

## ALTERNATIVE SOLUTIONS TO *LEX REI SITAE* AS THE LAW APPLICABLE TO REAL ESTATE IN BORDER AREAS

Alfonso ORTEGA GIMÉNEZ\*  
Universidad Miguel Hernández de Elche

**SUMMARY:** I. INTRODUCTION: *LEX REI SITAE* RULE AS THE APPLICABLE LAW TO REAL ESTATE.— II. SPECIFIC CASE: BORDER REAL ESTATE.— III. ALTERNATIVES TO *LEX REI SITAE* AS THE LAW APPLICABLE TO BORDER REAL ESTATE.— IV. CONCLUSIONS.

### I. INTRODUCTION: *LEX REI SITAE* RULE AS THE APPLICABLE LAW TO REAL ESTATE

1. Rights *in rem* pertain to tangible assets and impact all parties involved, while personal rights regarding assets can solely be enforced against the debtor.<sup>1</sup> Therefore, to safeguard and promote the exchange of goods in international trade, Private International Law strives to allocate rights *in rem* to their holders clearly, determining competent courts and, specifically in this context, the relevant law governing rights *in rem*.

2. In Spanish private international law, the law governing «rights *in rem* over goods considered as single units is determined in accordance

---

\* Profesor Titular de Derecho internacional privado de la Universidad Miguel Hernández de Elche (UMH) ([alfonso.ortega@umh.es](mailto:alfonso.ortega@umh.es)).

<sup>1</sup> Sentencia del Tribunal de Justicia de 14 febrero 2019, Asunto C-630/17, *Milivojevic*, FD 100; Sentencia del Tribunal de Justicia de 16 noviembre 2016, Asunto C-417/15, *Schmidt*, FD 31 y Sentencia del Tribunal de Justicia de 17 diciembre 2015, Asunto C-605/14, *Pekka Komu*, FD.

with Article 10.1 of the Civil Code<sup>2</sup>, which states that «Possession, ownership, and other rights over real estate, as well as their publicity, shall be governed by the law of the place where they are located. The same law shall apply to movable property». Article 10.1 of the Civil Code incorporates the *Lex Rei Sitae* rule, which means that rights *in rem* over property, both movable and immovable, are generally subject to the law of the country where such property is located.

3. Rights *in rem* over movable or immovable property —ownership, possession, security interests, etc.— are governed by the law of the place where they are located. This principle stems from the sovereignty of the State, which reserves the application of its rules to regulate the acquisition of one of its essential elements: territory, in any case. Regarding movable property, over which our courts declare jurisdiction if they are located in Spain, there are rules specifically referring to property in locations posing challenges or that are being transported through different countries<sup>3</sup>.

4. Historically, the *Lex rei sitae* principle has been the law applicable to real estate, addressing two essential requirements: a) firstly, as mentioned before, the imperative for these properties to be subject to the sovereignty of the states where they are located; and b) secondly, the imperative to afford them universal protection, which, given the publicity systems associated with them, can only be effectively implemented in the jurisdictions where the properties in question are located.

5. We are presented with a precise, predictable, and harmonious solution. Thus, a) it is sufficient to know the country where the real estate is located to determine the applicable law; b) the *Lex rei sitae* rule leads us to predictable solutions for all the parties involved in a specific legal relationship, including third parties; and c) it is practically a universal solution, provided for in a large number of state systems of

<sup>2</sup> Royal Decree of 24 July 1889 publishing the Civil Code (Gaceta de Madrid no. 206, 25 July 1889). Art. 10.1 CC applies to rights *in rem* over movable or immovable property. By using the same connecting criterion in both cases, no problems of qualification usually arise: whenever tangible property is involved, whatever its nature, the applicable law is that indicated by Art. 10.1 CC.

