, is based on very different principles. In 1979 the Court of Justice of the European Union (CJEU), in its famous *Cassis de Dijon* judgment dealt with the fundamental issue underlying the internal market.[21] The case dealt with a producer of creme de cassis, blackcurrant liqueur, from France wanting to import his products to into Germany to be sold there. The liqueur was famously produced with a 24 % alcohol percentage, common and completely valid under the applicable rules of French law. In German law however, the appropriate legislation required an alcohol percentage of a minimum of 40 % for a product to be sold as liqueur on the German market. Following this, the import of the French products was prohibited. The import restriction was brought to court and a preliminary reference was brought to the CJEU. The CJEU responded with a principled judgment in which it explores the principle of mutual recognition.[22]

The principle of mutual recognition is one of the fundamental principles of the internal market.[23] It traditionally relates to the free movement of goods and concerns the idea that a product lawfully produced in one Member State, must be recognised by other Member States. The core of this idea is that a receiving

19 See, for a general scheme (flowchart) on the workings of the *lex rei sitae* rule as well as a comparative analysis, Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 131.

20 See also, Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae in Perspective: national developments of a common rule?, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 123 *et seq*.

21 Case 120/78 Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649 (Cassis de Dijon).

22 Catherine Barnard, The substantive law of the EU. The Four Freedoms (Oxford: Oxford University Press, 2016), p. 95 et seq.

23 Paul Craig and Grainne de Burca, EU Law. Text, Cases and Materials, 6th edition (Oxford: Oxford University Press, 2015), p. 713.

Member State cannot impose rules on the product that fulfill the same purpose as the rules that the product has already complied with in the original Member State.[24] This idea is also known as the prevention of double burdens. The internal market is, after all, one market and once a product lawfully enters that market, it should not be made to fulfill the different rules. That applies to the content of blackcurrant liqueur, but also to the packaging of butter, or the fat content of cheese.[25]

Also in relation to the other freedoms, the idea of mutual recognition applies. For example, a legal person with limited liability, lawfully created in one Member State, must be recognised in other Member States and able to move its seat to another Member State without having to fulfill additional requirements. So a Dutch *Besloten Vennootschap (BV)* can also establish itself in Germany or France.[26] The same applies for a natural person that relocates to another Member State. A double last name acquired on birth in once country must also be recognized by another country.[27]

The case law of the CJEU in relation to legal persons is worth special consideration as the recognition of foreign limited liability company forms was not always automatic. Under rules of German private international law, in force at the time, limited liability could only be awarded to a German company type. Hence, foreign companies needed to change their statute to a German limited liability company form if they wished to continue to enjoy limited liability status. This theory, known as the real seat theory, was the subject of investigation of the CJEU. In its judgment, the CJEU held that the real seat theory, which referred to German company law as the sole applicable law for companies was not in conformity with the free movement of persons.[28] The incorporation theory, which recognizes

24 See Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (Text with EEA relevance).

25 See Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 09361, Case C-286/86 *Ministère public v Gérard Deserbais* [1988] ECR 04907. See, for an overview of the most important cases, Catherine Barnard, The substantive law of the EU. The Four Freedoms (Oxford: Oxford University Press, 2016), p. 33 *et seq*.

26 See Jan-Jaap Kuijpers, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 66 *et seq*.

27 See Case C-353/06, *Grunkin and Paul* [2008] ECR I-07639.

28 Case C-208/00, *Überseering* [2002] ECR I-9919, Case C-167/01, *Inspire Art* [2003] ECR I-10155, and Case Case C-216–06 *Cartesio* [2008] ECR I-09641. See, Jan-Jaap Kuijpers, Cartesio and Grun-

foreign company forms if they have been lawfully created in another country, was therefore to prevail.

