National Reports on the Transfer of Movables in Europe
National Reports on the Transfer of Movables in Europe

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edited by
Wolfgang Faber / Brigitta Lurger

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Preface

This is the first of a series of national reports on basic issues concerning the acquisition and loss of ownership of movable assets. The series is planned to cover 27 European legal systems, distributed over six volumes, and appears as a by-product of the research activities of the Graz & Salzburg working group ‘Transfer of Movables’ within the ‘Study Group on a European Civil Code’.¹ The Study Group – as a successor of the Lando Commission on European Contract Law – has developed ‘European’ black letter rules with extensive comments and comparative notes (published in the years 2006-2009) for almost all areas of patrimonial law: contracts, torts, unjustified enrichment, benevolent intervention, security rights in movables, trusts, and acquisition and loss of ownership of goods. The key publication of our working group on ownership of movables (containing text, comments and notes), which will be published in 2009, is primarily based on the information provided to the group by the 27 national reports and its national reporters.

Starting with general property law issues like the concepts of ownership and possession employed in the respective legal systems, and the related means of protection, the reports primarily deal with the ‘derivative’ transfer of ownership, but extend to good faith acquisition from a non-owner, acquisitive prescription, processing and commingling, and further related issues. Corresponding to the working group’s task within the Study Group, the reports are generally restricted to movable assets and basically leave aside fiduciary transfers, such as transfers for security purposes. After all, they do, however, not only cover mere property law issues, but also much of the related law of obligations, enforcement law and insolvency law – in a generally accessible language, i.e. English.

The original purpose of these national reports was to provide the working group with detailed information about the respective rules, case law and legal literature, prepared by national property law experts, serving as a basis for the working group’s own comparative research. But it was soon clear that these reports have a value of their own, worth being shared with the scientific community as a starting point for further comparative research in property law as well as with practitioners searching

for information on foreign legal systems. Although all reports are based on the same detailed questionnaire, we did not impose a strict structure on the authors, but regarded it important to allow for adaptations according to the – partly – fundamentally different starting points and structures followed by the national property law regimes. The idea was to present a complete picture of the respective part of law in each legal system, revealing that system’s way of thinking and structural interdependencies, covering the subject matters determined by the questionnaire in an appropriate way. This way of discussing each legal system in detail and as a unified whole also aims at supplementing the working group’s final publication in the ‘Principles of European Law’ series, where information about the single legal systems will necessarily be presented in a more compact form and structured according to the draft rules proposed there.

Where available and as far as reasonable, the reports include translations of the most important statutory provisions either in the text or in an annex. All reports include a table of literature and a table of abbreviations, which shall facilitate carrying out further research. However, it is inevitable that the reports will, to some degree, differ as to length and intensity, which will often reflect the number of material available.

Publishing the whole series of national reports would not be possible without generous support by a number of institutions. This first volume received particular funding from the Austrian Ministry of Science and Research (Bundesministerium für Wissenschaft und Forschung). For the whole series, financial support is granted by the Swiss Institute of Comparative Law (Lausanne), the Land Salzburg and the Evers-Marcic-Stiftung an der Rechtswissenschaftlichen Fakultät der Universität Salzburg. The editors wish to express their gratitude to all these institutions. We also wish to thank Mrs Monika Lammer for formatting the manuscripts and, in particular, our colleague Ernest Weiker, LLB, for his enormous efforts in linguistically improving all reports published in this volume.

May 2008
Salzburg and Graz

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Introduction

This report\(^1\) shall provide an overview of the rules relevant for a **transfer of ownership in tangible movable assets** under Austrian law, and shall also discuss some related issues, such as good faith acquisition, acquisitive prescription and the protection of ownership and possession.

1. Due to this thematic priority, the **scope of the report** is restricted in several ways: Immovable property will, in general, be left aside. The discussion on movable property will be limited to tangible movable assets (goods); the transfer of intellectual or industrial property rights, company shares, financial instruments, current money and the assignment of claims will not be dealt with.

As to the types of rights discussed in this report, the focus will be on the right of ‘ownership’. Other proprietary rights will only be touched on occasionally. Since proprietary security rights generally fall outside the scope of the project, the transfer of ownership for security purposes will not be treated in detail. However, there is a special chapter on transfers subject to retention of title, as such transactions play an important role in the context of several other questions as well.

The report is not constrained to transfers based on contract, such as a contract for sale. The latter is, however, the paradigmatic case.

2. As to the **material** used for this report, it may be noted that currently no extensive systematic treatises on Austrian property law in general are available. Apart from law review articles and some monographs on detailed issues, the main sources are commentaries and textbooks written, although not exclusively, for students. Literature will partly be quoted in an abbreviated form in the footnotes. The full reference can be obtained from the list of literature in the annex.

Austrian Supreme Court decisions will be quoted with their reference number and one main source of reference. They can be obtained free of charge from the internet.\(^2\) Statutory provisions in German language can be

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\(^1\) I would like to thank my colleagues Ernest Weiker for linguistic support and Georgia Neumayer for her assistance in preparing the registers. My former colleague Stefan Szücs corrected a previous draft version.

\(^2\) See the ‘Rechtsinformationssystem des Bundes’ (RIS) (http://www.ris2.bka.gv.at), sub-database ‘Judikatur Justiz’ (http://www.ris2.bka.gv.at/jus). Insert the reference number under ‘Geschäftszahl’ and mark ‘Entscheidungstexte’ in order to obtain the full text document. – This database currently includes almost all Supreme Court Judgments passed since 1984; the most important ones (published in the ‘SZ’) even go back to 1946.
obtained from the same source.\textsuperscript{3} English translations of some of the most important provisions will be listed in an annex to this report.

\textsuperscript{3} Sub-database ‘Bundesrecht – geltende Fassung’.
Part I: Basic information on property law

I. Ownership and other property rights

1.1. General basics

1.1.1. The Austrian codification, sources and structure of Austrian property law

The Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB) is a rather old statute. Enacted in 1811, it entered into force on 1 January 1812. It has been substantially influenced by the Roman law tradition, which is particularly evident in property law, and by the natural law ideologies of the late 18th and beginning of the 19th century. As a reaction to the Prussian Civil Code of that time, a very voluminous and casuistic set of regulations, the Austrian redaction committees intended to create rather general and flexible rules and to keep codification relatively short. They succeeded in drafting a Civil Code with ‘only’ 1502 sections. This is one of the main reasons why the ABGB is still in force today: In many respects, it has always been possible to develop suitable results by interpreting the old, but flexible rules in a modern way. However, this also carries a certain risk one should be aware of when doing comparative legal research in Austrian private law: The black letter text of the ABGB often does not reveal the full content of ‘the law’ and may, sometimes, even be misleading. Relevant court decisions and literature should always be considered.
The structure of the ABGB has been inspired by the ancient Roman lawyer Gaius, who divided his textbook *Institutiones* in three sections: *personaes*, *res* and *actiones*. The first part of the ABGB regulates the ‘law of persons’ (§§ 15-283), the second part deals with ‘property law’ (§§ 285-1341), including, however, the law of succession and the main part of the law of obligations (labelled as ‘personal property rights’, §§ 859 ff). The third and last part is called ‘common rules of the law of persons and property law’ (§§ 1342-1502). In nowadays’ legal practice and legal education, this structure is of no importance at all. In textbooks and legal thinking in general, the code’s structure is completely overlapped by the pandectist system, which has been derived from German doctrine in the late 19th century after the enactment of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB).8

Austrian private law can, therefore, be divided into five parts: General part (*Allgemeiner Teil*), law of obligations (*Schuldsrecht*), property law (*Sachschrecht*), family law (*Familienrecht*) and law of succession (*Erbrecht*).

For this report, the rules of property law are of main interest. In the ABGB, property law provisions are laid down in §§ 285-530 (definitions, possession, ownership, pledge and servitudes), §§ 825-858 (mainly dealing with co-ownership) and in §§ 1452-1502 (acquisitive prescription and some related aspects). Some property law provisions regarding movables are contained in the Commercial Code (*Handelsgesetzbuch*, HGB),9 which was renamed and modified with 1 January 2007 and has been, since then, called *Unternehmensgesetzbuch*, UGB.10 Some of these rules have, however, been retransferred to the ABGB by the aforementioned law reform, such as the most important aspects of §§ 366 f HGB concerning good faith acquisition. Especially with regard to immovable property, there are also some special statutes to be considered, such as the Land Register Act (*Grundbuchgesetz*, GBG), the *Baurechtsgesetz*, providing for a special right to erect a building on another person’s land, or the *Wohnungseigentumsgesetz* (WEG), dealing with a special kind of co-ownership of apartments. Finally, there are some provisions in insolvency and enforcement law, safeguarding the effectiveness of property rights against creditors.

To a large extent, the rules on movable and immovable property follow common principles.11 For instance, the rules on the protection of possession and the protection of ownership are exactly the same; the rules on the transfer of ownership are the same, except that the requirement of delivery for

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8 Enacted in 1896, effective since 1900.
9 The HGB is of German origin: The German Commercial Code of 1897 was enacted in Austria in 1938.
11 The Austrian understanding of the terms ‘movable property’ and ‘immovable property’ will be discussed in chapter 4.
movable property is replaced by the requirement of registration for immovable property.

As compared with other parts of Austrian private law, the property law rules are rarely affected by law reforms. In particular, the provisions on acquisition, loss and protection of ownership of movable property have – almost – remained untouched since 1811.12

Another important aspect of Austrian private law, including property law, has already been indicated above: the **German influence**. This influence takes effect on different levels. On the one hand, a number of important law reforms have been inspired by German law, particularly following the enactment of the German BGB, which led to three big reform Acts in 1914-1916.13 On a second level, which is more relevant with regard to moveables, significant German influence can be observed in doctrine. A central example is the concept of a separate real agreement (Verfügungsgeschäft) in the transfer of property rights.14 German court rulings form a third level of influence: When new problems arise, the Austrian Supreme Court (Oberster Gerichtshof, OGH) regularly takes into account, and often follows, the view of the German Supreme Court (Bundesgerichtshof, BGH). This is facilitated by the fact that Austrian and German private law are rather similar in a great number of aspects.

As to the **relevance of ‘case law’** in general, it has to be clarified right at the beginning that a doctrine of binding precedents does not exist in Austrian law; courts are only bound to statutory law. In legal practice, however, Supreme Court rulings are of remarkable importance. Lower courts usually follow these decisions and also the OGH, which decides in several chambers (senates),15 usually upholds the opinions it has developed. Nonetheless, from time to time it happens that the OGH changes its view, or that the different senates of the OGH develop diverging views on the same subject matter.

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12 Except, e.g., a reform of the law of finding, which entered into force in 2003 (§§ 388 ff ABGB, see below, 14.1.) and slight adaptations regarding good faith acquisition with 1 January 2007 (see chapter 12). Furthermore, §§ 357, 359, 360, 1122-1150 and § 1474 ABGB were eliminated by the Deregulation Act 2006, BGBl I 2006/113. These provisions, dealing with a division of ownership (of land) into rights of a ‘main owner’ (Obereigentümer), who is only entitled to the substance, and rights of a ‘sub-owner’, who is entitled to the substance and, exclusively, to the profits of the land (Nutzungseigentümer), have been inapplicable (‘dead law’) since the abolition of remaining feudal structures in 1848 and 1862. See Spielbüchler in Rummel, ABGB I, §§ 357-360 no. 1.

13 Concerning property law, the third of these modifications (so-called dritte Teilnovelle of 1916) mainly amended the protection of immovable property against neighbours and introduced new provisions to the law of pledge (Pfandrecht).

14 See below, 5.5.

15 There exists a certain distribution of competences between the different senates of the OGH; however, it often happens that identical issues are treated by different senates.
1. Ownership and other property rights

1.1.2. Characteristics of property rights (rights in rem) in contrast to obligations

It has already been indicated that property rights and obligations are regarded as fundamentally different concepts. The difference is not only a dogmatic one, but has important practical consequences, especially in insolvency and with regard to enforcement.

Property rights are defined as rights in rem (dingliche Rechte) with effect against everyone (‘absolute’ character, effect erga omnes). These terms describe the following effects: A person entitled to a right in rem has direct and immediate power over the object of this right. The right in rem, therefore, produces a direct relationship between the holder of the right and the object affected by the right. This can be described as the ‘positive’ or ‘internal’ side of a property right. The erga omnes effect describes the second aspect of a property right, i.e., it gives the power to exclude everyone else from the enjoyment of the asset. This absolute character can be described as the ‘negative’ or ‘external’ side of a property right, i.e., it also provides protection in the insolvency of another person holding the asset. These two aspects, the ‘positive’ and the ‘negative’ side of a property right, are related with each other and necessarily correspond in their extent.

Obligations, on the other hand, do not have in rem character. Instead of creating a relation between a person and a thing, they produce a relation between a person and another person. One person, the creditor, can demand performance from the other person, the debtor. Performance can be any conduct, an act as well as an omission. Obligations are ‘relative’ rights, they do not have absolute effect. In principle, the only person tied to the obligation is the debtor. The debtor is liable with all of his assets. If these assets

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16 See the enumeration below, 1.1.3.a).

17 In land law, a proprietary right can even be linked to the ownership of another asset: This is true of ‘real servitudes’ (as opposed to ‘personal servitudes’ where the right is linked to a particular person), under which the owner of one plot of land is entitled to the toleration of a certain conduct by the owner of another plot of land, such as the former driving over the latter’s land. See § 473 ABGB and Koziol/Welser, Grundriss des Bürgerlichen Rechts I, 424.

18 These effects will be discussed in more detail below, 1.2.

19 See, for instance, Spießbücher in Rummel, ABGB I, § 354 no. 2; Koziol/Welser, Grundriss I, 280 ff.


21 Only under certain restrictive requirements, a violation of such obligatory claims may give rise to a claim for damages; see below, 6.2.2. on double sales.
prove to be insufficient to fulfil the debtor’s obligations, the obligation will be enforceable only as a ‘dividend claim’ in insolvency.

In some respect, these two different categories are linked with each other: The violation of a property right, such as ownership, can create obligations, like an obligation to pay damages or an obligation to reverse the unjustified enrichment. Furthermore, also property law itself produces relative rights against the interferer. The latter is bound to restore the asset and/or to stop interfering with it.  

Furthermore, it is accepted that mere obligatory rights have, in some respect, absolute effect against third parties: The creditor can demand performance from only one person. His position of being the creditor is, however, protected against third parties in a certain manner: Where a third party interferes with an obligatory right, this may, under certain heavily debated requirements, result in a claim for damages against this third person. Where a third person, e.g., the previous creditor after having assigned the claim, receives performance, this person must transfer this benefit to the (real) creditor pursuant to the unjustified enrichment rules.

1.1.3. General principles of Austrian property law

Similarly to German law, Austrian property law is governed by some general principles, which more or less apply to all types of rights in rem, to movable as well as immovable property. The main principles are the following:

(a) According to the principle of the **numerus clausus** (exclusivity, Typenzwang) of property rights, the number of available types of property rights is restricted to those expressly provided by statutory law. Property rights, therefore, cannot be created autonomously by the parties. The parties can only choose one of the types provided by law. Austrian law recognises the following types of property rights: Ownership (**Eigentum**), pledge (**Pfandrecht**), servitudes (**Servitut, Dienstbarkeit**), Reallast (the right to demand a certain positive performance – such as providing daily food – from the owner of a particular immovable property), Baurecht (right to erect a

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22  See below, 1.2. and 1.4. on the notion of ownership and the protection of ownership.
23  On these questions see, e.g., Koziol/Welser, Grundriss I11, 238, II11, 1 f. On the question of the tort law consequences of an infringement of another’s obligatory right, see 6.2.2., below.
24  See, for instance, Iro, Sachenrecht1, nos. 1/5 ff; Koziol/Welser, Grundriss I11, 238 ff; see also F. Bydlinski, System und Prinzipien 318-332.
25  §§ 353 ff ABGB.
26  §§ 447 ff ABGB.
27  §§ 472 ff ABGB.
28  Not explicitly regulated in the ABGB, but accepted in § 530 ABGB and §§ 9, 12 of the Land Register Act (Grundbuchgesetz).
building on another’s land), the right to operate a mine (Bergwerksberechtigung) and a special kind of co-ownership of apartments (Wohnungseigentum). Further categories may be provided for by statutory law; most of these types are similar to servitudes.

Functionally, the right of a buyer of movables under reservation of title can also be considered to have in rem effect. In some respect, a lessee is granted rights erga omnes as well, and his position is described as a quasi-right in rem. Possession as such is not considered a right in rem.

A principle closely related to the numerus clausus rule is that also the content of property rights is mandatorily determined by law (Typenfixierung, definition of types). Both aspects intend to serve the concept of legal certainty: Third parties, who, due to the absolute effect of proprietary rights, are required to respect these rights, shall be able to make out their content. In the end, this also facilitates the marketability of property rights: The transferee shall have a clear idea of which kind of right he acquires, so that it is not necessary to scrutinise the content of the right in question. Individual negotiations about the effects of a property right are neither necessary nor allowed.

(b) The principle of publicity (Publizität) requires that the existence as well as the transfer of property rights shall be discernible to third persons. With regard to movables, this function should be served by possession; with regard to immovables, by an entry in the land register (Grundbuch).

However, it is evident that the publicity function of possession has lost much of its persuasive power in nowadays economic reality. This is not so much caused by the fact that the transfer rules of the ABGB itself provide for exceptions to the principle of physical delivery, especially by allowing the transfer of ownership by a constitutum possessorium, where the transferor keeps the goods under his physical control. Such agreements are rarely concluded in practice. The reason, rather, is that goods are often bought under retention of title, acquired by means of financial leases, or used on the basis of ordinary leasing contracts. In all these cases, the person exercising physical control over the movable is not the owner. Although this observation would be rarely disputed among lawyers, there has not been any extensive critical debate about the role of publicity in relation to the ownership in movables. The most important practical problems regarding publicity

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29 Baurechtsgesetz 1912.
30 Wohnungseigentumsgesetz 2002.
31 E.g., the right to have telecommunication masts placed on another person’s land according to §§ 5 ff Telecommunications Act (Telekommunikationsgesetz 2003).
32 See below, 9.3.2. and 15.3.
33 See below, 3.1.
34 With a focus on security rights, see Migsch, Faustpfandprinzip und Publizitätsprinzip, FS Welser (2004) 711 (730 ff). With a perspective on the role of possession in good
occur in connection with security rights in movables: According to §§ 451, 452 ABGB, a pledge cannot be created by constitutum possessorium. This rule is applied, by way of analogy, to transfers of ownership for security purposes.

(c) The principle of **speciality** (Spezialitätsprinzip) provides that rights in rem must always relate to a particular, individual thing. The right of ownership or pledge can, therefore, not relate to an aggregate of things as such (Sachgesamtheit, e.g. over all movable assets of an enterprise), but must address all individual assets.\(^{35}\) For the transfer of such aggregates of things, however, Austrian law provides for a so-called symbolic delivery.\(^{36}\) Another effect of the principle of speciality is that a transfer of generic goods cannot take place before these are identified to the obligation, based on which the transfer takes place.

(d) The principle of **causality** (Kausalität) is not only a principle of property law, but a general principle of Austrian private law and applies, e.g., also to the assignment of claims: The transfer of a right in rem requires a valid legal relationship (Titel, Titelgeschäft, Verpflichtungsgeschäft), for example a valid contract of sale, which obliges the transferor to transfer his right of ownership. If this underlying obligation is void or is avoided at a later stage, a transfer of the property right does not take place or, if it has already taken place, the property right reverts to the transferor retroactively.\(^{37}\)

### 1.2. Notion and concept of ownership

#### 1.2.1. Definition of and restrictions on the right of ownership

§ 354 ABGB defines the right of ownership (Eigentumsrecht) as the ‘ability to dispose, according to the owner’s free will, of the substance and the profits of a thing and to exclude anyone else from it’.\(^{38}\) This definition refers to the in rem character and the absolute effect, which have already been highlighted as characteristics of all property rights.\(^{39}\) The owner may, in principle, use the thing as he likes; he may alter or destroy it or may dispose of it (inter vivos or by will). All in all, the right of ownership is the **most comprehensive legal position** under Austrian private law. The various aspects, which are linked to the right of ownership, will be discussed in more detail below, 1.2.2. Although the ABGB formally kept provisions on a ‘divided

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\(^{35}\) See also chapter 18.2), below, on the non-existence of ‘floating charges’ in Austrian law. However, the problem there seems to be publicity rather than speciality.

\(^{36}\) See infra, 5.6.2.

\(^{37}\) See, in more detail, infra, 5.4.2., especially (b).

\(^{38}\) Cf. also § 362 ABGB, which repeats some of these principles.

\(^{39}\) Supra, 1.1.2.
ownership' up to 2006, the concept of ownership as a comprehensive right has been dominant in Austrian legal thinking since the 19th century. Nonetheless, the right of ownership may be subject to numerous restrictions. Such restrictions may be of private law or public law origin. Naturally, they are much more relevant for immovable property than for movables. Restrictions under private law follow from the general principle that a person may not exercise his rights in a way that rights of another person are affected (cf. § 364 (1) ABGB). This principle is regulated in further detail in the law concerning the respective interests of neighbours. Also, the owner himself can create restrictions on his right by granting contractual rights (e.g., by way of a leasing contract) or limited proprietary rights (e.g., by handing over his asset as a pledge) to another person. As to the effects of an agreement not to sell (pactum de non aliendo), see below, 1.5.2. However, as the right of ownership is considered the maximum comprehensive right ('Vollrecht'), restrictions are, in principle, to be seen as an exception. Therefore, if an encumbrance ceases, the right of ownership 'expands' to its original extent. This effect is described as the 'elasticity of ownership' (Elastizität des Eigentums).42

Furthermore, the right of ownership may be restricted by public law regulations, provided that such restrictions serve a public benefit. Again, such limitations are more relevant for immovable property. For example, there are building regulations, agricultural and environmental law provisions limiting the owner’s right to use his property. Expropriation is allowed by § 365 ABGB and Article 5 StGG, provided that it is based on a specific statutory provision and that it serves public benefit. The former owner is to be compensated.

1.2.2. Rights and interests linked to ownership

As mentioned above, ownership is the most comprehensive right in a thing, comprising numerous aspects, such as the right to use or dispose of the asset. This concept of a comprehensive right is particularly important when it comes to the transfer of ownership: All aspects, which are linked to the

40 See footnote 12, above.
41 Cf. § 364 sections 2, 3 and § 364a, § 364b ABGB, regulating, for instance, the degree of emissions, originating from other immovable property in the neighbourhood, which the owner of a real estate must tolerate.
42 Koziol/Welser, Grundriss I13, 282.
43 Further examples are provided by Koziol/Welser, Grundriss I13, 282 f.
44 Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger of 1867, which is of constitutional nature.
45 Cf. Koziol/Welser, Grundriss I13, 340 ff; in more detail Spielbüchler in Rummel, ABGB I11, § 365 no. 2 ff with extensive examples and further references.
right of ownership, pass from the transferor to the transferee at one particular point in time (unitary concept; see in more detail below, 5.2.).

In order to illustrate the importance of the concept of ownership in this transfer system, it seems advisable to start with an overview of the various aspects linked to the right of ownership. The description will deal with the interests of the owner himself as well as with the interests of third persons that may also be affected, particularly in a transfer situation. For the purposes of this report, the discussion will focus on movable property.

(a) Rights and duties of the owner

(i) Based on the in rem character of ownership, which allocates to the owner the power to factually and legally influence his property, the owner is first of all entitled to use the asset (Nutzungsbeugnis). He is entitled to manage the property (Verwaltungsbeugnis) and, therefore, may also allow others to use it, either based on a right (e.g., by letting out on lease) or regardless of the non-existence of a third person’s entitlement to use it (by factually tolerating the latter’s use).

The owner has a right to the profits of his property, covering all economic benefits, as well as all kinds of fruits, that are derived from the substance of the property; these may be ‘natural fruits’ (e.g., the calf casted by his cow; the apples from his tree) or ‘civil fruits’ (i.e., profits produced as the consequence of a legal relationship, such as a rental income). With regard to transfer situations, however, it should be added that the final allocation of fruits is linked to the passing of the risk, which follows different criteria. Therefore, it may happen that the ownership of natural fruits is, first, acquired by the owner, but subsequently has to be transferred to the acquirer based on the named rules.46

Another aspect of ownership is the owner’s entitlement to physically alter, use up or destroy his property, i.e., the owner may change the substance of his property in any way he wishes.

In addition to such rights that are related to the physical substance of the property, the entitlements of the owner also relate to his legal position: The owner is entitled to dispose of his property, inter vivos as well as by will (i.e., in contemplation of death): He can transfer his right of ownership to another person, he may also encumber his property with limited proprietary rights in favour of another person (e.g., a pledge or a servitude) or may simply voluntarily dispose of his right by way of abandonment.

As a consequence of his right to the substance, the owner may also transfer his property for security purposes. This may, on the one hand, be the case when the owner endeavours to obtain credit from a third person: He

46 In more detail 10.2., below.
can offer his property as a pledge or as security by transferring the right of
ownership. On the other hand, the right of ownership may also serve as
security if the owner wants to sell a specific object and grants a credit to his
buyer, which is to enable the latter to purchase the object: The property may
be sold subject to reservation of title and, therefore, secures the seller’s claim
for the purchase price.

The owner is, of course, also entitled to simply have (physically hold) the
asset, even if he has no particular interest in making use of it.

It is clear that some of these aspects can not be distinguished clearly from
each other.

(ii) Based on the absolute nature

of the right of ownership, the owner is
entitled to recover his property from any other person, except if this other
person has a specific right against the owner to hold the item (e.g., based on
a leasing contract). This right of revindicatio n is provided by § 366 ABGB.47
Based on the same legal principle, the right of ownership is also protected if
the property becomes the object of an enforcement proceeding against
another person: The owner can bring a special action in order to stop the
execution proceedings (so-called Exzindierungsklage, § 37 EO). If the prop-
erty becomes the object of insolvency proceedings against another person,
the owner can also recover his asset (so-called Aussonderungsrecht, § 44 KO,
§ 21 AO). These rights are of particular importance in a transfer situation:
Being the owner of the asset in question means being protected against the
creditors of the other party.48

If the property is not taken away, but simply used or interfered with by
another person, the owner is, based on his right of ownership, entitled to
stop the interference, to prohibit future interferences and to claim for resti-
tution to the previous condition (§ 523 ABGB, so-called actio negatoria).49

Another consequence of the absolute nature of the right of ownership is
the entitlement to claim damages,50 if the property has been injured by a
tort: As ownership is considered to be a legal position that is protected
against everyone (so-called absolut geschütztes Rechtsgut), everyone has the
duty to respect other people’s property and, as a consequence, an injury of
the property will indicate that the conduct of the offender has been unlawful
(rechtswidriges Verhalten), which is one of the general requirements for a
claim for damages. Furthermore, the absolute nature of the right of owner-
ship confers upon the owner a claim ex unjustified enrichment, if his prop-
erty has been used by another person: According to § 1041 ABGB, this
other person is obliged to restore the movable itself or to reverse the benefits
obtained from the asset without legal justification, respectively.51

47 See 1.4.1., below.
48 For more details, see chapter 9.
49 See 1.4.3., below.
50 OGH 8 Ob 167/78, SZ 51/163.
51 See 1.4.5., below.
(iii) On the other hand, the right of ownership may also produce risks and result in duties; one may speak of 'negative' interests in property: According to the casum sentit dominus-rule in § 1311 ABGB, the owner principally bears the risk of accidental destruction, loss and deterioration of the property. However, if such an event occurs in a transfer situation, i.e., between the conclusion of the contract and the transfer of possession, the economic effect of the event on the relation between the two parties to the transaction is regulated by another set of rules: the rules on the passing of risk (Gefahrtragungsregeln), which belong to the law of obligations.  

The owner also has to tolerate other legal or contractual charges on the right of ownership: These may derive, e.g., from tax law or from a pledge encumbering the property, where the owner has the choice between paying the creditor or losing his property. Liability for damage does not depend on one’s status of being the owner of a particular asset: In the case of motor vehicles, strict liability (Gefährdungshaftung) is imposed on the person who is regularly in charge of the vehicle, i.e., the person who may decide on how the vehicle is to be used and who keeps it on his own account (operator, keeper; in German: Halter). This person, however, is not necessarily the owner of the car; he may also be a lessee or a user under a gratuitous lending agreement. For damage caused by animals, § 1320 ABGB provides that the keeper of the animal (Tierhalter) is liable if he can not prove that he took care of the necessary safekeeping and supervision. Also this provision does not create a link between the mere fact of ownership and liability: First, the keeper may be a person other than the owner and, second, § 1320 ABGB requires a culpable act or omission, only that the burden of proof is reversed. Under some public law regulations, the owner of immovable property may be held subsidiarily liable to the operator or possessor, but only if additional requirements of accountability are fulfilled. Also in this area, the mere fact of ownership of an asset does not create liability. Under the statutory regulations on the protection of monuments (Denkmalschutz), which also apply to movable property, the mere fact of being the owner of

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52 For more details, see infra, 5.2.2. sub (a)(i) and 10.1.
53 Regarding immovable property: § 9 Land Tax Act (Grundsteuergesetz).
54 §§ 1, 5 Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (EKHG). For details as to the 'operator'-requirement see Schauer in Schwimann, ABGB VII, § 5 EKHG nos. 10 ff.
55 See the prevailing opinion reflected by Harrer in Schwimann, ABGB VI, § 1320 nos. 24 f; Reischauer in Rummel, ABGB II/2, § 1320 nos. 20 f, understands the rule as a compromise solution between culpa-liability (Verschuldenshaftung) and strict liability (Gefährdungshaftung).
56 For instance, the owner of real property may be held liable for the costs of the appropriate removal of illegal waste under § 74 Waste Management Act (Abfallwirtschaftsgesetz 2002, AWG), if the possessor of the waste can not be identified or is not able to pay, provided that the owner either consented to, or did not take reasonable measures against, the deposit of the waste on his land.
57 § 1 (1) Denkmalschutzgesetz (Statute on the Protection of Monuments).
a monument can, however, create certain binding effects, such as a prohibi-
tion to destroy the monument, which includes deliberately failing to take
necessary and reasonable maintenance measures.58

(b) Interests of third persons

For a discussion on the transfer of ownership, it is essential to keep in mind
that it is not only the transferor, as the original owner, and the transferee, as
the new owner, who have interests in the property, but third persons as well.

(i) These interests often mirror those of the transferor or the transferee,
respectively: Both parties to the transfer are personally liable for their
(other) obligations, meaning that their creditors can enforce their claims
against all assets of the relevant party. If the particular piece of property still,
or already, belongs to the relevant party’s assets, this increases the total
assets of this party and, naturally, benefits this party’s creditors. In the case
of insolvency, the creditors can file their claims in the bankruptcy procedure
and obtain a share of the total assets. Outside insolvency cases, provided
that a claim has become enforceable, the debtor’s property may be subjected
to a forced sale and the creditor will be satisfied out of the proceeds of that
sale.59 In this respect, one may say that the general creditors have a kind of
security interest (in a wide sense) related to the right of ownership of the
particular asset.

(ii) A creditor may obtain a security interest in rem, such as a right of
pledge, and can also obtain security by way of the transfer of ownership or by
acquiring reserved ownership in a sale under reservation of title. In these
cases, the secured creditor is given exclusive security with effect against the
parties to the transfer as well as their creditors.

(iii) Another category of third party interests can be described as inter-
est to make a valid acquisition. A buyer or pledgee has an interest in le-
gally acquiring a proprietary right. The right of ownership serves this inter-
est, as the existence of the predecessor’s right in rem is a prerequisite for a
derivative acquisition of the property right.60 This ‘interest’ may, to a certain
extent, also be served by the rules on good faith acquisition. In this context,
such an ‘interest’ is often referred to as the ‘interest in circulation’ or ‘inter-
est in the protection of commerce’ (Verkehrsschutzinteresse).

(iv) As to the content of such third party interests, one may distinguish
interests related to the substance (confer (i) to (iii)) from interests in the
use, the latter possibly also covering a right to the profits of the property.

58 § 4 (1) no. 2 Denkmalschutzgesetz. Transferring the ownership of a monument may
require the consent of the competent public authority under § 6 Denkmalschutzgesetz.
59 With regard to movables: §§ 249-289 EO.
60 Cf. infra, 5.1.2.(a).
Such an interest may be served by a right in rem, such as a servitude, for example the enjoyment of fruits and benefits (usus fructus, Fruchtgenussrecht, §§ 509 ff ABGB), or by an obligatory right, e.g., based on a leasing contract.

1.3. Other property rights

As already mentioned several times, ownership is not the only type of proprietary right existing under Austrian law. Other property rights have already been listed supra, 1.1.3., sub a). With regard to movables, the right of pledge (Pfandrecht) is the most important one (§§ 447-470 ABGB). It confers upon the pledgee a right to preferential payment, i.e., the exclusive right to have the pledge sold and to satisfy his secured claim out of the proceeds of that sale, if the debtor does not pay the secured obligation after falling due. The rules related to the establishment and the transfer of a pledge are rather similar to those governing the transfer of ownership. An important difference is that the publicity principle is considered to be more important in relation to security rights. A pledge over a movable may, therefore, not be created by a constitutum possessorium (§§ 451, 452 ABGB e contrario).

Ownership transferred for security purposes (Sicherungseigentum) is not considered a separate type of right in rem. It is considered to be ownership with all of ownership’s external effects, but modified in certain respects due to the fiduciary nature of the transfer. Due to its economic similarities to the right of pledge, ownership for security purposes can not be created by constitutum possessorium under Austrian law.\(^6\)

Servitudes (§§ 472 ff ABGB) can, theoretically, also be created over tangible movable assets. However, this is of no significant practical relevance.

1.4. Protection of ownership

The remedies available for the purposes of the protection of ownership can roughly be divided into two categories: First, there are remedies provided by property law, which directly follow from the absolute character of the right in rem (so-called dingliche Ansprüche).\(^6\) Such remedies are the classical rei vindicatio, i.e., the right to recover the property if it is under the physical control of another person (1.4.1., 1.4.2.) and the so-called actio negatoria, which provides an entitlement to stop other kinds of interference and to have the traces of such interference removed (1.4.3.).

\(^6\) See Spielbüchler in Rummel, ABGB I, §§ 357-360 no. 3, providing a short general overview.

\(^6\) Cf. Spielbüchler in Rummel, ABGB I, § 354 no. 5.
The second category is made up of remedies provided by the law of obligations (schuldrechtliche Ansprüche), which are, however, based on an unlawful interference with the right in rem. Such remedies are claims under tort law (1.4.4.) and under the law of unjustified enrichment (1.4.5.).

In practice, the owner can often resort to a third category of remedies, which can, functionally, also serve to protect ownership: the rules on the protection of possession. These rules will be discussed in chapters 2.5. and 2.6., below.

In principle, all of these rules apply equally to movable and immovable property. A high percentage of court decisions concern immovables.

1.4.1. Right to recover physical control (rei vindicatio)

The most important proprietary remedy with regard to movables is the entitlement to recover physical control from another person, which is, according to its Roman law origin, usually referred to as the rei vindicatio (Eigentumsklage). This remedy is provided for by § 366 ABGB.63

The following requirements must be fulfilled: The person exercising this right must be the owner of the particular asset; the object must be described in a way that clarifies to which asset the right of ownership relates (§ 370 ABGB). In proceedings before the court, the burden of proof as to the existence of the right of ownership is on the person exercising this remedy (§ 369 ABGB). If the item is rather old or has been transferred several times, this burden of proof may be difficult to discharge (‘probatio diabolica’).64 The second requirement for revindication is that the object is under the physical control of another person. The scope of application is rather wide: This other person may be a thief; a buyer under reservation of title after the contract of sale has been terminated; a buyer under a void or avoided contract etc.

With regard to the different categories of possession recognised by Austrian law,65 it should be clarified that the remedy of revindication may be directed against each of these persons: against the person exercising direct physical control for himself (unmittelbarer Eigenbesitzer, e.g., a thief); against a person exercising only physical control without any intention to keep the asset for himself (Inhaber, detentor; e.g., a finder willing to hand over the

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63 The notion Eigentumsklage and the wording of § 366 ABGB seem to refer to a court proceeding. However, this is only a terminological reference to the Roman law tradition (Roman law operated with different types of actions), the right to recover one’s property exists independently of initiating court proceedings. Furthermore, there is no specific type of court proceeding for this kind of remedy.

64 Koziol/Weber, Grundriss I, 345; for details see Spielbüchler in Rummel, ABGB I, § 369 no. 2.

65 See 2.1., below.
asset to the competent authority, or to the owner, respectively); against a
person exercising direct physical control for another person without any
particular interest in the asset (Besitzdiener, e.g., an employee holding this
item for his employer); against a person exercising direct physical control for
another person based on a right to possess (Besitzmittler, e.g., a lessee or a
pledgee); or against the indirect possessor, who exercises control only
through such an intermediary (e.g., the lessor).66 However, a person exercis-
ing physical control for another can escape the claim for revindication by
revealing the identity of the indirect possessor (§ 375 ABGB).67

Revindication is excluded if the other person has a right to possess. Such a
right to possess may be based on a limited right in rem (servitude or
pledge) or on an obligatory right, such as a right of use under a leasing con-
tract, a gratuitous lending contract or based on a sale under retention of
title. A special matter of dispute is the right of revindication against a third
person, where the owner has let his property to a lessee and the lessee is,
according to his legal relationship with the owner, entitled to permit third
persons to use the property (e.g., by way of a sublease contract or by grant-
ing mere factual permission, for instance in favour of a family member).
Most of the case law on this subject matter concerns immovable property,
but the question may arise in relation to moveables as well, e.g., with cars.
According to the Supreme Court, what is decisive is only that the (first)
lessee is entitled, vis-à-vis the owner, to leave the asset to a third party. It is,
however, not decisive, whether the third party has a right to possess vis-à-vis
the (first) lessee.68 According to the prevailing view in literature, on the
other hand, the third party shall be protected against the owner only if he,
too, is validly entitled, as against the (first) lessee, to use the object. Ac-

cording to this view, which is to be seen as the favourable one, the third person
will have a right to possess as against the owner only if there is a ‘chain of
entitlements to possess’ going back to the owner.69

The legal consequence, if the requirements of revindication are fulfilled,
is that the possessor has to hand over the movable to the owner; with regard
to immovables, the owner has the right to have the premises vacated (Räu-
mungsanspruch). As to the effect of revindication in the case of the posses-
sor’s insolvency, or when the property is affected by enforcement proceed-
ings against another person, see below, 1.4.2.

66 Cf. Spielbüchler in Rummel, ABGB I, § 369 no. 3 with examples from court practice.
67 For details see Spielbüchler in Rummel, ABGB I, § 375 nos. 2 ff.
68 See OGH 3 Ob 532/94, wobl 1996/2; Spielbüchler in Rummel, ABGB I, § 366 no. 4
with numerous references to case law (regarding immovable property) and criticisms of
these rulings; Klicka in Schwimann, ABGB II, § 366 no. 11. In OGH 4 Ob 75/01k, JBl
2002, 106, it is left open whether this court practice should be abandoned.
69 Cf. Koziol/Welser, Grundriss I, 346; Iro, Sachenrecht*, no. 7/3; Spielbüchler, cit.
1. Ownership and other property rights

To what extent there are further (obligatory) rights between the owner and the possessor, such as a right to the reimbursement of expenses incurred while keeping the movable, is discussed in chapter 19, below.\(^{70}\)

It should be added that, under Austrian law, the right of ownership is not subject to prescription; consequently, the right of revindication does not prescribe either.\(^{71}\)

1.4.2. Protection against creditors: Insolvency of and enforcement proceedings against the possessor

Due to the absolute character of ownership, the owner's right to recover physical control is effective not only against any (unlawful) possessor of the property, but also against such a possessor's creditors. In principle, such protection is nothing other than the remedy of revindication.\(^{72}\) In common legal terminology, however, specific terms are used to label this effect. These terms also reflect the procedural context of insolvency law and enforcement law, respectively. Accordingly, one usually differentiates between the following two kinds of rights:

(a) If the person having physical control over the property becomes insolvent, the owner can recover his property from the bankrupt's estate (so-called Aussonderungsrecht, § 44 KO, § 21 AO). The creditors of the bankrupt debtor, therefore, are prevented from satisfying their claims out of the proceeds of the property. This subject matter will be discussed more closely in chapter 9 below.

In case ownership has been transferred for security purposes (Sicherungseigentum), however, the effect is somewhat different in an insolvency situation: Due to the economic similarities to a right of pledge, the owner is not entitled to demand physical recovery (Aussonderungsrecht), but is entitled ‘only’ to preferential satisfaction out of the proceeds of the sold object (so-called Absonderungsrecht, § 48 KO).\(^{73}\)

(b) If the property, while being under the physical control of another person, is affected by seizure in the course of enforcement proceedings initiated against that person by one of his creditors, the owner of the property can bring a certain action in order to terminate the execution with respect to his property (so-called Exzindierungsklage or Drittwiderspruchsklage.

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\(^{70}\) § 379 ABGB refers to §§ 329 ff ABGB.

\(^{71}\) See Mader/Janisch in Schwimann, ABGB VI, § 1459 no. 1 and § 1479 no. 2.


\(^{73}\) See Schudyok in Konecny/Schubert, Insolvenzgesetze, § 48 KO nos. 256 ff.
§ 37 EO). This means that the owner is not protected automatically; he has to institute the special action in the enforcement proceedings. If he fails to do so during the course of the enforcement proceedings and the asset has already been alienated by way of a forced sale, he will regularly lose his right of ownership to the buyer, provided the latter is in good faith: According to the good faith acquisition rule in § 367 ABGB, the buyer may acquire ownership in good faith at an auction held by the court; § 269 EO extends this good faith acquisition rule to other (non-auction) sales in enforcement proceedings. However, this does not mean that the former owner is left unprotected: He will have a claim for unjustified enrichment (§ 1041 ABGB, Verwendungsanspruch) against the enforcing creditor, who has to surrender the proceeds of the forced sale to the former owner. § 1041 ABGB, therefore, causes a ‘continuation’ of the right of ownership (described as ‘Rechtsfortwirkung’ in legal doctrine).

1.4.3. Right to refrain from interference (actio negatoria)

In case of interferences other than dispossession, the owner can resort to a remedy usually called the actio negatoria (Eigentumsfreiheitsklage, § 523 ABGB). The practical importance of this remedy clearly lies in the field of immovable property; a paradigmatic example is to walk or drive over another’s land. It may, however, also be applied to movables, for instance if a machine is used without permission. The rule has even been applied to the owner of a fax machine, who received a fax message containing commercial

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74 For details see, for instance, Jakusch in Angst, Kommentar zur Exekutionsordnung (2000), § 37 nos. 1 ff. Ownership for security purposes is treated in the same way, cf. Jakusch, cit., no. 18.
75 As to good faith acquisition in general, see chapter 12.
76 OGH 1 Ob 173/66, EvBl 1976/199 and many others; Jakusch in Angst, Kommentar zur Exekutionsordnung, § 37 no. 76 with further references. On § 1041 ABGB in general, see also 1.4.5., below.
77 On the connection between the right of ownership and the ‘Verwendungsanspruch’ see Wilburg, Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht (1934) 27 ff; Wilburg, Die “Subsidiarität” des Verwendungsanspruches, JBl 1992, 545 (549); see also F. Bydlinski, System und Prinzipien des Privatrechts (1996) 239-244.
78 Literally, § 523 ABGB only provides this remedy against someone who, unlawfully, pretends to be entitled to a servitude, but it is generally accepted that the principle is to be extended to all kinds of interferences, irrespective of whether the existence of a right is pretended or not: OGH 6 Ob 352/64, EvBl 1965/360; OGH 10 Ob 506/95, SZ 68/55 (regarding immovable property); Hofmann in Rummel, ABGB I, § 523 no. 9; Koziol/Welser, Grundriss I, 350 f. Again, the terms ‘action’ and ‘Klage’ do not mean that this remedy has to be exercised in a specific type of court proceeding (cf. footnote 63).
79 OGH 1 Ob 187/64, SZ 38/16.
advertising without his previous consent: The other party was sentenced to refrain from such interferences.\textsuperscript{80}

The \textbf{requirements} for enforcing this remedy are the \textbf{ownership} of the concerned asset and any kind of \textbf{interference}, \textit{i.e.} any act by which the right of ownership is affected unlawfully.\textsuperscript{81} It is neither required that the owner has suffered any loss, nor that the interferer has acted negligently or even intentionally; nor is it required that the interferer had legal capacity.\textsuperscript{82} This remedy can be enforced against the person who causes the interference himself; under specific requirements, it can also be directed against a so-called indirect interferer (\textit{mittelbarer Störer}), \textit{i.e.}, another person who either ordered the direct interferer to carry out the act or a person from whom help could be expected because he or she had the legal power to avoid the interference. For instance, the keeper (\textit{Halter}) of a car was regarded as an indirect interferer, because he did not prohibit his employees from driving the car over another person’s land.\textsuperscript{83}

The owner is granted a \textbf{twofold remedy}: He may, on the one hand, require the interferer to \textbf{abstain from future interferences} (\textit{Unterlassungsanspruch}). This right, however, is granted only subject to the fulfilment of an additional requirement: If an interference has already taken place, there must be a danger of the repetition of such infringement (\textit{Wiederholungsgefahr}); the threshold for presuming such a danger is rather low.\textsuperscript{84} If no interference has taken place so far, the right to demand an abstention from interference may be exercised if the risk that such interference will take place has reached a certain level (\textit{vorbeugende Unterlassungsklage}).\textsuperscript{85}

On the other hand, the owner may demand the \textbf{restoration to the former condition} of the property (\textit{Wiederherstellung des vorigen Zustands}). The costs of this restoration have to be borne by the interferer, even – as indicated above – if he did not act culpably. In the older literature, it was disputed whether the interferer’s liability based on the \textit{actio negatoria} was to be limited to reasonable costs\textsuperscript{86} or not.\textsuperscript{87} In recent Supreme Court decisions, this question has been decided in the affirmative: Aspects of reasonableness are to be considered, as in the case of the right of restitution \textit{in natura} (\textit{Natu-}

\textsuperscript{80} OGH 4 Ob 320/97f, SZ 70/227. The court refers to § 354 ABGB, but the principle it applied is the one discussed here.
\textsuperscript{81} Kiendl-Wendner in Schwimann, ABGB II\textsuperscript{1}, § 523 no. 11.
\textsuperscript{82} See OGH 1 Ob 47/00v, SZ 73/57; Hofmann in Rummel, ABGB I\textsuperscript{1}, § 523 no. 9 with further references to Supreme Court rulings.
\textsuperscript{83} OGH 1 Ob 680/81, EvBl 1982/93. Further references are provided by Hofmann in Rummel, ABGB I\textsuperscript{1}, § 523 no. 9.
\textsuperscript{84} See, for instance, OGH 4 Ob 320/97f, SZ 70/227; Kiendl-Wendner in Schwimann, ABGB II\textsuperscript{1}, § 523 no. 13; Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 354 no. 5.
\textsuperscript{85} Kiendl-Wendner in Schwimann, ABGB II\textsuperscript{1}, § 523 no. 14; Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 354 no. 5.
\textsuperscript{86} In this direction, see Ehrenzweig, System I/2\textsuperscript{1}, 303.
\textsuperscript{87} Klang in Klang, ABGB II\textsuperscript{1}, 604: No indication of such a limitation in property law.
rahrestitution) granted to the aggrieved party under Austrian tort law (§ 1323 ABGB) – which requires a culpable act (§ 1295 (1) ABGB). It is, therefore, sufficient to achieve a state more or less equal to the previous one.

A third possibility, which is often chosen in combination with the mentioned remedies, but can also be exercised independently of the latter, is to seek a declaratory judgement, which confirms that the right pretended by the other party does not exist.

With regard to immovable property, it should be noted that the principle of prohibiting interferences, which is generally expressed the actio negatoria in § 523 ABGB, is regulated more intensely in relation to emissions from vicinal real property in § 364 (2) and § 364a ABGB (‘law concerning the respective interests of neighbours’).

Like the action for revindication, the negatory action is not subject to prescription.

1.4.4. Right to claim damages

Under the general rule of § 1295 (1) ABGB, a claim for damages presupposes an unlawful (rechtswidrig) and culpable (schuldhaft) act or omission of the tortfeasor. Austrian court practice and doctrine have established various categories of the mentioned requirement of ‘unlawfulness’. One of them, which is of particular importance in our context, is usually described as an interference with absolute rights (Eingriff in absolute geschützte Rechtsgüter).

Ownership – as has been pointed out above, 1.1.2. – is such an absolute right (others are, e.g., a person’s physical integrity; intellectual property rights). The property is solely attributed to its owner and, due to the absolute character of the right of ownership, any other person is generally obliged to take reasonable care not to interfere with it. The establishment of such a general rule of conduct is facilitated by the concept of ownership: As to its content, the right of ownership is rather clearly defined. Furthermore, the existence of anybody else’s right of ownership of a certain asset is

88 OGH 5 Ob 143/04x, MietSlg 56.051; OGH 5 Ob 297/04m.
89 OGH 6 Ob 352/64, EvBl 1965/360; OGH 5 Ob 143/04x, MietSlg 56.051; OGH 5 Ob 297/04m. On the subject matter, see also Kienzl-Wendner in Schwimann, ABGB II, § 523 no. 6; Klang in Klang, ABGB II 603 f with reference to old case law.
90 Hofmann in Rummel, ABGB I, § 523 no. 11. For details, see for instance OGH 8 Ob 51/03p, MietSlg 56.672.
91 Kienzl-Wendner in Schwimann, ABGB II, § 523 no. 5.
92 Koziol/Weber, Grundriss II, 312; Harrer in Schwimann, ABGB VI, Vor §§ 1293 ff no. 2.
93 See supra, 1.1.3.a), on the principle of the definition of types (Typenfixierung).
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rather obvious. Consequently, it is not particularly burdensome to make oneself aware of the existence and the scope of such a right. However, according to the prevailing opinion in Austria, the mere fact that the property has been damaged does not fulfil the requirement of unlawfulness. This always involves a comprehensive weighing of the interests involved (umfassende Interessenabwägung). But the fact that an absolute right has been infringed may indicate that the act or omission of the damaging party was unlawful. The following case may illustrate this rule: The owner of a car let his vehicle to another person. Driven by this person, the car went into a skid and crashed, upside down, into a field. In its finding of facts, the court ascertained that the driver did not drive particularly riskily until the accident happened; on the other hand, no indications for any technical defect of the car that might have led to the accident were found. The Supreme Court held the driver liable: The interference with the absolute right of ownership does not, in itself, constitute an unlawful act. But deviating from the road without any obvious reason was considered to be the typical consequence of a driving mistake which, taking into account the riskiness of motor traffic, indicated an objective breach of the duty of care and, therefore, an unlawful behaviour of the driver.

This kind of protection of ownership differs from the proprietary remedies discussed above: The claim for damages is a mere obligatory right. In a certain sense it is, however, rooted in the absolute right of ownership. But as the claim for damages is an obligatory right, the owner is not protected in the tortfeasor’s insolvency.

1.4.5. Claim for unjustified enrichment

Another obligatory remedy is provided by the law of unjustified enrichment (ungerechtfertigte Bereicherung). This remedy, too, is based on the exclusive attribution of the property to its owner, i.e., on the in rem character of ownership. According to § 1041 ABGB, the enrichment following from each unjustified ‘use’, which is obtained contrarily to the designated attribution of the property (or right), must be returned to the person entitled to the property (so-called Verwendungsanspruch).

The term ‘use’ (Verwendung) has to be understood in a very wide sense. It covers, for instance, the case of a thief driving a stolen car, eating up

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94 Even if the principle of publicity might be regarded as somewhat questionable in relation to movables (see supra, 1.1.3.b)), because it is often not evident who is the owner of a movable, it is clear to every person that a particular asset is someone else’s property, and that other people’s property must be respected.
96 Cf., for instance, Koziol/Welser, Grundriss II, 312 f; OGH 2 Ob 153/98h, JBl 1999, 47.
97 Rummel in Rummel, ABGB I, § 1041 no. 6.
stolen food or heating with stolen wood. Other examples are: The processing of another's material and the selling of another person's property, where an enrichment consists of the purchase price received from the buyer.\textsuperscript{98} Furthermore, an asset or a right can be 'used' in the sense of § 1041 ABGB by way of an act of the owner\textsuperscript{99} or even without any act of the enriched party or owner.\textsuperscript{100}

The 'use' must be \textit{unjustified}, \textit{i.e.}, contradict the exclusive attribution, granted by law, to the entitled person. This often, but not necessarily, implies an unlawful act which can also give rise to a claim for damages. Conversely, if the transfer of the enrichment is legally justified, \textit{e.g.}, by a contract (sale, gift, lease \textit{etc.}) or by law (\textit{e.g.}, by the rules on good faith acquisition or acquisitive prescription), no retransfer of the enrichment takes place.\textsuperscript{101} In the case of the commingling or processing of another person's material, a change in ownership may take place, but a claim for unjustified enrichment may still be possible (cf. § 416 ABGB).\textsuperscript{102}

As to the \textbf{legal consequences} of § 1041 ABGB,\textsuperscript{103} the owner is, primarily, entitled to claim for the physical restitution of the property. This claim concurs with revindication; the owner may resort to both remedies.\textsuperscript{104} If physical restitution is impossible, the (former) owner can demand compensation in money (\textit{Wertersatz}). If the enriched party was in good faith, the compensation will amount to the market value; in case he is in bad faith, the debtor has to return all benefits. Apart from physical restoration, unjustified enrichment law provides a right to consideration for utilisation (\textit{Benützungsentgelt}), \textit{e.g.}, for the benefit a thief obtained from driving the stolen car for two months or for using a leased machine after the end of the leasing period.\textsuperscript{105} Contrary to a claim for damages, which is based on the loss suffered by the aggrieved party, the claim \textit{ex} unjustified enrichment is based on the benefit accruing to the enriched party, which has to be reversed to the entitled person. The loss suffered by one party and the benefit accruing to the other party do not necessarily coincide. It may happen that the owner

\begin{itemize}
\item \textsuperscript{98} References are provided by \textit{Apathy} in Schwimann, ABGB IV\textsuperscript{3}, § 1041 no. 5. Further examples are listed by \textit{Rummel} in Rummel, ABGB I\textsuperscript{3}, § 1041 no. 7.
\item \textsuperscript{99} Example: Goods are delivered to an agent who acted without authority. The seller can resort to § 1041 ABGB against the agent; \textit{Apathy} in Schwimann, ABGB IV\textsuperscript{3}, § 1041 no. 6.
\item \textsuperscript{100} \textit{E.g.}, a cow grazes on another's land; cf. \textit{Apathy} in Schwimann, ABGB IV\textsuperscript{3}, § 1041 no. 7, who provides further references.
\item \textsuperscript{101} Numerous references are listed by \textit{Apathy} in Schwimann, ABGB IV\textsuperscript{3}, § 1041 nos. 10 ff.
\item \textsuperscript{102} See 11.2.3), below.
\item \textsuperscript{103} For the following, see \textit{Apathy} in Schwimann, ABGB IV\textsuperscript{3}, § 1041 nos. 24 ff; \textit{Rummel} in Rummel, ABGB I\textsuperscript{3}, § 1041 nos. 13 ff.
\item \textsuperscript{104} The claim \textit{ex} unjustified enrichment is, however, not protected in insolvency, and it prescribes after 30 years.
\item \textsuperscript{105} OGH 6 Ob 523/93, eclex 1993, 521.
\end{itemize}
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does not suffer any loss (his sailing boat is taken away for three weeks while he is abroad, and restored undamaged) while the enriched party has obtained a benefit (he has saved a sum equal to the leasing price of a sailing boat). In such a case, the owner can demand the payment of consideration for utilisation under unjustified enrichment law, but does not have a claim for damages.106

According to § 1041 ABGB (unlike under the German rule in § 818 (3) BGB), the enriched party bears the risk that the enrichment subsequently ceases. The latter is, in principle, still obliged to return the enrichment previously obtained.107

1.5. Transferability of movable property

In principle, movable assets are transferable inter vivos and by will. Transferability (Verkehrsfähigkeit) as such is regarded as being of public interest and as being in the interest of the owner. Nonetheless, there are some exceptions to be mentioned. They may be based on general provisions of law (1.5.1.), on party autonomy (1.5.2.) or on physical changes of the property (1.5.3.).

1.5.1. Statutory limitations on transferability, res extra commercium

With regard to movables, statutory limitations on transferability are provided for drugs (Suchtmittel), which may only be acquired and possessed for medical or scientific purposes by specific persons or institutions, within strict limits regulated by law.108 Similarly, war equipment and certain weapons, like pump guns, may neither be acquired, imported nor possessed (exceptions may be made by the authorities). They are, however, subject to a right of ownership.109 Holy things (res sacrae), like relics, could not be transferred against consideration according to an old statute from 1826. This provision was abolished in 1999.110

106 Cf. Rummel in Rummel, ABGB I, § 1041 no. 2.
107 Some authors make an exception in the case of the accidental loss (zufälliger Unter- gang) of the property; see Apathy in Schwimann, ABGB IV, § 1041 no. 27; Koziol/Welser, Grundriss II, 294 f; in detail: P. Huber, Wegfall der Bereichung und Nutzen (1988).
108 §§ 5, 6 Drugs Act (Suchmittelgesetz, SMG), BGBl I 1998/30 (modified several times).
109 Cf. §§ 17 ff, 43 Weapons Act (Waffengesetz), BGBl I 1997/12 (with subsequent modifications).
110 See Koziol/Welser, Grundriss I, 246 f, with further examples, also regarding immovable property.
1.5.2. Limitations on transferability by contract or will

The effects of an exclusion of or limitation on transferability (Veräußerungs- und Belastungsverbot) by contract or will are rather limited under Austrian law. One has to distinguish two levels: The question whether or to what extent such a limitation can have effect between the parties; and the effect against third parties.

(a) A limitation on transferability inter partes can be validly established by contractual agreement or by will, but only binds the first owner or heir/legatee and has no effect against their successors (§ 364c sentence 1 ABGB). Such a limitation is a mere obligation. If the owner nevertheless transfers or pawns the property, the third party acquires a valid title. The only consequence is that the (original) owner may be liable to pay damages. Only under very strict requirements, the entitled party may demand a reversal of the transaction from the third party (as restitution in natura, which is a general tort remedy, § 1323 ABGB). One of these cases is when the third party intentionally induced the owner to breach his obligation of refraining from making any transfers.111

Within these restrictions, an obligatory limitation on transferability can be established as to movable and immovable property.

(b) An effect against third parties can only be produced regarding immovable property (provided that the limitation has been registered in the land register and that it has been agreed between certain close relatives; this also applies to the limitations described above; § 364c sentence 2 ABGB). With regard to movables, therefore, a limitation on transferability with erga omnes effect, i.e., resulting in the invalidity of a transfer, is not possible.

1.5.3. No separate transferability of accessories

If a movable asset is combined with another asset in such a way that separation is either impossible without destroying its substance, or can not be effected in an economically reasonable way, this movable becomes a so-called dependent component part (accessory, unselbständiger Bestandteil) of the other asset. With regard to the attachment of movables to immovables, this rule goes back to the principle superficies solo cedit. The rule may also apply to the inseparable attachment of two movables (see also chapter 11).112

The consequence of such attachment is that component parts are necessarily subject to exactly the same proprietary rights as the principal asset.

111 See Oberhammer in Schwimm, ABGB II, § 364c nos. 3 f; Koziol/Welser, Grundriss I, 291 f.
112 Infra, 11.2.3 and 11.3.2.
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The accessory part can not be transferred separately, nor can a property right, which has been established before the attachment, prevail.

This is of particular practical importance with regard to goods sold under reservation of title: If, e.g., tubes for water or gas have been sold subject to reservation of title, but, subsequently, were built into a house so that they can not be removed without being destroyed, the retained ownership of the seller is extinguished. The seller loses his security right.

2. Possession

2.1. Notion and categories of possession

2.1.1. The notion of possession

According to the definition in § 309 ABGB, possession (Besitz) requires two aspects: To have physical control over the asset (Innehabung, Gewahrsame, ‘corpus’) and to have the intention to keep the thing as one’s own property (animus rem sibi habendi). If only the first criterion of physical control is fulfilled but the intention requirement has not been met, there is no possession in the sense of Austrian private law. § 309 ABGB defines such a relationship as detention (Innehabung, Detention). A deviating definition in the Commercial Code has just been abolished.

Possession is a mere factual relationship between a person and a thing. It does not create a right to the object. However, this factual state is granted certain protection by law. The following text provides a short discussion of the named two requirements (sections (a) and (b)) and addresses the two different objects possession can relate to under Austrian law: to a corporeal thing or to a right (section (c)).

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113 Cf. Klicka in Schwimann, ABGB II, § 294 nos. 2 ff; Iro, Sachenrecht, nos. 1/20 f.
114 Up to the end of 2006, a special rule was provided in Art. 5 of the Fourth Introductory Regulation to the Commercial Code (Vierte Einführungsverordnung zum Handelsgesetzbuch, in short: 4. EVHGB): For the notion of possession (Besitz) in the sense of the Commercial Code (HGB), the intention to keep the property like one’s own was not required. The notion of possession within the HGB, therefore, converged with the notion of possession in the German BGB, which has to be seen in the light of the fact that the German HGB had been enacted in Austria in 1938. – In 2006, the 4. EVHGB was abolished (by the HaRÄG, cf. footnote 10, entering into force on 1 January 2007). In the Commercial Code, from now on called the Unternehmensgesetz (UGB), the term ‘possession’ is replaced by the term ‘detention’. Accordingly, this terminology now converges with § 309 ABGB. The material content of the UGB rules referring to possession/detention stays the same, cf. the government bill: RV 1058 BlgNR 22. GP, 80.


116 See below, 2.5. and 2.6.
The criterion of physical control does not mean mere physical closeness but bears an element of control over the object. Whether or not this is fulfilled is to be decided according to the common opinion (Verkehrsauffassung). Physical control can be exercised by means of another person (see 2.1.2.). As physical control is considered a mere factual state, it is assumed that this criterion can be fulfilled even if the possessor (or detentor) does not know that he has such physical control. Accordingly, possession can still exist even if the possessor forgot where he placed the property. § 352 ABGB states that the mere intention (cf. the second requirement) may suffice to stay in possession of a lost object, 'as long as there is hope to recover it. The absence of the possessor or subsequent inability to possess do not terminate possession that has once been established'. Possession of a movable (only) ends if the object gets lost (without the hope to recover it), in the case of abandonment and when another person takes possession (§ 349 ABGB).

From these principles, one can deduce that the intensity of physical closeness may be reduced after possession has once been established. As has been pointed out above, physical closeness is not the decisive aspect. It may, according to the common opinion, be helpful to ascertain the element of control. When the possession of a particular asset is obtained, the common opinion will regularly demand an obvious establishment of a physically close relationship, such as a corporeal handing over after the conclusion of a contract of sale. After that, the importance of physical closeness declines, as there are numerous other forms of control accepted by the common opinion. Whether a person places his coat in the cloakroom of a museum or leaves it in his car while going for a walk, everyone will accept that it is still in this person's possession. Also, placing milk bottles on the pavement or leaving a tractor on a field, even if it is not the farmer's own field, will not terminate possession.

As to the element of intention, it is often stated that the external appearance of the relationship between person and object is decisive. This must, probably, be seen in the light of the difficulties that would be created if the possessor had to provide evidence of his intention in a subjective-psychological sense. One has to keep in mind that Austrian law recognises the possession of things and the possession of rights, and it would be diffi-

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117 Cf. Klicka in Schwimann, ABGB II, § 309 no. 2, who provides further references.
118 Cf. Spielbüchler in Rummel, ABGB I, § 349 no. 1. – How close the corporeal relation must be for the occupation of wild animals or fish is not of practical relevance under Austrian law: Upon capture or shooting, ownership is acquired always by the holder of the hunting or fishing license (if no such entitlement exists: by the land owner). See Klicka in Schwimann, ABGB II, § 383 no. 1.
119 See Spielbüchler in Rummel, ABGB I, § 309 no. 3; Klicka in Schwimann, ABGB II, § 309 no. 4, with reference to settled court practice (regarding immovables).
120 See section (c), below.
cult to differentiate if only the – invisible – internal intention was decisive. Accordingly, the intention to possess can be assessed from the legal relationship under which possession has been obtained: A buyer has the intention to hold the property as an owner; a lessee has the intention to possess the leasing right. Regarding a thief or a robber, who are possessors as well, it does not create difficulties to refer to their intention in a subjective sense.

As to the content of intention, it is sometimes stated that the intention to possess is not necessarily directed at holding the property as one’s own, but like one’s own (‘as if’ being the owner).

Legal capacity is not required for retaining possession. For obtaining possession, § 310 ABGB requires, at least, limited legal capacity, i.e., an age of at least seven years (except such assets of low value which are usually acquired by children).

(c) Under Austrian law, the object of possession may be both corporeal things (Sachbesitz) and rights (Rechtsbesitz). In principle, the same rules apply to both categories. To have possession of a right means to exercise a right with the intention to do so in one’s own name (Ausübung im eigenen Namen). It is, however, not necessary that the right exists. According to the prevailing opinion, only rights that can be exercised constantly may be subject to possession, such as the right of use under a leasing contract, a servitude, the right of pledge or the expectant right of a buyer under retention of title (Anwartschaftsrecht). Rights that extinguish by being exercised once, such as for instance the claim to a purchase price, can not be possessed. The custodian (Verwahrer) is not considered to be a possessor of a right, as he has no right to hold and use the asset, but rather is under an obligation to keep it safe.

The main practical importance of the concept of possession of rights lies in the applicability of the rules on the protection of possession. This will be discussed more closely in chapter 3, below. According to the prevailing opinion, legal protection of possession is only granted with respect to rights related to the physical control of a corporeal asset.

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121 Klicka in Schwimann, ABGB II’, § 309 no. 5; LGZ Wien (High Court of Vienna) MietSlg 27.006; LGZ Wien MietSlg 31.012.
122 See Klicka in Schwimann, ABGB II’, § 310 nos. 1 f.
123 Cf. §§ 311 ff ABGB. §§ 312, 313 contain some additional rules for acquiring and exercising the possession of a right.
124 See, for instance, Kodek, Besitzstörung 103.
125 Cf. Koziol/Welser, Grundriss I’’, 259 f; Klicka in Schwimann, ABGB II’, § 311 no. 4.
126 Koziol/Welser, Grundriss I’’, 259.
127 References are provided by Kodek, Besitzstörung 104 f, who discusses this question at length (105-160) and comes to the conclusion that the physical control of a corporeal asset is neither required for the possession of a right as such nor for the protection of such possession.
As a consequence of the twofold concept of possession, one asset is often possessed by two persons if the owner does not exercise physical control himself: In the case of a lease, servitude or pledge etc., the owner is regarded as the possessor of the thing (Sachbesitz), whereas the lessee is the possessor of the respective right (Rechtsbesitz). In the following, the report will mainly focus on the possession of things.

