WASTE AND UNNECESSARY RISK: BREXIT IS AN OPPORTUNITY TO CURE LEX SITUS

Transaction parties in Europe and elsewhere often require their aircraft finance, sale, and purchase transactions to be subject to English law. Reasons typically underlying this requirement include: market perception that English law is predictable; disincentives to litigation, such as the rule that the loser of litigation pays all, or a part, of the winner's legal fees; and, for those in and close to Europe, the geographical convenience of the English courts as well as the expectation that, as a general matter, English law judgments should be automatically enforceable in the European Union and the European Free Trade Association. The English courts also have a reputation for being creditor-friendly.

This law firm's practice as external general counsel requires it to be agnostic regarding choice of law issues. This intellectual distance allows this law firm to provide objective advice to its clients – which includes borrowers, buyers, and sellers of aircraft – as they consider how to structure their transactions. Lex situs continues to result in: economic and potential environmental waste; and unnecessary risk for parties to English law governed aircraft finance, sale, and purchase transactions where the aircraft is located outside of England at closing.

This article:

1. identifies English law conveyances over aircraft;
2. defines and addresses lex situs and identifies where it occurs;
3. explains the burdens, waste, and risk produced by lex situs;
4. explains how valid English law mortgages subject to lex situs are flimsy;
5. argues that the limited utility of valid English law mortgages in transactions subject to lex situs does not justify the burden or risk produced by lex situs;
6. identifies and analyzes proposed solutions to lex situs; and
7. concludes that legislation should override lex situs.

This article focuses on English law governed mortgages over aircraft, though it occasionally addresses transfers of title to and releases of mortgages over aircraft where convenient to show how lex situs can affect an entire transaction. This article also considers potential impacts of Brexit on the enforcement of English judgments within Europe.

1. Identifying English law conveyances over aircraft

Under English law, these conveyances include transfers of title between sellers and buyers and transfers of title to grant and release mortgages. These conveyances are usually evidenced by written instruments.

To grant an English law mortgage over an aircraft, the debtor conveys title to the aircraft to the creditor as security for the duration of the financing. The intended effect of the conveyance is to render the creditor a senior secured creditor as to the aircraft where the secured creditor has the ability to recover the aircraft. To release the mortgage, the creditor must reconvey title back to the debtor.

2. Defining and addressing lex situs; where it occurs

In 2010, the market learned that lex situs could invalidate security interests created by an English law mortgages when Blue Sky One Ltd & Ors v Mahan Air [2010] EWHC 631 (Blue Sky) was published. Blue Sky was shocking because of both its immediate effect on mortgages and its confirmation that the lex situs rule applies to other conveyances such as releases of mortgages and transfers of title between sellers and buyers.

The lex situs issue arises when a movable asset, such as an aircraft, is located outside of England when an English law mortgage is granted. The question central to the lex situs issue is whether the security interest created by an English law mortgage is effective under the law of the non-English jurisdiction. Further, the rules that guide the analysis resolving the lex situs question prohibit the lawyers or a court in that non-English jurisdiction from considering points of English law, such as whether the mortgage would otherwise be valid under English law.

The market has since developed practices intended to satisfy the conflicts of law analysis required under Blue Sky. The settled conservative practice is that lawyers qualified to practice law in the jurisdiction where an asset is located at closing (lex situs counsel) issue legal opinions (lex situs opinions) stating that the law of the jurisdiction where they are qualified to practice would recognize the effectiveness of the English law mortgage, and it is on this basis that English counsel will issue an English law opinion covering the validity and enforceability of the security interest created by the English law mortgage.

The lex situs issue also occurs under the laws of the British Overseas Territories to the extent that their laws depend on English law.

3. The burdens, waste, and risk produced by lex situs

Market practices cause sellers and buyer-borrowers of aircraft to incur the costs for the lex situs compliance exercise; contractual risk allocation causes sellers and buyer-borrowers to backstop lex situs risk. Addressing lex situs can also result in costs to the environment. Lex situs imposes significant burdens on individual transactions that can only mushroom when aggregated across the market.

