

The law applicable to rights in rem in tangible assets

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 assets¹.

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 obligations²,

(d) non-contractual obligations³,

(e) the creation, acquisition or transfer of proprietary rights resulting from matrimonial property regimes⁴,

¹ 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.

² A recital should clarify that the law applicable under this Regulation determines the requirements for the creation, acquisition or transfer of a property right. When such a law requires a valid contract as a title for its creation, acquisition or transfer, the validity of the contract shall be governed by the law applicable under the Rome I Regulation. However, this Regulation does determine the law applicable to the agreement that transfer property (“proprietary agreement” = Einigung) in those legal systems where this is a condition independent from the underlying contract that simply creates an in personam obligation to transfer property.

³ A recital should clarify that claims arising from damages to (intromissions emanating from, see Art. 44 EGBGB) an immovable property do not fall within the scope of this Regulation, but within Rome II.

⁴ 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.

- (f) the creation, acquisition or transfer of property rights resulting from the proprietary consequences of registered partnerships⁵,
- (g) the creation, acquisition or transfer of property rights by succession⁶,
- (h) the effects of the opening of insolvency proceedings on proprietary rights⁷,
- (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 trust⁸.

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, mortgages, usufructs or servitudes;
- (b) “Tangible assets” means assets able to be physically possessed and includes both movable and immovable;

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

⁵ *Idem*.

⁶ 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

⁷ 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 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.

⁸ 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. Conversely, the mutual rights and obligations between the settlor of the trust, the trustee and the beneficiary are not governed by this Regulation

Article 4. General rule

The proprietary rights in an asset are governed by the law of the State within the territory of which the asset is located.⁹

Article 5. Assets in transit or to be exported

The acquisition and the loss of proprietary rights in an asset in transit or to be exported are governed by the law of the State of destination¹⁰.

Article 6. Means of transport¹¹

The proprietary rights in an aircraft, vessel or railway vehicle subject to registration are governed the law of the State under the authority of which the register is kept.¹²

Article 7. Scope of the applicable law

[Without prejudice to Article 8]¹³ The law applicable pursuant to this Regulation shall govern, in particular:

⁹ Though Rome I Regulation refers to “law of the country”, the recent EU instruments refer to “the law of the State”. This is also the terminology used by the Regulation on assignments.

¹⁰ See Art. 101 Swiss PIL Act, Art. 88 Belgian PIL Act or 52 Italian PIL Act (but see Art. 10(1) III Spanish Civil Code). A recital should explain that (i) this provision allows, in particular, for the acquisition of a proprietary right over an asset in transit before its arrival to the State of destination; and (ii) it presupposes that the asset eventually arrives in that State (see Art. 85 (4) UNCITRAL Model Law on Secured Transactions). Thus, it must be clarified that if a proprietary right is created while the asset is in transit under the actual *lex rei sitae*, ie by the *lex rei sitae* where the asset is physically but temporally located, this law will determine the priority between the two conflicting rights. Another recital should define the concept of assets in transit (ie assets being relocated from one State to another) and assets to be exported (ie assets destined to be moved to another State). An alternative approach is to define these terms in Article 2.

¹¹ See Art. 45 EGBGB, Art. 89 Belgium PIL Act, Art. 10 (2) Spanish CC;

¹² A recital should clarify whether this provision covers registration for mere administrative purposes, or only registers that evidence entitlements or proprietary rights.

¹³ As regards the structure, there are two possible approaches: (i) Either to place Article 8 as a sort of exception/clarification of Article 7; (ii) or to place it after Article 4. In the latter case, the clause “without prejudice” would not be necessary.

- (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 certificate¹⁴;
- (c) the priority between competing proprietary rights over the same asset;
- (d) the nature and content of the proprietary rights over an asset;
- (e) the enforcement of security interest over an asset; or
- (f) the extinction or loss of a property right

Article 8. [conflit mobile] Protection of acquired rights

Option A

1. This Article applies if there is a change of the connecting factor that determines the applicable law under this Regulation¹⁵.

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. When a proprietary right has been acquired under the old law, this law continues to govern the existence of a proprietary right created before the change of the applicable law¹⁶.

¹⁴ A recital should explain the consequences, ie if the assets is covered by a negotiable instrument, the transfer of proprietary rights over the physical asset may take place by endorsement or delivery of the instrument. See, for a different approach, Art. 106 Swiss PIL or Art. 91(3) Belgium PIL Act

¹⁵ 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.

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

4. The new law governs the extent and the exercise of a proprietary right created under the old law¹⁷ 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 law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it¹⁸.

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 law¹⁹.

Option B [Marc]

1. Sauf dans les cas prévus aux articles 5 et 6, lorsque le bien a été déplacé du territoire d'un Etat à un autre, un droit réel acquis conformément à la loi du premier Etat continue de régir l'existence d'un tel droit après le déplacement

2. Lorsqu'une personne fait valoir un droit réel auquel elle peut prétendre en vertu du paragraphe 1 et que la loi désignée en vertu de l'article 4 après le déplacement du bien ne connaît pas le droit réel en question, ce droit est, si nécessaire et dans la mesure du possible, adapté au droit réel équivalent le plus proche en vertu de cette loi en tenant compte des objectifs et des intérêts poursuivis par le droit réel en question et des effets qui y sont liés.

3. Lorsqu'un droit réel n'a pas encore été acquis en vertu du paragraphe 1, il est tenu compte de faits survenus avant le déplacement lors de l'application de la loi applicable en vertu de l'article 4 après le déplacement.

¹⁷ See Art. 43 (2) EGBGB; Art. 100 (2) Swiss PIL Act

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

¹⁹ 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.

[Possible special rule for claims over stolen goods²⁰ or cultural goods²¹]²²

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.

Article 10. Public policy (ordre public)

The application of a provision of the law of any State 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

²⁰ 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.”*

²¹ 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”.

²² Another possible approach is to address these issues under Article 9.

The application of the law of any State specified by this Regulation means the application of the rules of law in force in that State 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.

[Possible inclusion of a special rule in Brussels I on right in rem over movable property]