<sup>3</sup> *Vid.* in particular, A. ORTEGA GIMÉNEZ, «Determinación de la ley aplicable a los inmuebles fronterizos», *Revista Actualidad Jurídica Iberoamericana*, núm. 3, agosto 2015, pp. 655-660; A. ORTEGA GIMÉNEZ, «Derechos reales: ley aplicable a los inmuebles fronterizos», *Revista de la Facultad de Ciencias Sociales y Jurídicas*, núm. 3, 2008, pp. 83-92; I. LORENTE MARTÍNEZ, «Inmuebles fronterizos, corrección de frontera y competencia judicial internacional de los tribunales españoles», *Cuadernos de Derecho Transnacional*, vol. 11, núm. 2, octubre 2019, pp. 693-704; A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ (Dir.), *Compendio de Derecho internacional privado*, 4.<sup>a</sup> ed., Murcia, Rapid Centro Color, S.L., 2022, p. 266; A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Tratado de Derecho internacional privado, Tomo III*, Valencia, Tirant lo Blanch, 2020, p. 3465; A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, pp. 479-483; y J.C. FERNÁNDEZ ROZAS y S. SÁNCHEZ LORENZO, *Derecho Internacional Privado*, 3.<sup>a</sup> ed., Madrid, Civitas, 2004, pp. 536-539.

Private International Law<sup>4</sup>. Regarding EU law, there are no provisions concerning the applicable law for rights *in rem* and their publicity. Consequently, this issue falls entirely under the jurisdiction of each Member State. Article 345 of the Treaty on the Functioning of the European Union (TFEU) expressly states, «The Treaties shall in no way prejudice the rules in Member States governing the system of property».

6. Among other aspects, the following fall under the umbrella of the *Lex rei sitae* rule: a) Items that can be the subject of rights *in rem*; b) The nature of movable and immovable property, *intra commercium*, *extra commercium*, susceptible only to certain rights, etc.; c) The system of establishing rights *in rem*, conditions of acquisition, whether original or derivative, modification, transmission, loss, and termination of the right.

This information holds significance due to the notable discrepancies in national laws, especially concerning the acquisition of ownership of movable property through possession; d) The duration, substance, and implications of the rights *in rem*, including legal avenues for defending property or possession; the extent of the rights, entitlements of the holder of the rights, such as usufruct and disposal, actualization of the asset's value, as well as restrictions, obligations, and burdens incumbent upon the holder of the real right; the scope of the rights *in rem* vis-à-vis third parties; and e) Public disclosure of actions related to the establishment, transfer, and termination of rights *in rem* established over both movable and immovable assets<sup>5,6</sup>.

<sup>4</sup> *Vid.* A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*, vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, p. 479.

<sup>5</sup> *Vid.* Resolution of the Directorate General of Registries and Notaries of 24 January 2014, in the appeal lodged against the qualification note issued by the property registrar suspending the registration of a deed of liquidation of the Dutch community property after divorce, accompanied by a regulatory agreement. This decision points out that it is reiterated doctrine that whatever the title deed submitted for registration in international cases, it must meet the requirements set out in Spanish mortgage law by application of the conflict rules of our CC, which so establish for immovable property situated in Spain. In this respect, Art. 608 CC attributes exclusive competence in the regulation and determination of registrable deeds, as well as their formal requirements and effects, to the Mortgage Law. In short, the Property Registrar is obliged to apply the Spanish conflict rule (Article 12.1 CC) and, by reference to this, the Mortgage Law, which determines the requirements for registration that the documents presented must meet. Therefore, the Directorate General agreed to reject the appeal and confirm the qualification note of the registrar; or, the Resolution of 18 December 2018 of the Directorate General of Registries and Notaries, which resolves the appeal lodged against the refusal of the Mijas property registrar no. 3 to register a deed of sale. In this respect, it points out that the use of powers of attorney granted outside Spain is a constant feature of notarial practice in view of the internationalisation of economic relations, and is therefore commonplace and by no means exceptional.

The presentation to the notary of a power of attorney granted outside Spain requires, as is the case with powers of attorney granted in Spain, a legal analysis which will be carried out in accordance with articles 10.1 and 11.1 CC, on the one hand, the reference regarding the sufficiency of the power, to the Spanish law to which the exercise of the powers granted by the represented party is subject, if there is no express provision, and on the other, Article 11.1 of

Note 6 in next page

7. The law designated by Article 10.1 and 2 of the Civil Code governs the nature of the publicity of the right, the extent of such publicity, and the means through which the right is made public. When it comes to publicity through registration, the law applicable to the asset governs the conditions for accessing the Registry of documents that record the transmission of ownership<sup>7</sup>. It also includes the list of rights *in rem* that can be established over assets and establishes the system for creating rights *in rem* (either a closed or open system), as well as the scope of private autonomy in shaping rights *in rem*. The aspects not covered by Articles 10.1 and 2 of the Civil Code include: a) The capacity to acquire rights *in rem*, which is governed by the individual's national law (Article 9.1 of the Civil Code); b) The form of the transaction used to acquire or transfer the real right (Article 11 of the Civil Code); and c) The validity or appropriateness of the document through which the real right is acquired or transferred, such as a contract, will, intestate succession, or participation in a community property regime as a matrimonial economic system, etc. These aspects are governed by their respective rules of private international law.