An interesting parallel to *lex rei sitae* can be made in this respect. Also there a legal relation, lawfully created in one Member State, can only produce effects under the law of another Member State if the right is transformed to a host-country equivalent. In that way, *lex rei sitae* operates in a similar manner as the real seat theory in company law. Both conflict rules also point to an applicable closed system, one of company forms with limited liability, one with property rights.[29]

However, there are also significant differences. A company with limited liability is a legal person and as such can directly profit from the rules on free movement of persons. To move a company, much more is needed than a mere transfer of a movable object across the border. A property right is a legal relation created on an object, and therefore has a much more indirect link to EU law. The object on which the property right is created can be a movable object, in which case the free movement of goods can apply, or an immovable object, in which case the free movement of capital may apply.

Also in EU law, in other words, a connecting factor is needed to establish whether EU law applies and, if so, what part of EU law is to be applied. A double connecting factor is therefore perhaps a more accurate description: (1) does EU law apply to the situation, most often because it concerns a cross border aspect or at least a potential restriction to the access of the market of a Member State, and (2) which of the four freedoms (goods, persons, services and capital) does the case concern.

At the same time, these EU connecting factors are different from the traditional PIL factors, that focus on the application of the own system only. Not only because they take precedence over the national factors, but also because the context in which the EU factor exists is an EU market functionalism, whereas the national factors are aimed at maintaining national internal doctrinal coherence.[30]

Within the EU, Member States have a freedom to give shape to their own legal system. The principle of procedural autonomy of the Member States seeks to

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kin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 70 *et seq*.

29 Jan-Jaap Kuijpers, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 71 *et seq*., Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia, 2008), p. 502 *et seq*.

30 See, Bram Akkermans, The use of the functional method in European Union property law, in European Property Law Journal (2013), p. 95 *et seq*.

ensure that. At the same time, there is also a duty of sincere cooperation, providing the outer limit within which the national procedural autonomy is to be exercised. That does not only apply in general, but also applies to matters of property law. This perhaps becomes most clear in the case law of the European Court of Justice relating to Article 345 TFEU.

Article 345 TFEU famously states that the 'treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. The article has been subject to a long debate amongst academics on whether or not this means that EU law cannot deal with property law.[31] The Court of Justice has provided clarity to the debate by clearly indicating that although, in the absence of EU legislation, Member States are free to give shape to their systems of property law, they must do so in the context of the rules governing the EU internal market.[32] With that, EU law clearly provides the playing field for national private law.

Lex rei sitae is a good rule that can exist in national private international law and national property law, but when the application of the rule leads to a market-access problem in respect to the application of EU internal market law, national law, including *lex rei sitae* must make way for EU market functionalism. The result is not the application of the law of the receiving Member State but – if not justified by an imperative reason – a forced recognition, as well as application, of the foreign legal relation.[33]

The result of this is a legal transplant, or perhaps in Gunter Teubner's terminology a legal irritant, that is difficult to accommodate by the receiving legal system.[34] It is precisely because of this that the *lex rei sitae* rule exist. EU legisla-

31 Bram Akkermans and Eveline Ramaekers, Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations', *European Law Journal*, 2010 (16/3), p. 292 *et seq.*, Fernando Losada, Teemu Juutilainen, Katri Havum and Juha Vesala, Property and European Integration: Dimensions of Article 345 TFEU', Tidskrift utgiven av Juridiska föreningen i Finland, 2012, p. 203–224, Peter Sparkes *et al*, *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Report to the European Parliament PE 556.936, available through http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556936/IPOL_STU(2016)556936_EN.pdf.

32 See Joined Cases C-105/12, C-106/12 and C-107/12, Staat der Nederlanden v Essent and others [2013] 2013/677, Joined Cases C-52/16 and C-113/16 of 6 March 2018, SEGRO Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal [2018] not yet reported.

33 Of course, the actual effect of the case depends on the case-specifics and of the interpretation by the national court that started the preliminary reference procedure. At the same time, there is *acte clair* effect of the judgment of the CJEU. See, on this, Paul Craig and Grainne de Burca, EU Law. Text, Cases and Materials, 5th edition (Oxford: Oxford University Press, 2011), p. 456–458.