2.1.2. Categories of possession

Both the criteria of physical control and the creation of the intention to possess can be fulfilled by another person. This is important for the acquisition of possession as well as for retaining the object in possession: Possession can be acquired or retained, e.g., by an employee (for the employer), by a lessee (for the lessor), by a custodian, pledgee or a family member.\textsuperscript{128}

Based on this phenomenon, one can distinguish, at different levels, various categories of possession. They will be discussed below. It should be added that these definitions are not contained in the ABGB. They have been taken over from German law (§§ 855, 868 and 872 BGB, in particular) and are nowadays commonly used in Austrian legal terminology.\textsuperscript{129} The different categories may overlap or may be combined.

(a) Direct and indirect possession. A direct possessor (unmittelbarer Besitzer) exercises physical control himself. A person who exercises possession through another person is called an indirect possessor (mittelbarer Besitzer).\textsuperscript{130}

(b) Types of intermediaries: For exercising physical control through another person, a possessor may make use of two different types of intermediaries:

An ‘intermediary in possession’ (Besitzmittler) can be described as a person who exercises physical control for the (indirect) possessor based on a certain legal relationship, which gives him a right to physical control over

\textsuperscript{128} Cf. for instance Iro, Sachenrecht\textsuperscript{‘}, nos. 2/45 ff.

\textsuperscript{129} There is, however, not much literature available as to a closer discussion of these categories as such. In short, see for instance Klicka in Schwimann, ABGB II\textsuperscript{’}, § 309 no. 3. Iro, Besitzerwerb durch Gehilfen (1982) discusses particular questions as to the acquisition of possession through intermediaries. – For more information in the English language, one might refer to the report on German law by McGuire, Transfer of Title Concerning Movables Part II – National Report: Germany (2006) 48 ff (or the respective sections of the new version of the German report, to be published in the present series).

\textsuperscript{130} According to the terminology used in German law, one would speak of indirect possession only if the other person fulfils the requirements of a Besitzmittler (see below, (b)). It seems that Austrian lawyers do not distinguish as exactly: If the other person is to be regarded as a mere Besitzdiener, some nevertheless speak of indirect possession; see for instance Kodek, Besitzschutz 259.
the particular asset as against the possessor, but respects the indirect posses-
sor’s superior power of control.\textsuperscript{131} The lessee (Mieter, Pächter); borrower
(person entitled to gratuitous use, Entlehrer); pledgee (Pfandgläubiger), per-
son entitled to enjoy fruits and benefits based on a right of usufruct (Frucht-
enießer, Usufruktuar) and the custodian (Verwahrer) are considered to fall
within this category;\textsuperscript{132} the buyer under reservation of title, as well as the
carrier, should be added.

The ‘intermediary in possession’ is considered a possessor himself, in the
sense that he is in possession of a right (Rechtsbesitz). With regard to the
corporeal asset, the other party (lessor, pledgor etc.) is regarded as an indi-
rect possessor (mittelbarer Sachbesitz). Being qualified as a possessor, the
‘intermediary in possession’ can resort to possessory remedies.\textsuperscript{133} The ‘inter-
mediary in possession’ can acquire and transfer possession for the indirect
possessor. The relationship has to be distinguished from direct representa-
tion (direkte Stellvertretung).

The second type of intermediary is the so-called ‘possessory servant’
(Besitzdiener). This type is usually characterised by the existence of a rela-
tionship of ‘social dependence’; the possessory servant is bound to follow the
instructions of the principal (possessor). The most important example
nowadays is the employee. Other examples are family members or household
servants who factually use the property.\textsuperscript{134} Such persons are not considered
possessors themselves (they are mere detentors). Accordingly, they can not
resort to possessory remedies in the strict sense, but only to self-help against
third persons.\textsuperscript{135}

For both types, acquisition of possession through an intermediary requires
that the relationship between possessor and intermediary is disclosed to the
third person transferring possession, and that the intermediary is authorised
by his principal to acquire physical control. Whether this authorisation is
legally valid or not, is not regarded as decisive.\textsuperscript{136}

(c) The distinction between ‘possession for oneself’ (Eigenbesitz) and
‘possession for another’ (Fremdbesitz) is known from German law (§ 872
BGB), but not that frequently used in Austrian legal terminology. The main
reason is that the definition of possession in the sense of § 309 ABGB al-
ready implies the intention to keep the asset like one’s own.\textsuperscript{137}

(d) Sole possession and co-possession. Like ownership, possession can
be held exclusively by one person (sole possession, Alleinbesitz) or jointly by

\textsuperscript{131} Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 309 no. 2; Klicka in Schwimmann, ABGB II\textsuperscript{1}, § 309
no. 3.
\textsuperscript{132} Cf. Klicka in Schwimmann, ABGB II\textsuperscript{1}, § 309 no. 3.
\textsuperscript{133} See 2.5., below.
\textsuperscript{134} Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 309 no. 2.
\textsuperscript{135} See below, 2.7.
\textsuperscript{136} In more detail Iro, Besitzerwerb durch Gehilfen 25 ff (with summary 78 ff).
\textsuperscript{137} See above, 2.1.1.
several persons (co-possession, Mitbesitz). As to the possessory remedies of a co-possessor, see section 2.5. below.

2.2. Functions of Possession

With regard to corporeal movable assets, possession is said to serve a number of different functions. As to immovable property, the same functions are served by the land register.138

1. Function of transfer (Übertragungsfunktion): The transfer of ownership of a movable asset as well as the creation or transfer of other rights in rem, such as the right of pledge, require a transfer of possession (including forms of constructive possession).139 With regard to immovable property, the transfer of possession is replaced by the entry in the land register (Grundbuch). This principle, together with the function mentioned sub b), can also be described as the publicity function of possession.

2. Function of creating good faith (Gutglaubensfunktion): In the traditional view, possessing a corporeal movable asset makes the possessor appear to be the owner of that asset or, possibly, to be otherwise entitled to dispose of the asset (legitimising appearance of possession, Rechtsschein des Besitzes). This is regarded as important, especially in the context of good faith acquisition, which is partly justified by the idea that the purchaser may rely on the seller’s ownership or entitlement to dispose.140 – However, this view is open to criticism on similar grounds as the publicity principle discussed above, 1.1.3.(b).141

3. Function of creating a legal position (rechtsbildende Funktion): The factual state of being in possession can be turned into a right. The possessor may acquire ownership by acquisitive prescription.142

4. Function of protection (Schutzfunktion) – this function only concerns possession, not also registration: The possessor may resort to special remedies. In particular, he can institute a special action for disturbance of possession (Besitzstörungsklage, § 339 ABGB) upon dispossession or any other interference with his possession. This kind of protection is rather easily available in special summary proceedings. It can be seen as a reflex of the

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138 Some of the functions overlap; the categorisation could be made differently as well. The overview follows the script by H. Böhm, Sachenrecht Allgemeiner Teil¹ (2006) 5 f. Cf. also Gschnitzer/Faistenberger/Bartal/Caill/Eccher, Sachenrecht², 5; Binder, Sachenrecht³ (2003) 52 f; Iro, Sachenrecht⁴, nos. 2/1 ff. On German law see for instance Wiebling, Sachenrecht I (2006) 121 ff.
139 See below, 5.6., on the transfer of ownership.
140 In more detail, see chapter 12, below, especially 12.2.5.
141 See the references provided by Koziol/Welser, Grundriss I, 273 f, who defend the named view.
142 In more detail, see chapter 13, below.
prohibition of unlawful interference with another’s possession (Eigenmachtverbot). In this way, possession also serves an important **peace-keeping function** (Friedensfunktion).\(^{143}\)

Another aspect of the protection of possession is the so-called **actio Publiciana** (§ 372 ABGB), which provides for the protection of a person having the ‘better right to possess’ as against any other person with an inferior (or no) right.\(^ {144}\)

5. **Function of presumption (Vermutungsfunktion):** The law provides certain rebuttable presumptions linked to possession. On the one hand, there is a presumption that the possessor acquired possession based on a valid title (Titel, § 323 ABGB). This presumption, however, is of low practical importance under Austrian law, because the existence of such a valid title has to be proven, according to general rules, by the relevant possessor both for the **actio Publiciana** and for acquisitive prescription.\(^ {145}\) A more important presumption is provided by § 328 ABGB: In case of doubt, there is a presumption that the possessor is in good faith. This is relevant for the acquisition of ownership by good faith acquisition and acquisitive prescription; the rule also applies to the **actio Publiciana** in the sense of § 372 ABGB.

In contrast to German law (cf. § 1006 BGB), there is no general presumption that the possessor is the owner of a movable asset.

2.3. **Excursion: The meaning of possession in ‘good faith’**

According to a definition provided in § 326 ABGB, a possessor is in good faith if he, ‘for probable reasons’, considers himself to be the owner (in the case of the possession of a right: to be entitled to this right). According to the prevailing opinion, a possessor lacks good faith if he positively knows, or negligently does not know, that he is not the owner. Therefore, even slight negligence (leichte Fahrlässigkeit) **prevents good faith.**\(^ {146}\) Another view assumes that a lack of good faith presupposes at least gross negligence.\(^ {147}\) According to a third view, good faith means subjective ignorance, provided the possessor (subjectively) is not in doubt about his entitlement. In this view,

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\(^{143}\) F. Bydlinski, System und Prinzipien des Privatrechts 323; the peace-keeping function is particularly stressed as the main rationale of the protection of possession by Kodek, Besitzstörung 36 ff.

\(^{144}\) See 2.6., below.

\(^{145}\) See Spielbüchler in Rummel, ABGB I, § 323 no. 1; Koziol/Welser, Grundriss I\(^ {1}\), 273.

\(^{146}\) Cf. Koziol/Welser, Grundriss I\(^ {1}\), 262 and the references provided by Spielbüchler in Rummel, ABGB I, § 326 no. 2 (also for the deviating views). The Supreme Court followed all three different views in different decisions. – As to the notion of good faith, see also below, 12.2.4. and 13.1.1.(d).

\(^{147}\) Oberhofer, Sonderhaftpflicht für Besitzer? JBl 1996, 152, with further reference.
an objective test only applies to the good faith acquisition rules (§§ 367, 368 ABGB).\textsuperscript{148}

Under the prevailing view, the definition of ‘good faith’ is generally applicable in the whole field of property law.

\section*{2.4. Acquisition of Possession}

§ 312 ABGB gives examples of acquisitions of possession of corporeal movable assets (physical capture, leading away, keeping) but does not regulate this subject matter in detail. For the acquisition of possession in a transfer situation, which is of main interest here, it is generally assumed that the delivery rules on the transfer of ownership are to be applied by way of analogy.\textsuperscript{149} For these rules, see below, 5.6.

\section*{2.5. Judicial protection of possession}

\subsection*{2.5.1. General aspects}

The means of judicial protection of possession (Besitzschutz) are the most important effects of the possession of a corporeal asset (Sachbesitz) as well as of a right (Rechtsbesitz). The rules are the same for movable and immovable property.\textsuperscript{150} Any possessor, including illegal possessors like a thief, may ask the court for protection against any interference (Störung) with his possession, which is based on the unlawful initiative (verbotene Eigenmacht) of the interferer (§ 339 ABGB).\textsuperscript{151} One can distinguish two types of interference, which are reflected in the designations of the respective claims: Dispossession, triggering an action for recovery of possession (Besitzentziehungsklage); and other kinds of interference, giving rise to an action for disturbance of possession (Besitzstörungsklage).

Protection is granted in a specific kind of court proceeding, which is particularly speedy (§§ 454 ff ZPO). The claimant must only prove that he was in possession when the interference took place and that the defendant interfered with his possession (§ 454 ZPO). The proceedings do not go to the merits of the case in the sense that questions such as whether the claimant acquired possession based on a ‘valid title’ (e.g., a valid contract) and whether the claimant possessed in good faith are not examined. Accord-

\textsuperscript{148} Supporting this view Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 326 nos. 2, 4.
\textsuperscript{149} See for instance Klicka in Schwimann, ABGB II\textsuperscript{1}, § 312 no. 1.
\textsuperscript{150} §§ 340 ff ABGB contain some additional rules on interference with possession through building activities. They will be neglected in the following.
\textsuperscript{151} For the following, see Koziol/Welser, Grundriss I\textsuperscript{2}, 274 ff; Iro, Sachenrecht\textsuperscript{3}, nos. 2/55 ff. In great detail Kodek, Besitzstörung 93 ff.
ingly, the question whether the claimant had a right to possess is of no im-
portance in the possessory proceedings (possessorium). The effect of the court
order granted at the end of such a trial is, however, only of provisional char-
acter: The defeated party may resort to other remedies, which are based on
the right to possess, and initiate ordinary court proceedings (petitorium). In
these proceedings, however, the possessor will be in the position of the de-
fendant, which is of practical advantage. The court is not allowed to com-
bine the possessory proceedings with other (ordinary) proceedings. However,
if the court order, resulting from the possessory proceedings, is enforced
and a contrary decision of an ordinary proceeding already exists, enforce-
ment must be terminated.

The actions for recovery and disturbance of possession are subject to a
particularly short prescription period of 30 days (§ 454 ZPO). This period
is a subjective one in the sense that it begins to run only when the possessor
has gained knowledge of the occurrence of the interference and the identity
of the interferer. The possessor must, however, undertake reasonable inves-
tigations in order to obtain knowledge of the identity of the interferer; e.g.,
in case an interference is caused by a motor vehicle, he must investigate the
identity of the holder of the license (plates) by consulting the competent
authority. If interferences take place repeatedly, the period begins to run
when the possessor obtains knowledge of the first interference and the iden-
tity of the interferer.

2.5.2. Requirements and consequences in detail

As mentioned above, judicial proceedings for the protection of possession
can be instituted by any possessor in the sense of § 309 ABGB. Both the
possessor of a corporeal thing (Sachbesitzer) and the possessor of a right
(Rechtsbesitzer) are protected. A mere detentor, who has no ‘animus rem sibi
habendi’, cannot resort to these remedies. Apart from possession, the follow-
ing requirements must be fulfilled:

(a) The first requirement is an act of interference with possession (Stö-
 rung, Eingriff). In court practice, this is defined as an actual intrusion (ta-
tsächlicher Eingriff), which results in an actual or possible disadvantage to the
possessor. The courts require a physical kind of interference. According to
a strong view in literature, any act that would be qualified as an interference

152 For details, see Kodek, Besitzstörung 845 ff.
153 OGH 3 Ob 823/31, SZ 13/249; Klicka in Schwimann, ABGB II', § 339 no. 56.
154 On all these issues, see, e.g., Klicka in Schwimann, ABGB II', § 339 nos. 51 f.
155 See the references listed by Klicka in Schwimann, ABGB II', § 339 no. 10 and Spiel-
büchler in Rummel, ABGB I', § 339 no. 4 (all of them being court of appeal cases, be-
cause such issues, for procedural reasons, can not be brought before the Supreme
Court).
with the right of ownership can also be qualified as an interference with possession.\textsuperscript{156}

It has already been mentioned that the requirement of interference can be divided into two sub-groups: The first type is dispossession (Besitzentziehung), i.e., acquisition of possession by another person. However, if a lessee, borrower or depository does not return the asset after the end of the respective contract, this is not regarded as an interference with possession because these persons just maintain the actual status quo without bringing about a factual change.\textsuperscript{157} Another exception is recognised where a dispossessed person reacts by dispossessing the other person (e.g., the owner ‘steals back’ his property from a thief): If this reaction takes place within 30 days from (the first) dispossession, an action for recovery of possession cannot be instituted.\textsuperscript{158}

The second sub-group covers all other kinds of interferences (Besitzstörung). With regard to the possession of movable property, the following examples from court practice can be mentioned: Physical removal, with the exception of minor changes; painting windows and doors; sleeping in another’s double bed, even with the permission of the possessor’s wife.\textsuperscript{159} Where the other party merely declares to prohibit a certain behaviour of the possessor, such declaration is not regarded as an interference with possession, unless it implies an immediate threat that an infringing act will be committed.\textsuperscript{160}

(b) As a second requirement, interference must be based on the unlawful initiative (verbotene Eigenmacht) of the interferer. In fact, one should rather require that there be no defences (Rechtfertigungsgründe) available to the interferer.\textsuperscript{161} Reversely, an interference is not regarded as unlawful if it is justified by the possessor’s assent, by law or by a permission granted by the competent public authority.

In court practice, justification by the possessor’s assent was accepted not only in the case of an explicit permission, but also, e.g., when the husband declared that he would sell the TV-set and his (co-possessing) wife neither objected at the time of this announcement nor at the moment when he

\textsuperscript{156} Cf. Kodek, Besitzstörung 208 ff; Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 339 no. 2; Binder, Sachenrecht\textsuperscript{2}, 55. The difference to the courts’ view lies in the fact that this opinion also covers interferences such as noise, smell and dust (which are, of course, mostly important in cases concerning immovable property).

\textsuperscript{157} Koziol/Weber, Grundriss I\textsuperscript{4}, 274; Kodek, Besitzstörung 145, 224 ff; Iro, Sachenrecht\textsuperscript{3}, no. 2/60.

\textsuperscript{158} Koziol/Weber, Grundriss I\textsuperscript{4}, 274.

\textsuperscript{159} References are provided by Klicka in Schwimann, ABGB II\textsuperscript{3}, § 339 no. 17.

\textsuperscript{160} Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 339 no. 2.

\textsuperscript{161} Kodek, Besitzstörung 205 ff with reference to the question of the burden of proof (footnote 143). According to LGZ Wien 42 R 15/80, MietSlg 32.010, the burden of proof as to all requirements is upon the claimant (possessor), but it is not that clear whether the court also meant the aspect of unlawfulness.
actually sold it.\textsuperscript{162} Letting out an object on lease implies the lessor’s consent to any usual utilisation.\textsuperscript{163} Justification granted by law and permission granted by a competent authority practically only occur with immovables.\textsuperscript{164}

It is not required that the interferer knows that he acts unlawfully. Against possessory remedies, a defence of acting in good faith is not available. Accordingly, an erroneous belief of being entitled to commit a certain act does not help the interferer; only an error as to the fact of possession may.\textsuperscript{165}

(c) Where the action is aimed at obtaining an order to refrain from further interference (\textit{Unterlassungsanspruch}),\textsuperscript{166} it is additionally required that there be a risk of repeated interference (\textit{Wiederholungsgefahr}).\textsuperscript{167}

(d) Consequences. In principle, the plaintiff’s claim contains three aspects: a declaration that interference has taken place (\textit{Feststellung}); an order to refrain from further interference (\textit{Unterlassungsanspruch}) and the restitution of the status \textit{quo ante} (\textit{Wiederherstellung}).\textsuperscript{168} The declaratory aspect is not absolutely necessary. The claim for restitution presupposes that such restitution is possible.

\subsection*{2.5.3. Persons entitled to and affected by judicial possessory remedies}

(a) As mentioned before, any possessor may resort to judicial possessory remedies. That applies, on the one hand, to the possessor of a corporeal thing (\textit{Sachbesitzer}), such as the owner in possession as well as to the thief in possession. He may institute the possessory action against any third party, but also against a person exercising physical control for him (\textit{e.g.}, a lessee or borrower), provided that and insofar as this person exceeds the permissible utilisation under the legal relationship between these two persons.\textsuperscript{169}

On the other hand, also the possessor of a right (\textit{Rechtsbesitzer}) can bring an action for the protection of possession. This is of utmost practical importance for residential renting, but the same principles will apply to the

\begin{itemize}
  \item \textsuperscript{162} LGZ Wien 47 R 2023/90, EFSlg 63.142.
  \item \textsuperscript{163} See Spielbüchler in Rummel, ABGB I', § 339 no. 5 with numerous examples as to immovable property.
  \item \textsuperscript{164} Examples are provided, for instance, by Spielbüchler in Rummel, ABGB I', § 339 no. 6.
  \item \textsuperscript{165} See Klicka in Schwimann, ABGB II', § 339 nos. 26 ff.
  \item \textsuperscript{166} See (d), below.
  \item \textsuperscript{167} See Spielbüchler in Rummel, ABGB I', § 339 no. 8. Cf. also supra, 1.4.3., on the \textit{actio negatoria}.
  \item \textsuperscript{168} For more details, see Spielbüchler in Rummel, ABGB I', § 339 nos. 8 f; Klicka in Schwimann, ABGB II', § 339 nos. 44 ff.
  \item \textsuperscript{169} For examples with regard to immovable property, where this is of immediate practical importance, see Klicka in Schwimann, ABGB II', § 339 nos. 3, 33 f.
\end{itemize}
leasing of movables as well: The tenant of a flat is entitled to possessory protection against any third party's interference with his right of use, including other tenants, e.g., interference caused by parking a car on the parking space specifically reserved for him. The tenant/lessee may resort to these remedies also against the lessor, if the latter does not facilitate the kind and extent of use agreed on in the leasing contract.\footnote{170 For examples, see Klicka in Schwimann, ABGB II, § 339 nos. 3, 35 f.} In other words, also the intermediary in possession (Besitzmittler) can bring a claim against the indirect possessor. A possessory servant (Besitzdiener), conversely, is not regarded as a possessor and, therefore, can neither resort to possessory remedies against third persons, nor against the possessor (e.g., the employer).\footnote{171 Cf. Schey/Klang in Klang, ABGB II, 63.}

Similarly, a co-possessor may institute possessory actions against third parties; also in the case where only one of the co-possessors brings the action.\footnote{172 Spielbüchler in Rummel, ABGB I, § 339 no. 1.} The co-possessor may also proceed against another co-possessor in case the latter dispossesses the former co-possessor and thereby establishes exclusive possession; or, if he interferes with an internal agreement as to utilisation. For instance, if spouses have a common telephone connection and one of them requests the phone disconnection from the telephone company, this will give rise to a possessory action.\footnote{173 Similarly, a co-possessor may institute possessory actions against third parties; also in the case where only one of the co-possessors brings the action. The co-possessor may also proceed against another co-possessor in case the latter dispossesses the former co-possessor and thereby establishes exclusive possession; or, if he interferes with an internal agreement as to utilisation. For instance, if spouses have a common telephone connection and one of them requests the phone disconnection from the telephone company, this will give rise to a possessory action. (b) It goes without saying that the possessory actions can be instituted against the actual interferer (unmittelbarer Störer). It makes no difference if the latter acted solely on the demand of a third party. According to court practice, also the so-called indirect interferer (mittelbarer Störer) can be sued. This is a person from whom help could be expected or in whose interest the offence was committed.\footnote{174 See, for instance, Klicka in Schwimann, ABGB II, § 339 nos. 29 ff with further references. Cf. also section 1.4.3., above, with regard to the actio negatoria.} This is a rather wide concept. The holder of a car, for instance, is always regarded as an indirect interferer, even if he did not use the car personally and did not know where the driver would go to.\footnote{175 References are provided by Spielbüchler in Rummel, ABGB I, § 339 no. 7, who criticises this concept.} In literature, some authors take the view that, in addition, the indirect interferer must either have consented to or, at least, have knowledge of the possibility that an interference might take place.\footnote{176 Cf. Spielbüchler in Rummel, ABGB I, § 339 no. 7; Klicka in Schwimann, ABGB II, § 339 no. 29.}
2.6. Protection of ‘better possession’ (actio Publiciana)

2.6.1. Basic principles and requirements

As mentioned above, the owner may face severe practical difficulties in exercising his right to recover physical control (revindication), because such remedy requires the proof of his right of ownership. In order to facilitate the re-gaining of physical control, §§ 372 ff ABGB provide for a right to restoration based on particularly qualified possession: These rules require that possession has been obtained based on a valid legal ground (e.g., a contract of sale, donation, or legacy), that possession has not been obtained violently, secretly or by refusing to return an object, the use of which was merely factually tolerated (vi, clam, precario), and that possession was obtained in good faith (good faith being presumed under § 328 ABGB). To have the right of ownership is not required. Based on its Roman law tradition, this remedy is usually referred to as actio Publiciana.

The effect of the actio Publiciana can be described as the protection of the better right to possess: As enumerated in more detail in § 373 ABGB, the right to recover can be exercised against any person whose possession is less qualified. That is, a person who did not obtain possession based on a valid contract, who seized it violently (a thief), who acquired the object from a suspicious seller or can not even name the person from whom the object was acquired, or who acquired it gratuitously. Where the claimant and the defendant are equally eligible, the person in possession (the defendant) prevails (§ 374 ABGB, ‘beatus possidens’). As a general rule, the actio Publiciana can never be successful against the real owner.

177 See section 1.4.1., above.
178 § 372 ABGB speaks of a ‘valid title’ for acquisition, which refers to the definition of ‘rightful possession’ (rechtmäßiger Besitz) in § 316 ABGB. § 323 ABGB provides that such ‘valid title’ of the possessor is presumed.
179 These requirements are laid down in § 345 ABGB, which § 372 ABGB refers to by speaking of ‘real possession’ (echter Besitz).
180 It is partly argued that good faith must only be present at the moment in time of the acquisition of possession; Spielbüchler in Rummel, ABGB I, § 372 no. 2. – Good faith has been denied, for instance, where the buyer of a second-hand car did not receive the official vehicle registration document (Typenschein, Kraftfahrzeugbrief) in which each new owner is recorded, although the seller was recorded as ‘owner or keeper’ in an international registration certificate and his right to possess was not in any way questioned by anyone after the purchase, cf. OGH 2 Ob 227/06f, EvBl 2007/133. For this reason, the buyer was not allowed to claim damages from a third person who damaged the car in an accident (cf. 2.6.2. on the remedies by recurring to § 372 ABGB).
181 Again, such notion has no procedural implications. It is just a traditional way to label a certain substantial right.
182 For details, see for instance Spielbüchler in Rummel, ABGB I, § 373 nos. 1 ff; Koziol/ Welser, Grundriss I, 278 f.
183 Klicka in Schwimann, ABGB II, § 372 no. 1 with further references.
2.6.2. Remedies

§ 372 ABGB provides for a right to recover physical control similar to revindication. However, it is accepted that the principle of protection of the better right to possess can be extended to achieve further effects similar to the rights based on ownership.\(^{184}\) In analogy to § 372 ABGB, the qualified possessor is provided a right to require that interferences be refrained from as well as a right to restoration of the former condition (like the actio negatoria), a right to claim damages from a third-party tortfeasor and a right to claim the return of benefits, which a third party derived from the asset under unjustified enrichment law.\(^{185}\) Where § 372 ABGB is used in relation to the exercise of a proprietary right, the actio Publiciana may also grant priority over the creditors of a less qualified person in insolvency or enforcement proceedings.\(^{186}\)

2.6.3. Scope of application

Originally, the actio Publiciana of § 372 ABGB was intended to apply to the possessor of a corporeal asset (Sachbesitzer). But, since the basic idea of this remedy is to protect the better right to possess, the prevailing opinion extends its scope of application also to possessors of a right (Rechtsbesitzer).\(^{187}\) Possessors of a right in this sense are: the pledgee, the usufructuary, the buyer under reservation of title, the lessee.\(^ {188}\) They are protected under § 372 ABGB, provided that they have already obtained physical control over the respective object.

2.7. Self-help

2.7.1. Requirements of lawful self-help

Under Austrian law, self-help is only allowed exceptionally. According to § 344 ABGB, the possessor is entitled to self-help in case of dispossession and other kinds of interference,\(^ {189}\) provided that the help of the authorities

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\(^{184}\) As to the content of the following remedies, see chapter 1.4., above.

\(^{185}\) In short: Iro, Sachenrecht, no. 2/71; in detail: Apathy, Die publizianische Klage (1981), 41 ff, 80 ff.

\(^{186}\) OGH 3 Ob 2305/96h, JBl 1998, 590 (Hoyer); Spielbuchler in Rummel, ABGB I, § 372 no. 4.

\(^{187}\) For these notions, see 2.1.1.(c), above. As to the applicability to possessors of a right, confer Apathy, Publizianische Klage 35 ff, 62 ff; Kozio/Welser, Grundriss I, 279 f and many others.

\(^{188}\) See also chapter 3.

\(^{189}\) See above, 2.4.2.
would come too late\textsuperscript{190} and provided he only takes \textit{adequate} counter-measures. According to a view shared by some court decisions and some academics, the possessor is required to go to court subsequently. Otherwise, even lawful acts of self-help would qualify as an interference with possession (of the other party).\textsuperscript{191} Self-help, therefore, is a subsidiary right. Its practical importance nowadays is rather limited.\textsuperscript{192}

If the named requirements are met, self-help can be exercised in two ways: \textbf{Passive} self-help (self-defence, \textit{Notwehr}), which is only possible as long as an offence still takes place, and \textbf{offensive} self-help (\textit{offensive Selbsthilfe}, self-help in the strict sense).\textsuperscript{193} According to the prevailing opinion, offensive self-help, such as regaining possession from a thief, is only allowed as long as dispossession has not been ‘completed’; the possessor must act \textit{in continenti}.\textsuperscript{194} What this means in practice is hardly ever discussed. In an old decision, the OGH stated that regaining possession after three days is too late.\textsuperscript{195} In the context of self-help against unlawfully parked cars, on the other hand, the courts do not see any problem in the fact that the act of interference (unauthorised parking of the car on a particular parking space) has already been completed.\textsuperscript{196}

The requirement that counter-measures must be \textit{adequate} means that, first, the force exercised in order to stop the interference must not exceed the level of force necessary to achieve this result. Second, the risk of infringing the interferer’s interests (taking into account the value of these interests) may not be disproportionate to the risks of the interference to the possessor.\textsuperscript{197} The courts decided, for instance, that spreading poison is not adequate to keep away the neighbour’s chickens.\textsuperscript{198} On the other hand, pasting election posters over the posters of another political party shortly before the election day, after the other party had done the same, was considered lawful self-help.\textsuperscript{199}

\textsuperscript{190} § 344 ABGB only mentions courts, but the provision relates to all public authorities, including the police; \textit{Kodek}, Besitzstörung 533. Closer on this criterion \textit{Kodek}, \textit{cit.}, 532 ff.
\textsuperscript{191} Cf. \textit{Kodek}, Besitzstörung 541 ff with further references.
\textsuperscript{192} See \textit{Kodek}, Besitzstörung 516 f. An overview of court practice is provided by \textit{Kodek}, \textit{cit.}, 543 ff. This is of some relevance to, for instance, the towing away of cars. See also \textit{Piskernigg}, \textit{Die Selbsthilferegelung des ABGB} (1999).
\textsuperscript{193} \textit{Kodek}, Besitzstörung 518.
\textsuperscript{194} Cf. \textit{Spielbüchler} in Rummel, ABGB I \textsuperscript{1}, § 344 no. 2; \textit{Kodek}, Besitzstörung 519 ff.
\textsuperscript{195} OGH GIU 10.590.
\textsuperscript{197} See \textit{Spielbüchler} in Rummel, ABGB I \textsuperscript{1}, § 344 no. 5. For a closer discussion of this prerequisite, see \textit{Kodek}, Besitzstörung 635 ff.
\textsuperscript{198} OGH 2 Ob 843/24, SZ 6/405.
\textsuperscript{199} OGH 9 Os 208, 209/66, EvBl 1967/355.
The self-help remedies provided for in § 344 ABGB are considered to be a special form of the general (restricted) right to self-help, which is, in a rudimentary form, regulated in § 19 ABGB.\footnote{Cf. Klicka in Schwimann, ABGB II\textsuperscript{1}, § 344 no. 1.}

### 2.7.2. Persons entitled to self-help

Similarly to what has been said about the judicial protection of possession, \textit{any possessor}, including a possessor of rights, may resort to self-help if the named prerequisites have been fulfilled. Regularly, self-help will be exercised by a possessor who is in physical control of the asset. But also the indirect possessor may proceed against his intermediary in possession (\textit{Besitzmittler}) or possessory servant (\textit{Besitzdiener}) if they use the asset in breach of the legal relationship established between these two persons.\footnote{Spielbüchler in Rummel, ABGB I\textsuperscript{3}, § 344 no. 4.} Furthermore, an intermediary in possession, such as a lessee, may exercise self-help against a third person or, as the case may be, against the indirect possessor.\footnote{Spielbüchler in Rummel, ABGB I\textsuperscript{3}, § 344 no. 3; Kodek, Besitzstörung 528 f.}

Different to the position under the rules on the judicial protection of possession, self-help may also be exercised by any \textit{mere detentor}, such as a possessory servant.\footnote{Klicka in Schwimann, ABGB II\textsuperscript{1}, § 344 no. 3; in detail: Kodek, Besitzstörung 527 ff. According to Gschmitzer/Faistenberger/Barta/Call/Eccher, Sachenrecht\textsuperscript{2}, 7, a possessory servant may exercise self-help against third persons, but not against the person (the possessor) who let the property to him.} In addition, \textit{any third person} may exercise self-help in order to help the possessor, intermediary in possession or detentor (\textit{Nothilfe}).\footnote{Spielbüchler in Rummel, ABGB I\textsuperscript{3}, § 344 no. 3.} As § 344 ABGB only regulates the possessor’s self-help rights, this result is achieved by applying the general self-help provision of § 19 ABGB.\footnote{Koziol/Weber, Grundriss I\textsuperscript{3}, 274.}

The same right is available to \textit{co-possessors}; again, against third persons or other co-possessors. For example, a co-possessor may prevent the other co-possessor from the secret removal of goods by installing a lock.\footnote{LGZ Wien MietSlg 25.008.}

### 3. Rights to use and rights to acquire on the borderline between property rights and obligations (‘quasi rights in rem’)

As mentioned previously,\footnote{Cf. Klicka in Schwimann, ABGB II\textsuperscript{1}, § 344 no. 1.} rights in \textit{rem} on the one hand and obligations on the other hand are regarded as fundamentally different concepts. Rights
in rem have an absolute character and are opposable against everyone; obligations have a relative character in the sense that they create a right only against a certain – the obliged – person. This is considered a common dogmatic starting point.

There are, however, legal positions where this distinction is not that clear. These cases are discussed in the present chapter.

3.1. Lease

1. The lease (hire) is, in principle, a mere contractual right to use. In an important respect, though, the lessee is protected against third persons as if he had a right in rem; one, therefore, often speaks of a ‘quasi in rem’ right. The legal basis for this effect is an analogy to the so-called actio Publiciana in § 372 ABGB, which grants the qualified possessor protection against anyone except the owner. It has already been mentioned that possession also covers the possession of a right (Rechtsbesitz) under Austrian law. Consequently, § 372 ABGB is held to protect also certain persons who are ‘only’ entitled to an obligatory right, such as a lessee, provided that the asset in question has already been handed over. Based on the mentioned provision and its ‘quasi in rem’ effect, the lessee has, against an interfering third party,

- a right to recover physical control (like revindication);
- a right to demand that interferences be refrained from and a right to the restoration of the former condition (like the actio negatoria);
- a right to claim damages and
- a right to claim the return of benefits derived by a third party from the asset under unjustified enrichment law.

In these respects, the lessee is protected like an owner or usufructuary. It should be remembered that § 372 ABGB requires certain qualifications of

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207 See 1.1.2.

208 §§ 1090 ff ABGB. The ABGB distinguishes two sub-categories (Miete and Pacht), which is of no importance here, and covers both with the term Bestandvertrag. They have in common that the lessee is under an obligation to pay a rent.

209 See chapter 2.6., above.

210 Cf. supra, 2.1.1.(c).

211 See, e.g., Klicka in Schwimm, ABGB II, § 372 nos. 3 ff; Koziol/Welser, Grundriss I, 279 f. As to the content of these rights, see the explanation on the respective rights of an owner in chapter 1.4., above. Critical regarding claims for damages and unjustified enrichment Spielbüchler in Rummel, ABGB I, § 372 nos. 1 and 5.

212 First of all, this covers a lessee in the sense of §§ 1090 ff ABGB. There are, however, leasing agreements, which also include elements other than mere rights of use, such as an option to buy (‘financial lease’, ‘acquisition leasing’). In literature, it is argued that a person who leases a movable under such a contract is, in principle, also protected by
possession as well as being in a ‘better possession’ than the opponent. Accordingly, if the lessee has reason to believe that the leased object has already been leased to another person, he is not in good faith and will not be protected against the former lessee.

In addition to the ‘quasi in rem’ protection of § 372 ABGB, the lessee, qualifying as the possessor of a right, can resort to the means of judicial protection of possession.

2. However, these rules do not provide full in rem protection in a strict sense: They are, as such, of no help against a subsequent buyer of the leased asset, nor do they grant priority over a person acquiring a security right in it. Likewise, there is no such priority in the lessor’s bankruptcy or where one of the lessor’s creditors attaches the leased object. But, there is another rule in Austrian law which provides for, so to speak, a medium level of protection in these respects: According to § 1120 ABGB, any person who acquires the leased-out object becomes party to the lease contract by operation of law, and thereby replaces the transferor. In other words, the transferor’s contractual position (as lessor) is transferred, ex lege, to the acquirer and the acquirer is substituted as a party to the lease contract upon the transfer of ownership of the leased-out object. The only requirement is that the lessee has already obtained physical control of the leased object. It is not decisive whether he knows or could have known of the lease; the rule also applies to unusual stipulations. It applies to immovables as well as movables; the transfer of property may be based on a sale, gift or other form of transfer of a particular asset. The transfer of the contractual position by operation of law does, however, not mean that the new owner must respect the lessee’s right forever: A second rule in § 1120 ABGB provides that where the leasing contract is concluded for a fixed period of time, or for an indefinite period of time but with an extended period of notice, the new owner is entitled to terminate the contract by giving notice in observance of the period provided for in the relevant statutory default rules. In other words, the rule grants an extraordinary right to end the lease contract to the acquirer. According to the prevailing view, such notice of termination must be given in reasonable due time.

§ 372 ABGB. For details see Apathy, Die publizianische Klage (1981) 95 ff (101 f); see also Fischer-Czermak, Schadenersatz nach Verkehrsunfällen mit Leasingfahrzeugen, ZVR 1997, 38 (39, 41). The Supreme Court has accepted the protection of such an atypical lessee in OGH 1 Ob 416/97a, RdW 1998, 606 (regarding immovable property; the terms of the lease contract were, however, not clearly reported).

See supra, 2.6.1.

Koziol/Welser, Grundriss I, 279.

See section 2.5., above.

See, for instance, Binder in Schwimann, ABGB V, § 1020 nos. 33 ff with further references.

Confer Binder in Schwimann, ABGB V, § 1020 nos. 56 ff with further references. For certain immovables, in particular for certain apartments, there is an even stricter rule.
provide a compromise between full in rem protection and no protection for the lessee.

§ 1121 ABGB extends these rules to a transfer of ownership by way of a **forced sale** (within bankruptcy proceedings or outside bankruptcy). The commencement of bankruptcy proceedings against the lessor as such does not have any direct effect on the lease contract: According to § 24 (1) of the Bankruptcy Act (Konkursordnung, KO), the administrator in bankruptcy enters into the lease contract and has to continue it under the same conditions which the lessor was subject to. Only if the leased object is sold in the course of the proceedings, the new owner will be entitled to end the contract in accordance with the special rules of §§ 1120, 1121 ABGB.218

3. Scope: It is obvious that the rules discussed above have their main importance in relation to leases of immovable property, especially in relation to the leasing of apartments. It is also clear that the doctrine of the lessee’s ‘quasi in rem’ protection under § 372 ABGB was mainly developed in view of the social needs of housing. However, the named principles and the underlying argumentation can also be applied to movables.219 A certain minimum duration of the leasing period is not required. One could apply these rules also to a person who leases a car for half a day (there just will not be any practical necessity). As mentioned already, the lessee must have obtained physical control of the leased object for all the named rules to apply. The obligation to pay a price is required for §§ 1120, 1121 ABGB to apply, as this is part of the definition of a lease contract (§ 1090 ABGB). The ‘quasi in rem’ protection based on § 372 ABGB, however, also applies to a borrower, i.e., a person entitled to gratuitous use (Entlehrer).

### 3.2. Other cases of holding a movable: Custody, service provider’s right to retain

1. Whether a person who entered into a contract to keep and take care of a movable (custodian, Verwahrer) may resort to the ‘quasi in rem’ protection in analogy to § 372 ABGB220 is considered to be linked to the question whether such person qualifies as the possessor of a right: In lit-

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219 This is perfectly clear for §§ 1120, 1121 ABGB, which apply both to leases of movables and immovables. As to the analogy to § 372 ABGB, its application to the leasing of movables is partly questioned (cf. Spielbüchler in Rummel, ABGB 1^3^, § 372 no. 5 with reference to some earlier Supreme Court decisions. But, generally, the applicability to movables is accepted without a debate of the issue in any further detail.

220 See 3.1.1., above.
erature, it is argued that the custodian is not a ‘possessor’ because he has no right to hold or use the object; he is just obliged to keep it.\textsuperscript{221} Under this argumentation, § 372 ABGB can not be applied.

2. A strong view in literature holds that a service provider who performed work on another person’s movable property and, as a consequence, is entitled to retain the asset in order to secure his claim for payment, is to be regarded as the possessor of a right and can resort to the judicial protection of possession.\textsuperscript{222} In a case where the owner of a car brought it to a garage for repair shortly before his death and his mother, subsequently, took it away by using a second key, it was held that the service provider was entitled to claim damages based on his ‘quasi in rem’ protection in analogy to § 372 ABGB.\textsuperscript{223}

3.3. Rights to acquire: Buyer under reservation of title, pre-emption etc.

1. A buyer has an obligatory right to acquire ownership. This applies, in principle, also to the buyer under reservation of title. However, from the moment of delivery, such a buyer is also contractually entitled to use the purchased movable. Based on this right to use, he is also considered a possessor of a right and is granted the ‘quasi in rem’ protection of § 372 ABGB, which has been discussed already. The conditional buyer under reservation of title is even granted further protection, as will be shown below, 15.3.

2. Other contractual agreements over the acquisition of a certain asset do not produce any ‘quasi in rem’ effect: An option to buy, as such, is a mere obligatory right.\textsuperscript{224} The same holds true for a right of pre-emption (Vorkaufs-

\textsuperscript{221} Koziol/Weber, Grundriss I\textsuperscript{1}, 259; Iro, Sachenrecht’, no. 2/10. This argumentation is mainly based on the question whether there is a right to hold or use or not. This may be regarded as similar to the question whether the object is kept in the holder’s own interest or in the interest of the other person, but does not fully converge, as it may be argued that the custodian has an (maybe indirect) own interest insofar as he may be entitled to a price and/or will seek to avoid being held liable under the contract.


\textsuperscript{223} Apathy in his gloss on OGH 8 Ob 636/93, JBl 1995, 53 (55); Klicka in Schwimann, ABGB II, § 372 no. 4. The Supreme Court used a different argumentation and referred to the ‘natural principles of law’ (which may be applied according to § 7 ABGB in case no other suitable rule is in sight), under which no one may profit from fraudulent conduct. The case was peculiar, insofar as the mother did not acquire the car by inheritance but in exchange for paying the funeral costs. She was, originally, not obliged to pay the price charged for the repair by the service provider, which the deceased’s estate was unable to pay. Accordingly, the mother was under an obligation to pay only from the moment when she took away the car.

\textsuperscript{224} The effect may be different where the option is combined with other contractual rights, such as a right to use combined with an option to buy in an acquisition lease
4. Scope of the rules on the transfer of movables, relevant definitions

The transfer rules discussed in the following chapters apply to corporeal (tangible) movable assets (bewegliche körperliche Sachen); one could also say:

contract. But here, provided that the lessee has obtained physical control, the ‘quasi in rem’ effect can already be deduced from the right to use. – Regarding the mere option, there will also be no specific protection in the insolvency of the debtor: The right to conclude a contract will be converted into a claim for money and can be asserted with its estimated value as a claim in bankruptcy (‘dividend claim’, § 14 KO); confer Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I, § 24 KO no. 3.

Insofar, there is a similarity to the effect of a right to repurchase (Wiederkaufsrecht, §§ 1068 ff ABGB) which, however, can only be stipulated for immovables (§ 1070 ABGB).

225 See 1.5.2., above.

226 See 1.5.2., above.

227 Aicher in Rummel, ABGB 1’, § 1080 no. 14; Binder in Schwimann, ABGB IV’’, § 1080 no. 14. This is correct where approval has the function of a suspensive condition, which is the case unless otherwise provided (§ 1080 ABGB). Where, on the other hand, disapproval is stipulated to be a resolutive condition, the buyer will have already obtained full ownership before disapproval.

228 Mayer-Maly in Klang, ABGB IV/2’, 907; see also OGH 4 Ob 541/60, EvBl 1961/114.

229 Binder in Schwimann, ABGB IV’n, § 1080 no. 13. For the status of a borrower, see 3.1.3., above.
goods. Where the short term ‘movables’ is used in this report, this generally refers to such objects.

§ 293 ABGB defines ‘movables’ as ‘things which can be moved from one place to another without damaging their substance’. All other objects are immovables. Also, corporeal movable items, which have been linked to an immovable asset by virtue of law or through the decision of their owner (appurtenances) are legally treated as immovables and are subject to the transfer rules for land. On the other hand, buildings which are designated to remain in the same place only for a ‘provisional time period’ (which may even be as long as 50 years) are legally considered to be movables (so-called Superädifikate, cf. § 297 ABGB) and the ownership of such a building can – as an exception – be held by a person other than the land owner. This legal construction causes a lot of problems and will not be dealt with in the following. Unlike the general rules for movables, the transfer of such buildings requires the deposit of a document with the competent court.

‘Tangible’ or ‘corporeal’ things are, according to the modern understanding of § 292 ABGB, things that can be perceived as a confined substance, be it solid, liquid or gaseous. Consequently, mere energy (like electricity) is not considered a corporeal asset and is not governed by the rules discussed in this report. Only the energy source (Energieträger), such as a battery, will be considered a corporeal thing which is subject to the relevant property law rules.

There is no separate category of ‘registered movables’ in Austrian law. But there are special transfer rules for registered ships.

Animals are stated not to be ‘things’ in the programmatic provision of § 285a ABGB, but are to be treated as (corporeal) movable things unless otherwise provided by law. In the context relevant for this report, no such deviating provision exists, so that one can generally say that the transfer rules apply to animals.

It follows from the rules discussed above that money in the form of banknotes and coins qualifies as corporeal movable assets and is, therefore, subject to the general transfer rules as discussed in the following chapters. However, their practical importance is limited by a rule expressed in § 371 ABGB, stating that where unascertained items belonging to different owners

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230 Different from the abovementioned working terminology used for this report, ‘movable’ assets in the sense of § 273 ABGB also include intangible assets, such as claims and intellectual property rights.

231 For an overview of the consequences of this distinction, see, e.g., Spielbüchler in Rummel, ABGB I, § 293 no. 1.

232 In Austrian terminology: Zubehör; for instance: a tractor used on a farm. For further examples, see Spielbüchler in Rummel, ABGB I, § 294 no. 4.

233 For an overview, see Koziol/Welser, Grundriss I, 250 ff, 370.

234 For these issues, cf. Spielbüchler in Rummel, ABGB I, § 292 no. 1

235 See below, 5.4.3. and 5.6.8.(a).
are mixed in a way that identification is no longer possible, the possessor becomes the sole owner, irrespective of this person’s good or bad faith or whether the general transfer requirements have been met or not.236 Bank account money, on the other hand, is generally considered to be a claim against the bank, which falls outside the scope of property law.

In general, claims (rights to the performance of an obligation) can not be ‘owned’ in the strict sense (as a right in rem) under Austrian law. They are transferred by assignment (Zession, §§ 1392 ff ABGB), which partly follows patterns, which are similar to the patterns in the transfer rules for corporeal assets,237 but do not require ‘delivery’. However, where claims are embodied in a tangible document (e.g., a savings book payable to bearer), the general transfer rules for corporeal movables will apply to the document, and the claim will be transferred together with the document.238 For some kinds of such negotiable instruments (Wertpapiere), the law provides special transfer rules, in particular involving endorsement.239 These issues will not be dealt with in any more detail in this report.

Also, the transfer of other kinds of rights follows separate rules. A share in a limited liability company (Gesellschaft mit beschränkter Haftung, GmbH), for instance, is transferred by the agreement of the parties in the form of a public notarial deed (Notariatssakt).240 The right to use a work under copyright law is created and transferred without the use of any equivalent to ‘delivery’ and the distinction between an ‘underlying contract’ (Verpflichtungsgeschäft) and a ‘real agreement’ (Verfügungsgeschäft) is irrelevant in this area of law; the mere consent of the parties suffices.241 The transfer of a patent right requires a contractual agreement (or other ‘title’) and registration.242

236 This rule will be discussed a little more closely below, 11.2.4.
237 This applies, e.g., to the distinction between an underlying contract (Verpflichtungsgeschäft) and a ‘real agreement’ (Verfügungsgeschäft). See chapter 5 for a closer discussion of these concepts.
238 Cf. below, 5.6.2. and 5.6.3.
239 See, e.g., §§ 11 ff Wechselgesetz for bills of exchange (Wechsel); § 61 (2) Aktiengesetz for registered shares (Namensaktien).
240 § 76 GmbHG (Limited Liability Company Act). The form requirement applies to the underlying obligation (arising from a sale, donation etc.) as well as to the real agreement; for details see Koppensteiner/Rüffler, GmbHG-Gesetz (2007), § 76 nos. 17 ff, 26 f.
241 Cf. OGH 4 Ob 340/78, SZ 51/134. See also footnote 255, below.
242 §§ 33, 43 Patentgesetz and OGH 4 Ob 173/90, SZ 64/10.
Part II: Derivative acquisition

5. The system of transfer of ownership under Austrian law

5.1. Basic characteristics and general overview

5.1.1. ‘Derivative’ and ‘original’ acquisition, unitary transfer concept

The rules on the acquisition of ownership under Austrian Law can be distinguished and systemised in various ways. However, only one of those distinctions is of a major importance: The distinction between the so-called original and derivative acquisition (originärer respectively derivativer Eigentumsvererb). According to this terminology, derivative acquisition can be defined as an acquisition depending on the right of the predecessor: The acquiring party obtains the right in question (e.g., the right of ownership or a limited right in rem) to exactly the same extent as his predecessor owned it. If, for instance, the predecessor’s right was limited in some way, the acquirer will obtain the right subject to the same limitation. If the predecessor’s right was limited in some way, the acquirer will obtain the right subject to the same limitation. If the predecessor’s right was limited in some way, the acquirer will obtain the right subject to the same limitation.

243 Besides the distinction between ‘derivative’ and ‘original’ acquisition of ownership, which has to be discussed in more detail in the following, a distinction between ‘indirect’ and ‘direct’ acquisition can also be made, as well as one between ‘unilateral’ and ‘bilateral’ acquisition of ownership: The acquisition of ownership is called ‘indirect’ (mittelbar), if the object of acquisition was owned by another person at that point of time; if it was not owned by anyone, the acquisition is called ‘direct’ (unmittelbar), § 423 ABGB. According to another criterion of distinction, the acquisition of ownership is ‘unilateral’ (eineinzel), if it is perfected only by the acquirer’s acts, e.g., acquisition by adverse possession. If, on the other hand, also the previous owner’s acts are required, the acquisition is ‘bilateral’ (zieleinzel), e.g., in the case of a transfer of title based on a contract of sale. For those distinctions see Koziol/Welser, Grundriss I, 310.

244 For example, if the property of the transferor was encumbered by the limited proprietary right of a third person (e.g., the right of enjoyment of fruits and benefits, Fruchtgenussrech), this third person will have the same right against the transferee. Another example is reservation of title: If the transferor has sold a movable to a third person subject to retention of ownership, he is still owner of the property, but his ownership is limited insofar as the buyer will only obtain ownership by paying the full purchase price. Before this happens, the original owner can transfer his right of ownership to another person, but under the rules of derivative acquisition the transferee’s position is the same as the transferor’s: He will lose his property right when the buyer pays the purchase price.
The system of transfer of ownership under Austrian law

5. The system of transfer of ownership under Austrian law

5.1. Overview of the main transfer requirements

5.1.2. Overview of the main transfer requirements

For the passing of ownership from one person to another by transaction inter vivos, Austrian law establishes four requirements. It should be noted that these general rules apply to the acquisition of movable property as well as to the acquisition of immovables. These are:

(a) A first general requirement for a transfer of ownership is that the transferor has to be entitled himself. He must have the right of ownership himself, otherwise he cannot transfer it. This follows from the general rule provided in § 442, 3rd sentence ABGB, which states that no one can transfer more rights than he himself has (nemo plus iuris transferre potest quam ipse habet). This rule, however, must be supplemented: If the person in whose name the relevant juridical acts of transfer – see aspects (b) and (d) below – are effected is not the owner, ownership can nevertheless be transferred, provided that this person is authorised (ermächtigt) by the owner to do so. Therefore, also the existence of an authority to dispose (Verfügungsbefugnis,
Verfügungsermächtigung) suffices for the derivative acquisition of property. Where such authority does not exist at the moment of disposition, the real owner can ratify the act of disposition at a later point in time (with the effect that the disposition by the unauthorised person becomes valid). A second exception with minor practical importance is provided for in § 366 sentence 2 ABGB: If a non-owner disposes of the property and, subsequently, acquires ownership himself, the defect of lack of ownership is cured and ownership is transferred to the transferee by operation of law.

(b) The second general requirement is a valid causa traditionis. §§ 380, 424, 425 ABGB use the term ‘title’ (Titel), i.e. an obligation to transfer ownership, such as an obligation created by a contract of sale or an obligation ex unjustified enrichment. If the causa is ‘contractual’ (which will be the main focus in our context), one can speak of a commitment or the ‘underlying contract’ (Titelgeschäft, Verpflichtungsgeschäft or Grundgeschäft). According to the modern Austrian legal doctrine, it is essential that this underlying juridical act is valid. Validity in that sense is lacking, if, on the one hand, the contract is void ab initio (for example, in the case of dissensus or lack of capacity); on the other hand, in the case of avoidance of a voidable contract: As a result of the avoidance on account of mistake (§ 871 ABGB), for instance, the contract is eliminated with retroactive effect, i.e., the contract is deemed never to have been valid. Accordingly, after avoidance the transferee is considered never to have been owner of the asset in question, as a consequence of the fact that this second requirement was not fulfilled.

(c) Third, § 380 and §§ 425 ff ABGB require a ‘legal mode of acquisition’, usually spoken of as ‘Modus’. However, the – rather old – provisions of the ABGB do not really make clear what exactly is meant by this requirement. The modern doctrine distinguishes two aspects: On the one hand, it is assumed that the passing of ownership, in addition to the underlying juridical act, must also be legal. This legal mode of acquisition will be discussed in the following paragraphs.
ing juridical act (the *causa*, *Verpflichtungsgeschäft*) mentioned above, requires another juridical act, which makes the transfer of ownership effective (*Verfügungsgeschäft*). This second juridical act is also understood as a contract; the parties agree that the right in question (e.g., ownership) will pass from the transferor to the transferee. This contract is called ‘real agreement’ (*dinglicher Vertrag, dingliche Einigung*).250

As mentioned above, the juridical act effecting the transfer of ownership (‘real agreement’) is ‘causal’. This means that it can have legal effect only on the basis and to the extent of the valid underlying legal act. If the underlying obligation is invalid, the real agreement is invalid as well.251 The two juridical acts have to correspond, especially concerning the object and the scope of the right.

(d) The fourth requirement and second aspect of the *Modus*-prerequisite252 can be described as something factual: The passing of ownership of movable property requires the *delivery of the movable* (*Übergabe, Tradition*) to the transferee (§§ 425-429 ABGB); by this, the acquirer obtains possession. This can be achieved by a transfer of physical control or by one of the substitute forms of delivery, which will be discussed in section 5.6. For immovable property, § 431 ABGB requires the registration in the land register (*Grundbuch*).

In short, the Austrian system of transfer can be described as a system of ‘causal tradition’.

5.1.3. Universal applicability

(a) The scope of application of this concept in Austrian private law is rather broad. On the one hand, it applies to various types of objects and rights: The abovementioned four requirements, the *nemo plus iuris*-rule, the valid underlying *causa* (obligation), the ‘real agreement’ effecting the legal change and the requirement of a factual act intended to provide publicity (delivery or registration) govern, as mentioned already, the transfer of movable and immovable property, but also the establishment or transfer of limited rights in *rem*, such as the right of pledge or a servitude. With the exception of the last requirement of delivery or registration, they also apply to the assignment

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250 To clarify the difference between *Verpflichtungsgeschäft* and *Verfügungsgeschäft*: The *Verpflichtungsgeschäft* gives rise to an obligation to transfer ownership. The *Verfügungsgeschäft* effectuates the actual change in the legal position, i.e. ownership passes to the transferee. The latter concept will be dealt with more closely below, 5.5.

251 See 5.4.2. for more details as to possible grounds of invalidity.

252 The terminology used is not uniform: Sometimes, the term *Modus* is used collectively to describe the real agreement and the factual act (delivery or registration, respectively); others use it to refer exclusively to the latter aspect; cf. *Iro, Sachenrecht*, no. 6/39.
of claims (Forderungsabtretung, rechtsgeschäftliche Zession)\textsuperscript{253} and to the renunciation (Verzicht, § 1444 ABGB).\textsuperscript{254} In copyright law (Urheberrecht), on the other hand, the distinction between an underlying contract (Verpflichtungsgeschäft) and a ‘real agreement’ (Verfügungsgeschäft) does not apply.\textsuperscript{255}

\textbf{(b)} On the other hand, the concept applies to transfers based on all \textit{kinds of obligations}. In principle, the same rules as apply to a transfer based on a contract of sale also apply to a transfer based on unjustified enrichment etc.\textsuperscript{256}

\textbf{(c)} In principle, the same rules as apply to contracts for the supply of \textit{specific} goods also apply where the goods have only been described in \textit{generic} terms. In the case of an obligation for the delivery of generic goods, the requirement of identification must be observed.\textsuperscript{257}

\textbf{(d)} Different rules apply to the acquisition of ownership at a public auction, when forming part of an enforcement proceeding. Here, ownership passes with the fall of the hammer, accepting the highest bid (§ 237 EO).\textsuperscript{258} These situations will not be dealt with in the following.

5.2. \textbf{The unitary concept of ownership and the unitary transfer concept in particular}

Before dealing with the requirements for a transfer of ownership under Austrian law, it seems advisable to have a look at the consequences such a transfer of ‘ownership’ implies. These consequences can be characterised as a ‘unitary transfer concept’.

5.2.1. \textbf{Basic idea of the unitary transfer concept}

The unitary transfer concept builds upon the concept of ownership. As discussed in more detail above,\textsuperscript{259} the right of ownership contains, by definition, a wide range of rights; such as the right to use, alter, consume, destroy or dispose of the property, the right to recover it from or otherwise protect it against others, the right to claim damages or to have unjustified enrichment

\textsuperscript{253} See for instance OGH 5 Ob 640/83, RdW 1983, 105; OGH 1 Ob 676/84, 677/84, SZ 57/174.

\textsuperscript{254} OGH 7 Ob 47/89, SZ 63/29.

\textsuperscript{255} See for instance OGH 4 Ob 340/78, SZ 51/134 contrary to the older literature; OGH 4 Ob 93/94, SZ 67/172; 4 Ob 274/99v, EvBl 2000/85; Adler/Höller in Klang V\textsuperscript{2}, 440; Dittrich, Das österreichische Verlagsrecht (1969) 83 f.

\textsuperscript{256} See 5.4.1. for further examples.

\textsuperscript{257} Cf. infra, 5.3.

\textsuperscript{258} Cf. Koziol/Welser, Grundriss I\textsuperscript{1}, 343 f.

\textsuperscript{259} Cf. supra, 1.2.2.
reversed in case the property has been damaged or is being used without entitlement to the benefit of another. The basic idea is that all these ‘aspects’ pass from the transferor to the transferee at one particular point in time. This point in time is defined by the transfer rules, which are discussed in the following chapters. But, in principle, there is one rule (i.e. one point in time as defined by the applicable transfer provisions) that is decisive for all aspects.

However, it must be stressed that the sort of unitary approach that is applied in Austria does not extend to all possible consequences one may think of. For instance, the passing of risk in a sales transaction is not considered a ‘property law question’, i.e. governed by the rules on the transfer of ownership. Also, the transfer of ownership rules are not necessarily decisive for the attribution of assets under tax law, which establishes a principle of ‘economic ownership’, i.e. such questions of attribution must be looked upon from the viewpoint of economic reality. Some further examples will be referred to below, 5.2.2.

It may be noted that the ‘unitary approach’ concept is hardly ever reflected upon in more detail on a theoretical level, neither in Austrian legal literature, nor in court practice. Most Austrian lawyers will probably regard this as self-evident and are not aware of other transfer approaches such as the Scandinavian ‘functional approach’, which tries to treat all of these issues separately.

Also, most lawyers will be altogether unaware of the terms ‘unitary approach’ or ‘unitary transfer concept’. I assume that this state of (non-) discussion may, to a certain extent, be explained by the way these issues are regulated in the Austrian civil code: The statutory provisions do (to some degree) define the right of ownership. In the provisions following these, the term is used as a tool. Accordingly, the rules regulating transfers of this kind of right only deal with the requirements of such a transfer. The effect is already clear from the definition. Consequently, all ‘aspects’ of ownership are transferred at the same time.

5.2.2. Other branches of law partially providing ‘functional’ effects

However, one should also not be induced to overestimate the practical consequences of the named ‘unitary’ transfer approach. There is no doubt that

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260 See 5.2.2.(a)(i).


262 The principle underlies, for instance, the description given by Aicher in Rummel, ABGB I, § 1063 no. 7.

263 Cf. the reports on the Scandinavian legal systems in this series. See also, for instance, Martinson in Faber/Lurger, Rules for the Transfer of Movables 69.

264 Cf. supra, 1.2.
its consequences are, in fact, far-reaching. But the question of ‘who owns’ does not necessarily decide all cases. There are often additional rules to be taken into account, many of them not being regarded as property law rules but as belonging to other branches of private law which, in some way or the other, have priority over the property law rules and limit the effects the ‘unitary’ transfer concept might otherwise achieve. To some extent, therefore, the (unitary approach-based) Austrian legal system is not that remote from a ‘functional’ approach, as followed by the Scandinavian legal systems, which deal with the various constellations of conflict separately.

Some examples, where provisions from other parts of the law limit the possible effects of a unitary transfer concept, are listed in the following.265

(a) Contract law rules

As far as only the relation between the two parties of a transaction is concerned, contract law rules and the interpretation of the contractual relationship between the transferor and the transferee will be decisive for quite a number of issues.

(i) Passing of risk

A main example in this respect are the rules on the passing of risk. They regulate which one of the parties, the transferor or the transferee, shall bear the negative economic consequences in case the object of the transfer is damaged, destroyed or lost incidentally (i.e., without any of the parties being responsible for this occurrence) between the time of the conclusion of the contract and the point in time when delivery is actually to take place. The rules decide whether the transferor may, nevertheless, demand payment for the asset, and whether the transferee may still demand performance. Primarily, the parties are free to regulate the passing of risk by mutual agreement. If they do not, dispositive contract law rules will apply. For sales and barter contracts, for instance, §§ 1048 f, 1051 ABGB provide that with regard to specific goods, the risk will pass on the agreed date of delivery and if no such agreement has been established, upon actual delivery. Generic goods are to be treated like specific goods from the moment of their identification.266

265 For a closer discussion of some of these rules see Faber in Faber/Lurger, Rules for the Transfer of Movables 97 at 104 ff.
266 The rules on the passing of risk will be elaborated more closely below, 10.1.; as to the identification (appropriation) requirements, see also 5.3., below.
Since it has been mentioned previously\(^{267}\) that it follows from the concept of ownership that the risk of accidental loss, destruction and deterioration is borne by the owner, perhaps a short explanation should be added as to the relation between these two sets of rules, in order to show that they do not contradict each other. In a certain sense, the owner always bears the risk of any kind of loss: He or she ‘has’ the asset, and if the object is damaged or lost, he or she will own it in a deteriorated condition, or ‘will not have’ it any more, respectively. This is expressed in § 1311, 1\(^{st}\) sentence ABGB \((\text{casum sentit dominus})\).\(^{268}\) If no other rules that could shift this economic disadvantage onto another person apply, the owner will finally be burdened with the negative effect. This is what the ownership-concept means by referring to the risk that is borne by the owner. There may, however, exist applicable rules, which lead to such a shift of the economic disadvantage. The practically most relevant rules will be those on liability for damage \((\text{Schadenersatz})\), which generally presuppose that another person, the tortfeasor, caused the loss or damage intentionally or negligently (§ 1295 ABGB). A second set of rules that may help the owner in this respect are the provisions on the passing of the risk: In case certain requirements are fulfilled,\(^{269}\) the buyer – who has not acquired ownership so far and has not taken delivery of the goods – has to pay the price, although he will never physically obtain the goods due to their accidental loss. Then, it will still be the seller’s property which was lost, but the seller has (and retains) a contractual claim against the buyer (for the purchase price) which economically compensates for this loss. This aspect of the passing of the risk is described as \text{Preisgefahr} (the risk of being obliged to pay the price). A second aspect is the buyer’s risk of losing the right to take delivery of the sold movable \((\text{Leistungsgefahr})\) where the specific object sold or, where the contract is for the sale of generic goods, where goods of this kind have been destroyed incidentally whilst in the seller’s bulk. In this respect, the main idea is that the seller remains obliged as long as goods of this kind are still available \((\text{genus non perit})\).\(^{270}\)

In principle, as mentioned above, the rules on the passing of risk only regulate the effects of accidental loss on the contractual rights and obligations of the transferor and the transferee: The former may still have a claim for payment of the purchase price, although the sold property has been lost; the latter may still have a claim for delivery, even though the transferor has lost one of the assets with which he could have fulfilled his obligation to

\(^{267}\) Supra, 1.2.2.(a) sub (iii).

\(^{268}\) This principle is usually described as ‘Sachgefahr’ \((\text{periculum rei})\). See also Ch. Rabl, Die Gefahrtragung beim Kauf (2002) 3 f.

\(^{269}\) For example, if the buyer was in delay in taking delivery of the goods \((\text{Annahmeverzug or Gläubigerverzug}, § 1419 ABGB, see infra, 10.1.1.(a))\) or if the parties have agreed on a passing of risk prior to delivery.

\(^{270}\) For a closer analysis, see 10.1., below.
perform. The relation between owner and third parties, however, will be governed by the ownership concept.\footnote{271}

Whereas it is nowadays undisputed that the passing of ownership and the passing of risk are to be seen as different questions, there have been different ideas about the relationship between these two issues in the past. Today, the prevailing opinion maintains that the passing of risk is completely independent from the transfer of ownership.\footnote{272} However, a minority view stresses that the rules on the passing of risk at least tend to follow the transfer of ownership rules,\footnote{273} which is sometimes used as an argument when being confronted with unregulated issues.

