

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 3**

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**2021**

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# The Concept of Lex Situs and Tangible Movable Properties under Private International Law

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## ABSTRACT

*This paper discusses about the concept of movable properties under Private International Laws. It will discuss about rights of ownership over the movable properties under the situation of stolen cultural properties and tax claims over goods in transit. This paper will also discuss about the differing opinions of Courts in United States and England as well as principle of Lex Rai Sitae and its application under different circumstances. In addition to this, the important provisions of UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995 have been analysed as well.*

**Keywords:** *Conflict of Laws, Lex Rae Sitae, Lex Domiclii, stolen cultural property, bona fide purchase, goods in transit, movable properties.*

## I. INTRODUCTION

In the realm of Private International Law, also known by the name of Conflict of Laws, the legal relations between individual entities (which also include corporations and other entities) are governed by some form of foreign element which is in the form of domestic laws. Therefore, when looking at the domestic laws of individual countries, it is also important to look at other important things, namely the substantial and procedural elements of applying them to a particular case along with the principles of private international law in order to ensure a smooth process of harmonizing the elements of different laws to a common cause. However, understanding the rules of Conflict of Laws are not that simple and they differ from case to case. A foreign case may involve more than two countries involving multiple parties of different domicile and different subject matters and the legal principles governing their relationship with each other. When the parties cannot resolve their grievances effectively, three important questions come into the picture namely: firstly, the jurisdiction (which court had the power to decide the suit in question?); secondly, the choice of law rule (which countries' laws should a court apply?); And lastly, the question as to whether or not and under what circumstances the judgments of a foreign court will be considered. When all these questions

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are answered, only then can the court seek to proceed with the case.

When dealing with the concept of movable properties under Private International Law, the “*Lex Situs*” rule (the law of the place where the property is situated) and the “*Lex Domicilii*” rule (the law of the place where a person is domiciled) comes handy as a connecting factor. The *lex situs* rule is fairly and easily applicable to tangible immovable property especially “real property”. While it may seem to work very well in the case of tangible immovable property, it is not at all feasible and poses various problems when applied to movable property and intangible movable properties like bank accounts, shares, bonds, and certificate of deposits, letters of credit and other financial instruments. Applying *lex situs* rule to movable properties requires thorough understanding of the transactions as it can involve forums of different jurisdictions and therefore proper understanding of the forum and the connecting factor is very essential.

The situation of stolen goods under the Conflict of Law is a complicated process since the decisions of courts in the domestic legislations of countries vary a lot. The *lex situs* rule also becomes complicated when considering when the goods are in transit in a ship.

#### **(A) Literature Review**

**Wendell Carnahan, *Tangible Property and the Conflict of Laws*, 2, the University of Chicago Law Review, 345-384 (1935):**

This article discusses about some of the problems of conflict of laws with relation to movable chattels. It discusses about some important cases such as *Cammell v. Sewell*, 5 H & N. 728 (1860), and also discusses about the concept of gifts causa mortis, and various juristic opinions on the maxim, *mobilia sequuntur personam*.

**Trevor C Hartley, International Commercial Litigation 696-719 (2009):**

Studies concerning Conflict of Laws with respect to both tangible movables and intangible movables have been extensively discussed under this book. With respect to tangible movables, it discusses about stolen properties, tax claims, Nationalization in England and United States. The issues related tangible movables have been used from this book.

**Alba Mayss, Principles of Conflict of Laws 173-184 (3<sup>rd</sup> d. 1999):**

The topics concerning both tangible and intangible movables along with the succession of movables both testate and intestate have been discussed under this book.

#### **(B) Research Problem**

The *lex situs* rule, though may seem simple, is quite complicated when looking from the

perspective of different cases. While it may apply directly to immovable properties, its application in relation to movable properties has to be carefully looked at. For instance, applying this rule in a case where the plaintiff's goods were removed without his consent (stolen goods) would seem unfair and unjust. Similarly, its application in cases of tax claims, goods in transit, etc., has to be looked carefully so as to avoid any loopholes. The issue of goods in transit is a confusing one with regard to the *lex situs* rule.

### **(C) Research Questions**

1. Whether “*lex situs*” rule of Conflict of Laws apply in a situation where the goods are removed to a foreign country without the consent of the owner?
2. Whether the *lex situs* rule can be applied for the contents on board of a ship in the territorial waters of another country?

### **(D) Hypothesis**

1. Although various conflicting decisions show otherwise, the *lex situs* rule has been held applicable in most of the cases even if a property was removed without the owner's consent.
2. The *lex situs* rule does not apply in a normal way when the goods boarded on a ship are in transit.

### **(E) Scope and Objectives**

The scope of this paper is mainly concerning the English Common law and the Conflict of Law rules.

The Objectives of this paper are:

1. To know about the application of conflict of law rules with respect to movable properties.
2. To understand the proper application of the connecting factors under different case situations.
3. To understand different problems associated with conflict of law rules.
4. To understand how the domestic courts apply the decisions of foreign courts or their own laws for foreign citizens under Private International Law.
5. To understand the important provisions of UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995, when dealing with stolen property under Private International Law.