34 Michele Graziadei, Comparative Law as the Study Transplants and Receptions, in Matthias Reimann and Reinhard Zimmermann (Eds.), Oxford Handbook of Comparative Law (Oxford:

tion dealing with private international law therefore traditionally excludes property law from its scope by directly referring to the *lex rei sitae*.[35] The idea behind this is that parties may be able to determine the applicable law to their affairs, but only in respect to those aspects that are dealt with by the specific legal instrument authorizing them to do so. The Rome I Regulation therefore allows parties to choose the applicable law to their contract, but not to the property effects resulting from that contract.[36] A reference to the *lex rei sitae* refers the matters clearly to the laws of the Member States.

This is different in newer EU private international legislation. The EU Succession Regulation does not hold such a *lex rei sitae* reference and instead introduces a single regime that will apply to the entire scope of application.[37] Also here, restrictions are made, such as the nature of rights *in rem* and matters of land registration, but the general principle of *lex rei sitae* becomes of a secondary nature.[38] The same applies to the Regulation on Matrimonial Property Law.[39] In these Regulations, EU citizenship has become a leading principle underlying the allocation of the applicable law and has replaced the traditional territorial connection. These EU private international law regulations are intended to simplify legal matters for EU citizens. The EU Succession Regulation states to this effect in its 7th consideration:

Oxford University Press, 2006), p. 441 et seq., and Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergence, in The Modern Law Review (1998), p. 11 *et seq*.

35 For example Article 11 Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 8 and especially Article 24 Regulation 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).

36 See Recital 27 and Article 4(1)(c) Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

37 Article 23(1) of Regulation 650/2012 of the European Parliament and of the 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 (EU Succession Regulation) states that 'The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.'

38 Secondary in the sense that *lex rei sitae* is used to supplement a choice of law or jurisdiction, but is not the primary conflict rule.

39 See Article 21 of Council Regulation 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, which states that 'The law applicable to a matrimonial property regime pursuant to Article 22 or 26 shall apply to all assets falling under that regime, regardless of where the assets are located.'

> 'The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.'[40]

By connecting the applicable law (and jurisdiction) to the citizen, rather than to the legal system, these EU Regulations are returning to a personal- rather than territorial foundation.[41] No free choice of law, as these legal instruments are not just dealing with rights with effect *inter partes*, but with effect *erga omnes*, but a restricted choice instead. The applicable law determines not only the content of these rights, but also the way in which the effect plays out, for example in the ranking of property rights in regular property law, in marital property law, insolvency law or in the law of succession. By connecting a legal system to a specific person, for example because of nationality or place of residence, a limited freedom is created that would not exist in a territorial model.[42]

Member States have traditionally claimed the full and unrestricted right to deal with property relations on their territory. Although there are theories in private international law that bring the focus away from sovereignty and territoriality to the fostering of trade and to the economic ties an object will have to its location, in the context of EU law these seem weak arguments. In a functional approach the effect of the provision is of importance, not it's purpose.[43]

If the connecting factor that decides on the applicable law is no longer the economic ties of the object, but rather the economic ties of the person holding the object, such as is the case with the EU Succession Regulation, the ideas at the

40 See, for considerations of a similar nature, considerations 8 and onwards of Council Regulation 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.

41 Marc-Philippe Weller, Anknüpfungsprinzipien im Europäischen Kollisionsrecht: Abschied von der 'klassischen' IPR-Dogmatik?, Praxis des Internationalen Privat- und Verfahrensrecht (IPRAX) (2011), p. 431, Hessel E. Yntema, 'The Historic Basis of Private International Law', 2 *American Journal of Comparative Law* 297 (1953), p. 305 *et seq*., Bernard Audit, Droit international privé, 5th edn. (Paris: Economica 2008), n. 161, p. 137.

42 Additional provisions on third party protection are therefore needed, which are also offered by both Regulations (Article 69 Succession Regulation and Article 28 Matrimonial Property Regimes Regulation).

43 Bram Akkermans, The use of the functional method in European Union property law, in European Property Law Journal (2013), p. 95 *et seq*.

foundation of *lex rei sitae* seem unnecessarily complications. They are, after all, remains of a world that was organized in a very different manner.