(ii) Allocation of uses and charges between the parties

(aa) Another example where contract law rules may ‘eclipse’ the effect of the ownership concept relates to the right to use. Again, the ownership-concept involves that, as a matter of principle, the exclusive right to use the object is allocated to the owner.\footnote{274} But again, contract law rules may partly lead to different effects. On the one hand, the owner can, of course, grant a right to use to another party by concluding a contract, e.g., a lease contract; but also in a transfer situation, \textit{i.e.} when the movable has been sold but not yet delivered, contract law rules must be observed.

If the parties conclude any agreement regarding the right to use, this agreement will be decisive for the relation between transferor and transferee. The parties may stipulate, for instance, that the seller is no longer entitled to use the asset, or that the buyer, before delivery and a transfer of ownership shall take place, may already use the object, \textit{e.g.} for test purposes or in order to prepare necessary adaptations. In case the parties have not concluded any specific agreement, such consequences may follow from an interpretation of the contract. For example, where a completely new asset is sold, an interpretation of the contract may reveal the applicability of a term of non-usage before the moment of delivery, simply because using the movable might result in a decline in value. This does, however, not mean that the ‘right to use’ has already passed to the buyer. The interpretation of the contract may just reveal that the seller is not entitled to any further use and could be held

\footnote{271} But see below, (b)(ii), for some interrelations between the internal allocation of risk and claims against third parties.\footnote{272} See, \textit{e.g.}, F. Bydlinski in Klang IV/2, 496 f; Aicher in Rummel, ABGB I\textsuperscript{1}, §§ 1048-1051 no. 8. A summary of the debate is provided by Ch. Rabl, Gefahrtragung 62 ff.\footnote{273} Reischauer in Rummel, ABGB II/3\textsuperscript{3}, § 1419 no. 13; see also Kerschner, Der OGH auf dem Weg zur Saldotheorie? JBl 1988, 548.\footnote{274} Cf. §§ 354, 362 ABGB and supra, 1.2.2.(a) sub (i).
liable by the buyer in case of non-compliance with this contractual duty.\(^{275}\) In case no result can be derived from an interpretation of the contract, the general dispositive provisions of contract law will apply. They provide that the right to use will pass at the agreed time of delivery (§ 1050 ABGB) and that, before this point in time, the seller will be entitled to use the asset ‘in a normal way’.\(^{276}\) Of course, the buyer may also be entitled to damages if the seller has not complied, negligently or intentionally, with such a duty of non-use.

If, however, a third party takes and uses the asset without permission (so that the issue at stake is not restricted to the relation between seller and buyer), the right of ownership will actually be considered to be the starting point: The owner (e.g., the seller, in case the object is used by the third party before delivery), will have a claim for unjustified enrichment against the third party. But, in certain constellations, the buyer may have a contractual right against the seller for having the latter’s claim against the third party assigned to him.\(^{277}\) This may be the case, in particular, where the seller is delayed in delivering the goods, because then usually the ‘inter partes right to use’ passes to the buyer.

(bb) The question of who has to bear the costs and charges arising from the property is treated parallel. §§ 1049, 1050 ABGB provide that the transferee has to bear these costs up to the agreed date of delivery or, in lieu of an agreement as to that date, up to actual delivery. If, for instance, the buyer fails to take delivery on the agreed date, the maintenance costs generated by the property may be charged to the buyer.

The possibilities of the seller’s or the buyer’s creditors to have their claims satisfied (e.g., by attaching the property and obtaining its monetary proceeds by way of a forced sale), in principle, depend on the question of who owns the object (although the buyer’s creditors may also levy execution against the buyer’s claim for the delivery of the goods, possibly including profits attributed to the buyer according to § 1050 ABGB).\(^{278}\)

\(^{275}\) For a more detailed analysis, see Faber in Faber/Lurger, Rules for the Transfer of Move-ables 97 at 105 f.

\(^{276}\) Cf. Binder in Schwimann, ABGB IV, § 1050 no. 3.

\(^{277}\) Cf. Binder in Schwimann, ABGB IV, § 1050 no. 3, who points out that generally the contractual right for ‘use’, in relation to the sold object, encompasses all those types of advantages which can also be derived from the right of ownership in the sold asset.

\(^{278}\) Also, the creditors may levy execution against a claim for compensation, resulting from the fact that one of the parties has borne more charges than it was obliged to under § 1049 ABGB. These examples show that the rules on profits and charges (which comply with the rules on the passing of risk and not those on the passing of ownership) also may, although indirectly, have effect on third parties.
(b) Rules on non-contractual liability for damage

Apart from contract law provisions, other rules rooted in the law of obligations may adapt effects which would otherwise follow from the unitary property law concept. Of particular importance is the law of damages. I will give two examples.

(i) Claim for damages in double sale constellations

As will be discussed in more detail below, where the same asset is sold twice to two different buyers, ownership will pass to the buyer who takes delivery. Under the property law rules, it is irrelevant whether the second buyer (who finally takes delivery) knew or ought to have known of the first sale. This result is, however, ‘corrected’ by the law of damages. At least, where the second buyer actually knew that the object had already been sold to another person, the first buyer will have a tort claim against the second buyer (who became owner upon delivery). Under the tort law rules, the party who suffered the loss shall, in principle, receive restitution in natura. Based on this rule, the first buyer can demand a transfer of ownership from the second buyer.

(ii) Rules for damages where a third party suffers the loss (‘Drittschadensliquidation’)

Where the buyer fails to take delivery of goods on the due date, the risk of loss will pass to him or her, whereas the seller will remain the owner until delivery can be made. If, in such a constellation, a third party causes damage to the goods, the seller, who still owns the goods, may be considered to suffer no loss, whereas the buyer, who already bears the risk of accidental damage or loss in relation to the seller, is traditionally considered to have no claim against the tortfeasor, as the damaged goods were not his property.

Austrian courts and literature accept that in such a case, where the damage is economically ‘shifted’ to the buyer, the third-party tortfeasor shall

279 See infra, chapter 6 and 6.2.2. in particular.
280 See infra, 10.1.1.(a).
281 This is, in fact, a problematic issue which can not be dealt with in detail here. One aspect is that Austrian law knows different methods of calculating damages, and if one accepts that the owner is always permitted to choose the ‘objective’ method of calculation, i.e. demanding the market value of ‘his’ movable (which has the effect that the passing of risk to the buyer remains irrelevant for assessing the damage), the problem does not arise. For the whole issue, see for instance Koziol, Haftpflichtrecht I nos. 13/9 ff (pp. 437 ff); Lukas, JBl 1996, 481 and 567; Reischauer in Rummel, ABGB II, § 1295 nos. 26 ff; Koziol/Welser, Grundriss II, 332 ff.
remain liable. In a recent case, the Supreme Court ruled that the party who suffers the economic damage shall be entitled to sue the wrongdoer. However, the whole Austrian discussion regarding these rules does not at all focus on mitigating the ‘unreasonable effects of the ownership concept in property law’ (in the sense of a ‘functional approach’ in property law). The problems are considered to lie in the law of damages.

(c) Insolvency law

‘Functional effects’ may result from different insolvency law rules: Under the rules on avoidance in bankruptcy (actio Pauliana), the administrator in bankruptcy (representing the creditors) may be entitled to set aside the debtor’s transactions that cause a diminishment of the debtor’s estate. The effect of such ‘avoidance’ is a relative one: The transaction is to be disregarded (only) in relation between the third party acquirer and the insolvency creditors.

Another example is the right of stoppage in transit provided for by § 45 KO. It becomes relevant where goods are in transit when the buyer goes bankrupt. In case also the seller becomes insolvent (‘double insolvency’), Austrian law will in fact protect both the seller and the buyer: The buyer will be protected by the rules on the transfer of ownership, as ownership will pass to the buyer when the goods are handed over to the independent carrier (§ 429 ABGB). At the same time, the seller – regardless of him having already lost the right of ownership – may exercise his right of stoppage in transit as long as the goods have not been physically taken over by the buyer, which provides protection against the buyer’s creditors in insolvency.

282 Cf. the references in footnote 281.

283 OGH 8 Ob 287/01s, JBl 2003, 379. The question of who shall be entitled to sue was – and still is – disputed. A different position (namely that the seller, being the owner, would in principle be entitled to sue, but the buyer may demand the assignment of the seller’s claim) is held by Koziol, Haftpflichtrecht I nos. 13/21 f, who also provides further reference to the discussion.

284 See §§ 27-43 KO and infra, 9.1.3.

285 In more detail, exercising the right of stoppage is considered to create an obligatory right to retransfer ownership of the goods to the seller; but this right is of special character insofar as it has the quality of a right of separation in insolvency (Aussonderungsrecht), which means that the right to claim back the goods is protected against the insolvent buyer and his creditors in bankruptcy. Cf. Schulyok in Konecny/Schubert, Kommentar zu den Insolvenzgesetzen (1997, amended 2002), § 45 KO no. 4; Petschek/Reimer/Schieder, Das österreichische Insolvenzrecht (1973) 453 ff.

286 See also Faber in Faber/Lurger, Rules for the Transfer of Movables 97 at 106 ff. – For the consequences of stoppage on the risk of loss, see infra, 10.1.3. in fine.
(d) Rules of civil procedure

Finally, one may also mention rules of civil procedure in this context: Under a ‘functional approach’, as followed in Scandinavia, one would regard it as important that deciding one specific conflict should not impose binding effects on third parties who did not take part in these court proceedings; this would be achieved by the ‘functional’ property law rules of these legal systems. In Austria, the question of ‘who owns’ would be more decisive also in multi-party-relationships. However, this does not mean that a lawsuit between two parties, where the ‘unitary’ ownership concept is applied, would produce binding effects on a third person who did not take part in these proceedings. But, this effect is produced by rules on civil procedure, which provide that a judgment is only binding on the parties to the lawsuit (matérielle Rechtskraft). This is based on the principle that the binding effect of a judgment presupposes that the respective party had a right to be heard before the court and, therefore, was able to influence the course of the proceedings by providing evidence.

5.3. General requirement: Identification

Where the transferor’s obligation is defined in generic terms (Gattungsschuld), in particular where a contract has been concluded for the delivery of generic (unascertained) goods, a transfer of ownership can not take place before the goods are identified (or ascertained) to the contract (in German: Konzentration or Konkretisierung). Otherwise, it would not be clear to which assets the transferee’s new right of ownership relates, which would contradict the general property law principle of ‘speciality’. This general requirement is, however, not spelled out explicitly in the civil code and is hardly ever reflected on more closely in treatises on Austrian property law. This is most likely caused by the fact that the question will be considered to be of very little importance in Austrian commercial practice. The issue could, in particular, be of relevance where, under a contract for generic goods, the parties postpone physical delivery but stipulate for an immediate transfer of ownership (constitutum possessorium) and the seller becomes insolvent before the goods are handed over to the buyer. But, as a matter of fact, a constitutum possessorium is very rarely agreed upon in

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288 Cf. supra, 1.1.3.

289 § 428 ABGB; for more details, see infra, 5.6.5. The practical reason may be that the buyer is to pay in advance and strives for obtaining a secure position by acquiring ownership.
contemporary Austrian practice and it seems that such agreements are not included in contracts for generic goods. For this reason, there is no reported common opinion as to which prerequisites must be fulfilled for ascertainment in a property law context.\(^\text{290}\) The question may, however, also arise where generic goods allotted to different buyers are shipped in bulk (e.g., in one and the same container)\(^\text{291}\) or where a bulk of goods is stored with a third person and the ownership of some of the goods shall be transferred by giving notice to the third person (Besitzanweisung).\(^\text{292}\)

The question of the ascertainment of generic goods is discussed rather in the context of the passing of risk.\(^\text{293}\)

### 5.4. The requirement of a valid obligation to transfer ownership

As mentioned before, §§ 380, 424, 425 ABGB require a valid obligation in order to transfer ownership (Titel, Titelgeschäft, Verpflichtungsgeschäft). This requirement has two aspects, as will be discussed in the following. The rules apply to movable as well as to immovable property.

#### 5.4.1. Suitable types of obligations

First, the obligation in question must be generally suitable for being the basis of a transfer of ownership. Therefore, focussing on contractual obligations, one can think of a contract for sale (§ 1053 ABGB), barter (Tausch, § 1045 ABGB) or donation (Schenkung, § 938 ABGB), but also of ‘modern’ types of contracts such as certain leasing contracts containing an option to acquire ownership after a certain period of time (financial leases). Furthermore, the basis for acquiring ownership can be a security agreement (Sicherungsabrede):\(^\text{294}\) Security is provided by a transfer of ownership (Sicherungseigentum). Also, a company’s articles of association (Gesellschaftsvertrag) and, therefore, an agreement concluded by more than two parties can be basis for an acquisition of ownership by the company. But, also ‘the law itself’ can create an obligation to transfer ownership, especially the rules on

\(^{290}\) For German law, see for instance Wieling, Sachenrecht I’, 312, who gives examples of ascertainment, such as placing the sold object in a certain room, entering it in a list, or marking it.

\(^{291}\) In the case of transport by an independent carrier, § 429 2\(^\text{nd}\) alternative ABGB provides for a passing of ownership upon the handing over of the goods to the carrier. This issue is very briefly touched by Ch. Rabl, Die Gefahrtragung beim Kauf (2002) 401.

\(^{292}\) For this form of transfer, see infra, 5.6.6.

\(^{293}\) See infra, 10.1.1.(b).

\(^{294}\) In great detail on this point Klang in Klang II’, 300 ff.
unjustified enrichment,\textsuperscript{295} tort\textsuperscript{296} or negotiorum gestio.\textsuperscript{297} Moreover, an obligation to transfer ownership may derive from the law of succession: A legacy creates a claim against the heirs for the transfer of the ownership of an asset. Finally, the obligation may be based on a judgement or other declaration made by a court.\textsuperscript{298}

5.4.2. Validity of the obligation: ‘Causal’ transfer system

Second, the obligation must be valid. This requirement may be lacking where the obligation is based on a juridical act (Rechtsgeschäft), especially a contract. In principle, the validity of a transfer of ownership depends on the validity of the underlying obligation. Austrian property law, therefore, establishes a ‘causal’ transfer system (as opposed to the German approach of an ‘abstract’ system).

However, one has to distinguish different types of defects, concerning either the contractual agreement as such or its performance, as well as contractual stipulations which may affect the transfer of a right in rem. These different cases will be analysed in the following subchapters.

The only chance to obtain ownership without a valid ‘title’ is by long acquisitive prescription (uneigentliche Ersitzung, § 1477 ABGB), which specifically requires possession bona fide for 30 or 40 years.\textsuperscript{299}

(a) Invalidation ab initio

(i) A contract is invalid and, therefore, no transfer of property can take place, for instance, where the contract was concluded with one of the parties lacking capacity\textsuperscript{300} (unless the legal representative ratifies the contract afterwards),\textsuperscript{301} in the case of dissensus or, in the case of direct representation, if the agent lacks authority to act in the name of the principal (Vollmachtst- mangel). According to the essential provision of § 879 ABGB, a contract is

\textsuperscript{295} For instance § 1435 ABGB, see 5.4.2.(c).

\textsuperscript{296} See 6.2.2.

\textsuperscript{297} In German: Geschäftsführung ohne Auftrag, regulated in §§ 1035-1040 ABGB. The rules apply where a person acts in the interest of another without a mandate to do so. If, under such a legal relationship, the gestor acquires property in the principal’s interest, he is under an obligation to transfer its ownership to the principal (§ 1009 ABGB will be applied by way of analogy).

\textsuperscript{298} Cf. § 436 ABGB, where this principle is spelled out explicitly regarding immovable property. For practical examples, see Mader in Kletečka/Schauer, ABGB, § 436 nos. 1 ff.

\textsuperscript{299} Cf. infra, 13.1.3.

\textsuperscript{300} See infra, (ii), for more details.

\textsuperscript{301} So-called nachträgliche Genehmigung, see § 865 ABGB.
also void if it is illegal (violating mandatory rules, Gesetzwidrigkeit)\textsuperscript{302} or contrary to fundamental principles (contra bonos mores, Sittenwidrigkeit).\textsuperscript{303} Focussing on the transfer of ownership, however, it must be emphasised that partial nullity under § 879 ABGB does not necessarily result in complete nullity and a failure of the transfer of ownership: Someone who buys a movable under a usurious contract, paying the double price, may keep the asset as § 879 ABGB will, according to the protective purpose of the norm, only affect the price. Where a clause limiting liability for damage is void, this will also neither have an effect on the rest of the contract nor on the transfer of ownership.\textsuperscript{304}

The claim for nullity by reason of violation of statutory provisions or the principle of good faith and fair dealing (§ 879 ABGB), or for or nullity resulting from dissensus, is not subject to any limitation period. An unjustified enrichment claim for recovery, however, will prescribe in the general period of 30 years.\textsuperscript{305}

(ii) As mentioned above, the lack of capacity\textsuperscript{306} of either of the parties hinders the transfer of ownership, since legal capacity is one of the essential requirements for each contract. Lack of capacity will, therefore, cause the

\begin{itemize}
  \item \textsuperscript{302} This rule is interpreted restrictively: The sanction of nullity only applies where this converges with the purpose of the infringed statutory provision, e.g., where illegal weapons or drugs are sold, but not where provisions of tax law are disregarded. See for instance Koziol/Welser, Grundriss I\textsuperscript{13}, 175 f.
  \item \textsuperscript{303} To be precise, a distinction has to be made both for contractual provisions violating fundamental principles (Sittenwidrigkeit) as well as for contracts violating mandatory rules: Nullity may either be ‘absolute’ or ‘relative’. Nullity is ‘absolute’ in the sense that no declaration of avoidance is necessary, any person can assert the nullity and the court must declare the stipulation void \textit{ex officio}, if the contract violates public interests. However, a contract will often affect private interests of only one party. In these cases, the sanction of nullity provided for in § 879 ABGB is understood to be ‘relative’, i.e., it may be asserted only by the party suffering detriment (e.g., the party exploited by a usurious contract, cf. § 879 (2) no. 4 ABGB). In effect, this relative nullity, to a high extent, converges with the avoidance of a contract (\textit{Anfechtung}, see below, (b)). For this differentiation, see for instance Koziol/Welser, Grundriss I\textsuperscript{13}, 181 f; Krejci in Rummel, ABGB I\textsuperscript{1}, § 879 nos. 247 ff; Apathy/Riedler in Schwimann, ABGB IV\textsuperscript{3}, § 879 nos. 34, 36.
  \item \textsuperscript{304} The general rule is that in the case of the partial nullity of a contract due to illegality or infringement of fundamental principles, the protective purpose of the norm will decide whether nullity will also affect the rest of the contract or not; Koziol/Welser, Grundriss I\textsuperscript{13}, 182 ff; Apathy/Riedler in Schwimann, ABGB IV\textsuperscript{3}, § 879 nos. 37 f.
  \item \textsuperscript{305} Cf. Koziol/Welser, Grundriss I\textsuperscript{13}, 182; Mader/Janisch in Schwimann, ABGB VI\textsuperscript{1}, § 1487 no. 12.
  \item \textsuperscript{306} Minors lack capacity until the age of 18, §§ 21 (2), 151 (1). Other persons may lack capacity due to a mental illness or a temporary inability to understand the implications of concluding a contract, e.g., when being under the (heavy) influence of alcohol or drugs, § 865 ABGB.
\end{itemize}
invalidity of the underlying contract (Verpflichtungsgeschäft) as well as the invalidity of the real agreement (Verfügungsgeschäft).  

More precisely, according to Austrian doctrine, those juridical acts (if the contracting party is not less than seven years old) are not absolutely invalid, but 'provisionally invalid' (schwebend unwirksam). This means that the person's legal representative (gesetzlicher Vertreter) is able to give his or her assent to the contract subsequently (nachträgliche Genehmigung), by means of which the contract becomes valid. If so, the transfer of ownership will take place. Until the legal representative has decided whether or not to ratify the contract, the other party is bound to its contractual declaration. The other party may well demand the representative to declare his intention within an adequate period of time. If the representative refuses to give his assent or does not declare his intention within the agreed period of time, the contract is deemed to be invalid ab initio (cf. §§ 865, 151 ABGB).

(b) Avoidance

It has also been mentioned that avoidance (Anfechtung) of a voidable contract has retroactive effect under Austrian law, and this retroactive effect also affects the level of property law (sachenrechtliche Wirkung ex tunc): The contract is deemed to have never been concluded, ownership 'reverts' retroactively and the transferor is considered to still be the owner. This applies to the avoidance of a contract on account of fraud (Arglist), duress (Drohung, both provided for in § 870 ABGB) or error (mistake, Irrtum; §§ 871-873, 875 ABGB). Hence, with regard to the transfer of ownership, the effect of avoidance is the same as in the cases of nullity ab initio mentioned above.

A practical consequence of this mechanism is that, after avoidance, the transferor can claim restoration of the property based on revindication (§ 366 ABGB), which also provides protection in case the transferee is insolvent. A disputed question is whether a transferor (who delivered the movable without receiving payment) can achieve such effect by invoking a mistake as to the transferee’s solvency (Irrtum über die Zahlungsunfähigkeit). This is partly affirmed, because § 873 ABGB allows the avoidance of a contract on account of mistake as to the other party's personal qualities and a party's ability to pay his or her debts can be seen as a rather relevant personal quality. In this view, both the underlying contract (Verpflichtungsgeschäft) and the ‘real agreement’ (Verfügungsgeschäft) may be subject to

307 Cf. also supra, 5.1.2.(c).
308 In the case of minors, the representative is, by provision of law: The parents (§ 144 ABGB), or the mother if the parents are not married (§ 166 ABGB).
310 For details as to revindication in general, see 1.4.1., above. For the insolvency implications, see also 9.2., below.
avoidance on account of mistake,\textsuperscript{311} so that the transferor is to be treated as still being the owner and, therefore, will have a claim for release from the bankrupt’s estate (\textit{Aussonderungsrecht}, § 44 KO), if certain additional requirements are met.\textsuperscript{312}

Parallel to revindication, the transferor may also claim recovery of the property under the rules on unjustified enrichment (§ 877 ABGB), which is, however, not of an \textit{in rem} but only of an obligatory nature. Both retransfers (restitution of the property and the price) must be made simultaneously (\textit{Zug um Zug}).\textsuperscript{313}

The rules on avoidance apply regardless of at which stage of the transfer (\textit{i.e.}, immediately after the conclusion of the contract, before or after delivery etc.) the relevant ground is relied on. Only the general rules on the limitation of actions (\textit{Verjährung}) have to be considered. Therefore, an action for avoidance on account of mistake or duress has to be brought within three years after the conclusion of the contract (§ 1487 ABGB). For avoidance on account of fraud, the general limitation period of 30 years\textsuperscript{314} applies (§ 1478 ABGB). It is discussed, however, whether the claims ex unjustified enrichment, which arise after the avoidance of the contract when performance has already been made, should be limited in accordance with the relevant ground of avoidance (which would result in a three-year period also for the claim for recovery if the contract has been avoided on account of mistake, for instance) or whether they should generally be subject to the general limitation period of 30 years, as provided for in § 1478 ABGB. The prevailing opinion applies the short period.\textsuperscript{315}

\textsuperscript{311} Bollenberger, Irrtum über die Zahlungsunfähigkeit (1995), especially 7-26 and 95-101.

\textsuperscript{312} See Bollenberger, cit., 102-150. The additional requirements are mainly that delivery takes place when the transferee is already insolvent and that the value of the property is still existent in the bankrupt’s estate. – Of dissenting opinion for instance Rummel in Rummel, ABGB I\textsuperscript{3}, § 873 no. 1, who argues that this solution would contradict the system of the Bankruptcy Act (in particular, the principle of equal treatment of all creditors); cf. also Dellinger, Vorstands- und Geschäftsführerhaftung im Insolvenzfall insbesondere gegenüber sogenannten Neugläubigern (1991) 192-208.

\textsuperscript{313} This is usually argued to follow from § 877 ABGB; for references see for instance Apathy/Riedler in Schwimann, ABGB IV\textsuperscript{3}, § 877 no. 19. Critical of this reasoning Jabornegg, Zurückbehaltungsrecht und Einrede des nichterfüllten Vertrags (1982) 168 ff.

\textsuperscript{314} As far as certain privileged persons are concerned, the general period of limitation, according to § 1472 in conjunction with § 1485 (1) ABGB, will even be 40 years. This privilege applies to legal persons (of public law as well as those of private law; \textit{juristische Personen des öffentlichen Rechts und des Privatrechts}).

\textsuperscript{315} OGH 3 Ob 75/87, JBl 1988, 172 (P. Bydlinski); M. Bydlinski in Rummel, ABGB II\textsuperscript{3}, § 1487 no. 7; Dehn in KBB, ABGB\textsuperscript{3}, § 1487 no. 3; Klang in Klang, ABGB VI\textsuperscript{3}, 629; Gschnitzer in Klang, ABGB IV/1\textsuperscript{2}, 156; dissenting Rummel in Rummel, ABGB I\textsuperscript{3}, § 877 no. 12; doubts are also expressed by Mader/Janisch in Schwimann, ABGB VI\textsuperscript{3}, § 1487 no. 12.
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(c) Termination

A different regime applies to the case of the termination of a contract. In the context of a transfer of ownership, the most relevant constellations are those in which the movable has already been delivered but the price has not been paid, so that the seller terminates the contract for non-payment (Rücktritt, § 918 ABGB), or where the property has been delivered but does not correspond to the qualities stipulated in the contract, so that the buyer terminates the contract for lack of conformity (Wandlung, § 932 ABGB). A right of termination is also granted where it becomes impossible to fulfil an obligation and this impossibility is attributable to the debtor (§ 920 ABGB). Termination does not have retroactive effect with regard to ownership: The transferee remains the owner of the asset, although he is bound to return the asset and to retransfer ownership under an obligation ex unjustified enrichment (§ 1435 ABGB). This, however, is a mere obligation and does not provide protection in the transferee’s insolvency. The basic difference to the rules on avoidance is that a right to avoidance is based on a defect in the conclusion of the contract (fraud, mistake etc.), whereas the termination rules mentioned above are based on a defect in performance.

The termination-principles also apply to the termination of a doorstep selling contract between a professional seller and a consumer (Rücktritt, §§ 3, 4 Consumer Protection Act). § 3a Consumer Protection Act provides a right to terminate the contract if certain 'significant circumstances', that were presented to the consumer as very likely to occur, fail to come into existence. The scope of § 3a KSchG covers certain cases of mistake, even cases of errors in motivation; nonetheless, the provision grants a right of termination (which, under Austrian law, does not have retroactive proprietary effect).

In this context, it should be mentioned that under Austrian law quite a lot of factual situations may be subject to both the rules on avoidance of contracts on account of mistake (§ 871 ABGB) and the rules on implied warranties against lack of conformity (Gewährleistung, §§ 922-932 ABGB). Then, the party entitled to several remedies may choose which remedy shall be pursued. If, for instance, A sells a used car to B and guarantees that the engine of the vehicle has a certain power output, but this statement is found to be incorrect after the car has been handed over to B, the buyer will be entitled to avoid the contract because of his mistake at the time of the conclusion of the contract. And he may have the possibility to pursue the remedy of termination of the contract pursuant to § 932 ABGB, based on the fact that the car did not meet the contractually stipulated requirements at the time of delivery. As explained above, this may lead to severe diver-

316 As to some detailed problems concerning this right to termination see footnote 556, below.
317 Cf. Apathy in Schwimann, ABGB V, § 3a KSchG nos. 1 ff.
5. The system of transfer of ownership under Austrian law

genesis in the proprietary effects, because avoidance has retroactive proprietary effect whereas termination does not.

(d) Laesio enormis

Another right to set aside\textsuperscript{318} the contract is provided in §§ 934, 935 ABGB, and can be invoked if one of the parties to a contract, under which both sides have to exchange performances, is entitled to performance that is actually \textbf{worth less than the half} of the value of the performance that this party must make to the other party (calculated based on the market value of the mutual performances at the time when the contract is concluded).\textsuperscript{319} This kind of remedy is usually referred to as \textit{laesio enormis} (\textit{Verkürzung über die Hälfte}). However, the other party has a right to avoid the invocation of this remedy by paying the difference in the objective values to the ‘disadvantaged’ party. The proprietary consequences – in case contractual obligations have already been performed – have been disputed in recent literature and court decisions: For a long time, it was assumed that exercising the remedy of \textit{laesio enormis} only creates an obligation to reverse performances under unjustified enrichment law.\textsuperscript{320} Nowadays, it is mainly argued that the effects equal those of avoidance, \textit{i.e.} there is a retroactive proprietary effect and ownership is deemed to have never passed to the transferee.\textsuperscript{321} If, for example, A sells a used car to B for \(€ 5,000\) and, after delivery, it turns out that the objective market value was only \(€ 2,000\) due to some hidden defects, the latter view leads to the result that A ‘automatically’ becomes owner again (and is deemed to have never transferred ownership) when B exercises his right under § 934 ABGB.

\textsuperscript{318} This is used as a neutral term because it is disputed, as described in the text, whether the effects equal those of ‘avoidance’ or ‘termination’ in the sense of the previous sections (b) and (c).

\textsuperscript{319} There are some exceptions provided in § 935 ABGB, such as for mixed donations or where the objective value was positively known to the disadvantaged party. In principle, the right to set aside the contract is mandatory (§ 935 ABGB). However, it can be excluded by contractual agreement in relation to a professional party (§ 351 UGB; for contracts concluded before 1 January 2007, the remedy of \textit{laesio enormis} was not available to professional parties pursuant to § 351a HGB).

\textsuperscript{320} Still of this opinion: \textit{Reischauer} in Rummel, ABGB I, § 934 no. 8 (with further references).

\textsuperscript{321} See, for instance, P. Bydlinski, Die Stellung der laesio enormis im Vertragsrecht, JBl 1983, 410 (417); Binder in Schwimann, ABGB IV, § 934 no. 26; OGH 2 Ob 325/98b, JBl 1999, 537 (Rummel).
Another disputed issue is the effect of transfers involving resolutive conditions or time limits. One can distinguish two basic constellations: First, ownership could be transferred based on a contract\(^{322}\) that is subject to a condition or time limit with the intended effect that ownership shall revert to the transferor when the condition is met. Second, ownership could be transferred subject to the agreement that ownership shall pass to a third person when the condition is fulfilled.

Such constellations involve a number of problems, most of them being disputed. One aspect is whether the transfer of the right of ownership can take place 'automatically' upon fulfilment of the condition (or lapse of the time limit), without meeting the regular transfer requirements of delivery or an equivalent to delivery, or the requirement of the registration of immovables, respectively. Regarding the first constellation mentioned above (re-transfer), the Austrian Supreme Court held that when the condition occurs, this will not only give rise to an obligation to re-transfer (still requiring delivery),\(^{323}\) but rather an **automatic re-transfer** of ownership. Such re-transfer would, however, not have retroactive effect (such as avoidance), but would only be effective from the point in time at which the condition is met. Partly, this view is criticised heavily in literature, with the argument that only the law itself can create the possibility of an automatic re-transfer; in all other cases, delivery (or an equivalent) is required by the general rules. A transfer based on a contract or real agreement that is subject to a resolutive condition will, in this view, still be a transfer of the full right, and when the condition occurs this only creates an obligation to re-transfer based on an unjustified enrichment claim under § 1435 ABGB.\(^{324}\)

What shall apply in the second constellation (transfer to third party) is left open by the Supreme Court in this most recent decision. In literature, it is often argued that such a third party must fulfil the ordinary transfer requirements (like taking delivery of a movable or registering it in the case of

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\(^{322}\) The condition or time limit can affect the underlying obligation (Verpflichtungs geschäft) and/or the 'real agreement' (Verfügungsgeschäft), cf. OGH 5 Ob 73/94, JBl 1995, 110.

\(^{323}\) OGH 5 Ob 73/94, JBl 1995, 110. One of the basic arguments was that rules on conditions (regulated in contract law) apply both to the underlying obligation (in the specific case, a contract for donation) and to the real agreement and that there is no obvious reason why it should be impossible to grant the right of ownership conditionally, as this is possible with other rights.

land) but he or she has, or can be granted, priority over potential acquirers or the general creditors of the first transferee.

Further problems related to such constellations emerge from the law of succession, the statutory restrictions on contractual limitations in relation to transferability and, regarding immovables, the rules on registration.

(f) General arguments justifying the causal system?

Since the requirement of a valid causa traditionis is rather clear from the provisions of the ABGB, there is not much discussion nowadays about the underlying reasons. The draftsmen of the ABGB under Franz von Zeiller built their system of the acquisition of property on the old doctrine of titulus and modus acquirendi, and it seems clear that they intended to adopt this doctrine in a very pure form.

However, if we compare the requirement of a valid causa traditionis with the system of abstract tradition adopted in § 929 of the German BGB, the Austrian system provides a relatively strong protection of the transferor. If the underlying contract is invalid or avoided, he remains the owner of the property, which causes a great advantage, especially in the case of the transferee's insolvency.

Another reason can be seen in the avoidance of unnecessary changes in the legal status of the property: If, despite the absence of a valid causa,.

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325 See, e.g., Spielbüchler in Rummel, ABGB I, §§ 357-360 no. 4. According to Hoyer (cit., 290 f), also the requirement of a real agreement is problematic, as a 'real agreement in favour of a third party' can not be construed analogously to contracts in favour of a third party. The Supreme Court just states that contractually created third party rights can be registered in the land register, which leads to protection erga omnes, see OGH 5 Ob 84/95, JBl 1997, 165 (Spielbüchler).

326 Details and argumentation vary. Egghmeier, NZ 1997, 33 (38 f), for instance, assumes a fiduciary bond (Treuhand) of the first transferee in favour of the second transferee, which grants protection in the course of the first transferee's insolvency or execution proceedings against him.

327 The stipulation of a revisionary succession (Nacherbschaft, fideikommissarische Substitution) in favour of persons who are not yet born is only possible in relation to one future heir regarding immovable property and two future heirs regarding moveables, § 612 ABGB. This policy must be obeyed in our context as well, see, e.g., Spielbüchler in Rummel, ABGB I, §§ 357-360 no. 4.

328 § 364c ABGB, see 1.5.2., above.


330 The protection of the owner's interests is also mentioned by Rappaport, cit., 428, 430.

331 Spielbüchler in Rummel, ABGB I, § 424 no. 1; Mayer-Maly, ZNR 1990, 164 (168).
ownership passed to the transferee, it would have to be retransferred anyway. However, if the asset has already been handed over to the transferee, there may still be factual and also legal problems that need to be handled (for instance, if the transferee has incurred expenses on the property and, therefore, has a right of retention, § 471 ABGB). Finally, it is sometimes stressed that the causal approach helps to avoid results which are not intended by law.332 This is a strong argument, especially with respect to contracts which are illegal or contra bonos mores (Gesetzwidrigkeit and Sittenwidrigkeit, § 879 ABGB); but it is hardly discussed whether such reasoning may also justify the retroactive proprietary effect of avoidance for a mere mistake (§ 871 ABGB), as opposed to the mere obligatory effect of a termination.

5.4.3. Exception: Abstract transfer of registered ships

Although this issue is hardly ever discussed in Austrian property law literature, it seems quite evident that Austrian law also contains an abstract transfer system for certain kinds of movable assets, meaning that only a valid ‘real agreement’ (Verfügungsgeschäft) is required, but not a valid underlying obligation to transfer ownership. This applies to registered ships and follows from the rather clear text of the relevant provisions, which were introduced in 1940 when Austria was part of the ‘3rd Reich’ and were designed in accordance with § 929 BGB, being the basis of the abstract transfer principle in German law.333 Before the ship has been registered, however, the general Austrian transfer rules apply;334 the latter include the requirement of a valid underlying obligation.

332 Spielbüchler in Rummel, ABGB I, § 424 no. 1: Unlawful results shall be avoided.
333 See § 2 (for sea-going vessels) and § 3 (for inland vessels) of the ‘Act on Rights in Ships’ (Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken, in short: Schiffsrechtsgesetz, German Reichsgesetzblatt I 1940/1499. The provisions are still in force and form part of Austrian law: OGH 6 Ob 251/00f, SZ 74/27. § 2 (1) of this Act explicitly states that for the transfer of a ship, which is registered in the register of sea-going vessels, it is ‘necessary and sufficient that the owner and the acquirer agree that ownership shall pass to the acquirer’. § 3 (1) leg. cit. contains a similar provision, but requires an additional registration. § 3 (2) provides that, before registration, the parties are bound to the ‘real agreement’ only if they have concluded their agreement before the competent court, or if the agreement has been authenticated by a court or a notary, etc.
334 OGH 6 Ob 251/00f, SZ 74/27. – See also infra, 5.6.8.(a) for further aspects of the transfer of ownership of ships.
5.5. The requirement of a ‘real agreement’ (Verfügungsgeschäft)

As mentioned above, §§ 380 and 425 ff ABGB require a ‘legal mode of acquisition’ (Modus) which, according to modern doctrine, has two aspects: A separate contract effecting the transfer of ownership (‘real agreement’, Verfügungsgeschäft), \(^{335}\) on the one hand, and the factual transfer or delivery (Übergabe) of the goods on the other hand.

Modern literature\(^{336}\) and court decisions\(^{337}\) conceive of the ‘real agreement’ as a contract in which the parties agree that the transferor transfers and the transferee acquires ownership. This juridical act gives effect to the underlying contract (Verpflichtungsgeschäft; e.g. a sales contract), which only gives rise to an obligation to transfer ownership. The ‘real agreement’ is understood to create immediate effects on an existing right; in our context: by transferring the right of ownership of an asset to another person.\(^{338}\)

In principle, such a ‘real agreement’ is also required for the transfer of immovable property. However, in contrast to the transfer of movables, according to § 32 (1)(b) GBG, such a juridical act does not necessarily have to be a contract (i.e. a bilateral act) here: With regard to immovables, the transfer of a proprietary right only requires the (express) unilateral declaration\(^{339}\) by the party who is to limit, encumber, give up or transfer his or her legal position; e.g. the vendor or pledgor.

5.5.1. Consequences

Since the ‘real agreement’ is understood as a contract (or, with regard to immovables: a unilateral declaration of intention), the general rules of contract law and, in particular, the general rules on ‘declarations of intention’ (Willenserklärungen) apply: The ‘real agreement’ consists of two corresponding ‘declarations of intention’, which may be declared in any form, e.g., orally or in writing, expressly and, being of great importance in our context, also implicitly by conduct: Where the transfer of goods is effected by physical delivery, there will, in most cases, not be any express agreement on the

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\(^{335}\) Or: Dinglicher Vertrag, dingliche Einigung.

\(^{336}\) See for instance Klang in Klang, ABGB II', 306 ff; Koziol/Welser, Grundriss I\(^{13}\), 117 ff; 325 f; Iro, Sachenrecht\(^{4}\), nos. 6/40 f; in more detail: Mayrhofer, Verpflichtungs- und Verfügungsgeschäfte, FS Schnorr (1988) 673.

\(^{337}\) See for instance OGH 7 Ob 39/94, SZ 67/213, OGH 4 Ob 536/92, JBI 1993, 183; OGH 5 Ob 18/97a, ecolex 1997, 424 (Wilhelm); OGH 3 Ob 43/86, ÖBA 1987, 51 (Iro).

\(^{338}\) A ‘real agreement’ could also affect a right in terms of waiving or limiting it. Further examples would be, for instance, the assignment of claims (Zession) or the creation or transfer of a pledge.

\(^{339}\) So-called Aufsandungserklärung. Cf. Koziol/Welser, Grundriss I\(^{13}\), 358; Iro, Sachenrecht\(^{4}\), no. 3/24.
transfer of ownership. According to the general rules on ‘declarations of intention’, the ‘real agreement’ also requires, for instance, the legal capacity of the parties. The ‘real agreement’ may also be avoided on account of mistake or fraud, or it may be void on account of illegality ($879 ABGB). However, those consequences are of no great practical importance because, normally, already the underlying juridical act (Verpflichtungsgeschäft) will be considered to suffer from the same deficiencies.

Another consequence is of greater importance: As the ‘real agreement’ is a juridical act, the general rules on conditions (Bedingung) and time limitation (Befristung) also apply. Therefore, the ‘real agreement’ can be made subject to a suspensive or resolutive condition. This is the legal basis for the construction of one of the most important security instruments in Austrian law, namely the retention of ownership (Eigentumsvorbehalt): The ‘real agreement’ is concluded under the suspensive condition that the purchase price is to be paid. Therefore, the factual handing over of the movable does not lead to a transfer of ownership. The ‘real agreement’ becomes effective (and ownership passes) only at the moment when the last instalment of the price has been paid.

5.5.2. Problems

It should be noted that the transfer rules of the ABGB do not mention the requirement of a ‘real agreement’ expressly. $380, 425 ABGB just speak of a ‘legal mode of acquisition’ (‘rechtliche Erwerbungsart’) and a ‘legal handing over and accepting’ (‘rechtliche Übergabe und Übernahme’), respectively, but do not explain the exact meaning of these requirements. It is clear that the factual delivery of the property (or the registration of immovable property, respectively), as laid down in §§ 426-437 ABGB, is a necessary element of this ‘legal mode of acquisition’. But the provisions do not expressly state whether it is the only one. It is generally assumed that the draftsmen of the ABGB did not think of a ‘real agreement’ as being part of the named ‘legal mode of acquisition’. For them, this requirement was a merely factual one (delivery). The concept of the ‘real agreement’ was adopted much later by Austrian legal literature, after Savigny had developed...

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340 More modern parts of the ABGB are, however, clearly based on this concept. See for instance § 151 ABGB, which, in defining the effects of legal incapacity, distinguishes between the conclusion of contracts giving rise to an obligation and juridical acts implying the immediate disposition of an asset.

341 It is almost impossible to translate these terms into another language and they even remain unclear in German.


343 A quite compact summary of Savigny’s theory in English language provides van Vliet, Transfer of movables in German, French, English and Dutch law (2000) 186 ff.
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In the past 40 years, the discussion has concentrated on the **point in time**, at which the ‘real agreement’ should be assumed to be concluded (as mentioned above, the agreement will usually be made implicitly). The problem arises where delivery of the goods takes place after the underlying juridical act (contract for sale) has been concluded. The traditional opinion assumes that the conclusion of the ‘real agreement’ regularly takes place at the **time of delivery**. Spielbüchler and – in a similar way – Franz Bydlinski, on the other hand, state that the ‘real agreement’ is concluded at the **same time as the underlying contract** (Verpflichtungsgeschäft). At that point in time, the parties agree, according to this second theory, that ownership shall actually pass from the transferor to the transferee. For these authors, therefore, delivery is of a merely factual nature; the ‘real agreement’ seems to be part of the underlying contract. Since 1986, the OGH has been following Spielbüchler’s theory in several decisions, but has not, so far, dealt with the counter-arguments put forward by the traditional opinion. However, in a more recent decision on this topic (from 1997), the OGH explicitly left the question open.

For most of the cases, this controversial discussion has no practical relevance. It may be said that the traditional opinion’s concept (conclusion of a contract at the time of transfer) does not really meet people’s expectations

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344 Cf. Meinhart, Übertragung des Eigentums, 10 ff, 17 ff. Further ancient literature is also reflected on by Rappaport, (footnote 329) 405 with note 16.


346 Cf. Spielbüchler, Der Dritte im Schuldverhältnis (1973) 101 ff; Spielbüchler, Übereignung durch mittelbare Leistung, JBl 1971, 589 (592-595); F. Bydlinski, Die rechtsgeschäftlichen Voraussetzungen der Eigentumsübertragung nach österreichischem Recht, in: FS Larenz (1973) 1025 (1034 ff); F. Bydlinski in Klang, ABGB IV/2, 370 ff. See also Aicher in Rummel, ABGB I, § 1061 no. 16 and § 1063 no. 30; Pletzer, Dopfellveräußerung und Forderungsengriff (2000) 26 f.

347 See Spielbüchler, Schuldverhältnis 111; F. Bydlinski, FS Larenz, 1025 (1035).

348 OGH 3 Ob 43/86, ÖBA 1987, 51 (Iro); OGH 5 Ob 324/86, RdW 1987, 157 (Iro); OGH 7 Ob 39/94, SZ 67/213; OGH 5 Ob 18/97a, ecolex 1997, 424 (Wilhelm). Before 1986, the OGH expressly followed the traditional opinion; see for instance OGH 7 Ob 632/83, RdW 1984, 310.

349 OGH 7 Ob 25/97w, VersE 1.733. The abovementioned decision OGH 5 Ob 18/97a, ecolex 1997, 424 may also be interpreted in the way that the OGH, in principle, is willing to re-examine its position on that point.
in everyday life (a criticism, which is in some way true for all concepts of a ‘real agreement’). But, there are also arguments put forward against Spielbüchler’s and Bydlinski’s concept: It is considered a little ‘artificial’ to presume a (‘real’) agreement on the actual passing of ownership at the (earlier) point in time of the conclusion of the underlying contract in the case of an obligation to supply unascertained goods (Gattungsschuld), because, at that point in time, the goods which shall actually be transferred by the ‘real agreement’ have not been chosen by the supplier yet.

However, in one aspect, the two theories can also lead to different results that may be economically remarkable. The problem occurs if the transferor unilaterally declares a reservation of title at the time of delivery, in contradiction to the (previously concluded) underlying contract: According to Spielbüchler’s and F. Bydlinski’s theory and the recent decisions of the OGH, such a unilateral declaration has no effect: The ‘real agreement’ (on the passing of ownership) was already concluded when the parties concluded the underlying contract. The latter, therefore, binds the supplier and ownership passes at the moment when the asset is handed over to the transferee.

According to the traditional opinion, on the other hand, ownership does not pass in this case: At the time of delivery, a ‘real agreement’ is just not concluded. The transferee (in accordance with the underlying contract) declares to acquire the right of ownership, the transferor declares the contrary: that he or she is not to transfer ownership until the purchase price has been paid in full. Since there is a dissensus on the passing of ownership, the conclusion of a ‘real agreement’ does not occur. This result may appear strange, at least at first sight, because the transferor violates his contractual obligation (arising from the underlying contract) to transfer ownership immediately. Nevertheless, the supplier will be in default, since he has not fulfilled his contractual obligation (to transfer ownership) in due time and,

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350 This is one of the main arguments of F. Bydlinski; cf. F. Bydlinski, FS Larenz, 1025 (1034 f).
351 Cf. Iro, Sachenrecht’, no. 6/40. However, this does not mean that it is legally impossibly to construe a valid ‘real agreement’ at the time of conclusion of the contract in the case of unascertained goods: According to the general rules on juridical acts, a valid ‘real agreement’ only requires that its object is at least identifiable. – Further arguments against Spielbüchler’s and F. Bydlinski’s theory are listed by Welser, JBl 1975, 220; Koziol/Weber, Grundriss I’, 325 f.
352 This is called a ‘subsequent unilaterally declared reservation of title’ (nachträglicher einseitig erklärtter Eigentumsvorbehalt).
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...therefore, can be sued to transfer ownership immediately (§ 918 ABGB). In some constellations, the result of the application of the traditional opinion is also considered to be quite equitable by some scholars: If the transferee appears to be insolvent or close to insolvency, such a unilateral reservation of ownership is considered to be an adequate and effective means of protecting the economic interests of the supplier, since it provides him with a right of separation and recovery (Aussonderungsrecht) in the case of bankruptcy. Furthermore, if the transferee sues for the transfer of ownership, the supplier, according to § 1052 ABGB, can only be ordered to transfer ownership reciprocally to and simultaneously with the payment of the full purchase price (so-called Unsicherheitseinrede, § 1052, 2nd sentence ABGB, which gives the debtor the right to withhold performance until the other party provides him with security for his claim, provided that there is a risk that the debtor’s claim will not be fulfilled due to the deteriorating financial situation of the other party; further, it is required that the first party must have been innocently unaware of the deteriorating financial situation at the time of concluding the contract). The transferee, on the other hand, still has the possibility to obtain ownership by paying the purchase price.

Besides the problem of the insolvency of the transferee, the two theories also lead to different results if the purchased (and delivered) goods become the object of enforcement measures taken by a creditor of the buyer: If ownership has passed to the transferee (Spielbüchler, F. Bydlinski, OGH), the former owner cannot recover the goods (and, therefore, may be unprotected) if the purchase price remains unpaid. If, on the other hand, he is still the owner of the goods (according to the traditional opinion), he has a right to object to the execution according to § 37 EO (so-called Exzindierungsklage); if his property has already been sold forcibly in a compulsory sale (Zwangsversteigerung), he can claim for the proceeds of that sale from the transferee’s creditor.

Different consequences may also result in the case of the incapacity of one of the parties at the time of delivery (which will not happen often, since this party will also regularly lack legal capacity at the time of the conclusion of the underlying contract): According to Spielbüchler’s and F. Bydlinski’s theory, this will have no effect on the transfer of title, as the ‘real agreement’ has already been concluded at the time of the conclusion of the

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355 In this case, the declaration of intention (Willenserklärung) of the supplier (to transfer ownership) is deemed to be made when the judgment becomes non-appealable (Rechtskraft, § 367 EO).

356 Cf. the discussion in Bollenberger, Irrtum über die Zahlungsunfähigkeit 79-88, 87; see also Hoyer, Einseitig erklärter Eigentumsvorbehalt? WBl 1995, 181 (183 ff); Iro, Sachenrecht, no. 6/40. In OGH 5 Ob 18/97a, ecolex 1997, 424 (Wilhelm), also the Supreme Court has shown sympathy for the argument of the ‘Unsicherheitseinrede’.

357 By a claim ex unjustified enrichment (§ 1041 ABGB); so-called abgeirrte Exekution. See also 1.4.2.(b) and 15.2.
underlying contract;\textsuperscript{358} ownership will, therefore, pass at the moment of delivery. According to the other theory, which assumes that the ‘real agreement’ is concluded at the point in time of delivery, the ‘real agreement’ will be invalid on account of incapacity. The consequence of this concept would be that ownership does not pass. However, according to another general rule, a person subject to an incapacity can validly discharge obligations, provided that they have been validly created and that their performance is due (§ 1421 ABGB). It is generally considered that such a valid performance can also be made where performance involves a juridical act.\textsuperscript{359} As a result of applying this rule, it could be argued that a ‘real agreement’ concluded by an incapable transferor is to be considered as being valid. The question, however, does not seem to be discussed more closely in Austria.\textsuperscript{360} Furthermore, § 1421 ABGB will not apply where the transferee (not the transferor) is subject to an incapacity.

5.6. Delivery

Besides the aspect of the ‘real agreement’ discussed above, the requirements of a ‘legal mode of acquisition’ (rechtliche Erwerbungsart) and a ‘legal handing over and acceptance’ (rechtliche Übergabe und Übernahme), as mentioned in §§ 380, 425 ABGB, doubtlessly contain a merely factual aspect: delivery (Übergabe, Tradition). Provided that the other transfer requirements are fulfilled, ownership passes to the transferee with the \textit{transfer of possession}.\textsuperscript{361} With respect to movable property, §§ 426-429 ABGB distinguish several forms of \textit{traditio} (physical delivery and equivalents to delivery). This list of legally accepted ways of transferring possession is, in principle, a closed one. The parties are not free to create additional forms of ‘delivery’ by mutual

\textsuperscript{358} Based on this theory, one could also argue that where the transferor was additionally subject to an incapacity at the time the underlying contract was concluded, a ratification of that contract (by the legal representative) should be interpreted as covering the real agreement as well.

\textsuperscript{359} Cf. Mader/W. Faber in Schwimann, ABGB VI\textsuperscript{1}, § 1421 no. 1.

\textsuperscript{360} Other authors state – however without taking into account the named rule in § 1421 ABGB – that transferring ownership in fulfilling one’s obligation from a contract for sale by virtue of a real agreement will require legal capacity; see Kozioll/Welser, Grundriss I\textsuperscript{1}, 95.

\textsuperscript{361} The various forms of tradition suitable for transferring ownership, which will be discussed below, are usually equated with the acquisition of possession (Besitz). With regard to the definition of possession in § 309 ABGB (actual physical power plus intention to have the thing as one’s property), this definition, of course, suits the regular cases. In the discussion, however, normally only the aspect of obtaining actual physical power is regarded as important. Regularly, the ‘intention-component’ of possession is not literally stressed in this context, except with regard to the forms of ‘traditio by declaration’ (Übergabe durch Erklärung) provided for in § 428 ABGB (cf. 5.6.4.-5.6.6., below).
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agreement. Practically, however, these rules already allow for a considerably wide scope of arrangements. The ABGB’s rules are supplemented by some specific rules in other statutory provisions, in particular governing the transfer by documents of title, and some rules on registration. All these issues will be discussed in the following sections.

No delivery or delivery equivalent is required for the transfer of sea-going vessels, under the condition that they have been registered.

The Austrian delivery rules imply that delivery is a voluntary act of the transferor. This means that a buyer could not acquire ownership by unilaterally taking away the movable from the seller without the latter’s consent. However, it is sometimes argued that the seller, in such a situation, could not claim back the item based on his right of ownership (revindication), because the agreement to sell provides the buyer with a right to possess the object. If so, formally, the transfer of ownership could be perfected by a subsequent brevi manu traditio (whereby the agreement of the transferor could be substituted by a court order granted in enforcement proceedings).

5.6.1. Physical delivery (§ 426 ABGB)

According to § 426 ABGB, movable property is ‘regularly only’ transferred by physically handing over the object. In Austrian law, this concept of physical delivery is understood in a rather broad sense: The characteristic requirement is that the acquirer obtains actual physical power over the thing (unmittelbare Gewahrsame), which has to be assessed in accordance with generally accepted standards (Verkehrsanschauung). Therefore, it is not necessarily required that both parties are present at the time of delivery (although they normally are). It is also possible that the acts of handing over (by the transferor) and acceptance (by the transferee) take place one after another.

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362 Spielbüchler in Rummel, ABGB I, § 425 no. 2.
363 See 5.6.8.(a), below.
364 Which can, of course, be executed by way of enforcement, in case the transferor should refuse to deliver the goods.
365 In most court decisions and legal literature, this is not spelled out explicitly. However, the examples and formulations used form a rather clear picture in this respect.
366 Klang in Klang, ABGB II, 218. Cf. also OGH SZ 9/283 (from 1927), where a landlord, who was entitled to receive two cows as the annual ‘price’ payable under a leasing contract, took the cows away arbitrarily after not receiving them from the tenant, and the tenant’s claim for revindication was denied with the argument that the bringing of this claim was an ‘abuse of law’. On this case and similar decisions, see Mader in FS Mayer-Maly (2002) 417 (420 ff).
367 Other forms of ‘delivery’ are provided for in the subsequent provisions of the ABGB (§§ 427-429). The formulation, however, shows that physical handing over is considered as being the paradigmatic case in the concept of the ABGB.
368 Cf. Spielbüchler in Rummel, ABGB I, § 426 no. 2; Iro, Sachenrecht, no. 2/34; Koziol/Welser, Grundriss I, 236 f.
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another, e.g., where the sold goods have been placed at the buyer’s disposal by the seller and the buyer collects them the next day\textsuperscript{369} or where bricks are placed on the buyer’s building site when the buyer is absent. Erecting a gravestone on a cemetery will also be considered as being covered by § 426 ABGB.\textsuperscript{370}

5.6.2. Symbolic delivery (§ 427 ABGB)

Provided that delivery ‘from hand to hand’ in the sense of § 426 ABGB is impossible or unreasonable, § 427 ABGB allows for a ‘transfer by signs’ (Übergabe durch Zeichen), also known as ‘symbolic delivery’ (symbolische Übergabe).

(a) The scope of this rule is a limited one, since § 427 ABGB explicitly provides that the ‘symbolic delivery’ in the sense of this provision is subsidiary to physical delivery: ‘Symbolic delivery’ is only possible where ‘physical delivery’ in the sense of § 426 ABGB is impossible or ‘unreasonable’ (unzweckmäßig, untunlich). The ‘unreasonableness’ of physically handing over may, in particular, be caused by the weight or dimension of the object of transfer, by its location or quantity, or because it is joined to other property. Consequently, § 427 ABGB applies particularly where a big quantity of goods stored in a stockroom or warehouse (because it would be economically unreasonable to hand over each single item) or other groups of assets (Sachgesamtheiten) are transferred, such as all books of a library or the fittings and furnishings of an office. Furthermore, § 427 ABGB applies to heavy and bulky machines (because of their weight) and to goods which are stored in a remote place (e.g., freight and cargo) or at a location which is unknown.\textsuperscript{371}

According to the subsidiary character of § 427 ABGB, the transfer of ownership under this rule fails where ‘physical delivery’ can be effected without having to make any unreasonable efforts. An important practical question has been whether a car can be transferred under § 427 ABGB by just handing over the vehicle documents or by placing visible markings on the car (as a ‘symbol’). The courts answered this question in the negative: The rule on

\textsuperscript{369} Cf. OGH 7 Ob 266/62, EvBl 1963/24; OGH 6 Ob 87/64, SZ 37/48.

\textsuperscript{370} OGH 1 Os 604/48, EvBl 1948/944. Further cases and examples are listed by Mader in Kletecka/Schauer, ABGB, § 426 no. 2; Spielbüchler in Rummel, ABGB I, § 426 no. 2.

\textsuperscript{371} A comprehensive list of cases is provided by Spielbüchler in Rummel, ABGB I, § 427 no. 3; see also Mader in Kletecka/Schauer, ABGB, § 427 nos. 2 and 3. On the symbolic delivery of goods stored in a stockroom, see also Migsch, Faustpfandprinzip und Publicitätsprinzip, FS Welser (2004) 711 (with a particular focus on the creation of security rights in such goods: § 427 ABGB applies both to transfers as well as to the creation of security rights).
'symbolic delivery' is inapplicable since it is possible and feasible to transfer
the actual physical power over the car.\footnote{OGH 3 Ob 933/28, SZ 10/266; OGH 3 Ob 29/70, EvBl 1970/374; OGH 3 Ob 116/84, SZ 58/1 and others; for further decisions cf. Mader in Kletecka/Schauer, ABGB, § 427 no. 4.}

It must be clarified, however, that the practical importance of the rule's subsidiary character is not that remarkable in relation to the transfer of ownership. Since Austrian law also allows for a transfer of ownership by \textit{constitutum possessorium} (§ 428 ABGB, without requiring that physical delivery must be impossible or unreasonable), and the parties' consent to a 'symbolic delivery' will regularly imply a \textit{constitutum possessorium} as well, the transfer of ownership will be effective based on this other rule.\footnote{Mader in Kletecka/Schauer, ABGB, § 427 no. 1; Eccher in KBB, ABGB\textsuperscript{2}, § 427 no. 1.} The subsidiary character of symbolic delivery is, however, of significant practical importance for the creation of proprietary security rights, where a \textit{constitutum possessorium} is not sufficient.

According to the text of § 427 ABGB, this rule also seems applicable to ‘claims’ (\textit{Forderungen}).\footnote{The provision explicitly mentions ‘Schuldforderungen’.} It is, however, generally accepted that the assignment of claims (\textit{Forderungsabtretung, Zession}) is not governed by the property law rules on the transfer of movables, but rather by §§ 1392-1399 ABGB, which belong to the law of obligations. These rules also require a ‘real agreement’ (\textit{Verfügungsgeschäft}), but no \textit{traditio} of any kind.\footnote{A certain exception exists only with regard to the assignment of claims for security purposes (\textit{Sicherungszession}), which requires some kind of publicity under Austrian law; cf. Heidinger in Schwimann, ABGB VI\textsuperscript{3}, § 1392 nos. 23 ff.} § 427 ABGB only applies to claims, which are embodied in bearer instruments or order instruments (\textit{Inhaber-} and \textit{Orderpapiere}), such as bills of exchange (\textit{Wechsel}), cheques (\textit{Scheck}) and savings bank books (\textit{Sparbuch}).\footnote{For more detailed information see for instance Spielbüchler in Rummel, ABGB I\textsuperscript{3}, § 427 no. 2. Cf. also § 1393 ABGB.}

\textbf{(b)} In order to effect a transfer of ownership by ‘symbolic delivery’ in the sense of § 427 ABGB, some symbolic act must be performed. The provision provides some examples. Among the most important categories is the transfer of \textbf{documents} which are capable of proving – to anyone or, at least, to the person who has physical control over the goods – that the transferee is entitled to the goods. These may be ‘documents of title’ in the strict sense (\textit{e.g.,} a bill of lading),\footnote{Which are, in addition, governed by specific provisions, see 5.6.3. below.} deposit receipts, pawn tickets or certificates issued by a public authority.\footnote{Spielbüchler in Rummel, ABGB I\textsuperscript{3}, § 427 no. 4. The prevailing opinion nowadays seems to be that the document may prove the transferor’s right of ownership, a claim for the return of the object against a third party having it in his possession, or the transferee’s acquisition of ownership; in this sense also Koziol/Welser, Grundriss I\textsuperscript{3}, 266; the whole issue is not undisputed.} The documents themselves must be transferred...
according to the (other) transfer rules for movables in §§ 426, 428 or 429 ABGB\textsuperscript{379} or, in the case of ‘documents of title’, in accordance with the relevant additional prerequisites (such as endorsement), which are imposed by the commercial law provisions.

Furthermore, the ‘symbolic delivery’ rule of § 427 ABGB mentions the delivery of ‘tools’ (Werkzeuge), which enable the transferee to obtain exclusive physical power over the object. A classical example is to hand over the keys to a depot of goods, or the keys or other instruments, which are necessary to operate the machine that is the object of the transfer.\textsuperscript{380} Merely telling the transferee the password to the depot has been considered sufficient by an old Supreme Court decision.\textsuperscript{381} If the transferor secretly keeps a second key, ownership is nevertheless considered to pass. It is seen as crucial that, from the transferee’s perspective, the transferor no longer has access to the goods.\textsuperscript{382} Especially with regard to this category of ‘symbols’, the field of application of § 427 ABGB often seems difficult to differentiate from the rule on physical delivery (§ 426 ABGB), since the latter provision is generally interpreted extensively.

Finally, ‘signs’ in a narrow sense can be used. In order to effect a ‘symbolic delivery’ in accordance with § 427 ABGB, they must be of such quality that they make the transfer of ownership perceptible to anyone who may be interested in the object of transfer. Hence, this requirement will be met, for instance, by affixing signs or adhesive labels, showing the name of the transferee and indicating his acquisition of ownership, on the relevant movable.\textsuperscript{383} The mere creation of an inventory or other register has not been considered sufficient by some (old) Supreme Court decisions.\textsuperscript{384} Where a symbolic delivery shall be made by affixing signs in a warehouse, legal scholars argue that affixing these signs only in some places in the warehouse will not meet the requirements of § 427 ABGB, as some items could be removed

\textsuperscript{379} Cf. Iro, Sachenrecht’, no. 2/36: Symbolic delivery in the sense of § 427 ABGB will typically not be possible with regard to these documents, as physical transfer will usually be possible and feasible.

\textsuperscript{380} Cf. Spielbächler in Rummel, ABGB I’, § 427 no. 5 with reference to (older) court practice.

\textsuperscript{381} OGH 3 Ob 41/49, SZ 22/27; contra: Spielbächler in Rummel, ABGB I’, § 427 no. 5.

\textsuperscript{382} See Spielbächler in Rummel, ABGB I’, § 427 no. 5 and the references given there.

\textsuperscript{383} OGH 6 Ob 246/65, SZ 38/190; OGH 12 Os 197/66, EvBl 1967/357. – A mere nameplate has not been considered sufficient by an older decision: OGH 3 Ob 840/28/1, JBl 1928, 562.

\textsuperscript{384} OGH 7 Ob 98, 99/63, HS 4274; obviously maintaining this view: Spielbächler in Rummel, ABGB I’, § 427 no. 5.
without noticing the warning sign. Some Supreme Court judgments on this question, however, take the opposite view.

5.6.3. Transfer by documents of title

In addition to the general rule on symbolic delivery in § 427 ABGB, Austrian commercial law provides for three specific types of ‘documents of title’ (Traditionspapiere), the transfer of which has the same proprietary effects as the delivery of goods. These three documents are the warehouse receipt (Lagerschein), the inland waterway bill of lading (Ladeschein) and the (marine) bill of lading (Konnossement). They are issued by the person taking the goods into his possession for the purposes of transport or storage, are handed over to the person delivering the goods, and embody the possessor’s obligation to hand over the goods. The creditor of this obligation to deliver can be named, an order clause can be added, or the bearer of the document can be declared to be entitled. In the case of a warehouse receipt, the specific transfer function only applies where the document is made out to order. It is, however, argued that such restrictions of the proprietary effects, which are imposed by the commercial law rules on negotiable instruments, do not hinder a valid transfer under § 427 ABGB.

Austrian doctrine holds that the rules on transfer by document of title can be integrated into the general rules of transfer by delivery (§§ 425 ff ABGB), supplementing the rules of equivalents to delivery by providing for a special form of symbolic delivery in the sense of § 427 ABGB. As this general rule on symbolic delivery already forms part of Austrian law, it is argued that the extensive theoretical disputes as to the ‘nature’ of these rules and their role in the general transfer system, which take place in respect to German law, are not relevant for Austria. In this view, a transfer of ownership by documents of title will require a) a valid obligation and a ‘real agreement’ as to the transfer of the goods, and b) a valid transfer of the
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document under the respective commercial law rules, which will include endorsement in case the document has been made out to order. In other words: Delivery (valid transfer) of the document substitutes the delivery of the goods. In addition, the commercial law rules require that the warehouse keeper or carrier, respectively, has actually accepted the goods. There are slightly different views as to the question of whether the warehouse keeper or carrier must still be in possession when the document is delivered or whether it also suffices that he regains possession at a later point in time. But, it is generally agreed that there will be no ‘traditio effect’, if the warehouse keeper or carrier has already delivered the goods to someone else or has lost the goods, as all equivalents to delivery are, in some way, understood as deriving from actual physical control.392

A certain difference to the general rule on symbolic delivery in § 427 ABGB is that the special commercial law rules do not contain a requirement that the transfer of physical control of the goods be ‘unreasonable’. This is rather clear from the wording of §§ 424, 450, 650 UGB/HGB; and, it would certainly not fit practical commercial needs if one had to verify the existence of such ‘unreasonableness’ in each individual case.

As to the relation of these transfer rules to the general ABGB provisions, it is argued that where a ‘document of title’ has been issued, effecting a transfer by giving an order to a third party in possession of the asset to be transferred (Besitzanweisung),393 or the mere assignment of the claim embodied in the document (in both cases: without delivery or transfer of the document) will be impossible.394 On the other hand, the rules on transfers that are effected by handing over the goods to the carrier (§ 429 ABGB)395 are not considered to be excluded by the existence of a document of title so that, in case of carriage, the transferee will often have already obtained ownership when the goods were handed over to the carrier.396

The prevailing opinion now accepts an analogous application of the transfer rules in §§ 424, 450, 650 UGB/HGB for other documents developed

392 G. Roth, Wertpapierrecht, 122.
393 See infra, 5.6.6.
394 G. Roth, Wertpapierrecht, 122. This is also generally agreed upon in Germany, where a transfer can normally be made by assigning the (obligatory) claim for recovery; cf. Hakenberg in Ebenroth/Boujong/Joost, HGB, § 364 no. 20: ‘Sperrwirkung’. Under German law, this consequence is rather evident, since the transferor’s claim for recovery is embodied in the document. As the Austrian construction of a ‘transfer by order’ is somewhat different to the German approach, the statements in Austrian literature as to this question are rather cautious.
395 See infra, 5.6.7.
396 In this sense: G. Roth, Wertpapierrecht, 120. The question does not seem to be discussed intensively. Under German law, it does not arise at all, since there is no rule comparable to § 429 ABGB in German law.
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by commercial practice, provided that they come very close to the documents regulated by these statutory provisions.397

In general, one can observe that there has been a rather limited number of court decisions involving the issue of transfers by documents of title under Austrian law.

