

The law applicable to rights in rem in corporeal 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 corporeal assets.¹

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,²

(d) non-contractual obligations,³

(e) the creation, acquisition, encumbrance or transfer of proprietary rights resulting from matrimonial property regimes,⁴

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 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.

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, encumbrance or transfer of property rights resulting from the proprietary consequences of registered partnerships,⁵
- (g) the creation, acquisition or transfer of property rights by succession,⁶
- (h) the effects of the opening of insolvency proceedings on proprietary rights,⁷
- (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.⁸

Article 2. Definitions

For the purpose of this Regulation:

- (a) “Proprietary rights” means rights over corporeal assets that are effective against third parties (*erga omnes*), such as ownership, security interests, mortgages, usufructs or servitudes;
- (b) “Corporeal 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;
- (e) “Cultural object” means a corporeal object that is classified or defined by a State, at the time of its removal from the territory of that State, as being among the national treasures possessing cultural, including religious, artistic, historic or archaeological value, under national legislation or administrative procedures.

The term ‘cultural object’ also includes a sacred or communally important corporeal object that is part of a generally recognised indigenous, tribal or other cultural community’s religious,

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 corporeal 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.

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 corporeal assets to the trustee, and any proprietary rights of the trustee and the beneficiaries in the corporeal trust assets

traditional or ritual heritage at the time of its removal, irrespective of any classification or definition by a State.⁹

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. General provisions

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 the law of the State in the territory of which the asset is physically located, the law of the latter ~~this~~ State will determine the priority between the two conflicting rights.

⁹ [For the purpose of this paragraph, an indigenous, tribal or other cultural community is considered generally recognised in particular if it is involved, directly or through representatives, in the activity of any body of the United Nations, in particular the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples or previously the Working Group on Indigenous Populations, or if it is a beneficiary or nominator of a beneficiary of funding from the United Nations, in particular the UN Voluntary Fund for Indigenous Populations.]

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 assets does not reach the State of destination, the general rule applies

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, encumber 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, including prescription and limitation of actions.

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

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

¹² 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.

¹³ 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.

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. However, if the object was stolen or illegally removed,¹⁴ the time for filing an action to recover the object does not start running until the owner knew or should have known of facts that would enable a diligent person to take effective legal action to protect his rights.

4. 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 transposed¹⁵ 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.

5. 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.

Special rules for the recovery of cultural objects

Article 9. General provision

Except as otherwise provided in this Chapter, the provisions of this Regulation apply to cultural objects which have been stolen or illegally removed.¹⁶

Article 10. The law applicable to claims for the recovery of stolen or illegally removed cultural objects

1. A claim for the recovery of a stolen or illegally removed cultural object is governed, at the choice of the claimant, by the law of:

- (a) the State in which the object was located at the time of its theft or illegal removal from that State;
- (b) the State in which the object was located at the time of the acquisition of possession by the defendant subsequent to the theft or illegal removal; or
- (c) the State in which the object was located at the time of the filing of the action.

¹⁴ “Stolen objects” also include those objects which have been acquired lawfully by the possessor but which have been wrongfully retained.

¹⁵ Unlike other EU instruments where the term “adaptation” is used, GEDIP understands that the correct term in accordance with the general theory of PIL is “transposition”.

¹⁶ “Illegally removed cultural objects” also include cultural objects which have been temporarily lawfully exported, but not returned in accordance with the terms of the export authorisation (see Art. 5(2) of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects).

2. If the claimant is entitled to recover the object under the law applicable under paragraph 1, but that law does not provide for any reimbursement of funds spent in the acquisition of possession in good faith or for the necessary preservation of the object, the court seized may award the reimbursement of such funds reasonably spent.

3. For the purpose of this article, the place of acquisition of possession is the place in a State where the cultural object was delivered based on a legal relationship underlying the acquisition.

Article 11. Applicability of public law provisions

The public law character attributed to a provision of foreign law designated as applicable under this Chapter shall not prevent the application of that provision.

Chapter IV. Other provisions

Article 12. Overriding mandatory provisions

1. 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 pursuant to this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

[3. Without prejudice to paragraph (21), in relation to claims for the recovery of stolen or illegally removed cultural objects, the court seized may give effect to the overriding mandatory provisions adopted for the protection of cultural objects~~the national treasures~~ by a ~~foreign~~ State other than the one whose law governs under this Regulation, and with which the situation has a close connection.]

~~{Provisional version yet to be discussed}~~

Article 13. Public policy of the forum

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 14. Exclusion of renvoi

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 15. States with more than one legal system

Option 1

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.

Option 2

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of proprietary rights, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules, any reference to the law of the State referred to in paragraph 1 shall be construed as referring to the law of the territorial unit in which the relevant element underlying the connecting factor referred to in this Regulation is located.

[Note: If Option 2 is accepted, a separate new article should contain the current Article 15(2) under the title 'Non-application of this Regulation to internal conflicts of laws'.]

Article 16. 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 17. 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.

Chapter V

Final provisions

Article 18. 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.]