This misfit between *lex rei sitae* and these EU factors is due to the fundamentally different starting points on which these are based. Moreover, this misfit is also very strongly connected to the way in which the European integration process is perceived. Does the primacy lie with the protection of the integrity of the legal systems of the Member States or with the idea of establishing and further completing an EU Internal Market. In case of the former, the host country principle would apply, in case of the latter it seems much more logic to connect to the vested-rights theory.[44]

When, to provide an example, a right of usufruct lawfully created over money (cash) under Dutch law, with permission to use the money, and the money is brought to a holiday home in France, the right of usufruct will become governed by French law. Suppose there is conflict in the family and one of two children holds the right of usufruct over the money, but the other child objects to this and takes both parent and the child with the right of usufruct over the money to court. The *lex rei sitae* rule will apply as we are dealing with a property right and both a French and a Dutch court will point to French law as the applicable law as the money is physically located in France. The Dutch right of usufruct will have to be transformed into a French law equivalent. However, French law does not recognise the power to consume the objects under usufruct and will have to (1) transform it into a French right of usufruct without consumption power, (2) transform it into a quasi-usufruct, which is a transfer of ownership with a duty to return objects of a similar value at the end of the existence of the property right, or (3) recognize a French right of usufruct *with* power of consumption. The second option seems standard practice is France.[45]

In the first two situations, either the person holding the right of usufruct will lose part of the right or the bare owner will lose the right of ownership: a restriction to the access of the French market seems, at least potentially, evident.[46] The much more interesting question is the ground for justification offered by the

44 See Ralph Michaels, 'EU Law as Private International Law? Reconceptualising the country-of-origin principle as vested-rights theory', *Journal of Private International Law*, 2/2 (2006), 195, p. 205 *et seq*.

45 Maarten Jan van Mourik, Het erfrecht bij versterf: de wettelijke verdeling, in MJA van Maurik *et al*, Handboek Erfrecht (Deventer: Kluwer, 2011), p. 56 *et seq*. French law operates its own systematics in Articles 912 *et seq*. C.Civ. See Cass. civ. I, 21 March 2000, D.00.539, Bernard Audit, Droit international privé, 14th edition (Paris: Economica, 2006), p. 97, p. 718 *et seq*., In context of Regulation 650/2012, see consideration 54 of that Regulation.

46 There is no *de minimis* requirement for the application of Article 34 TFEU, but see Case 69/88, Krantz v Ontvanger der Directe Belastingen [1990] ECR I-583.

French as well as the proportionality test with which this ground for justification will be scrutinised.

Under French law, which uses a consensual system to create property rights, the rules of property law are of public policy.[47] These rules are of public policy as they provide the outer limits to the freedom of contract: when parties seek to create a limited property right, they must therefore contract with each other within the limits provided by the mandatory rules of the legal system. Also in private international law this is relevant as the internal coherence of the French legal system is at stake. It is very likely, therefore, that public policy would be the primary ground for justification. As this is a situation that applies to all situations alike regardless of where the property right originates, additional grounds for justification that can be brought under the case law of the CJEU. These could be the internal coherence of the legal system or the protection of creditors.

All of these will be held to the proportionality test, which is to be decided on a case by case basis. This test comprises two parts, one of necessity and one of suitability. The CJEU will look at whether the loss of a part of the property right (under option 1) or an entire property right (under option 2) could have been prevented by a less far reaching solution, and that no other less restrictive solution would have been possible. Option 3, i.e. the recognition of a French right of usufruct with power to consume, provides such an option. Of course, that would mean that non-French nationals would have more possibilities than French nationals that must adhere to the French *numerus clausus* of property rights, but such cases – known as reversed discrimination – are generally accepted by the Court. It does therefore not seem likely that such a situation, when properly considered in the perspective of less far-reaching effects than a refusal of recognition, or a very limited recognition (i.e. options 1 and 2), would pass the CJEU proportionality test.[48]

Lex rei sitae plays a crucial role in this: it is because the rule points to the national legal system without exception, that the problem arises.[49] The time has come, therefore to modernize this part of property law and to search, especially in the context of the European Union, for exceptions and alternative connecting factors.

