Principles of European Law
Study Group on a European Civil Code

Proprietary Security in Movable Assets

(PEL Prop. Sec.)

prepared by
Ulrich Drobnig
Ole Böger
with advice from the Advisory Council
and the Drafting Committee approved by the
Co-ordinating Group

s|e|l|p
sellier european law publishers

The Hamburg Working Group
Members of the Study Group on a European Civil Code's Hamburg Working Group on Personal and Proprietary Security under the direction of the senior author, Professor *Ulrich Drobnig,* were:

Christopher Bisping, LL.M. (2000–2003),
Luca Bizarri (2004),
Dr. *Ole Böger,* LL.M. (2003–2008),
Cristiana Cicoria (2003–2004),
Dr. *Francesca Fiorentini* (2004–2008),
Alessio Greco (2004),
Judith Hauck, LL.M. (2001–2009),
Menelaos Karpathakis (1999–2003),
Caroline Lebon (2000–2002),
Birte Lorenzen (1999–2000),
Dr. *Alumudena de la Mata Munoz* (1999–2003),
Teresa Pereira (2003), *Frank Seidel* (2000–2002),
Dr. *Malene Stein Poulsen,* LL.M. (2000–2009),
Yves Thiery (2002).

The Advisory Council
The Working Group had the benefit of discussions with and advice from an Advisory Group consisting of Professor *Hugh Beale* (Warwick), Professor *Michael G. Bridge* (London), Professor *Angel Carrasco Perera* (Toledo), Professor *Pierre Crocq* (Paris), Justitierådet Professor *Torgny Håstad* (Stockholm), Professor *Matthias Storme* (Leuven), Professor *Luboš Tichý* (Prague), Professor *Anna Veneziano* (Rome) and Professor *Fryderyk Zoll* (Cracow).

The Co-ordinating Group
Professor *Guido Alpa* (Genua/Rome, until May 2005), Professor *Kaspars Balodis* (Riga, December 2004 until December 2006), Professor *Christian von Bar* (Osnabrück), Professor *Maurits Barendrecht* (Tilburg, until May 2005), Professor *Hugh Beale* (Warwick), Dr. *Mircea-Dan Bob* (Cluj Napoca, since June 2007)
Professor *Michael Joachim Bonell* (Rome), Professor *Mifsud G. Bonnici* (Valetta, since December 2004), Professor *Carlo Castronovo* (Milan), Professor *Eric Clive* (Edinburgh), Professor *Eugenia Dacoronia* (Athens), Professor *Ulrich Drobnig* (Hamburg), Professor *Bénédicte Fauvarque-Cosson* (Paris),
Professor *Marcel Fontaine* (Louvain La Neuve, until December 2003),
Professor *Andreas Furrer* (Luzern, since December 2003),
Professor *Jacques Ghestin* (Paris), Professor Sir *Roy Goode* (Oxford, until December 2002),
Professor *Viggo Hagstrøm* (Oslo, since June 2002),
Professor *Arthur Hartkamp* (The Hague, until December 2002),
Justitierådet Professor *Torgny Håstad* (Stockholm), Professor *Johnny Herre* (Stockholm), Professor *Martijn Hesselink* (Amsterdam), Professor *Ewoud Hondius* (Utrecht, until May 2005), Professor *Jérôme Huet* (Paris), Professor *Giovanni Iudica* (Milan, since June 2004), Dr. *Monika Jurčova* (Trnava, since June 2006),

Professor *Konstantinos Kerameus* (Athens),
Professor *Ole Lando* (Copenhagen), Professor *Kåre Lilleholt* (Bergen, since June 2003),
Professor *Brigitta Lurger* (Graz), Professor *Hector MacQueen* (Edinburgh),
Professor *Denis Mazeaud* (Paris, since June 2005), Professor *Ewan McKendrick* (Oxford),
Professor *Valentinas Mikelenas* (Vilnius, since December 2004),
Professor *Eoin O'Dell* (Dublin, until June 2006),
Professor *Edgar du Perron* (Amsterdam), Professor *Denis Philippe* (Leuven, since June 2004), Professor *Jerzy Rajski* (Warsaw), Professor *Christina Ramberg* (Gothenburg),
Professor *Philippe Rémy* (Poitiers, until June 2005), Judge Professor *Encarna Roca y Trias* (Madrid/Barcelona), Professor *Peter Schlechtriem*† (Freiburg i. Br.),
Professor *Martin Schmidt-Kessel* (Osnabrück, since December 2004),
Professor *Jorge Sinde Monteiro* (Coimbra, until December 2004),
Professor *Lena Sisula-Tulokas* (Helsinki), Professor *Sophie Stijns* (Leuven),
Professor *Matthias Storme* (Leuven), Dr. *Stephen Swann* (Osnabrück),
Professor *Christian Takoff* (Sofia, since June 2007), Professor *Luboš Tichý* (Prague, since June 2005), Professor *Verica Trstenjak* (Maribor, until December 2006),
Professor *Vibe Ulfbeck* (Copenhagen, since June 2006), Professor *Paul Varul* (Tartu, since June 2003), Professor *Lajos Vékás* (Budapest),
Professor *Anna Veneziano* (Teramo).