The burdens and waste

If lex situs counsel is able to give English counsel a satisfactory lex situs opinion, then the borrower must pay for the cost of: English counsel's time to explain the issue to lex situs counsel and to manage lex situs counsel; lex situs counsel to draft the lex situs opinion; for English counsel to review and comment on it; and for English counsel to review and approve lex situs counsel's bills. Conservatively, one may expect the entire cost incurred in connection with a lex situs opinion to be twice what lex situs counsel estimates. The costs compound because lenders who are properly advised will require at least two opinions at transaction inception, one for the transfer of title to the aircraft and one for the granting of the mortgage. A debtor who is properly advised will require at least one lex situs opinion upon termination of the financing to ensure that the lender has properly released the mortgage. These costs can further increase when a refinancing occurs.

If lex situs counsel is unable to give English counsel a satisfactory lex situs opinion, then all counsel must engage in gymnastics, whether documentary or logistical, to ensure the primary transaction documents can remain subject to English law, or to take a view on the risks associated with the absence of a lex situs opinion. The total cost will depend on the complexity of the transaction. If an aircraft must be repositioned in order to close, then the obligor pays the cost of moving the aircraft, and the environment bears the cost of the depleted resources and carbon footprint of that repositioning. If the aircraft is used to generate revenues, the repositioning of the aircraft may cause it to be taken out of service thus resulting in lost revenues.

As a logistical exercise, closings require more planning and can take more time, which represents an uncompensated administrative burden for the business principals. And, addressing lex situs is distracting: instead of focusing on issues of commercial substance that matter, principals and their counsel must focus on an issue of form.

Risks incurred by parties under transaction documents due to lex situs

Sellers may find themselves constrained to paying for a lex situs opinion. This is because without one they may not have comfort that they have be effectively transferred title to the asset. Yet, even where they obtain those opinions, they may still find

themselves incurring liability under their transaction documents for the failure to effectively transfer title.

Where a financing supports a purchase of an aircraft, the finance documents likely include representations, warranties and corresponding events of default covering good title and the validity of security along with further assurances obligations. A borrower, therefore, risks being in default, because the borrower would not have good title to the aircraft with the knock-on effect that the lenders would not have valid security. That, in turn, could trigger cross-defaults for the borrower, and a cascading mess would ensue. The cascading mess could become exponentially worse where the financing involves the capital markets. And, as is typical of such financings, the borrower would have to incur the cost of curing that default.

The provisions addressing title and security described in the foregoing paragraph are standard in purchase agreements and financings and, where the law governing the transaction has no structural defects, appropriate. When viewed through the prism of lex situs, however, sellers and borrowers are effectively backstopping English law's failure to correct lex situs.

Quantifying the costs imposed by lex situs[1]

The costs associated with conducting a lex situs exercise – even one that involves the repositioning of an aircraft – may be negligible when expressed as a percentage of asset value for any given transaction, particularly if that transaction is high volume. But the cost the lex situs exercise represents may be significant when expressed as a percentage of transaction costs (excluding applicable taxes). Assuming the total legal fees paid by a buyer/borrower for a buy/sell transaction involving a financing (consistent with market conventions, the buyer/borrower pays for lender's counsel) on one aircraft are $200,000, the cost of the lex situs exercise (conducted in accordance with the practices described above) could represent between five percent and ten percent of the legal fees, irrespective of whether the legal opinions are charged on an hourly basis or on a risk-adjusted, fixed-fee basis.[2]

Transaction costs further increase when aircraft have to be repositioned for closing. Assume that a short to medium range narrow body aircraft with 189 seats configured for solely economy class must be moved from Toulouse to London for closing and that this movement does not fit within the airline's schedule. Moving that aircraft the single leg would result a total cost of £17,638.26 that breaks down as follows: a total headline cost of £8,147.79; and lost total flight revenue (airfare and ancillary based on a load factor of 91.9%) of £9,490.47.[3] The environment would suffer because the aircraft during that single leg would consume 4,400.5 kilograms of fuel thus generating 21,036.3 kilograms of carbon dioxide emissions (i.e., 111.3 kilograms per seat).[4] No carbon offsets are available, because no passengers would be on the aircraft.[5] When considered in the aggregate across the entire market, lex situs can be expected to have resulted in significant economic and environmental waste with questionable benefits to clients.