47 See Cass. 3e civ 31 October 2012, n. 11–16.304 and Cass. 3e civ 6 September 2016, n. 11–26.953.

48 The effect on national law would, of course, be very far reaching, but should not prevent the application of EU law. See on this on this extensively, Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 89 *et seq*.

49 See, in the same sense, Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 199–200.

4. In search of alternative connecting factors

The attempt to search for other connecting factors is not new. Jeroen van der Weide mentions three options: unify property law, choose a different connecting factor or allow choice of law.[50] In the absence of a European European civil code or even a European property law code, we are left dealing with the second and third options Van der Weide offers.

In 2013, Eveline Ramaekers dealt with the search for another connecting factor, with *lex registrationis* and *lex destinationis* as two suitable alternatives.[51] Ramaekers argues that using the *lex registrationis*, meaning the law of the place where the property right is registered creates difficulties as registration systems do not always exist (in case of movables), are very differently organized between Member States and, especially, are sometimes difficult to access. A European Registration System would be much more suitable in Ramaekers' view.[52]

The *lex destinationis* refers to the law of the country of destination of an object. This especially applies to movable objects and some legal systems, such as the Netherlands, already allow for the *lex destinationis* to be applied instead of the *lex rei sitae*. This also creates difficulties, as not overy object has a *destinationis*. A car taken on a holiday is very different from a car sold on a national market. Such an approach can therefore also include a very limited choice of law, rather than full party autonomy (see below). An example of this approach exist in the form of Article 10:182(2) of the Dutch Civil Code, which allows parties to agree that the property effects of their retention of title (or reservation of ownership) clause are to be governed by the legal system of the destination of the object.[53]

Another option, Van der Weide's third option, is to allow parties to choose their own applicable law. In that situation the *lex contractus* would decide the applicable law. This comes, however, at a cost of legal uncertainty that is unlikely to be accepted by anyone.[54] Of course the original parties to the legal relation will

50 Jeroen van der Weide, Mobiliteit van goederen in het IPR – tussen situsregel en partijautonomie, (Deventer: Kluwer, 2006) p. 231–232.

51 Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), 192 *et seq*.

52 Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 192–193.

53 Of course the object must be exported to that legal system or the Dutch *lex rei sitae* rule will be applied instead. Ramaekers also mentions Swiss law as an example of a country offering such limited choice of law. Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 193–194.

54 See Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 195.

know all the contractual specifics to the right and will have made the choice for a specific legal system. Their successors, we are dealing with property rights after all, will already experience much more difficulty finding out the specifics to the property right, including its applicable law. Third parties, finally, will have no way of knowing what legal system applies unless they explicitly research the right because they are confronted with it.[55]

It is exactly the reduction of the information costs that come with this uncertainty that the numerus clausus of property rights seeks to facilitate. When all parties, market participants in other words, deal with a standardized set of rights, most of them will have enough information if they know what type of property right they are dealing with. Parties that seek to acquire the right will have to do additional research into the specifics of the right, such as the contractual agreement underlying the property right.[56]

With these three more traditional private international law alternatives leading to unsatisfactory results, perhaps EU law can offer an alternative? In the context of the previous section, this could be the principle of mutual recognition and the country of origin principle.[57] Also these have been extensively discussed by Eveline Ramaekers. First, Ramaekers refers to the analysis by Jürgen Basedow who sees the principle of mutual recognition as a hidden conflicts of laws norm.[58] It means, in this view that Member States must recognise the regulatory system of another Member State. It is therefore, in Basedow's view, a hidden norm that forces Member States to accept the country of origin of a legal relation as the applicable law.[59]

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55 For example because a third party wishes to acquire the right or because a third party is a creditor to the right holder of the right. On the distinction between types of third parties see Bram Akkermans, Standardisation of Property Rights in European Property Law, in Bram Akkermans, Eveline Ramaekers and Ernst Marais (eds.), *Property Law Perspectives II* (Oxford-Antwerp-Portland: Intersentia, 2013), p. 225–226.