## II. SPECIFIC CASE: BORDER REAL ESTATE.

8. Given this, the aforementioned *Lex rei sitae* rule poses problems regarding border real estate, i.e., those properties located in territories subject to different state sovereignties<sup>8</sup>. In these cases, the

---

the Civil Code to the analysis of the equivalence of the form in Spain, a form that must be registered by the law of the country in which they are granted. This implies that, having analyzed the value of the document in the country of origin, both from a material and formal perspective, its equivalence or substantial approximation of effects can be concluded, in relation to a power of attorney for the same act granted in Spain. The General Directorate of Registries and Notaries, in a Resolution dated September 14, 2016, reiterates the doctrine applicable to documents granted abroad, pointing out how our system, in application of the principle of legality, establishes a rigorous selection of titles. . registrable documents that must be submitted to the registrar for qualification, requiring that they be public or authentic documents (= articles 3 of the Mortgage Law and 33 and 34 of its Regulations). Likewise, it has established an extensive doctrine regarding the suitability of documents granted abroad to produce a modification of the content of the Spanish Registry. In short, the declaration of equivalence of the extrajudicial power of attorney document made by a Spanish notary will be sufficient for the registration in the Property Registry of the dispositive act carried out based on it. In the event that the registrar disagrees with the equivalence declared by the notary, he must expressly and adequately justify this, and this does not mean that the registrar may request that the document from which the representation arises be transcribed or accompanied.

<sup>6</sup> *Vid.* A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho Internacional Privado*, 3.<sup>a</sup> ed., Madrid, Civitas, 2004, pp. 536-539.

<sup>7</sup> *Vid.* Resolution of the Directorate General of Registries and Notaries of 13 October 2015, resolving not to register a deed of cessation of directors, change of the administrative body and appointment of joint administrators of a company

<sup>8</sup> *Vid.* E. PÉREZ VERA, *Derecho Internacional Privado*. Vol. II., Madrid, UNED, 2002, p. 267.

prevailing doctrinal solution is to literally apply the *Lex rei sitae* rule, meaning to consider all concurrent laws, with their application depending on the geographical location within each part of the real estate property. Thus, the part of the property located in each State will be subject to the law of that State. However, «this solution is unsatisfactory, as in practice, it leads to treating border property as two separate properties subject to two different national laws: the syndrome of the cumulative application of laws»<sup>9</sup>.

In addition to the classical doctrinal solution, an alternative approach arises from the July 6, 1988 Judgment of the Court of Justice (Sixth Chamber) in the case «R.O.E. SCHERRENS v. M. G. MAENHOUT, AND OTHERS»<sup>10</sup>, which addresses an international judicial competence issue within a lease contract involving a property with plots in two states between R.O.E. Scherrens (Belgium) and M.G. Maenhout (Belgium), R.A.M. van Poucke (Netherlands) and L.M.L. van Poucke (Belgium), in relation to a dispute whose subject is to determine the potential existence of a lease contract concerning an immovable property located in two contracting states, in principle, and subject to particular cases where the structure of a property may require a different solution, the competent courts, concerning immovable properties located in the territory of each contracting state, are exclusively those of the respective state.

9. The issue arose within a dispute between Mr. Scherrens and Mrs. Maenhout and others, concerning whether a rural lease was verbally concluded between Mr. Scherrens, as the tenant, Mrs. Maenhout and her deceased husband, as landlords, regarding a property consisting of buildings and agricultural land measuring approximately 5 hectares located in Maldegem (Belgium), as well as four plots of land totaling 12 hectares situated in the municipality of Sluis (Netherlands).