5.6.4. Brevi manu traditio (§ 428, 2nd alternative ABGB)

§ 428 ABGB contains two separate provisions that are subsumed under the term ‘delivery by mere declaration’ (Übergabe durch Erklärung): the brevi manu traditio (also called Übergabe kurzer Hand), in its second alternative, and the constitutum possessorium (Besitzkonstitut), which is mentioned in the first alternative of this provision. Also, the so-called ‘delivery by order to a third party in possession (Besitzanweisung), which is not provided for explicitly in the ABGB but is generally accepted by legal literature and by the courts, is often counted as a form of ‘delivery by declaration’. All these categories have in common that the direct physical control over the property remains unchanged. And, in contrast to the ‘symbolic delivery’ in the sense of § 427 ABGB, all these forms are not subsidiary to physical delivery. They, therefore, can be chosen as primary forms, i.e., even if it is possible and suitable to hand over the property physically.

The brevi manu traditio provided for in the second alternative of § 428 ABGB covers situations where the acquirer already has physical control over the asset; for instance, where the owner of a book has lent it to someone and now intends to sell and transfer it to the borrower. In this case, the law requires that the seller makes obvious his intention that, from now on, (or from some future date onwards)398 the acquirer shall possess the property based on the right of ownership. This ‘declaration’ of the transferor’s intention does not have to be express. According to the prevailing opinion, the intention to transfer ownership can also be ‘declared’ implicitly; the decisive criterion is that there shall not be any reason to doubt this intention.399 Of course, this can cause practical problems.

397 Cf. OGH 3 Ob 519/92, RdW 1992, 402, where the FIATA Combined Transport Bill of Lading (FBL) was accepted as an order instrument with a proprietary function equal to delivery. See also G. Roth, Wertpapierrecht’, 111. In OGH 8 Ob 703/88, SZ 62/138, on the other hand, it was stated that the Luftfrachtbriefdritt (a kind of airway bill) is no ‘document of title’.

398 The declaration can also be made in advance (antizipiert).

The *brevi manu traditio* also applies to situations where, originally, *both* the transferor and the transferee have actual physical power over the object (*gemeinsame Gewahrsame*).400

### 5.6.5. Constitutum possessorium (§ 428, 1st alternative ABGB)

(a) The *constitutum possessorium* (*Besitzkonstitut, Besitzauftragung*) could be called the opposite of the *brevi manu traditio*: The object remains under the physical control of the transferor, who agrees to *hold* it – as from a specific point in time – *for the acquirer*. The relevant point in time may be the one of the conclusion of this agreement or any later point in time, in other words: A *constitutum possessorium* can also be stipulated in advance (‘anticipated *constitutum possessorium*’).401 At the decisive point in time, the acquirer becomes owner and indirect possessor, and the former owner remains the mere *detentor*402 of the object.

In accordance with the rules on the *brevi manu traditio* mentioned above, the law requires that the transferor ‘makes obvious his intention’ to hold the object in the name of the acquirer from the relevant point in time. The prevailing understanding of this rule is that the intention to transfer must be *clear only to the parties of the transaction* (not to third parties).403 It is, however, stressed in academic writing that it must be possible to *prove* the process of transfer, in order to avoid the unlawful co-operation of the transferor and the transferee, in particular where the property is attached by creditors of the transferor.404 According to the general rules on the interpretation of contracts, it is not required that the parties literally stipulate a ‘transfer of ownership’. This means that a *constitutum possessorium* can also be agreed upon *impliedly by conduct*, *i.e.* by taking into account all the circumstances and aspects of the contractual agreement. Where someone bought goods subject to the agreement that the seller should keep the goods in order to sell them to third parties, acting as the buyer’s commission agent, it was held that the seller and the buyer had agreed on a *constitutum possessorium*, by which the buyer acquired the ownership of the goods. The court’s argument was that where parties agree on a sale by commission, the principal will not, regularly, transfer ownership to the agent who will then sell the goods in his own name; the agent will rather sell them on the account of the

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400 OGH 5 Ob 465/58, SZ 31/161; OGH 6 Ob 94/64, SZ 37/43; OGH 3 Ob 104, 105/71, EvBl 1972/98; Spielbüchler in Rummel, ABGB 1’, § 428 no. 3.
401 Cf., for instance, Spielbüchler in Rummel, ABGB 1’, § 428 no. 2.
402 On the concept of detention, see 2.1.1., above.
403 This view is reflected in a number of Supreme Court decisions (whereas not being spelled out explicitly in all cases), cf. OGH 1 Ob 670/90, JBl 1991, 805.
404 See, for instance, Spielbüchler in Rummel, ABGB 1’, § 428 no. 2; Mader in Kletečka/Schauer, ABGB, § 428 no. 2.
principal. Therefore, it was concluded that in the named situation, the parties intended the buyer (principal) to be the owner of the goods (until they would be sold and transferred by the agent based on his authority to dispose). It has also been ruled that the parties’ agreement must contain not only a transfer of physical control, but an obligation of custody assumed by the transferee; the mere declaration by the transferor that the buyer ‘can freely dispose of the goods and can collect them any time’ was, therefore, not regarded as sufficient. In another case of acquisition by means of indirect representation, the Supreme Court argued that an (implied) transfer by *constitutum possessorium* (i.e. the agent transfers the goods to the principal upon obtaining possession of them) can only be presumed where the agent shall continue to have physical control over the goods, but not where the parties intend to deliver the goods to the principal in the near future anyway. Where spouses agree upon establishing a community of property, this agreement is understood to contain a *constitutum possessorium* concerning all movable property existing at this point in time, resulting in the co-ownership of the other spouse; with regard to movables acquired at a later point in time by one of the spouses, an anticipated *constitutum possessorium* is presumed.

It should be mentioned that agreements upon a *constitutum possessorium* are anything but frequent in Austrian legal practice. One can assume that ordinary people and perhaps also a remarkable number of businessmen are not aware of this possibility of transferring ownership. Another reason for the small practical importance is that the standard terms of sales contracts usually contain retention of title clauses, providing for a transfer of ownership even after delivery. Due to the unitary concept of ownership in Austrian law, the right of ownership can, in these situations, operate as a security device for the transferor, but it can not, at the same time, be used for protecting the buyer’s interests (of being protected against the seller’s creditors) prior to delivery. The existence of a *constitutum possessorium* in stan-

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405 OGH 1 Ob 670/90, JBl 1991, 805.
407 In the given context, this formulation is clearly not to be understood in the sense that the buyer was granted an ‘authority to dispose’ of the goods by creating or transferring rights in rem in these objects. What the parties intended was to give the buyer a right to make ‘factual’ disposals, e.g., to collect the goods or have them collected by someone else.
408 OGH 6 Ob 226/71, SZ 44/157.
409 OGH 3 Ob 120/95, RdW 1996, 468.
410 Cf. Koziol/Weser, Grundriss I, 481 with further reference.
411 One could, of course, stipulate for a transfer of ownership at the time of payment, irrespective of the payment being made before or after delivery, but this hardly ever occurs in commercial practice. The usual retention of title clause will provide that ownership ‘remains with the seller until full payment of the purchase price’, but the
dard terms and conditions seems to occur only exceptionally in practice.\textsuperscript{412} Furthermore, as has been shown above, courts are rather reluctant to presume implicit stipulations of a \textit{constitutum possessorium}.

\textbf{(b) It is partly argued that, from the perspective of third parties, the \textit{constitutum possessorium} is a rather problematic form of \textit{tradition}, since the original owner remains in physical control and the transfer of the right in \textit{rem} may not be discernable to third parties.\textsuperscript{413} The traditional argument in this respect is that particularly future business partners of the seller may, based on the latter’s physical control, conclude that he is the owner of the respective goods, and that these goods can be made subject to enforcement if their future claims remain unsatisfied. Based on such deliberations, which are reflected in the strict publicity requirement for pledges over movables (so-called \textit{Faustpfandprinzip}, cf. § 452 ABGB), the \textit{constitutum possessorium} is generally assumed to be \textbf{insufficient for creating security rights}, such as pledges or transfers of ownership for security purposes (\textit{Sicherungseigentum}).\textsuperscript{414}

\subsection*{5.6.6. Delivery by order to a third party in possession}

\textbf{(a) As mentioned above, Austrian law knows a third form of ‘transfer by declaration’: ‘Delivery’ by issuing an order to a third party in possession (so-called \textit{Besitzanweisung}). This form of transfer is not expressly provided for in the ABGB, but it is generally accepted by legal literature and the courts. Some try to derive it from an analogy to § 428 ABGB, others fall back on § 427 ABGB.\textsuperscript{415}

‘Delivery by order’ can be effected with regard to goods which are located neither on the transferor’s nor the transferee’s premises, but which rest with a third person (e.g., a warehouse keeper or a lessee). The right of ownership is transferred by the owner by simply giving an \textbf{order to the third person that the latter shall possess the goods for the acquirer}. Direct physical control remains with the third party, ownership passes at the moment when the third person receives the order – or at a later point in time if this is stated in the order (anticipated order, \textit{antizipierte Besitzanweisung}). Whether

\begin{itemize}
\item parties stipulating it will not thereby contract out of the delivery rule of § 426 ABGB concerning the case of prepayment.
\item Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 428 no. 2, reports one case where, according to standard terms, storing the goods with the seller shall transfer ownership to the buyer ‘only under certain conditions’; however, the reference provided for this case, unfortunately, seems to be incorrect.
\item E.g., Koziol/Welser, Grundriss I\textsuperscript{1}, 266.
\item See for instance Koziol/Welser, Grundriss I\textsuperscript{1}, 267, 337 f and 406 f; Spielbüchler in Rummel, ABGB I\textsuperscript{1}, § 428 no. 2.
\item Cf. Koziol/Welser, Grundriss I\textsuperscript{1}, 268 f; F. Bydlinski in Klang, ABGB IV/2\textsuperscript{2}, 659 ff; Iro, Besitzerwerb durch Gehilfen (1982) 84 ff.
\end{itemize}
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The third person has to consent to the order or not, has been discussed controversially. Nowadays, the opinion prevails that the third party’s consent is not required. This is based on the argument that the position of the third party can not be deteriorated by the passing of ownership anyway; the third party can exercise all rights against the transferee which it could have exercised against the transferor.\(^{416}\) However, if the third party is to exercise possession for the transferee under conditions different to those before the order was given, it is partly argued that the third party's consent is a prerequisite for the transfer.\(^{417}\)

The order must be given by the transferor, as he is the one who has already entered into a legal relationship with the third party and the latter possesses the movable for him. But the Supreme Court considers it sufficient that communication of the order to the third party is made by the transferee.\(^{418}\)

A transfer by the mere assignment of the transferor’s obligatory claim for recovery (against the third party)\(^{419}\) to the transferee – as provided for by § 931 of the German BGB (so-called Abtretung des Herausgabeanspruchs) – is not considered sufficient under Austrian law. The transferor would have to combine it with an order to possess for the transferee.\(^{420}\) A separate assignment of the (in rem) claim for revindication is also considered impossible. According to the prevailing opinion, claims directly based on a right in rem can only be transferred together with the property right.\(^{421}\)

(b) Examples: A has lent a book to B. Before B has finished reading it, A sells the book to C. In order to transfer ownership to C, A gives an order to B to hold the book for C. Another field of application of high practical importance is the so-called ‘purchase financed by a third party’ (drittfinanzieter Kauf): Car dealer A sells a car to B, who cannot presently pay the full purchase price. As A does not want or is not able to allow credit, a credit contract with bank C is concluded. To give the bank some security, A will deliver the car to B subject to a reservation of ownership and will – upon the receipt of the rest of the purchase price that is paid to him directly by C – transfer the ‘retained property’ (vorbehaltenes Eigentum) to Bank C. Since the

\(^{416}\) In such a case, the general rule of § 1401 (1) ABGB is considered to apply (so-called Anweisung auf Schuld), under which a debtor receiving such an order has to perform his obligation to another person in accordance with the content of this order. A comprehensive discussion is provided by F. Bydlinski in Klang, ABGB IV/2\(^{2}\), 657-669; see also Koziol/Welser, Grundriss I\(^{11}\), 268 f; Spielbüchler, Schuldverhältnis 136 f; Frotz, Kreditsicherungsrecht 68 f; for more recent references, cf. also Spielbüchler in Rummel, ABGB I\(^{1}\), § 428 no. 4.

\(^{417}\) In this direction: Koziol/Welser, Grundriss I\(^{11}\), 269; the whole issue is not undisputed.

\(^{418}\) OGH 6 Ob 632/91, eclex 1992, 768 (concerning leasing).

\(^{419}\) E.g., the lessor’s right to have the object returned after the end of the leasing period.

\(^{420}\) Cf. for instance Koziol/Welser, Grundriss I\(^{11}\), 269; Mader in Kletečka/Schauer, ABGB, § 428 no. 8.

\(^{421}\) Koziol/Welser, Grundriss I\(^{11}\), 269 with further reference.
car has already been handed over to B, the transfer of ownership from A to C will be effected by a ‘transfer by order’.

5.6.7. Delivery in the case of transport by an independent carrier (§ 429 ABGB)

(a) Where the goods have to be transported from the seller to the buyer, three constellations have to be distinguished with regard to the transfer of ownership: If the buyer has to collect the goods himself, ownership will pass upon the physical handing over of the goods to him at the place of performance. If, on the other hand, the seller is obliged to deliver at destination, ownership will pass upon the handing over of the goods there. In both cases, the general rule on physical delivery applies (§ 426 ABGB). Third, the contract between the transferor and the transferee may provide that the transferor is only obliged to send the goods to the acquirer, in which case the transport will be made by a third party carrier. This situation is explicitly regulated in § 429 ABGB, which regularly provides for a passing of ownership at the time and place of shipment.422

More precisely, § 429 ABGB contains two provisions, which stand in a relationship of rule and exception: The first one, which is, from the wording of the provision, regarded to govern the ‘regular case’, provides that ownership shall pass only when the transferee physically obtains the goods.423 In exception to this, ownership will pass upon the handing over to the carrier, when the transferee ‘has himself chosen or accepted the way of transport’. – However, this relationship of rule and exception is turned upside down by the prevailing opinion nowadays, for it is generally assumed that the usual modes of transport (e.g., railway, postal service, ship or aircraft, as the case may be) are ‘accepted’ by the transferee implicitly.424

(b) The rule contained in § 429 ABGB is also considered decisive for the passing of the risk, since the ABGB does not handle this problem in a separate provision. A separate rule on commercial sales, which generally provided for the passing of risk upon the handing over to the (first) carrier (i.e. without excepting unusual modes of transport)425 has recently been abol-

422 The provision is, however, often regarded as merely being a special application of the general rules laid down in §§ 426, 428 ABGB. In this sense, for instance, Spielbüchler in Rummel, ABGB I, § 429 no. 1; see also Iro, Sachenrecht, no. 2/42.
423 This is consistent with the rule of § 426 ABGB, since the acquirer obtains physical power over the object at this very moment.
424 Cf. Koziol/Welser, Grundriss I19, 269; Spielbüchler in Rummel, ABGB I, § 429 no. 3; extensive discussion is provided by F. Bydlinski in Klang, ABGB IV/22, 141-148 (also dealing with the issue of the passing of risk).
425 Art. 8/20 4. EVHGB. The rules was applicable also where only one of the parties was a professional (cf. § 345 HGB).
The reason for this modification was that the legislator intended to simplify and harmonise the law with regard to the passing of ownership and risk.\footnote{By the so-called Handelsrechts-Änderungsgesetz BGBl I 2005/120, in force as of 1 January 2007. – See also sub 10.1.3., below.}

The dogmatic explanation usually given for this rule is based on the argument that the acquirer should bear the risk because it is in his interest that the goods are transported to his premises.\footnote{See the reasoning in the government’s legislative proposal, RV 1058 BlgNR 22. GP, at 82; Schauer in Krejci, Reformkommentar, 4. EVHGB no. 3.} Considering modern economic life, also several arguments for the opposite solution may be found (\textit{i.e.} the passing of ownership and risk only when the goods are handed over to the acquirer): Distance selling, for instance, is definitely not only advantageous to the purchaser; the seller may also save costs with such a sales strategy and, therefore, may be able to offer attractive prices, thereby increasing his turnover. Also, it will normally be the seller who chooses the carrier and, therefore, the seller will have more influence on the carrier than the buyer. Finally, especially where the supplier is a big company, which performs a great number of distance selling contracts, it will also be easier and cheaper for the supplier to obtain insurance against the risks of transportation. In recent literature, it has been discussed that § 429 ABGB itself (as to the passing of ownership, but indirectly also as to the passing of the risk) could be subjected to reform. The argument was that, with regard to consumer sales, it appears problematic to pass all risks of transport on to the consumer.\footnote{F. Bydlinski, in Klang, ABGB IV/2, 141 ff; Iro, Besitzerwerb durch Gehilfen, 83 f. For a critical discussion, see Ch. Rabl, Gefahrtragung 119 ff, 130 ff.}

\textit{(c)} For the seller’s right of stoppage in transit, see supra, 5.2.2.(c), and infra, 9.2.1.(b)(iv). For the consequences of stoppage on the risk of loss, see infra, 10.1.3. in fine (also touching upon property law implications).

### 5.6.8. Transfer by registration

It has already been mentioned that registration is of central importance for the transfer of ownership – and the creation or transfer of other rights \textit{in rem} – of immovable property (land). With regard to corporeal movable assets, on the other hand, registration plays a rather limited role in Austrian property law.

\footnote{See Schauer in Krejci, Reformkommentar, 4. EVHGB no. 4, with reference to the German development, where § 447 BGB was declared inapplicable to consumer sales in 2002 (§ 474 (2) BGB).}
(a) Ships

Registration is only relevant for certain ships. The statutory provisions governing this area are of German origin and were introduced in 1940, which explains the partly different concepts these rules are based on (cf. a principle of abstraction). As to the relevance of registration, one has to distinguish sea-going vessels (Seeschiffe) and inland vessels (Binnenschiffe).

The transfer of ownership of sea-going vessels, once they have been registered, only requires the consent of the parties to the transfer of ownership (‘real agreement’, Verfügungsgeschäft). Neither a specific form in relation to the agreement, nor registration, delivery or an equivalent to delivery in the sense of §§ 426 ff ABGB are required. The reason for this simplified transfer rule is seen in the practical need for a possibility to make rapid dispositions. According to the statutory provision, even a valid obligation is not essential, which fits the German principle of abstraction. Before a vessel is registered, however, any transfer must be made in accordance to the general Austrian rules on the transfer of movable property, i.e. based on a valid obligation, a ‘real agreement’ and delivery or an equivalent to delivery according to §§ 426 ff ABGB.

Only the transfer of ownership of registered inland vessels requires, in addition to a ‘real agreement’, a registration in the ship register. Registration, therefore, has a constitutive function as to the acquisition of ownership of such ships. If the parties agree that the transfer shall also cover accessories of the vessel (Zubehör), the transferee will acquire ownership of these assets upon acquiring the right to the ship. Before registration has been made, the general Austrian transfer rules will apply, parallel to the provisions governing sea-going vessels.

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430 The provisions are still in force and form part of Austrian law: OGH 6 Ob 251/00f, SZ 74/27.
431 See 5.4.3., above.
432 § 2 (1) of the ‘Act on Rights in Ships’ (Gesetz über Rechte an eingetragenen Schiffen und Schiffbauwerken, in short: Schiffsrechtegesetz, German Reichsgesetzblatt I 1940/1499.
433 OGH 6 Ob 251/00f, SZ 74/27, with reference to German literature.
434 OGH 6 Ob 251/00f, SZ 74/27.
435 § 3 of the ‘Act on Rights in Ships’ (cf. footnote 432). Before registration, the parties are bound to the ‘real agreement’ only under certain conditions, e.g., if they evidenced their consensus in a document before a court or notary public, or if they declare their consensus before the court, which keeps the register, § 3 (2) leg. cit.
436 § 4 leg. cit.
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(b) No constitutive registration: Aircraft, railway vehicles, cars

The transfer of ownership of aircrafts has to be registered in the aircraft register (Luftfahrtregister),\(^{437}\) but such registration has mere declarative character. For railway vehicles, there is no public register.\(^{438}\) For cars, there now is – as from 1 July 2007 – a general electronic register for cars (‘database for motor vehicle licensing’, Genehmigungsdatenbank).\(^{439}\) The registration in this database is not relevant for the transfer of ownership of or any other right in rem in a car; the main purposes seem to be the introduction of an EU-wide system that facilitates the treatment of car licensing and taxation issues, for instance cases of private imports. The database is also intended to combat fraud, as the car documents issued under the previous system were sometimes counterfeited and used for the illegal licensing of stolen cars. Only the number of licensing acts that have taken place in relation to a vehicle, which has been road-licensed in Austria, will be entered in the documents issued under this new system, but not the personal data of previous possessors. Such data will be kept by the authority, but is not accessible to the public. For this reason, buyers are now recommended to obtain information on previous owners from the seller, including contracts of sale and receipts, which may influence the possibility of a good faith acquisition from a non-owner.\(^{440}\) This new system’s relevance to property law, however, has not been subject to a detailed discussion in legal literature yet.

5.6.9. Conclusive remark on publicity:
Purpose and criticism of the delivery requirement

Doubtlessly, the underlying idea of the delivery principle in the Austrian Civil Code is to provide publicity (through possession). This has already been stated expressly by Franz von Zeiller, the main draftsman of the ABGB.\(^{441}\)

However, as far as the aforementioned transfer rules for tangible movable assets are concerned, contemporary legal literature identifies at least two problems with the idea of providing publicity: The more general aspect of

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\(^{437}\) Kept by the Austro Control GmbH, www.austrocontrol.at.

\(^{438}\) One of the sub-companies of the Austrian Railway Company (Österreichische Bundesbahn, ÖBB) keeps a type of database where all railway engines licensed in Austria are registered, including information about their owners. This has, however, no relevance for property law issues.

\(^{439}\) Kept by the Association of Insurance Companies (Versicherungsverband Österreich, VVO). The main provision regulating this database is § 30a Kraftfahrgesetz.


\(^{441}\) Cf. Ofer, Urentwurf I 213; Zeiller’s statement can be looked up for instance in Pletzer, Doppelveräußerung und Forderungseingriff (2000) 21.
the criticism is that – taking into account, for instance, the importance of reservation of ownership or leasing contracts nowadays – one may well doubt whether detention (possession) and ownership really coincide so frequently in everyday life that it would be justified to draw material consequences from the fact of detention. The second problem are the forms of ‘tradition by declaration’ established in § 428 ABGB (traditio brevi manu, constitutum possessorium), which provide almost no publicity. One may well say that, in this point, the principle of publicity is, in fact, breached. Also, the forms of symbolic delivery (§ 427 ABGB) and the ‘delivery by order to a third party in possession’ (Besitzanweisung) may, depending of the facts of the individual case, be considered problematic in the light of the idea of publicity.

5.6.10. Necessity of delivery in the case of an assignment or cessio legis?

A specific problem arises in the case of the reservation of ownership, when the seller (A) wants to transfer his (retained) ownership to a third person, e.g., a bank (C), who gave credit to the buyer (B) in order to enable the latter to purchase the goods. In this scenario, seller A will assign his claim for the purchase price to C by a juridical act; or, C will just pay A and demand that latter’s claim for the purchase price be transferred to him, in which case the claim will pass to C ipso iure, according to the rule of § 1422 ABGB (cessio legis). However, with regard to the transfer of retained ownership, there is controversial discussion in Austrian law: According to the majority of decisions of the OGH, the passing of ownership does not require an act of ‘delivery’ in such cases: Rather, ownership passes based on the mere agreement between A and C, or by operation of law in the case of a cessio legis (§ 1422 ABGB). According to the counter opinion, which seems to

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442 A good summary of the criticisms concerning the traditio principle is offered by Pletzer, Doppelveräußerung 24 f. She mainly quotes from German sources, but I assume that many Austrian lawyers will have somewhat similar ideas, although this does not lead to a broad academic debate. Also, Pletzer’s conclusion is not in favour of abolishing the delivery system. – See also supra, 1.1.3.(b).
443 In German: Vorbehaltenes Eigentum.
444 Transfer of the purchase-money claim by way of mutual agreement between A and C (rechtsgeschäftliche Zession, §§ 1393 ff ABGB).
445 So far, only the passing of the claim for the purchase price has been concerned (not the passing of the property right).
446 The same is argued for § 1358 ABGB, which applies where the paying person (C) was liable to perform payment to the creditor under a preceding legal relationship (such as a suretyship or other security instrument). – As far as the ‘automatic transfers’ under §§ 1422, 1358 ABGB are concerned, also the requirement of the ‘real agreement’
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prevail in legal literature, an act of publicity is required in these situations. The form of ‘delivery’ suitable in those situations is the transfer by order to the third party in possession, i.e. buyer B (Besitzanweisung).

A parallel discussion takes place on the transfer of the limited proprietary right of pledge (Pfandrecht).

5.7. Transferor’s right or authority to dispose

The person who transfers ownership must either be the owner or must have been authorised, by the owner, to legally dispose of the goods. Those requirements have been mentioned above, 5.1.2.(a). There seems no need for further discussion.

5.8. The role of payment

In principle, the payment of the purchase price plays no role in the Austrian rules on the transfer of ownership. However, two aspects shall be mentioned in this context:

1. The first aspect is usually discussed in the context of the reservation of title. This problem occurs when the parties agree to fulfil their obligations simultaneously but, actually, only the seller performs (by handing over the asset to the buyer, expecting the latter to pay the price immediately). In this case, the expectations of the seller are disappointed and one may ask how he should be protected.

For this scenario, Franz Bydlinski developed the figure of a kind of implied reservation of title: According to this theory, ownership, although delivery obviously took place, does not pass to the buyer, because the contractual agreement is to be implicitly understood in a way that ownership should only pass if the buyer pays the purchase price immediately. Substantially, this construction is based on a certain interpretation of the contract for sale

would, according to this theory, be ‘replaced’ by the operation of law. However, only the aspect of ‘delivery’ is the subject of discussion.

See, for instance, Koziol/Welser, Grundriss I, 415, who give reference to both positions.

See also infra, 15.4.


I.e., each party is bound to perform (only) upon the rendering of the counter-performance (in German: Leistung Zug um Zug).

In contemporary Austrian private law doctrine, this figure is known as ‘kurzfristiger Eigentumsvorbehalt’.

See F. Bydlinski in Klang, ABGB IV/2, 376-379; F. Bydlinski, FS Larenz 1025 (1036-1042); F. Bydlinski, Überflüssiger Eigentumsvorbehalt und schlüssige Argumentation, JBl 1977, 332.
and the ‘real agreement’, which, according to F. Bydlinski, is only one ‘part’ of the underlying contract.\textsuperscript{453} In the following years, many authors adopted Bydlinski’s idea.\textsuperscript{454} However, no decision on this issue seems to have been made by the OGH so far.\textsuperscript{455}

2. \textit{De lege ferenda}, F. Bydlinski once contemplated a change of the existing § 1063 ABGB to the effect that in all cases of sales on credit (Kreditkauf),\textsuperscript{456} the transferor should stay owner until the purchase price has been paid in full, unless the parties have agreed otherwise.\textsuperscript{457} This suggestion of a more or less automatic reservation of title, however, has never been adopted by the legislator.

5.9. The role of party autonomy

After all, although the transfer rules are, as such, cogent law and the list of forms of delivery and delivery equivalents is a closed one, there is still a wide range of possibilities for the parties to shape the transfer according to their preferences.\textsuperscript{458} In particular, the fact that the Austrian civil code accepts a \textit{constitutum possessorium} facilitates a transfer of ownership in many situations; e.g., where a ‘symbolic delivery’ in the sense of § 427 ABGB is impossible due to the subsidiary nature of this provision. However, a transfer by way of mere assignment of the transferor’s obligatory claim for recovery against a third party in possession (cf. § 931 German BGB, \textit{Abtretung des Herausgabeanspruchs}) can not be validly agreed upon by seller and buyer (the Austrian construction would require the giving of an order to the third person to possess for the transferee). If the parties to the transaction want to transfer ownership while the goods are being held by a third party for the transferor, but do not want to inform this third party of the transfer, they could, theoretically, agree that the seller will now possess for the buyer (con-

\begin{tabular}{l}
\textsuperscript{453} See supra, 5.5.2. \\
\textsuperscript{455} If one regards the idea of publicity as being of great importance (which I, personally, would be a little sceptic about), one may worry about third persons who trust in the external appearance of the buyer’s possession; all the more, because in other situations where seller and buyer explicitly agree on a reservation of title, this will normally be visible from the terms of the written contract (so that a creditor should know that he ought to check for indications that payment has been made); but, there will be no indication of a reservation of title in those situations. \\
\textsuperscript{456} Meaning that the parties have originally agreed that the price should be paid after delivery. On the other hand, in the constellations discussed under (a), above, the parties originally agree that both parties shall perform contemporaneously. \\
\textsuperscript{457} F. Bydlinski in Klang, ABGB IV/2, 450-452. \\
\textsuperscript{458} Most of the issues listed in the following have already been discussed in previous sections of chapter 5, so that no detailed references will be given here.
\end{tabular}
5. The system of transfer of ownership under Austrian law

stitutum possessorium) by remaining in indirect possession through the third person. Accordingly, party autonomy could also govern this situation. But this does not seem to be done frequently in practice.

Another technique to shape the transfer according to the parties’ needs is to carry out the necessary acts before they shall take effect, or even before they can take effect. This applies, in particular, to those equivalents of delivery which only require the consensus of transferor and transferee. For instance, the lessor and the lessee can stipulate for a brevi manu traditio taking effect at the end of the leasing period; the underlying contract, the ‘real agreement’ and the brevi manu traditio can be made ‘anticipatorily’, years before they become effective. Also, an anticipated constitutum possessorium can be agreed upon when the goods have not yet been individualised, do not yet even exist or have not yet been acquired by the transferor.459

Further options are the inclusion of conditions or time limits in the underlying contract and/or the ‘real agreement’. Such conditions can be suspensive (like in the case of a reservation of title), or they may be resolutive, in which case ownership will be retransferred automatically when the condition has been fulfilled – without any publicity whatsoever. A practical example is where ownership is transferred for security purposes (Sicherungsgeistum), the parties may agree that ownership is transferred to the secured creditor under the resolutive condition of full repayment of the credit.460

Another aspect – which would, however, not be considered a property law issue in the first place – is that the parties are free to create new or atypical kinds of obligations that are to underlie a transfer of ownership. Historically, security agreements and fiduciary agreements have been the most important examples of such obligations; these are generally accepted today. Contracts granting exploitation or mining rights could be another example.461

Party autonomy, therefore, has a wide scope of application in this central area of property law. The hypothetical counter-argument, namely the publicity principle and the idea that an agreement between two parties should not have (negative) effects on third parties, does not dominate the debate on ‘genuine transfers’ (i.e. transfers other than for security purposes).462 Some – but not all – third parties are protected by the rules on good faith acquisition, which may also come into play in double sale constellations. But such protection is only available to a person who purchases the goods. All other general creditors of a possessor, in particular those who give credit

459 Cf. Spielbüchler in Rummel, ABGB I, § 428 no. 6. See also below, 8.2., in the context of acquisition by means of indirect representation.
460 Cf. Spielbüchler in Rummel, ABGB I, § 424 no. 5 and § 428 no. 5.
461 Spielbüchler in Rummel, ABGB I, § 424 no. 4.
462 Concerns about publicity do exist, but without any consequences for normal transfer situations; see, e.g., Koziol/Welser, Grundriss I, 267. Cf. also supra, 1.1.3.(b) and 5.6.9.
based on the assumption that they may, if necessary, satisfy their claims out of the goods, are not granted such protection.

6. Double sales

6.1. The rules on double selling in Austrian property law

The rules on double selling of movables (A sells the same asset to B and afterwards to C) are provided in § 430 ABGB; they correspond with the general rules discussed in chapter 5: Ownership will pass to the buyer who first meets all transfer requirements, i.e. transferor A must be the owner or authorised to alienate, a valid underlying contract and a real agreement must have been concluded with A, and – normally being the crucial criterion – the transferee has taken delivery, or has accepted a suitable equivalent to delivery, from A. All forms of delivery, and its equivalents, that are accepted by Austrian law, including a constitutum possessorium, suffice in this respect. As to the mere property law consequences – we will, however, see in section 6.2.2. that there are other rules which may outweigh the results achieved in this first step of the analysis, it is irrelevant whether it is B or C who first concludes the contract for sale with A. As delivery or an equivalent to delivery is usually the last requirement to be fulfilled, the Austrian rule may also be expressed by saying that ownership will pass to the transferee who first takes delivery (or accepts an equivalent form of it). Corresponding with the unitary transfer approach in Austrian law, the result will be that, from this very moment, A is no longer owner of the asset and, therefore, is no longer able to transfer ownership to the other buyer, even if physical delivery is made to this other buyer.

In particular, where 'delivery' to the first buyer B has been made by a constitutum possessorium (e.g., A sells the asset to B and leases it back immediately), A is no longer owner of the asset and C, therefore, cannot obtain ownership derivatively. But, as A still has physical control over the asset and B has entrusted his property to A by allowing him to detain it, C may acquire ownership in good faith, provided delivery, or one of the general equivalents of delivery, has been effected by A to C and the other requirements of § 367 ABGB have been fulfilled.

Furthermore, it should be mentioned that the same system applies to double sales of immovables: In those cases, ownership is obtained by the

463 This is generally accepted by legal literature and the courts; for a comprehensive discussion see Pletzer, Doppelveräußerung und Forderungseingriff (2000) 27 ff.
464 See the detailed discussion in section 5.6., above.
465 Cf. Pletzer, Doppelveräußerung 30 f. § 367 ABGB contains the rules on the good faith acquisition of ownership of a movable from a non-owner. See below, chapter 12, for more details.
buyer who has applied for registration in the land register first (§ 440 ABGB).

6.2. Further consequences and ‘corrections’ under the law of obligations

6.2.1. The relation between the seller and the second buyer

Given that owner A has sold the same object twice and has delivered it to one of the buyers, who, through this, has acquired ownership: What are the rights of the other buyer against seller A? The solution is the same irrespective of whether B, who concluded the first contract, or C, who contracted with A at a later point in time, has received the object. In the following, the question is discussed with the assumption that B, the first buyer, took delivery (and thereby also acquired ownership).

As A will not be able to deliver the same asset to C when his performance becomes due under the contract, A will default on his obligations towards the second buyer C (Schuldnerverzug). According to § 918 ABGB, A is, in principle, still obliged to deliver and to transfer ownership to C. Therefore, A is obliged to attempt to buy back the asset from B. If he fails to do so within an appropriate time limit, § 918 ABGB gives C a right to terminate the contract. C will also have a right to claim damages. When it is (or has become) impossible to buy back the asset from B, § 920 ABGB, instead of § 918 ABGB, applies. This provision regulates the consequences of the debtor’s (seller’s) inability to perform, where such inability is attributable to him. Comparable to § 918 ABGB, it offers a right of termination (which can be combined with a claim for damages). Alternatively, C can choose to abide by the contract – therefore, he has to fulfil his own obligation – and claim damages for non-performance. In the latter case, i.e. when C chooses to abide by the contract, C can also sue A for the purchase price that A received from B (instead of the asset that has originally been the object of the contract: so-called stellvertretendes commodum).

6.2.2. The relation between the first buyer and the second buyer

Under certain circumstances, there may also be a possibility for the first buyer B to proceed directly against the second buyer C, who took delivery

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466 Performance against C may be impossible, for instance, when the object has been destroyed or where B instantly refuses to sell it back. This may be the case from the beginning or may emerge after A has tried to negotiate with B.

467 For details, see Pletzer, Doppelveräußerung 103-125; for the very last aspect mentioned in the text, see Bollenberger, Das stellvertretende Commodum (1999) 237 ff. and passim.
and acquired ownership from A, in order to oblige C to transfer the property to B. Such a claim is based on C’s interference with somebody else’s (B’s) right to performance against A (so-called Eingriff in ein fremdes Forderungsrecht), which can result in liability under tort law. According to a general rule of the law of damages, which is provided for in § 1323 ABGB, reparations have to be made primarily by way of restitution in natura. In the present case, restitution in natura will be the transfer of ownership to B.

The more detailed requirements of such liability for damage are amongst the most controversially discussed issues in Austrian private law. The main problems result from the requirement of illegality (Rechtswidrigkeit), which is generally assessed by a weighing of interests. Deducing illegality from an interference with somebody else’s obligation poses the problem that a mere obligation is usually not obvious to persons other than the parties and, therefore, an interference by the third person, under regular circumstances, cannot be considered illegal (also, the idea of the privity of contract plays a role in this respect).

It would be impossible to reproduce the discussion in all its details, but some of its main results are (as far as movable property is concerned):

- It is generally agreed upon that intentional injury in violation of the principles of good faith (absichtliche sittenwidrige Schädigung) will result in such a liability for damage. This directly follows from § 1295 (2) ABGB. Of course, there is a severe problem of evidence with regard to the aspect of intention.
- According to some important scholars, liability for damage can also be based on the general rule of § 1295 (1) ABGB, if the second buyer C has knowledge of the existence of the first contract and suborns the seller A to break his contract with the first buyer B (wissentliche Verleitung zum Vertragsbruch).
- According to the most recent literature, the second buyer C is also liable if he knows that A is breaking his contract with B and C takes advantage of that (without actively suborning A to do so; bewusstes Ausnutzen fremden Vertragsbruchs).

468 The general requirements of liability for damage under Austrian civil law are 1) the occurrence of a certain loss (Schaden); 2) the causation of the loss (Kausalität) by the injuring party’s behaviour; 3) the illegality (Rechtswidrigkeit) of the injuring party’s act or omission and 4) the culpa (Verschulden) of the injuring party.

469 Koziol, Die Beeinträchtigung fremder Forderungsrechte (1967); F. Bydlinski in Klang, ABGB IV/2, 115 ff.

470 Cf. Pletzer, Doppelveräußerung 217-252. For a comprehensive discussion of the literature and court decisions on this issue see Pletzer, cit., 125-217. The Supreme Court also moves in this direction; see for instance OGH 5 Ob 236/06a with further reference. Most of the case law and academic debate is on the double sale of immovable property – where additional aspects may be considered. For instance, the first buyer may have already taken possession of the land when the contract with the second buyer is concluded, who, subsequently, is entered into the land register. For such constellations of
As mentioned above, the first buyer B has, under these circumstances, a claim against the second buyer C for the transfer of ownership and delivery to B. In this situation, the underlying obligation for the transfer of ownership is B’s claim against C under tort law.\textsuperscript{471} This is a mere obligatory claim, not a right in rem. Accordingly, if C goes bankrupt, B will only be a general creditor and get a dividend, but will not be able to separate the object from the bankrupt’s estate.

7. Selling in a chain with direct delivery

7.1. General

Especially in modern economic life, it often happens that one asset is sold several times consecutively, e.g., from A to B and subsequently\textsuperscript{472} from B to C. In this case, A may hand over the property to B (so that B will obtain ownership as a result of delivery), whereupon B hands it over to C.\textsuperscript{473} In the Austrian private law discussion, this is referred to as a ‘transaction in the triangle’.\textsuperscript{474}

As this might be impractical in many cases, the parties may also agree that A will deliver the object directly to C. In this case, B never obtains physical control over the property. This form of transaction is referred to as a ‘transaction in a chain’ (‘Streckengeschäft’). By virtue of the delivery from A to C, ownership is transferred directly from A to C. B will not obtain ownership, not even for a ‘logical second’\textsuperscript{475} – this, at least, seems to be the prevailing view.\textsuperscript{476}

\textsuperscript{471} Cf. 5.4.1., above.

\textsuperscript{472} The second contract B – C might also be concluded prior to the contract A – B. This makes no difference in the present context and will, therefore, not be mentioned separately in the following.

\textsuperscript{473} Some terminological remarks, which apply irrespective of whether delivery is carried out ‘in the triangle’ or directly from A to C: The relation A – B is usually called ‘Deckungsverhältnis’, the relation B – C ‘Valutaverhältnis’ and the relation A – C ‘Einschlüsselungsverhältnis’.

\textsuperscript{474} So-called Abwicklung im Dreieck or Abwicklung ‘im langen Weg’.

\textsuperscript{475} No so-called ‘Durchgangserwerb’ (transitory acquisition) by B.

\textsuperscript{476} Not even Spielbüchler, Übereignung durch mittelbare Leistung, JBl 1971, 589, who argues that B obtains ownership where the second contract B – C is invalid (598), is in favour of the assumption of a ‘transitory acquisition’ (‘Durchgangserwerb’) in the regular scenario of both contracts A – B and B – C being valid (ibidem, 600). This view seems to be accepted (although this is not expressly stated) by OGH 3 Ob 82/02b, JBl, 2003, 445 (Spielbüchler). See also Spielbüchler, Die Leistungskondiktion im System der kausa-
Statutory law deals with this form of transfer only as regards property rights in immovables (§ 22 GBG).\textsuperscript{477} According to this provision, C can demand registration if there is 1) a chain of underlying contracts\textsuperscript{478} from A to C, and 2) either a chain of so-called Aufsandungserklärungen (which is a special form of the ‘real agreement’ applicable to immovable property, cf. § 32 (1)(b) GBG) or one Aufsandungserklärung that is effected directly from A to C. As mentioned above,\textsuperscript{479} according to § 32 (1)(b) GBG, the Aufsandungserklärung can also be a unilateral juridical act of the party who gives up his or her title, whereas the regular understanding of the ‘real agreement’ as a contract would require a bilateral juridical act. With regard to movable property, there is no statutory provision in Austrian law. The problem of the ‘transaction in a chain’ (Streckengeschäft) is subject to controversial discussion in legal literature; interestingly, there seem to be rather few decisions of the OGH that deal more closely with this issue.\textsuperscript{480}

The dogmatic construction of C’s acquisition of ownership in the case of a ‘transaction in a chain’ involving a direct delivery causes some difficulties under the Austrian transfer system. Some of these problems are rooted in the fact that delivery is made directly by A to C, who are not directly linked by a contractual relationship.\textsuperscript{481} Further dogmatic uncertainties are particularly caused by the requirement of a ‘real agreement’: For those who assume that the ‘real agreement’ is concluded at the same time as the underlying obligation is created,\textsuperscript{482} the solution for ‘transaction in a chain’-cases will be that the chain of underlying sales contracts (A – B, B – C) also contains a chain of ‘real agreements’, which result in the acquisition of ownership by C\textsuperscript{483} (by the mere factual traditio A – C). Others, who support the view that the ‘real

\textsuperscript{477} GBG is short for Grundbuchgesetz, Land Register Act.

\textsuperscript{478} ‘Verpflichtungsgeschäfte’, cf. 5.4., above. Paradigmatic example: Contracts for sale in the relations A – B and B – C.

\textsuperscript{479} Cf. supra, 5.5.

\textsuperscript{480} See, for instance, OGH 3 Ob 84/02b, JBl 2003, 445 (Spielbüchler); other cases are reported by Binder in Schwimann, ABGB IV, § 1053 no. 46.

\textsuperscript{481} See the problem of the invalidity of contracts in the A – B – C triangle discussed sub 7.2., below. Cf. Aicher in Rummel, ABGB I, § 1061 no. 13, who gives further reference.

\textsuperscript{482} Especially Spielbüchler, F. Bydlinski and the recent decisions of the OGH, see supra, 5.5.2.

\textsuperscript{483} Cf. Spielbüchler in Rummel, ABGB I; § 425 no. 5; Aicher in Rummel, ABGB I, § 1061 no. 16.
agreement’ will usually be concluded upon delivery, assume that there is only one ‘real agreement’, which is the one that has been concluded directly between A and C.484

There are also some questions as to the exact content of the rights and obligations resulting from the sales contracts: Is A only obliged to transfer the property to B (or, must he also transfer to C) and is C entitled to receive the property from A (instead of B)? In order to cope with these – partly perhaps rather ‘academic’ – difficulties, legal writers tried to construe certain additional juridical acts, which may accompany the contracts of sale and justify C’s acquisition of ownership. Accordingly, one can differentiate between a ‘transaction in a chain’ accompanied by:485

- an assignment (Zession) of B’s right to obtain ownership to C, so that C can acquire ownership based on A’s contractual obligation (originally created in favour of B);
- an assumption of B’s obligation towards C by A (Schuldübernahme): A assumes (and fulfils) B’s obligation to transfer property to C;
- an agreement in favour of a third party (Vertrag zugunsten Dritter): C benefits from A’s obligation towards B and, therefore, obtains ownership on the basis of this obligation. The agreement between A and B may either be construed in a way that C himself is entitled to claim the transfer of ownership from A (so-called ‘echter Vertrag zugunsten Dritter’), or with the effect that only B is entitled to claim the transfer to C (so-called ‘unechter Vertrag zugunsten Dritter’).
- an order (Anweisung) in the sense of §§ 1400-1403 ABGB: B authorises A to transfer the object to C (in A’s own name, but for the account of B) and also authorises C to take delivery of the object from A (again, in C’s own name, but for the account of B). A, therefore, delivers the movable to C and therewith performs his obligation towards B; C takes delivery of it from A on the basis of his contract with B. In a special form, the order may be ‘accepted’ by A (angenommene Anweisung, § 1402 ABGB), in which case a separate ‘abstract’ obligation directly towards C will be assumed by A. ‘Abstract’ in this context means that it is ‘independent’ from the validity of the contracts A – B and B – C (which is only allowed exceptionally in Austrian law).

Nowadays, though, it is generally accepted that C will acquire ownership also if there is no such additional juridical act (sometimes called a ‘naked transaction in a chain’), as there are two valid underlying contracts and an

484 See Iro, Sachenrecht¹, nos. 6/80 ff; cf. also Koziol, Streckengeschäft und Anweisung, JBl 1977, 617 (621) and the elder decisions of the OGH, as for instance 7 Ob 632/83, RdW 1984, 310, where the OGH obviously presumes an agreement between A and C. – Cf. also footnote 476, above.
485 Cf. Koziol/Welser, Grundriss I¹, 329 f; Aicher in Rummel, ABGB I¹, § 1061 no. 14.
act of delivery.\footnote{See for instance Aicher in Rummel, ABGB I\textsuperscript{1}, § 1061 nos. 14, 24; Koziol/Welser, Grundriss I\textsuperscript{11}, 330.} It seems that most of the constructions of additional juridical acts, as mentioned above, are more or less theoretical. In real life, an ‘order’ (Anweisung) in the abovementioned sense will normally be made. Usually, the order will not be ‘accepted’ by A in the sense of § 1402 ABGB, because one normally cannot assume that A, even if he agrees to hand over the goods to C, also wants to assume the risks of an ‘abstract’ obligation. Therefore, the following discussion will focus on the construction of a ‘transaction in a chain’ in conjunction with a ‘non-accepted order’ (‘nicht angenommene’ Anweisung). In addition, it will be pointed to the legal situation of the ‘normal’ transaction ‘in the triangle’ (where two acts of delivery are effected, A – B and B – C), which produces rather similar results in many constellations. Moreover, the Supreme Court recently argued that the fact that delivery is effected directly from A to C should not lead to results different from those produced in a ‘triangle’-delivery situation.\footnote{Cf. OGH 3 Ob 84/02b, JBl 2003, 445 (Spielbüchler); the question there related to the effect of a reservation of title declared directly by A to C (where such a clause had been stipulated in the contract A – B, but not in the contract B – C) – see 7.3., below.}

7.2. The effects of invalid or avoided contracts

So far, it was assumed that both contracts A – B and B – C are valid. Special difficulties arise when one of them or even both contracts are invalid (\emph{ab initio}) or avoided with retroactive effect (\emph{e.g.}, on account of fraud or mistake).\footnote{If, on the other hand, the contract is terminated without retroactive proprietary effect, there may be no effect on ownership at all. Such cases are not discussed in the following. For the different effects of avoidance and termination, see 5.4.2., above.} As mentioned above, the discussion will focus on the construction of a ‘transaction in a chain’ that is accompanied by an ‘order’ in the sense that A is authorised to perform, and C is authorised to receive performance for the account of B.

These constellations also cause difficulties as concerns the law of unjustified enrichment. Some of them will also be mentioned in the following.

7.2.1. Invalidity of the contract A – B

If the contract A – B is invalid (\emph{ab initio} or avoided with retroactive effect), C \emph{cannot acquire ownership derivatively}, for his predecessor B (in the contractual chain) lacks title himself. This applies to cases of transactions ‘in the triangle’ as well as to cases of ‘transactions in a chain’ where a direct delivery is effected. But, it is quite likely that C will be able to acquire own-
ership originally according to the rules on good faith acquisition (§ 367 ABGB).\footnote{See chapter 12 for more details on good faith acquisition.} In the case of a transaction ‘in the triangle’, the good faith acquisition rules apply directly. In the case of a ‘transaction in a chain’, they apply by way of analogy: B never had physical control over the property and, therefore, he, due to the lack of any externally visible possession, cannot appear to be the owner (so-called ‘Rechtsscheinwirkung’ of possession, which is generally regarded as one of the dogmatic foundations of a bona fide purchase).\footnote{Cf. 12.2.5., below.} But the fact that A follows the ‘order’ (Anweisung) of B is considered sufficient by the prevailing opinion and justifies an application of the good faith acquisition rules by way of analogy. In the cases of a ‘transaction in a chain’ with direct delivery, the requirement of C’s good faith, therefore, does not relate to B’s right of ownership but to the validity of the contract A – B.\footnote{Cf. Iro, Sachenrecht¹, no. 6/82; Aicher in Rummel, ABGB ¹, § 1061 no. 18. Of dissenting opinion: F. Bydlinski in Klang, ABGB IV/2¹, 308 ff.} So, if C is in good faith in the latter sense, he acquires ownership; if he is not, A will stay owner (and can, subsequently, demand the return of the object from C).

If C has not been in good faith, A will also have a direct claim against C based on unjustified enrichment,\footnote{Cf. Mader in Schwimann, ABGB VI¹, Vor §§ 1431 ff no. 31; Rummel in Rummel, ABGB II/3¹, Vor § 1431 no. 14.} which is particularly important where the goods have been consumed (Verbrauch) by C, as a physical return of these would be impossible. In any case, A has a claim ex unjustified enrichment also against B.

7.2.2. Invalidity of the contract B – C

If only the second contract for sale (between B and C) is invalid, the results of constellations of transactions ‘in the triangle’, on the one hand, and ‘transactions in a chain’ with direct delivery, on the other hand, will differ: If the movable is physically delivered to B first (so that B obtains ownership), B will of course stay owner, since C lacks a valid contractual right.\footnote{B will, therefore, be entitled to demand the return of the goods from C based on re vindication and, in addition, based on a claim ex unjustified enrichment.} If the movable is handed over directly by A to C, C will not obtain ownership for the very same reason. The prevailing opinion seems to be that A will stay owner in this case, because B never had possession and, therefore, has not obtained ownership.\footnote{See, among others, Koziol, JBl 1977, 817 (618); Aicher in Rummel, ABGB ¹, § 1061 no. 20. Of dissenting opinion are Binder in Schwimann, ABGB IV¹, § 1053 no. 45; Spielbächler, JBl 1971, 589 (598): According to them, B obtains ownership in this case. Spiel-} However, A will be obliged to transfer ownership to B, as the contract A – B is valid.

489 See chapter 12 for more details on good faith acquisition.
490 Cf. 12.2.5., below.
491 Cf. Iro, Sachenrecht¹, no. 6/82; Aicher in Rummel, ABGB ¹, § 1061 no. 18. Of dissenting opinion: F. Bydlinski in Klang, ABGB IV/2¹, 308 ff.
492 Cf. Mader in Schwimann, ABGB VI¹, Vor §§ 1431 ff no. 31; Rummel in Rummel, ABGB II/3¹, Vor § 1431 no. 14.
493 Of dissenting opinion are Binder in Schwimann, ABGB IV¹, § 1053 no. 45; Spielbächler, JBl 1971, 589 (598): According to them, B obtains ownership in this case. Spiel-
C cannot acquire ownership in good faith in this scenario (§ 367 ABGB), as such an acquisition also requires a valid contract B – C. (The only possibility for C to become owner would be by long acquisitive prescription, which would require possession in good faith for a period of 30 or 40 years).495

7.2.3. Invalidity of both contracts A – B and B – C

If both contracts A – B and B – C are invalid, there is no doubt that A will stay owner.496

There is some discussion on this constellation, in cases involving the direct delivery by A to C, as regards the law of unjustified enrichment:497 Some scholars state that there is a 'Kondiktion'498 A – B and B – C and, in addition, a so-called ‘Verwendungsanspruch’499 A – C. Others assume that there is only a Kondiktion A – C500 (which will have a negative effect on A in the case of C’s insolvency), or that A has a right to choose: Kondiktion A – B or A – C.501

7.3. Further questions: Direct delivery and reservation of ownership

In 1984, the Supreme Court had to deal with a case where A and B agreed upon a reservation of title clause whereas in the contract between B and C

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495 See below, 13.1.3.
496 See Aicher in Rummel, ABGB I, § 1061 no. 22.
497 The following solutions are based on the assumption that at least the ‘order’ (Anweisung, cf. supra, 7.1.) was valid; if A and C do not have such authorisation, it is, almost generally, presumed by courts and literature that A has a direct claim against C; see Rummel in Rummel, ABGB II/3', Vor § 1431 no. 14 (paragraph d); further reference is given by Koziol, gloss on OGH 2 Ob 514/78, JBl 1979, 325 (327).
498 Cf. Rummel in Rummel, ABGB II/3’, Vor § 1431 no. 14 (paragraph c); Mader in Schwimann, ABGB VI’, Vor §§ 1431 ff no. 31. The ‘Kondiktion’ or ‘Leistungskondiktion’ is a type of claim based on unjustified enrichment, which applies where there has been an act of ‘performance’ (Leistung) by the disenriched to the enriched party.
499 The ‘Verwendungsanspruch’ (§ 1041 ABGB) is another type of claim ex unjustified enrichment; it applies where the enrichment occurs in a way other than by performance by the disenriched to the enriched person.
500 F. Bydlinski in Klang, ABGB IV/2', 309 f.
8. Transfer or acquisition by means of indirect representation

Indirect representation means that a person, the ‘representative’, acts in his own name, but for the account of another person, the principal. Between the principal and the representative, there may exist a contract of mandate, or a mere authorisation of the latter to act on behalf of the principal, or another legal relationship. Where the representative concludes a contract

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502 OGH 7 Ob 632/83, RdW 1984, 310. The decision is based on the former opinion of the OGH regarding the question of the point in time when the ‘real agreement’ is concluded: The OGH presumed that the ‘real agreement’ was concluded at the time of delivery, which made it possible to interpret the reservation of ownership clause into the agreement in the present case. But the result has also been accepted by authors who generally follow the opposite opinion, i.e. the conclusion of the ‘real agreement’ at the point in time of the conclusion of the underlying contract (cf. Aicher in Rummel, ABGB I, § 1061 no. 13a). For the different views on the point in time of the creation of the real agreement, see 5.5.2., above.

503 See for instance Aicher in Rummel, ABGB I, § 1061 no. 13a; Spielbüchler in Rummel, ABGB I, §§ 357-360 no. 10.

504 OGH 3 Ob 84/02b, JBl 2003, 445 (Spielbüchler).

505 Observed by Spielbüchler in his gloss (footnote 504) at 448.
with a third party, the legal effects of this contract bind these two persons. In order to transfer the economic effect of the transaction to the principal, another legal act is, in principle, required.\textsuperscript{506} There is no specific set of rules in the Austrian Civil Code that regulates this phenomenon. But, an important sub-type of indirect representation is regulated in more detail in the Commercial Code: commission (§§ 383 ff UGB).

In the case of direct representation, where the representative is authorised to act not only for the account, but also in the name of the principal, a direct contract between the principal and the third party would be concluded, and also the transfer of ownership of the goods would be effected directly between these two persons. On the other hand, where ownership is to be transferred by means of indirect representation, we have to differentiate between representation for alienation (the principal’s goods are transferred to a third party by the representative) and representation for acquisition (the representative buys goods for the principal from the third party).

A right to ‘circumvent the intermediary’ or to ‘step into his shoes’, which is granted to the principal or the third party, respectively, under certain requirements in some legal systems,\textsuperscript{507} does not exist in Austrian law.

\textbf{8.1. Representation for alienation}

In case the principal intends to sell his goods through an indirect representative and hands over the goods to the latter, this will normally not mean that ownership is transferred to the representative (who would, in turn, have to transfer it to a third party purchaser). The intermediary is only granted authority to dispose by the principal, so that the principal remains the owner, but the representative can, in his own name, conclude a contract for sale with the third party and fulfil all other requirements to transfer ownership to the purchaser (conclusion of the ‘real agreement’ in the representative’s own name, delivery to the third party).\textsuperscript{508} On this basis, ownership passes directly from the principal to the third party. Also, if the contract between the representative and the third party is avoided with retroactive effect, ownership will revert directly to the principal.\textsuperscript{509} In case the representative becomes insolvent, the principal can, consequently, always separate ‘his’ goods.

\textsuperscript{506} See for instance OGH 3 Ob 120/95, RdW 1996, 468; Strasser in Rummel, ABGB I', § 1002 no. 8; Kozicol/Welser, Grundris I', 198 f.

\textsuperscript{507} Cf. articles 3:302, 3:303 PECL, under which the principal may exercise against the third party the rights acquired on the principal’s behalf by the intermediary, subject to any defences which the third party may set up against the intermediary (and vice versa), provided that the intermediary has become insolvent, or has committed a fundamental non-performance.

\textsuperscript{508} Cf. Griss in Straube, HGB I', § 383 no. 20; OGH 1 Ob 670/90, JBl 1991, 805.

\textsuperscript{509} Griss in Straube, HGB I', § 383 no. 20. For the effect of avoidance in general, see supra, 5.4.2.(b).
8. Transfer or acquisition by means of indirect representation

Of course, principal and intermediary may also agree to transfer ownership to the intermediary before carrying out the second transaction, but this is not the regular case. In the case of a commission agreement for alienation in the sense of the Commercial Code (Verkaufskommission), the commission agent will also become owner if he has received the goods from the principal and declares to enter into the transaction himself.510

8.2. Representation for acquisition

Where the indirect representative buys goods from the third party, he, by taking delivery, becomes owner of these goods under the general transfer rules. In order to transfer ownership from the intermediary to the principal, the general transfer requirements must be fulfilled in relation to the principal. Where the principal and the intermediary have entered into a contract of mandate (which is often the case, commission being a sub-form of the contract of mandate), the ‘underlying obligation’ (‘Titel’) for this transfer already results from this contract.511 Delivery may be carried out in any form provided in §§ 426 ff ABGB. In particular, principal and representative can agree on an anticipated constitutum possessorium, so that ownership will pass to the principal when the intermediary receives it from the third party. Whether the intermediary becomes owner for a ‘logical second’ (‘Durchgangserwerb’) is a matter of dispute, but hardly ever discussed specifically in relation to indirect representation. While some authors assume such an interim acquisition by the principal as a matter of logical reasoning, 512 Spielbüchler rejects this view as being ‘construed’, as the intermediary does not want to acquire but rather wants to transfer the right to the principal immediately. He argues that the representative would only acquire ownership where the transfer to the principal fails (e.g., because the contract with the principal is void).513

In the case of a commission contract under the Commercial Code, the practical effect of such a ‘two-step’ transfer is reduced as regards a very important aspect: By way of an analogous application of § 392 (2) UGB, the principal will also be protected against the commissioner and his creditors where the goods are still owned by the intermediary. In relation to the commissioner and his creditors, the goods received from the third party, in the course of the fulfilment of the commission contract, are treated as if

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510 So-called Selbsteintritt, § 400 UGB. See Griss in Straube, HGB I, § 383 no. 20.
511 Cf. OGH 3 Ob 120/95, RdW 1996, 468 (see also supra, 5.6.4.(a), for a closer discussion of this case in the context of the constitutum possessorium). § 1009 ABGB provides that the agent must surrender everything he has received to the principal.
512 See F. Bydlinski in Klang, ABGB IV/2', 695 f (with a more general focus, commencing with questions that may arise in the context of a purchase under retention of title).
513 Spielbüchler in Rummel, ABGB I, § 428 no. 6 (also with a more general focus).
they belonged to the principal. Consequently, the principal may separate the goods in the case of the commissioner's insolvency. Whether this rule can be extended to constellations of indirect representation other than commission is disputed; the Supreme Court once argued that the rule should be applied where the intermediary's status as an indirect representative was obvious or, at least, known to the other person.

8.3. Protection of the representative

As follows from the previous sections, the indirect representative will normally not become owner (in the case of representation for alienation) or the principal can treat the goods as his own as against the intermediary (in the case of a commission for acquisition), which may also affect the intermediary's creditors. In the case of a commission contract in the sense of the Commercial Code, however, the representative's interests are protected insofar as the commissioner is granted, by operation of law, a right of pledge (Pfandrecht) in the goods in accordance with the commission agreement, for as long as he has them in his possession. This security right covers, in particular, costs incurred and commission payments owed in relation to these goods, as well as all current account claims stemming from the commission transactions. The commissioner can enforce this security right, also where it concerns goods owned by himself.

9. Consequences of the insolvency of one of the parties at different stages of the transfer

9.1. General

9.1.1. Types of insolvency proceedings

Austrian insolvency law provides for different types of judicial proceedings in the case of insolvency. Most of the rules are laid down in the Bank-

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514 § 392 (2) UGB applies to claims acquired by the representative as a result of the commission agreement; it is extended to property rights which are acquired in the course of fulfilling the commission contract. – Cf. Griss in Straube, HGB I, § 383 no. 19 and § 392 no. 3; OGH 7 Ob 561/86, SZ 59/105.
515 OGH 7 Ob 561/86, SZ 59/105. Further references on the different views are provided by Griss in Straube, HGB I, § 392 no. 6.
516 See 19.5.3.(b), below.
517 §§ 397, 398 UGB.
518 The commencement of all kinds of insolvency proceedings requires either the debtor’s ‘inability to pay his debts’ (Zahlungsunfähigkeit, § 66 KO) or, alternatively, but only insofar as certain companies, for which no natural person is personally liable, are con-
ruptcy Act (Konkursordnung, KO,) and the Composition Act (Ausgleichsordnung, AO).\(^{519}\) **Bankruptcy proceedings** (Konkursverfahren), which are governed by the KO, will ultimately lead to the universal liquidation of all of the debtor's assets. As a basic principle, all creditors have to be treated equally; they will, therefore, recover only a certain percentage of their claims. As such claims against the bankrupt's estate (Konkursforderungen) are often not worth more than about five per cent of the original debt, this usually means a severe economic loss for the creditor.

As an alternative to such a universal liquidation of the debtor's assets, §§ 140-165 KO entitle the debtor to apply for a so-called composition in bankruptcy (Zwangsausgleich), which avoids liquidation and enables the debtor to continue his business. The law imposes certain minimum requirements: In particular, all creditors have to be satisfied in relation to at least 20 \% of their claims, payment has to be made within two years and the creditors have to be treated equally. There are also certain requirements regarding the majority of creditors that have to assent.\(^{520}\)

**Composition proceedings** (Ausgleichsverfahren as governed by the AO) lead to a judicial settlement between the debtor and his creditors in order to avoid bankruptcy. In his proposal for composition (Ausgleichsvorschlag), the debtor must offer all (non-privileged)\(^{521}\) creditors to satisfy at least 40 per cent of their claims within a period of two years.\(^{522}\) Whether composition

\(^{519}\) As an alternative to these judicial proceedings, the debtor and his creditors may agree on a private settlement in order to avert bankruptcy (außergerichtlicher Ausgleich), which is not governed by any specific statute. Such negotiations have, inter alia, the advantage of usually being much shorter and much more flexible than judicial proceedings. For instance, it is not required that all creditors must be treated equally. The most practical disadvantage of this form of settlement is that it requires the consent of all creditors.

\(^{520}\) Assent must be given by 50 \% of the existing creditors, representing \(\frac{3}{4}\) of the monetary value of all claims forming part of the proceedings (§ 147 KO). For an overview on composition in bankruptcy proceedings, see, e.g., Rechberger/Thumer, Insolvenzrecht\(^{3}\), 96 ff.

\(^{521}\) Privileged creditors are, in particular, those who are secured by a proprietary right, e.g., by a pledge (providing a right to preferential payment, the so-called Absonderungsrecht, § 48 KO) or a reservation of title (providing a right to separation from the estate, the so-called Aussonderungsrecht, § 44 KO). On the latter, see infra, 9.2.2.(c).

\(^{522}\) § 3 (1) no. 3 AO.
proceedings can be initiated depends upon certain majority requirements. 523 Under Austrian law, the debtor can choose whether bankruptcy proceedings or composition proceedings shall be commenced. 524

9.1.2. Consequences of the commencement of insolvency proceedings

From the day following the publication of the commencement of the insolvency proceedings, 525 the creditor loses the right to administer and dispose of his estate that is involved in the bankruptcy proceedings. If he, nevertheless, disposes of the property, such dealings are ineffective against the creditors who are party to these proceedings. The bankrupt’s estate encompasses all assets (except assets not subject to enforcement under the general enforcement rules) belonging to the creditor at the moment of commencement of the bankruptcy proceedings and assets acquired by the creditor during these proceedings. 526 The administration and legal representation of the bankrupt’s estate are transferred to an administrator in bankruptcy (Masseverwalter) who is appointed by court. 527 Judicial proceedings, in which the bankrupt debtor is involved, are interrupted by operation of law; new ones can not be initiated, except for the purposes of the separation of another person’s property, or preferential payment based on limited proprietary rights. As to proceedings, in which the debtor acted as claimant, the administrator in bankruptcy can choose whether or not to continue these. Claims against the bankrupt’s estate must be lodged in the bankruptcy proceedings. 528 Also, enforcement proceedings against the debtor can not lead to the creation of security rights. 529 The underpinning of these rules is the principle

523 § 42 AO. The majority requirements are the same as for the ‘compositions in bankruptcy’ mentioned above (footnote 520).
524 If one of the creditors applies for the commencement of bankruptcy proceedings, the debtor can avert this by applying for composition proceedings, cf. § 1 (2), § 7 (2) AO. If the debtor’s proposal for composition is not accepted, however, ‘subsequent bankruptcy proceedings’ may be commenced (so-called Anschlusskonkurs, § 69 AO).
525 § 2 (1) KO, § 7 (1) AO. For an overview of the following, see for instance Rechberger/Thurner, Insolvenzrecht, 26 ff, 138 ff. The discussion in the text will primarily focus on bankruptcy proceedings, composition proceedings are dealt with in less detail.
526 As to these effects, see § 1 (1) and § 3 KO. In composition proceedings, the court is given some discretion in reducing the debtor’s right to dispose (§ 3 (2) AO). In contrast to the ‘bankrupt’s estate’ in bankruptcy proceedings, there is no ‘composition estate’ in composition proceedings.
527 Cf. §§ 80 ff, 114 ff KO.
528 §§ 6-8 KO (so-called Prozesssperre, stay of proceedings). In composition proceedings, this is not possible.
529 § 10 KO, § 10 AO. Security rights created in enforcement proceedings in favour of an execution creditor within 60 days before commencement of the insolvency proceedings are extinguished.
of the **equal treatment** of all (unsecured) creditors. The creditors have to bear the loss proportionally; their claims will be satisfied up to a certain percentage of their value as a result of the liquidation of the debtor’s estate (in bankruptcy proceedings), or as a result of other payments (in the case of composition and ‘composition in bankruptcy’).