### **(F) Methodology**

The methodology used in this paper is based on doctrinal research method. The secondary

sources used in this paper are books, journal articles, case reviews, commentaries, case laws and academic websites.

## **II. CONFLICT OF LAW SITUATION UNDER STOLEN CULTURAL PROPERTY**

This chapter will be dealing with the question, “**Whether “lex situs” rule of Conflict of Laws apply in a situation where the goods are removed to a foreign country without the consent of the owner?**” In addition to this, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995 will be discussed as well.

### **(A) Stolen Cultural Goods and its Restitution**

Theft of art or valuable cultural objects is not something new and has been depicted in popular culture and in various film depictions as being glamorous and to some extent, frivolous. The film trope consists of both lighted-hearted and harsher variations made generally as a sort of entertainment for its viewers without paying any consideration to the real life situation. The reality, however, is often more complicated as the thief is less dashing or romantic (as being depicted in the films), and involves not so simple and complicated levels of criminal networks. Along with museums, private collections, historic and cultural institutions are also the targets for such kind of thievery.

The issue is not that great when the property was stolen, but starts being complicated after they go through multiple transactions and transfer, through higher-level intermediaries, cleaning them of any information about thievery, or link with its original owner. The new owner, often void of information and often at an innocent position (since he or she has no idea about the property being stolen from someone else), enjoys the immunity from being prosecuted criminally (often because he acted in good faith as a buyer), while the original owner is placed at a disadvantaged position.

The following cases show the situation of stolen property under different instances.

#### **1. England *Winkworth v. Christie Manson and Woods Ltd*<sup>2</sup>**

**Facts of the Case:** Certain artworks were stolen from a collector from Winkworth in England. The art thief took them to Italy. Later, they were brought by Dr. Paolo Dal Pozzo D’Annone, who was the second defendant acting under good faith. After the purchase, he consigned these artworks to an auction house in London by the name of Christie. When they came to England, Winkworth, the plaintiff, claimed them.

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<sup>2</sup> *England Winkworth v. Christie Manson and Woods Ltd* [1980] 2 WLR 937

**Issue of the Case:** The issue was whether the English Court should apply the law of the land, that is, the English law or should it apply the law of the defendant's domicile, that is, the Italian law? If the English law was to apply, then the plaintiff's title to the property would have weighed more, since the English law does not recognize rights over stolen goods even if bought under good faith. The goods would remain the property of the owner. However, the Italian law governs that a bona fide purchaser would acquire good title to the stolen goods.

**Judgement:** The court dismissed the suit because the Italian bona fide purchase had transferred good title to the purchaser, here Dr. Paolo. The title was valid in England as a vested right and could not be denied successfully by the former owner. Slade J while delivering the judgement stated that, "*On the other hand, there are other equally powerful – I think more powerful – counter-balancing considerations. Security of title is as important to an innocent purchaser as it is to an innocent owner whose goods have been stolen from him.*"<sup>3</sup> In this case, the principle of *lex rei sitae* was confirmed and was held in favour of the Italian law.

The above instances show that due to differences in opinions, the justifications can often end up one-sided. While enough remedies are provided to a bona fide purchaser even in a case where he does not acquire title, by way of compensation, the original owners can be seriously prejudiced. Next to the drug trade, the illegal art trade is often considered to be one of the greatest worldwide criminal activities. Many people feel that the law should not assist those dealers who acquire properties mala fide and through dubious circumstances. The next case shows that how legal and factual elements were used by one American court to ensure that a work of art was restored to its original and rightful owner.

## 2. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg

**Facts of the Case:** The plaintiff, a Greek-Orthodox Church in the late 1970s was the victim of a theft. The stolen items were a set of mosaic relics that were smuggled to Germany to be kept for a period of time. They were sold eventually to an American art dealer, Peg Goldberg, who took them to a free-port area of the Geneva airport, to be shipped to the United States. The free-port area is part of the airport where goods in transit can be kept for a temporary basis, without having to have cleared Swiss customs. After that, Peg Goldberg took them to the United States, where he tried to resell them at a vastly inflated price. When the museums contacted the Cypriot authorities regarding the same, the plaintiff came to know about it and claimed them back. The defendant relied upon the Swiss law, under which a good-faith purchaser, under certain circumstances, could obtain title to stolen property.

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<sup>3</sup> *England Winkworth v. Christie Manson and Woods Ltd* [1980] 2 WLR 937.