56 Thomas Merill and Henry Smith, Optimal Standardizationin the Law of Property: the Numerus Clausus Principle, *110 Yale Law Journal (2000)*, p. 1 *et seq.*, Bram Akkermans, Standardisation of Property Rights in European Property Law, in Bram Akkermans, Eveline Ramaekers and Ernst Marais (eds.), *Property Law Perspectives II* (Oxford-Antwerp-Portland: Intersentia, 2013), p. 226–228, Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 195.

57 See above, section 3.

58 Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 196, Jürgen Basedow, 'Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis', *Rabels Zeitschrift fuer Auslaendisches und Internationales Privatrecht*, 1995 (59), p. 15.

59 Jürgen Basedow, 'Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis', *Rabels Zeitschrift fuer Auslaendisches und Internationales Privat-*

However, other views on this also exist. When the recognition of a foreign relation and the application of the law are viewed separately, it could be argued that the principle of mutual recognition sees only to the first part and that Member States are still free to apply their own rules when it comes to the actual application of the law. So a property relation would have to be recognised as a property relation, but could be applied in the national legal system using an equivalent property right from the available list of rights. In this view, in other words, the principle of mutual recognition and the country of origin principle are separate and the procedural autonomy of the Member State remains safeguarded.[60]

The latter theory, which is very private international law inspired, seems in tension to the principle of the effective application of EU law (*effet utile*). At the end of 2017 the CJEU dealt with the recognition of property rights under the EU Succession Regulation in the case *Kubicka*.[61] In short the case deals with the refusal of a Polish notary to help ms. Kubicka, a Polish citizen living in Germany, to choose Polish law as the applicable law to her succession in a testament. Even though the EU Succession Regulation allows Ms. Kubicka to make that choice for her entire succession estate, the difference between Polish and German law led the Polish notary to refuse cooperation as he was sure German law would not apply the *legatum per vindicationem* that ms. Kubicka sought. German law adheres to the *legatum per damnationem* which means the heirs of the deceased become owner of the object for which the legacy was created first and must transfer the object to the legatee after that. The *legatum per vindicationem* skips that steps and immediately makes the legatee owner of the object. Such refusal to cooperate was, according to the CJEU not allowed under the rules of EU law. The Court then stated the following:

> '65. it follows that Article 31 of Regulation No 650/2012 must be interpreted as precluding refusal of recognition, in a Member State whose legal system does not provide for legacies 'by vindication', of the material effects produced by such a legacy when succession takes place in accordance with the chosen succession law.'

recht, 1995 (59), p. 13–15, Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 196.

60 Eveline Ramaekers, European Union Property Law: from Fragments to a System (Antwerp: Intersentia, 2013), p. 197.

61 Case 218/16 of 12 October 2017 Aleksandra Kubicka v Przemysława Bac, acting in her capacity as notary [2017] 2017/755. See on this case 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)), in European Property Law Journal (2018), p. 4 *et seq*.

German law, in other words, is not only forced to accept the foreign element, in this case a legacy by vindication, that it does not know in its own legal system, but must also ensure that that foreign element produces the material effects in accordance with the law of the country of origin. It seems, therefore, that Basedow's theory of mutual recognition and country of origin as a hidden conflict of laws norm, is the one followed by the CJEU.[62]

The *Kubicka* case deals with a situation where a limited choice of law is allowed. The EU succession regulation explicitly allows EU citizens to choose the law that will apply to their succession and also provides a default legal system, that of the last habitual residence, in the absence of a choice of law in an international succession case.[63] That is different from the current situation in which all Member States adhere to the *lex rei sitae* rule that does not allow for any party autonomy. This case provides additional arguments that when the *lex rei sitae* is relaxed in favor of a limited choice of law, EU law will immediately step in to not only protect the choice of law, but also the material application of the law of the country of origin.

Moreover, the Kubicka case brings insights in the use of a final alternative connecting factor: EU Citizenship.[64] The EU Succession Regulation is part of a legislative effort by the European Commission in particular to enhance the protection of EU citizens. By taking a single market perspective, citizens are offered a single legal system that governs their entire succession or entire martial property relation, and prevents these citizens from having to deal with multiple legal systems. Of course these EU rules only apply in cross-border cases, but there are so many citizens with international property. For those that lack the cross-border connection, national law is formally the only remaining option. However, citizens that would really want to, could introduce a cross-border element by either acquiring property in another Member State or by acquiring another nationality that allows a more favorable choice of law.