As far as issues related to the property of another person and a transfer of ownership are concerned, the relevant rules of the KO and the AO are quite similar. The commencement of insolvency proceedings has no effect on the right of ownership as such: Both the KO and the AO uphold another person’s right of ownership of an asset that is involved in the insolvency proceedings. The owner’s right is explicitly respected in the form of a ‘right to separation’ (so-called Aussonderungsrecht).\(^{530}\) It gives the owner of an asset, which is held by the debtor, a right to recover his property (§ 44 KO, § 21 AO).

Furthermore, the commencement of insolvency proceedings does not, in itself, terminate existing ‘synallagmatic’ contracts (i.e. contracts under which both parties are obliged to perform).\(^{531}\) Under both types of procedure, the commencement of the proceedings has different effects on contracts, depending on whether the contractual obligations have not been fulfilled completely by both or just one of the parties: If both parties have not fully discharged their obligations, the administrator in bankruptcy (§ 21 KO), or the debtor himself (§ 20b AO), respectively, has a **right to choose** whether to fulfil his obligation and claim for the other party’s performance in turn, or whether to repudiate the contract. Therefore, the consequences of insolvency on the transfer of ownership do **not only** depend on the stage of transfer of property (i.e. the extent to which the transferor has already fulfilled his obligation to transfer ownership), but also on the discharge of the counter-performance. A closer discussion of these effects at the different stages of a transaction will be provided below, 9.2. and 9.3.

### 9.1.3. Avoidance by creditors (actio Pauliana)

(a) The idea of equal treatment of creditors is also realised by another set of rules granting a right to the administrator in bankruptcy, or a single creditor outside bankruptcy, to ‘avoid’ various kinds of ‘legally relevant acts’ carried out by the debtor **before** the opening of bankruptcy proceedings (or enforcement outside bankruptcy, respectively). The goal of such ‘avoidance’ (the so-called Gläubigeranfechtung) is to put the creditor(s) in a position as if these legally relevant acts had never occurred. A ‘legally relevant act’ (Rechtshandlung) in the sense of these rules must affect the debtor’s estate

\(^{530}\) § 11 KO, § 11 AO.

and must, in case of avoidance, be capable of improving the possibility to satisfy the creditors (Befriedigungstauglichkeit). This may, in principle, cover contracts concluded by the debtor, including a ‘real agreement’ aimed at disposing of an asset, payments and other factual acts, acts in judicial proceedings etc. Some of the rules have a more limited scope. The relevant provisions for avoidance in bankruptcy can be found in §§ 27-43 KO, and, for avoidance outside bankruptcy, in the so-called Avoidance Act (Anfechtungsordnung, AnfO). The requirements imposed by these statutes are quite similar.

(b) The effect of such ‘avoidance’ is somewhat unusual as compared with other rules of Austrian private law. Where, for example, a transfer of ownership is avoided, this does not mean that ownership reverts with retroactive effect against all parties one can think of: ‘Avoidance’ in the sense of these rules means that the transaction is ineffective only in relation to the creditors. What has been transferred away from the debtor’s estate must be restored to the bankruptcy estate; in case restitution in natura is unreasonable, compensation must be paid. A counter-performance made by the other party may be claimed back to the extent to which it is still identifiable in the bankrupt’s estate or to the extent to which the estate would, otherwise, be unjustifiably enriched. One may say that this is an exception to the ‘unitary’ concepts of ownership and transfer of ownership in Austrian law. If, for example, a sale of goods is avoided, the goods must be handed over to the bankrupt’s estate (i.e. to the administrator in bankruptcy, who will liquidate the assets for the creditors). The debtor himself, however, is not freed from his obligations as a seller. After the end of the bankruptcy proceedings, the buyer could, again, demand performance from the seller. Also, third parties who acquired rights in the purchased goods (which are subject to ‘avoidance’) can only be affected under certain restrictive requirements, e.g., in the case of a gratuitous acquisition or if they knew or should have known, at the time of the acquisition of their right, the facts on which the right of avoidance is based.

532 See for instance König, Die Anfechtung nach der Konkursordnung (2003) 23 f. This book is the most comprehensive one on the topic in Austria. See also Koziol, Grundlagen und Streitfragen der Gläubigeranfechtung (1991) and the commentaries on §§ 27 ff KO in Konecny/Schubert, Insolvenzgesetze, and Bartsch/Pollak/Buchegger, Insolvenzrecht. For an overview of the following issues, see also Rechberger/Thurner, Insolvenzrecht, 53 ff.

533 § 27 KO, § 1 AnfO.

534 See §§ 39-41 KO.

535 Cf., for instance, Koziol/Bollenberger in Bartsch/Pollak/Buchegger, Insolvenzrecht, § 27 KO no. 53.

536 § 38 KO. It should be stressed that the description given in the text is highly summarised and, therefore, incomplete.
(c) Under the Austrian Bankruptcy Act, avoidance can be demanded of:\textsuperscript{537}

- any ‘legally relevant act’ made within 10 years before the opening of bankruptcy proceedings, provided that the act was performed with the intention to defraud the creditors and the other party knew of this intention; or of any act effected within a period of 2 years before the opening of bankruptcy proceedings, if the other party should have known of such an intention (§ 28 nos. 1 and 2 KO);
- contracts for sale, barter or other ‘contracts for delivery’ concluded within one year before the commencement of the proceedings, provided that there is a considerable imbalance between the value of the mutual performances, and the other party knew or should have known of this disadvantage (§ 28 no. 4 KO);
- any ‘legally relevant act’ related to a gratuitous disposal of property within the last two years (with certain limited exceptions, § 29 KO);
- security given or performance made to a creditor in preference to other creditors within one year before the opening of the bankruptcy proceedings, provided that the preferential act was made after, or within 60 days before, the debtor’s inability to pay his debts or overindebtedness have occurred. A ‘preference’ in the sense of these rules exists when the other party receives something to which it objectively has no right (at all, or at the time of the act); or where the other party receives something to which it would be entitled in principle, but the act is performed with the intention of preferring this party over other creditors and this intention is known, or should have been known, to the other party (§ 30 KO);
- any ‘legally relevant act’ performed within six months before the opening of the bankruptcy proceedings, provided that it occurred after the commencement of the debtor’s inability to pay his debts or overindebtedness or after the filing for bankruptcy, if such facts relevant for insolvency are known or, as a result of negligence, not known to the other party (§ 31 KO).

Where the other party is the debtor’s spouse or a close relative, stricter rules apply with regard to some of these provisions.

\textbf{9.1.4. Rights to withhold performance under contract law}

Two further legal devices of considerable practical importance in the case of the other party’s insolvency should be mentioned in this context, although

\textsuperscript{537} As to the following, see the overview provided by Rechberger/Thurner, Insolvenzrecht\textsuperscript{2}, 56 ff; for details, see König, Anfechtung\textsuperscript{1}, 98 ff or the commentaries quoted in footnote 532 (on §§ 28 ff KO). – §§ 2 and 3 AnfO contain rules equivalent to the first three categories listed below.
they form part of the general contract law. They apply to contracts under which both parties are obliged to mutually perform.

According to § 1052 sentence 1 ABGB, any debtor who is not obliged to perform in advance can withhold his performance if the counterparty does not perform its due obligation. This right, reflecting the so-called Zug-um-Zug principle, has a security function as well as the function of creating pressure. But also a debtor who is obliged to perform in advance may withhold its performance, provided that the other party’s performance is doubtful because of its bad financial situation and the debtor has been innocently unaware of this situation at the time of the conclusion of the contract (§ 1052 sentence 2 ABGB). Performance may be withheld until the counter performance is discharged or secured.\textsuperscript{538}

From this it follows that the delivery of the goods and the payment of the price are of outstanding importance in terms of protection from the other party’s insolvency. Until such performance is made, and given that the requirements for withholding performance have been fulfilled, the debtor will practically be protected. Some detailed aspects, focusing on the insolvency context, will be dealt with in the following.

9.2. Insolvency of the transferee

The following discussion will concentrate on ‘synallagmatic’ contracts, \textit{i.e.} contracts under which both parties are obliged to perform, such as contracts for sale, barter, or contracts for non-gratuitous services. In the case of a donation, the insolvency of the transferee will not affect the donor’s obligation to perform.

9.2.1. Situations where one of the parties has discharged its obligation in full

(a) General

Where a contract for sale has been concluded and the buyer has paid the purchase price before being declared bankrupt, the seller – who received all he could expect under the contract – must perform to the bankrupt’s estate. If, on the other hand, the seller has already performed to the buyer but the latter has not paid the price, the seller is still entitled to payment but will receive a dividend only. The performance of the seller will normally be delivery in the sense of the transfer of physical control, but could consist of any equivalent to delivery if this is provided in the contract. Whether a

\textsuperscript{538} See for example Koziol/Welser, Grundriss II\textsuperscript{13}, 40 ff.
seller, who has transferred ownership under a *constitutum possessorium* and has agreed to store the goods for the buyer, whereby payment is to be made upon the physical handing over, may still withhold physical delivery under § 1052 ABGB does not seem to be discussed in relation to Austrian law. Probably, he will be considered to have lost such right (having fulfilled the main obligation under the contract, *i.e.* the transfer of ownership). If so, physical control over the object will not always help the seller. It shows that the right of ownership is a key element in insolvency.

Also, where the ‘transferee’ acquires ownership ‘originally’, the former owner, if at all, may only have a dividend claim.

(b) Special rules and situations

(i) The abovementioned allocation of the insolvency risk to the transferor who has already performed may be altered if one accepts the existence of the transferor’s right to avoid the contract (or the ‘real agreement’) on account of *mistake as to the transferee’s solvency* (*Irrtum über die Zahlungsfähigkeit*). This is partly advocated in legal literature. If this is accepted, the transferor can claim for the separation of the delivered goods from the bankrupt’s estate: Due to the retroactive proprietary effect of avoidance under Austrian law, he will be deemed never to have lost his right of ownership.

(ii) Due to this retroactive effect, the transferor who has already delivered will also be protected in the case of the *avoidance* of the contract on any other legally relevant ground (mistake, fraud, duress), irrespective of which party to the contract seeks avoidance. The transferor will be considered to have remained the owner and can recover the asset. This, of course, also helps where a seller is still in possession but has transferred ownership by way of a *constitutum possessorium*.

(iii) *Termination* of the contract, irrespective of which party has sought it, has no direct effect on the right of ownership. If the transferor has already transferred ownership, the acquirer stays owner and is only under an obligation to retransfer ownership. This obligatory right, however, will only constitute a dividend claim in the transferee’s insolvency. The main practical case in this respect will be the seller’s termination for non-payment. But

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539 Conveying ‘free possession’ and transferring the right of ownership are obviously seen as the crucial factors, cf. OGH 7 Ob 523/56, JBl 1957, 218; Gamerith in Bartsch/Pollack/Buchegger, *Insolvenzrecht I*, § 21 KO no. 11. One can assume that the buyer’s indirect possession (through the seller) will suffice.

540 See Part III: Good faith acquisition, acquisitive prescription, accession and processing etc.

541 See *supra*, 5.4.2.(b).

542 Again, see 5.4.2.(b) above.

543 See *supra*, 5.4.2.(c), also for the different rules providing for such a right of termination.
the same also applies in case the buyer terminates the contract for lack of conformity.

For a transfer based on a contract subject to a resolutive condition, I refer to the general information provided above, 5.4.2.(e). Although the issue is disputed and a clear answer is difficult to provide, the original transferor’s right to recover will, most likely, be converted into a mere dividend claim in case the condition is met after the commencement of the bankruptcy proceedings against the transferee. If the condition is met before that point in time, a retransfer could take place, but it could possibly be subject to avoidance in bankruptcy.

(iv) Exceptionally, the right of ownership may not necessarily be the decisive aspect for the availability of protection in bankruptcy, where the seller is under an obligation to dispatch the goods to the buyer and the goods are in transit. Ownership will usually pass to the buyer when the goods are handed over to the carrier (§ 429 ABGB).\textsuperscript{544} As mentioned previously,\textsuperscript{545} the seller is granted a right of stoppage in transit (§ 45 KO). Provided that the goods have not reached the place of destination and have not been handed over to the buyer before the opening of the bankruptcy proceedings, the unpaid seller can claim them back. The practical importance of this right has declined over the past decades, since the purchase price is usually secured by the stipulation of a ‘retention of title’ or ‘cash against documents’ clause.\textsuperscript{546}

Correspondingly, but irrespective of the buyer’s insolvency, the consignor, under § 433 UGB, has a right to redirect the goods against the carrier.

9.2.2. Synallagmatic contracts not discharged in full by both of the parties

(a) As already mentioned, § 21 KO and § 20b AO provide for a special right to choose in case the mutual obligations arising from a synallagmatic contract are not discharged in full by both of the parties at the time of commencement of the insolvency proceedings. The administrator in bankruptcy (in the composition proceedings: the debtor himself, though requiring the consent of the composition administrator, Ausgleichsverwalter) can choose either to perform the contract fully and, in turn, demand full performance from the other party, or can repudiate the contract (Rücktritt).\textsuperscript{547} In effect, this

\textsuperscript{544} Supra, 5.6.7.

\textsuperscript{545} Supra, 5.2.2.(c) with details in footnote 285.

\textsuperscript{546} Schulyok in Konecny/Schubert, Insolvenzgesetze, § 45 KO no. 3. See ibidem, nos. 4 ff for further details as to this device.

\textsuperscript{547} For details see Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I', § 21 KO nos. 15 ff.
protects the other contracting party from being obliged to render further performance after the commencement of the bankruptcy proceeding, without the possibility of receiving counter performance.548

(b) This rule applies where the transferor still has the goods in his possession and the transferee has not paid the price (or the full price) when the insolvency proceedings are commenced. As the state of performance at this point in time is decisive, the rule also applies where both parties have not fully performed at the time of commencement of the proceedings, but the other party (here: the transferor) performs after that point in time; for instance, where the other party delivers the sold goods to the bankrupt buyer because it was ignorant of the declaration of bankruptcy: The administrator can either choose to enter into the contract (and fulfil the bankrupt’s obligations under the contract), or can repudiate the contract, in which case the other party can demand the restitution of its performance (the goods) based on unjustified enrichment of the bankrupt’s estate.549

(c) The rules of §§ 21 KO, 20b AO also apply, this being a very important field of application, where goods have been delivered subject to reservation of title: The transferee has not discharged his obligation, as he has not paid the full purchase price. The transferor’s obligation, on the other hand, has not been fulfilled completely, since he has not transferred ownership yet, although the object has been handed over physically already. If the administrator chooses to stick to the contract, the bankrupt’s estate will have to pay the (rest of the) purchase price and, therefore, ownership will pass. If he chooses to repudiate the contract (Rücktritt), the transferor, still being the owner of the object, has the right to separate it from the bankrupt’s estate (Aussonderungsrecht, § 44 KO).

According to § 44 (1) KO, such a right to separation usually presupposes that the other person’s property is still situated in the bankrupt’s estate. Therefore, if the debtor has resold it (to a third party) before the commencement of bankruptcy proceedings, the creditor will not have a right of separation. If, on the other hand, the property has been resold after the commenceent or bankruptcy proceedings, § 44 (2) KO provides a right to separate the purchase price already paid by the third party; if the price has not been paid yet, the claim for the purchase price has to be assigned.550

(d) Which particular effect a repudiation (Rücktritt) in the sense of § 21 KO and § 20b AO has, is discussed controversially.551 According to the OGH, this kind of repudiation does not terminate the contract in the sense of the other termination rules, i.e. triggering obligations to mutu-

549 Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I’, § 21 KO no. 10.
550 See for instance OGH 5 Ob 248/61, SZ 34/113.
551 An overview is given by Rechberger/Thurner, Insolvenzrecht’, 35 f; cf. also Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I’, § 21 KO no. 24.
ally return the performance that has already been received, but only has the effect that further performance is stopped. The other party’s claim for performance is converted into a claim for damages (not based on negligence), but this will be a mere dividend claim. This understanding of the effects of repudiation may result in an enrichment of the other party in certain situations: If, for instance, A has sold a machine to B subject to reservation of title and B has paid €10,000 of the purchase price of €15,000 when he goes bankrupt, the administrator of B’s estate will not be entitled to recover the already paid €10,000 after repudiating the contract under § 21 KO. A, on the other hand, will recover the machine by virtue of his right of separation that is based on the retained ownership (§ 44 KO) and – additionally – will keep the €10,000 since repudiation is understood not to result in a reversal of transactions. This problem is solved by giving the bankrupt’s estate a claim ex unjustified enrichment against the other party.

(e) A special provision applies where the other contracting party is obliged to perform in advance (Vorleistung): Due to § 21 (3) KO, the other party can claim for simultaneous mutual performance (Leistung Zug um Zug), unless this party should have known of the weak financial circumstances of the (now bankrupt) debtor at the time of concluding the contract.

(f) According to § 25a KO, §§ 21-25 KO are cogenent law and, therefore, may not be excluded by contractual agreement.

(g) The relation between the administrator’s right of choice and the seller’s right to terminate the contract on account of the transferee’s default in payment is somewhat unclear (§ 918 ABGB or an equivalent contractual right of termination): In some decisions, the OGH seems to assume that

552 Cf. supra, 5.4.2.(c).
553 Cf. OGH 5 Ob 311/81, SZ 56/78; Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I, § 21 KO no. 25.
554 § 21 (2), 3rd sentence KO. On the whole context see for instance Holzhammer, Insolvenzrecht, 49 f; Rechberger/Thurner, Insolvenzrecht, 35 f; Gamerith in Bartsch/Pollak/Buchegger, Insolvenzrecht I, § 21 KO no. 24.
556 The construction of this right of termination caused some problems until commercial law was reformed, these reforms entering into force in January 2007: The general rule on the debtor’s delay in § 918 ABGB provides for a right of termination, if the other party has not discharged her obligation at the proper time. Problems arose from Art. 8/21 4. EVHGB, a provision originally applicable to commercial contracts governed by the HGB, but also applied by way of analogy to general civil law; cf. Koziol/Welser, Grundriss II, 49; OGH 3 Ob 290/99i, JBl 2000, 727 (transfer of land): By that provision, the right of termination pursuant to § 918 ABGB is excluded, if the seller has delivered the goods and has allowed additional time for payment of the purchase price (Stundung). However, there was general agreement that, in the case of a reservation of ownership clause, Art. 8/21 4. EVHGB will not apply. The arguments varied: Some presumed the parties’ implicit agreement on a contractual right of repu-
the supplier can terminate the contract only if the administrator in bankruptcy is in delay with exercising his right of choice. More recent decisions, on the other hand, clearly state that § 21 KO has no effect on the supplier’s right of termination. This opinion is also shared by important academic writers and, therefore, seems to prevail today.

9.2.3. Contracts fully performed by both parties

If both parties have already discharged their obligations in full at the time of the commencement of insolvency proceedings, §§ 21 KO and § 20b AO do not apply. Ownership has already passed to the transferee; this will not be changed by the transferee’s bankruptcy.

Ownership reverts only in case of avoidance of the contract on account of mistake, fraud or threats (§§ 870, 871 ABGB). As discussed above, the contract, once avoided, is deemed retrospectively invalid from the beginning. In the transferee’s bankruptcy, this will result in a right of the transferee to separate the sold property from the bankrupt’s estate (§ 44 KO). The bankrupt’s estate, on the other hand, is entitled to recover the purchase price from the transferor based on unjustified enrichment.

9.3. Insolvency of the transferor

When the transferor becomes insolvent, the crucial question for determining whether the transferee will be protected against the transferor’s creditors will be whether he has already acquired ownership: Then he can keep the goods that he already possesses, or can separate them from the bankrupt...
transferor’s estate. Additional insolvency rules, again, come into play when both parties to a synallagmatic contract have not fulfilled their obligations in full.

As discussed in detail in chapter 5, ownership will regularly pass upon delivery, but the parties are free to regulate the point in time of the passing of ownership in accordance with the legal framework provided by the transfer rules. The acquisition of ownership upon the conclusion of the contract, including a right of separation in case the transferor goes bankrupt before delivery, is only possible if the parties agree on a constitutum possessorium. Subject to the general rules outlined in chapter 5, such an early protection will only be possible where generic goods have already been identified to the contract before the commencement of the bankruptcy proceedings, future goods have come into existence, goods not yet owned by the transferor have become his property or the transferor has become entitled to dispose of them, respectively. There is, in principle, no difference as to which kind of obligation such transfer of ownership is based on.\textsuperscript{563} A mere option to buy will not provide a right of separation in insolvency either.\textsuperscript{564} As to a transfer by means of an indirect representative who goes bankrupt while being in possession of the goods, see chapter 8, above.

In the following, some basic principles are discussed in the bankruptcy context.

9.3.1. Situations where one of the parties has discharged its obligation in full

If the buyer has already paid the price but the seller has not transferred ownership when insolvency proceedings are commenced, the buyer would, in principle, still have his claim for the transfer of ownership. But, as the bankruptcy procedure intends to satisfy the creditors’ claims equally (to the same percentage), § 14 KO provides that claims other than for money are converted into their estimated monetary value in order to be enforceable. However, only a dividend will be discharged.\textsuperscript{565} This also applies in the case of a binding donation where delivery to the donee has not been made yet.

If, on the other hand, the transferor has already transferred ownership to the transferee, but the latter has not paid the purchase price, the bankrupt’s estate is still entitled to claim the full purchase price.

\textsuperscript{563} See supra, 5.4.1.
\textsuperscript{564} Cf. supra, 3.3.2. and the references provided there.
\textsuperscript{565} See for instance Feil, Konkurs, Ausgleichs- und Anfechtungsordnung\textsuperscript{e} (1988), § 14 KO no. 1 and 2; Holzhammer, Insolvenzrecht\textsuperscript{e}, 39. Another possibility for the transferee could be to terminate the contract due to the transferor’s late performance (§ 918 ABGB). In this case, he could claim for the recovery of the paid purchase price, but also this claim will only be a dividend claim in bankruptcy.
9.3.2. Synallagmatic contracts not discharged in full by either of the parties

As discussed in the foregoing sections, the administrator in bankruptcy has a right to choose whether to enter into a synallagmatic contract, fulfilling the debtor's whole obligation, or to repudiate the contract (§ 21 KO). This principle also applies here.

However, according to the probably prevailing opinion in scientific writing, an exception has to be made in the – rather important – case of reservation of title: Here, the transferee has a right to obtain ownership by virtue of having paid the purchase price in full (expectant right, Anwartschaftsrecht). In Austrian law, this expectant right is considered to be a special kind of right, similar to a right in rem, and therefore also has the effect of a right of separation in the sense of § 44 KO. This right of the transferee would be interfered with, if the administrator in the seller's bankruptcy had a right to opt for repudiation under § 21 KO. After all, the administrator in the seller's bankruptcy will have a right to repudiate the contract only in the case of the transferee's late payment. This derives from the general rule of § 918 ABGB, but has nothing to do with the insolvency of the transferor. In the case of composition proceedings under the AO, the same rules apply (the debtor may choose pursuant to § 20b AO).

9.3.3. Contracts completely fulfilled by both parties, including subsequent avoidance or termination

Where both parties have fulfilled their mutual obligations, the transferee has already acquired ownership.

In the case of the avoidance of the contract on account of mistake, fraud or duress (§§ 870, 871 ABGB), which dissolves the contract with retroactive effect, the administrator of the transferor's estate will be entitled to lay claim to the goods. On the other hand, the transferee will be entitled to claim for the return of the purchase price based on unjustified enrichment law (§ 877 ABGB). In principle, it is accepted that the transferee, although no longer being the owner, may withhold the physical redelivery of the movable to the transferor until the latter pays back the purchase price. It has even been


568 See below, 19.5.1.(c) with references in footnote 893.
argued\textsuperscript{569} that this right to withhold should have the same effect as a proprietary security right in the former seller's insolvency: According to § 10 (2) KO, 'rights of retention' (Zurückbehaltungsrechte) are to be treated as rights of pledge (Pfandrechte) in bankruptcy. This means that the asset belongs to the bankrupt's estate but the transferee is entitled to preferential payment from the proceeds of the sale of the asset. The same has been argued for situations where the contract is not avoided (with retroactive proprietary effect) but terminated, for example for lack of conformity. Also, no difference is made between avoidance (termination) before or after the opening of bankruptcy proceedings.

10. Passing of risk and internal allocation of uses and liability for charges

The rules on the passing of risk and the rules on the transfer of ownership do not necessarily converge under Austrian law; though, in many cases, they coincide factually. The same goes for the rules on the internal allocation of uses and liability for charges deriving from or linked to the movable. In the following, only the internal (contract law) relation between the transferor and the transferee will be dealt with.\textsuperscript{570}

10.1. The passing of risk

10.1.1. General principles

The notion of 'bearing the risk' (Gefahrtragung) is used in different contexts in Austrian law. There is a common aspect insofar as all of these issues deal with the question of who has to bear the detriment in the case of an accidental loss or deterioration of an asset. An 'accidental' event (Zufall) is defined as an occurrence, which neither of the parties (transferor or transferee) has caused through his or her fault, and which neither of them may be held liable for (e.g., negligent behaviour of the party's employee).\textsuperscript{571}

(a) One aspect of 'risk' is the effect of accidental loss, which occurs between the conclusion of a synallagmatic contract\textsuperscript{572} and the delivery to the

\textsuperscript{569} As to the following, see Iro, Das Zug-um-Zug-Prinzip im Insolvenzverfahren, RzW 1985, 101, arguing for an application of § 10 (2) KO (however, erroneously speaking of § 19 instead of § 10) by way of analogy.

\textsuperscript{570} For the relation to the respective property law principles see supra, 5.2.2.(a) and 1.2.2.(a).

\textsuperscript{571} A detailed analysis of the passing of risk under Austrian law is provided by Ch. Rabl, Die Gefahrtragung beim Kauf (2002).

\textsuperscript{572} E.g., a contract for sale.
buyer, on the transferee's obligation to pay the price (or other counter-performance). This aspect of risk is called 'Preisgefahr' (literally: 'risk of payment'). Here, the question arises whether the seller, whose property was lost accidentally, nonetheless has a right to the purchase price; or, looked at from the buyer's perspective, whether the latter must pay the purchase price without, in turn, receiving the object.

This question is governed by §§ 1048, 1049 and 1051 ABGB. The main principle is that the risk passes to the acquirer at the agreed time of delivery. The same principle is reflected in § 1419 ABGB, which provides that a creditor who is in default of acceptance (Annahmeverzug) has to bear the negative consequences of this delay. If the parties have not agreed upon a certain time of delivery, the moment of actual delivery is relevant. The mentioned rules of §§ 1048-1051 ABGB are located in the chapter on barter contracts, which applies to contracts of sale by way of reference in § 1064 ABGB. As far as service contracts (Werkverträge) are concerned, §§ 1168, 1168a ABGB contain separate rules on the passing of risk, which cater for the special characteristics of those contracts (where the question of the passing of risk can arise in different ways). However, in the case of an accidental loss (or deterioration) of goods that have already been manufactured, the rules on the passing of risk converge with those on sales contracts (§ 1068a, 1st sentence ABGB). In the case of the donation of a specific asset, the risk 'passes' with the conclusion of the contract: Since there is no counter-performance, the question of a 'risk of payment' (Preisgefahr) does not arise. The following discussion will focus on contracts for sale.

The rules on the passing of the 'risk of payment' focus on contracts for specific (ascertained) goods (Speziesschulden). Their application to obligations to supply generic (unascertained) goods (Gattungsschulden, Genusschulden) requires an appropriation (identification) of the unascertained goods to the contract (Konkretisierung, Konzentration). Before appropriation, the question of the passing of risk in the sense of a 'risk of payment' does not arise, because the seller would be bound to deliver an object of the agreed kind anyway.

A difficult regime applies where the sold goods have not been completely destroyed but simply damaged, so that they can still be delivered, though in a deteriorated condition. According to §§ 1048, 1051 ABGB, the contract 'shall be deemed not to have been concluded' in case the deterioration

573 The main principle is already spelled out in § 1447 ABGB, which provides that, in case the performance of an obligation becomes impossible (here: the transferor's obligation to deliver a specific asset) due to the occurrence of an accidental event, this obligation and the obligation to render the counter performance are extinguished.

574 See for instance Reischauer in Rummel, ABGB II/3¹, § 1419 no. 22; Aicher in Rummel, ABGB I ¹, §§ 1048-1051 no. 14.

575 See Reischauer in Rummel, ABGB II/3¹, § 1419 no. 12.

576 See below, (b).
amounts to more than 50 per cent of the goods' value before the relevant point in time (agreed time of delivery). If, on the other hand, the object's deterioration has amounted to maximally 50 per cent before the (stipulated or actual) delivery, the loss is to be borne by the possessor, i.e. the supplier, according to § 1049, 1st sentence ABGB. The contract remains valid, but the price has to be reduced proportionally.\footnote{OGH 8 Ob 533/91, ImmZ 1993, 178. Aicher in Rummel, ABGB I\textsuperscript{1}, §§ 1048-1051 no. 7. See also Binder in Schwimann, ABGB IV\textsuperscript{1}, § 1049 nos. 1 ff. The rule is analysed in much detail by Ch. Rabl, Gefahrtragung 185 ff.} In recent literature, it has been argued that the 50 %-rule has been derogated by a reform of the warranty provisions (Gewährleistungsrecht), which entered into force in 2002. According to this view, where the lack of conformity can not be cured by repair or replacement, the buyer can choose – even before taking delivery –, whether to uphold the contract and be compensated by a price reduction, or terminate it, unless the non-conformity is minor.\footnote{Ch. Rabl, Gefahrtragung 227 ff.}

(b) A second aspect of ‘risk’ relates to the question of whether the transferor, where the object of performance has been lost or destroyed accidentally, is still bound to perform; in particular, whether he must take another piece from his stock in order to discharge his obligation.\footnote{Ch. Rabl, Gefahrtragung 227 ff.} This aspect is called ‘performance risk’ (Leistungsgefahr); the relevant rules are also laid down in §§ 1048-1051 ABGB.

The accidental loss or destruction of a specific asset extinguishes the obligation to deliver it.\footnote{Performance has become impossible; cf. also § 1447 ABGB.} Where a contract is for the delivery of generic goods, the seller remains obliged to deliver until the appropriation (identification) of the unascertained goods has taken place. Under the prevailing opinion, appropriation can be described as the point in time when the supplier has done everything necessary to fulfil his obligation to perform.\footnote{F. Bydlinski in Klang, ABGB IV/2\textsuperscript{2}, 149 f; Aicher in Rummel, ABGB I\textsuperscript{1}, §§ 1048-1051 no. 4. A comprehensive overview and critical discussion is provided by Ch. Rabl, Gefahrtragung 362 ff; see also Ch. Rabl, Die Konzentration der Gattungsschuld – Eine Relativierung, in FS Welser (2004) 833.} If the obligation is to be discharged at the domicile of the debtor (Holschuld), this requires, under the prevailing opinion, that certain objects are separated from the rest of the seller’s stock and that these objects are placed at the creditor’s disposal. If, on the other hand, the obligation is to be discharged at the creditor’s address, appropriation will ensue from the creditor’s default of acceptance. In the case of the dispatching of the goods to the buyer’s address (Versendung), appropriation requires a handing over of the goods to the carrier. The prevailing opinion’s formula, in particular the requirement of isolating or separating the sold objects from the rest of the seller’s stock, has
10. Passing of risk and internal allocation of uses and liability for charges

recently been criticised by Christian Rabl.\textsuperscript{582} He argues that, for the passing of risk, the seller's proof of an accidental loss affecting the goods ascertained for the buyer must suffice. According to his view, appropriation generally takes place in three situations: Upon performance, upon the creditor's default of acceptance or, in the case of transport by an independent carrier, upon delivery to the carrier.

\begin{itemize}
  \item \textbf{(c)} It is generally accepted that the rules on the passing of the risk – in contrast to the rules on the passing of ownership – are \textit{non-mandatory} provisions (cf. § 1051 ABGB). The parties, therefore, can agree to adopt different rules,\textsuperscript{583} such as Incoterms clauses.
  \item \textbf{(d)} Another aspect – which is also relevant for the transfer of ownership – should be mentioned here: At least according to some scholars, the \textbf{passing of risk requires a valid contract} (Verpflichtungsgeschäft). Therefore, the risk does not – even in the case of actual physical delivery – pass to the buyer, if the contract is invalid \textit{ab initio} or avoided with retroactive effect (e.g., on account of mistake). But also in relation to the cases where a termination of the contract does not have retroactive effect on ownership,\textsuperscript{584} it is stated that the risk will not pass to the buyer, since the obligation to deliver ceases to exist when the contract is terminated.\textsuperscript{585}
\end{itemize}

\subsection*{10.1.2. Underpinnings of the rules on the passing of risk as opposed to the transfer of ownership provisions}

It is nowadays accepted that the rules on the passing of risk (in the sense of ‘risk of payment’, Preisgefahr) derive from a \textit{different ratio} than the rules on the passing of ownership. In the recent debate, there have been mentioned at least three arguments to justify the principle of the passing of risk at the moment of (stipulated or – subsidiarily – actual) delivery: The first argument is based on the idea that the risk shall pass to the acquirer \textbf{when the transferor has carried out the principal acts of his performance}, so that it is up to the transferee to fulfil the purpose of the contract.\textsuperscript{586} Another argument is that until the moment of delivery the seller has \textbf{better opportunities to protect the goods} from possible danger; after delivery has taken place, this

\begin{itemize}
  \item \textsuperscript{582} Cf. Ch. Rabl, Gefahrtragung 398 ff; \textit{idem} in FS Welser 833 at 844 ff.
  \item \textsuperscript{583} See for instance Aicher in Rummel, ABGB I', §§ 1048-1051 no. 16; Binder in Schumann, ABGB IV', § 1048 nos. 25 ff.
  \item \textsuperscript{584} \textit{E.g.}, termination of the contract on account of the debtor's default of payment or lack of conformity, §§ 918, 932 ABGB. See supra, 5.4.2., for the different effects of defects in the obligation or in performance.
  \item \textsuperscript{585} See Aicher in Rummel, ABGB I', §§ 1048-1051 no. 17; F. Bydlinski in Klang, ABGB IV/2, 699.
  \item \textsuperscript{586} This argument is stressed particularly by Schilcher, Die Preisgefahr beim Kauf, JBl 1964, 395 (especially 403-406); see also Aicher in Rummel, ABGB I', §§ 1048-1051 no. 8.
\end{itemize}
could be said of the buyer. In addition, the delivery principle is based on the argument that it is up to the supplier to use the asset and yield the fruits of its use before tradition; therefore, he shall also bear the risk (‘cuius commodum, eius periculum’-principle). Graf tries to deduce these arguments from one basic principle, namely the parties’ possibilities to calculate the risks which the object of performance is subject to.

10.1.3. Further details regarding the different forms of delivery in relation to the passing of ownership

As already mentioned, the passing of ownership and the passing of the risk do not necessarily converge under Austrian law (although both adopt a principle of ‘delivery’ in some way). This is a consequence of the different functions of these rules. Prominent examples are the transfer of immovable property, where the risk passes when the property is handed over physically (whereas the passing of ownership requires registration), and, as far as movable property is concerned, the case of sales under reservation of title. Here the risk passes, corresponding with the rules of §§ 1048-1051 ABGB, at the time of delivery to the buyer (whereas ownership passes when the price is paid in full).

Difficulties and disputes also arise with respect to some of the different forms of traditio provided for in §§ 426-429 ABGB. No problems are caused by physical delivery (§ 426 ABGB), which is rather frequent in everyday life. Here, the passing of risk and the transfer of ownership actually converge, except in the case of the buyer’s default of acceptance. As to ‘symbolic delivery’ according to § 427 ABGB, it is stated that, in regular

587 Cf. F. Bydlinski in Klang, ABGB IV/2, 499; Aicher in Rummel, ABGB I, §§ 1048-1051 no. 8; Koziol/Welser, Grundriss II, 171. Against the argument based on the better opportunity to prevent the risk of damage (since the rules on the passing of risk also cover risks that can not be controlled at all) Reischauer in Rummel, ABGB II/3, § 1419 no. 13. For a summary of the discussion see also Graf, Vertrag und Vernunft (1997) 158 f; Ch. Rabl, Gefahrtragung 62 ff (who is sceptic about identifying universal arguments for all different constellations where the passing of risk may be relevant).

588 Graf, Vertrag und Vernunft 159-162.

589 This thesis is not undisputed in Austrian legal literature: Some scholars hold that the ABGB, in principle, provides that the passing of the risk shall occur at the same moment as the passing of ownership; see for instance Reischauer in Rummel, ABGB II/3, § 1419 no. 13, who inter alia gets back to Zeiller, the main draftsman of the ABGB (Zeiller, Commentar über das allgemeine bürgerliche Gesetzbuch III/1 [1812] 342 ff), who in fact associated the question of the passing of risk with one on the passing of ownership.

590 See for instance Reischauer in Rummel, ABGB II/3, § 1419 no. 13; Aicher in Rummel, ABGB I, §§ 1048-1051 no. 9 with various references.

591 For these different forms see supra, 5.6.

592 Cf. Aicher in Rummel, ABGB I, §§ 1048-1051 no. 12.
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situations, the risk will not pass to the acquirer, since he has not obtained actual physical power over the goods yet. As the rules on the passing of risk are non-mandatory, the parties may agree upon a different solution though. The content of a possible contractual agreement is also considered to be of primary relevance in the case of a constitutum possessorium (§ 428 ABGB). If there is no such contractual agreement, which provides that the risk shall pass at the moment when ownership passes, many writers tend to assume that the risk will not pass until the goods are physically handed over to the acquirer, as this subsequent physical transfer is deemed to be usually intended. Others argue that the risk will regularly pass when ownership passes under the constitutum possessorium, if, according to an interpretation of the parties’ agreement, the obligation arising from the contract for sale is fulfilled with the constitutum possessorium. Similar arguments are brought forward in discussing the case of a transfer by order to a third party (Besitzanweisung): Partly, it is argued that the seller is, regularly, obliged not only to transfer ownership, but also to ensure that the third person will hand over the goods to the acquirer at a later date. Under this view, the risk should not pass with the transfer of ownership; again, the parties may, of course, agree otherwise. Others assume that the seller will usually have fulfilled his contractual obligations by giving notice to the third party, which also supports the assumption that risk passes.

In the case of a brevi manu traditio (§ 428 ABGB), where the acquirer already has actual physical power over the object, the risk will pass to the buyer upon the conclusion of the contract for sale. Where the parties stipulate that ownership shall pass at a later time, this moment will be decisive for the passing of risk as well. This result is, however, not seen as a consequence of the transfer of ownership as such, but rather perceived as following from an interpretation of the contract.

Where the goods are to be transported by an independent carrier (Versendungskauf), § 429 ABGB provides that ownership will pass when the goods are handed over to the carrier, unless the seller has chosen an unusual

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593 See F. Bydlinski in Klang, ABGB IV/2, 501, who develops this thesis from his research on the constitutum possessorium. Cf. also Aicher in Rummel, ABGB I, §§ 1048-1051 no. 11; Ch. Rabl, Gefahrtragung 107. The question is, however, not discussed in much detail in Austria.

594 Cf. F. Bydlinski in Klang, ABGB IV/2, 498 ff; this view is followed by Aicher, cit., no. 11; see also Kozioł/Welser, Grundriss II, 171; Schilcher, JBL 1964, 395 (406 f).

595 Cf. Ch. Rabl, Gefahrtragung 94 ff; see also Reischauer in Rummel, ABGB II/3, § 1419 no. 18; Binder in Schwimann, ABGB IV, § 1048 no. 8.

596 Cf. F. Bydlinski in Klang, ABGB IV/2, 501; Aicher in Rummel, ABGB I, §§ 1048-1051 no. 11.

597 Ch. Rabl, Gefahrtragung 105 ff. Cf. also Schilcher, JBL 1964, 395 (406); Reischauer in Rummel, ABGB II/3, § 1419 no. 18.

598 Cf. Ch. Rabl, Gefahrtragung 93 f with further reference.
mode of transport. Today, this rule applies to the passing of risk as well. For contracts concluded before 1 January 2007, a specific rule existed for the passing of risk in commercial transactions: Art. 8/20 of EVHGB provided that, generally, the risk was to pass to the buyer when the goods were handed over to the carrier (without making any exceptions for unusual modes of transport). This rule has now been abolished in order to simplify and unify the law. – In a recent case, the Austrian Supreme Court ruled that if the seller redirects the shipped goods into 'his sphere of control' by storing them in the interim, the risk 'reverts' to the seller, irrespective of whether or not he was entitled to order such a redirection. The court did not have to decide on the consequences of such acts for the transfer of ownership, but showed sympathy for the view that the transfer of ownership, which had taken place upon handing over the goods to the carrier, would remain unaffected.

10.2. Internal allocation of the right to profits and the liability for charges

The internal allocation of the profits (‘uses’, Nutzungen, § 1050 ABGB) of and charges (Lasten, § 1049 ABGB) from the sold object is expressly linked to the passing of the risk, i.e. the stipulated time of delivery or, in lieu of any agreement, the time of actual delivery. Like the provisions on the passing of the risk, these rules are not mandatory. The right to the profits is understood to cover all advantages the property produces; e.g., the fruits of a plant, a sold cow’s calf or the sum received from letting out the property on lease. Charges may result from public law (especially taxes) or contractual obligations (e.g., an insurance premium). Periodical profits and charges are regularly shared on a pro rata basis (in relation to the – stipulated or actual – delivery as the relevant point in time). Where the parties established an agreement as to the point in time of the passing of risk, this moment will

599 See supra, 5.6.7.
600 Cf. Aicher in Rummel, ABGB I’, §§ 1048-1051 no. 10 with further references.
601 Cf. the reasoning in the government bill, RV 1058 BlgNR 22. GP, at 82; Schauer in Krejci, Reformkommentar, 4. EVHGB no. 3. The idea of eliminating this rule has been criticised by Ch. Rabl, ecolex 2004, 602.
602 OGH 1 Ob 202/03t, JBl 2004, 310. The reason for stopping the transport was a default in payment. As to the question how this result can be achieved under the law applicable as from 1 January 2007, see Schauer, cit., no. 5.
603 This had been decided differently in the older decision OGH 7 Ob 108, 109, 125, 126/71, SZ 44/118, which was criticised by Kramer in Straube, HGB I’, Art. 8/20 no. 6.
604 For details see Wahle in Klang, ABGB IV/2ü, 57-61; cf. also Aicher in Rummel, ABGB I’, §§ 1048-1051 no. 21.
605 Cf. Wahle in Klang, ABGB IV/2ü, 60-62; Aicher in Rummel, ABGB I’, §§ 1048-1051 no. 21.
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Regularly be regarded as decisive for the internal allocation of uses, costs and charges as well.\textsuperscript{606}

For the relationship between these rules and the consequences resulting from the right of ownership, see 5.2.2.(a)(ii), above.

\textsuperscript{606} Aicher in Rummel, ABGB I\textsuperscript{1}, §§ 1048-1051 no. 21.
Part III: Original acquisition

Whereas Part II dealt with the acquisition of ownership based on the transfer of an existing ownership right from a former owner to a new owner (derivative acquisition), Part III deals with rules under which a ‘new’ right of ownership is created in favour of the acquirer, which is independent from any predecessor’s entitlement or non-entitlement (original acquisition). When such a new ownership right comes into existence, however, the former owner’s right is extinguished.

Some of these rules have an important supplementary function where a transfer of ownership (i.e. derivative acquisition) was intended but failed; in particular, the rules on good faith acquisition, where the transferor was neither the owner nor authorised to dispose of the property (chapter 12), and acquisitive prescription, which may cure various ‘transfer defects’ through possession for a certain period of time (chapter 13). Another set of rules, which may become relevant in a transfer context, especially when goods are sold under reservation of title, deals with the results of the combination, commingling and processing of goods belonging to different persons (chapter 11).

11. Acquisition by combination, commingling and processing

11.1. The different situations; terminology

Austrian law provides rules for different situations where either moveables owned by different persons, or a movable owned by one person and work performed by another person on it, are, in one way or another, ‘combined’. All of these provisions, as discussed in the following, have in common that they only apply where the physical restoration of each contribution is impossible or economically unreasonable (§ 415 ABGB). According to the Supreme Court, restoration is economically unreasonable when it requires the incurrence of unreasonable costs or causes an unreasonable deterioration. In case these requirements are not fulfilled, each owner of the in-

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607 OGH 1 Ob 110/67, EvBl 1968/174 and others. See also Spielbüchler in Rummel, ABGB I, § 414 no. 4.
11. Acquisition by combination, commingling and processing

Involving material remains the owner of his respective part and can demand its physical separation from the combined entity. On the other hand, if the named requirements are fulfilled, one traditionally differentiates between the following categories (whereas their legal consequences are basically the same).

**Processing or specification (Verarbeitung)** is defined as the transformation of a movable asset into a ‘new movable’ (neue Sache) by work performed on it by a person other than the owner of the original movable. Whether a new movable has been created is to be assessed by common opinion. Criteria to be taken into account in this assessment are a change in the external form or appearance, purpose of use or usability; to a certain extent, also a change in name or an increase in value may be taken into account in arriving at a decision. Examples for processing have been, for instance, the production of petrol from crude oil, sewing a suit out of cloth, drawing a painting on another person’s canvas, creating jewellery out of another person’s gold or spinning yarn from wool etc. Today, the most important field of application seems to be where material is bought under reservation of title and processed to new products before payment of the purchase price of these materials.

One of the criteria mentioned above, namely whether an increase in value is essential for ‘processing’ to occur, has been the subject of controversial debates. While some authors argue in favour of such a criterion, others state that this issue is not decisive because, in the case of worthless production (not resulting in any increase in value), an application of the relevant rules would not lead to any change in the property law status of the material; also, a physical restoration to the previous state would be more likely to be ‘economically reasonable’ because there has been no economically valuable performance of labour that could be frustrated.

**Combination** (in a wide sense) occurs where movables belonging to different owners are physically put together in a way that separation would be impossible or economically unreasonable. § 415 ABGB mentions ‘combination’ (in a more narrow sense: physically linked solids; Vereinigung), ‘commixture’ (commingling of similar solids, such as grain; Vermengung) and the

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608 See, e.g., Spielbüchler in Rummel, ABGB I, § 415 no. 2.
611 Cf. Madl, Verarbeitung 84 ff.
612 Cf. Koziol/Welser, Grundriss I, 319; Klicka in Schwimann, ABGB II, § 415 no. 3.
613 For instance Spielbüchler in Rummel, ABGB I, § 414 no. 3.
614 Koziol/Welser, Grundriss I, 319; on the whole discussion, see Madl, Verarbeitung 115 ff.
‘confusion’ of liquids or gases (Vermischung), but these distinctions have no practical relevance. Also, it is irrelevant whether or not these are caused by acts of man.

From the text of the ABGB, it appears that the civil code understands ‘repairs’ as a further category (‘Ausbesserung’), in the sense of material being used to replace worn out parts with ‘new’ ones. But, substantially, the rule has the function of providing different legal consequences where one of the contributions is of minor importance. The rule is assumed to contain a general principle, which is also applicable to processing.

All these categories have in common that the legal capacity of the acting person is not required.616

11.2. Legal consequences

1. The ABGB’s rules on the processing and combination of movables are default rules. They only apply where the parties – i.e. the owners of the involved material and the producer, as the case may be – have not established a valid agreement as to the proprietary consequences of these events. This is of particular importance for processing, where the work is performed by an employee of the owner of the material or where the owner of material instructs a service provider, in a contract for work and services (e.g., the owner of wood orders the production of furniture from his own material), to produce a new asset using the former’s own materials. In such cases, the contract between the owner of the material and his employee, or the service provider, respectively, will contain at least an implied term that the owner of the material will acquire the sole ownership of the product.619

2. Where no such contractual provision exists, the basic rule of the ABGB is that the contributors will acquire a co-ownership share in the produced or combined entity (§ 415 ABGB). The size of each undivided share will be determined according to the proportional value of each combined movable or, in the case of processing, by subtracting the value of the material from the value of the new product. As a result of the latter rule, the producer always bears the economic risk of incurring production costs in vain. The value of the material is determined with reference to the moment in time the processing or combination occurs.620

615 Cf. Klang in Klang, ABGB II, 283; Spielbüchler in Rummel, ABGB I, § 414 no. 4.
616 See for instance Spielbüchler in Rummel, ABGB I, § 414 no. 6: So-called ‘Realakt’.
617 See below, 15.6., for the limits of such agreements in the case of a reservation of title.
618 See for instance Spielbüchler in Rummel, ABGB I, § 414 no. 2 and § 415 no. 7.
619 Iro, Sachenrecht, no. 6/18.
620 Cf. Spielbüchler in Rummel, ABGB I, § 415 no. 3. Details on the calculation of the undivided shares are discussed by Madl, Verarbeitung 176 ff.
Whether the acting person processed or combined the material in good or in bad faith is irrelevant for the proprietary consequences. Even a thief can acquire property rights in a new asset that he produced from his victim’s material. Good or bad faith is, however, relevant when it comes to the question of how the co-ownership of the combined or produced entity is to be divided: Such division of co-ownership is not subject to the general ABGB-rules on division (i.e. selling the object as the result of a court order and dividing the proceeds, § 843 ABGB);621 the Austrian civil code contains special separation rules in relation to co-ownership that has been created by virtue of combination or processing. Under these rules, the person whose property was combined or processed due to the other party’s fault (intention or negligence) can choose either to accept the entity and pay the other party a sum in the amount of the value that the latter added to the movable, or to leave the whole entity to the other party and be paid for his or her own contribution. If neither party acted in fault, the party who made the more valuable contribution has the right of choice (§ 415 ABGB). The same will apply if both parties equally acted in bad faith.622 In addition, the general rules of tort law apply and additional compensation can be demanded from a party acting intentionally or negligently under these provisions.623

3. An exception from the general co-ownership solution is provided for in § 416 ABGB. As mentioned above, the rule speaks of ‘repair’. It provides that where a (clearly)624 subordinate part is combined with a principal part, the owner of the principal part becomes sole owner of the combined entity. One may speak of accession. The subordinate part becomes a ‘dependent component part’ of the principal part, and the former necessarily adopts the proprietary fate of the latter. The sole owner must compensate the other party according to the principles of unjustified enrichment law. If he acted in good faith, he must provide compensation in the amount of the objective value; if he acted in bad faith, further compensation may be due.625

Today, it is generally accepted that these principles also apply to the case of processing, i.e. where one of the contributions was labour.626 For instance, where a document had been written on another’s paper, the Supreme Court decided that the author of the document acquires sole ownership.627

4. Specific principles also apply in case movables of the same kind are commingled (e.g., grain belonging to different farmers is commixed in a silo

621 Cf. chapter 17, below.
622 Spielbüchner in Rummel, ABGB 1’, § 415 no. 4.
623 Spielbüchner in Rummel, ABGB 1’, § 415 no. 6.
624 The imbalance must be striking (‘sehr ungleichgewichtig’), cf. OGH 2 Ob 210/97i, SZ 70/188. Clear examples are hardly ever provided.
625 Details are problematic. See for instance Madl, Grundprobleme der Verarbeitung 219 ff (in particular, 225 ff).
626 See for instance Spielbüchner in Rummel, ABGB 1’, § 416 no. 1.
627 OGH 4 Ob 62/90, JBl 1991, 188.
or oil belonging to different owners is confused in a tank). As discussed above, the owners of the individual assets will become co-owners of the whole. However, the division of co-ownership can be exercised in a simplified way, namely by physically separating a quantity corresponding to each co-owner’s contribution. This separation is also denoted as ‘vindication by quantities’ (Quantitätsvindikation) and the right in the undivided quantity is usually described as ‘quantity ownership’ (Quantitätseigentum).628 Specific problems will also be discussed below, 18.1.

A specific problem in this respect results from another provision which deals with the same issue but which provides for different consequences: According to § 371 ABGB, where indistinguishable things belonging to different owners are commingled, the possessor acquires sole ownership irrespective of whether he is in good or bad faith. This seems to contradict § 415 ABGB, which would lead to the co-ownership of the contributors. A number of theories have been put forward in order to eliminate this contradiction.629 A relatively widespread theory assumed that § 415 ABGB only applies where the commingled items can be separated from the possessor’s other property, because otherwise one would not be able to determine in relation to which assets co-ownership exists.630 According to a more recent opinion, not the possibility of separation is decisive but rather whether one can determine the shares: Where it is possible to determine the shares, § 415 ABGB applies and the contributors have co-ownership which they can physically divide, as described above. Where, on the other hand, the shares can not be determined, such ‘vindication’ claims fail and the possessor is regarded as the sole owner of the whole bulk.631

§ 419 of the Commercial Code (UGB) contains rules on the storage of fungible goods. According to this provision, the warehouse keeper is allowed to commingle such goods only if the depositor has explicitly consented to this. As to the proprietary consequences of such commingling, § 419 UGB only states that the warehouse keeper does not acquire ownership. Accordingly, the general provision of § 415 ABGB will apply, which provides for the co-ownership of all depositors.632 Under § 419 UGB, the warehouse keeper is entitled to restore each depositor’s respective quantity of goods, without requiring the consent of the other co-owners.

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628 Confer, among others, Koziol/Welser, Grundriss I, 301 and 320.
629 They are listed by Holzner, Vermengung und Eigentum, JBl 1988, 564 and 632.
630 Defended, e.g., by Ehrenzweig, System I/2, 215 f.
631 Holzner, JBl 1988, 632 (635 ff), followed by Spielbüchler in Rummel, ABGB I, § 371 no. 2.
632 Cf. Schütz in Straube, HGB I, § 419 no. 4.
11.3. Additional issues

1. The effect of processing and combination on third parties’ rights in rem in the original movables is very little discussed in Austria. The practical relevance of this question with regard to movables is rather limited in Austrian law, as non-possessory security rights are not permitted.

The general rule, which is basically discussed in relation to the legal fate of the retained ownership of material, which becomes a ‘dependent component part’ (unselbständiger Bestandteil) of another thing, is that upon becoming such a ‘dependent component part’, the original movable ceases to exist as a separate entity; as a result, all existing rights in this thing are extinguished. It is, however, argued, that the encumbrance continues to exist in the form of a previous owner’s claim for compensation. Where the consequence of combination or processing is co-ownership, the third party’s right is considered as continuing to exist in a co-ownership share that represents the respective former movable.

Where someone combines or processes his own goods, which are encumbered by rights of third parties, these principles are said to apply accordingly.

2. Similar consequences to the ones described supra, 11.2.3., result where a movable asset is physically combined with immovable property: If separation is impossible or economically unreasonable, the movable asset will become a ‘dependent component part’ (unselbständiger Bestandteil) of the immovable. The consequence, which can be derived from §§ 294 and 416 ABGB, is that the ownership of the (formerly) movable asset is extinguished, this part accedes to the immovable asset, and the owner of the immovable must compensate the owner of the movable in accordance with the principles of unjustified enrichment. This mechanism is of particular practical importance where material is bought under reservation of title: For instance, if water pipes, which have been purchased from A subject to a reservation of ownership clause but have not been paid for yet, are built into the house of buyer B, A loses his retained ownership and B acquires the ownership of the pipes, since it would be impossible, or at least economically inefficient, to separate them from the building again.

633 Cf. supra, 11.2.3.
634 Spielbüchler in Rummel, ABGB I, § 416 no. 4 and § 414 no. 7; OGH 5 Ob 599/84, JBl 1985, 543; F. Bydlinski in Klang, ABGB IV/1, 486, 631 f.
635 Spielbüchler in Rummel, ABGB I, § 414 no. 7 and § 416 no. 6.
636 Cf. Spielbüchler in Rummel, ABGB I, § 414 no. 7, who discusses this question only with reference to the case where someone combines or processes his own goods, which are encumbered by rights of third parties.
637 Spielbüchler in Rummel, ABGB I, § 414 no. 7.
12. Good faith acquisition

The Austrian provisions on good faith acquisition from a non-owner have been subject to a recent reform, which entered into force on 1 January 2007 and applies to contracts concluded on or after this day.\textsuperscript{638} Before this reform, there were two separate, but largely comparable regulations on \textit{bona fide} purchases: A general one in the Civil Code (§§ 367, 368 ABGB) and a special one, for sales where at least the seller was a ‘merchant’, in § 366 HGB (Commercial Code).\textsuperscript{639} The new act intended to abolish the differences between these two regulations, as there were considered to be no compelling reasons for having two diverging regimes.\textsuperscript{640} The following discussion is based on the new law, but contains references to the previous provisions in relation to which changes have been made.

In order to simplify the discussion, the ‘true owner’ will generally be called A, the non-owner who ‘transfers’ the property is B and the potential good faith acquirer C.

12.1. Scope of application; specific rules

The good faith acquisition rules of §§ 367, 368 ABGB make up for the transferor’s lack of ownership or authority to alienate. There may be such a lack in a number of constellations: The ‘transferor’ B never had ownership (B borrowed, leased or received the goods from A for the purpose of keeping them in his custody; B found or even stole the movable) or he bought the goods from A under reservation of title, but did not pay the purchase price before transferring the goods to C. Another field of application is where B first acquired the right of ownership from the owner, but the contract has been subsequently avoided on account of mistake, duress or fraud. Due to the ‘causal system’ of Austrian property law, ownership will then revert to A with retroactive proprietary effect; B is deemed to have never acquired the right.\textsuperscript{641} Due to this retroactive effect, it is irrelevant whether the contract A – B is avoided before or after B ‘transferred’ the movable to C. In both cases, C can only acquire on the basis of the good faith acquisition rules. Another constellation where §§ 367, 368 ABGB may apply is a double sale: If the

\textsuperscript{638} Handelsrechtsänderungsgesetz (HaRÄG), BGBl I 2005/120. This Act, \textit{inter alia}, changed the name of the Commercial Code from \textit{Handelsgesetzbuch} (HGB) to \textit{Unternehmensgesetzbuch} (UGB).

\textsuperscript{639} Where, in a commercial case, acquisition was not possible under § 366 HGB but would have been possible under § 367 ABGB, the acquirer could invoke the more favourable general provision (§ 366 (5) HGB).

\textsuperscript{640} Cf. Schauer in Krejci, Reformkommentar, §§ 367, 368 ABGB no. 1.

\textsuperscript{641} Cf. \textit{supra}, 5.4.2. Where the contract is ‘terminated’, there is no such retroactive proprietary effect (see \textit{supra}, 5.4.2.(c)), so that C will have acquired from the owner and the good faith acquisition rules will not apply.
original owner B sells to A first and transfers ownership to him by way of a
constitutum possessorium, which allows B to remain in possession, and B
subsequently sells to C, C may acquire in good faith.

§§ 367, 368 ABGB apply to corporeal movable assets, including negotia-
tible bearer instruments (Inhaberpapiere), lost or stolen goods and so-called
Superädifikate, i.e. buildings erected with the intention that they should
remain in the same place only for a 'limited time' (since such buildings are
treated as movable assets). There is no special rule on the good faith
acquisition of registered ships. For money and other indistinguishable
movable assets, there is a specific rule in § 371 ABGB.

Whether the acquirer C is acting as a consumer or not is irrelevant in
principle. The assessment of good faith may, however, be subject to some-
what stricter conditions with regard to professional parties.

Cultural objects will, in principle, also be subject to the general rules.
Austria has enacted a statute regulating the restitution of cultural objects
objects unlawfully removed from the territory of a Member State. But, like
the directive, this statute does not spell out any property law effects. In
particular, it does not prevent the good faith acquisition of cultural objects
in general. However, the good faith acquisition of single items which
belong to a 'collection', according to the public law regulations on the pro-
tection of 'monuments' (Denkmalschutz; this also may include movables), is
impossible without having obtained the prior consent of the relevant public
authority, because the contract between B and C will be void in such a
case.
12.2. Good faith acquisition under §§ 367, 368 ABGB

As a general principle, no one can transfer more rights than he himself has (cf. § 442 ABGB). As an exception to this rule, good faith acquisition of ownership of movable property ‘from a non-owner’ is possible under §§ 367, 368 ABGB, provided that the following requirements are met.

12.2.1. Acquisition must be for value

As already follows from the text of § 367 ABGB, good faith acquisition is only possible where C acquires for value. The underlying policy consideration is that someone who does not pay a price in exchange for property does not lose any investment when the movable must be returned to the real owner.\(^{649}\) There is not much discussion on where to draw the borderline between an acquisition ‘for value’ and a gift with respect to the good faith acquisition rules, and this question obviously was never of any big practical importance. The general guideline is that the amount of payment, as well as the modalities of payment, are irrelevant for the applicability of the good faith acquisition rules.\(^{650}\) An unreasonably low price can, however, indicate C’s bad faith (§ 368 ABGB).

In recent times, there has been some debate as to the question whether the ‘for value’ requirement only means that the contract B – C imposes an obligation of payment on C, or whether C shall only be protected if or insofar as he has already paid (which has been argued to lead to co-ownership by A and C in case C has made a partial payment to B, and to a right to keep the movable upon paying A in a case where an acquirer in good faith learns about A’s ownership before such a payment).\(^{651}\) The Supreme Court has

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\(^{649}\) See, for instance, Koziol/Welser, Grundriss I\(^{11}\), 333; Spielbüchler, Schuldverhältnis 155.

\(^{650}\) Cf. Spielbüchler in Rummel, ABGB I, § 367 no. 4; Eccher in KBB, § 367 no. 2. The Supreme Court once held that a price equivalent to one third of the value does not prevent good faith acquisition, cf. OGH 7 Ob 43/66, JBl 1967, 367 (the decision is problematic because the rules on good faith acquisition should not have been applied for other reasons: Seller B had sold in the name of owner A, without having been granted the power to represent A, from which follows that the contract with C should have been regarded as void).

\(^{651}\) In favour of the latter solution, in particular, Bollenberger, Veräußerung von Vorbehaltsgut, ÖJZ 1995, 641 (651 f); Bollenberger, Gutgläubenserwerb nach Maßgabe der Zahlung – Anhaltspunkte in der Rechtsordnung, ÖJZ 1996, 851; see also Koziol/Welser, Grundriss I\(^{12}\), 297, but the view supported in this book was changed in the following edition (Koziol/Welser, Grundriss I\(^{13}\), 333). Against a requirement of having already paid, e.g., Holzner, Gutgläubenserwerb nur nach Maßgabe der Zahlung? ÖJZ 1996, 372; Holzner, Umdenken beim Gutgläubenserwerb? ÖJZ 1997, 499; Spielbüchler, Der Dritte im Schuldverhältnis 155 ff; Aicher in Rummel, ABGB I, § 1063 no. 97; Prisching, Gutgläubiger Erwerb an beweglichen Sachen im Rechtsvergleich (2006) 231 ff.
12. Good faith acquisition

now decided that actual payment is not decisive and the mere obligation to pay suffices for § 367 ABGB, mainly arguing that the other opinion is simply not covered by the wording of the statutory rules.\(^{652}\)

### 12.2.2. General transfer requirements, including delivery

All other general transfer requirements – except B’s ownership or authority to dispose – must be fulfilled, since, as has been mentioned previously, the purpose of the good faith acquisition rules is limited to making up for the lack of B’s entitlement. This means that the contract between B and C must be valid (requirement of a valid underlying obligation); there must be a valid ‘real agreement’ between B and C and delivery, or one of the generally accepted equivalents to delivery, must have effected between B and C.\(^{653}\)

The most debated issue\(^{654}\) in this respect is whether ‘delivery’ by means of a *constitutum possessorium*\(^{655}\) suffices for a good faith acquisition. The argument that a mere change of mind by the person, to whom the real owner had entrusted the goods (B), could not constitute a change in ‘possession’\(^{656}\) is usually rejected by pointing to the mere factual nature of possession.\(^{657}\) The – at least so far – prevailing opinion defends the view that good faith acquisition by means of a *constitutum possessorium* within the relationship B – C is possible.\(^{658}\) Lack of publicity is not considered as a convincing counter-argument: Even if the shift in possession from B to C was visible to owner A, this would not be of any advantage to A, as C’s acquisition in good faith would already have occurred; A would always come late. Furthermore, the *constitutum possessorium* could, in most cases, be replaced by physical delivery and an immediately following redelivery, which, however, would practically not provide more publicity.\(^{659}\) Also, the Supreme Court does not differentiate between the different equivalents to delivery.\(^{660}\) In a recent monograph, however, it has been argued that a differentiation should be

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652 OGH 2 Ob 144/02v, RdW 2002, 724.
653 See chapter 5 for details.
654 A comprehensive overview and detailed discussion is provided by Karner, Redlicher Mobiliarwerb (2006) 343 ff.
655 As to this equivalent to delivery in general, see supra, 5.6.5.
656 This argument had been put forward by Ehrenzweig, System I/2, 84, 189, against the *constitutum possessorium* being a sufficient mode of good faith acquisition.
657 Iro, Besitzerwerb 238; Spielbüchler, Schuldverhältnis 173 f, Kamer, Gutgläubiger Mobiliarwerb 343 f with further reference.
658 Iro, Besitzerwerk 237 ff; Iro, Sachenrecht, no. 6/49 (but changed in the third edition); Klicka in Schwimann, ABGB II, § 367 no. 9; Eccher in KBB, § 367 no. 2; Spielbüchler, Schuldverhältnis 171 ff, 178 ff (with certain modifications: the real owner A can reacquire ownership in case the movable is actually restored to him).
659 Spielbüchler, Schuldverhältnis 173; cf. also Iro, Besitzerwerk 240.
660 OGH 2 Ob 1146/28, SZ 11/12.
made: Where C acquired at a public auction or from a professional seller, or where a contract for sale had been concluded between A and B, but was invalid, a constitutum possessorium between B and C should suffice. Here, it is said that the risk of losing one’s ownership ‘secretly’ must be accepted. In other situations, A should lose ownership only where he was able, at least theoretically, to learn about this loss and to react by proceeding against C (for instance, where B explicitly gives notice to A that he now ceases to possess for A). 661 This new view has partly been accepted in the most recent literature, 662 while others have criticised this concept. 663

Good faith acquisition by means of B’s order to a third party in possession (Besitzanweisung) 664 to possess the property for C is accepted by the prevailing opinion; 665 though this acceptance differs in some details. 666 As to the question of whether C can acquire in good faith in case the real owner A still has physical control over the movable (by B ordering A to possess for C), one legal scholar discusses the specific constellation where A, in fact, sold the goods to B but still stores them for the latter, and a transfer of ownership by way of a constitutum possessorium was agreed upon, but fails because the contract between A and B is invalid, this invalidity not being known to the parties. In relation to this special case, it is argued that C does not acquire ownership by giving a mere order to A, but only acquires when he (C) takes delivery. 667 In the – merely hypothetical – constellation of A not even believing to possess for B, and B simply approaching C, telling the latter the complete lie that he owns goods stored with a certain A, B then ‘transferring’ these goods by producing faked documents and ‘giving order’ to A to possess for C, certainly no good faith acquisition would take place (not only because C’s good faith is questionable, but also because the delivery equivalent would not be regarded as having been fulfilled).

