

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, encumbrance 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~~ when the law applicable under this Regulation requires a valid contract as a title for ~~the its~~ 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” = Verfügungsgeschäft 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.

- (f) the creation, acquisition, [encumbrance](#) 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 trusts⁸.

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 moved to another State](#)

Article 3. Universal application

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.

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 [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 proceeding 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.

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 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](#) ~~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~~

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

The acquisition and the loss of [a proprietary rights](#) 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](#)⁹¹⁰.

Article 6. Means of transport

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.¹¹¹²

⁹ 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;~~ (ii) 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; (iii) ~~if the asset does not reach the State of destination, the general rule applies. 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.~~

¹⁰ ~~Several members of the Group advocated for including an additional condition linked to an agreement by the parties on the application of the *lex destinationis* or to a certain period of time prior to the exportation of the asset from the State of origin. This question is still pending for further discussion.~~

¹¹ A recital should clarify ~~that whether~~ this provision only covers ~~registration for mere administrative purposes, or only~~ registers that evidence entitlements or proprietary rights.

¹² ~~Some members of the Group have suggested the extension of this provision to other means of transport, in particular automobiles, rocket engines or spacecrafts (or means of transport for these assets). This question is still pending for further discussion.~~

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 evidenced by a title certificate and transfer by delivery or endorsement of such a certificate¹³;
- (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. ~~[conflict mobile]~~ 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.¹⁴

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 adapted **[transposed]** 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.

¹³ A recital should explain the consequences, ie if the asset 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. But this Regulation does not determine the law applicable to the transfer of the instrument itself.

¹⁴ A recital should clarify that this provision is not limited to a change of the applicable law in accordance with the main rule, ie 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.

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

[Escape clause]¹⁵

[Stolen assets and cultural goods]¹⁶

¹⁵ Some members of the sub group have advocated for the inclusion of some provisions to give more flexibility to the rules laid down in Article 4 to 8. One option would be to include an escape clause, e.g.: Article X

“If there is a substantially closer connection with the law of a state other than that which would apply under article 4 to 8, then that law shall apply”

Another alternative would be to include special rules for certain situations, in particular assets that form part of a functional unity or statutory liens (i.e. liens by operation of law). For example:

“When an asset form part of a functional unity with a special purpose, like a business concern, it is deemed to be located in the territory of the State with which the whole of assets has the closest connection” (see Art. 87.2 Belgium PIL Code). [Anyway, a recital should clarify that this Regulation does not apply to universal transfers of a patrimony by operation of law, e.g. successions, mergers or divisions]

Statutory liens are probably a more difficult issue. In principle, public-law liens are excluded from the scope of the instrument, but not private-law liens. We can also exclude them, maintain the application of the lex rei sitae or look for another solution.

These issues are also pending for further discussion within the Group.

¹⁶ The addition of special rules for stolen assets and cultural goods is still “work in progress”. A subgroup coordinated by Symeon will take care of presenting a proposal for the next meeting of the Group.