

GEDIP – document adopté à la réunion virtuelle 2021

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The law applicable to rights in rem in tangible assets

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[1] [2].
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[3],
 - (d) non-contractual obligations[4],
 - (e) the creation, acquisition, encumbrance or transfer of proprietary rights resulting from matrimonial property regimes[5],
 - (f) the creation, acquisition, encumbrance or transfer of property rights resulting from the proprietary consequences of registered partnerships[6]
 - (g) the creation, acquisition or transfer of property rights by succession[7],
 - (h) the effects of the opening of insolvency proceedings on proprietary rights[8],
 - (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 trusts[9].

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;
- (c) “Asset in transit” means an asset being relocated from one State to another;
- (d) “Asset to be exported” means an asset destined to be relocated to another State.

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 State within the territory of which the asset is located.

Article 5. Assets in transit (*res in transitu*) or to be exported

1. The acquisition and the loss of a proprietary right in an asset in transit or to be exported are governed by the law of the State of destination, provided that the asset reaches that State[10].
2. If a proprietary right is created in accordance with the law of the State of destination and another property right is created under law of the State in the territory of which the asset is physically located, the law of this State will determine the priority between the two conflicting rights.

Article 6. Means of transport

The proprietary rights in means of transport subject to registration are governed by the law of the State under the authority of which the register is kept[11].

Article 7. Scope of the applicable law

Without prejudice to Article 8, the law applicable pursuant to this Regulation shall govern, in particular:

- (a) the requirements to create, transfer, encumbered or acquire a proprietary right over an asset;
- (b) the question of whether the ownership of the corresponding asset may be embodied in a title certificate and transfer by delivery or endorsement of such a certificate[12];
- (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. Protection of acquired rights

1. When there is a change of the applicable law in accordance with this Regulation and a proprietary right has been acquired under the former law, this law continues to govern the existence of such a right[13].
2. The new law governs the extent and the exercise of that proprietary right, and the priority between that proprietary right and a competing proprietary right created under the new law.
3. Where a person invokes a proprietary right to which he or she is entitled under the law referred to in paragraph 1 and the law referred to in paragraph 2 does not know the proprietary right in question, that right shall, if necessary and to the extent possible, be transposed[14] to the closest equivalent proprietary right under the law referred to in

paragraph 2, taking into account the aims and the interests pursued by the specific right and the effects attached to it.

4. If a proprietary right has not been acquired under the law referred to in paragraph 1 previously to the change of law, as to the acquisition of a proprietary right under the law referred to in paragraph 2, facts that took place under the old law are considered as if they took place under the new law.

Chapter III. Other provisions

(provisional version yet to be discussed)

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 of the forum

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.

[1] Cultural and stolen goods are not covered by this instrument. GEDIP continues its works in relation to these two types of assets.

[2] 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.

[3] A recital should clarify that when the law applicable under this Regulation requires a valid contract as a title for the creation, acquisition or transfer of a right in rem, 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” or Verfügungsgeschäft) in those legal systems where this is a condition independent from the underlying contract that simply creates an in personam obligation to transfer property.

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

[5] 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.

[6] *Idem*.

[7] 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.

[8] A recital should clarify the relationship between this Regulation and the Regulation on insolvency proceedings along these lines: In principle, and notwithstanding the opening of insolvency proceedings, the law applicable under this Regulation continues to apply to the creation and perfection of rights in rem over tangible assets; however, this does not prejudice the application of the special rules governing insolvency proceedings and their effects upon proprietary rights. 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.

[9] 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 the transfer by the settlor of proprietary rights in tangible assets to the trustee, and any proprietary rights of the trustee and the beneficiaries in the tangible trust assets.

[10] 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; (ii) if the asset does not reach the State of destination, the general rule applies.

[11] A recital should clarify that this provision only covers registers that evidence proprietary rights.

[12] A recital should explain the consequences if, according to the law designated by this instrument, the transfer of proprietary rights over a tangible asset may take place by delivery or endorsement of a

certificate representing that asset. However, this Regulation does not determine the law applicable to the transfer of the certificate itself.

[13] A recital should clarify that this provision is not limited to a change of the applicable law in accordance with the main rule, i.e. Article 4, but may also apply when, for example, there is a change of the applicable law under Article 6 if the asset is de-registered from State A and register in State B.

[14] Unlike other EU instruments where the term “adaptation” is used, GEDIP understands that the correct term, in accordance with the general theory of Private International Law, is “transposition”.