EU Citizenship as a connecting factor would enable all citizens a limited choice of law directly connected to EU law. The default rule could be the *lex rei*

62 It remains to be seen if this is also the reading the CJEU will give to Article 31 of the Succesion Regulation as a whole.

63 Articles 21 and 22 Regulation 650/2012 of the European Parliament and of the 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 (EU Succession Regulation).

64 Of course, the EU Succession Regulation connects primarily to nationality as a connecting factor. When third country nationals, in other words, are involved, the EU citizenship argument loses some of its impact. However, it could also be argued that third country nationals are treated as EU citizens under the rules of the EU Succession Regulation.

sitae of an object, but based on EU citizenship parties would be able to choose the law of their nationality or any other choice provided for by EU law. This would fit perfectly with the EU Succession Regulation and the Regulation on Matrimonial Property Law, that provide exactly that option.

The result, of course, would be complex for property law, but not so complex as allowing a full *lex contractus* would be. If EU citizens choose their own legal system as the law that governs their property relationship, be it over land, movables or intangible assets, they can choose from another list of property rights than the list of the country they are currently in. The current EU instruments dealing with this, all offer a possibility to take a national route after all:

> Article 29 reg. matrimonial property:
> 'Where a person invokes a right *in rem* to which he is entitled under the law applicable to the matrimonial property regime and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.'[65]

Member States thus remain allowed to adapt a foreign property right into a national law equivalent. However, they must always do so in the context of the effective application of EU law (*effet utile*) and not adapting a right sufficiently will cause other problems with the application of EU law.[66] However, it seems from the reasoning of the CJEU in *Kubicka* that the Member States will have a hard

65 Article 29 of Council Regulation 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. Article 31 of the Regulation 650/2012 states 'Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.'

66 See extensively on this Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia, 2008), p. 510–523, Bram Akkermans, Property Law and the Internal Market, in Sjef van Erp, Arthur Salomons and Bram Akkermans (Eds.), *The Future of European Property Law*, München (Sellier European Law Publishers) 2012, p. 199 et seq. On the effects of the Succession Regulation see Sjef van Erp, The new Succession Regulation: The *lex rei sitae* rule in need of a reappraisal?, European Property Law Journal (2012), p. 187 *et seq.*, Jan Schmidt, Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (*Kubicka*)), European Property Law Journal [2018], p. 4 *et seq*.

time upholding their own legal system. With that, the CJEU may be moving property law in the direction it has taken company law after all.

When adaptation is not possible, the question arises whether foreign law should not be applie . After all, the receiving Member State is giving effect to an EU legal instrument. An English trust relation could be applied in Dutch law, or a Dutch special right of usufruct could be applied in French law.[67] When this happens, spontaneous convergence of systems of property law is not unlikely.[68]

5. Conclusion

The days of the Nation State in which all matters are dealt with under the own legal system and by the own judiciary alone are far behind us. In international business, choice of applicable law and choice of jurisdiction have become commonplace. More and more people go and live in other countries to study, work, or for a relationship. Companies no longer just function on a national market. Even small and medium sized enterprises employ cross-border activities.

The rules of private international law dealing with all these relations – such as in contract, marital property law, succession, and the seat of a company – facilitate these cross-border activities. They do not automatically provide for one legal system to apply, but offer (limited) party autonomy to enable parties to choose the law that will apply to their legal relation and to choose the court that will deal with any issues arising from their legal relation.

There is only one area of law where there is hardly any party autonomy. Here the *lex rei sitae* rule still applies and this creates more and more issues. International property law remains to adhere very strictly to the idea that the economic ties of an object are the only decisive factor for the applicable law. Only in case of international property security rights, very minor exceptions are allowed, as long as this mean that another legal system will apply once the object leaves the territory as shown by the example of Dutch PIL rules regarding the retention of title. The territorial connection, although perhaps no longer leading in private international law theories, remains obvious.