Further Members of the Study Group's Advisory Councils
Professor *John W. Blackie* (Strathclyde, Tort and Trust Law), Professor *Michael Bridge* (London, Property Law and Security), Professor *Angel Carrasco* (Toledo, Security),
Professor *Pierre Crocq* (Paris, Security), Professor *Helmut Grothe* (Berlin, Lease of Goods),
Professor *Jan Kleineman* (Stockholm, Tort Law, until June 2003),
Professor *Irene Kull* (Tartu, Lease of Goods; Gratuitous Contracts; Trust Law),
Professor *Marco Loos* (Amsterdam, Service Contracts; Mandate),
Professor *Graham Moffat* (Warwick, Trust Law, since May 2006),
Professor *Guillermo Palao Moreno* (Valencia, Tort Law),
Professor *Maria A.L. Puelinckx-van Coene* (Antwerp, Gratuitous Contracts),
Professor *Stefano Troiano* (Verona, Gratuitous Contracts),
Professor *Antoni Vaquer Aloy* (Lleida, Lease of Goods; Gratuitous Contracts),
Professor *Alain Verbeke* (Leuven and Tilburg, Lease of Goods),
Professor *Anders Victorin* † (Stockholm, Lease of Goods),
Professor *Sarah Worthington* (London, Lease of Goods).

Volume 11

To be cited as: PEL / *Drobnig, Böger,* Proprietary Security in Movable Assets, Introduction, A, 1
PEL / *Drobnig, Böger,* Proprietary Security in Movable Assets, Chapter 1, Article IX.–1:101, Comments, A
PEL / *Drobnig, Böger,* Proprietary Security in Movable Assets, Chapter 1, Article IX.–1:101, Nat. Notes, I, 1

ISSN 1860-0905
ISBN (print) 978-3-935808-65-1
ISBN (eBook) 978-3-86653-910-5

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.dnb.de.

Production: Karina Hack, Munich. Typesetting: fidus Publikations-Service GmbH, Nördlingen. Printing and binding: Friedrich Pustet, Regensburg. Printed on acid-free, non-ageing paper. Printed in Germany.

Introduction

A. Functions and Basic Kinds of Security

1. Security as a means of facilitating credit. The economic function of any kind of security – personal or real – is to facilitate the granting of credit. Experience shows that, the more developed a country's economy is, the higher is the demand for credit and consequently also for adequate security for credits.

This basic statement must be specified in two respects. First, with respect to the quality of the security. This depends upon two factors, first upon the inherent quality of the asset that is offered as a security by the debtor. This quality is determined by factors such as the physical condition of a corporeal asset and its commercial marketability. The legal quality of the security depends upon external factors, *e.g.* whether the encumbered asset is free from rights of a third party so that it can be fully and quickly realized.

The aforementioned factors are relevant for the secured creditor's decision of whether or not to grant credit and on which terms, especially with respect to the rate of interest charged to the debtor for the secured loan.

2. Non-possessory security. Contrary to former times, the possessory pledge held by the secured creditor has in the course of the 20th century given way to its antipode, non-possessory security. Neither the merchant nor the industrialist is able to repay the secured credit without access to, and disposition of, the assets serving as security. Non-possessory security, *i.e.* the debtor's possession of and the power to work with and/or to dispose of the encumbered assets is the sign-mark of modern systems of secured credit.

3. Trade and bank credit. Economically, a major distinction must be drawn between two classes of creditors, namely professional providers of monetary credits, such as banks and other credit institutions, on the one hand, and sellers' credit granted to buyers in the context of a sale, on the other hand. Does this economic distinction justify different levels of protection? Should the law take a position between these two competing groups for the granting of credit and their use of competing legal means of security? These are two major issues of a modern system of security for credits.

4. Publicity by registration. As pointed out before *(supra* 2) non-possessory security, *i.e.* security that is in the possession of the debtor rather than of the creditor, has become the dominant method of security. Therefore, possession of the encumbered asset no longer performs the function of warning third parties about rights which the secured creditor holds in the debtor's encumbered assets. An important alternative that has been adopted in many countries is the registration of non-possessory security interests.

However, not all countries provide for registration of security rights, especially those without legislation on non-possessory security rights, such as Austria and Germany; in other countries registration is optional, as in the Czech Republic.