In this context, the tenant, as the appellant, argues that there is a single lease contract for the entire estate and the plots of land. Therefore, considering the possibility that the Belgian and Dutch judges might issue conflicting decisions, the Dutch Court of Appeal deemed it necessary to determine which judge had jurisdiction under Article 16, heading and paragraph 1, of the Convention in cases similar to the present one. In these circumstances, the Dutch Court of Appeal suspended the proceedings and requested the Court of Justice to «rule on how to interpret Article 16, heading and paragraph 1, of the aforementioned Convention regarding the rural lease concluded on a property whose buildings (with

<sup>9</sup> Vid. A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, p. 483.

<sup>10</sup> Sentencia del Tribunal de Justicia (Sala Sexta), de 6 de Julio de 1988, «R.O.E. SCHERRENS CONTRA M. G. MAENHOUT, Y OTROS», *Recopilación de Jurisprudencia 1988* página 03791, EUR-Lex – 61987J0158 – ES.

a portion of land) are located in one contracting state (Belgium) and the land (mostly) in another contracting state (Netherlands)».

**10.** Thus, the Court of Justice itself ruled that a dispute aimed at determining the potential existence of a lease contract for a real estate property located in two contracting states falls exclusively under the jurisdiction of the courts of each contracting state concerning the real estate located within their respective territories. Furthermore, concerning a lease of real estate entirely situated within a single contracting state, Article 16, heading and paragraph 1, applies to all lease contracts of real estate, regardless of their particular characteristics. It should be interpreted to mean that in a dispute regarding the possible existence of a lease contract for a real estate property located in two contracting states, then the courts of each contracting state are exclusively competent regarding the real estate located within their respective territories.

**11.** By judgment of March 23, 1987, received at the Court of Justice on May 26 of the same year, the Court of Appeal of Arnhem, in accordance with the Protocol of June 3, 1971 concerning the interpretation by the Court of Justice, referred a preliminary question regarding the interpretation of Article 16, heading and paragraph 1, of the Convention of September 27, 1968, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as «the Convention»).

This issue arose within a dispute between Mr. Scherrens and Mrs. Maenhout and others, concerning whether a verbal rural lease was entered into between Mr. Scherrens, as the tenant, and Mrs. Maenhout and her deceased husband, as the landlords, regarding a property consisting of buildings and agricultural land spanning approximately 5 hectares located in Maldegem (Belgium), as well as four plots of land totaling 12 hectares situated in the municipality of Sluis (Netherlands). It is evident from the records that the plots of land in the Netherlands are not adjacent to the parcel in Belgium but are located 7 km away.

Mr. Scherrens initiated legal proceedings regarding the lease before the Magistrate in Eeklo (Belgium) for the land located in Belgium, and also before the *Pachtkamer* (the chamber handling matters related to rural lease contracts) of the District Court of Oostburg (Netherlands) for the land located in the Netherlands. The District Court ruled that there was insufficient evidence to support the existence of the lease contract and dismissed Mr. Scherrens' claim. He then lodged an appeal before the *Pachtkamer* of the Court of Appeal of Arnhem.

According to order of referral, the tenant, as the appellant, argues that there is a single lease contract for the entire estate and the plots of land. Therefore, considering the possibility that the Belgian and Dutch judges might issue conflicting decisions, the Court of Appeal deemed

it necessary to resolve the question of which judge had jurisdiction under Article 16, heading and paragraph 1, of the Convention in cases similar to the present one. Under these circumstances, the Court of Appeal suspended the proceedings and requested the Court of Justice to «rule on how to interpret Article 16, heading and paragraph 1, of the aforementioned Convention concerning the rural lease concluded on a property whose buildings (with a portion of land) are located in one of the contracting states (Belgium) and the land (mostly) in another contracting state (Netherlands)».

For a more comprehensive presentation of the facts of the main issue of litigation, the reasoning behind the order of referral, as well as the written observations submitted and the procedural developments, the Chamber refers to the Report for the Hearing. Hereinafter, reference will only be made to these elements to the extent required by the Court's reasoning.

Article 16 of the Convention states the following: Regardless of domicile, exclusive jurisdiction shall lie with: «1) concerning real property rights and leases of immovable property, the courts of the contracting state in which the property is located; (...)».

The issue raised by the national judicial authority concerns whether Article 16, heading and paragraph 1, of the Convention should be interpreted to mean that, in a dispute aimed at determining the potential existence of a lease contract for a real estate property located in two contracting states, the courts of each contracting state have exclusive jurisdiction over the real estate located within their respective territories.

