

Book VIII

Transfer of Movables

CHAPTER 1: GENERAL PROVISIONS

Section 1: Scope of Application and Relation to Other Provisions

Article 1:101: Scope of Application

- (1) This book applies to the acquisition, loss and protection of ownership in movables and to specific related issues.
- (2) This book does not apply to the acquisition or loss of ownership in movables
 - (a) by universal succession, in particular under the applicable law of succession and under the applicable company law;
 - (b) by expropriation or forfeiture, on execution or otherwise by authority of law [, with the exception of chapters 3 and 4];
 - (c) by separation from a movable or immovable asset;
[alternative: delete this subparagraph]
 - (d) by occupation, unless covered by chapter 4 of this book;
[alternative: delete this subparagraph]
 - (e) by finding and
[alternative: delete this subparagraph]
 - (f) by abandonment.
[alternative: delete this subparagraph]

Article 1:102: Priority of Other Provisions

- (1) Where ownership in a movable has the effect of a security right, the provisions set out in book IX apply and have priority over the provisions of this book.
- (2) Where ownership in a movable is transferred to or from a trust, the provisions set out in book X apply and have priority over the provisions of this book.

Article 1:103: Application of Rules on General Contract Law by Way of Analogy

Where, under the provisions of this book, proprietary effects are directly determined by an agreement, chapters 1 – 6 and 15 PECL apply, by way of analogy, to this agreement.

[(2) This rule does not apply to the following provisions: ...PECL.]

[Wording may be improved]

Section 2: Definitions

Article 1:201: Movables

- (1) “Movables” in the sense of this book are corporeal movable assets, including animals, liquids and gases.
- (2) In particular, this book does not apply to
 - (a) claims, financial instruments and company shares;
 - (b) current money [*banknotes and coins*];
 - (c) intellectual or industrial property rights or other intangible assets;
 - (d) documentary intangibles, except documents entitling to delivery of movables [*documents of title*] and
 - (e) electricity.
- (3) This book also applies to a co-owner’s undivided share in a movable.

Article 1:202: Movables to be Registered

[to be drafted]

Article 1:203: Transferor

The “transferor” in the sense of this book may be the owner, a person granted a right or authority to transfer ownership by the owner or, in the case of good faith acquisition (Chapter 3), a person without a right or authority to transfer ownership.

Article 1:204: Ownership

Ownership is the most comprehensive right a person can have over a movable, comprising the fullest enjoyment of the movable and exclusion of interference by others within the limits of the law. This right includes, in particular, the right to use, modify, destroy, dispose of and recover the movable, with effect against any other person and that person’s creditors.

Article 1:205: Co-ownership

- (1) Ownership in a movable can be held by two or more co-owners in the form of shared or joint ownership. In both cases, each co-owner is owner of an undivided share in the whole movable.
- (2) In the case of shared ownership each co-owner can dispose of his share by himself.
- (3) In the case of joint ownership all co-owners have to act jointly in order to dispose of a share.

- (4) Unless provided otherwise, the provisions on ownership set out in this book apply to the undivided share of a co-owner.

Article 1:206: Limited Proprietary Rights

Limited proprietary rights in the sense of this Book are

- (a) security rights as provided in Book IX;
- (b) usufruct rights [and similar rights to use] as provided by the relevant national law;
- (c) *[the lessee's right under the draft on leasing of movables? – To be decided by the Bergen Group]*
- (d) *[trust-related rights? – To be decided by the Trust Group]*
- (e) *[others?]*.

Article 1:207: Possession

- (1) A person having physical control over the movable is considered to be in “possession” of the movable in the sense of this book.
- (2) A person is also considered to be in “possession” of the movable if another person has physical control over the movable and this person is
 - (a) entitled or obliged to have physical control over the movable for the possessor or
 - (b) otherwise bound to the possessor’s instructions regarding the movable.

