

# **CROBECO**

**(CROss Border Electronic Conveyancing)**

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# How far we are?

“It is true that the law of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res ... But the same reason establishes that the *lex rei sitae* cannot control personal covenants not purporting to be conveyances between persons outside the jurisdiction though concerning a thing within it ...”

*Mr. Justice Holmes, Polson v. Steward, 167 Mass. 211 (1897)*

# 1. Contract: *forum*

- Only RB-I considered: Forum of choice (23 RB-I). Otherwise: 2 (domicile of the defendant) or 5.1RB-I (place of performance?)
- “[E]xclusive jurisdiction of the Contracting State in which the property is situated does not encompass all actions concerning rights *in rem* in immovable property but only those which both come within the scope of the [RB- I] and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest.”

(ECJ 10 January 1990 C-115/88 *Reichert I -actio pauliana-*, 5 April 1991 C-518/99 *Gaillard -rescission of sales contract*).

## 2. Contract: Applicable law

- Substance: law of choice (3 RR-I). But 3.4 and 9 RR-I. Otherwise: 4.1c (*lex rei sitae*) RR-I
- Scope of the *lex substantiae* (12 RR-I):
  - Yes: threshold and conditions of termination. (=>8)
  - No: conveyance/transfer of property (see 345 TFEU)
- Form: Might be *lex rei sitae* (11.5 RR-I)

### 3. Transfer of property: substance

- *Lex rei sitae* (Spain: 10.1 Spanish Civil code)
- Spanish system for transfer of rights *in rem*: contract plus delivery/*traditio*. “Escritura pública” is an instrumental *traditio* (1462.2 Spanish Civil Code; 531-4.2 a Catalan Civil Code)
- *Traditio* might be incorporated in a foreign public document (Same way the contract may be subject to a non *lex rei sitae*)
- Spanish Tribunal Supremo 19 June 2012: transfer and foreign document not intended to transfer.

## 4. Document

- Effects intended v. conditions required. Examples:
- Enforcement of “authentic documents” as to the outstanding sales price: conditions set by 57 RB-I.
- Title of property: conditions set by *lex rei sitae* (non EU law: 345 TFEU). Substance of transfer (*supra* 3) plus form (*locus regit actum, auctor regit actum*). But 11.2 Spanish Civil Code (similar 11.5 RR-I)
- Title to land registry entry: conditions set by the *lex tabulae* (non EU law)= *lex rei sitae*.

# 5. Registry

- Shift of the point of view: conditions required by the law of the competent authority (Registrar):
- Property aspects: *lex rei sitae* (local law). Classification *in rem v. in personam* (not allowed to a registry enter) Decision of the Spanish Directorate of Registrars and Notaries of 23 February 2004). A Swiss example.
- “Formal” aspects: documents admitted for conveyances and the equivalence rule. The dwelling of the “land taboo”: restricting foreign documents in the matter of property (Spanish Tribunal Supremo, Judgment of 19 June 2012 v. German Constitutional Court 19 June 2012). Unaffected by ECJ Judgments of 24 May and December 2011 (345 TFEU).

## 6. *Culpa in contrahendo*

- Forum: Only RB-I considered: Forum of choice (23 RB-I). Otherwise: 2 (domicile of the defendant) or 5.3 RB-I (place of negotiations, place of contract, place of the real estate).
- Applicable law: Law of choice (14 RR-II). But 14.3RR-II. *Lex contractus* (substance): 12.1 RR-II.

## 7. Recognition and enforcement

- Recognition and enforcement of the judgment in the *locus rei sitae*: 22.4 RB-I.
- *In rem* and *in personam* judgments: “The claimant, and in turn, the non-*situs* forum, must not force the hand of the courts of the *situs*, or suggest that that court is doing anything other than acting on its own accord, and as master of its own house, for the *situs* court becomes somewhat piqued in the face of a presumptuous and ill-mannered non *situs*-forum” (Janeen M. Carruthers)

Decisions of the Spanish Directorate of Registrars and Notaries of 23 February 2004 -and 12 May 1992, according to Spanish-French 1969 Treaty.

Thank you for your attention !