Publicity by registration for security rights in movables differs markedly from the publicity for immovables; the intricate system of land registration is closely connected to the broad general publicity for all rights in land by a land registry. It would be extremely burdensome, time-consuming and expensive if one would adopt this system for movables. Some of the most modern systems for "registration" of security rights in movables therefore have chosen a fundamentally different approach. What is registered is merely a notice that specific assets may be subject to a security right. This notice is to serve as a warning; every potential creditor is invited to communicate with the registered creditor in order to find out details about the latter's security right.

B. Important Developments on the Level of Regional, Inter- and Supranational Instruments

5. Only towards the end of the 20th century has it been realized that the efficient securing of credits by proprietary security is relevant not only for individual countries. Rather, it may affect regions and even continents. This is particularly true for regions which are characterized by close economic contacts, a high degree of commercial intercourse and, accordingly, a strong volume of transborder trade. Transborder trade, like domestic trade, involves the granting of trade credit, especially by sellers to buyers; and the terms of such credits inevitably are influenced by the availability of security for the financing creditor. Where a supranational codification or convention does not (yet) appear to be feasible, a supranational restatement may be useful. It may serve as a persuasive model for future transnational or merely national codification. The following paragraphs outline some of the main existing codifications, conventions and other regional, inter- and supranational instruments on proprietary security in movables, which partly and to a varying extent also influenced the development of the Principles in this Book.

6. UNCITRAL Legislative Guide on Secured Transactions. This Legislative Guide, which was adopted by UNCITRAL in 2007, approved by resolution of the General Assembly of the United Nations in 2008 and published in 2010,[1] is the most prominent effort of harmonizing the rules on secured transactions in movables in general that has been undertaken so far on the universal level. In about a dozen weeklong sessions, delegates and special experts from the diverse legal backgrounds of the various Member States discussed and drew up recommendations on security rights in movables. Understandably, US-American delegates relying upon the leading example of US-American UCC art. 9 were particularly influential. The influence of the model of UCC art. 9 is obvious in the functional and uniform approach of the guide. In this regard, only on one major point a concession was made to European practice: states are free to choose whether

[1] The Guide is available for download at http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf.

– the security for a seller's claim for payment of the purchase price shall be subject to the general regime, *i.e.* the buyer as debtor granting to the seller a security right in the bought goods; or

– the unpaid seller shall be able to retain not only a limited proprietary security right, but ownership in the sold goods as security for payment of the purchase price (retention of ownership).

According to the recommendations of the Legislative Guide, no kind of non-possessory security shall be effective vis-à-vis third persons, unless it is registered. The details of a registry system are dealt with in the Guide on the Implementation of a Security Rights Registry, which has been adopted by UNCITRAL in 2013.[2]

7. Convention on International Interests in Mobile Equipment of 2001 (Cape Town Convention). This Convention is one of the most successful examples of an international uniform law in the area of proprietary security in specific types of movables. As of yet, there are three Protocols to the Convention covering three types of mobile assets: aircraft equipment,[3] railway rolling stock[4] and space assets.[5] Only the Protocol concerning aircraft equipment has already come into force.

The Cape Town Convention system envisages a uniform international security interest, covering both traditional security rights and functional security rights (specifically financial leasing and retention of ownership) (see Art. 2(2)). It allows a special treatment of the retained ownership rights of the secured creditor under a financial leasing and retention of ownership agreement by recognising, if this is so provided under the relevant national law, the secured creditor's right to reclaim its assets (Art. 10(a)) instead of a mere preferential position as regards the enforcement into the collateral. Under the Cape Town Convention system, security interests are to be registered in an international register operated on an electronic basis; the register for aircraft is seated in Dublin.

8. European Union secondary legislation. As of yet, there is relevant European Union secondary legislation primarily for two issues of proprietary security in movables.

First, the European Union Financial Collateral Directive[6] contains special rules for proprietary security over financial collateral, providing, amongst others, for the concept of the control over financial assets by the secured creditor as a method for achieving third party effectiveness (see Arts. 3(1) *juncto* 1(2)). The exercise of control replaces other methods

2 See http://www.uncitral.org/uncitral/commission/sessions/46th.html.

3 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment of 2001.

4 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock of 2007 (Luxembourg Protocol).

5 Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets of 2012 (Berlin Protocol).

6 EU Directive 2002/47/EC of 6 June 2002 on Financial Collateral Arrangements, as amended.

such as possession or registration. The Directive also allows agreements for the appropriation of financial collateral and for its use by the secured creditor even before the occurrence of a default under the secured right (see Arts. 4(2) and 5; such agreements would otherwise be void under the *lex commissoria).*

Secondly, European Union secondary legislation contains several provisions acknowledging the traditional concept of the retention of ownership (or reservation of title): The most relevant of these is the European Union Late Payment Directive.[7] According to Art. 9 of this Directive, the Member States shall provide for the retention of title by the seller, if the parties agreed on such a clause "in conformity with the applicable national provisions." Also the European Union Insolvency Regulation[8] refers in its Art. 7 to retention of ownership regulating this legal institution separately from other proprietary rights in general, including limited proprietary security rights.