Section 3: Further General Rules

Article 1:301: Transferability

- (1) All movables are transferable except where provided otherwise by the applicable law. A contractual limitation or prohibition of the transfer of a movable does not affect the transferability of the movable.
- (2) Accessories to immovable assets or other movables are not transferable separately. *[Maybe to be elaborated in more detail.]*

CHAPTER 2: TRANSFER OF OWNERSHIP BASED ON THE TRANSFEROR'S RIGHT OR AUTHORITY

Section 1: Requirements for the Transfer of Ownership

Article 2:101: Requirements for the Transfer of Ownership in General

- (1) The transfer of ownership in a movable requires
 - (a) the transferor's right or authority to transfer ownership in the movable and
 - (b) delivery or an equivalent to delivery or an agreement as to the time ownership is to pass [or registration] [based on]
 - (c) an obligation to transfer ownership.
- (2) Where the obligation defines the movable in generic terms, ownership can only pass when the movable is identified to the obligation.
- (3) *[Rule on transferability of shares in an identified bulk – to be developed]*

Article 2:102: Transferor's Right or Authority

- (1) The transferor must have the right or authority to transfer ownership in the movable at the time ownership is to pass.
- (2) Where the transferor lacks a right or authority to transfer ownership at that time, the transfer takes place *[takes effect]* when the right is obtained or the entitled person has ratified the transfer at a later time. On ratification the transfer produces the same effects as if it had initially been carried out with authority.

Article 2:103: Obligation to Transfer Ownership

- (1) The obligation to transfer ownership may arise from a contract, other legal act or provision of law.
- (2) For the purposes of this book, an "obligation" in the sense of Article 2:101 is also implied in a gratuitous transfer.

Article 2:104: Delivery

- (1) For the purposes of this book, delivery of a movable takes place when the transferor gives up and the transferee obtains *[takes?]* possession of the movable.
- (2) *[Movables to be transported – under construction]*

Alternative 1:

Where the movable is to be transported, delivery takes place when the respective carrier or the transferee obtains possession at the place of delivery of the transferor's obligation. Irrespective of whether an independent carrier was engaged by the transferor or the transferee, a carrier possesses for the transferor in the sense of Article 1:207 (2) before

delivery [in the sense of sentence 1] has taken place. A carrier possesses for the transferee after delivery has taken place.

Alternative 2:

Where the transferor is obliged to dispatch the movable, delivery takes place when the transferor gives up and the (first) carrier obtains possession of the movable. [*Additional clarification:* For the purposes of this Article [*Chapter, Book*], the fact that the transferor or the transferee has engaged the independent carrier does not constitute possession of that party.]

Alternative 3:

Where the transferor is obliged to dispatch the movable, delivery takes place when the (last) carrier gives up and the transferee obtains possession of the movable. [*Additional clarification:* For the purposes of this Article [*Chapter, Book*], the fact that the transferor or the transferee has engaged the independent carrier does not constitute possession of that party.]

Alternative 4: delete paragraph (2)

[*Effect: It would be decisive by whom the carrier was engaged – that would constitute indirect possession under Article 1:207*]

Article 2:105: Equivalents to Delivery

- (1) Where the movable already is in possession of the transferee, the creation of the obligation has the same effect as delivery. [*Possible addition: unless this is incompatible with the agreement of the parties.*]
- (2) Where the movable is in possession of a third party, the same effect as delivery is achieved when the third party receives a notice from the transferor from which follows the transfer of ownership to the transferee, unless this is incompatible with the agreement of the parties.
- (3) The same effect as delivery of the movable is achieved when the transferor gives up and the transferee obtains possession of
 - (a) a [physical or electronic] document entitling the possessor of this document to demand delivery of the movable, where the movable is in possession of a third party and this third party has issued that document. Where the transfer of that document presupposes further requirements under the applicable provisions of law (like endorsement), these requirements must be met. [*very provisional!*]
 - (b) [other] means enabling the transferee to obtain [*take*] possession of the movable, unless this is incompatible with the agreement of the parties.