One may conclude by saying that B’s possession is a central element of the rules on good faith acquisition, and that this is not restricted to direct

661 Kamer, Gutgläubiger Mobiliarerwerb 366 ff and 379 ff. A differentiation has also been proposed by Frotz, Gutgläubiger Mobiliarerwerb und Rechtsscheinprinzip, FS Kastner (1972), 131 (153).
662 Iro, Sachenrecht, no. 6/49.
663 Holzner, Altes und Neues zum gutgläubigen Mobiliarerwerb, JBl 2007, 401. His main argument is that Kamer’s solution neglects one of the main purposes of the constitutum possessorium, namely to avoid useless transfers and immediate retransfers of possession.
664 Cf. supra, 5.6.6.
665 Koziol/Welser, Grundriss I 11, 335; Frotz, Kreditsicherungsrecht 46 f; contra: Klang in Klang, ABGB II, 226.
666 According to Iro, Besitzererwerb 243 ff, it is necessary that the third party acknowledges to be possessing for C.
667 See Spielbichler, Schuldverhältnis 170-182; what is reflected in the text is a compressed summary of his argumentation. One peculiarity of this constellation is that A subjectively possesses for B.
possession, but also open to indirect possession through another person.\textsuperscript{668} The external appearance of B’s possession is said to be one of the basic dogmatic reasons for the existence of good faith acquisition.\textsuperscript{669}

### 12.2.3. Public auction, purchase from professional seller and purchase of entrusted goods

§ 367 ABGB imposes three alternative criteria; one of them has to be met in order to make a good faith acquisition.

(a) Good faith acquisition is possible at a public auction (öffentlich Versteigerung). This covers, in particular, forced sales in the context of execution proceedings brought before a court or other public authority.\textsuperscript{670} The auction must be conducted properly, in accordance with the respective rules, i.e. by the competent authority, after proper notice and observance of the procedural rules.\textsuperscript{671} This provision is considered as being based, on the one hand, on the specific interest of transferability and protection of ‘commerce’ in auction sales (which aim at achieving the highest price possible) and, in particular, on the special trust usually put in an institution authorised by the state.\textsuperscript{672} In forced sales, contrary to the other cases, ownership is acquired when the ‘hammer falls’ (not by delivery).\textsuperscript{673}

§ 269 EO (Enforcement Act) extends the applicability of § 367 ABGB to ‘private’ (non-auction) sales of objects, seized in the course of judicial enforcement proceedings, which are conducted by a broker, credit institution, auction house or enforcement officer. The ‘public auction’ rule is also said to be applicable to auction sales made by private enterprises entitled to conduct auctions under the provisions of public law.\textsuperscript{674} These, however, were, in large part, liberalised in 2002. Whether the applicant is specifically

\textsuperscript{668} Cf., for instance, Spielbüchler, Schuldverhältnis 172.

\textsuperscript{669} Below, 12.2.3.

\textsuperscript{670} Before 1 January 2005, the rule also covered voluntary sales at court auctions. This possibility is now limited to immovable property.

\textsuperscript{671} Klicka in Schwimann, ABGB II', § 367 no. 10. – It may be noteworthy that a most recent amendment to the Enforcement Act (EO) introduced special rules on carrying out public auctions on the internet; see §§ 272a ff EO as amended by BGBl I 2008/37 (in force as of 1 March 2008). Inter alia, a public announcement of the auction is not required where, due to the number of customers of the relevant institution, one can assume that a wide range of people interested will take notice of the auction; cf. § 272a (5) EO.

\textsuperscript{672} Cf. Karner, Gutzgläubiger Mobiliarerwerb 286 ff; Kozioł/Welser, Grundriss I\textsuperscript{1}, 333.

\textsuperscript{673} Spielbüchler in Rummel, ABGB I', § 367 no. 7; on the whole rule, see also Reidinger, Gutzgläubiger Mobiliarerwerb in öffentlicher Versteigerung, JBI 1980, 579.

\textsuperscript{674} Iro, Sachenrecht', no. 6/54; Karner, Gutzgläubiger Mobiliarerwerb 282 (with concerns regarding internet auctions).
reliable is not examined any longer.675 Where not the auction firm, in its own name, but a private person sells goods in an internet auction (which is organised by a firm fulfilling the named public law requirements), it is argued that an acquisition in good faith based on the ‘public auction’ rule can not be made.676

(b) Alternatively, a buyer may acquire ownership in good faith if he purchased from a professional seller in the ordinary course of the latter’s business.677 This criterion was introduced to § 367 ABGB by the abovementioned reform, which entered into force in 2007. Formerly, Austrian law contained two similar, but not exactly equal provisions. The old version of § 367 ABGB required a purchase from an ‘authorised professional’ (befugter Gewerbsmann), which meant that the seller was licensed under public law to carry on the specific trade.678 A second rule was contained in § 366 Commercial Code, requiring a purchase from a merchant in the sense of the old Commercial Code (Kaufmann) as well as the conclusion of the contract of sale in the merchant’s course of business (which was a rather broad test). The new version of § 367 ABGB combines the two formerly separate rules. The seller must be a ‘professional’ (Unternehmer) in the sense of § 1 of the modified Commercial Code (UGB), which equals the definition of ‘professional’ in the Consumer Protection Act. A license under public law is not required under this criterion.679 The effect of the new provision’s reference to the ‘ordinary course of business’ is that the rule mainly covers the purchases of any goods whatsoever from a producer of such goods, as well as purchases of inventory from a professional merchant.680 Equipment, which was used in the course of the seller’s own business but is not used any more (e.g., an old machine formerly used in the production process), will regularly not be covered.

(c) The third alternative requirement of § 367 ABGB is fulfilled where the good faith purchaser bought from a person to whom the real owner A had entrusted the goods (so-called Vertrauensmann). This requires that the owner voluntarily transferred actual physical control to that person, or that

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675 Cf. § 158 (public auctions of moveables) and §§ 94, 95 (list of ‘regulated’ trades where reliability is examined) of the Gewerbeordnung, as amended by BGBl I 2002/111.
677 In the original wording: ‘von einem Unternehmer im gewöhnlichen Betrieb seines Unternehmens’.
678 So-called Gewerbeberechtigung. Cf. Reischauer in Rummel, ABGB I, § 367 no. 8; Klicka in Schwimann, ABGB II, § 367 no. 12 and many others. For instance, § 367 ABGB in its old version applied to a car dealer selling a car. The rule did not apply to a car dealer selling a computer (as he lacked a licence to sell computers).
679 Schauer in Krejci, Reformkommentar, §§ 367, 368 ABGB no. 5.
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the entrusted person entrusts the goods to a second person etc. (chain of entrustments).681

If the owner A has handed over the goods to B by mistake or was induced to do so by fraud, the goods are nevertheless considered, by the prevailing opinion, to have been ‘entrusted’, since the handing over was still a ‘voluntary’ one. On the other hand, where the transfer of possession has been caused by violence or duress, the entrustment requirement has not been fulfilled.682 Furthermore, the entrustment criterion is met if B leases the goods, holds them in custody for A or holds them as a pledgee. Nowadays it is also accepted that a relationship of entrustment has been created where A handed over the goods to B without intending to ever get them back again. Based on this interpretation, also the purchaser (who bought the goods from the real owner) will be considered to have been ‘entrusted’. As a very important practical consequence, it is possible to acquire (full) ownership from someone who bought the movable under reservation of title and has not paid the price yet.683

Difficulties arise in cases where the sales contract between the original owner A and his predecessor B turns out to be invalid or is avoided with retroactive effect after the goods have been resold to C, who purchases them in good faith. As B never became owner, C may obtain ownership under § 367 ABGB only if B – nevertheless – can be regarded as having been entrusted with the goods. In legal literature, § 367 ABGB is applied by way of analogy, since the defect in the transfer A – B is more attributable to A’s sphere of control (who, therefore, loses ownership) than C’s (whose good faith should not be frustrated). The opposite solution is held as true in the case of A’s lack of capacity or if A has been forced to conclude the contract by exercising duress.684 A person lacking capacity is generally regarded as being worthy of specific protection (§ 21 (1) ABGB); in a case of duress, the owner’s free will is also considered as having been seriously restricted.

12.2.4. Good faith

In order to acquire ownership under § 367 ABGB, C must be in good faith from the point in time of the conclusion of the contract up to the moment of delivery (or the utilisation of an equivalent to delivery). Provided the other prerequisites have been fulfilled, C will acquire ownership immedi-

681 So-called Vertrauensmannkette; cf. Koziol/Welser, Grundriss I13, 334 and many others. See also Karner, Gutgläubiger Mobiliarerwerb 254 ff.
682 See, for instance, Spielbüchler in Rummel, ABGB I3, § 367 no. 9; Karner, Gutgläubiger Mobiliarerwerb 258 ff.
683 For a closer discussion on the implications of reservation of title see infra, 12.2.8.
684 See Koziol/Welser, Grundriss I13, 334; Karner, Gutgläubiger Mobiliarerwerb 261 ff.
ately. Should the acquirer realise the lack of his predecessor’s ownership at a later moment, this will not have any negative effect on C’s position.\textsuperscript{685}

There must be good faith as to transferor B being the owner of the object. In the case of an acquisition from a professional seller in his ordinary course of business, also the buyer’s good faith in the seller’s (B’s) authority to dispose suffices. The latter was doubtful under the old version of § 367 ABGB,\textsuperscript{686} but has now been explicitly clarified in the new wording of § 368 (1) ABGB. As to the other two alternatives (public auction, entrusted goods), the new rule intends to clarify that good faith solely in the seller’s mere authority to dispose will not be protected.\textsuperscript{687} Also, there is an almost common understanding that §§ 367, 368 ABGB do not protect good faith in B’s power to represent A by concluding the contract in A’s name.\textsuperscript{688}

As to the standard of good faith, §§ 367, 368 ABGB, in their version before the reform of 2007, were prevalently understood in the sense that already slight negligence excludes good faith,\textsuperscript{689} whereas § 366 HGB explicitly provided that only gross negligence or actual knowledge hindered good faith. Now, the government’s proposition on the new version of § 368 ABGB clarifies that slight negligence shall suffice to exclude good faith.\textsuperscript{690}

Based on the old rules, the Supreme Court has held, for instance, that where the car documents are missing, the buyer of a car must take particular care and is obliged to make inquiries, as cars are often sold on credit in conjunction with a reservation of title clause. If the buyer does not make any inquiries in such a suspicious situation, this would even constitute gross negligenc-
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gence. Even where the seller is registered in the car documents as its keeper, additional investigations may be necessary.\footnote{Cf. OGH 5 Ob 407, 408/61, SZ 34/197; OGH 6 Ob 610/92, EvBl 1993/90; OGH 4 Ob 536/92, JBl 1993, 183; OGH 8 Ob 534/85, JBl 1986, 235; OGH 1 Ob 614/95, SZ 68/196 (with numerous further references); Aicher in Rummel, ABGB I, § 1063 no. 97.} For cars registered in the new ‘database for motor vehicle licensing’ (as of 1 July 2007),\footnote{See supra, 5.6.8.(b) at footnote 439.} the ‘certificate of conformity (COC)’ and a certain road permit document\footnote{So-called Zulassungsbescheinigung Teil II.} are intended to serve as a means of proving one’s lawful possession. However, the names of the previous owners are not entered in these documents any longer.\footnote{See supra, 5.6.8.(b).} The exact impact of this new system on the good faith acquisition of cars has not been discussed in legal literature so far. – Where, according to the circumstances, additional investigations would be necessary, but such investigations would not have caused any suspicions about the seller’s lack of entitlement, the prevailing opinion defends the view that the buyer may acquire in good faith even if he failed to make any investigations.\footnote{Iro, Sachenrecht, no. 6/50; Holzner, JBl 2007, 401 (403). Of different opinion: Karner, Gutgläubiger Mobiliarerwerb 412 ff.}

There is a certain debate over whether, in addition to good faith, an objectively unsuspicious sale situation must exist,\footnote{E.g., Spielbüchler, Schuldverhältnis 289 ff; Spielbüchler in Rummel, ABGB I, § 326 no. 2 and § 368 nos. 1 f. Similar Klang in Klang, ABGB II, 227.} or whether ‘good faith’ itself is to be understood ‘objectively’.\footnote{Karner, Gutgläubiger Mobiliarerwerb 402 ff; details of his analysis are criticised by Holzner, JBl 2007, 401 (403).} One of the main backgrounds to this discussion is the provision of § 368 (2) ABGB, which lists certain objective elements that are to be taken into account when deciding on whether the possessor C must return the object to A or not. According to the named rule, this depends on whether C, acting reasonably, should have become suspicious because of the nature of the goods, because of their remarkably low price, the personal character of the seller provided that this is known to him, the seller’s business or because of other reasons.

Good faith is presumed (§§ 328, 368 (2) ABGB). Consequently, the original owner A must prove that C acquired in bad faith. The policy underlying this provision is a general decision in favour of protecting commerce: It would be difficult for the acquirer to provide evidence for the situation in which he received the object after a long time has passed.\footnote{Kamer, Gutgläubiger Mobiliarerwerb 387 ff (391 in particular).}

A statutory duty of the buyer, C, to inform the original owner, A, about the circumstances of the acquisition does not exist under Austrian law.

\footnote{691 Cf. OGH 5 Ob 407, 408/61, SZ 34/197; OGH 6 Ob 610/92, EvBl 1993/90; OGH 4 Ob 536/92, JBl 1993, 183; OGH 8 Ob 534/85, JBl 1986, 235; OGH 1 Ob 614/95, SZ 68/196 (with numerous further references); Aicher in Rummel, ABGB I, § 1063 no. 97.}
\footnote{692 See supra, 5.6.8.(b) at footnote 439.}
\footnote{693 So-called Zulassungsbescheinigung Teil II.}
\footnote{694 See supra, 5.6.8.(b).}
\footnote{695 Iro, Sachenrecht, no. 6/50; Holzner, JBl 2007, 401 (403). Of different opinion: Karner, Gutgläubiger Mobiliarerwerb 412 ff.}
\footnote{696 E.g., Spielbüchler, Schuldverhältnis 289 ff; Spielbüchler in Rummel, ABGB I, § 326 no. 2 and § 368 nos. 1 f. Similar Klang in Klang, ABGB II, 227.}
\footnote{697 Karner, Gutgläubiger Mobiliarerwerb 402 ff; details of his analysis are criticised by Holzner, JBl 2007, 401 (403).}
\footnote{698 In this sense: Kamer, Gutgläubiger Mobiliarerwerb 387 ff (391 in particular).}
12.2.5. Dogmatic background of good faith acquisition

As to §§ 367, 368 ABGB (and the former § 366 HGB), three main arguments justifying good faith acquisition are discussed in relation to Austrian law. As to the alternative of entrusted goods, it is argued that owner A should bear the risk of putting trust in a person (B) who turns out not to be trustworthy. Therefore, A, rather than C, shall try to recover his loss from B. This idea is reflected in an old German principle (‘Hand wahre Hand’) and is nowadays referred to as the ‘risk principle’.699

A second, more general, argument is the external appearance of possession700 (Rechtsscheinwirkung des Besitzes). With different nuances, this idea is, almost generally, assumed to be one of the bases of good faith acquisition — although it is more or less undisputed today that possession might only be a weak indicator of ownership.701 Some authors argue that the basic factor should rather be seen in the transferor’s (B’s) capability of enabling C to possess.702 Others stress that, except for the alternative of entrusted goods, the law demands additional criteria which ‘strengthen’ the external appearance of possession, such as a public auction (referring to the idea of state control) or a professional seller acting in the ordinary course of his business.703

The third element, which is usually referred to, is the general policy of protecting and facilitating the circulation of goods (Verkehrsschutz), which does not only refer to the interests of the individual parties A and C, but also to the needs of commerce in general.704

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699 See Karner, Gutgläubiger Mobiliarerwerb 240 ff. Cf. also Schauer in Krejci, Reformkommentar, §§ 367, 368 ABGB no. 6; Koziol/Welser, Grundriss I1, 334 and others.

700 It is often stressed that ‘possession’ must be understood in the meaning of the Code’s definition in § 309 ABGB, meaning physical control plus the intention to possess the object as owner: Spielbüchler, Schuldverhältnis 172; Karner, Gutgläubiger Mobiliarerwerb 161 ff.

701 The most comprehensive discussion is provided by Karner, Gutgläubiger Mobiliarerwerb 167 ff, 193 ff, 277 ff. Textbooks usually refer to the external appearance of possession and stress the importance of this idea for good faith acquisition: Koziol/Welser, Grundriss I1, 273 f; Iro, Sachenrecht’, no. 2/4. Cf. also supra, 1.1.3.(b) and 5.6.9.

702 Spielbüchler in Rummel, ABGB I, § 367 no. 6. For a discussion of this theory see Karner, Gutgläubiger Mobiliarerwerb 179 ff.

703 See Karner, Gutgläubiger Mobiliarerwerb 277 ff: ‘Verstärkte Rechtsscheingrundlage’.

704 Cf. Koziol/Welser, Grundriss I1, 331; Karner, Gutgläubiger Mobiliarerwerb 121 ff; Frotz, FS Kastner 131 (133 f); as to the revised ABGB provisions of 2007: Schauer in Krejci, Reformkommentar, §§ 367, 368 ABGB no. 7.
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12.2.6. Lost and stolen goods

The former commercial law provision of § 366 (4) HGB explicitly stated that good faith acquisition, on the basis of this rule, is excluded with regard to goods which have been stolen from, or lost by, the owner, or the possession of which has otherwise been lost involuntarily. On the other hand, good faith acquisition under the general rules of the Civil Code remained unaffected (§ 366 (5) HGB), so that an acquisition from a businessman with the respective trade license was possible under § 367 ABGB. The reform, which entered into force in 2007, abolished § 366 HGB and its exception for lost and stolen goods. Under the new § 367 ABGB, good faith acquisition of lost and stolen goods is possible at a public auction and when purchasing from a professional seller acting in the ordinary course of his business. By contrast, it is not possible to acquire in good faith from a private seller, as the remaining alternative of § 367 ABGB, namely that the owner entrusted the goods to B, does not apply to such goods.

12.2.7. Effect of good faith acquisition; no right to buy back

As mentioned previously, the good faith acquisition rules lead to an immediate acquisition of ownership. This is effective against the former owner, A, as well as against third parties. Consequently, the new owner, C, can validly dispose of the movable and transfer his title, or limited proprietary rights in the object, to third parties. Whether such a sub-purchaser knows or should have known of B’s lack of entitlement or not, is of no relevance, as he can acquire derivatively from the (new) owner. This fits the unitary concept of transfer on which Austrian law is based. There is only one situation in relation to which the effects are disputed, namely where the good faith acquirer C retransfers the movable to B, who is in bad faith. The Supreme Court ruled that B acquires ownership, since he obtains the object from the owner. In literature, however, it has been argued that the policy of the good faith acquisition rules does not cater for such an effect and that ownership should rather revert to the original owner A.

Good faith acquisition either occurs or does not occur. A right of the former owner, A, to buy back the movable from the good faith acquirer, C – whether the object may have been stolen or not – does not exist under Austrian law.

705 As to the understanding of these criteria, see Schuhmacher in Straube, HGB I, § 366 nos. 18 f: The owner’s involuntary loss of possession is the main criterion, theft and loss are mere examples. – The rule contained a counter-exception for money, bearer instruments and acquisitions at a public auction.

706 OGH 6 Ob 108/98w, SZ 72/72.

707 Spielbüchler, Der Rückerwerb durch den Nichtberechtigten, ÖBA 2000, 361.
12.2.8. A field of principal practical importance: Retention of title and good faith acquisition

A main field of application of the good faith acquisition rules are situations where A sold to B subject to reservation of title and B, without being authorised by A to do so, disposes of the goods by selling and ‘transferring’ them to C, without disclosing A’s reserved ownership. Case law has established certain principles for such cases, which have gradually extended the protection of good faith acquirers. These principles have been developed on the basis of § 367 ABGB and § 366 HGB before the reform 2007, but will continue to be applicable under the modified § 367 ABGB.

The courts hold that in the context of the purchase of goods, which are usually sold under reservation of title, the good faith of the purchaser has to be examined rather strictly; at least if the purchaser is a professional party: The purchaser has to actively investigate his seller’s legal status by verifying documents such as bills and receipts; he may not rely on B’s statement of being owner. If the purchaser fails to do so, this will constitute negligence (even gross negligence). On the other hand, where the goods are sold by a professional seller in the ordinary course of his business, also the good faith in the seller’s authority to dispose is protected, which makes a good faith acquisition still possible notwithstanding the strict good faith test with regard to ownership. In this respect, the Supreme Court first stated that buyer C may trust in the existence of an authority to sell against cash payment, as this is presumed to be also in the interest of the conditional seller A, because receiving cash typically enables B to pay his debts to A.

Developing these principles still further, the OGH has held that A will typically consent to the loss of his reserved ownership at the moment when C pays the full price to B, even if payment is made after delivery. According to the OGH, purchaser C may trust in the existence of an authority to dispose in the sense that B may resell the goods to C (again) under reservation of title. Then, C will obtain an ‘expectant right’ based on his good faith. By paying the full purchase price to B, he will obtain full ownership (irrespective of whether B has paid A or not). In a further case, the Supreme Court took the view that the purchaser may even trust in an authority to dispose to the extent that a sale in the ordinary course of business may lead to C’s acquisition of ownership when the latter pays the full

708 See the references in footnote 691, above.
709 Cf. supra, 12.2.4.
710 See OGH 1 Ob 713/86, SZ 60/13; OGH 1 Ob 614/87, JBL 1988, 314; Koziol/Welser, Grundriss I, 417. See also Bollenberger, Veräußerung von Vorbehaltsgut, ÖJZ 1995, 641.
711 Cf. OGH 8 Ob 606/92, RdW 1993, 331; OGH 1 Ob 614/87, JBL 1988, 314 (Czermak).
price to B within an ordinary period of time after delivery, and if no reservation of title has been agreed upon between B and C.\footnote{OGH 3 Ob 84/02h, JBl 2003, 445 (Spielbüchler).}

\subsection*{12.3. Further rules on the acquisition of ownership from a non-owner}

There is no doubt that § 367 ABGB (and formerly § 366 HGB) is the most important provision in the present context. Thus, Austrian law contains further provisions concerning the acquisition of movables from a non-owner. They shall be discussed briefly in the following.

\subsubsection*{12.3.1. Good faith acquisition of fungible goods under § 371 ABGB}

Although this may seem hard to read into the phrasing of the provision, § 371 ABGB is held to contain two separate rules on the acquisition of fungible goods. The rule is designed for assets which resemble each other so much that they usually can not be told apart. The main examples are \textit{money and bearer instruments} (Inhaberpapiere), such as bearer shares (Inhaberaktien) or bearer bonds (Inhaberschuldverschreibungen).

The \textit{first rule} of § 371 ABGB provides that in the case of commixing such things in a way that they become indistinguishable, the possessor will obtain sole ownership. Good faith is not required. This rule and the difficulties raised by it have already been discussed \textit{supra}, 11.2.4.

The \textit{second rule} of § 371 ABGB contains a special \textit{bona fide acquisition} rule for such fungible goods. It is not required that commixing has occurred. In some respect, the requirements for good faith acquisition differ from § 367 ABGB. According to the prevailing opinion, § 371 ABGB also covers gratuitous acquisitions;\footnote{See Koziol/Welser, Grundriss 1\textsuperscript{1}, 336 with further references. Of different opinion Spielbüchler, Der Dritte im Schuldverhältnis 230 f; Spielbüchler in Rummel, ABGB I, § 371 no. 3; Iro, Sachenrecht, no. 6/60.} also, good faith is only denied in the case of gross negligence (or actual knowledge).\footnote{Cf. Iro, Sachenrecht, no. 6/60; Karner, Redlicher Mobiliarerwerb 397 f.} However, this second rule of § 371 ABGB is not of great importance.

\subsubsection*{12.3.2. Protection of trust in the scope of an (existing) authority to dispose (§ 1088, 2\textsuperscript{nd} sentence ABGB)}

It may happen that the real owner, A, has, in principle, granted power to dispose of the goods (Verfügungsbeugnis) to B but B \textit{contravenes certain}
limitations of this power to dispose. For example: Producer A sells goods to retailer B under reservation of title and permits B to resell them to his customers, but grants this permission only subject to the condition that B assigns his claim for payment (against buyer C) to A. If B sells the goods to C without assigning the claim to A, he lacks the authority to dispose and C, therefore, will not be able to acquire ownership derivatively. C’s only possibility to obtain ownership is through an original acquisition. This possibility is assumed to be provided by § 1088, 2nd sentence ABGB (which refers to § 367 ABGB): If purchaser C is in good faith with respect to the scope of B’s power to dispose (i.e., he believes, in good faith, that such a limitation does not exist, or that all relevant conditions have been complied with, he will acquire ownership.715

Partly, authors try to overcome this limitation to situations where an authority to dispose already exists. According to Karner, the owner will succumb to the good faith acquirer if, though no authority has been granted to B, C may conclude from A’s conduct that a sufficient authority to dispose has been granted to B (‘Anscheinsverfügungsbefugnis’).716 Others, who accept that C’s trust in B’s mere authority to dispose may, in certain situations, also be protected in the case of goods entrusted for mere storage (bought from a person other than a professional seller acting in the ordinary course of business) understand § 1088 S 2 ABGB as a mere reference to the general rule of § 367 ABGB.717

12.3.3. Acquisition in extrajudicial enforcement, § 466d ABGB

For pledges created over corporeal movable assets after 31 December 2006, the new rules in §§ 466a-466e ABGB provide that the secured creditor may enforce the secured debt without commencing court proceedings even where this has not been contractually stipulated in advance (extrajudicial enforcement). When meeting certain prerequisites, such as giving notice to the creditor and selling against cash payment only, he may have the object sold at a public auction operated by a licensed professional enterprise or, in case the goods have a market price, he may also sell them himself for this price. In compliance with these requirements, the secured creditor sells the goods on the basis of an authority to dispose granted by law, and the purchaser acquires ownership derivatively (i.e. from the owner of the collateral).

715 See for instance OGH 10 Ob 347/97w, RdW 1998, 394; Aicher in Rummel, ABGB I, § 1088 no. 4; Iro, Sachenrecht’, no. 6/51. A different understanding of § 1088 ABGB offers Frotz, FS Kastner 131 (151 f). An overview is provided by Karner, Redlicher Mobiliarerwerb 206 ff.
716 Karner, Redlicher Mobiliarerwerb 216 ff.
717 Holzner, JBl 2007, 401 (402); Spielbüchler in Rummel, ABGB I, § 367 nos. 1, 6.
eral). If the statutory requirements,\textsuperscript{718} or at least certain basic principles of extrajudicial enforcement,\textsuperscript{719} are not obeyed, the secured creditor will sell without an authority to dispose, but the buyer may acquire ownership, believing, in good faith, in the existence of such an authority (§ 466d ABGB). § 367 ABGB would not suffice in such a case since, in an enforcement sale, the secured creditor (seller) will typically not pretend to be the owner. The buyer’s good faith must relate to the enforcing creditor’s compliance with all duties imposed by §§ 466a ff ABGB (\textit{i.e.} to the seller’s authority to dispose).\textsuperscript{720}

12.3.4. Acquisition from a ‘presumptive heir’ (§ 824, 2\textsuperscript{nd} sentence ABGB)

Another specific situation, in which the good faith acquisition principles play a role, is where someone seems to be the heir of a deceased person and this ‘presumptive heir’ (\textit{Scheinerbe}) transfers the estate’s assets. If it subsequently turns out that this person – materially – is not the heir, for instance because a later will has been found which designates another person as the deceased’s successor, this ‘true heir’ can recover the estate by bringing an action for recovery of the deceased’s estate (\textit{Erbschaftsklage}) having retroactive effect. As a consequence, the ‘presumptive heir’ will be deemed to have never been owner of the assets. Accordingly, if he has transferred goods belonging to the estate to third persons in the meantime, the latter can not obtain ownership derivatively. In order to protect such third persons, § 824, 2\textsuperscript{nd} sentence ABGB provides for a special type of \textit{bona fide} acquisition, which makes up for the presumptive heir’s lack of a title to the inheritance. Other defects are not cured (\textit{e.g.}, if the deceased himself was not owner). In some respect, the specific requirements for an acquisition under § 824, 2\textsuperscript{nd} sentence ABGB differ from § 367 ABGB; for instance, also gratuitous acquisitions are covered. The rule also applies to immovable property.\textsuperscript{721}

\textsuperscript{718} \textit{Iro}, Sachenrecht’, no. 11/31, referring to the government’s legislative proposition (RV 1058 BlgNR 22. GP, p. 70), assumes – while himself being critical of this result – that each infringement of the enforcement provisions will result in a lack of authority. The same result is arrived at by \textit{Schauer} in Krejci, Reformkommentar, § 466d ABGB nos. 1 and 2; \textit{Koch} in KBB, § 466b no. 1.

\textsuperscript{719} According to \textit{Hinteregger} in Schwimann, ABGB\textsuperscript{1} Ergänzungsband, § 466d no. 2, not every infringement of the enforcement rules will result in a lack of authority; this will only be the case where the goods are sold before the debt became due, where more goods than necessary are sold in order to pay off the debt, where the required mode of sale is not observed and where the auction has not been announced.

\textsuperscript{720} Cf. \textit{Schauer} in Krejci, Reformkommentar, § 466d ABGB no. 3.

\textsuperscript{721} Cf. \textit{Koziol/Welser}, Grundriss I\textsuperscript{1}, 337, providing further reference.
12.4. Good faith acquisition free of encumbrances

Another issue are goods encumbered by the limited proprietary right of a third party, in particular a pledge or the conditional right of a buyer under a reservation of title. Generally, such limited proprietary rights prevail when the encumbered asset is transferred to a new owner. Under certain requirements, however, the acquirer may obtain the object even free of such encumbrances, provided that he is in good faith. The issue has previously been regulated in § 366 (2) HGB, but not in the ABGB. Since 2007, an explicit rule is contained in § 367 (2) ABGB.

This provision covers the situation where a seller (B) transfers a movable which belongs to owner A1 and which is, in addition, subject to the limited proprietary right of a third party (A2). B sells to C, without having been authorised by A2 to dispose of the property free of the proprietary right. Whereas § 367 (1) ABGB will lead to a good faith acquisition of ownership, paragraph (2) provides that C obtains unrestricted ownership if he, in good faith, believes in the non-existence of this right or – having to be added –, where C acquires from a professional seller in the ordinary course of business, being in good faith as to B’s authority to dispose free of the right. Substantially, there is an agreement that the general requirements of § 367 ABGB must be met; in particular the requirement that such a good faith acquisition may only be made when purchasing at a public auction, from a professional seller or from the person holding the limited right (A2), who entrusted the property to B.

A second situation is where the seller of the encumbered movable is actually the owner of the property (but he disposes free of a third party’s limited proprietary right, without being authorised to do so). Here, C will acquire ownership derivatively (from seller B) and he may acquire free of the encumbrance on the basis of the principles set out in § 367 (2) ABGB.

13. Acquisitive prescription and limitation of ownership

The ABGB of 1811 does not clearly distinguish between the legal institutions of acquisitive prescription (Ersitzung) and limitation (Verjährung).

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722  Cf. Iro, Sachenrecht³, no. 6/61. With regard to mere obligatory rights (such as those created under a lease contract), the following principles do not apply.

723  See, with differences in reasoning, Schauer in Krejci, Reformkommentar, §§ 367, 368 ABGB no. 9; Iro, Sachenrecht³, nos. 6/62 f; Iro, HaRÄG: Irrwege beim lastenfreien Erwerb kraft guten Glaubens, RdW 2006, 675.

724  Iro, Sachenrecht³, no. 6/62.

725  Acquisitive prescription will be explained and dealt with in section 13.1., limitation in section 13.2. of this chapter.
13. Acquisitive prescription and limitation of ownership

Hence, both are dealt with collectively in §§ 1451-1502 ABGB. Today, it is generally agreed that these two institutions must strictly be kept apart.\footnote{See, for instance, Koziol/Welser, Grundriss I\textsuperscript{13}, 337.}

13.1. Acquisitive prescription of movable property

13.1.1. General

Like other property rights,\footnote{A comprehensive discussion on which types of rights can be acquired by acquisitive prescription is offered by Gusenleitner. Ersitzung als allgemeiner Rechtserwerbsstatbestand (2004) 177 ff. She argues that this kind of acquisition is also available to certain obligatory rights and to certain rights, the classification of which as ‘proprietary’ is partly doubtful. – For the purposes of this report, only the acquisition of ownership is relevant.} ownership – of corporeal movable as well as of immovable property – can be acquired by possession over a certain period of time, provided that such possession meets certain qualifications. An acquisition in accordance with these rules is an \textit{original} acquisition, meaning that the right is not derived from, or dependent on, the entitlement of a predecessor: A ‘new’ right is created, whereby the former owner loses his right. Some general aspects, which apply to all forms of acquisitive prescription regulated by the ABGB, are discussed in this section.

\textit{(a)} The main \textit{function} of acquisitive prescription may be seen in providing legal certainty (\textit{Rechtssicherheit}), by facilitating the proof of one’s entitlement to a particular object and, in this connection, by avoiding legal disputes which would otherwise easily arise if rights and legal relationships were uncertain. Factual situations (the possession of an asset) which have persisted for a long time shall convert into legally relevant positions, based on the trust in the external appearance. The idea of facilitating the provision of evidence will, to a large extent, favour the person who is entitled to the right in question anyway (but evidence for the existence of such a title may be difficult to produce after a very long period of time), but may also benefit a person who was, originally, not entitled. In the latter case, the underlying idea is that the original owner had a long period of time in which he could have exercised his right and may, after the expiration of the prescription period, be, therefore, burdened with the risk he assumed by his inactivity.\footnote{See Apathy, Ausgewählte Fragen des Ersitzungsrechts, JBl 1999, 205 (206 with further reference); see also Gusenleitner, Ersitzung 31; Koziol/Welser, Grundriss I\textsuperscript{13}, 337.} This is, of course, a simplified typology: Especially with regard to movable assets, the real owner may be practically prevented from exercising his right because he is, although undertaking reasonable efforts, simply unable to determine the location of his object (e.g. where it has been stolen from him). It has been recognised that acquisitive prescription is not ‘just’ in
the sense of natural law; however, the interest of protecting legal certainty and facilitating the circulation of property prevails.\textsuperscript{729} – Some functions acquisitive prescription historically had are obsolete under the present Austrian law: Lost and abandoned property can be acquired by virtue of other provisions, providing for a shorter or even no time period,\textsuperscript{730} and the good faith acquisition rules of § 367 ABGB allow an immediate acquisition of ownership where the relevant requirements have been fulfilled (in particular: acquisition for money, valid contract B – C). Still, acquisitive prescription serves an important supplementary function where an immediate good faith acquisition is not possible.\textsuperscript{731}

(b) In principle, all kinds of corporeal assets can be acquired by acquisitive prescription. Practically, there is a main difference between movable and immovable property, as two different sets of rules on acquisitive prescription exist in the ABGB and the ‘type’ that provides for a relatively short prescription period only applies to movable property. There is no exception or special legislation for the acquisitive prescription of cultural objects.\textsuperscript{732} Also, in principle, stolen goods may be acquired, but not by the thief himself, as good faith is a general prerequisite for acquisitive prescription under Austrian law. Furthermore, the fact that the property has been registered does not, as a matter of principle, exclude acquisitive prescription, but may have an impact on good faith. A special provision, however, applies to the acquisitive prescription of registered ships: If a person is registered as the owner of a ship but has not acquired ownership, this person acquires ownership provided that he meets the condition of being registered for 10 years and possessing the ship, within this time period, ‘for himself’ (Eigenbesitz).\textsuperscript{733} Good faith does not seem to be required under this rule.

(c) The central requirement for acquisitive prescription is possession over a certain period of time. ‘Possession’ in the present context is only possession ‘for oneself’ (Eigenbesitz), i.e. exercising physical control with the intention of doing so as an, or as if being the, owner. Whether physical control is exercised by another person for the possessor (indirect possession) or directly is irrelevant.\textsuperscript{734} As to the intensity of the physical relationship between the possessor and possessed object, the general possession principles

\textsuperscript{729} Gusenleitner 31 with reference to authors of the codification period.

\textsuperscript{730} As to the acquisition of lost movables, see below 14.1. Abandoned property may be acquired immediately by occupation, §§ 381, 386 ABGB.

\textsuperscript{731} Among others: Iro, Sachenrecht’, no 6/85.

\textsuperscript{732} But, even where acquisitive prescription has taken place, the new owner may be obliged to restore a cultural object under the Kulturgüterrückgabegesetz, which implements Council Directive 93/7/EEC (see 12.1., above). Cf. Mader/Janisch in Schwimann, ABGB VI’, § 1452 no. 6.

\textsuperscript{733} § 5 of the ‘Act on Rights in Ships’ (Schiffsrechtegesetz, cf. footnote 333, above).

\textsuperscript{734} Mader/Janisch in Schwimann, ABGB VI’, § 1460 no. 4.
Possession must be exercised continuously throughout the whole prescription period (§ 1460 ABGB). However, possession is deemed not to have been interrupted where it was lost involuntarily as the result of an application of force, secretly or as a result of borrowed property not being returned, where possession is regained within 30 days from its loss, or where an action is brought within 30 days from gaining knowledge of the dispossession.

Furthermore, § 1464 ABGB requires that possession must not have been obtained by violence, by secret dispossession or by not returning property, which has been handed over as a mere ‘precarium’ (an agreement under which the borrower has the right to recover the property at any time): *nec vi, nec clam, nec precario*. The ABGB calls this ‘real’ possession (*echter Besitz*, § 345 ABGB).

(d) Under Austrian law, acquisitive prescription is only possible if the possessor acts in **good faith** when obtaining possession and possesses in good faith throughout the whole prescription period. The possessor must believe to be the owner of the respective property, which includes that he must believe to have acquired on a valid legal basis (e.g. a valid contract). Good faith is presumed, so that the real owner must prove that the possessor acted in bad faith (§ 328 ABGB). As to the standard of ‘good faith’, one will fall back upon the general definition of § 326 ABGB, which is interpreted by the prevailing opinion as excluding good faith in the case of actual knowledge, as well as where the possessor is negligently unaware of the lack of his entitlement. This includes slight negligence where objective indications should make the possessor suspicious. Partly, however, it is assumed that after the acquisition of possession, good faith must be examined less strictly; even an exclusion of good faith only in the case of actual knowledge is defended by some authors. The statutory provisions, however, do not indicate the permissibility of such a differentiation.

(e) With regard to the remaining prerequisites, Austrian law provides for two different ‘types’ of acquisitive prescription, which differ in their respective qualifications of possession as well as in the prescription period. These two sets of rules are discussed in the following.

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735 Cf. supra, 2.1.1.(a) for details as to physical control and 2.1.2. for different categories of possession.

736 Mader/Janisch in Schwimann, ABGB VI', § 1460 no. 3; M. Bydlinski in Rummel, ABGB II', § 1460 no. 2.

737 Mader/Janisch in Schwimann, ABGB VI', § 1463 no. 3.

738 Mader/Janisch in Schwimann, ABGB VI', § 1463 no. 2.

739 Cf. Apathy, Redlicher oder unredlicher Besitzer, NZ 1989, 137, who gives an overview of the state of discussion and also defends this interpretation, in particular, in the context of acquisitive prescription (p. 140). See also Iro, Sachenrecht, no. 6/89 and supra, 2.3.

740 M. Bydlinski in Rummel, ABGB II/3', § 1463 no. 1; Spielbüchler, Schuldverhältnis 270.

741 Klang in Klang, ABGB VI', 581.
13.1.2. Acquisition in a short period (3 or 6 years)

Acquisitive prescription in a short period is only possible in relation to movable property. The Civil Code speaks of ‘ordinary’ acquisitive prescription (‘eigentliche Ersitzung’).

In addition to the general prerequisites listed above, §§ 1461, 1462 ABGB require a valid legal basis for obtaining possession, which, in principle, is capable of transferring ownership (e.g., a valid contract of sale or donation). One speaks of ‘legitimate’ possession (rechtmäßiger Besitz). A mere ‘putative title’, i.e. where the possessor erroneously believes that he acquired based on a valid legal relationship, does not suffice according to the prevailing opinion.742

The general prescription period under these rules is three years (§ 1466 ABGB). A special provision applies if the former owner is a legal person (whether governed by public or private law). As against such privileged persons, the period of acquisitive prescription is six years (§ 1472 ABGB).743

13.1.3. Acquisition in the long period (30 or 40 years)

The other ‘category’ is called ‘extraordinary acquisitive prescription’ (‘uneigentliche Ersitzung’). The difference is that a valid legal basis for the acquisition is not required (§ 1477 ABGB). These rules also apply to immovable property. The prescription period is 30 years, as against privileged persons in the abovementioned sense: 40 years (§§ 1472, 1477 ABGB).

13.1.4. Further rules as to the prescription period

(a) It may happen that someone starts a qualified adverse possession and, without having completed the prescription period, dies or sells the property. According to § 1493 ABGB, the prescription period of such a predecessor will be taken into account in favour of the heir or buyer, if he, too, meets all the prescription requirements, including good faith.744

(b) The period of prescription is interrupted (Unterbrechung), i.e., a completely new period begins to run, when the owner exercises his right by bringing an action against the possessor before the court (§ 1497 ABGB), provided that the owner wins the case. The interruption is only effective on

742 Mader/Janisch in Schwimann, ABGB VI, §§ 1461, 1462 no. 1; M. Bydlinski in Rummel, ABGB II/3, § 1461 no. 2.
743 For more details, see Mader/Janisch in Schwimann, ABGB VI, § 1472 nos. 1, 2.
744 As to some further detailed rules (which do not have much practical relevance), see Mader/Janisch in Schwimann, ABGB VI, § 1493 nos. 1-3.
the parties to the proceedings. There is also an interruption where the possessor acknowledges the owner’s right.745

c) The prescription period is suspended (Fortlaufshemmung), i.e., a certain period of time is not taken into account when calculating the prescription period, as between spouses for as long as the marriage is valid; furthermore, as between minors and other persons subject to custody, on the one side, and their parents or other people legally responsible for such persons, on the other side, for as long as the relevant relationship lasts (§ 1495 ABGB). Suspension may also occur in case the judicial system is inoperative (§ 1496 ABGB).746

d) A postponement of expiry (Ablaufshemmung) of the prescription period occurs, for instance, when the parties enter into negotiations for a settlement of the disputed issue. In this case, the period continues to run, but does not expire for as long as the negotiations persist. When the negotiations fail, the owner still is granted a reasonable period of time in which to institute judicial proceedings.747 Against a person subject to a lack of capacity, the prescription period does not begin to run, if such a person does not have a legal representative (gesetzlicher Vertreter). If the period has already begun to run and such a situation arises (e.g., a healthy person becomes insane), it continues to run but cannot end before the lapse of two years from the point in time of the obstacle’s disappearance (§ 1494 ABGB).748

The rules on the interruption, suspension and postponement of expiry are the same for acquisitive prescription and the limitation of claims (Verjährung). The main focus in textbooks and academic debate is usually placed on the limitation aspect.

13.1.5. Effects of acquisitive prescription

After the expiration of the prescription period, and if all requirements have been met, the possessor acquires ownership of the property and the former owner loses his right of ownership. The new owner’s right is valid erga omnes. According to the prevailing opinion, the new owner is not exposed to claims for unjustified enrichment.749 As good faith is always required for

746 Koziol/Welser, Grundriss I11, 231 f, 340.
747 Cf. Mader/Janisch in Schwimann, ABGB VI1, Vor §§ 1494-1496 nos. 3 ff.
748 As to details, see Mader/Janisch in Schwimann, ABGB VI1, § 1494 nos. 1 ff.
749 Koziol/Welser, Grundriss I11, 338; Apathy, JBl 1999, 205 (214 f). Of different opinion with regard to gratuitous acquisitions in the short period: Spielbüchler, Schuldverhältnis 226.
acquisitive prescription, also claims in tort of the former owner (based on
the interference with his property) do not arise.\textsuperscript{750}

Limited proprietary rights encumbering the movable are extinguished,
provided that the acquirer did not know and had no reason to know that the
movable was encumbered with such a limited right.\textsuperscript{751}

\subsection*{13.2. No limitation of the right of ownership}

‘Limitation’ (Verjährung) means that a right or claim ceases to be enforce-
able. The right is not extinguished. But when the creditor seeks to enforce it
judicially, the defendant can raise the defence of limitation, and the court
must dismiss the action.\textsuperscript{752} In Austrian law, it is generally accepted that the
right of ownership is not subject to limitation (cf. § 1459 ABGB); the word-
ing of § 1479 ABGB, according to which ‘all’ rights are subject to limitation,
goes too far. Today, it is also agreed that the claim for revindication, \textit{i.e.} the
action based on ownership enabling the owner to recover his property from
any other person who holds it without entitlement as against the owner,
cannot prescribe.\textsuperscript{753}

\section*{14. Other forms of original acquisition}

\subsection*{14.1. Finding of lost, forgotten and hidden goods, treasure trove}

1. Lost and forgotten movables are subject to special rules in §§ 388-
396 ABGB, which have been modified recently.\textsuperscript{754} Both categories have
in common that the holder of the object lost the physical control of it
involuntarily. The difference is seen in that lost goods are under nobody's
physical control, whereas forgotten things have been left at a place which
is supervised by another person, whereby such things are considered to be
under the physical control of the latter (§ 388 ABGB), \textit{e.g.} in a restaur-

ant or bus.

The finder, that is the person who detects the movable and assumes the
physical control over the item (§ 389 (1) ABGB), is subject to certain du-

\textsuperscript{750} This will generally be true if one follows the prevailing opinion, under which ‘good
faith’ is excluded in the case of any kind of negligence (see 13.1.1.(d)).

\textsuperscript{751} Mader/Janisch in Schwimann, ABGB VI\textsuperscript{1}, § 1452 no. 6.

\textsuperscript{752} Cf. Koziol/Welser, Grundriss I\textsuperscript{11}, 223 ff.

\textsuperscript{753} For details see Klang in Klang, ABGB VI\textsuperscript{1}, 606.

\textsuperscript{754} By BGBl I 2002/104, in force since February 2003. For the following, see the overviews
provided by Iro, Sachenrecht\textsuperscript{1}, nos. 6/6-6/12, and Binder, Sachenrecht\textsuperscript{2}, nos. 6/11 ff.
The most comprehensive treatment is provided by Mader in Kletečka/Schauer, ABGB,
on §§ 388-396.
14. Other forms of original acquisition

ties. Basically, he must hand over the found object to the competent public authority, unless he directly hands it over to the person who lost it or the value of the object does not exceed 10 Euro (§§ 390, 391 ABGB). Provided that the finder complies with these duties, he is awarded certain benefits: In case the owner (or other person who lost it) appears and reassumes possession of the property, the finder is entitled to a reward.\footnote{The calculation is a little difficult: With regard to lost goods, the reward is 10 \%, with regard to forgotten goods, 5 \% of their value. In either case, to the extent that the value exceeds 2,000 Euro, the reward will be half of the abovementioned percentage figures, see § 393 (1) ABGB. There exist certain exceptions to the right to a reward, for instance where a forgotten movable would have been recovered without risk anyway (§ 394 no. 3 ABGB).} If the owner (or other person) does not lay claim to the object within one year, the finder acquires ownership of the found object; if he possesses it, upon the lapse of the relevant time period; if he has handed it over to the competent authority, upon the authority’s handing over of the object to him (§ 395 ABGB). Contrary to acquisitive prescription, this form of acquisition is taken to simply be a consequence of the owner’s inactivity.\footnote{So-called Verschweigung. Mader in Kletečka/Schauer, ABGB, § 395 no. 6: Acquisition is ‘original’ and free of encumbrances.} An entitlement to the reimbursement of necessary and useful expenses exists in any case (§ 392 ABGB).

2. Movables which have been \textit{hidden} by an unknown, but still identifiable owner or entitled possessor are to be treated like lost goods in case they are located. The only difference is that a reward does not have to be paid if the goods would have been recovered by the owner without risk (§ 397 ABGB).

3. Again, specific rules exist where valuable movable assets (a treasure) belonging to an unknown and unidentifiable owner are detected. The finder and the owner of the land, on which the treasure has been found, each become co-owner of 50 \% (§§ 398-401 ABGB).

14.2. Further forms of original acquisition

Property, which is not owned by any other person, can be \textit{occupied}, whereby ownership is acquired. Occupation means taking the object into one’s possession, including the intention to possess it ‘for oneself’ (§ 381 ABGB).\footnote{For an overview, see \textit{Iro}, Sachenrecht’, nos. 6/2 ff, who also deals with types of property, which can only be acquired by a specifically ‘entitled’ person.}

\textbf{Fruits} (in the sense of the natural products of land or animals) belong to the owner of the ‘producing’ property and are acquired by accrual upon their separation (§ 404 ff ABGB). Before that, fruits are considered to be depend-
ent component parts (accessories) of the main property, which means that they can not be transferred separately. – The accrual of subordinate parts to a principal part as a result of processing or combination has been discussed supra, chapter 11.

An acquisition of ownership, following the expropriation of a former owner (which is exceptionally possible if in the public interest), is also considered to be a kind of ‘original’ acquisition by the prevailing opinion. The point in time of the acquisition of ownership is disputed; the main focus of the discussion is, of course, on immovable property. Some authors and court decisions expressed the view that ownership is already acquired by payment of the compensation sum (which is to be paid to the expropriated former owner), others demand an acquisition of possession in addition to the requirement of payment.758

758 Spielbüchler in Rummel, ABGB I, § 365 no. 5 with further reference.
15. Retention of ownership

Doubtlessly, retention of title (Eigentumsvorbehalt) is of enormous practical importance for the Austrian economy. However, there is no express statutory regulation on it in Austrian law. Nevertheless, this type of right, serving as a security for the purchase price, is generally accepted, although it lacks the publicity that is usually required of real security rights.\textsuperscript{759} Also, some provisions in Austrian civil law expressly or implicitly accept the existence of the reservation of title.\textsuperscript{760}

The instrument of reservation of ownership is particularly suitable for movable property, including buildings intended to remain in the same location only for a limited period of time (so-called ‘Superädifikate’). Regarding immovable property, there is the problem that the Land Register Act (Grundbuchgesetz) does not provide for any possibility to register such a right. An enterprise can be sold subject to reservation of title, but the proprietary effect of such a reservation practically only extends to its movable assets.\textsuperscript{761}

15.1. Notion and creation of reservation of ownership

When the parties agree on a reservation of title, the seller transfers ownership subject to the suspensive condition of full payment of the purchase price. Until the payment is made, the supplier stays the owner. The condi-

\textsuperscript{759} Some arguments that should justify the validity of reservation of title, in spite of it lacking publicity, are listed at Koziol/Welser, Grundriss I\textsuperscript{1}, 413: The risk that third parties get an incorrect impression of the buyer’s economic strength is deemed to be reduced, as no assets are ‘taken away’ from the debtor’s estate but rather a new one is added to which the other creditors do not have access. Also, it is mentioned that the idea of deferring the passing of ownership to the moment of payment points to the principle of simultaneous performance (Zug-um-Zug-principle), which is one of the basic principles of the civil code. For details, see F. Bydlinski in Klang, ABGB IV/2\textsuperscript{2}, 461-467; cf. also Frotz, Kreditsicherungsrecht 166 f.

\textsuperscript{760} § 24 (1) no. 9 KSchG; § 297a ABGB.

\textsuperscript{761} Cf. Iro, Sachenrecht\textsuperscript{1}, no. 8/5; for details, see Aicher in Rummel, ABGB I\textsuperscript{1}, § 1063 nos. 32-43; Binder in Schwimann, ABGB IV\textsuperscript{3}, § 1063 nos. 23-27.
tion affects the ‘real agreement’ (Verfügungsgeschäft). Nevertheless, an agreement upon the reservation of ownership will regularly also be part of the underlying contract (Verpflichtungsgeschäft).

In general, the reservation of ownership requires a **contractual agreement.** § 1063 ABGB, which seems to provide, as a general rule, that ownership will pass when the goods are handed over to the buyer although the purchase price is not paid in turn, is non-mandatory. As mentioned previously, there is some debate as to the question of whether a reservation of title is valid if it is just declared unilaterally by the supplier at a point in time between the conclusion of the contract and the delivery of the goods. As has also been discussed already, where the parties have agreed to perform simultaneously but the buyer removes the goods without paying, ownership is assumed not to pass due to an implied agreement upon a reservation of title.

### 15.2. Rights of the seller

Until the purchaser has paid the price in full, the supplier (seller) remains owner of the goods; in other words: The seller’s ownership is subject to the resolutive condition of full payment. Like other assets, the legal position of the supplier may be transferred to a third person.

If the **purchaser fails to pay,** the supplier has a right to recover his property and, therefore, he is secured by its value. In order to recover his property, the owner first has to terminate the contract, which, up to this point in time, gives the buyer a right to hold the goods. To some extent, this right of termination caused problems of construction in Austrian law before the reform of commercial law entered into force in 2007; but, as a result, there has been no doubt that a seller under reservation of title has such a right of termination.

The retained ownership also provides security in case other creditors of the purchaser commence execution proceedings against the purchaser’s estate and the goods sold subject to a reservation of title are affected by the

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762 Binder in Schwimann, ABGB IV, § 1063 no. 4; Aicher in Rummel, ABGB I, § 1063 nos. 24 f.
763 Koziol/Weber, Grundriss I, 411 and many others.
764 See supra, 5.5.2.
765 So-called ‘kurzfristiger Eigentumsvorbehalt’, see supra, 5.8.
766 A retention of title clause can be stipulated in a contract for sale, in a barter contract, as well as in a contract for services if it concerns the production of a movable asset. Therefore, the more general term ‘supplier’ may be more adequate, but ‘seller’ is used synonymously in the present chapter.
767 See infra, 15.4., for more details.
768 See supra, footnote 556.
15. Retention of ownership

§ 37 EO enables the owner to terminate the enforcement proceedings with respect to his property by bringing a certain action, the so-called Exzindierungsklage. If the goods have already been sold, the supplier will have a claim for payment under unjustified enrichment law (§ 1041 ABGB) against the creditor, who has to surrender the proceeds of the forced sale.

Due to his right of ownership, the supplier is also protected in the case of the purchaser's insolvency: Since the contractual obligations have not been discharged in full by both of the parties, the administrator in bankruptcy can only choose to either pay the full price or to repudiate the contract (§ 21 KO; § 20b AO). In the case of the repudiation of the contract, § 44 KO and § 21 AO become relevant, which provide for a right to separate the property from the bankrupt's estate.

Still being owner, the supplier could also recover the goods on the basis of the revindicatory action (§ 366 ABGB) if they have been taken away illegally by a third person (e.g., if a thief has stolen them from the purchaser). Thus, according to his contractual obligation, the seller will subsequently have to return the goods to the purchaser.

15.3. Rights of the transferee

Based on the contract existing between the supplier and the purchaser, the latter has the right to possess and use the goods. According to the prevailing opinion, the transferee's entitlement is not a right in rem (proprietary right), but a special expectant right (Anwartschaftsrecht): He has a right of ownership subject to the suspensive condition of full payment and, therefore, a right to unilaterally alter a legal relationship (Gestaltungsrecht), as the acquisition of ownership solely depends on his payment.

This expectant right can be transferred. In this case, the acquirer of the expectant right will obtain ownership when the original supplier (conditional vendor; not the transferor of the expectant right!) has received full payment and, therefore, loses his right of ownership. As for other assets, the conditional buyer can create a pledge over his expectant right and the expectant right can be subject to enforcement against the conditional buyer.

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769 On the following, see, e.g., Spielbüchler in Rummel, ABGB I', §§ 357-360 no. 8.
770 For more details, see 1.4.2.(b), above.
771 For more details see supra, 9.2.2.(c).
772 See for instance Koziol/Welser, Grundriss I', 413 ff with further references; Frotz, Kreditsicherungsrecht 65 ff. Assuming a proprietary right, e.g., Spielbüchler, Zur dinglichen Rechtsstellung des Vorbehaltskaufers, JBl 1981, 505.
773 See Aicher in Rummel, ABGB I', § 1063 nos. 72-79.
Under the requirements of § 367 ABGB,\(^{774}\) the expectant right can also be acquired in good faith\(^{775}\) where a professional seller B sells A’s goods to C under reservation of title. Being in good faith, C will obtain an expectant right. Having paid the price to his seller B (not to the owner A!), C will obtain ownership.

**Against third parties**, the conditional purchaser is protected like an owner:\(^{776}\) According to Austrian law, the conditional purchaser is a ‘possessor of a right’ (Rechtsbesitzer, §§ 311-314 ABGB) and, therefore, can resort to the special remedies of the protection of possession (Besitzstörungsklage, § 339 ABGB) against any interferer. Based on an analogy to the so-called *actio publiciana* (§ 372 ABGB), the conditional purchaser is also entitled to bring an action for recovery (*actio petitoria*, comparable to § 366 ABGB) or an *actio negatoria* (for prohibition of interference and restitution in integrum, comparable to § 523 ABGB). Based on this absolute protection by analogy to § 372 ABGB, the conditional purchaser is – in addition to the owner, whose absolute right of ownership is interfered with – also entitled to claim damages from a third party who damages the goods. Where the goods are used by a third person, the conditional buyer will be entitled to bring claims ex unjustified enrichment under § 1041 ABGB.\(^{777}\)

Furthermore, it is generally accepted that the conditional purchaser is entitled to bring an action to avoid enforcement (so-called Exzindierungs-klage, § 37 EO) in order to terminate enforcement measures commenced by the supplier’s creditors, affecting property that is subject to reservation of title. Another possibility would be to object to the enforcement of execution (so-called Vollzugsbeschwerde, § 68 EO, in conjunction with § 253 (1) and § 262 EO).\(^{778}\) If goods purchased subject to reservation of title become involved in insolvency proceedings against another person (including the conditional vendor), the conditional purchaser – such as an owner – has a right to separate the goods from the bankrupt’s estate (*Aussonderungsrecht* in the sense of § 44 KO, § 21 AO).\(^{779}\)

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\(^{774}\) See chapter 12, above.

\(^{775}\) Cf. Aicher in Rummel, ABGB I\(^{3}\), § 1063 no. 69; F. Bydlinski in Klang, ABGB IV/2\(^{2}\), 570 ff; Koziol/Welser, Grundriss I\(^{13}\), 414.

\(^{776}\) For the following, see Aicher in Rummel, ABGB I\(^{3}\), § 1063 nos. 65, 68-71, 80-82; Binder in Schwimann, ABGB IV\(^{3}\), § 1063 nos. 41 ff; for a summary, see also Koziol/Welser, Grundriss I\(^{13}\), 413 ff; Iro, Sachenrecht\(^{1}\), no. 8/8.

\(^{777}\) For the named remedies protecting ownership and possession, see 1.4., 2.5. and 2.6., above.

\(^{778}\) For more details, cf. Frotz, Kreditsicherungsrecht 174 ff; Aicher in Rummel, ABGB I\(^{3}\), § 1063 no. 71.

\(^{779}\) See above, 9.1.2. and 9.2.2.(c).
15.4. Transfer of ‘retained ownership’

As already mentioned, the reserved title of the conditional seller, who is still owner but whose ownership is subject to the resolutive condition of receiving full payment, may be transferred to third persons. This very often takes place in everyday life when the purchase of goods is financed by a third party (drittfinanzieter Kauf). If purchaser P wants to buy a car from seller S and neither P is able to pay immediately nor is S willing to sell on credit, they may agree that the transaction will be financed by the bank B: S and P will conclude a contract for sale subject to reservation of title. B and P will conclude a credit contract. B will pay the purchase price to S and S, on the other hand, will assign the claim for the purchase price to B (or, more frequently: B will pay and demand an ‘assignment by operation of law’ – cessio legis – according to § 1422 ABGB) and will also transfer his ‘retained ownership’ to B, which, for the latter, will serve as a security for the credit.

However, it is debated controversially how exactly such ‘reserved ownership’ passes from S to B in such a situation. According to the greater number of OGH-decisions, reserved ownership passes ‘automatically’ upon assignment of the claim for the purchase price, or upon payment to S in the case of a cessio legis. According to this view, the transfer of retained ownership does not require delivery. Some academic writers criticise this position; also, some of the more recent decisions of the OGH at least indicate a requirement of an act of delivery. The most practicable equivalent to delivery is an order to the third party (P) in possession (Besitzanweisung), as the goods are physically held by purchaser P.

15.5. Resale by the conditional buyer

It often happens that the conditional purchaser wants or even has to resell the goods before he has paid the full purchase price to the conditional seller. For the following discussion on the different variations, which can be observed in such a constellation, I employ the example of retailer B who buys...
goods from producer A subject to reservation of title. B has to resell the goods to his customer C in order to pay the purchase price to A.

1. First of all, the conditional purchaser B can transfer his exact legal entitlement, i.e. the special expectant right of becoming owner upon the payment of the purchase price, to C. However, this construction is normally not very attractive to C, since his acquisition of ownership depends on the making of payment to A, and not to his seller B.784

2. C will regularly be interested in obtaining full ownership (this may put some pressure on B, as he will be practically forced to make a promise to transfer of full ownership). The conditional purchaser B will be able to legally transfer full ownership to C if owner A has granted him an authority to dispose to that effect (Verfügungsermächtigung, Verfügungsbefugnis). In such a case, C derivatively obtains ownership from A. However, granting such an authority creates risks for A: Giving up the right of ownership, A’s claim will be unsecured. Nevertheless, an authority to dispose is frequently granted in practice, usually with additional stipulations; see infra, 5.

3. If, on the other hand, B has no power to dispose, he can not transfer ownership to C (nemo dat quod non habet). But C may acquire ownership in good faith based on § 367 ABGB, since B will often be a professional seller acting in the ordinary course of his business and, nowadays, selling goods to a conditional buyer is understood to constitute an act of ‘entrustment’ in the sense of § 367 ABGB. As shown above in section 12.2.8., C may regularly trust in B’s power to sell against a cash payment. Therefore, A runs a considerable risk of losing his right of ownership.

4. In principle, the same rules apply if the conditional purchaser B himself (pretending to be the full owner) has – without having been empowered to do so by A – sold the goods to C subject to reservation of title. In doing this, he promises C to obtain full ownership by paying the price to him (B),785 Under the requirements of § 367 ABGB, C will acquire an expectant right (Anwartschaftsrecht) in good faith. In this case, there are two reservations of title and two expectant rights (A – B and B – C). Ownership will pass to the party who first paid the purchase price: If B pays A before C pays B, B will obtain ownership derivatively and will transfer ownership to C, if C himself paid B. If, on the other hand, C paid B before B paid A, C will acquire ownership originally. Again, A will lose his security.786

5. These consequences of the good faith acquisition rules are quite unfavourable for the conditional seller A. It has, therefore, become a common practice (for A) to authorise the conditional purchaser B to resell the goods and to attempt to obtain security by other means.787 C, then, obtains own-

784 See for instance Koziol/Welser, Grundriss I13, 417 f. This construction is known as the so-called ‘weitergeleiteter Eigentumsvorbehalt’ in Austrian civil law terminology.
785 This is called a ‘nachgeschalteter Eigentumsvorbehalt’ in Austrian legal terminology.
786 Cf. Koziol/Welser, Grundriss I1, 418; Iro, Sachenrecht, nos. 8/15 ff.
787 Such constructions are discussed under the notion ‘verlängerter Eigentumsvorbehalt’.
ership derivatively (from A). A often only grants his permission to resell subject to the condition that he obtains other security from B (often requiring B to assign his claim for the purchase price against C to him). Accordingly, B would act without the necessary authority to dispose if he sold to C without assigning the claim to A. If so, C will not be able to acquire ownership derivatively; but he may be protected by § 1088, 2nd sentence ABGB, which is understood to protect good faith relating to the scope of B’s power to dispose.

The most common form of such ‘alternative’ security is the assignment to A of the claim for the purchase price from the resale. This will usually be effected in advance (before the goods have been sold to C). This form of security is adequate where the conditional purchaser B intends to resell the goods on credit. A practically problematic aspect, however, is that such assignment regularly has to be qualified as a fiduciary assignment for security purposes (Sicherungszeision). According to Austrian law, such a fiduciary assignment requires not only an agreement between the assignor (B) and the assignee (A), but also an act of publicity (§ 452 ABGB per analogiam). This act of publicity may be the informing of debtor C or the making of a note in B’s bookkeeping. As long as such act has not been performed, the assignment is not valid and B could assign the claim to another assignee. Also, if B became insolvent after having transferred the goods to C but before providing publicity of the assignment of the claim for the purchase price, A’s claim will be unsecured, since he has already lost the right of ownership whereas his claim has not been satisfied yet.

A second problem may arise in relation to the assignment of claims under Austrian law: Until the second buyer C is informed of the assignment, he can pay to B, which will cause his debt to be discharged (§§ 1395, 1396 ABGB). Again, A’s claim will be unsecured.

If B sells the goods to C against a cash payment, another form of ‘alternative security’ can be discussed in this context: B can, in advance, transfer the title to the sum, which he is to receive from a later resale, to A by an anticipated constitutum possessorium. But again, A is at risk of losing his security since B, at any time, can become owner of the money by simply mixing it with his own money (§ 371 ABGB).

788 Closer on this contractual term Bollenberger, Konkursfeste Gestaltung des verlängerten Eigentumsvorbehalts, RdW 1993, 36.

789 See supra, 12.3.2.

790 On these questions see for instance Bollenberger, RdW 1993, 36; Iro, Sachenrecht1, no. 8/24; Aicher in Rummel, ABGB 1, § 1063 no. 115.