As substantial as those costs seem, the quantified value of the risk incurred by sellers and buyers of aircraft dwarfs them. Assume the aircraft referred to above is sold for $50 million with 80% leverage where those transactions are completed under English law. The seller incurs risk valued at $50 million. The buyer incurs risk to its lender valued at $40 million, and its equity of $10 million is also at risk. Both sellers and buyers are at risk of enforcement costs and other costs and fees awarded against them by a court. The financier, who would expect to be a senior secured financier has the potential to be an unsecured creditor with an $40 million exposure. Therefore, the total risk incurred by all of the core transaction parties is equal to at least $140 million. The total value of the risk stemming from the core transaction further increases where ancillary, supporting transactions, such as derivatives (e.g., interest rate and currency hedges), are present and each time a syndication, participation, or securitization of that core transaction occurs.

The choice of law by itself is irrelevant to how one quantifies the risk for each component of the core transaction; yet the choice of law, along with other factors, can make the realization of that risk more or less likely to occur. For example, the methodology used to evaluate the risk incurred by transaction parties should be familiar; it echoes that used to evaluate risk in the market during the subprime crisis in the United States. The key difference, however, between the subprime crisis and lex situs is this: whereas subprime mortgages were intangible assets that were poorly understood, here the aircraft is tangible and well understood. Rather, it is the tool – English law – used to

[1] Every transaction is unique; the hypothetical described herein is illustrative only.

[2] These figures are based on off-the-record conversations with market participants.

[3] These ballpark figures are calculated based on (a) the per seat revenues (ancillary and fare-based) multiplied by the load factor and (b) the headline costs, as reported by a publicly traded airline in publicly available information published on its investor relations webpage.

[4] ICAO Carbon Emissions Calculator, https://www.icao.int/environmental-protection/CarbonOffset/Pages/default.aspx, (visited on September 6, 2018) (Note: These figures rely on 189 passengers as a proxy for 189 seats. This is because the ICAO Carbon Emissions Calculator measures carbon dioxide emissions on the basis of kg/passenger. The ICAO Carbon Emissions Calculator, therefore, calculates as 0 the total carbon dioxide emissions when the number of passengers on an aircraft is set at 0. This must be incorrect because an aircraft emits carbon dioxide when it flies, irrespective of whether passengers are on board.).

[5] See, e.g., IATA Carbon Offset Program, Frequently Asked Questions, Questions 2.3 and 2.4 (passengers incur the cost of carbon offsets, if they elect to pay for them), https://www.iata.org/whatwedo/environment/PublishingImages/ICOP%20FAQ%20general%20for%20airline%20participants%20jan%202016.pdf (visited on September 6, 2018).

acquire and finance aircraft that is defective, and it is that defective tool that has the potential to undermine the market that relies on it.

4. A facially valid English law mortgage subject to lex situs is a house of cards

English courts exercise jurisdiction over contractual disputes liberally. English counsel will typically advise their clients to select English law as a choice of law for all of the transaction documents. Yet, practically speaking, lex situs guts English law of its autonomy and structural integrity. This is because the lex situs analysis subjects the enforceability of English law mortgages over aircraft located in a non-English jurisdiction at the time the mortgage is granted to the laws of that non-English jurisdiction.

If litigation arises challenging an English law mortgage where lex situs is an issue, English law will conduct a proxy trial in English court on the non-English law issues to determine whether the English mortgage was valid under non-English law. This is because the rules of civil procedure in the commercial court in England permit the admission of evidence of non-English law. Assuming a satisfactory lex situs opinion can be obtained, the lex situs opinion could be submitted as evidence of non-English law tending to prove the validity and effectiveness of the English law mortgage.

The validity and effectiveness of an English law mortgage subject to lex situs relies on a fiction that, if stress tested, could fail. Legal opinions rely on assumptions and qualifications that may not, in fact, represent the state of affairs existing at the time the opinion is given. Further, English legal opinion practice typically provides for lenders' counsel to issue the lex situs and enforceability opinions; obligors' counsel issues no such opinions. Therefore, an obligor could: challenge the validity of the opinions on the basis that they are self-serving; and submit evidence that the English law mortgage was in fact invalid under the law of the lex situs jurisdiction.

If litigation were multijurisdictional, including in the lex situs jurisdiction, a court in the lex situs jurisdiction could determine that, either under the laws of its jurisdiction at the time the English mortgage was granted, or under current law, the English law mortgage was, or has become, invalid, despite the presence of a lex situs opinion. Compounding this risk is that the lex situs analysis is arcane. A judge in the lex situs jurisdiction could fail to understand how the lex situs analysis works and thus invalidate the English law mortgage, which could have immediately disastrous consequences, even if the judgment is later reversed on appeal. One may, therefore, conclude that English law mortgages subject to lex situs are flimsy.