[*Suggestion: No rule on marking. Alternative:*

- (4) *The same effect as delivery is achieved when the transferor marks the movable in a way showing the transferee's ownership, unless this is incompatible with the agreement of the parties.*]

Article 2:106: Agreement as to the Time Ownership is to Pass

The parties may agree on a different time ownership is to pass.

[Relation to “documents of title” (Article 2:105 (3) (a)) and goods to be registered (cf. Article 2:107) may be discussed.]

Article 2:107: Transfer of Registered Movables

[to be drafted]

Section 2: Effects

Article 2:201: Time Ownership Passes

- (1) Ownership passes when all requirements set out in Articles 2:101 – 2:107 [= *section 1*] are fulfilled.
- (2) Where the parties have made an agreement as to the time ownership is to pass (Article 2:106), that time is decisive.

Article 2:202: Effects of the Transfer of Ownership

- (1) At the time provided by Article 2:201 ownership passes within the limits of the transferor’s right or authority to dispose, with effect between the parties and with effect against third persons.

[Wording my be improved]

- (2) This rule does not affect rights between the parties under the law of obligations, may they be based on this Code or another provision of law or on an agreement of the parties, such as to
 - the passing of risk;
 - a right to withhold performance
 - a right of stoppage in transit / right to take back goods in transit
 - a right to fruits or benefits
 - a right to use or an obligation not to use or otherwise deal with the movable.

- (3) A right to withhold performance and a right of stoppage in transit [right to take back goods in transit?] in the sense of paragraph (2) has effect against the transferee, further acquirers from the transferee and the transferee’s general creditors. Such a right does not affect a lien or similar right of a carrier or warehouse-keeper or similar person. *[Addition: The right under this paragraph amounts to a security right in the sense of Book IX.]*

[Wording of second sentence to be improved]

Alternative 1: para (3) restricted to right to withhold performance.

Alternative 2: no para (3) (= no third party effect at all).

- (4) Where ownership is transferred or retained for security purposes, the effects are regulated in Book IX [*Hamburg group*].

Article 2:203: Transfer Based on Invalid, Ineffective, Avoided or Terminated Obligation

- (1) Where a movable is or has been transferred based on an obligation that is invalid, ineffective or avoided under this Code (PECL Chapters 3, 4 or 15) [or other rules comparable to these provisions], ownership never passes or is deemed to have never passed to the transferee (retroactive proprietary effect). [This rule applies to the relationship between the parties as well as to the relationship to third parties.]
- (2) Where a movable is transferred based on an obligation that has been terminated under this Code (PECL Chapter 9 and Book on specific contracts) [or other rules comparable to these provisions], ownership does not pass to the transferee. Where a movable has been transferred based on an obligation that is terminated afterwards, termination has no proprietary effect.
- (3) This Article does not affect any [obligatory] right to recover the movable [or its value] based on other provisions of this Code [or other rules comparable to these provisions].

[The article could be extended to:

- *avoidance in bankruptcy or on demand of a creditor (actio Pauliana); effect maybe: retroactive effect only in relation to the creditor(s);*
- *“avoidance” of gratuitous transfers, if there will be specific rules (to be developed in accordance with the relevant working team);*
- *“avoidance” of bequests (depending on inheritance law);*
- *“avoidance” on other grounds, as may exist (e.g. in protection of family interests).]*

Article 2:204: Transfer Based on Obligation under Condition or Time Limit

- (1) Where a movable has been transferred based on an obligation under a resolutive condition, the occurrence of that condition does not have retroactive proprietary effect, except the transfer of ownership has been made
 - (a) to administer the movable *[to be decided by the trust group];*
 - (b) for security purposes *[to be decided by the Hamburg group]* or
 - (c) gratuitously *[to be decided in accordance with the gratuitous group].*
- (2) Where a movable is transferred based on an obligation under a suspensive condition, ownership passes when the relevant event occurs. If this creates a security right, the rules of Book IX *[Hamburg group]* apply.
- (3) The same rules apply to a transfer based on an obligation under a resolutive or suspensive time limit.