It is important to remember that in its ruling dated January 15, 1985 (Roesler, Case 241/83, Rec. 1985, p. 99), the Court of Justice stated that the exclusive jurisdiction provided for in Article 16, heading and paragraph 1, in favor of the courts of the contracting state where the property is located, is justified by the close connection between leases and the legal framework of real property, including provisions governing its use, such as rules regarding rent regulation and safeguarding both landlords' and tenants' rights.

The Court of Justice further declared that Article 16, heading and paragraph 1, aims to ensure a rational distribution of jurisdiction by giving preference to the competent judicial authority based on its proximity to the property's location, as it is in a better position to have direct knowledge of the factual situations related to the conclusion and execution of leases of real estate properties.

In light of the foregoing considerations, the Court of Justice considered in the aforementioned case that, regarding a lease of real estate located entirely within a single contracting state, Article 16, heading

and paragraph 1, applies to every lease contract of real estate, regardless of its particular characteristics.

The same considerations are valid in principle in the case of leasing real estate property whose elements are located in two contracting states.

Therefore, it is appropriate to interpret Article 16, heading and paragraph 1, to mean that, in a dispute aimed at determining the possible existence of a lease contract for real estate located in two contracting states, in principle, the competent courts, regarding real estate situated within the territory of each contracting state, are exclusively those of the respective State.

However, it is not ruled out that there may be cases in which a real estate property, whose constituent parts are located in two contracting states but are subject to a single lease contract, presents such peculiarities that an exception to the general rule of exclusive jurisdiction just described is necessary. This could be the case, for example, when the real estate holdings located in one contracting state are adjoined to those located in another state, and the property is situated almost entirely in one of those states. In this situation, it may be appropriate to consider the property as a single unit and to regard it as entirely located in one of the states in order to assign exclusive jurisdiction to the courts of that state regarding the lease of the property.

Upon reviewing the proceedings, no such peculiarities are evident in this case. The portions of the property under dispute in the two contracting states are neither adjacent nor predominantly located in one state or the other.

Therefore, it is appropriate to respond to the question raised that Article 16, heading and paragraph 1, of the Convention should be interpreted to mean that in a dispute aimed at determining the possible existence of a lease contract for a real estate property located in two contracting states, the courts of each contracting state have exclusive jurisdiction over the real estate property located within its territory.

Thus, in a dispute aimed at determining the possible existence of a lease contract for a real estate property located in two contracting states, in principle, the competent courts, regarding the real estate property located within the territory of each contracting state, are exclusively those of the respective state.

**12.** Therefore, following the ruling in the «Scherrens» case, the law of the state where the most relevant part or main part of the property is located must be exclusively applied. When real estate properties located in one contracting state are contiguous to those located in another state, and the property is situated almost entirely in one of those states, in this situation, it may be appropriate to consider the property

as a unit and to regard it as entirely located in one of the states in order to assign exclusive jurisdiction to the courts of that state regarding the lease of the property. However, in the event that there is no «most relevant part» of the adjacent property, there is no alternative but the traditional solution: the part of the property located in each state will be regulated by the law of that State”<sup>11</sup>.

**13.** It seems that the «Scherrens» judgment distinguishes between «separate properties» and «contiguous properties»; in the case of the former —separate properties— if the action affects a part of the property, the courts of the country where that «part of the property» is located would have jurisdiction and would apply that law. If the dispute involves the entire property, both jurisdictions would be competent, each applying its respective law. In the case of contiguous properties, if the property is predominantly located in one state, international judicial competence would lie with the courts of that state, and its law would apply<sup>12</sup>.

**14.** In cases of mobile conflict, for example, if the property was previously in France but now, under a bilateral Franco-Spanish agreement, is located in Spain due to a border alteration, exclusive jurisdiction lies with the Spanish courts (which would apply Spanish law). In this regard, the ruling of the Provincial Court of Navarra on November 9, 2018, is significant. The ruling of the Provincial Court of Navarra on November 9, 2018, resolves a dispute raised by the owner of a property whose surface currently spans the border between Spain and France. In the years 1973 and 1974, the claimant purchased a property of 1700 m<sup>2</sup> located entirely in France at that time, according to the French cadastral map. The contested decision indicated that, according to the claimant, due to the shifting of the border between Spain and France to the north, following the latest demarcation between boundary markers 24 and 25 carried out by the Joint Boundary Commission established under the treaty of boundaries between Spain and France of December 2, 1856, part of this property, 773 m<sup>2</sup> in area, would then lie in Spanish territory, specifically within the municipal area of Bera. The claimant in this matter filed a lawsuit against the Municipality of Bera de Bidasoa, seeking a declaratory statement of ownership regarding several properties of 682 m<sup>2</sup>, 545 m<sup>2</sup>, 318 m<sup>2</sup>, and 773 m<sup>2</sup> in surface area, located on the summit of Mount Larun. Moreover, the appropriate cadastral correction in favor of their represented party was also requested.