**Judgement:** Unlike the England Winkworth case, here the Court held in favour of the plaintiff. There were three routes by which the court reached this conclusion :

- i. First, the court applied interest analysis, under which it concluded that Indiana, the state in which Peg Goldberg had her art gallery, had a greater interest than Switzerland. Under Indiana law, a bona fide purchaser did not obtain title to stolen goods.
- ii. Secondly, it concluded (after hearing expert evidence) that a Swiss court would not have applied Swiss law to the mosaics, because they were only passing through Switzerland in transit; a Swiss court, it was said, would apply the law of the country of destination, Indiana.
- iii. Thirdly, even if Swiss law did apply, the defendant did not acquire the title in good faith. She should have checked the origin of the mosaics and, if she had, she would quickly have discovered that they were stolen.

### **(B) Situation of Stolen Cultural Property under the UNIDROIT Convention**

According to the UNIDROIT Convention, the stolen cultural property must be returned to the original owner if the following five conditions are met:

- a) the object must qualify as a cultural object as defined in Article 2 ;
- b) it must have been stolen;
- c) it must have some connection with a Contracting State other than the State where it is actually located;
- d) The claim for restitution must be brought within the limitation period. No claim can be brought under this Convention if they fail to bring the suit within the time prescribed. (Article 3);
- e) The claimant must compensate a bona fide possessor (Article 4). The Convention does not abolish national rules on bona fide purchase, therefore does not preclude that a valid title to the object was transferred to the bona fide possessor [in the instant case, under Italian law].

## **III. TAX CLAIMS OVER GOODS IN TRANSIT**

This chapter will be analysing the question, “**Whether the lex situs rule can be applied for the contents on board of a ship in the territorial waters of another country?**” with particular reference to the case of England Brokaw v. Seatrain UK Ltd<sup>4</sup>.

### **(A) England Brokaw v. Seatrain UK Ltd**

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<sup>4</sup> England Brokaw v. Seatrain UK Ltd [1971] 2 QB 476; [1971] 2 WLR 791; [1971] 2 All ER 98; [1971] 1 Lloyd’s Rep 337

**Facts of the Case:** In this case, two US citizens (husband and wife) who were staying in the United States wanted to send a consignment of furniture and household effects to their son-in-law living in England. The goods were loaded on a US ship. This ship named “Transoregon” was registered in the United States and flew the US flag. It was owned by a US company, the Seatrain Lines. While the ship was still on the high seas, a notice of levy was served on the ship-owners on behalf of the US treasury. The US claimed that the two US citizens owed money for previous taxes, and under the US law the effect of the notice of levy was to confer a lien (a property interest) on the US as security for the taxes. When the ship docked in England, the US claimed possession over the same. Mr. Brokaw (the son-in-law) also claimed them. The English court had to decide who was entitled to them.

**Judgement:** While deciding about the enforcement of revenue laws of a foreign country. Lord Denning held that the United States government has no valid claim in England regarding the goods boarded on the ship. Though the US government claimed constructive possession of the goods and that they had a federal tax lien over it; the case was in favour of England as the ship was in the territorial waters of England now that had clear jurisdiction over them. Lord Denning pointed out that the English law does not give aid to enforce, either directly or indirectly, the revenue laws of another country. Furthermore, the US government was not in direct possession of the goods boarded on the ship. They had only relied upon a notice of levy served to the ship-owners. So, in his view, there were no sufficient grounds to reduce the goods into their possession.

The question as to whether, “**Whether the lex situs rule can be applied for the contents on board of a ship in the territorial waters of another country?**” can be clearly understood from this case law. Although the ship was registered in US and sailed in the name of the US flag, the ship is not, per se, considered to be part of the territory of that country. It is true, that for certain purposes the law of that country can be applied. However, since its *situs* is not in any state, the ship is also not part of the territory of that state as well. Therefore, in such situations, the *lex situs* rule cannot be applied in a normal way. The hypothesis has been proved correct.

#### IV. CONCLUSION

The above discussions show that the principle of *lex situs* is fairly complicated when applying it to tangible movable properties under Private International Law. The *situs* of immovable property is fixed, while for movable property, its *situs* may keep on changing based on the facts and circumstances. The above discussions on stolen cultural properties and tax claims over

goods in transit show two conflicting decisions. While for the first case (England *Winkworth v. Christie Manson and Woods Ltd* [1980] 2 WLR 937), the English courts had applied the decision of a foreign court (Italian Law), in the case of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg* 717 F Supp 1374 (Federal District Court for the Southern District of Indiana, 1989); affirmed 917 F 2d 278 (7th Cir. 1990) the US court had applied the domestic legislation rather than that of Switzerland. As for the case of *England Brokaw v. Seatrain UK Ltd* [1971] 2 QB 476; [1971] 2 WLR 791; [1971] 2 All ER 98; [1971] 1 Lloyd's Rep 337, the English court does not consider or give effect to the revenue laws of a foreign country. This was completely different from the case of *England Winkworth v. Christie Manson and Woods Ltd* where the English courts gave effect to the good faith principle under Italian Law. Because of these differing opinions, there has been a great effort to harmonize the rules of conflict (if not the internal laws) under Private International Law. Although there has not been much progress in this field, nevertheless, some form of unification can be achieved if the countries agree to co-operate on establishing common principles.

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