Section 3: Special Constellations

Article 2:301: Multiple Obligations to Transfer Ownership

Alternative 1 (no special requirements) – preferred by advisers and working group

Where the transferor is obliged to transfer ownership in a movable to two or more transferees, ownership is acquired by the transferee who first fulfils all requirements of section 1.

Alternative 2 (additional good faith requirement)

Where the transferor is obliged to transfer ownership in a movable to two or more transferees, ownership is acquired by the transferee who first fulfils all requirements of section 1. The second or a later transferee may acquire ownership only if he does not know nor has reason to know of the transferor's previous obligation(s) [to transfer ownership in the movable].

[Alternative wording instead of “nor has reason to know”: nor can reasonably be expected to know”. Standard of good faith could be adjusted.]

Article 2:302: Indirect Representation / Transfer or Acquisition of Ownership on Account of Another

[Further preparation needed!]

Alternative 1:

[Direct passing of ownership between principal and third party and vice versa only in cases covered by Article 3:302 (b) and Article 3:303 (b) PECL.]

Alternative 2:

[Direct passing of ownership in all cases. / Mandatory rule? If not: Which parties' consent would be necessary to deviate?]

Further alternatives to be discussed.

Article 2:303: Passing of Ownership in Case of Direct Delivery in a Chain of Transactions

Alternative 1 – preferred by advisers and working group

Where there is a chain of obligations to transfer ownership and delivery or an equivalent to delivery is effected directly between two parties within this chain, ownership passes with the effect as if it had been transferred from each member of the chain to the next.

Alternative 2

- (1) Where there is a chain of obligations to transfer ownership and delivery or an equivalent to delivery is effected directly between two parties within this chain, ownership passes directly between these two parties, subject to any limitation, such as limited real rights or conditions, imposed by one of the parties in between.
- (2) *[Additional rule on “falling back” of ownership in case of invalidity of one of the contracts/obligations in the middle. – Not drafted so far.]*

[Wording might be improved]

< *Something else to be regulated in this section?* >

Section 4: Additional Provisions

Not yet discussed with advisers & further debate within the working group needed!

Article 2:401: Protection of Third Person Holding the Movable

Where ownership is transferred while the movable is in possession of a third person, the third person may set up against the transferee all [substantive and procedural] defences which it could have used against the transferor. If the third person re-surrenders the movable to the transferor before receiving notice of the transfer of ownership, it is protected against the transferee.

Alternative to sentence 1:

Where ownership is transferred while the movable is in possession of a third person, the third person may set up its right of retention based on expenses made on the movable against the transferee's claim to surrender the movable.

< = *Warsaw Draft (Art 204)* >

< *could eventually also be placed in Section 2: Effects* >

[Section may be extended. If not, maybe section could be integrated in section 2 (effects)]

CHAPTER 3: GOOD FAITH ACQUISITION OF OWNERSHIP

Article 3:101: Good Faith Acquisition from a Person not Entitled to Transfer Ownership

- (1) Where the transferor has no right or authority to transfer ownership in the movable the transferee nevertheless acquires *[and the former owner loses]* ownership provided that
- (a) all other requirements set out in Article 2:101 are fulfilled; *[alternative wording: “in Articles 2:101 – 2:107”]*
 - (b) the transferee acquires the movable for value;
 - (c) the transferor is in possession of the movable or a document to the movable in the sense of Article 2:105 (3) (a) [meeting all requirements set out there], or, where the movable is registered in the sense of Article 1:202, it is registered for the transferor at the time ownership is to pass; and
 - (d) the transferee does not know nor has reason to assume that the transferor has no right or authority to transfer ownership in the movable at the time ownership would pass under Article 2:201. [The facts from which follows that the transferee has no reason to assume the transferor’s lack of right or authority have to be proven by the transferee. Actual knowledge of the transferee has to be proven by the transferor.]