---

<sup>11</sup> Vid. A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, p. 483; y A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, (Dir.), *Tratado de Derecho internacional privado*, Tomo III, Valencia, Tirant lo Blanch, 2020, p. 3465.

<sup>12</sup> Vid. A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, p. 483; y A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ (Dir.), *Compendio de Derecho internacional privado*, 4.<sup>a</sup> ed., Murcia, Rapid Centro Color, S.L., 2022, p. 266.

The Municipal Council of Bera complied with the requests contained in the lawsuit regarding the properties measuring 682 m<sup>2</sup>, 545 m<sup>2</sup>, and 318 m<sup>2</sup>, while opposing the claim concerning the 773 m<sup>2</sup> of another property, arguing that this surface area is integrated into the Cadastre of Bayonne, France. Regarding the properties subject to compliance, a judgment was issued on March 15, 2018, granting the claim with respect to them. However, regarding the area of 773 m<sup>2</sup>, during the preliminary hearing, the judge raised *sua sponte* the lack of jurisdiction, as the matter falls under the jurisdiction of the courts of another state, leading to his abstention from hearing the case and the dismissal of the proceedings, as provided in Article 65 of the Spanish Civil Procedure Law (LEC). During the proceedings, the Municipality of Bera maintained the lack of jurisdiction, arguing that jurisdiction over the mentioned area of 773 m<sup>2</sup> belongs to the courts of the French Republic, as this area is located within their territory, all in accordance with Regulation number 1215/2012 of December 12, issued by the European Parliament and the Council. On the other hand, the claimant argued that the mentioned area is located in Spain and that «not a single square meter outside of Spain is claimed through this lawsuit, so the competent court must always be the Spanish Court». The Public Prosecutor's Office reported that the lack of jurisdiction raised by the judge should be upheld. And in the ruling of February 8, 2018, it was declared «the Lack of International Jurisdiction of this Court to hear those issues raised in the litigation, related to the surface area of 773 m<sup>2</sup>, located on Mount Larun, refraining from hearing them, and ordering the dismissal of the case». It was then that the lawyers advocating the claimant's interests, lodged an appeal against the first-instance ruling of Court No. 6 of Pamplona.

With the act of redefinition of the Franco-Spanish border line in 2014, and from the perspective of the provisions of Article 36 (LEC), regarding the lack of international jurisdiction, as well as the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012, to the extent that the premises underlying the plea contained in the lawsuit are that these 773 m<sup>2</sup>, an integral part of the 1700 m<sup>2</sup> property located entirely in French territory at the time of its purchase, have now come to be located in Spanish territory as a result of the northward shift of the border attributed by the claimant to the aforementioned redefinition act, it would not be initially appropriate to assert the lack of international jurisdiction of the Court of First Instance No. 6 of Pamplona.

In summary, the Court emphasizes that the property's registration in France does not hinder the jurisdiction of the Spanish court, provided that the relocation of the border line, central to the claim in the lawsuit, is conclusively demonstrated. This does not affect the French registration and cadastre, as there is no request for rectification concerning

them. The fact that initially the entire property was located in France is not an obstacle, at least theoretically, for a claimed subsequent modification of the border line to entail a change as envisaged by the claimant in his lawsuit, as in such a case it would be due to a hypothetical alteration agreed upon by both France and Spain<sup>13</sup>.

The fact that the entire property is registered and listed in the cadastre located in France does not prevent the exclusive international judicial jurisdiction of Spanish courts (and the application of Spanish law)<sup>14</sup>.

### III. ALTERNATIVES TO *LEX REI SITAE* AS THE LAW APPLICABLE TO BORDER REAL ESTATE.

15. When deciding on the appropriate law for adjacent properties, we can draw an analogy from the «Scherrens» Judgment. This applies when real estate in one contracting state borders another, and the property is mostly within one state. In such cases, treating the property as a unified entity situated entirely within one state might be suitable for determining the applicable law.