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67 Although the United Kingdom is not part of the EU succession law regime, nor of the EU matrimonial property law regime, UK citizens as EU citizens can still benefit from the EU Succession and Matrimonial Property Law rules in other EU Member States.

68 See Sjef van Erp, A *numerus quasi-clausus* of property rights as a constitutive element of a future European Property Law, Electronic Journal of Comparative Law (2003), https://www.ejcl.org/72/abs72–2.html, Bram Akkermans, The Principle of *Numerus Clausus* in European Property Law (Antwerp: Intersentia, 2008), p. 523 *et seq*.

With that, *lex rei sitae* is reminiscent of times gone by and is in great need of modernisation. In fact, due to the process of European integration, there may not be a choice any more. Now that EU legislation also deals with private international law in matters such as succession and martial property law, the law of property comes into focus once more. As the purveyor of succession and marital property, the law of property must also provide solutions that are in conformity with the EU rules in this area. Leaving out all matters of national property law to be exclusively dealt with by national property law, creates undesirable effects for EU citizens. If EU citizenship is the decisive connecting factor, the effective application of EU law becomes leading: national rules of property, although they can still be decided on at national level, must function in the context of EU law to ensure that a – legally valid – choice of law of an EU citizen is not reduced to some aspects of the life of the citizen only. The existing rules of EU private international law provide a clear way forward for the development of this alternative: EU citizens choose as the applicable law to their entire life the legal system of the country of which they hold the nationality, or the law of the place where they have their residence. The law, in other words, to which the EU citizen has economic ties will then apply.[69]

On the other hand, property relations are special as they have effect *erga omnes*. They are therefore not only connected to the holder of the right or the parties that created the right, but also affect other market participants, such as third party acquirers and creditors. The functioning of the national markets depend, to a certain degree, on the legal certainty and predictability that the national property system, with its closed menu of property rights, offers.[70]

Considering the duty to recognise foreign property rights as an obligation that follows from EU law, leaves room to still apply the own national rules when it comes to the application of national property law.[71] However, the more room national law takes to change the legal relation by adapting it to a national law equivalent property right, the higher the chance of scrutiny by the CJEU. This is especially so if the effect of the right changes because of this transformation. Once

69 See, in this sense, Jan-Jaap Kuijpers, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 91 et seq.

70 See Bram Akkermans, The Numerus Clausus of Property Rights in Michele Graziadei and Lionel Smith (Eds.) Comparative Property Law: Research Handbooks in Comparative Law (Cheltenham – Northampton: Edward Elgar Publishing), p. 100 *et seq*.

71 See Jan-Jaap Kuijpers, Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law, in European Journal of Legal Studies, 2009 (2/2), p. 94 *et seq*.

recognition becomes a matter of EU law, its effects will also be included. Effective application of EU law, after all, applies to the outcome of a situation for an EU citizen and not only to a part of it. National procedural autonomy may bring with it that the application of property law remains a purely national matter for now, but it will have to do so within the context of EU law.[72]

It is in this context that the principle of sincere cooperation by EU Member States comes in. An EU obligation to recognise foreign rights on the basis of mutual recognition and country of origin principles, should not result in a loss of power or a refusal of application because the right cannot be adapted. The sentences in EU Private International Law instruments about adaptation of foreign property rights to the limit of 'the extent possible' should be taken as a rather empty statement. Member States will invoke their own prerogative to give shape to their law of property, but the CJEU is likely to use its reasoning in *Kubicka* and say that such restriction does not give effect to the choice of law made by the EU citizen. When this happens, the concept of *lex rei sitae* and especially the (nationalist) idea behind it is moved even further to the background. Replacing it with EU Citizenship with a limited choice of law will move us forward and allow us to continue to build the EU civil justice area. In the absence of EU property legislation, or a more comprehensive EU PIL instrument, a renewed Article 11 of the Rome I Regulation with a limited party autonomy in this respect may be a good start to achieve this.

72 Case C-218/16 of 12 October 2017 Kubicka v Przemysława Bac (Notary) 2017/755 and Joined Cases C-52/16 and C-113/16 of 6 March 2018, SEGRO Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal [2018] not yet reported.