*[Alternative wording instead of “nor has reason to assume”: “nor can reasonably be expected to assume”]*¹

- (2) Good faith acquisition in the sense of paragraph (1) does not take place where the movable has been stolen or robbed from the owner or the person holding it for him.

[Alternative: Delete paragraph (2)]

[no right to buy back suggested]

Article 3:102: Good Faith Acquisition of Ownership free of Limited Proprietary Rights

Where the movable is encumbered *[burdened]* with a limited proprietary right of a third person and the transferor has no right or authority to dispose of the movable free of the third person’s right, the transferee nevertheless acquires ownership free of this right provided that

- (a) the transferee acquires ownership under the requirements of chapter 2 or Article 3:101;
- (b) the transferee acquires the movable for value;
- (c) the transferor is in possession of the movable or a document to the movable in the sense of Article 2:105 (3) (a) [meeting all requirements set out there], or, where the movable is registered in the sense of Article 1:202, the third person’s right is not registered at the time ownership is to pass; and *[Modify or delete (c)?]*
- (d) the transferee does not know nor has reason to assume that the transferor has no right or authority to transfer ownership in the movable free of the third person’s right at the time ownership passes. [The facts from which follows that the transferee has no reason

¹ Cf Eric Clive, Interim Paper on drafting and terminology (June 2004) 13.

to assume the transferor's lack of right or authority have to be proven by the transferee. Actual knowledge of the transferee has to be proven by the transferor.]

[Alternative wording instead of "nor has reason to assume": nor can reasonably be expected to assume"]

Note:

We suggest that Book IX on security rights in movables contains corresponding provisions on

- *good faith acquisition of a security right and*
- *good faith acquisition of a security right in prior rank.*

CHAPTER 4: ACQUISITION OF OWNERSHIP BY ACQUISITIVE PRESCRIPTION

Preliminary deliberations only!

Not yet discussed with advisers!

Section 1: Requirements for Acquisitive Prescription

Article 4:101: Requirements as to Movables not Registered

- (1) Acquisition of ownership in a movable not registered in the sense of Article 1:202 by acquisitive prescription requires
 - (a) possession of the acquirer in the assumption of being owner for a period of three years and
 - (b) that the acquirer does not know nor has reason to know that it is not owner.
- (2) Acquisitive prescription [in a movable not registered in the sense of Article 1:202] also takes place provided that
 - (a) the acquirer is in possession in the assumption of being owner for a period of 10/15/20 years
 - (b) unless this assumption is grossly negligent. [*Wording may be improved.*]

[...]

Section 2: Extension and Interruption of Prescription Period

[missing]

Section 3: Effects

Article 4:301: Acquisition of Ownership

- (1) When the requirements set out in section (1) are fulfilled, the former owner loses and the acquirer acquires ownership with effect between these two parties and with effect against third parties.
- (2) When the acquirer knows or has reason to know that the movable is encumbered [*burdened*] with a limited proprietary right of a third person, this right continues to exist.

Article 4:302: Extinction of Claims under Unjustified Enrichment [and Non-contractual Liability for Damage]

Upon acquisition of ownership, any claim of the former owner against the acquirer based on the former ownership under the provisions of [Book VI and] Book VII is extinguished.

CHAPTER 5: ACQUISITION OF OWNERSHIP BY ACCESSION, CONFUSION AND SPECIFICATION
[PROCESSING, COMMINGLING ETC...]

CHAPTER 6: PROTECTION OF OWNERSHIP AND PROTECTION OF POSSESSION
[if protection of possession will be regulated at all]

CHAPTER 7: FURTHER RULES
[Eigentümer-Besitzer-Verhältnis; relation to unjustified enrichment in particular]