

**The law applicable to rights in rem in tangible assets**

*Provisional draft, 31.10.2020*

**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<sup>3</sup>,

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

(f) the creation, acquisition, encumbrance or transfer of property rights resulting from the proprietary consequences of registered partnerships<sup>5</sup>,

(g) the creation, acquisition or transfer of property rights by succession<sup>6</sup>,

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<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 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” = 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.

<sup>3</sup> 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.

<sup>4</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>5</sup> *Idem*.

<sup>6</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

- (h) the effects of the opening of insolvency proceedings on proprietary rights<sup>7</sup>,
- (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<sup>8</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, 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**

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 transit) or to be exported**

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<sup>7</sup> 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; 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.

<sup>8</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 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

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<sup>9</sup><sup>10</sup>.

#### **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.<sup>11</sup><sup>12</sup>

#### **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<sup>13</sup>;
- (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.<sup>14</sup>

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<sup>9</sup> A recital should explain that: (i) this provision allows, in particular, for the determination of the law applicable to 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. – There is an *issue warranting a brief further discussion by the group*. This is whether an operative provision should be included saying that as to assets in transit, if a proprietary right is created under the actual *lex rei sitae*, ie the law of the place where the asset is physically but temporarily located, that law will determine the priority between the two conflicting rights.

<sup>10</sup> 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.

<sup>11</sup> A recital should clarify that this provision only covers registers that evidence entitlements or proprietary rights.

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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. Where a person invokes a proprietary right to which he 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.

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

**[Flexibility]<sup>15</sup>**

**[Stolen assets and cultural goods]<sup>16</sup>**

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<sup>15</sup> Some members of the subgroup have advocated for the inclusion of some provisions to provide more flexibility to the rules laid down in Articles 4 to 8. One option would be to include an escape clause, eg. Article X:

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

Another alternative would be to include special rules for particular situations, e.g. assets that form part of a patrimony, statutory liens or bulk goods.

This issue is also pending for further discussion within the Group. The subgroup will prepare some proposals for the next meeting of the Group

<sup>16</sup> 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.