16. Therefore, following the «Scherrens» Judgment, when real estate properties located in one contracting state are contiguous to those located in another state, and the property is situated almost entirely in one of those states, it may be appropriate to consider the property as a unit and regard it as entirely located in one of the states in order to assign exclusive jurisdiction to the courts of that state regarding the lease of the property. Thus, «the exclusive application of the law of the State where the ‘most relevant part’ or ‘main part’ of the property is located would proceed. This leads to the ‘application of a predictable law for the parties involved and simplifies the issue of the applicable law, as there is only one applicable law and not two».<sup>15</sup>

However, in the event that there is no «most relevant part» of the contiguous property, there is no alternative but the traditional solution: the part of the property located in each State shall be governed by the law of that State”.<sup>16</sup>

<sup>13</sup> *Vid.* I. LORENTE MARTÍNEZ, «Inmuebles fronterizos, corrección de frontera y competencia judicial internacional de los tribunales españoles», *Cuadernos de Derecho Transnacional*, vol. 11, núm. 2, octubre 2019, pp. 693-704.

<sup>14</sup> *Vid.* A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ (Dir.), *Compendio de Derecho internacional privado*, 4.<sup>a</sup> ed., Murcia, Rapid Centro Color, S.L., 2022, p. 266.

<sup>15</sup> *Vid.* A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 15.<sup>a</sup> ed., Granada, Comares, 2014, p. 1038.

<sup>16</sup> *Vid.* A.-L. CALVO CARAVACA, y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 7.<sup>a</sup> ed., Granada, Comares, 2006, p. 483.

17. In the event that there is no «most relevant part of the contiguous property, there is no alternative but the traditional solution: the part of the property located in each State shall be governed by the law of that State»<sup>17</sup>. But what should we understand by «most relevant part»? The most suitable solution—and one that provides legal certainty—should be based on the percentage of occupation of the property: if we are dealing with real estate located in State A and State B; if the majority of the property is located in State A, the law applicable to the entire real estate should be that of State A; and if the property is divided equally between State A and State B, then yes, each part of the property will be subject to its corresponding law, the law of State A for one part, and the law of State B for the remaining part.

However, we should not automatically equate «most relevant part» with «largest area», but rather consider each case individually and take into account other elements (market price, value of its attributes, land type, etc.). For instance, it appears evident in scenarios involving easements between properties situated in different states that the resolution would entail applying the law of the country where the servient property is situated. This is because the acts constituting the easement take place on that specific property<sup>18</sup>.

## V. CONCLUSIONS

18. Indeed, we are witnessing a propitious moment. Private international law has become essential in addressing and preventing international private conflicts arising from the growing number of legal relationships governed by diverse legal systems. Among these scenarios are those governed by real estate regulations, which involve *in rem* rights over both movable and immovable property.

19. In general, relying on the traditional rule *Lex rei sitae* for determining the applicable law to real estate, as outlined in Article 10.1 of our Civil Code, offers a straightforward, logical, and precise solution that is also predictable and harmonious. However, in the case of real estate located in territories subject to different state sovereignties, it does not seem the most appropriate approach, as subjecting the same real estate to the jurisdiction of different legal systems can practically lead to irreconcilable solutions regarding the same litigious matter.

<sup>17</sup> Vid. A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 15.<sup>a</sup> ed., Granada, Comares, 2014, p. 1038.

<sup>18</sup> Vid. A.-L. CALVO CARAVACA y J. CARRASCOSA GONZÁLEZ, *Derecho internacional privado*. Vol. II, 15.<sup>a</sup> ed., Granada, Comares, 2014, p. 1039; y A.-L. CALVO CARAVACA, y J. CARRASCOSA GONZÁLEZ (Dir.), *Tratado de Derecho internacional privado*, Tomo III, Valencia, Tirant lo Blanch, 2020, p. 3465.

