

International succession and the lex rei sitae: book by Naivi Chikoc Barreda

This summary was provided by the author, Naivi Chikoc Barreda, Assistant Professor at the Faculty of Law of the University of Ottawa.

The book *Succession internationale et dispositions spéciales de la lex rei sitae. Contribution à l'étude de l'impérativité internationale en matière successorale* by Naivi Chikoc Barreda (L'Harmattan, Paris, December 2022) offers an in-depth reflection on the subject of overriding mandatory provisions in matters of succession, through an analysis of the clause allowing the application of the special provisions of the *lex rei sitae* which derogate from the unitary law of succession.

In **Part I**, the author traces the historical origins of the “territorial exception” to the unitary system in German legal literature and studies its subsequent development in the Introductory Act to the German Civil Code and in the convention drafts drawn up by the Hague Convention between 1900 and 1928. Theorized by Savigny under the concept of “*Gesetze von zwingender, streng positiver Natur*”, these special rules were associated with the public policy clause by the Hague drafts, under the influence of the Mancinian doctrine. To explain this convergence, the author analyzes the relationship between public policy and territoriality in the period in which these projects were conceived. The clause concerning the special regimes of the situs was finally detached from the public policy exception in the 1989 Convention. However, the methodological transformations in the field of Private international law during the second half of the XXth century left the phenomenon in a shadowy area. Unable to fit into the “new” approaches to public policy and overriding mandatory provisions, the derogatory application of the *lex rei sitae* took the form of a substantially oriented conflict rule. When the European legislator decided to insert the clause in Article 30 of Regulation 650/2012, it discarded the conflictual model and adopted the method of “*lois de police*”, thus restoring the Savignian understanding of this exception. The author discusses the reasons for this methodological choice, by exploring the family, economic and social purposes of these rules in accordance

with the principles underlying the autonomous interpretation of the regulation.

Part II addresses the complex issues arising out of the interaction between succession and other choice-of-law categories involved in the transfer of certain assets upon death. Most of the special provisions examined are at the intersection of several categories, their goal being precisely to ensure the stability of the function that the assets have been serving before the opening of the succession. Thus, it appeared important to distinguish between the ways in which property can be transferred otherwise than by succession, the rules for the distribution of particular assets of the estate, and the rules “affecting” the succession on such property. In the light of the CJEU case law, the author examined the treatment of the constitution of rights in rem by way of succession, the restriction on the acquisition of property by foreigners or non-residents, the transmission of the tenant’s rights after his death, the transfer of company shares, and the succession of the author’s *droit de suite*. An analytical framework is then proposed to delineate the respective scopes of the *lex successionis*, the *lex rei sitae*, the law governing matrimonial property regimes, the law applicable to maintenance obligations, the *lex contractus*, the *lex societatis* and the *lex loci protectionis*.

An extensive analysis is devoted to the compatibility between the clause on the special rules of the *lex rei sitae* and the concept of overriding mandatory provisions, as formulated in various regulations and interpreted by the CJEU. Two fundamental obstacles seem to prevent such integration: the absence of any reference to the protection of public interests and to the mandatory nature of the rules. Indeed, many of the special rules dealing with the transfer of particular assets for socio-economic purposes are either limited to enabling the owner to allocate the property according to some criteria or are default rules that apply absent a contrary disposition by the deceased. Despite the wording of the clause, the author argues for a shared intertextual interpretation of *lois de police* that brings the succession regulation in line with the position of other regulations on this issue. The traditional distinction between *lois de police* and the rules which are only mandatory at a domestic level is subject to a critical analysis from a new angle. The comparative study of the special rules of the *lex rei sitae* that intervene in succession matters leads the author to deconstruct the concentric circles theory that explain the convergence of both concepts on a core of super-imperative rules. Based on the interaction between the nature of the rule and its purpose in the law of succession, she explains the differences in the relationship

of these special rules with party autonomy on a substantive and a PIL level. From this perspective, some permissive and default rules of the *situs* are consistent with a functional conception of *lois de police*, freed from a concrete regulatory technique that is supposedly the only one suited to the pursuit of a public interest policy, and therefore deserve to be recognized as potentially having an overriding effect on the *lex causae*.