791 Aicher in Rummel, ABGB 1, § 1063 no. 116. On § 371 ABGB, see supra, 11.2.4.
15.6. The consequences of the processing of goods by the conditional purchaser

Especially when raw materials or semi-manufactured goods are sold subject to reservation of ownership, it often happens that these goods are processed or converted into a new movable asset by the conditional purchaser. As has been discussed in chapter 11, if the parties have not concluded a (valid) agreement on the proprietary consequences, the general rules on processing in §§ 414 ff ABGB will apply (at least per analogiam): The act of processing will, according to § 415 ABGB, lead to co-ownership by the supplier and the purchaser (who processes the goods); the size of each party’s undivided shares depends on the economic value of their contributions (material, work).\(^792\) If, on the other hand, the goods supplied under reservation of title can be qualified as being a subordinate of a principal object, to which they are inseparably joined, the supplier will lose his right of ownership according to § 416 ABGB. The whole entity will then be subject to the sole ownership of the purchaser, due to the latter being the owner of the principal object.\(^793\)

In principle, both § 415 and § 416 ABGB are non-mandatory rules.\(^794\) Therefore, supplier and purchaser may agree on the consequences of the processing of the goods, which is often referred to as the ‘processing clause’ (Verarbeitungsklausel). For instance, they may stipulate that the product shall fall into the sole ownership of the purchaser. However, special difficulties arise if the parties agree upon the sole ownership of the supplier, or if they stipulate that the supplier’s co-ownership-share shall be greater than the proportional value of the material supplied by him: As the seller’s sole or co-ownership of the product, in such a case, would constitute a more valuable security than his retained ownership of the assets, which he originally supplied, this construction would qualify as a transfer of ownership for security purposes (Sicherungsübereignung); this would require the fulfilment of special publicity requirements under Austrian law (§ 452 ABGB per analogiam). In order to fulfil these publicity requirements, the product would have to be handed over to the supplier – which is not practical. A constitutum possessorium is not sufficient. Accordingly, where the product remains in the possession of the processor, the stipulation of a higher security interest, corre-

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\(^{792}\) Undisputed today; cf. OGH 4 Ob 525/76, SZ 49/138 (against the former opinion of the OGH, which presumed the sole ownership of the purchaser); OGH 5 Ob 303/80, JBl 1982, 88; Aicher in Rummel, ABGB I’, § 1063 no. 91 and others.

\(^{793}\) See for instance Aicher in Rummel, ABGB I’, § 1063 no. 95; cf. also supra, 11.2.3.

\(^{794}\) Cf. supra, 11.2.1.
sponding to a value greater than the actual proportional value of the sold goods, is ineffective in property law.\textsuperscript{795}

\section*{15.7. ‘All sums’ clauses and similar extensions with regard to the secured debts}

The so-called ‘extended retention of title’ (erweiterter Eigentumsvorbehalt) is an agreement, according to which the right of ownership shall pass to the conditional buyer by virtue of not only having paid the purchase price under the particular transaction, but by also having paid the purchaser's other debts (such as: all present and future obligations).

According to the prevailing opinion, such an ‘extended retention of title’ is invalid under Austrian property law; \textit{i.e.} it is invalid only with respect to its proprietary effect. This is due to the publicity requirements of § 452 ABGB, which also cause the invalidity of a transfer of ownership for security purposes (Sicherungsübereignung) created by constitutum possessorium.\textsuperscript{796} Ownership, therefore, passes when the purchase price under the relevant transaction has been paid.

In spite of this invalidity with respect to property law effects, the agreement of an ‘extended retention of title’ may, according to some scholars, be interpreted as a (mere) \textit{obligation} to hand over the goods to the supplier in case of the purchaser's default of payment.\textsuperscript{797} By physically handing over the goods, the publicity requirements of § 452 ABGB would be fulfilled and the ‘reservation of title’ would become fully effective.

\section*{16. Abandonment and loss of ownership}

Corresponding to the unitary concept of ownership employed by Austrian law, ownership is always lost when another person acquires ownership, such as in the case of a transfer (chapter 5), good faith acquisition (chapter 12) or acquisitive prescription (chapter 13).

Furthermore, it is possible to lose the right of ownership without another person’s acquisition of it. This is the case where the property is destroyed or,

\textsuperscript{795} Cf. Spielbächler, JBl 1968, 589 (597 f); F. Bydlinski in Klang, ABGB IV/2\textsuperscript{2}, 629; Frotz, Kreditsicherungsrecht 192 f; Iro, Sachenrecht\textsuperscript{3}, no. 8/10; Spielbächler in Rummel, ABGB I\textsuperscript{1}, § 415 no. 7; Aicher in Rummel, ABGB I\textsuperscript{1}, § 1063 no. 92.

\textsuperscript{796} See for instance Aicher in Rummel, ABGB I\textsuperscript{1}, § 1063 no. 108; Koziol/Welser, Grundriss I\textsuperscript{1}, 419. For details, see Frotz, Kreditsicherungsrecht 197-214; F. Bydlinski in Klang, ABGB IV/2\textsuperscript{2}, 677-687; Mayrhofer, Erweiterter Eigentumsvorbehalt und Sicherungsübereignung, ÖJZ 1969, 197.

\textsuperscript{797} Cf. Aicher in Rummel, ABGB I\textsuperscript{1}, § 1063 no. 109; Iro, Sachenrecht\textsuperscript{3}, nos. 8/26 f; see also OGH 4 Ob 540/71, EvBl 1971/334; OGH 2 Ob 210/97i, JBl 1998, 300 (Holzner) and others.
according to § 362 ABGB, in case it is abandoned (Dereliktion). Abandonment is defined as the giving up of possession with the discernable intention to give up one’s right to the object. This act requires legal capacity. The effect is that the property becomes ‘ownerless’ and may be acquired by way of another person’s occupation.\(^\text{798}\) Liability in tort, for instance if someone throws away dangerously poisonous batteries with the intention to abandon them, will remain unaffected.

The right of ownership in a registered ship can be abandoned by declaring the waiver of this right before the Registration Court, and by entering this waiver in the register.\(^\text{799}\)

17. Co-ownership

Co-ownership can be held in two forms. Both have in common that each co-owner owns an undivided share in the whole property. In its most common form, frequently called ‘simple co-ownership’ (schlichtes Miteigentum), each co-owner can freely dispose of his or her share. In the case of the second form, which is called ‘joint ownership’ (Gesamthandeigentum), a share may only be disposed of when all co-owners act jointly. The latter form appears, for instance, in the case of certain commercial partnerships, which are not considered to be legal persons.\(^\text{800}\) The whole object as such may, in any case, only be disposed of with the consent of all co-owners.\(^\text{801}\)

As to the transfer of an undivided share, it is stressed that the mere non-material nature, i.e. the lack of the share’s corporeal substance, must be taken into account. From this, it is concluded that the undivided share of a co-owner can only be transferred symbolically (§ 427 ABGB) or ‘by declaration’ (§ 428 ABGB), but not ‘from hand to hand’ in the sense of § 426 ABGB.\(^\text{802}\)

Co-ownership may be divided by the agreement of all co-owners. In case they do not agree, each co-owner can apply for a division of co-ownership by the court (§§ 830 f ABGB). Only after such an agreement has been reached, or such a court decision has been enforced, the division of co-ownership is perfected. It may be achieved by physical separation, where this is possible and does not lead to a substantial decrease in value. Otherwise, the property

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\(^\text{798}\) Cf. Koziol/Welser, Grundriss I\(^1\), 344 ff with further reference.

\(^\text{799}\) Cf. § 7 of the ‘Act on Rights in Ships’ (Schiffsrechtesgesetz; see footnote 333, above).

\(^\text{800}\) E.g., in case of the Offene Gesellschaft (formerly Offene Handelsgesellschaft), §§ 105 ff UGB.

\(^\text{801}\) Cf. Koziol/Welser, Grundriss I\(^1\), 293 ff, Iro, Sachenrecht, nos. 5/3, 5/12. General provisions on co-ownership are contained in §§ 825-858 ABGB.

\(^\text{802}\) Eggmeier/Grubner/Sprohar in Schwimann, ABGB III\(^1\), § 829 no. 2; Klang in Klang, ABGB III\(^2\), 1095. For the different forms of delivery and equivalents to delivery (§§ 426 ff ABGB), see supra, 5.6.
will be sold and the proceeds are to be distributed among the co-owners in proportion to the size of their shares (§ 843 ABGB). A division of co-ownership may, however, not be sought where such a division would be unreasonable and disadvantageous due to the existence of temporary obstacles (§ 830 ABGB).

Other issues regarding co-ownership, such as the internal relationship between the co-owners and their rights to manage the property, are of limited relevance for the purposes of this report and, accordingly, will not be dealt with here.

18. No special provisions on bulk sales and floating charges

1. Specific statutory provisions on ‘bulk sales’, whereby a buyer, who has made an advance payment for a certain quantity of fungible goods that are contained in a ‘bulk’, acquires co-ownership of the bulk, do not exist under Austrian law. However, the parties should be able to achieve a similar effect by way of party autonomy. Seller and buyer may agree that, immediately or upon receiving payment, the buyer shall become co-owner of the bulk, whereby his share will correspond to proportional size, in relation to the size of the whole bulk, of the quantity of goods purchased by him. There should not be any legal obstacle to acquiring such an undivided share by a constitutum possessorium as between buyer and seller, the latter agreeing to store the goods for the former. As the co-ownership of such fungible goods can, according to the general opinion, be divided in a simplified manner, by physically separating a quantity, corresponding to the size of the share, from the bulk, the sole ownership of the purchased quantity could also be acquired by such physical separation. The Supreme Court, however, did not seem to accept this solution in a decision from 1973, and has been criticised for its formalistic reasoning. In literature, it has been argued that in such a constellation, the risk of shrinkage should be borne proportionally by all co-owners.

803 For more details and examples, see Eggheier/Gruber/Sprohar in Schwimann, ABGB III, § 843 nos. 1-15 and 37 ff.
805 This view seems to be shared by Mader in Kletečka/Schauer, ABGB, § 428 no. 2; Binder, Sachenrecht, no. 19/63 and F. Bydlinski, Probleme des Quantitätseigentums, JBl 1974, 32 (35), the latter, however, not discussing the issue more closely because the practical case he deals with does not contain sufficient facts, in his view, to justify the presumption of such an agreement.
806 Cf. supra, 11.2.4.
807 OGH 4 Ob 528/73, SZ 46/50: Criticised by the authors quoted in footnote 805.
808 Binder, Sachenrecht, no. 19/63.
2. Austrian law does not provide for a ‘floating charge’, such as existing, *inter alia*, in common law jurisdictions, *i.e.* a registered security right in (typically) all assets of a company, the debtor company, however, being entitled to dispose of the property in the ordinary course of its business until the charge ‘crystallises’, *e.g.*, upon liquidation. Crystallisation means that the charge is converted into a fixed charge, covering the company’s present assets. Under the present law on proprietary security rights in Austria, a right of pledge (or transfer of ownership for security purposes) could only be created in relation to goods contained in a defined place (*e.g.*, stock in a warehouse), if, corresponding to the publicity principle that governs Austrian proprietary security law, this right is made visible by plates or signs in front of, as well as inside of, the relevant location, and the creditor has, at least through another person, physical control over the single goods (§ 452 in conjunction with § 427 ABGB). The Supreme Court requires that the charged goods may only be removed from the warehouse (and disposed of by selling them to customers) with this controlling person’s consent. Case law has accepted that such person may also be an employee of the debtor, but the main idea still is that the debtor’s factual power to have access to the collateral must be effectively eliminated (by handing over all keys providing access to the pledged object etc).809 Although this creates enormous practical difficulties, such security rights in stock located in a warehouse are still agreed upon in practice. Typically, the parties also agree that the security right will extend to new items that are added to the stock at a later point in time. Insofar, a certain ‘floating’ effect may be achieved, but the practicability of such constructions is much smaller than in the case of ‘real’ floating charges.

By reason of these and other deficiencies in Austrian law, a reform debate has started and a registration system for proprietary security rights in movable assets has been proposed.810

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19. Consequential questions of restitution of the movable to the owner

19.1. General

19.1.1. Scope

This chapter combines a number of questions that may arise when the owner makes use of his right to recover the physical control over his movable (or immovable) property from another person in possession: What is to happen with fruits or benefits stemming from the movable (19.2.)? Is the possessor liable in case the property has deteriorated in the meantime or was even lost or destroyed (19.3.)? In case the possessor incurred any expenses on the property: Will he be reimbursed or otherwise protected against losing his investments (19.4)? If yes, does he have a right to retain the property in order to secure his claims against the owner (19.5)? The Austrian Civil Code regulates these questions in §§ 329 ff ABGB. Following the German BGB-terminology, these rules are sometimes referred to as the ‘owner-possessor-relationship’ (Eigentümer-Besitzer-Verhältnis).

It should be pointed out right at the beginning that the named rules may cover a wide range of different constellations. The following constellations can be distinguished (in nos. 1-5 only two parties are involved; nos. 6-8 are three-party constellations):

1. Restitution of the movable in the case of a transfer based on a void or avoided contract: The contract does not exist or is cancelled with retroactive effect, so that ownership is deemed to have never passed to the transferee. The transferor, still being the owner, may revindicate.

2. Restitution of the movable in the case of an invalid or avoided right to use: A leasing contract or the agreement upon a usufruct right have not been concluded validly or are avoided when the property is already used by the other party.

3. Restitution of the movable if the right to use the movable has ended; e.g., after the expiration of a leasing contract.

4. Restitution of the movable in the case of theft.

5. Restitution of the movable from a finder; the finder may or may not have complied with the duties imposed upon him by law. Regarding finders who comply with these duties, there exist some special regula-

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811 In the following, the parties will be referred to as the ‘owner’ and the ‘possessor’, respectively.

812 § 379 ABGB, which forms part of the rules on revindication, refers to §§ 329 ff ABGB.

813 As under German law, the rules provided in §§ 329 ff. ABGB can be described as governing non-contractual obligations (gesetzliches Schuldverhältnis). This is, however, not particularly emphasised in Austrian literature and court decisions.
tions, provided in §§ 388 ff ABGB (in particular § 392 ABGB, relating to the reimbursement of expenses).

6. Restitution of a movable ‘acquired from a non-owner’, provided that neither good faith acquisition nor acquisitive prescription have taken place. The following cases can be thought of: Gratuitous acquisition; the seller was neither a professional party selling in the ordinary course of his business nor did the true owner entrust the goods to him (cf. § 367 ABGB), or the contract between the seller and the buyer is void or has been avoided.

7. Restitution of the movable in the case of a right of use granted by a non-owner;

8. ‘Garage cases’: Restitution of the movable in case the garage-owner entered into a contract to repair the movable (e.g., a car), but the other contracting party was not the owner of it (e.g., the thief; buyer under retention of title; lessee). This other party does not pay the garage-owner, and the owner of the car will claim for the restitution of the car against the garage-owner.

Unless explicitly stated in the following, it can be assumed that the principles discussed in this chapter apply to all of these constellations.814

To clarify the scope of this chapter a little further, it must be emphasised that it will not touch on cases where the restitution of the movable, reimbursement of expenses etc. are based on a (valid) contractual relationship between the owner and another person exercising physical control – such as a leasing contract –, which also regulates issues such as the expenses incurred, or the deterioration that has occurred, during the leasing period. These cases are covered by specific rules of contract law.815

In some respect, this chapter will also touch on constellations where the rules governing the ‘owner-possessor-relationship’ are not applied, but certain similar questions arise in a transfer situation; namely, to what extent a

814 Although this is not explicitly discussed in recent literature, one can assume that the rules discussed here are not necessarily restricted to situations where the owner claims back his property on the formal basis of his right of ownership, i.e., based on the rei vindicatio (§ 366 ABGB). As far as consequences under property law and tort law, or the reimbursement of expenses, are concerned, the rules may also apply when he claims for restitution based on his ‘better possession’ (actio publiciana, § 372 ABGB), or based on a mere breach of possession (§ 339 ABGB, with the exception that a right of retention will not be adequate here, cf. also the exclusion in § 1440 sentence 2 ABGB). The prerequisites for there to be consequences under unjustified enrichment law, however, require that the property is legally attributed to the claimant. This attribution will typically be effected by the right of ownership, so that at least a claimant in the sense of § 339 ABGB will not be entitled to bring any unjustified enrichment claims.

815 E.g., § 1097 ABGB on the reimbursement of expenses under a leasing contract.
person who is confronted with the owner’s claim for revindication can use the movable for securing his claims related to the movable (see 19.5.3.):

9. The movable has been handed over to a warehouse-keeper, carrier or forwarder by its owner, who then transfers ownership. The former owner neither pays the price agreed upon under the contract of deposit, carriage or the forwarding contract, nor for other expenses that have been made on the movable. After the transfer of ownership, the new owner seeks to recover the goods by means of revindication.

10. A commission agent has bought goods from a third party (indirect representation) and immediately transfers ownership to the principal by means of an anticipated constitutum possessorium. The principal does not pay the purchase price of, or reimburse any other expenses made on, the movable (such as costs of transportation, storage or customs paid already). Nevertheless, the principal seeks to revindicate the goods from the commission agent who still exercises physical control over them.

19.1.2. Main criteria and problems

(a) In relation to the Austrian Civil Code, the main criterion contained in the rules on the owner-possessor-relationship (§§ 329 ff ABGB) is the distinction between a possessor in good faith and a possessor in bad faith. An additional rule is provided in § 338 ABGB: The possessor is considered to be in bad faith from the moment he officially, via the court, received the service of process (Klagszustellung), provided that the possessor subsequently loses the lawsuit. Considering this rule, one can summarise the relation between possession in good faith and possession in bad faith as follows: As a general rule, a possessor in good faith becomes a possessor in bad faith when he becomes aware of the fact that he is not the owner (or, in the case of the possession of a right: that he does not have this right) or at the moment in time at which he should become aware of this fact (negligent ignorance).816 This can – and will often – be the case before the possessor’s receipt of the service of process. It can, however, also happen that the possessor remains being in good faith even after having received the service of process, if he still has very good reasons to believe that he is the owner. For this case, § 338 ABGB provides that he will, retroactively, be treated as a bad faith possessor as regards the handling of issues such as the distribution of fruits, the assumption of liability and the reimbursement of expenses, if he subsequently loses the lawsuit.817 The rationale of this rule is, on the one hand, to avoid the effect of the owner being burdened with too many disadvantages that typically result from the long duration of court proceedings for the

816 This is the prevailing view. For other views see 2.3., above.
817 See Lurger in Kletečka/Schauer, ABGB, § 338 nos. 1, 2.
restitution of the property; however, on the other hand, the rationale is also not to prevent the possessor from instituting judicial proceedings in order to clarify who is entitled to the property; therefore, no far-reaching consequences should arise from the mere fact that the claimant went to court.818

The meaning of ‘good faith’ is defined in the general rule of § 326 ABGB, which has been discussed in more detail above.819 According to the prevailing opinion, a possessor lacks good faith when he positively knows that he is not the owner and, in any case, if he is negligently ignorant of the fact that he lacks the right of ownership, including slight negligence. As to the consequences of restoration, however, the Supreme Court decided, for cases covered by constellation 1, that the possessor is to be treated like a good faith possessor even if both parties knew that the contract would be void but, nevertheless, exchanged performance. The argument was that either party could assume not to be interfering with the other's rights.820 Good faith is presumed according to § 328 ABGB.

The point in time relevant for the assessment of the possessor's good faith or bad faith is the moment when the relevant fruits or benefits are generated, damage occurs or expenses are made.

(b) The main purpose of the rules in §§ 329 ff ABGB is to mitigate the responsibility of, and to provide certain privileges for, a possessor in good faith. The main case the legislator of 1811 had in mind was the situation where someone (C) had bought the movable from a non-owner (B) but did not acquire ownership on the basis of the rules on good faith acquisition and, therefore, had to restore the property to the real owner (A) (constellation 6 in the list above).821

It must be emphasised right at the beginning that the rules provided in §§ 329 ff ABGB are, to a great extent, problematic: Partly, the black letter text is simply misleading. The mentioned norms do not form a consistent set of rules, which is fully compatible with other parts of the Civil Code.822 As a consequence, their interpretation has always been highly controversial. The main problem, in theory as well as in practice, is the relationship of these rules to the rules of unjustified enrichment. According to today’s prevailing opinion, the unjustified enrichment rules ultimately prevail, but applying them is all but simple.823 A second difficulty is the determination of the

818 Iro, Sachenrecht, no. 7/7.
819 See supra, 2.3. See also 12.2.4. and 13.1.1.(d).
820 OGH 1 Ob 687/90, JBl 1992, 594; OGH 4 Ob 114/01w, JBl 2002, 789 (Holzer), both on immovable property.
821 This is evident from a commentary written by the leader of the editorial committee in 1811-1813; cf. Zeiller, Commentar II/1 69 f.
822 See, e.g., Spielbüchler in Rummel, ABGB I, § 329 no. 1. For details, see the discussion below.
823 One of the problems in unjustified enrichment law is that § 1437 ABGB, which deals with the calculation of the enrichment that is to be reversed, refers back to §§ 329 ff. ABGB and can, therefore, not be understood literally. The reference is rather under-
exact relationship to the tort law rules; these problems are of a rather theoretical nature and are of small practical importance. On the other hand, the relationship to the rules of *negotiorum gestio* (benevolent intervention in another’s affairs, *Geschäftsführung ohne Auftrag*, §§ 1035 ff. ABGB) is rather clear: As these rules only apply where the possessor intends to act in another’s (the owner’s) interest, these rules will be applied as the more specific ones where there is any overlap.

The main point of discussion in doctrine and court decisions is how to bring §§ 329 ff. ABGB in line with other parts of the ABGB. At least in recent times, there seems to be no discussion over whether the criterion of distinguishing between the possessor’s good faith or bad faith is, as such, a good solution as compared to other possible solutions.

### 19.2. Entitlement to fruits and benefits

This section deals with the question of who acquires ownership of fruits, or is entitled to other kinds of benefits, stemming from the movable, while it is under the physical control of a person other than the owner.

#### 19.2.1. Categories of fruits and benefits

According to Austrian private law terminology, the following categories can be distinguished:

- **Natural fruits** (*natürliche Früchte*) result directly from the movable; they can be separated physically. A classical example is the calf casted by a cow, while the latter was still under physical control of the other party.

- **Civil fruits** (*Zivilfrüchte*) are profits or interest that the movable produces as the consequence of a legal relationship between the possessor and a third party, *e.g.*, the price received under a leasing contract.

- **Other benefits** are also considered to be covered by the relevant rules, such as the possibility that a car is used by the possessor himself (*Gebrauchsnutzen*).

stood as a general principle that, under unjustified enrichment law, a debtor in good faith is to be treated less strictly than a debtor in bad faith. See Mader in Schwimann, *ABGB VI*¹, § 1437 nos. 1 ff. (no. 2 in particular).

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824 See 19.3., below.

825 Schey/Klang in Klang, ABGB II¹, 95 and many others.

The rules governing these categories are more or less the same; there is only one qualification as to civil fruits, which are attributed to the possessor in good faith subject to specific requirements.827

19.2.2. Possessor in good faith

As mentioned above (19.1.2.), the Austrian Civil Code regulates the distribution of fruits and benefits by distinguishing between the possessor's good or bad faith. The relevant provisions are § 330 ABGB (for the possessor in good faith) and § 335 ABGB (for the possessor in bad faith). As to the effect of receiving the service of process (Klagszustellung), see 19.1.2.(a), above.

With regard to the possessor in good faith, one has to distinguish three types of legal effect:

(a) On the level of property law, § 330 ABGB provides that the possessor in good faith acquires the ownership of natural fruits by separating them from the fruit-producing property. A special act of taking them into one's possession is not required. Ownership is acquired originally (originär).828 The rule can be understood as a lex specialis to the general provision of § 405 ABGB, which provides that, by separation, the ownership of the fruits is acquired by the owner of the fruit-producing property.829

Civil fruits are primarily attributed to the possessor in good faith, subject to the dual prerequisite that they have already been 'collected' (eingehoben) and that they have become due during 'quiet possession' (i.e., for as long the possessor has not been sued, cf. § 338 ABGB).830

(b) It is, however, a matter of dispute whether or to what extent this result is to be adapted under the rules of unjustified enrichment; in other words, whether the possessor will be under an obligation to return the fruits and benefits to the owner of the property. As mentioned above,831 this uncertainty is caused by the impossibility to interpret §§ 329 ff ABGB in full coherence with the rest of the code.

According to the prevailing opinion, such an adaptation must be made in the majority of cases.832 This view is based on the ratio legis the legislator

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827 See 19.2.2.(a).
828 Schey/Klang in Klang, ABGB II¹, 96; Spielbüchler in Rummel, ABGB I¹, § 330 no. 1; Lurger in Kletečka/Schauer, ABGB, § 330 no. 2. Not that clear: Koziol/Welser, Grundriss I¹, 346.
829 Cf. Klang in Klang, ABGB II¹, 405.
830 For more details, see Schey/Klang in Klang, ABGB II¹, 96 f, who explain that falling due and collection will coincide in ordinary cases.
831 19.1.2. sub (b).
832 For the following, see Wilburg in Klang, ABGB VI¹, 474 f; Lurger in Kletečka/Schauer, ABGB, § 330 no. 3 with further references; OGH 4 Ob 84/97z, SZ 70/69 (concerning immovable property). – Arguing for a stricter observation of the principles provided by § 330 ABGB: Spielbüchler in Rummel, ABGB I¹, § 330 no. 1.
19. Consequential questions of restitution

had in mind when introducing § 330 ABGB: The possessor in good faith should be entitled to keep the fruits, first, as compensation for the purchase price he paid to a third party, which he cannot recover from the owner (§ 333 ABGB); second, keeping the fruits was seen as a schematic way of compensating the possessor for his efforts to obtain such fruits. Therefore, the scope within which § 330 ABGB can be applied literally (i.e., the possessor may keep the fruits) has to be reduced to those situations, which suit the abovementioned arguments (teleologische Reduktion).

The result can be summarised as follows: In all two-party-constellations, the possessor must surrender all types of fruits and benefits to the owner; unjustified enrichment principles prevail over a literal application of § 330 ABGB. Regarding three-party-constellations, the literal application of § 330 ABGB has to be reduced to cases where the possessor in good faith actually paid a purchase price to a third party and is not able to recover it. These cases are rather rare; the main example will be ‘private’ purchase from a thief, which is a special variation of constellation 6. In all other constellations, the unjustified enrichment rules will be applied.

The obligation to restitute under unjustified enrichment law applies both to natural and civil fruits. As indicated above, it also applies to other benefits the possessor may have obtained from the movable, in particular its use. In the latter case, he is obliged to pay a sum equivalent to the fee for using the property (Benützungsentgelt), which is, according to the prevailing opinion, to be calculated based on the individual benefit the good faith possessor derived from utilisation. For the practically most important cases of constellations 1 and 2, namely for the unwinding of synallagmatic contracts, the Austrian Supreme Court presumed in several cases that both parties’ benefits derived from the use of the object of the other party’s performance (the benefits derived by the buyer from using the property and the benefit derived by the seller from the purchase price he received, respectively) are equal and, therefore, balance each other out. Consequently, the Supreme Court denied claims for a sum equivalent to a fee for using the object.

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833 See Lurger in Kletečka/Schauer, ABGB, § 330 no. 3.
834 Here, the good faith possessor has paid the purchase price, but can not acquire in good faith (§ 367 ABGB) because the seller is neither a professional party acting in the ordinary course of business, nor did the owner entrust the property to the seller.
835 In constellation 8 (garage cases), this question does not arise: The garage keeper has no reason to consider himself entitled to use the asset or to keep any kind of fruits produced by it. In case he, nevertheless, does, he will qualify as a possessor in bad faith and the benefits must be returned to the owner under unjustified enrichment law.
836 Klicka in Schwimann, ABGB II’, § 330 no. 2; Lurger in Kletečka/Schauer, ABGB, § 330 no. 3 with further references.
837 i.e., contracts under which both parties are obliged to mutually perform, such as a contract of sale or a leasing contract.
838 See for instance OGH 7 Ob 672/86, SZ 60/6; OGH 5 Ob 231/98a, SZ 71/162; these judgments concern immovable property.
This view has, for good reasons, been heavily criticised in literature.\(^{839}\) A main argument is that it will lead to inappropriate results, in particular with regard to movables, where the delivered asset can not be used at all.

As to unjustified enrichment claims under Austrian law, it should also be mentioned that, in general, the obligation to reverse the enrichment is not extinguished if the enrichment ceases to exist subsequently (no defence of ‘disenrichment’). Details, however, are disputed.\(^{840}\)

**Fructification costs** are to be deducted from the benefit that has to be returned under unjustified enrichment law.\(^{841}\)

(c) Two further aspects relating to **tort law** should be added: A possessor in good faith is neither liable under tort law for fruits that he consumed; nor for fruits he could have collected but did not.\(^{842}\) This can be deduced from §§ 329, 330 ABGB.

19.2.3. **Possessor in bad faith**

Also, with regard to possessors in bad faith, it seems useful to keep property law, unjustified enrichment law and the tort law aspects apart. The rules are, however, less complicated. There is no need to distinguish between the various constellations listed above, 19.1.1.

(a) **Property law** does not provide any special regulation that favours a possessor in bad faith. He does **not acquire ownership** of any (natural) fruits. According to the general rules of §§ 404 ff ABGB, ownership is acquired by the owner of the principal asset. As a consequence, the owner is entitled to recover the fruits based on his right of ownership (revindication, § 366 ABGB).

Exceptions to these principles, which will be absolutely rare in practice,\(^{843}\) may only apply indirectly as a consequence of the unjustified enrichment rules discussed sub (b): As will be explained below, the possessor in bad faith may be entitled to parts of the fruits in case they were only produced by virtue of significant efforts made by the bad faith possessor. This may result in an unjustified enrichment claim of the possessor against the owner. As the possessor will already have collected the fruits physically, the ownership of some of them can pass to him without the necessity of any further physical act, as the unjustified enrichment claim constitutes an underlying obligation suitable for the transfer of ownership (Titel) and physical delivery is not necessary where the acquirer already has physical control.

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840 See above, 1.4.5. with footnote 107.
841 Lurger in Kletečka/Schauer, ABGB, § 330 no. 4.
842 Iro, Sachenrecht, no. 7/5.
843 These cases are not discussed in literature; the solution discussed in the text derives from the general principles of the transfer of ownership.
19. Consequential questions of restitution

In addition, the speciality principle must be obeyed: A transfer of ownership is only possible if it is clear which of the fruits are affected by it.

(b) Unjustified enrichment law provides that the possessor in bad faith must return all benefits, which he derived from the movable, to its owner (§§ 335, 1437 ABGB). This principle may also apply to benefits which the owner would actually not have derived.845 In case the possessor consumed or sold the goods, he is obliged to pay, at least, the market price. He can not defend himself by arguing that, subjectively, his benefit was lower than the market value.846 Also, the equivalent to a fee for using the object (Benützungsentgelt) is to be calculated irrespective of the possessor’s subjective benefit.847 Regarding fructification costs, however, the same solution as for the possessor in good faith is advocated: Such costs have to be deducted from the benefit, which must be reversed under unjustified enrichment law.848

As mentioned above, these principles may be subject to an exception: If certain benefits are only achieved because of very significant efforts made by the bad faith possessor, the enrichment shall be divided according to the value of the owner’s and the possessor’s contributions (‘nach Beitragswerten’).849

Under § 335 ABGB, the possessor in bad faith is also liable for fruits not collected.850 (c) Under tort law, the possessor in bad faith is liable in case he causes damage to the fruits.

19.3. Deterioration, consumption or loss of the movable

If the movable has deteriorated while being in the physical control of the other party, the owner can nevertheless make use of his entitlement to

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844 This already follows from the wording of § 428 ABGB, which refers to the transferor’s intention. For the general requirements of a transfer of ownership, see chapter 5, above.
845 Klicka in Schwimann, ABGB II’, § 335 no. 1; Lurger in Kletečka/Schauer, ABGB, § 335 no. 1; OGH 1 Ob 607/95, JBl 1996, 653 (with a gloss by Karollus), regarding material extracted from land when digging a tunnel.
846 See, for instance, Lurger in Kletečka/Schauer, ABGB, § 335 no. 2.
847 Common opinion; for more details see Lurger in Kletečka/Schauer, ABGB, § 335 no. 3.
849 A very famous example is the creation of a successful media company on the basis of a credit, which was secured – without permission – by the savings book of another person: OGH 2 Ob 404/67, JBl 1969, 272. For further examples see Lurger in Kletečka/Schauer, ABGB, § 335 no 1.
revindications. In addition, the question arises to what extent the possessor may be held liable under tort law. Where the movable has been used up, alienated or lost, revindications will not be successful. Here, the question whether the possessor can be held liable under tort law and/or the rules of unjustified enrichment must be solved, as he damaged another’s property or derived a benefit from it, respectively.

Again, the ABGB distinguishes between a possessor in good faith and a possessor in bad faith. The relevant provisions are § 329 ABGB (for the possessor in good faith) and § 335 ABGB (for the possessor in bad faith). As to the effect of receiving the service of process (Klagszustellung), see 19.1.2.(a), above.

19.3.1. Possessor in good faith

The general idea of § 329 ABGB is to treat the good faith possessor like an owner with respect to all types of liability. The text of this provision, however, is partly misleading: The good faith possessor has no right to use, use up or destroy; the only person entitled to such conduct would be the owner. The good faith possessor may only be privileged as to liability. § 329 ABGB simply states that the possessor in good faith is ‘without responsibility’, which may be relevant for tort law and for unjustified enrichment law.

(a) If the good faith possessor uses, consumes or even destroys the movable, he is not liable under tort law. Insofar, § 329 ABGB treats the good faith possessor like the owner, who may do whatever he likes with his property. According to the prevailing understanding of the term ‘good faith’ in the meaning of the general rule of § 326 ABGB, the possessor already lacks good faith when he is slightly negligent as to his entitlement to the property. In this view, the exclusion of tort law liability in § 329 ABGB has no separate normative character, but rather a clarifying character: The good faith possessor will never act culpably, as he thinks to be the owner and, therefore, considers himself to be entitled to deteriorate the property’s condition.

(b) The relation between § 329 ABGB and the principles of unjustified enrichment law is a little more complicated and, therefore, controversial. According to the prevailing opinion in court practice and literature, the rules of unjustified enrichment prevail in two-party constellations. This

851 Klicka in Schwimann, ABGB II, § 329 no. 1.
852 For references, see Lurger in Kletečka/Schauer, ABGB, § 329 no. 1.
853 See 2.3., above.
854 Lurger in Kletečka/Schauer, ABGB, § 329 no. 2; Spielbüchler in Rummel, ABGB I, § 329 no. 1 and many others. If one believes, on the other hand, that ‘good faith’ in the sense of § 326 ABGB also includes slightly negligent ignorance, § 329 ABGB will constitute a privilege as compared to the regular tort law rules.
means that, in principle,\textsuperscript{855} the possessor is under an obligation to return the benefits obtained from the movable to its owner.\textsuperscript{856} For three-party situations (constellations 6 and 7),\textsuperscript{857} the prevailing opinion differentiates whether the possessor C ‘acquired’ for value, used the object against the payment of a fee or whether he used it gratuitously: If he did not pay for the acquisition or use of the property, he must reverse his enrichment to the owner under the unjustified enrichment rules, \textit{e.g.}, he must pay for using or consuming the asset, or surrender the purchase price he received when selling the object to another person. If, on the other hand, the possessor paid for acquiring or using the property, the ‘without liability’ rule of § 329 ABGB is applied and unjustified enrichment claims of the owner will be denied.\textsuperscript{858}

The calculation of unjustified enrichment claims – if they apply – is based on the subjective benefit the good faith possessor derived from using, consuming or selling the property. In an illustrative case from the 1920ies, the Supreme Court held that a good faith possessor who burned another’s high quality coal but, subjectively, derived no greater benefit than if he had burned (cheaper) ordinary coal, only had to pay an amount equal to the difference between the price of the coal he burned and the price of the same quantity of the cheaper coal.\textsuperscript{859} If the good faith possessor sold the property, he is obliged to surrender the purchase price to the owner, but this must not exceed the market value (therefore, he may keep a surplus in case he negotiated well).\textsuperscript{860}

An important amendment to what has been said so far – in relation to the principles of unjustified enrichment law – must be made with regard to the most relevant situations covered by constellation 1. It concerns the unwinding of synallagmatic contracts (sale, barter) where the reversal of one of the performances (here: restoring the property) is impossible because the property has been lost or destroyed accidentally (\textit{zufälliger Untergang}) while the debtor was in good faith. Example: S sold a used car to B for € 10.000. The value of the car is € 7.000 due to some defects. The contract is avoided

\textsuperscript{855} Exceptions may follow from unjustified enrichment law as such, see below at footnote 863.

\textsuperscript{856} This applies to constellations 1-3 (not to constellations 4 and 5: A thief is not in good faith, a finder can not consider himself entitled to use etc.). – For references, see Lurger in Kletečka/Schauer, ABGB, § 329 no. 3; Spielbüchler in Rummel, ABGB 1\textsuperscript{1}, § 329 no. 2.

\textsuperscript{857} Constellation 8 is not relevant, as a garage keeper may not consider himself entitled to use or even destroy the property.

\textsuperscript{858} Spielbüchler in Rummel, ABGB 1\textsuperscript{1}, § 329 no. 1; Lurger in Kletečka/Schauer, ABGB, § 329 no. 3.

\textsuperscript{859} OGH 2 Ob 318/25, SZ 7/150.

\textsuperscript{860} Cf. Lurger in Kletečka/Schauer, ABGB, § 329 no. 6 and the references provided there. For more details, see Bollenberger, Das stellvertretende Commodum (1999) 319 ff. The whole issue is somewhat disputed.
on account of mistake. Before the car is redelivered to S, it is stolen or destroyed without any fault being attributable to B. – It is a well-known matter of dispute how this case is to be solved. According to the view, which is (still) said to be the prevailing one, the two mutual unjustified enrichment claims are treated separately (Zweikondiktionentheorie): The buyer B can claim back the purchase price (€ 10,000), seller S would be entitled to the car, but that does not exist any more. Consequently, he gets nothing. A second theory (the so-called Saldotheorie), which prevails in Germany but is not that popular in Austria, assumes that only the party, who has received more than it performed, is ultimately (per saldo) ‘enriched’. In our example, this would be S: He received € 10,000 for a car worth € 7,000. This party’s enrichment, € 3,000, is to be reversed to B. The rest of the received purchase price can be retained by the seller. A third theory, with growing popularity in literature, is not so much rooted in unjustified enrichment law, but falls back upon the rules of sales law on the passing of risk: Hence, the buyer bears the risk of incidental loss before the point in time of redelivery. This is justified by the buyer’s factual possibility to use and protect the car within his own sphere of control. According to this theory, the seller must repay the whole purchase price but has an unjustified enrichment claim for the value of the car. The result is similar to the one arrived at by the saldo-theory: After set-off, S has to pay € 3,000.

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861 The same problem arises when the contract is terminated for lack of conformity.
862 This places the risk on the party who is entitled to claim for recovery. The result seems to be consistent with the one arrived at in the case of the avoidance of the contract with retroactive effect, as it corresponds with the general rule that the risk of accidental loss is to be borne by the owner (casum sentit dominus, § 1311 ABGB): The transferor, who has the right to recover his property after the contract has been avoided, is still considered as being the owner of the asset. In the case of termination for non-conformity, where the transferee remains owner, the casum sentit dominus-rule and the result of the theory of two independent unjustified enrichment claims can hardly be harmonised logically. However, academic writers point out that the constructive differences between the rules of avoidance and termination are not designed to solve the problems of the allocation of risk in cases of mutual restitution and, therefore, should not be decisive in that respect; see Koziol/Welser, Grundriss II¹, 298 f with further references.
863 For a summary of the discussion see Mader in Schwimann, ABGB VI¹, § 1437 nos. 23 ff; he favours the third theory, which has mainly been elaborated by Harrer, Rückabwicklungsprobleme beim fehlerhaften Kauf, JBl 1983, 228; see also Koziol/Welser, Grundriss II¹, 298 f (declaring to follow the saldo-theory). Defenders of the first, prevailing theory are, e.g., Wilburg in Klang, ABGB VI¹, 485; Rummel in Rummel, ABGB II/3¹, Vor § 1431 no. 24.
19.3.2. Possessor in bad faith

(a) With regard to the tort law consequences, the possessor in bad faith is liable for all losses caused by his possession (§ 335 ABGB), including lost profits, amounting to an aggravated liability in comparison to the general rule in § 1324 ABGB (which requires gross negligence for lost profits to be compensated). Liability does not only extend to damage inflicted on the property itself, but also consequential damage caused by the fact that the owner did not have physical control over the property.864 There is some dispute as to what extent the possessor in bad faith is also liable for accidental losses or deterioration.865

In cases of the continued use of a leased object after the termination of the leasing contract, it has been observed that the courts do not apply the strict § 335 ABGB, but rather the general rules on liability for damage.866

(b) As to the unjustified enrichment consequences of using or consuming the other party’s property, the same principles apply as described above, 19.2.3.(b).

19.4. Improvements and expenses

19.4.1. Categories of expenses

§§ 331, 332 ABGB differentiate between three types of expenses:867

- Necessary expenses (notwendige Aufwendungen) are indispensable for the preservation of the property.
- Useful expenses (nützliche Aufwendungen) are not necessary, but result in a durable improvement of profits.
- Sumptuary expenses (Luxusaufwendungen, Verschönerungsaufwand) do not result in any objective increase in value.

864 Lüger in Kletecka/Schauer, ABGB, § 335 no. 4.
865 Spielbüchler in Rummel, ABGB I, § 335 no. 1 argues that such aggravated liability should presuppose that the possessor had actual knowledge of his lack of entitlement. According to him, the negligent causation of loss results in liability under the general rules of tort law.
866 Klicka in Schwimann, ABGB II, § 335 no. 6 with references.
867 The structure and wording of these rules primarily refer to 'expenses', i.e., they look at the possessor's efforts. The result achieved by such activities, i.e., an 'improvement' (of the owner's asset), is accounted for indirectly when calculating the reimbursement sum. Therefore, the rules for 'expenses' and 'improvements' are actually the same.
19.4.2. Right to remove improvements (ius tollendi)

§ 332 ABGB provides that a possessor in good faith can remove sumptuary ‘improvements’ before restoring the property to its owner. This rule is also applied to a possessor in bad faith.868 The good faith possessor may also remove useful improvements.869

Such right (ius tollendi) can be exercised under the prerequisite that the substance of the property does not deteriorate, or, at least, the status quo ante can be restored.870

19.4.3. Reimbursement

In case the property is restored to the owner and the improvements made by the possessor have not been removed, the possessor may be entitled to reimbursement of his expenses. Such obligation becomes due upon redelivery.871 All expenses made up to the point in time of redelivery are subject to the rules on reimbursement.872

Where the requirements for reimbursement are met, the owner has no possibility to disapprove expenses and thereby escape his obligation to pay. It has been argued that the owner can not even avoid reimbursement by abandoning the property.873

(a) Possessor in good faith

A possessor in good faith is entitled to the reimbursement of necessary and useful expenses (§ 331 ABGB). There are two limitations: First, the possessor is not entitled to more than he expended. Second, he may only claim reimbursement insofar as the improvement still exists. The underlying principle is that the risk of the subsequent loss of the improvement is placed on the possessor who, in good faith, believes that he is the owner and therefore

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868 Klicka in Schwimann, ABGB II¹, § 336 no. 3; Lurger in Kletečka/Schauer, ABGB, § 336 no. 4.
869 § 332 ABGB is applied by way of analogy. See for instance Schey/Klang in Klang, ABGB II¹, 98; Lurger in Kletečka/Schauer, ABGB, § 331 no. 3.
870 Lurger in Kletečka/Schauer, ABGB, § 332 no. 2.
871 Cf. OGH 4 Ob 114/01w, JBl 2002, 789 (Holzner), regarding immovable property: Upon evacuation.
872 OGH 4 Ob 114/01w, JBl 2002, 789 (Holzner): The ABGB does not provide any further differentiations.
873 Schey/Klang in Klang, ABGB II¹, 98. – One may, however, argue that if the abandoned movable is occupied by the possessor (who then acquires ownership, § 381 ABGB), the bringing of a claim for reimbursement by him would be an abuse of rights, which would render such a claim void.
faces the same risks as an owner. As far as useful expenses are concerned, the objective increase in value is decisive, not the owner’s subjective preferences. It is also assumed that the possessor is entitled to reimbursement only insofar as he does not receive the benefits produced by the property anyway.

Consequently, expenses which do not lead to an objective increase in value (sumptuary expenses) are not to be reimbursed. There is only the ius tollendi mentioned above.

A finder (constellation 5) who complies with his duties imposed upon him by law can claim for the reimbursement of necessary and useful expenses under the special rule of § 392 ABGB which, implicitly, refers to the rules of the negotiorum gestio (benevolent intervention in another's affairs, Geschäftsleitung ohne Auftrag, §§ 1035 ff ABGB). There is a difference insofar as necessary expenses must also be reimbursed even when the effort remained fruitless (§ 1036 ABGB).

(b) Possessor in bad faith

§ 336 ABGB states that a possessor in bad faith is entitled to the reimbursement of expenses under the rules of the negotiorum gestio. The prevailing opinion modifies this rule insofar as expenses, which remain fruitless, are not to be reimbursed (otherwise the possessor in bad faith would be in a better position than a possessor in good faith). Whether expenses are useful (and, therefore, must be reimbursed) is assessed according to the individual preferences of the owner (cf. § 1037 ABGB); insofar, a different rule applies as compared to possessors in good faith. Sumptuary expenses are not to be reimbursed (cf. § 1038 ABGB).

874 Iro, Sachenrecht, no. 7/8; OGH 3 Ob 241/97f, SZ 70/136 (immovable property).
875 This is the prevailing opinion, see OGH 3 Ob 241/97f, SZ 70/136; Spielbüchler in Rummel, ABGB I, § 331 no. 1; Lurger in Kletečka/Schauer, ABGB, § 331 nos. 1 f and the references there. Others hold that the ‘usefulness’ of expenses must be calculated subjectively according to the owner’s preferences (analogy to § 1037 ABGB), see Koziol/Welser, Grundriss I15, 347.
876 Spielbüchler in Rummel, ABGB I, § 331 no. 1; Lurger in Kletečka/Schauer, ABGB, § 331 no. 1.
877(i.e.), who informs the authority and hands over the found object to such an authority or the person who has lost it.
878 Mader in Kletečka/Schauer, ABGB, § 392 no. 3.
879 Koziol/Welser, Grundriss I15, 347 f; Iro, Sachenrecht, no. 7/9; see also Lurger in Kletečka/Schauer, ABGB, § 336 nos. 1 f. Contrary Schey/Klang in Klang, ABGB II, 100 f.
880 Common opinion; see the references in Lurger in Kletečka/Schauer, ABGB, § 336 no. 3.
(c) Special aspects

In constellation 7 (lease from a non-owner), the lessee has to surrender the property to the owner and can claim for reimbursement from the latter. In addition, the lessee may have a contractual right to claim for reimbursement against the lessor (§ 1097 ABGB).881

Where the property has been transferred while being under the physical control of the possessor, the right to claim for reimbursement can be enforced against the new owner.882

The purchase price paid to a third party for acquiring the property (constellation 6) is not subject to reimbursement, irrespective of whether the possessor was in good faith or in bad faith. This is explicitly provided by § 333 ABGB.883 An exception to this is provided in the second sentence of this rule: Where someone, in good faith, obtains another’s property which would, otherwise, be recovered by the owner only with great difficulty, this person can claim an adequate reward.

19.5. Right to retain the movable and similar constructions

19.5.1. The right to retain in general

(a) Someone who is under a duty to surrender a thing is entitled to retain it as security for due claims for the reimbursement of expenses made on the asset, or for a claim for the compensation of damage caused by the asset. He can retain the property until the other party renders performance (so-called Zug um Zug Prinzip). This is provided for by a general rule in § 471 ABGB,884 which § 334 ABGB refers to. In our context, such a right to retain is important for the possessor’s right to the reimbursement of expenses; it may also apply to secure the ‘adequate reward’ that is granted under § 333 sentence 2 ABGB.885 The Supreme Court also argued that the right to retain may be exercised to secure a claim for repayment of the purchase price in the case of void contracts (constellation 1).886 It is not decisive whether the possessor is in good or in bad faith.887

881 Iro, Sachenrecht1, no. 7/11.
882 OGH 4 Ob 114/01w, JBl 2002, 789 (Holzner).
883 See Koziol/Welser, Grundriss I11, 348.
884 The owner can avoid the use of the right of retention by providing other security, § 471 (2) ABGB.
885 Hofmann in Rummel, ABGB I1, § 471 no. 8. As to the named secured claims, see 19.4.3.
886 OGH 4 Ob 114/01w, JBl 2002, 789 (critical Holzner)
887 Schey/Klang in Klang, ABGB II1, 99; Hofmann in Rummel, ABGB I1, § 471 no. 4 with further references.
The right of retention under § 471 ABGB is, according to the prevailing opinion, not considered a right in rem. However, it has certain effects against third parties. As long as physical control is maintained, it provides priority over subsequent dispositions. In particular, where ownership in the property has been transferred in the meantime, the right to retain may be opposed against the new owner (the Supreme Court often adds: If the new owner knew, or could not have been unaware of, the right to retain).\textsuperscript{888}

The right to retain under § 471 ABGB does not imply a right to sell the retained property, or have it sold. Such a right of satisfaction (Befriedigungsrecht), however, exists under § 371 of the Commercial Code (UGB/HGB) in relation to goods retained in accordance with the special right to retain that is provided for in §§ 369 f UGB/HGB. This rule applies to constellation 1 (restitution after the avoidance of a sales contract) provided that both parties are professional parties in the sense of the Commercial Code and that the contract was part of both parties’ commercial activities.\textsuperscript{889}

§ 471 ABGB does not differentiate as to the legal basis for the restitution of the property. Accordingly, the right to retain will not only apply where the owner exercises his right to revindicate (§ 366 ABGB), but also where he claims for recovery based on his better possession (actio Publiciana, § 372 ABGB). It will, however, not fit situations in which recovery is claimed on the basis of a mere violation of possession (§ 339 ABGB), because a right to retain would undermine the provisional nature of judicial possessory remedies. Second, a person dispossessing the other will hardly be worth protecting.\textsuperscript{890}

(b) According to another general rule (§ 1440 sentence 2 ABGB), a right to retain is excluded with regard to property, which has been taken away without permission or fraudulently, which has been borrowed, let out on lease or deposited. Therefore, a right to retain does not exist in constellations 2, 3, 4 and 7.\textsuperscript{891} The same may be argued for constellation 5, if the finder does not comply with his duties and keeps the found movable instead of surrendering it to the owner or to the competent authority.

(c) Where a contract turns out to be void or is avoided after both parties have performed (constellation 1), a general principle of unjustified enrichment law applies, according to which each party can withhold the performance of its obligation of reversal until the other party renders per-

\textsuperscript{888} See, e.g., OGH 4 Ob 114/01w, JBl 2002, 789 (Holzer). For further details, see Hoffmann in Rummel, ABGB I', § 471 no. 2.

\textsuperscript{889} Schuhmacher in Straube, HBG I', § 369 no. 6: The rule also covers proprietary claims for restitution.

\textsuperscript{890} Cf. also the effects of § 1440 sentence 2 ABGB, discussed sub (b) below.

\textsuperscript{891} These exceptions always relate to the circumstances under which the relevant possessor acquired possession. It does not create qualifications that are ‘affixed to the asset’. E.g., the rule does not provide that a movable, once stolen, can never be subject to a right of retention. See Spielbüchler in Rummel, ABGB I', § 334 no. 3.
formance (so-called Zug um Zug-Prinzip). Accordingly, the buyer can withhold the movable until the seller is willing to repay the purchase price. This is, originally, a defence to the seller’s unjustified enrichment claim, but it will also be effective against the seller’s claim for revindication.

19.5.2. Special constellations

(a) A finder (constellation 5) who complies with his duties may, on the other hand, retain the movable as security for his claim for reimbursement and, according to some authors, also for his finder’s reward.

(b) A special matter of dispute are the ‘garage cases’ (‘Reparaturfälle’) of constellation 8: The garage owner, who incurred expenses on the property, e.g. a car, by repairing it, will have a right to retain it under § 471 ABGB as security for his contractual claim for the repair price against the other party to the contract. But if this person is not the owner (but rather stole, leased or bought the movable under reservation of title from the owner) and does not pay, the question arises whether the garage owner has any claims (for the price or an equivalent of it), or, at least, any defences (against revindication), against the owner.

The best solution for the garage owner would be to bring an unjustified enrichment claim against the owner, based on the fact that, by repairing the item, he improved the owner’s property (§ 1041 ABGB, Verwendungsanspruch). However, such a claim is denied by the prevailing opinion, arguing

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892 Whereas the wording of § 877 ABGB, from which this rule is deduced, is all but clear, this principle is generally accepted. See for instance Rummel in Rummel, ABGB I, § 877 no. 4; Apathy/Riedler in Schwimann, ABGB IV, § 877 no. 19, both providing further references.

893 This is not often discussed, but see F. Bydlinski in Klang, ABGB IV/2, 517, who points out that the application of the Zug um Zug-principle for unjustified enrichment law in § 877 ABGB would make no sense if the seller, based on the retroactive effect of avoidance, could circumvent it by proceeding against the buyer on the basis of his right of ownership. Additionally, one could refer to the general principles of revindication, according to which the owner can not recover the property if, or as long as, the other person is entitled to exercise physical control over it (see 1.4.1., above). In our case, the right to exercise physical control derives from § 877 ABGB.

894 See Mader in Kletečka/Schauer, ABGB, § 392 no. 4 with reference to other (also dissenting) authors and the practical impossibility of exercising a right to retain where the movable has been handed over to the authority.

895 To complete the picture, it should be added that the owner often can not proceed against the garage owner immediately: In case there is a contractual relationship between the owner and the garage owner’s client, which entitles the latter to use the object, the owner of the asset must first terminate this contract. Where the third party leased the movable or bought it under reservation of title, this can often be done on account of non-payment.

896 A claim for the reimbursement of expenses based on § 331 ABGB (see 19.4.3.(a)) is not discussed in relation to these constellations.
that in a three-party situation like the present one, the enrichment is ‘justi-
fied’ by virtue of the services contract between the service provider (garage
owner) and the third party. Other authors, to the contrary, advocate the
availability of such unjustified enrichment claim against the owner; based on
this claim, the garage-owner would also have a right to retain under § 471
ABGB.

The next question, arising as a result of the denial of an unjustified en-
richment claim by the prevailing opinion, is whether the garage owner can
defend himself against the owner’s enforcement of his right to recover his
property (revindication, § 366 ABGB). According to the prevailing view,
the right to retain on the basis of § 471 ABGB is inapplicable: It is held that
such right can only be enforced against the one who is obliged to reimburse
the expenses, which is the garage owner’s client, not the owner. The
solution developed by the Supreme Court is to enable the garage owner to
acquire a right of retention ‘in good faith’ (§§ 471, 367 ABGB by way of
analogy). The main prerequisites are, first, that the owner has entrusted
the property to the third party. This is the case where the owner leased out
the item to the third party or sold it under reservation of title; but not where
the goods were stolen. Second, the garage owner must be in good faith as to
the client’s entitlement to have the item repaired. This is the case if the
service provider is in good faith as to the client being the owner; or, where
he may assume that the owner consented to the service being rendered. In a
case from 1975, the client, who handed over a car for the purpose of having
it repaired, was asked by an employee of the garage owner to produce the car
documents. The client pretended that he forgot the documents and prom-
ised to bring them the next day, but did not. Under such circumstances, the
garage owner was considered not to be in good faith as to the client’s enti-
tlement to have the car repaired. Consequently, the Supreme Court decided
that the garage owner had no right of retention against the owner of the
car. – Checking the car documents would, however, not necessarily be of
any use where the car was sold subject to a reservation of title.

897 Rummel in Rummel, ABGB I, § 1041 no. 10 with further references.
898 Apathy in Schwimann, ABGB IV, § 1041 no. 15 with further references. Apathy
argues that a transfer of the enrichment has not been completed as long as the garage
owner has not delivered the repaired item.
899 Cf. Koziol/Welser, Grundriss I, 349 with references to both views.
900 OGH 8 Ob 61, 62/75, EvBl 1976/1; OGH 7 Ob 615/90, JBl 1991, 241 (with a critical
gloss by Rummel); consenting Spielbüchler in Rummel, ABGB I, § 334 no. 2; Hofmann
in Rummel, ABGB I, § 471 no. 2a; dissenting Koziol/Welser, Grundriss I, 349 with
many further references.
901 OGH 8 Ob 61, 62/75, EvBl 1976/1.
902 Cf. the facts in OGH 7 Ob 615/90, JBl 1991, 241: The client produced his registration
certificate (Zulassungsschein) which stated that he was the registration holder. The
service provider did not require the production of another document, but this did not re-
sult in him being in bad faith.
Where the owner of the property, in fact, consented to the repair work, he must accept that the service provider’s right of retention may also be enforced against him.903

(c) Where a movable has been acquired from a non-owner (B) and the contract between B and buyer C was void or has been avoided (a special variation of constellation 6), a similar solution to the one arrived at in the ‘garage cases’ has been suggested: C could be granted a right of retention, provided that owner A entrusted the item to B.904

19.5.3. Statutory lien

A similar, but even more far-reaching function than the right of retention is served by statutory liens, which are provided for in relation to certain types of parties to commercial transactions:

(a) In constellation 9, where a movable has been handed over to a warehouse keeper, carrier or forwarder, such person is granted a statutory lien for the price agreed under the relevant contract and for expenses incurred on the movable on the basis of this contract. The lien is effective as long as this person is in possession of the movable or this person is entitled to dispose of the movable by means of a document of title.905 This right can be opposed to anyone, i.e., not only to the contracting party but also to a person who subsequently acquired the ownership of the movable906 (by means of giving an order to the third party holding the movable, the so-called Besitzanweisung;907 or, by the transfer of a document of title to the acquirer). The lien provides a right to retain the movable and, in addition, to realise the security and to satisfy one’s claims out of the proceeds.

Where the party who handed over the movable to the warehouse keeper etc. was not the owner, such a statutory lien can also be acquired bona fide, provided that the warehouse keeper was in good faith as to the contracting party’s ownership or entitlement to conclude such a contract over a movable owned by another at the time of obtaining physical control.908

(b) In constellation 10, where a commission agent (factor, consignee) bought goods from a third party and immediately transferred the ownership

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903 OGH 1 Ob 537/94, SZ 67/82; Spielbüchler in Rummel, ABGB 1ª, § 334 no. 2.
904 Cf. Spielbüchler in Rummel, ABGB 1ª, § 334 no. 2. In OGH 7 Ob 615/90, JBl 1991, 241 (Rummel) the Supreme Court, obiter, showed sympathy for this view.
905 See § 410 HGB/UGB for the forwarder (Spediteur), § 421 HGB/UGB for the warehouse keeper (Lagerhalter), § 440 HGB/UGB for the carrier (Frachtführer). There are slight differences as to the claims covered by this lien, but the price as well as the expenses are covered in all three cases.
906 From literature, see Schütz in Straube, HGB 1ª, § 410 no. 9 and § 440 no. 3.
907 See 5.6.6., above.
908 OGH 7 Ob 543/92, SZ 65/62 (concerning a warehouse keeper). Subsequent bad faith does not change this result.
of them to his principal by means of an anticipated constitutum possessori-um,909 and the principal now institutes an action for revindication against the commissioner, the latter is granted a statutory lien securing the price paid to the third party, other expenses incurred under the commission contract, the price due under the specific contract and, furthermore, all current account claims arising from the commission relationship. Again, such a statutory lien is effective as long as the commissioner is in possession of the movable or is entitled to dispose of the movable by means of a document of title.910

19.6. Costs of restitution

The question of who must bear the costs of restitution (e.g., transportation costs) on the basis of the property law remedy of revindication is neither regulated by the Civil Code, nor does there seem to have been any discussion of this question. In principle, this issue is linked to the question of where such ‘property law obligation’ is to be performed.

In practice, a solution will often be easily found where the possessor was in bad faith, like a thief or someone who bought the asset from a non-owner in bad faith (constellations 4, 6). He may be held liable for any costs under the rules on liability for damage. For the purposes of unwinding void contracts (constellation 1), the parallel issue of restitution under unjustified enrichment is somewhat discussed,911 so that one will probably resort to these principles.

909 See 5.6.5. and 8.2., above.
910 § 397 HGB/UGB. This type of statutory lien can be acquired in good faith, even where the predecessor was not the owner; Griss in Straube, HGB I, § 397 no. 2. – On the subject matter, see also 8.3., above.
911 The named principles are, however, a little complicated. The relevant rule (§ 905 ABGB) states that, in the absence of any agreement, the place of performance must be determined ‘according to the nature or the purpose of the contract’ or, subsidiarily, the obligation must be discharged at the debtor’s domicile or place of business. – As to the unwinding of contracts, it is argued that it can be the place to which the movable was brought according to the contract; it is also argued that one should differentiate as to which of the parties caused the reason for the unwinding of the contract. For more details, see Reischauer in Rummel, ABGB I, § 905 no. 25; Binder in Schwimann, ABGB IV, § 905 no. 14.
Table of Statutory Provisions

ABGB (Civil Code)\textsuperscript{912}

§ 309. A person who possesses power over a thing or holds it in his custody is its keeper. If the keeper of the thing has the intention of holding the movable as his own, then he will be its possessor.

§ 311. All corporeal and incorporeal things that are the object of legal relations can be taken possession of.

§ 326. A person possessing a thing is in good faith if possessing it in the reasonably probable belief that the thing is his. A possessor in bad faith is a person who knows, or should in the given circumstances suspect, that the thing he possesses belongs to another. By reason of a mistake of fact or lack of knowledge of legal provisions it is possible for one to be an unlawful possessor (§ 316) but, nonetheless, to possess in good faith.

§ 328. Whether a person possesses in good faith or in bad faith must be decided over by judicial sentence in the case of a legal dispute. In case of doubt, possession in good faith is presumed.

§ 329. A possessor in good faith can, at his convenience and without the need to account, by reason of possession in good faith alone, use, consume and indeed also destroy the thing he possesses.

§ 330. All fruits emanating from the thing belong to the possessor in good faith as soon as they have been separated from the thing; all other usage already derived also belongs to him insofar as they were already due during the time period of quiet possession.

§ 331. If the possessor in good faith has incurred useful expenses for the purposes of the continual maintenance of the substance or the increase of still continuing usage, he is entitled to reimbursement in the amount of the current value insofar as this does not exceed the actually incurred costs.

\textsuperscript{912} This translation has been prepared by Ernest Weiker and Wolfgang Faber.
§ 332. Expenses solely incurred for pleasure or for the purpose of embellishment are only reimbursed to the extent to which the thing's market value has genuinely increased by reason of these. However, the previous possessor has the option of removing all that can, without damaging its substance, be removed from it.

§ 335. The possessor in bad faith is not only obliged to return all benefits derived from the possession of another's thing, but also those which the damaged person would have derived, and further to compensate for all damage caused by his possession. In case the possessor in bad faith gained possession by committing an act prohibited by criminal law, compensation can extend to the value of special affection.

§ 336. If the possessor in bad faith has incurred expenses on the thing, that which has been provided for in the chapter on agency in relation to expenses incurred by an intervener in another's affairs is applicable.

§ 339. Nobody is entitled to arbitrarily disturb possession irrespective of its quality. The troubled person has the right to judicially demand the prohibition of the disturbance and the compensation of demonstrable damage.

§ 354. Seen as a right, ownership is the entitlement to handle the substance of and usage derived from a thing at one's pleasure, and to exclude anyone else therefrom.

§ 362. By virtue of the right to dispose over one's property freely, the full owner can, as a rule, make use of or leave his thing unused at his pleasure. He can destroy it, fully or partially transfer it to another, or distance himself from it which means abandoning it.

§ 366. Connected with the owner's right to exclude anyone else from the possession of his thing is also the right to judicially demand the return of his thing, which is withheld from him, from any keeper by way of bringing an action based on ownership. However, no such right vests in a person who sold a thing in his own name at a time when he was not the owner of it yet, but only subsequently acquired its ownership.

§ 367. (1) An action based on ownership against a person possessing a movable thing lawfully and in good faith is to be disallowed, if the possessor proves that he acquired the thing for money at a public auction, from an entrepreneur acting in the ordinary course of his business, or from someone to whom the previous owner entrusted the thing. In these cases, the person possessing lawfully and in good faith acquires ownership. The previous owner's claim for damages against his man of confidence or other persons will remain unaffected.
§ 368. (1) The possessor is in good faith if he neither knows nor should suspect that the thing does not belong to the alienator. In case of an acquisition from an entrepreneur in the ordinary course of his business, good faith as to the entitlement of the alienator to dispose over the thing suffices.

(2) If the owner proves that the possessor should have become reasonably suspicious by reason of a conspicuously low price, the personal characteristics of his predecessor known to him, the predecessor's business or other circumstances, the possessor has to surrender the thing to the owner.

§ 369. A person bringing an action based on ownership has to prove that the defendant has the thing sued for under his control, and that he owns this thing.

§ 370. A person judicially claiming a movable thing back has to describe its attributes, which distinguish it from all similar things of the same genus.

§ 371. Things, which cannot be distinguished in this manner, such as cash money mixed with other cash money or borrower's notes to bearer, are therefore, as a rule, not the object of an action based on ownership, unless circumstances by which the plaintiff can prove his right of ownership arise and the defendant should have known that he was not entitled to assume control over the thing.

§ 372. If the plaintiff's proof of his acquisition of ownership of a thing withheld from him indeed does not suffice, but does serve to demonstrate a valid title and the lawful manner in which he acquired possession, he will be deemed to be the true owner in relation to any other possessor who is not able to provide proof of his title or is only able to prove a weaker title.

§ 373. If the defendant possesses the thing in bad faith or unlawfully, if he cannot name any or only a suspicious predecessor, or if he, unlike the plaintiff, did not acquire the thing for money, he has to surrender it to the plaintiff.

§ 374. If the defendant and the plaintiff have equal titles of lawful possession, preference is to be given to the defendant by virtue of his possession.

§ 380. Without a title and a legal mode of acquisition ownership cannot be acquired.

§ 414. The processing of things owned by others, the unification, combination or commixture of these with one's own things, does not, by itself, confer upon oneself a claim to property owned by another.
§ 415. If suchlike processed things can be restored to their previous state, or if unified, combined or commixed things can be separated, every owner will receive his property back, and indemnity will be granted to the one deserving it. If restoration to the previous state, or separation, is not possible, all affected persons will own the thing jointly. However, the person, whose thing has been subject to the culpable unification carried out by another, can choose either to keep the entire thing but make payment for improvements, or to leave it to the other against payment. The culpable person will be treated according to the nature of his good or bad faith. However, if culpability cannot be ascribed to any of the parties, the person whose contribution has the highest value will have the right of choice.