5. The limited utility of valid English law mortgages in cross-border transactions does not justify the burden or the risk produced by lex situs

If the primary purpose of a mortgage is to facilitate a mortgagee's repossession of an aircraft, then valid English law mortgages – irrespective of whether they are subject to lex situs – provide few, if any, benefits where the encumbered aircraft is located outside of England. The cost and effort incurred to comply with the lex situs analysis, and the risks lex situs imposes on parties, are, therefore, unjustified.

Enforcement of judgments in the European Union

<u>Pre-insolvency, a valid English mortgage provides some benefits</u>

England is one of the few jurisdictions in the European Union that permits self-help, and this is a reason why creditors might elect to take an English law mortgage. This remedy is, however, limited by both the laws of the jurisdiction where the aircraft is actually located as well as the logistics involved with recovering the aircraft. For example: self-help is prohibited by many civil law jurisdictions; or accessing the aircraft, which is typically in a high-security, access-restricted area, requires special permission, unless a creditor wishes to risk claims and crimes arising out of a trespass. Therefore, creditors should expect to have to sue on a mortgage in order to repossess an aircraft.

In this respect, a valid English law mortgage does have some value when considered against the backdrop of the Recast Brussels Regulation (applying among the Member States in the European Union) and the Lugano Convention (applying among the Member States of the European Free Trade Association and the European Union). These rules allow creditors, on the basis of an express agreement regarding choice of law and jurisdiction, to circumvent courts in other jurisdictions that might be perceived to be creditor-unfriendly. This is because these rules effectively provide for the automatic enforcement of foreign judgments, both interim and final, within the European Union and the European Free Trade Association, and case law from the European Court of Justice has effectively foreclosed a party's ability to challenge the judgment in that party's home jurisdiction on the merits. The Recast Brussels Regulation is robustly drafted and expressly includes both interim and final judgments. The Lugano Convention is not drafted as robustly; in particular, it does not expressly state that the scope of judgments governed by it includes interim judgments. However, the scope of judgments covered by the Lugano Convention is interpreted to include interim judgments. There are other differences, but those differences are beyond the scope of this article.

<u>The Recast European Insolvency Regulation encourages creditors to take local law security</u>

If insolvency proceedings have been opened, then a valid English law mortgage provides scant protection in the European Union to a senior secured creditor. This is because the Recast European Insolvency Regulation operates to exclude the rules on the enforcement of judgments. The Recast European

Insolvency Regulation was crafted to ensure that debtor-friendly jurisdictions would be able to continue to protect insolvent entities that open insolvency proceedings within those jurisdictions.

Aircraft represent a special case because the Recast European Insolvency Regulation expressly provides that the laws of the jurisdiction where an aircraft is registered determine the debtor's rights to the aircraft. This does not mean, however, that one is required to take a local law mortgage. The Recast European Insolvency Regulation provides that security over collateral should be valid across the European Union to allow creditors to exercise their rights over the collateral, irrespective of where the main insolvency proceedings are opened. The Recast European Insolvency Regulation also provides that the laws of the state where insolvency proceedings have been opened govern such issues as the priority of creditors' claims and rights, disposal of collateral, and the distribution of proceeds. This means that local law will determine how non-local law security interests functionally operate. Creditors, therefore, can only be certain that they have a security interest that the local insolvency tribunal should recognize.

With respect to aircraft specifically, one could choose to take solely an English law mortgage; taking a local law mortgage in lieu of or in addition to the English law mortgage is a better practice. The local law mortgage will be more readily understood by the local court and not likely require translation for admission into evidence, which is an inherently imprecise exercise.

Enforcement of judgments pursuant to treaties on the reciprocal enforcement of judgments

Whether a valid security interest over an aircraft exists is irrelevant because these treaties typically limit their scope of application to judgments for money.

Enforcement of judgments elsewhere

It is a mistake to assume that courts located in countries outside of the European Union and with which the United Kingdom has no treaties for the reciprocal enforcement of judgments would automatically enforce an English judgment. The effectiveness of the English approach to lex situs would turn on the deference accorded by the jurisdiction where enforcement is sought to international principles of comity, reciprocity, and res judicata.