Comprehensive Europan Union legislation regulating proprietary security in general is lacking so far.

9. EBRD Model Law on Secured Transactions. In 1990, the European Bank for Reconstruction and Development (EBRD) with headquarters in London was founded. Its primary purpose was to assist in financing the economic recovery of the Eastern and South-Eastern European countries by granting credits and other financial assistance. In this context, the bank undertook broad programmes not only of financial assistance, but also of investigating in and advising on economic and legal support for the economic recovery of the former socialist countries.

The most conspicuous fruit of the efforts in the legal field was a "Model Law on Secured Transactions".[9] Leading East and South-East European experts supported this idea. Work on the draft was realized between 1992 and 1994 by two lawyers, an Englishman and a German, on the staff of the EBRD. This combination helped to keep account of modern tendencies. Since there was no comprehensive legislation that could have served as a model in any European country, attention turned to the most influential legislative model that was then available, *i.e.* art. 9 of the US-American Uniform Commercial Code (UCC). The avowed purpose of this Model Law was to assist the Eastern and South-Eastern European countries in drafting modern legislation for secured transactions with respect to movable assets. In 1997, the essence of the "Principles" was formulated in the form of ten "Core Principles", each consisting of just one sentence.[10]

The Principles avoided terms used in English law and coined a neutral terminology: core terms are charge, chargor and charge-holder. In substance, the Model Law uses the approach of art. 9 of the US-American UCC. In particular, non-possessory security rights

7 EU Directive 2011/7/EU of 16 Feb. 2011 on Combating Late Payment in Commercial Transactions.

8 EU Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings.

9 The text is reprinted in *Röver* 323–347. It is also available for download under http://www.ebrd.com.

10 The text is reprinted in *Röver* 348–349 and in *Kieninger* (ed.), Security Rights 102–103. It is also available under http://www.ebrd.com.

are not effective, unless registered, and the Model Law contains detailed rules on the registration of security rights in a public register (see arts. 33–35 of the Model Law).

Concerning the retention of title, the solution of the Model Law is as follows: While – inspite of a contractual retention clause – title to unpaid sold goods is regarded as having passed to the buyer, the latter is regarded as having encumbered the goods in favour of the unpaid seller (art. 9.1). In other words, with the help of that double fiction a retention of title is converted to a security right which charges the goods bought by the buyer; the only practical concession is a maximum time limit of six months for effecting registration (art. 9.3 and 9.4). An unpaid vendor's charge takes priority over any other charge granted by the purchaser over the thing transferred (art. 17.3).

A peculiarity which appears to be inspired by the practice primarily in England, but also in Scandinavian countries, is the possibility to create an enterprise charge and to appoint an enterprise charge administrator. Details are set out in art. 25 – a provision containing no fewer than 26 sub-rules!

While the Model Law has nowhere been adopted wholesale, it has exercised a very considerable impact upon the special legislation in most Eastern and South-Eastern European legal systems. A general survey and a comparative overview by subjects are to be found in a book by the German co-author of the EBRD Model Law.[11]

10. OHADA Uniform Law on Security. A true regional unification of proprietary security in general has been achieved only by OHADA, the Francophone *"Organisation pour l'Harmonisation en Afrique du Droit des Affaires"*. Founded in 1976, it has presently 16 Member States, 14 francophone and two hispanophone from Central and West Africa.[12] The OHADA is a fully integrated legal community: Its legislation is directly binding upon the Member States and its Supreme Court is the highest jurisdiction for the interpretation and application of the statutes enacted by OHADA.[13]

In 1997, a first OHADA Uniform Law on Security was adopted,[14] which followed a rather traditional approach, emphasising the possessory pledge (arts. 44–62 of the 1997 uniform Law), restricting the non-possessory pledge *(nantissement)* to five types of assets, *i.e.* membership in a company (including share certificates); enterprises; professional equipment; automobiles; and merchandise for sale and raw materials. By contrast, it did not cover the retention of ownership within the general framework of the rules on proprietary security

11 *Röver* 91–108 and 111–319.

12 The three Francophone North African states of Algeria, Morocco and Tunisia are not members of OHADA.

13 OHADA Treaty arts. 10 and 14–20. *Cf.* text in *Issah-Sayegh, Pougoué a.o.*

14 Acte uniforme portant organisation des sûretés (17 April 1997), *cf.* text in *Issah-Sayegh, Pougoué a.o.* 619 ss.; French text and English translation also in *Anoukaha* 79 and 119. A comment is to be found in *Anoukaha, Cisse-Niang a.o.*