**20.** While resorting to the traditional *Lex rei sitae* rule regarding the applicable law to real estate —provided for in Article 10.1 of our Civil Code— is, in general, a straightforward, logical, as well as precise, predictable, and harmonious solution; in the case of real estate located in territories subject to different state sovereignties, it does not seem the most appropriate approach, as subjecting the same real estate to the jurisdiction of different legal systems can practically lead to irreconcilable solutions regarding the same litigious matter. Hence, when determining the relevant law for adjacent properties, one can draw an analogy from the «Scherrens» Judgment. This applies when real estate in one contracting state borders that of another state, with the property predominantly situated in one of them. In such cases, considering the property as a unified entity and attributing its location entirely to one state may be suitable for determining the applicable law. However, «this solution based on the principles of proximity and predictability has its limits». The aim of these principles is to ensure effective access to justice.

**21.** The principle of proximity does not generate excessive or disproportionate costs for the individuals involved in international litigation, as it allows for a genuine judicial response to their legal claims. Nonetheless, there are also limitations to these principles, as in the well-known Alaska paradox. Indeed, if a Spanish or European conflict rule were to indicate that a dispute between two individuals who habitually reside in Madrid should be governed by Alaska law, such a conflict rule would be unconstitutional because it would compel individuals to undergo a judicial process with very high costs, and this would amount to ineffective judicial protection, to an inequitable judicial process. The conflict rule would violate Article 24 of the Spanish Constitution of 1978 and Article 6 of the European Convention on Human Rights of 1950 if it were to act in this manner.<sup>19</sup>

**22.** The law applicable to border real estate should follow the modern thesis inspired also by the CJEU judgment of the «Scherrens» case, thus ensuring legal certainty for the parties so that a predictable state law is applied to them and their claims. As long as a “relevant part” of the property is located in one State.

**23.** Therefore, in line with the «Scherrens» Judgment, when real estate in one contracting state borders that in another, and it predominantly lies within one of these states, it might be appropriate to view the property as a single entity and designate it entirely situated in one state to confer exclusive jurisdiction to its courts over the property’s lease. Consequently, it would be appropriate to exclusively apply the

---

<sup>19</sup> *Vid.* I. LORENTE MARTÍNEZ, «Inmuebles fronterizos, corrección de frontera y competencia judicial internacional de los tribunales españoles», en *Cuadernos de Derecho Transnacional*, vol. 11, Núm. 2, octubre 2019, pp. 702-703.

law of the state where the property's «most relevant part» or «main part» is located».

**24.** In the event that there is no «most relevant part» of the contiguous property, there is no alternative but the traditional solution: the part of the property located in each State shall be governed by the law of that State. But what should we understand by «most relevant part»? The most suitable solution—and one that provides legal certainty—should be based on the percentage of occupation of the property: if we are dealing with real estate located in State A and State B; if the majority of the property is located in State A, the law applicable to the entire real estate should be that of State A; and if the property is divided equally between State A and State B, then yes, each part of the property will be subject to its corresponding law, the law of State A for one part, and the law of State B for the remaining part.

However, we should not automatically equate «most relevant part» with «largest area», but rather consider each case individually and take into account other elements.

**25.** While resorting to the traditional *Lex rei sitae* rule regarding the applicable law to real estate—provided for in Article 10.1 of our Civil Code—is, in general, a straightforward, logical, as well as precise, predictable, and harmonious solution; in the case of real estate located in territories subject to different state sovereignties, it does not seem the most appropriate approach, as subjecting the same real estate to the jurisdiction of different legal systems can practically lead to irreconcilable solutions regarding the same litigious matter.

**26.** When determining the relevant law for adjacent properties, one can draw an analogy from the «Scherrens» Judgment. This applies when real estate in one contracting state borders that of another state, with the property predominantly situated in one of them. In such cases, considering the property as a unified entity and attributing its location entirely to one state may be suitable for determining the applicable law.

**27.** Ultimately, this alternative solution: a) implies the timely resurgence of Roman Law as an optimal solution for contemporary challenges: the principal owner has precedence over the accessory one; and b) manages to faithfully respect the principles of good administration of justice, conflictual efficiency, and predictability for the parties: it will always be more efficient to litigate in one country than in two, applying a state law rather than two to the same case. Individuals only need to be informed about one state law, and state sovereignty is respected<sup>20</sup>.

---

<sup>20</sup> *Vid.* I. LORENTE MARTÍNEZ, «Inmuebles fronterizos, corrección de frontera y competencia judicial internacional de los tribunales españoles», en *Cuadernos de Derecho Transnacional*, vol. 11, Núm. 2, octubre 2019, p. 704.