The impact of Brexit

Assuming the market's perception as to the benefits of English law comports with reality, the true value of English law is not its inherent virtue as a tool for dispute resolution, rather it is derived from the one's ability to enforce an English law judgment automatically in the European Union. Brexit might result in the European Union and the United Kingdom entering into an agreement that could govern the enforcement of judgments (among other things), but, with six months to go until the United Kingdom exits the European Union, there remains almost no clarity on what that agreement would look like. A conservative view is that the United Kingdom should expect neither to continue to benefit from either the Recast Brussels Regulation or the Recast European Insolvency Regulation, nor to accede to the Lugano Convention, and its legislation adopting the UNCITRAL model insolvency rules is of limited utility.

Some in the market have theorized that, following a hard Brexit, the Brussels Convention might re-activate and become binding on the United Kingdom and the other countries in the European Union that signed it. That position is uncertain, because the Recast Brussels Regulation was intended to supersede the Brussels Convention, even though it did not officially terminate the Brussels Convention. Anticipating how this issue would resolve itself would be a fruitless exercise in chasing hypotheticals.

Instead, the United Kingdom could attempt to accede to the Lugano Convention in its own right if the United Kingdom were to become a member of the European Free Trade Association or otherwise be sponsored by a party to the Lugano Convention. The United Kingdom's accession, however, would be subject to the unanimous agreement of the parties to the Lugano Convention. Even if there have been recent reports that the United Kingdom has high level support among the members of the European Free Trade Association to join it, membership in the European Free Trade Association would violate some Brexiteer red lines. In the alternative, the current parties to the Lugano Convention may be unable politically to justify allowing the United Kingdom to accede to the Lugano Convention on an ad hoc basis with no broader relationship in place.

As a last resort, the United Kingdom might attempt to accede to the Hague Convention on Choice of Court Agreements. That convention imposes on its treaty members obligations to enforce the judgments from the courts of one another, provided however the contracts between disputants domiciled in the treaty members include an exclusive jurisdiction clause. The European Union is already a party to this Hague Convention, and no party to this Hague Convention can prevent another party from acceding to it. Post-Brexit, the United Kingdom could accede to this Hague Convention, but the United Kingdom would not find itself in a position similar to the one it occupies today or could occupy were it to accede to the Lugano Convention. This Hague Convention applies only to final decisions on the merits; it expressly excludes interim measures of protection from its scope of application.

The position on insolvency is also muddy. Some argue that English insolvency tribunals could expand the scope of their jurisdiction to hear proceedings that include creditors and debtors not located in England. At best, that statement is a half-truth, because one must also consider one's ability to enforce a judgment. The United Kingdom has adopted

the UNCITRAL model law on cross-border insolvency into its domestic legislation. The UNCITRAL model law operates in a manner similar to the Recast European Insolvency Regime in that it creates a harmonized framework to permit cooperation among sovereigns when a multinational organization opens insolvency proceedings in a jurisdiction that has adopted the UNCITRAL model law. However, enforcement of judgments under the UNCITRAL model is limited in scope to certain kinds of judgments, and its application is limited to those countries which have passed legislation adopting it. Of them, the European Union has not passed legislation adopting the model law, and Greece is the only Member State of the European Union to have passed legislation adopting it.

6. Addressing the lex situs issue

Absent corrective legislation, there are other solutions that might address lex situs. The solutions described below are presented in no particular order.

Practical solution: rely on transaction precedent as comfort to avoid taking a lex situs opinion

If a buyer does not have title to an aircraft, then it should not be able to grant a mortgage over that aircraft. In this respect, there is anecdotal evidence that some lenders do not require lex situs opinions for new deliveries of aircraft on the basis of precedent transactions. The reasoning is that the lex situs issue has existed for almost ten years with no subsequent litigation, so transaction parties may be comfortable on the basis of practice that these transfers of title should be valid. The consequence of this practice is that the validity of an entire transaction relies on the seller's credit.

Whether an aircraft is new or pre-owned, a well-advised seller should consider whether a failure to obtain a lex situs opinion would cause that seller to breach any representations and warranties it gives as to title as well as any liability it could incur to other parties based on its knowledge of their existence and relationship with the buyer. Either way, the seller needs to be willing and able to take the actions required to correct a defective transfer of title and/or disgorge the purchase price and take the aircraft back. One should also consider whether the failure to obtain the lex situs opinion will result in a cascading effect under the related financings and syndications (in whatever form they take) that rely on good title having been passed from the seller to the buyer.

