

## The law applicable to rights in rem: skeleton

### GEDIP

#### Chapter I. Scope

##### Article 1. Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to proprietary rights (rights *in rem*) in tangible assets<sup>1</sup>.

2. The following shall be excluded from the scope of this Regulation

(a) questions involving the status or legal capacity of natural persons,

(b) questions involving the capacity of legal persons,

(c) contractual obligations<sup>2</sup>,

(d) non-contractual obligations,

(e) the creation or transfer of proprietary rights resulting from matrimonial property regimes<sup>3</sup>,

(f) the creation or transfer of property rights resulting from the proprietary consequences of registered partnerships<sup>4</sup>,

(g) the creation or transfer of property rights by succession<sup>5</sup>,

(h) the effects of the opening of insolvency proceedings on proprietary rights<sup>6</sup>,

---

<sup>1</sup> A recital should clarify that this Regulation shall not apply, in particular, to receivables, rights to the performance of obligations other than receivables, negotiable instruments or negotiable document in electronic form, right to payment of funds credited to a bank account, certificated and book-entry securities.

<sup>2</sup> A recital should clarify that when the law applicable to the proprietary rights requires a valid contract as a condition for its acquisition, the validity of the contract shall be determined by the law applicable under the Rome I Regulation.

<sup>3</sup> A recital should clarify the relationship between this Regulation and the Regulation on matrimonial property regimes in accordance with recitals 24 to 28 of the latter instrument.

<sup>4</sup> *Idem*.

<sup>5</sup> A recital should clarify the relationship between this Regulation and the Regulation on successions in accordance with recitals 14 to 19 of the latter instrument

<sup>6</sup> A recital should clarify the relationship between this Regulation and the Regulation on insolvency proceedings. The term “effects of the opening of insolvency proceedings” includes in particular, the

- (i) the transfer of proprietary rights by operation of law as a consequence of company mergers, divisions or global transfers (universal succession), and
- (j) the creation, administration and dissolution of trust<sup>7</sup>.

## **Article 2. Definitions**

For the purpose of this Regulation:

- (a) “Proprietary rights” means rights over tangible assets that are effective against third parties (*erga omnes*), such as ownership, security interests, usufruct or right of retention;
- (b) “Tangible assets” means assets able to be physically possessed and include both movable and immovable;
- (c) “Relevant time” means the time of the acquisition of the corresponding proprietary right (alternative: the time when the facts occurred from which the acquisition or the loss of the corresponding proprietary right derive<sup>8</sup>).

## **Article 3. Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

## **Chapter II. Uniform rules**

### **Article 4. General rule**

The proprietary rights in an asset are governed by the law of the country within the territory of which the asset is located at the relevant time.

---

enforcement of a proprietary right after the opening of insolvency proceedings, the ranking of claims and the avoidance of the creation or transfer of proprietary rights.

<sup>7</sup> A recital should clarify that this exclusion should not be understood as a general exclusion of trusts. Where a trust is validly created the law applicable under this Regulation should apply to govern the trust’s proprietary rights over tangible assets.

<sup>8</sup> See Art. 100 Swiss PIL Act. The issue of “transformation” or “modification” of a right *in rem* may be considered.

## **Article 5. Assets in transit**

The acquisition and the loss of proprietary rights in an asset in transit or to be exported are governed by the law of the country of destination<sup>9</sup>.

## **Article 6. Means of transport<sup>10</sup>**

1. The proprietary rights in an aircraft are governed by the law of the country of its nationality (alternative: flag/registration<sup>11</sup>).

2. The proprietary rights in a railway vehicle are governed by the law of the country of its licensing (alternative: registration)

3. The proprietary rights over a vessel are governed by the law of the country of its registration.

[The coming into existence of a statutory lien in those means of transport underlies the law applicable to the underlying claim. The ranking among several claims is governed by the law of the country of location of the asset<sup>1213</sup>]

## **Article 7. Scope of the applicable law**

The law applicable pursuant to this Regulation shall govern, in particular:

---

<sup>9</sup> See Art. 101 Swiss PIL Act or 52 Italian PIL Act (but see Art. 10(1) III Spanish Civil Code). A recital should explain that (i) this provisions allows, in particular, for the acquisition of a proprietary right over an asset in transit before its arrival to the country of destination; and (ii) it presupposes that the asset eventually arrives in that country (see Art. 85 (4) UNCITRAL Model Law on Secured Transactions).

<sup>10</sup> See Art. 45 EGBGB, Art. 10 (2) Spanish CC;

<sup>11</sup> If “registration” is used here, a unique rule may cover all means of transport included in this provision.

<sup>12</sup> See Art. 45 (E) EGBGB. It should be discussed whether this rule should be generalized.