Documentary solution: carve out or tie in lex situs

Tenacious obligors could seek to negotiate lex situs carve outs in the transaction documentation. These carve outs would absolve obligors for liability arising out of the lex situs issue. Alternatively, obligors could seek to tie in lex situs issues, either explicitly by reference to the legal opinions that support their transactions, or with a knowledge qualifier that implicitly refers to the legal opinions. Either approach might be expected to result in a certain amount of teeth-gnashing, and it would not solve the underlying lex situs issue.

Structural solution: security over the primary obligor

Sometimes creditors require the parent of the primary obligor to grant security over the parent's interests in the primary obligor. This security will be governed by the law where the primary obligor is formed. The remedies in the security include the rights for the creditor to seize and manage the primary obligor.

Reliance on this security to mitigate lex situs uncertainty is a red herring because: the primary obligor may not be end user of the aircraft; and the creditor may not be able, or want, to exercise its rights over the primary obligor. Therefore, a creditor would still need to ensure it is a senior secured creditor as to the aircraft.

Legislative solution: Cape Town Convention

An English law mortgage, irrespective of whether it is compliant with lex situs, can create an international interest under the Cape Town Convention. This is because the English legislation implementing the Cape Town Convention permits English law mortgages to create international interests without consideration of lex situs. The Cape Town Convention may also have solved the problem inherent to English law that an English law mortgage cannot be perfected in England where the mortgagee is not English (so a filing at Companies House is not possible or would have any effect) and/or the aircraft is not registered in England (so a filing at the Civil Aviation Authority is not possible or would have any effect).

Yet, creditors should not rely on the Cape Town Convention, alone, to become senior secured creditors under English law. The Cape Town Convention is effective only in the convention's seventy-seven contracting states, and the remedies available to creditors are subject to any declarations a contracting state may have made. Also, the effectiveness of creditor support documents under the Cape Town Convention, such as the IDERA, is subject to a registry's practices. Creditors, therefore, should not assume that an English law mortgage would facilitate their repossession of an aircraft.

The Cape Town Convention's utility, therefore, appears to be limited to constructive notice of international interests. Yet, whether that constructive notice is effective depends on: the local law in the country where the party receiving notice is located; and the law of the contracts governing the transactions to which that party is a party. Like lex situs, this, too, is a conflict of laws issue.

Structural solution: mortgages under laws other than English law

Savvy obligors and financiers may agree that the mortgages required for their transactions be subject to laws other than English law. For example, if obtaining an international interest under the Cape Town

Convention is a requirement of credit approval, then there are seventy-six choices of law that can be used to govern the security document that creates an international interest other than English law. One might criticize this solution as imperfect, because it may result in litigation in more than one forum.

That criticism rings hollow: the market has developed practices in cross-border transactions to address this issue; and buyers, lenders, and borrowers in aircraft finance transactions are typically deep-pocketed and expect to have to litigate in multiple jurisdictions when transactions sour. For example, lenders may elect to take redundant local law security. If a dispute arises, relief could be sought in those jurisdictions directly without waiting for an English judgment. Yet, this solution presupposes that the borrower had valid title to begin with, which it may not, if the transfer of title were subject to English law.

That is why a law other than English law ought to govern the entire transaction, if it is material that the finance documents be subject to the same laws as the security documents.

7. A legislative override can resolve lex situs

Viewed objectively, England is proving to be a highly unstable jurisdiction in which to do business and to have disputes heard, and its influence over parties in the European Union is waning. Indeed, in July of this year, the Law Society Gazette reported that businesses increasingly are shunning English law and English courts due to the uncertainty caused by Brexit.

If Brexit was motivated, in part, by England's desire for greater autonomy, then England should expect to be subject to proportionately greater accountability as it completes globally on its own. Part of that calculus should include an effort to clean up its law to facilitate practices in the modern economy. For, although clients understand that good legal advice can highlight ambiguity, whether legal or factual, and propose solutions meant to navigate it. Clients understandably go apoplectic when they must pay for legal work whose value is limited to papering over structural issues resulting from arcane, theoretical, or antiquated legal concepts. Lex situs is one area ripe for such an overhaul.

In 2011, several English firms formed a working group to address the lex situs issue. Yet, no further action appears to have occurred since, and the United Kingdom's implementation of the Cape Town Convention is merely window dressing that glosses over lex situs. The time is right to introduce legislation that overrides lex situs.

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