<sup>13</sup> Alternatively, this clarification may be located in Article 7.

- (a) the requirements to create, transfer or acquire a proprietary right over an asset;
- (b) the question of whether the ownership of the corresponding asset may be evidenced by a title certificate and transfer by delivery or endorsement of such a certificate<sup>14</sup>;
- (b) the priority between competing proprietary rights over the same asset;
- (c) the nature and content of the proprietary rights over an asset;
- (d) the enforcement of security interest over an asset

### **Article 8. [conflit mobile] Protection of acquired rights**

1. This Article applies if there is a change of the connecting factor that determines the applicable law under this Regulation<sup>15</sup>.

2. In this Article -

- a) "the new law" means the law applicable under this Regulation after the change;
- b) "the old law" means the law applicable under this Regulation before the change.

3. The old law continues to govern the existence of a proprietary right created before the change of the applicable law<sup>16</sup>.

4. The new law governs the extent and the exercise of a proprietary right created under the old law<sup>17</sup> and the priority between a proprietary right created under the old law and a competing proprietary right created under the new law.

5. Where a person invokes a proprietary right to which he is entitled under the old law and the new law does not know the proprietary right in question, that right shall, if necessary and to the extent possible, be adapted [transposed] to the closest equivalent right *in rem* under the

---

<sup>14</sup> A recital should explain the consequences, ie if the assets is covered by a negotiable instrument, the law of the State in which the document is located will governed the proprietary right over the document and therefore over the assets.

<sup>15</sup> An alternative formulation may be: "This Article applies if the asset is moved from one State to another", but it would not cover the means of transport governed by Article 6.

<sup>16</sup> A recital should explain that this provision entails the obligation to recognize "proprietary rights" validly created under the law of the country where the asset was at the time of creation of the right.

<sup>17</sup> See Art. 43 (2) EGBGB; Art. 100 (2) Swiss PIL Act

law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it<sup>18</sup>.

6. If a proprietary right has not been acquired under the old law previously to the change of law, as to the acquisition of a proprietary right under the new law, facts that took place under the old law are considered as if they took place under the new law<sup>19</sup>.

[Possible special rule for claims over stolen goods<sup>20</sup> or cultural goods<sup>21</sup>]

### Chapter III. Other provisions

#### Article 9. Overriding mandatory provisions

1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the third-party effects of assignments of claims pursuant to this Regulation.

---

<sup>18</sup> See, e.g., Art. 31 of the Succession Regulation, the corresponding recitals should also be included in this Regulation.(recitals 16 and 17)

<sup>19</sup> See Art. 43 (3) EGBGB; Art. 102 Swiss PIL Act. This solution could also be included in the recital as an interpretive criteria of the general rule.

<sup>20</sup> See, for example, Art. 92 Belgian Law: *“La revendication d'un bien volé est régie, au choix du propriétaire originaire, soit par le droit de l'Etat sur le territoire duquel le bien était situé au moment de sa disparition, soit par celui de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication.*

*Toutefois, si le droit de l'Etat sur le territoire duquel le bien était situé au moment de sa disparition ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication.”*

<sup>21</sup> See, for example, Art. 90 Belgian Law: *“Lorsqu'un bien qu'un Etat inclut dans son patrimoine culturel a quitté le territoire de cet Etat de manière illicite au regard du droit de cet Etat au moment de son exportation, sa revendication par cet Etat est régie par le droit dudit Etat en vigueur à ce moment ou, au choix de celui-ci, par le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication.*

*Toutefois, si le droit de l'Etat qui inclut le bien dans son patrimoine culturel ignore toute protection du possesseur de bonne foi, celui-ci peut invoquer la protection que lui assure le droit de l'Etat sur le territoire duquel le bien est situé au moment de sa revendication”.*

#### **Article 10. Public policy (ordre public)**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

#### **Article 11. Exclusion of renvoi**

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

#### **Article 12. States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of proprietary rights, each territorial unit shall be considered as a State for the purposes of identifying the law applicable under this Regulation.

2. A Member State which comprises several territorial units each of which has its own rules of law in respect of proprietary rights shall not be required to apply this Regulation to conflicts of laws arising between such units only.

#### **Article 13. Relationship with other provisions of Union law**

This Regulation shall not prejudice the application of provisions of Union law which, in relation to particular matters, lay down conflict of laws rules relating to proprietary rights.

#### **Article 14. Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of laws rules relating to proprietary rights.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

#### **Article 15. Application in time**

1. This Regulation shall apply to proprietary rights created or acquired on or after [date of application].
2. The law applicable pursuant to this Regulation shall determine the priority between a proprietary right acquired on or after the date of application of this Regulation and a competing proprietary right acquired before this Regulation becomes applicable.