§ 416. If materials owned by another are only used for the purpose of repairing a thing, such material will fall to the owner of the principal thing; the latter is obliged, according to the nature of his conduct in good faith or in bad faith, to pay the previous owner a sum representing the value of the used up material.

§ 425. A mere title does not in itself bestow ownership. Ownership and all proprietary rights can, except in those cases provided by law, only be acquired by legal delivery and receipt.

§ 426. Movable things can, in principle, only be transferred to another by corporeal hand-to-hand delivery.

§ 427. However, in the case of such movable things that, according to their nature, do not allow for delivery, such as claims, freights, in the case of a warehouse or another aggregate thing, the law permits a symbolic delivery, by way of the owner handing over documents demonstrating his ownership to the recipient, by handing over the means enabling the recipient to take exclusive possession of the thing, or by marking the thing, such marking enabling anyone to clearly recognize that the thing has been left to someone else.

§ 428. The thing is delivered by way of declaration, if the alienator displays his intention, either that he will hold the thing for the recipient in the future, or that the recipient, heretofore holding the thing unaccompanied by a proprietary right, shall hold the thing on the basis of a proprietary right in the future, in a demonstrable manner.

§ 429. Forwarded things are, as a rule, only deemed to have been delivered when the recipient obtains them, unless the latter himself has chosen or consented to this mode of forwarding.

§ 430. If the owner has alienated the same movable thing to two distinct persons, to one with, and to one without, delivery, the one to whom it has been handed over first is entitled to it; however, the owner is liable to the aggrieved person.
§ 442. The acquirer of the ownership of a thing also acquires the rights connected therewith. Rights, which are confined to the transferor's person, cannot be transferred. Nobody can ever transfer more rights than he himself has.

§ 471. (1) A person obliged to surrender a thing can retain it for the purpose of securing a due claim based on the expenses incurred by him on the thing or damage caused to him by the thing, with the effect that he can only be sentenced to surrender the thing against the counter-performance that is to be rendered concurrently.

(2) The exercise of the right of retention can be averted by the provision of a security; the provision of security by sureties is impermissible.

§ 523. In view of easements, there is a dual right of action. One can assert the right of easement against the owner; or, the owner can complain about the assumption of the right of easement. In the first case, the plaintiff must prove the acquisition of the easement or at least the possession thereof in the form of a proprietary right; in the second case he must prove the other's assumption of the easement in his own thing.

§ 877. A person demanding the avoidance of a contract on the basis of a lack of acceptance must, in turn, restore any benefits he has received as a result of the contract.

§ 1041. If, not on the basis of benevolent intervention in another's affairs, a thing has been used to the benefit of another, the owner can reclaim it in kind, or, if this is no longer possible, can demand the value it had at the time of its use, albeit its benefit was subsequently defeated.

§ 1048. If a time has been agreed at which the delivery shall take place, and, in the meantime, either the thing that is the object of the barter agreement has been prohibited by law, or, coincidentally, the whole thing or more than half of its value has been destroyed, the barter agreement is deemed as not having been concluded.

§ 1049. Other, having occurred coincidentally in the meanwhile, deteriorations of the thing and burdens are to be borne by the possessor. However, if the agreement concerns things “lock, stock and barrel”, the transferee bears the risk of the coincidental destruction of individual items, unless more than half of the value of the aggregate thing has been lost by this.

§ 1050. The possessor is entitled to the use of the things that are the object of the barter agreement until the agreed time of delivery. As of that time, the transferee is entitled thereto together with any accretion, albeit the thing has not been delivered to him yet.
§ 1051. If the time of delivery of a particular thing has not been agreed upon, and none of the parties have committed any inadvertences, the above provisions on Risk and Usage (§§ 1048-1050) are to be applied to the issue of the point in time of the delivery itself, unless the parties have agreed otherwise.

§ 1052. A person urging the delivery must have fulfilled his obligations or be willing to fulfil them. Also the person obliged to make an advance performance can refuse performance until counter-performance has been effected or assured in a case where such counter-performance is jeopardised by the weak financial position of the other party, which he need not have been aware of at the time of the conclusion of the contract.

§ 1295. (1) Any person is entitled to claim compensation from the tortfeasor on the basis of damage that the latter culpably caused to the former. Such damage may have been caused by the violation of a contractual duty or may be unrelated to a contract.

(2) Also a person intentionally causing damage in a manner contrary to good morals is responsible for it, though if such occurred in the exercise of a right only if the exercise of the right obviously had the purpose of causing damage to another.

§ 1323. In order to compensate for damage caused, everything must be returned to its previous condition, or, if this is not feasible, the estimated value must be reimbursed. (…)

§ 1435. The giver can also reclaim things that have been given on the basis of a genuine obligation from the recipient if the legal basis for keeping them has terminated.

§ 1460. Apart from the capability of the person and the object, the following are prerequisites for acquisitive prescription: that a person actually possesses the thing or the right that is to be acquired in this manner; that possession be lawful, in good faith and genuine, and that it be exercised throughout the whole of the time period determined by law (§§ 309, 316, 326 and 345).

KO (Bankruptcy Act)

§ 21. (1) If a bilateral contract has not been entirely fulfilled or has not been fulfilled at all by the bankrupt and the other party at the time of the opening of bankruptcy, the liquidator can, in place of the bankrupt, fulfil the contract and demand performance from the other party, or withdraw from the contract. (…)
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<td>4. EVHGB</td>
<td>Vierte Einführungsverordnung zum Handelsgesetzbuch (Fourth Introductory Regulation to the Commercial Code)</td>
</tr>
<tr>
<td>ABGB</td>
<td>Allgemeines bürgerliches Gesetzbuch (Austrian Civil Code)</td>
</tr>
<tr>
<td>AktG</td>
<td>Aktiengesetz (Stock Corporation Act)</td>
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<td>Art(s)</td>
<td>Article(s)</td>
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<tr>
<td>AO</td>
<td>Ausgleichsordnung (Composition Act)</td>
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<tr>
<td>AnfO</td>
<td>Anfechtungsordnung (Avoidance Act)</td>
</tr>
<tr>
<td>AWG</td>
<td>Abfallwirtschaftsgesetz 2002 (Austrian Waste Management Act)</td>
</tr>
<tr>
<td>BGBl</td>
<td>Bundesgesetzblatt (Austrian federal law gazette)</td>
</tr>
<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
</tr>
<tr>
<td>BGH</td>
<td>Bundesgerichtshof (German Federal Supreme Court)</td>
</tr>
<tr>
<td>BlgNR</td>
<td>Beilagen zu den stenographischen Protokollen des Nationalrates</td>
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<tr>
<td>cf.</td>
<td>confer (compare with)</td>
</tr>
<tr>
<td>COC</td>
<td>Konformitätstzertifikat (certificate of conformity)</td>
</tr>
<tr>
<td>DMG</td>
<td>Denkmalschutzgesetz (Protection of Monuments Act)</td>
</tr>
<tr>
<td>ed(s).</td>
<td>Editor(s)</td>
</tr>
<tr>
<td>e.g.</td>
<td>exempli gratia (for example)</td>
</tr>
<tr>
<td>EKHG</td>
<td>Eisenbahn- und Kraftfahrzeughaftpflichtgesetz (Railway and Automobile Liability Act)</td>
</tr>
<tr>
<td>EO</td>
<td>Exekutionsordnung (Enforcement Act)</td>
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<tr>
<td>et al.</td>
<td>et alii (and others)</td>
</tr>
<tr>
<td>et seq.</td>
<td>et sequentes, et sequentia (and the following)</td>
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<tr>
<td>etc.</td>
<td>et cetera (and those that follow)</td>
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Austria

EU European Union
EvBl Evidenzblatt der Rechtsmittelentscheidungen (in ÖJZ)

f, ff and the following
FBL FIATA-Konnossement des kombinierten Transports (FIATA Combined Transport Bill of Lading)
FS Festschrift

GBG Grundbuchgesetz (Land Register Act)
GIU Sammlung von zivilrechtlichen Entscheidungen des kaiserlich königlichen Obersten Gerichtshof, edited by Glaser and Unger
GmbH Gesellschaft mit beschränkter Haftung (private limited company)
GmbHG Gesetz über Gesellschaften mit beschränkter Haftung (Limited Liability Company Act)
GP Gesetzgebungsperiode (period of legislation)
GS Gedächtnisschrift

HaRARÁG Handelsrechtsänderungsgesetz (Act on Modification of Commercial Law)
HGB Handelsgesetzbuch (Commercial Code)
HS Handelsrechtliche Entscheidungen

i.e. id est (that is)
ImmZ Österreichische Immobilien-Zeitung

JBl Juristische Blätter

KBB Koziol/Bydlinski/Bollenberger (see table of literature)
KFG Kraftfahrgesetz (Road Traffic Act)
KO Konkursordnung (bankruptcy act)
KSCHG Konsumentenschutzgesetz (Consumer Protection Act)

leg. cit. legis citatae (of the quoted statutory act)
LGZ Wien Landesgericht für Zivilrechtssachen Wien (High Court of Vienna)

MietSlg Mietrechtliche Entscheidungen
MRG Mietrechtsgesetz (Act on Tenancy Law)
<table>
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<tr>
<td>no., nos.</td>
<td>number, numbers</td>
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<tr>
<td>NZ</td>
<td>Österreichische Notariatszeitung</td>
</tr>
<tr>
<td>OGH</td>
<td>Oberster Gerichtshof (Austrian Supreme Court)</td>
</tr>
<tr>
<td>ÖAMTC</td>
<td>österreichischer Automobil-, Motorrad- und Touring Club</td>
</tr>
<tr>
<td>ÖBA</td>
<td>Österreichisches Bankarchiv</td>
</tr>
<tr>
<td>ÖBB</td>
<td>Österreichische Bundesbahnen (Austrian Federal Railways)</td>
</tr>
<tr>
<td>ÖJZ</td>
<td>Österreichische Juristen-Zeitung</td>
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<tr>
<td>p., pp.</td>
<td>page, pages</td>
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<tr>
<td>PatG</td>
<td>Patentgesetz (Patent Act)</td>
</tr>
<tr>
<td>PECL</td>
<td>Principles of European Contract Law</td>
</tr>
<tr>
<td>RdW</td>
<td>Österreichisches Recht der Wirtschaft</td>
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<tr>
<td>RIS</td>
<td>Rechtsinformationssystem (Austrian law information system)</td>
</tr>
<tr>
<td>RV</td>
<td>Regierungsvorlage (government bill)</td>
</tr>
<tr>
<td>SMG</td>
<td>Suchtmittelgesetz (Drugs Act)</td>
</tr>
<tr>
<td>StGB</td>
<td>Strafgesetzbuch (Criminal Code)</td>
</tr>
<tr>
<td>StGG</td>
<td>Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (Human Rights Act)</td>
</tr>
<tr>
<td>SZ</td>
<td>Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen</td>
</tr>
<tr>
<td>UGB</td>
<td>Unternehmensgesetzbuch (Commercial Code as renamed by the HaRÄG)</td>
</tr>
<tr>
<td>VersE</td>
<td>Versicherungsrechtliche Entscheidungssammlung</td>
</tr>
<tr>
<td>VVO</td>
<td>Versicherungsverband Österreich (Association of Austrian Insurance Companies)</td>
</tr>
<tr>
<td>WaffG</td>
<td>Waffengesetz (Weapons Act)</td>
</tr>
<tr>
<td>WBl</td>
<td>Wirtschaftsrechtliche Blätter</td>
</tr>
<tr>
<td>WEG</td>
<td>Wohnungseigentumsgesetz (Act on Co-ownership in Apartments)</td>
</tr>
<tr>
<td>WG</td>
<td>Wechselgesetz (Bills of Exchange Act)</td>
</tr>
<tr>
<td>wobl</td>
<td>Wohnrechtliche Blätter</td>
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<tr>
<td>www</td>
<td>world wide web</td>
</tr>
<tr>
<td>ZPO</td>
<td>Zivilprozessordnung (Code of Civil Procedure)</td>
</tr>
<tr>
<td>ZIK</td>
<td>Zeitschrift für Insolvenzrecht und Kreditschutz</td>
</tr>
<tr>
<td>ZNR</td>
<td>Zeitschrift für Neuere Rechtsgeschichte</td>
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<td>----------------------------------------</td>
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<tr>
<td>ZVR</td>
<td>Zeitschrift für Verkehrsrecht</td>
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National Report on the Transfer of Movables in Estonia

Kai Kullerkupp
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Introduction and background

Property law in Estonia is understood, as in many other jurisdictions, as a component part of the civil law system. When speaking of the current civil law system in Estonia, we are referring to a system which has largely been built up from 1991 onwards. Only with regard to some very basic general aspects can we speak of the long-term continuity of the Estonian civil law doctrine.¹

The roots of the Estonian civil law lie in Roman law. In 1864, a codification of Baltic Private Law² entered into force, which was a comprehensive compilation of the various particular laws and usage largely based on Roman law. After the proclamation of the Republic of Estonia in 1918 efforts were launched to elaborate a new civil code for Estonia. Although the draft, which used the Baltic Private Law Code and the German and Swiss civil law as its main models, was completed by 1939, the outbreak of World War II hindered its being enacted as a law. In 1940, the laws of Soviet Russia were brought into force in the territory of Estonia, followed in 1967 by the ‘Civil Code of the Estonian Socialist Soviet Republic’. The latter remained in force until gradually replaced by new legislation after the restoration of the independent Republic of Estonia in 1991.³

The current Estonian civil code follows the ‘pandectic’ system,⁴ consisting of five ‘books’ which have all been enacted and entered into force at different times as separate laws: the general part (first version 1994, second version 2002), the law of obligations (2002), property law (1993), family law (1995, currently being revised) and the law of succession (1997, second version 2009).⁵ The fact that the new law of property was

¹ On December 1st 1992 the Riigikogu (the Estonian parliament) passed a decision concerning the continuity of legislation, pursuant to which laws in force in Estonia before June 16, 1940, were to be considered in elaborating bills for new legislation. This decision became an essential guideline for the legislator in selecting sources and models for new laws. See also PÄRNA (2001), p 89.
³ For an overview and general evaluation of these developments see PÄRNA 2001, p 89.
⁵ The English translations of these as well as those of all other major legal acts of Estonia, are available at the website www.legaltext.ee/indexen.htm.
elaborated and enacted before any other section of the new civil legislation (including the General Part) well illustrates the urgent necessity for a new and workable regulation of economic and proprietary relations in an emerging market economy. Due to the underlying dogmatic and ideological differences, none of the Soviet-time property law heritage has played any role in designing the current system,\(^6\) meaning *inter alia* that between 1940 and 1991 there was no scholarly legal discussion or research on property law issues which could have contributed to the creation of the new system. At the time of the introduction of the new property law system, there was not much time for scholarly research or discussion on the various alternatives. A natural approach was taken – not to ‘re-invent the wheel’ but rather to rely on the experiences of such legal orders that already had a history of influencing the Estonian legal thinking.\(^7\)

The Property Law Act of 1993 – the main legal source of Estonian property law today – bears a fairly clear resemblance to Book 3 (*Sachgerecht*) of the German BGB, although to some degree the influence of Swiss property law is also evident. It proved during the first decade of application of the Act that mixing the model provisions taken from differing legal systems poses a danger of resulting in inconsistency. Later amendments have further underlined the role of German law as the main model of Estonian property law.

The original legal literature on property law is still rather scarce thirteen years after the entering into force of the Property Law Act: one commentary\(^8\) and one textbook\(^9\) together with a handful of articles. Therefore, foreign legal materials will sometimes have to be consulted and cited, as will also be the case in this report. The Supreme Court of Estonia (*Riigikohus*) has confirmed the acceptability of such an approach in a decision of December 21, 2004, stating that ‘the analogous laws and legal practice of other countries can, at least in case of civil legislation, be taken into account as comparative material in interpreting Estonian law and in formulating its ideas and goals […]. This applies primarily in situations where we are lacking an established practice of applying a law, but in other countries the practice of applying a similar provision exists. This

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\(^6\) Except for in the context of the property and land reform (*ie* privatisation of land, restitution of property *etc*), which will not be discussed in this report.

\(^7\) See VARUL (2000) for a more comprehensive overview of the developments in building up a new system of private law.


concerns first and foremost those countries with which we have a generally similar legal system and similar practice of applying the law, first of all the fellow Member States of the European Union and, above all, countries belonging to the legal family of Continental Europe. Keeping in mind the orientation on the German model as well as the enormous amounts of scholarly literature published on property law in Germany, it still remains a largely unfinished task of Estonian legal scholars to develop well-grounded and consistent interpretations of the norms for the Estonian legal order.

The court practice in matters of property law is not yet fully representative either: there are very few fundamental decisions concerning movable property. A number of decisions dealing with immovable property issues tackle general principles of property law, which in general are applicable to movable property cases as well.

10 Decision of the Riigikohus (Supreme Court) of December 21, 2004, No 3-2-1-145-04.

11 A peculiarity resulting from the recent reforms of the property law system – constructions (buildings) as well as flats situated on ‘non-reformed’ land (ie land not entered into the land registry) are treated as movable things, thus the property in such buildings etc will also pass according to the rules concerning the transfer of movable property (the only difference being that in case of such ‘buildings as movables’ the contract for alienation needs to be concluded in a notarised form). Therefore, most court practice dealing with issues of movable property transfer at all is concerned with such ‘buildings as movables’ which, however, is only intended as a temporary measure to help out until all land involved in civil commerce will have been entered into the land registry.
Part I:
Basic information on property law

1. Notion of ownership and types of property rights

1.1. General basics

1.1.1. Sedis Materiae

As already mentioned above, the main set of rules of property law, including both movable and immovable property issues, are found in the Property Law Act, which was enacted and entered into force on December 1st, 1993. The act is a basis for the whole property law system: it sets forth the definition and character of property rights (including ownership and the restricted or dismembered property rights), the rules on how these rights are acquired or created and transferred, modified or extinguished; the entitlements arising out of these rights and ways of their exercise as well as protection against infringements by third persons. The Act also serves as a basis for other laws dealing with specific property, such as ships, apartments etc.\textsuperscript{12} Inevitably, the Property Law Act also contains provisions on certain specific legal relationships of obligatory nature which arise as a ‘side-product’ of proprietary relationships, eg the mutual accessory claims of the owner and possessor regarding damages and fruits of the thing in case of revindication. Possession and the main principles of the land registration\textsuperscript{13} are also regulated in the Property Law Act. Since it first entered into force, the Act has been amended several times, the latest major set of amendments dating to 2003. However, these amendments have been of a purely clarifying nature as far as the transfer of movable property is concerned.

Due to the ‘pandectic’ structure of the Estonian civil law system, the General Part of the Civil Code Act, the current version of which entered into force on July 1st, 2002, is to be considered as a general part for the Property Law Act as well. The General Part Act contains \textit{inter alia} the

\textsuperscript{12} For such specified property various separate laws exist: the Law of Maritime Property Act, the Apartment Ownership Act etc.

\textsuperscript{13} The procedure of keeping and maintaining the land register is, however, separately regulated in the Land Register Act.
definition and classification of objects (including things), as well as the general provisions on transactions (including rules on legal capacity).

1.1.2. Main characteristics of rights in rem in contrast to obligations

Following the German model, the Estonian property law system is characterised by a strict differentiation between property rights, *ie* rights in rem (aka real rights), and obligations. This distinction is firstly evident in the structure of the Estonian Civil Code – *ie* the fact that property rights and obligatory rights are regulated in different parts (books) of the civil code: the provisions on property rights are found in the Property Law Act, whereas provisions on obligations are contained in the Law of Obligations Act. Although these Acts are both covered by a common General Part, the property law is clearly distinguished from the law of obligations.14

Essentially, the separation of the law of property from the law of obligations is reflected in the fact that the legal bases of formation, transfer, modification as well as extinguishment of property rights are regulated solely by provisions of property law and the effect of these changes in the pre-existing property rights situation is as such not contingent upon the existence or performance of obligations between the parties. Thus, an obligation to transfer property, or respectively, to create a restricted real right, does not qualify as a prerequisite for the actual transfer, *ie* the realisation of the material change in the distribution of property rights. A change in the existing property rights situation, including a transfer of a property right (ownership), always requires the conclusion of a real agreement (also named ‘disposition agreement’ or ‘transfer transaction’) which, in case of movables, must be combined with the creation of possession for the acquirer.

The clear distinction between rights in rem and obligations is largely based on the division of subjective rights15 into absolute and relative rights depending on whether they involve a legal remedy *erga omnes*, *ie* every other person regardless of the existence of a specific legal relationship between the entitled person and the counter-party, or, in case of relative rights, only *inter partes*, *ie* against a certain person with whom the entitled person is linked through a concrete legal relationship. Obligations are by their nature legal relations only effective *inter partes*;16 there-

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14 See also VARUL (2000) p 106 et seq.
15 On the definition of subjective right: KAUFMANN, pp 103-104.
16 The definition of an obligation is found in § 2 (1) LObligA: an obligation is a legal relationship giving rise to the duty of one person [the obligee or the debtor] to perform in favour of another person [the entitled person or the creditor] a certain act
1. Notion of ownership and types of property rights

1.1.3. The **numerus clausus** of property rights

The Estonian property law system is characterised by the principle of **numerus clausus** of property rights.

§ 1 of the PropLA sets forth the main objective of the Act, which is to provide for real rights, their content, creation and extinguishment and to serve as the basis for other laws regulating real rights. § 5 of the Act provides a conclusive list of real rights, which is at the same time a general definition of real rights: the law expressly delimits the real rights as ownership (i.e. the right of ownership) and restricted real rights: servitudes, real encumbrances, the right of superficies, the right of pre-emption and the pledge. In the second subsection of § 5 it is further clarified that the law (other laws) may provide for other real rights in addition to those

or to refrain therefrom – to fulfil an obligation – and the right of the entitled person to claim from the obligee the performance of the obligation.

17 Although no corresponding provision on restricted (dismembered) real rights is expressly contained in the PropLA, it follows from the nature of these rights that, within the boundaries of their scope, they grant the entitled person absolute protection as well. See subsection 1.4.2. and Chapter 3.

18 Eg the ownership is transferred to a new owner.

19 Exceptions from this general rule are the cases of **cessio legis** expressly provided for by law. On the other hand, a change of parties to an obligation based on an agreement has itself a contractual and therefore relative nature.
listed above. This is, at the same time, to be considered as a restriction which prohibits the creation of additional real rights in a manner other than by the choice of the legislator – first and foremost, the creation of real rights not envisaged by law is thus not allowed by way of party autonomy (contracts). The parties can therefore only choose between the types of property rights expressly provided for by law.

In its following chapters, the PropLA gives a more detailed regulation on those basic types of property rights, including definitions on what is to be understood under each type. This is important because the **numerus clausus** also presupposes the rule that property rights are only recognised as such when their content accords with that prescribed by law (**Typenfixierung**). This means that the parties may not, by agreement, modify the essence of the real rights. For example, although § 5 of the PropLA classifies the right of pre-emption as one of the category of restricted real rights, it only considers as such a right of pre-emption with real effect, applicable only in the case of immovables and where the right of pre-emption is apparent from the land register. This ‘real effect’ allows the entitled person to obtain the immovable even when the ownership therein has already been transferred to a third person (original buyer), meaning that such transfer will be invalid as against the entitled person if the transfer violated his right to obtain the immovable. All other rights of pre-emption, especially those concerning movables, do not have such real effect and do not qualify as rights in rem. It is furthermore not possible to agree upon a ‘right of pre-emption with a real effect’ with regard to movables.20

The principle of **numerus clausus** of property rights is closely connected with the absolute effect of the rights in rem: since property rights are effective against all persons, there is a need for clarity as to which legal positions may influence third persons not having entered into a legal relationship (an obligation) with the entitled person.

So far, all basic types of property rights (real rights) remain to be regulated by the Property Law Act; no additions to these basic types have been made by other laws. However, other laws do contain regulations on certain specific forms of the main types of property rights, such as: property rights in ships and other vessels21 which follow the main types set forth in the PropLA; the commercial pledge – essentially a ‘right of security’ (pledge) named in the PropLA; also: some rights of pre-emption envisaged for specific constellations. In addition, there is a tendency to give, in some cases, a quasi-proprietary effect to certain legal positions

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20 See also subsection 1.3.
arising out of the law of obligations. The result of this development is that the position of the persons entitled to a thing on the basis of a mere obligation, as opposed to a right in rem (e.g., lessee), is protected in a similar way as is characteristic of rights in rem. However, such rights are nevertheless not recognised as property rights.

1.1.4. Other general principles of property law

As already pointed out above, the absolute effect is perhaps the most characteristic feature of property rights, which distinguishes them from obligations and which is closely intertwined with a number of other important principles applicable in property law. The absolute effect allows the entitled person to invoke his right against whoever holds the thing in his possession or whoever is affecting the thing by his conduct. A similar characteristic of the property rights is the droit de suite, i.e., the entitled person is free to follow and claim his property regardless of in whose hands it may be. This principle is expressed in § 80 PropLA which sets forth the rei vindicatio of the owner: as stated therein, an owner has a claim against anyone who possesses a thing, belonging to the owner, without a legal basis, whereas the claim is directed at the recognition of the right of ownership and reclamation of the thing from the illegal possessor into the owner’s possession.

Also connected with the absolute effect of property rights is the principle of exclusivity in the sense that the entitled person (owner) can exclude all other persons from affecting the thing by their conduct. This is expressed in the definition of ownership in § 68 (1) PropLA (see also above, 1.1.2.).

Further, the principle of publicity plays an important role in the law of property. Again, it underlines the absolute and exclusive character of property rights: because all persons should recognise property rights, these rights should, in principle, be perceptible for the general public. In the case of movables, this goal can be achieved through possession combined with the presumption that whoever is in possession of a thing is also legitimately entitled to the thing, unless otherwise proved by the person actually entitled (owner). This principle is expressly stated in § 90 (1) PropLA, according to which a possessor of a movable (including an ear-

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22 For example, § 324 LObligA sets forth the possibility of making a notation concerning a contract of lease into the land register, which will guarantee the validity and bindingness of the contract of lease vis-à-vis every subsequent owner of the immovable (as well as a person in whose favour the immovable is encumbered with a restricted right in rem, such as a superficiary), who will be obliged to allow the lessee to use the immovable in accordance with the contract and the new owner will not be entitled to terminate the contract as he normally would be.
lier possessor) is deemed the owner of the thing for the time of his possession, unless the contrary is proved. The transfer of movable property as well as the creation of restricted real rights in movables (pledge) require the delivery of the thing to the acquirer; in the case of a registered pledge, an entry in the appropriate register is called for. In the case of immovables, publicity is achieved by way of land registration – according to § 64 PropLA, the transfer of immovable ownership, as well as encumbrances of immovables with real rights and a transfer of such real rights, is effected by a corresponding entry in the land register.

Another dominant principle in the law of property is the principle of speciality (specificity) or the principle of determination, requiring that only specific, individual things may be object of property rights. As a result, each thing is a subject of a separate right of ownership. Therefore, aggregate things, bulks of goods (merchandise), enterprises etc cannot be transferred by just one single transaction and the prerequisites of transfer must be fulfilled with regard to each individual thing. The principle of specificity (determination) is expressed in § 6 (3) of the General Part, providing that each right and obligation shall be transferred separately unless otherwise provided by law. Specificity is often achieved alongside with publicity as the instruments of publicity – delivery in the case of movables and land registration in the case of immovables – presuppose a clear individualisation of the thing.

The principles of separation and abstraction are perhaps the most outstanding examples of a legal concept having been imported into Estonian law from German law. The principle of separation requires the distinction between transactions out of which, on the one hand, an obligation for a disposition over a right (including a transfer of the right) arises and, on the other hand, such transactions through which a disposition (transfer) is effected. The separation, therefore, is a structural one, meaning that an obligation, as an underlying causa, and an actual disposition (transfer) are to be regarded as separate transactions whose legal validity must also be separately evaluated. The second transaction is known as a real agreement in the law of property. Further, the principle of abstraction states that the legal effect of the disposition (the real agreement) is not dependent on the existence of an underlying obligation. As a result, a transfer will in principle remain valid even in case the underlying obligation proves to be without effect; the transferor cannot regain the thing by way of revindication but must rather have recourse to a claim ex unjustified enrichment (§ 1028 et seq LObligA).

Since 2002, the principles of separation and abstraction are expressly stated in § 6 of the General Part of Civil Code Act, regulating the basics of legal succession. As a general principle, civil rights and obligations

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23 See also: PÄRNA (2001), p 96.
may be transferred from one person to another, unless they are inseparably bound to one person pursuant to law. Such legal succession may take place either on the basis of a transaction or law (§ 6 (2)). According to § 6 (3), the transaction by which rights and obligations are transferred from one person to another, is called a transfer transaction (a disposition). Further, § 6 (4) states that the validity of a disposition (i.e., the transfer transaction) is not contingent upon the validity of the obligation to transfer.

The principle of priority in property law means that in case of colliding property rights, the older right (i.e., the one having emerged earlier) will have preference (prior tempore, potior iure). Because a disposition (a real agreement) by which a property right is transferred or created diminishes the right of the transferor, it follows from the priority principle that a similar disposition (creation of an equal legal position for another transferee) will not be possible later (nemo plus iuris ad alium transferre potest, quam ipse haberet). This principle is reflected, inter alia, in the system of ranking of real rights concerning immovables entered into the land register. For example, in case of compulsory execution of an immovable, a mortgagee with a higher ranking will have better chances that his claim will be satisfied.

Protection and promotion of the economic exchange: the provisions of property law are designed to promote the economic exchange, which sometimes results in a loss of the legal position of an otherwise fully entitled person. The most notorious example is the protection of good faith which sometimes overrides ownership: in case the acquirer did not know nor ought to have known that the transferor lacked the right to transfer ownership (or otherwise dispose over the thing), he will still be fully entitled according to the transfer. The numerus clausus of property rights also helps to promote the economic exchange by enhancing clarity as to the content of legal relationships and relieving the parties to a proprietary relationship from the necessity to reach an agreement with respect to a large number of details, since many of the essential aspects are already predetermined by the main core of a right in rem.

1.2. Notion of ownership

1.2.1. Definition and scope of ownership

The right of ownership is protected under § 32 of the Constitution of the Republic of Estonia:

§ 32. The property of every person is inviolable and equally protected. Property may be expropriated without the consent of the owner only in the public
interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. Everyone whose property is expropriated without his or her consent has the right of recourse to the courts and to contest the expropriation, the compensation, or the amount thereof.

Everyone has the right to freely possess, use, and dispose of his or her property. Restrictions shall be provided by law. Property shall not be used contrary to the public interest. […]

Although the Constitution does not define ‘property’ or ‘ownership’, these terms are used synonymously. The notion of ownership within the meaning of the Constitution covers both corporal assets as well as rights and obligations with a monetary value.\(^{24}\) In interpreting the text of the Constitution as to the scope of the right of ownership, Article 1 of the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of application thereof by the European Court of Human Rights is taken into account.\(^{25}\)

The legal definition of the right of ownership within the meaning of private law is provided in § 68 (1) PropLA:

(1) Ownership is full legal control by a person over a thing. An owner has the right to possess, use and dispose of a thing, and to demand from all other persons that they refrain from violation of these rights and eliminate the consequences of such violation.

This notion is clearly narrower than the one used by the Constitution, being confined solely to things as corporal objects.\(^{26}\) The term ‘full legal control’ is to be mainly understood as distinguishing ownership from the other property rights (restricted real rights): ownership is the most comprehensive of all proprietary rights, whereas the restricted real rights only give the entitled person a ‘slice’ of the rights that belong to the owner. However, these partial entitlements cannot be separated from the all-embracing right of ownership, neither permanently nor irrevocably.

The right to possess, the right to use and the right to dispose are all component parts of the right of ownership. The owner is thus generally free to decide whether to enjoy the useful advantages of the thing himself or transfer these rights partly or wholly to another person in exchange for such compensation as may satisfy the owner.

\(^{24}\) Commentary of the Constitution, § 32, 2.1, p 274. Protected are both obligatory and proprietary claims arising out of the right of ownership; Supreme Court decision No. III-2/3-26/95 (November 1st 1995) and No. III-2/1-56/95 (October 5, 1995).

\(^{25}\) ANNUS, Riigioigus (2001), § 45, p. 249.

\(^{26}\) PARNA (2004), § 68 comm. 12, p 141.
The right of the owner to decide on the economic use of the asset and the enjoyment of its useful qualities involves the entitlement to acquire the fruits of the asset. Fruits are products of a thing, created by the forces of nature or with human assistance, as well as income receivable from the thing due to a legal relationship. Civil fruits are composed of income which an entitled person receives from a right pursuant to the purpose of the right, and income received from the right due to a legal relationship.\(^{27}\)

The right to renounce ownership or to destroy the object of ownership are part of the owner’s general right of disposition over the thing as well.\(^{28}\) However, these two components of the right of ownership may be restricted by special rules, such as animal protection, environmental restrictions etc.

Ownership includes the entitlement of the owner to exclude all other persons from influencing the asset and from violating the owner’s privilege to enjoy his property at his will. To that end, the owner may rely on the actions for property protection (revindication, actio negatoria), see below (1.4.). However, the owner has to respect the rights of other persons vis-à-vis the asset that are valid as against the owner, such as contracts for use between the owner and the other party or rights of third persons arising out of law.

### 1.2.2. Restrictions of ownership

Both § 32 of the Constitution and § 68 (2) PropLA state that the rights of an owner may only be restricted by law or the rights of other persons. As any civil right, the right of ownership must be exercised in good faith; the law prohibits the exercise of any legal position with the purpose of causing damage to other persons.\(^{29}\) § 32 of the Constitution prohibits the use of property contrary to the public interest.

Limitations of ownership are subdivided into restrictions ex public law (eg expropriation and other limitations serving the public interest) and restrictions ex private law.\(^{30}\) Numerous laws in the public law realm restrict the ways in which the owner is allowed to use the thing and its benefits. Most of these restrictions (eg zoning, building, natural resources etc) affect immovables only. Private law restrictions include the provisions of neighbour law and the spatial extent of ownership. These rules are to balance the often colliding interests of owners of immovables,

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\(^{27}\) § 62 General Part.

\(^{28}\) PÄRNA (2004), § 68 comm 6, p 138.

\(^{29}\) § 138 General Part.

\(^{30}\) PÄRNA (2004), § 68 comm 9, p 139.
which serve different purposes. As a general rule, an owner is not entitled to prohibit impacts on his property that do not materially affect the enjoyment thereof.

The owner cannot exclude the restriction of his ownership or impacts on the asset if such violation takes place in the state of emergency. Pursuant to § 141 General Part, an act causing damage to another person is not considered unlawful if committed in the state of emergency.

1.3. Other property rights

As indicated in subsection 1.1.3, Estonian property law knows a number of restricted real rights (property rights) aside from ownership which is to be considered as the most comprehensive, ie ‘full’, real right. These restricted real rights include servitudes, real encumbrances, rights of superficies, rights of pre-emption and pledges. Subsequently, a brief overview of the various types of restricted property rights is given.

The majority of the restricted real rights described below are only applicable to immovables. De lege lata the only other property right applicable to movables, aside from ownership, is the pledge in its various forms set forth by law.

The restricted real rights can be roughly subdivided into three groups on the basis of their main content: (1) rights to use the thing of another; (2) rights to acquire a thing and (3) rights of realisation of a thing belonging to another with the purpose of satisfying a claim out of the proprietary value of the asset. Such subdivision is useful to illustrate the different degrees of protection afforded to the legal position of the person entitled by a right in rem in relation to third persons. This, in its turn, is in close correlation with the extent to which a restricted real right actually limits the entitlement of the owner in the exercise of his rights.

1.3.1. Rights of use

Servitudes encumber an immovable in such way that the entitled person has the right to enjoy the use of the immovable in a particular manner or that the actual owner of the immovable is required to refrain, to a certain extent, from the exercise of his right of ownership for the benefit of the entitled person. Servitudes are subdivided into real servitudes (PropLA § 172) and personal servitudes, the latter including the usufruct (PropLA § 201 et seq) and the personal right of use (PropLA § 225 et seq) with

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31 PÄRNA (2004), § 68 comm 10, p 140.
32 PÄRNA (2004), § 5 comm 4, p 36.
1. Notion of ownership and types of property rights

the main distinction that in case of real servitudes a servient immovable is encumbered for the benefit of a dominant immovable, so that the legal relationship will remain binding on the actual owner of both immovables on both sides even when either of them is alienated, whereas in case of a personal servitude the entitled person is determined particularly and the entitlement is not tied to the ownership of an immovable. The usufruct, as a traditional type of personal servitude, encumbers an immovable in such a way that the entitled person (the usufrucuary) has the right to use the immovable and to acquire the fruits thereof. A personal right of use grants the entitled person the right to use the immovable in a particular manner or to exercise, with respect to the immovable, a particular right which in substance corresponds to a real servitude. A specific form of the personal right of use expressly mentioned in the PropLA is the personal right of use of a residential building which grants the entitled person the right to use the specified residential building, situated on the immovable being encumbered, for habitation.

The right of superficies (§ 241 et seq PropLA) encumbers an immovable in such way that the person, for whose benefit a right of superficies is constituted, has a transferable and inheritable right to own, for a specified term, a construction (building) permanently attached to land on the encumbered immovable. A construction which is constructed on the basis of a right of superficies or which already exists at the time of the constitution of such right, and to which the right of superficies extends, is an essential part of the right of superficies – not an essential part of the encumbered immovable as it would otherwise be. The right of superficies has a dual nature: on the one hand, it is regarded as a restricted real right encumbering an immovable; on the other hand, a legal regime close to that of an immovable is attributed thereto.33

1.3.2. Rights to acquire

The right of pre-emption (§ 256 et seq PropLA) within the meaning of the PropLA only covers the right of pre-emption with a certain proprietary effect. The general definition of the right of pre-emption is derived from § 244 of the LObligA, according to which, in case a right of pre-emption is exercised, a sales contract will be deemed to have been concluded between the entitled person and the seller on the same conditions which the seller and the original buyer agreed upon. The proprietary effect attributed to the right of pre-emption in rem means that the transfer of ownership will be void ex lege to the extent that it prejudices the

33 Pursuant to § 241 (4) PropLA, the provisions concerning immovables apply to the right of superficies unless otherwise provided by law.
right of the entitled person to obtain ownership of the encumbered object. Thus, where the seller has transferred the ownership of the object to the original buyer, while the entitled person makes use his right of pre-emption, such transfer is void vis-à-vis the entitled person as the validity of the transfer would make it impossible for the seller to fulfil his obligation to transfer ownership to the entitled person.

The proprietary effect of a right of pre-emption follows from § 257 (3) PropLA, pursuant to which a right of pre-emption evident from the land register has the same legal effect, with regard to third persons, as a preliminary notation securing a claim for the transfer of ownership. According to § 63 (3) PropLA, a disposal of a real right after the entry of a preliminary notation in the land register is void to the extent that this prejudices or restricts a claim secured by the preliminary notation.

1.3.3. Rights to realise

A real encumbrance (PropLA § 229 et seq) obliges the actual owner of the encumbered immovable to make periodic payments, in money or in kind, to the entitled person or perform particular acts. Characteristically for property rights, a real encumbrance will be transferred to each acquirer of the encumbered immovable regardless of the consent of the acquirer. The owner is liable, the liability extending to the encumbered immovable, for the performance of the individual obligations arising from a real encumbrance. The owner of an immovable is also personally liable for the performance of each individual obligation which becomes due within the period of the owner's ownership, unless otherwise agreed (§ 239 PropLA).

A pledge encumbers an object in such way that the person for whose benefit the pledge is established (pledgee) has the right to the satisfaction of the claim secured by the pledge out of the pledged property, where the claim is not satisfied appropriately. The various forms of pledges include pledges of movable and immovable property (mortgage). The pledge of movable property is further subdivided into the possessory pledge (pawn) and the registered pledge, the latter involving certain objects entered into public registers (ie: patents, trade marks, industrial designs, utility models, varieties, layout-designs of integrated circuits, motor vehicles and civil aircrafts). The commercial pledge (floating charge) can be classified as a specific form of the registered pledge of movables.\textsuperscript{34} Whereas the possessory pledge (pawn) requires the handing over of the pawned object to the pledgee, the registered pledge arises upon the entry into the corresponding register. A further fundamental difference between the pawn

\textsuperscript{34} See subsection 20.2, Part IV, for more detailed information.
and registered pledge is that the pawn is accessory to the secured claim, whereas the registered pledge follows the legal structure of the mortgage. The existence of a secured claim is thus not a prerequisite for the existence of a registered pledge.

1.4. Protection of property rights

1.4.1. Protection of ownership

The Property Law Act expressly sets forth two types of claims intended for the protection of ownership:

**Revindication** (PropLA § 80) is the tool for recovery of property in cases where the owner has been deprived of the possession of his thing:

§ 80. Revindication
(1) An owner has a right of claim against anyone who possesses a thing of the owner without legal basis.
(2) The claim of the owner is directed at recognition of the right of ownership and reclamation of the thing from illegal possession into the owner’s possession.

The claim belongs to an owner who has lost possession of his thing as well as an owner who has never physically held the thing himself. The wording of the paragraph makes it clear that the claim of revindication is only directed against a possessor who possesses the thing without a legal basis. Such a legal basis must be valid as against the owner. It may either be a property right in favour of the possessor (e.g. a pawn) or a contract of obligatory nature, or it may be that such legal basis is derived directly from the law. In case such a basis exists, the possessor has the right to refuse the delivery of the thing to the owner (§ 83 (1) PropLA).

The owner is not entitled to resort to self-help or force in order to exercise his right of ownership and to regain his thing from the illegal possessor. In case the possessor groundlessly refuses to deliver the thing to the owner, the owner will have to turn to the court to exercise his claim.

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35 Some authors refer to the owner’s right to choose between the different legal grounds to recover the thing, e.g. in the case of the expiry of a contract of lease if the lessee fails to return the thing: PÅRNA (2004), § 80 comm 2, pp 160-161. However, it should be kept in mind that where a legal relationship between the owner and the possessor is covered by a specific regulation (such as the obligation to return the object after expiry of a contract for use, unjustified enrichment or others), such specific provisions have precedence over the right to revindicate. The same view is expressed in the decision of the Supreme Court No 3-2-1-136-05 (December 20, 2005).
by way of compulsory execution if necessary. The owner can also apply for an interim injunction where necessary so as to prevent material damage or arbitrary conduct or for other reasons.\textsuperscript{36}

**Negatory action** (PropLA § 89) is available where the owner has retained possession of the thing but is hindered in the enjoyment thereof. The action is directed towards the restoration of the former condition and/or the interdiction of further interference by the defendant.

\begin{verbatim}
§ 89. Protection of ownership in case of violation unrelated to loss of possession

An owner has the right to demand elimination of any violation of the right of ownership even where the violation is not related to a loss of possession. If there is reason to presume recurrence of such violation, the owner may demand omission of the violation. A demand is precluded if the owner is required to endure the violation.
\end{verbatim}

The violation has to result from the conduct of another person – *ie* an intruder who is responsible for the interference with the owner's rights. The negatory action is, however, only applicable if the interference is unlawful – it expressly follows from § 89 PropLA that where the owner is under a duty to endure the violation, he is not entitled to require the cessation thereof or refrainment therefrom. Such a duty may arise from a prior agreement with the owner (contracts as well as restricted real rights) and, in certain cases, also directly from law. The owner is thus entitled to avert both intrusions that have already occurred and persist, and future intrusions if there has been a preceding intrusion and there is reason to believe the recurrence thereof.\textsuperscript{37} The intruder’s fault is not a prerequisite for the negatory action. Again, the owner may apply for an interim injunction to prohibit the intruder from violating the owner’s rights.

These two types of action clearly belong to the area of property law, having been dealt with in the Property Law Act itself. These claims cover such infringements of the right of ownership that preclude the owner from the enjoyment and use of his property according to his own choice. Thus, these claims of property law basically work to restore the full control of the owner over his property, together covering the powers of the owner derived from the definition of ownership (§ 68 (1) PropLA).

These remedies will therefore not suffice as far as any material losses have arisen out of the property infringement for either side (*ie* the owner

\begin{verbatim}
\textsuperscript{36}§ 377 et seq Code of Civil Procedure.

\textsuperscript{37}A similar right of claim is set forth in § 1055 LObligA, pursuant to which, if unlawful damage is caused continually or a threat to cause unlawful damage is uttered, the victim or the threatened person can claim the cessation of the behaviour causing damage or the omission of further threats.
\end{verbatim}
and the possessor), such as the deterioration of the thing, the decrease in its value, the loss of the fruits and profits for the owner on the one hand, and expenses borne by the possessor to preserve the thing or improve its condition or to yield fruits from the thing. These additional claims (owner-possessor-relationship) belong to the sphere of the law of obligations by their essence. These claims are mentioned in the PropLA, but to avoid an overlap, references are made to the provisions of LObligA dealing with torts (unlawful damage of property) and unjustified enrichment.38

1.4.2. Protection of other property rights

With regard to restricted real rights, the law contains few express provisions on remedies for the protection of such rights. Hereby, the content of the legal position in question – and resulting therefrom, the scope of protection needed – is to be considered. Further, the relationships between the owner and the entitled person on the one hand, and between the entitled person and third persons on the other hand should be distinguished. As in the case of the right of ownership, protection should be provided in the interest of a person entitled by a restricted real right in order to ensure his ability to exercise his right to the full extent of his entitlement. In the case of rights of use, this interest lies in the possession and use of the thing together with the enjoyment of benefits resulting therefrom. The proprietary protection of this interest implies that the entitled person has a right to claim delivery of the asset directly from the possessing third persons, or demand the omission of interferences as well as claim delivery of the benefits derived from the asset. Such a position is currently only partially valid in Estonian law.39 The rights of acquisition and the rights to realise call for a different method of protection as they do not necessarily involve the right of possession of the asset.40 The entitled person must be able to exercise his right validly also vis-à-vis third persons, that is – his legal position should ‘override’ the possible entitlements of third person with regard to the asset. Claims secured by a pledge

38 See Chapter 21 for more details.
39 An express provision on the protection of the entitled person’s rights vis-à-vis third persons is only contained in the regulation on real servitudes: pursuant to § 184 PropLA, the entitled person has the right to file a negatory action in case he is hindered in the exercise of the servitude. Pursuant to § 228 PropLA, the same applies to the personal right of use, but there is no corresponding provision concerning the right of usufruct. PÄRNA expresses the view that § 184 should be applicable to the right of usufruct as well – PÄRNA (2004), § 214 comm 4, p 344.
40 The only exception here is the possessory pledge (pawn) of movables. Yet the law does not provide the pledgee with any independent right to recover possession of the pledged movable from third persons.
are preferred to all other claims concerning pledged property (§ 280 PropLA). In addition, the pledgee should have further reasonable remedies against the decrease in value of the encumbered asset.\textsuperscript{41} In the case of a real encumbrance, the interest of the entitled person in claiming for the performance of the obligation arising out of the real encumbrance on the immovable is guaranteed by the provisions concerning real encumbrances.\textsuperscript{42} The right of superficies confers on the entitled person the right to own a building permanently attached to land on an immovable belonging to another; thus, the entitled person has the rights of an owner, including the remedies for the protection thereof, with regard to the building. The right of pre-emption with proprietary effect is protected by way of attributing the legal effect of a preliminary notation thereto.\textsuperscript{43}

### 1.4.3. Further means of protection

In addition to the remedies of protection of ownership and other real rights provided for in property law, there are further remedies available in the law of obligations as well as the law of insolvency and execution.

#### (a) Claim for damages (tort law)

The proprietary remedies for the protection of ownership do not cover situations where property is damaged as a result of the unlawful conduct of another person. Such cases are regulated by the law of non-contractual obligations.

The purpose of compensation for damage is to place the aggrieved person in a situation, which is as near as possible to that in which the person would have been, had the circumstances constituting the basis for the duty to compensate not occurred.\textsuperscript{44} According to §§ 1043 et seq LObligA,

\textsuperscript{41} In the case of a possessory pledge, the pledgee is responsible for the preservation of the asset itself (§ 287 PropLA). In the case of a registered pledge (§ 298 PropLA) and a mortgage, the pledgee/mortgagee is entitled to claim from the pledgor (owner of the encumbered asset) the omission of behaviour decreasing the value of the asset, take necessary steps to avoid such decrease in value, demand the restitution of the previous condition or claim for an additional security – §§ 334 and 335 PropLA.

\textsuperscript{42} Pursuant to §§ 237 and 239 PropLA, a real encumbrance will be transferred to any subsequent acquirer of the immovable regardless of the consent of the latter. The owner of the encumbered immovable is liable for the performance of individual obligations arising out of the encumbrance. In addition, each owner is personally liable for the individual obligations that became due during his ownership.

\textsuperscript{43} See also Chapter 3 below.

\textsuperscript{44} § 127 (1) LObligA.
1. Notion of ownership and types of property rights

(a) Compensation for unlawful conduct

A person (tortfeasor) has to compensate for the damage unlawfully caused to another person (victim) intentionally or negligently, or as a result of being otherwise accountable for the causation of the damage. § 1045 (1) p 5 expressly lists the damaging of the victim's property or a similar right or possession as unlawful conduct which will give rise to a claim for damages.

(b) Claims ex unjustified enrichment

The various types of claims ex unjustified enrichment form the basis of the reclamation of proprietary values that a person (defendant) has obtained without a legal ground at the cost of another person. In case the right of ownership is violated by disposition, use, consumption, conjoining, commixture, specification or in another manner, the owner is entitled to compensation in the amount of the usual value of what was obtained as a result of the violation by the responsible person (§ 1037 LObligA, aka ‘condiction for violation’). Such claim may or may not accompany a claim for the delivery of the asset in question: the owner may not have lost possession of the thing, or the return of the thing may be impossible due to consumption or for other reasons.

Relevant are also the provisions on the reclamation of proprietary values transferred without a legal ground (condictio indebiti etc). Where a transferor has transferred ownership of an asset with the purpose of performing an obligation, ownership may be reclaimed from the recipient if such obligation did not exist, does not arise or it ceases to exist later (§ 1028 LObligA). This provision is essential within the context of the abstract transfer system provided for in Estonian law.

(c) Protection of the owner in the case of the insolvency of or execution against a third holder

Upon the declaration of bankruptcy of a third holder, assets belonging to a third person (ie other than the bankruptcy debtor) will not become part of the bankruptcy estate. Where an owner has a claim for the delivery of an asset he owns, the insolvency administrator has to return the asset (exclusion of property). In case the asset has been alienated by the administrator or it is not preserved, the person entitled to exclusion is entitled to compensation for his property out of the bankruptcy estate before disbursements on the basis of distribution ratios are made. If the administrator is liable for the property not being preserved, the entitled person may additionally claim for the compensation of the damage from the administrator. In case the debtor has sold the property in question before
the declaration of bankruptcy and the person entitled to exclusion has no claim of recovery against the person who acquired the asset, he may demand that the claim for payment of the purchase price be assigned to him unless already settled; the proceeds of the transfer are to be paid out of the bankruptcy estate if the purchase price was settled after the declaration of bankruptcy, or he may participate in the bankruptcy proceedings as a creditor if the selling price was paid to the debtor before the declaration of bankruptcy.\footnote{\textsection{} 123 Bankruptcy Act.}

Upon the opening of \textit{execution proceedings} against a third holder, movables in possession of the debtor are seized. In case there are movables belonging to other persons among the seized objects, such movables will be relieved of the seizure upon an application of the owner if it is evident that the applicant is the owner of the movable.\footnote{\textsection{} 77 (2) Code of Execution Procedure. At that stage, the court bailiff decides upon relief.} If relief is denied, the owner may file a claim for relief in court.\footnote{\textsection{} 222 Code of Execution Procedure.}

All of the aforementioned remedies are means of proprietary protection in the sense that, in case of the violation of the right of ownership, the entitlement to bring forward the appropriate claim follows from the right of ownership, as the relevant provisions expressly mention the legal position of an owner. Claims arising out of torts or unjustified enrichment are also available to persons entitled by other rights \textit{in rem}. The right of pledge, as the only restricted real right available with regard to movables, guarantees certain privileges to the pledgee in the case of the bankruptcy of the pledgor, but provides no entitlement to contest the seizure of the movable in execution proceedings.\footnote{\textsection{} 73 (1) Code of Execution Procedure.}

\section{1.5. Transferability of movable assets}

\subsection{1.5.1. General}

As a general rule, movable assets are freely transferable under Estonian law. Here, a distinction should be made between corporeal and incorporeal assets: the latter (personal rights) may be tied to a certain person so that a transfer of the right in question is excluded (eg a claim for maintenance). Some restricted real rights are also intransferable, such as the right of usufruct (\textsection{} 215 PropLA) and the right of pre-emption with proprietary effect, where established in favour of a certain person (\textsection{} 260 PropLA).
1. Notion of ownership and types of property rights

The law may provide for restrictions on the transferability of certain types of movables. According to § 32 III of the Constitution, types of property which, in the public interest, may only be acquired in Estonia by Estonian citizens, legal persons of certain type, local self-governments or the State of Estonia, can be specified by law. Restrictions exist, for example, with regard to narcotic substances and weapons that may only be transferred if certain conditions are met. Certain restrictions exist with regard to items of heritage. Restrictions on the right to dispose can arise as a result of certain proceedings against the owner or an otherwise entitled person. For example, upon the declaration of bankruptcy, the right to dispose over assets belonging to the bankruptcy estate is transferred to the insolvency administrator and the debtor loses the right to dispose over his property. Similarly, the disposition over an asset may be prohibited on the basis of an interim injunction granted in court proceedings. A disposition, violating a restraint on disposition established by a court or any other authority or official so entitled by law, is void pursuant to § 88 (1) General Part.

1.5.2. Restrictions of transferability based on agreements

The transferability of an asset cannot be restricted by an agreement between the owner and a third person.

General Part § 76. Restriction or preclusion of right of disposal
(1) The right of a person to dispose of an object belonging to the person shall not be precluded or restricted by a transaction.
(2) If the right of a person to dispose of an object belonging to the person is precluded or restricted by a transaction and the person disposes of the object thereby violating an obligation arising from the transaction, such violation shall not render the disposition void and only claims arising from violation of the obligation may be filed against the person.

The above provision should be understood in the way that an agreement by which the right to dispose is excluded or restricted, will not, in itself, be regarded as invalid, but such an agreement will not bring with it the intended legal consequence – to affect the proprietary situation in deter-

49 PÄRNA (2004), § 92 comm 5, p 182.
50 For example, movable items of heritage (monuments), which together constitute a body of things, may only be transferred separately with the permission of the National Heritage Board. § 21 Heritage Conservation Act. In the case of the transfer of ownership of a movable monument, the state has a right of pre-emption (§ 27 Heritage Conservation Act).
51 § 35 (1) p 2-4 Bankruptcy Act.
mining how and on what conditions property can be transferred. This is in line with one of the main principles in property law which prohibits the modification of the essence and contents of property rights by party agreement. § 76 (2) General Part expressly states that where the right of the owner (or an otherwise entitled person) to dispose over an asset belonging to him has been restricted by an agreement and the owner nevertheless disposes over the asset, thereby violating the contractual duty to refrain therefrom, the disposition will not be ineffective, and the other contracting party will only be able to rely on a claim arising out of the violation of the agreement. The remedies for the case of breach of contract are enumerated in § 101 LObligA. The other contracting party will not be able to claim specific performance but can, instead, have recourse to the other remedies, primarily claiming compensation for damage caused by the breach of the contract or withholding the counterperformance by way of termination or otherwise.

In the opinion of the author of the current report, a contractual stipulation restricting the freedom of an owner to dispose over an asset will not have any effect at all as against third persons. Even in case a third person is aware of an agreement by which the owner of an asset has undertaken to refrain from alienating his thing and the owner still transfers the asset to that third person notwithstanding his contractual duty to refrain from alienation the third person will acquire the thing without having to meet any specific requirements, such as being in good faith with regard to the right of the owner to dispose over the thing. The rules on good faith acquisition are designed for cases where the person alienating the thing is not entitled to dispose over the thing, but as mentioned above, § 76 (1) General Part expressly excludes the possibility of restricting the right to dispose over an asset by way of contract. Such a stipulation would also not be effective inter partes in the sense that where the owner has disposed over the thing contrary to the contract, the disposition is also effective as against the other contracting party to whom the owner had promised not to alienate the asset. The promisee will therefore only be able to rely on remedies for breach of contract other than claiming performance.

1.5.3. Separate transferability of accessories

The definition of accessories is provided in § 57 General Part, according to which an accessory is a movable that, without being a part of the prin-

52 See § 116 LObligA for the general prerequisites for termination in case of breach of a contractual duty.
53 See §§ 110, 111 LObligA regarding the right to withhold performance as a remedy for the case of breach of a contractual duty.
principal thing, serves the principal thing and is related thereto through a common economic purpose and a corresponding spatial conjunction. An accessory is therefore an independent movable thing which is commonly regarded as being intended to serve a common purpose together with the principal thing, whereas the latter may be either a movable or an immovable. § 57 (3) General Part lays down that the rights and obligations relating to the principal thing also extend to the accessories, unless otherwise provided by law or stipulated by contract (transaction). Further, it is presumed that an obligation to transfer or to encumber a principal thing also includes the accessories of the thing. Therefore, an accessory may, in principle, be transferred separately from the principal thing, but this has to be stipulated either in an applicable law or in a contract. The exclusion of the accessories from the transaction by which the principal thing is transferred is completely a matter of choice of the parties, on whom no restrictions have been imposed by law. However, such exclusion must arise from the contract with sufficient clarity, whereby the burden of proof will be on the party maintaining that the parties had agreed to exclude the accessories from the transaction.

2. Possession

2.1. Notion of possession

2.1.1. Definition and characteristics

According to § 32 PropLA, possession is ‘actual control over a thing.’ The legislator has assumed the position that possession is to be regarded as a factual situation rather than a right (i.e., a legal position): a person having actual control over a thing is a possessor regardless of whether he is entitled to possession on any legal ground. The notion of ‘actual control’ is understood to include the following components:

1. A certain spatial relationship (physical tangency or corpus possidendi) of the possessor to the thing, combined with
2. A (realisable) position/possibility of the possessor, allowing him to have influence on the thing and to exclude other persons from having access thereto.

These criteria are to be understood in a broad sense. They also involve situations where the possessor does not have constant physical contact with the thing (e.g., a car left in a public car park). It should rather be in-
terpreted in conformity with the essence and the economic purpose of the thing.\textsuperscript{54}

A certain temporal continuance of possession is sometimes also mentioned as a characteristic feature of possession, pointing out that a merely transitory physical tangency with the thing will not qualify as possession. However, no concrete requirements can be imposed on the duration of possession and the ascertainment of possession will yet depend on the circumstances.\textsuperscript{55} Thus, the duration will mostly be an indicator of the existence of the other characteristic features of possession, such as the factual position allowing the exercise of actual control, rather than a feature on its own.

3. The placement of the thing within the sphere of control of a possessor, so that the fact that the thing is subject to the control of a possessor is perceptible to others.\textsuperscript{56}

Decisive are the possibility of exercising actual control and the common outlook – whether a certain situation is generally perceived as actual control over a thing or not. A legal entitlement to possession is not a criterion for the ascertainment of possession.

The author of the current report is of the opinion that the requirements regarding the intensity of the relationship between the person (possessor) and the object are stricter for obtaining possession than for keeping it. Once possession is acquired (see subsection 2.3.), it will only be terminated if the possessor relinquishes actual control over the thing or loses it in another manner. A temporary impediment to or interruption of the exercise of actual control does not terminate possession (expressly so: \S 39 PropLA). A relinquishment of possession encloses the intention (volition) to give up possession of the thing combined with an outward act, eg handing over the thing to another person, throwing the thing away etc. Possession can also be terminated involuntarily, eg in case the thing is forgotten, lost or stolen.\textsuperscript{57} Thus, where a person is already in possession of a thing, the possession will not be terminated if the possessor merely leaves the object unattended for a certain while, but generally retains the possibility of regaining immediate physical control, eg by collecting the thing the next day.

In the case of taking possession of an asset for the first time, it must be clear that the (purported) possessor has gained actual power over the asset, that he is able to keep it and that his position is superior to that of other persons, so that the possessor can exclude others from exercising

\textsuperscript{54} PÄRNA (2004), \S 32 comm 6, pp 43-44.
\textsuperscript{55} PÄRNA (2004), \S 32 comm 6, pp 43-44.
\textsuperscript{56} PÄRNA (2004), \S 32 comm 6, p 43; ERMAN-LORENZ, \S 854 12 (No. 3) = p 3192.
\textsuperscript{57} PÄRNA (2004), \S 39 comm, pp 53-54.
similar control over the asset. Under which conditions the capturing of a wild animal or fish will qualify as possession is also a matter of common outlook – in case the animal or fish can only be held in custody very briefly and it escapes thereupon, the situation can hardly be described as actual control.

Sometimes, possession is also recognised as such without there being a manifest physical proximity and actual power of a possessor over a thing. This phenomenon is also referred to as ‘open possession’, where the access of third persons to the asset is in fact not excluded, eg in the case of a pile of logs stored in a forest area accessible to all. Such a situation is still recognised as possession\(^\text{58}\), as it will normally be plausible that the assets have been placed there in the interest of an entitled person (there is no legal ground to assume that the logs have been abandoned and are now ownerless). In such cases, the possession is not reflected in the actual control, but rather based on a (supposable) legal situation – both the entitlement and ability to exercise control. A legal basis for the recognition of such a type of possession can be found in § 36 (2) PropLA, pursuant to which an agreement between the current possessor and the acquirer of possession is sufficient to gain possession if the acquirer is in the position (able) to exercise actual control over the thing.

The law does not expressly require that the possessor should have a certain will (intention) to possess the thing (\textit{animus possidendi}), but in literature this is justified on the grounds that factual control is unimaginable without an intention to gain and exercise such control. However, no strict requirements are laid upon such intention to possess. The intention does not have to be manifested in a particular way and normally the existence of the intention is to be concluded from the circumstances. Although, as a rule, a possessor is expected to be aware that a particular thing is within his sphere of influence and to intentionally adhere to this position, a more general intention to control all things within the sphere of influence of the possessor is sometimes considered sufficient (eg in case of a letter slipped into a mailbox).\(^\text{59}\) In my opinion, such intention may be considered necessary when acquiring possession, but the existence of an intention will be rather unimportant afterwards – no further act or manifestation of an ‘intention to possess’ is necessary until the possessor gives up possession. This, in turn, will presuppose the expression of the will to renounce possession.

The intention to possess is not regarded as the will (intention) to engage in a transaction requiring legal capacity – instead, a ‘natural’ intention to possess is considered sufficient.\(^\text{60}\)

\(^{58}\) PÄRNA (2004), § 32 comm 4, p 42.

\(^{59}\) PÄRNA (2004), § 32 comm 6, pp 43-44.

\(^{60}\) PÄRNA (2004), § 32 comm 6, pp 43-44.
The notion of possession does not contain a requirement that the possessor should hold a thing as its owner (no requirement of *animus rem sibi habendi*). This becomes evident in the various forms of possession recognised, including possession of a thing belonging to another on the basis of a contract for use or similar legal ground.

The rules on possession only apply to the possession of tangible assets,\(^\text{61}\) which already results from the definition of possession as ‘actual control over a thing’ (§ 32 PropLA), a thing being defined as a ‘corporal object’ in § 49 (1) General Part. The possession of mere rights is not recognised under Estonian law.

### 2.1.2. Forms of possession

The Estonian property law distinguishes between several different forms of possession, based on the following criteria:

1. **The intensity of the relationship to the asset**

   **Direct possession** (*unmittelbarer Besitz*) is understood as immediate actual physical control over the thing, whereas **indirect possession** (*mittelbarer Besitz*) refers to a relationship where a person (the direct possessor) possesses a thing belonging to another person (the indirect possessor) on the basis of a commercial lease, a residential lease, a deposit, a pledge or another similar (contractual) relationship out of which a right to temporarily possess an asset belonging to another arises.\(^\text{62}\) As the indirect possessor has no immediate physical control over the thing, the direct possessor is also an ‘intermediary of possession’ to the indirect possessor. Indirect possession can only exist insofar as the direct possessor recognises the legal relationship pursuant to which he is temporarily entitled to possess a thing belonging to another (the indirect possessor) and acknowledges the legal position of the latter as superior. In such cases, both the direct and indirect possessor are considered to be ‘in possession’ of the thing and the legal consequences of possession are extended to both unless otherwise provided by law.\(^\text{63}\)

   A lessee (eg a person renting a car from a car hire firm) is considered a direct possessor, whereas the lessor (eg car hire firm) is an indirect possessor within the meaning of § 33 (2) PropLA, a lease relationship having

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\(^{61}\) PÄRNA (2004), § 32 comm 9, p 44.

\(^{62}\) § 33 (2) PropLA.

\(^{63}\) PÄRNA (2004), § 33 comm 3, p 46. For example, the indirect possessor is also entitled to take action to protect possession according to § 47 PropLA, although with some particularities, see subsection 2.4.
been expressly mentioned in the exemplary list. The same holds true for a person entitled to use the movable gratuitously (eg on the basis of a contract of loan for use – §§ 389 et seq LObligA) – decisive is the nature of the legal relationship (granting a possessor the right to hold a thing belonging to another for a limited time period), but not the question whether the possessor owes remuneration to the owner. Similarly, a custodian or other person obliged to keep and/or take care of the asset as an accessory obligation to another legal relationship (eg a garage keeper who takes on a car for repair) falls under this category: during the time the asset is in his actual control, he is considered the direct possessor whereas the owner (the customer) is the indirect possessor.

The function of this type of possession can be seen in the extension of the possibilities to protect possession. That way, an owner entrusting his asset to another person will not lose his position as possessor and will have the continuing ability to protect his possession, as a component of his right of ownership, against interferences.

(b) The extent of possession

Depending on the number of persons possessing one thing, a distinction can be drawn between sole possession or common possession. Sole possession may either be a full or partial possession. Common possession means the joint control of several persons over a thing (§ 50 PropLA), who have the position of possessors as against third persons but not as against each other.

Family members and other household members allowed to use the item (other than those falling under the category of ‘servant in possession’, including children), can be regarded as parallel possessors to the ‘primary’ holder of the asset. In such cases, there may be common (joint) possession. Eg where the property of one spouse is used for family purposes (flat, car, etc) the other spouse using the asset(s) will be considered a possessor as well.

The function of this type of possession is mainly to be seen as serving the purpose of protecting possession as well.

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64 According to § 49 PropLA, partial possession means that the possessor has control over a physically determined section of a thing, eg a separate room in a building.

(c) The legality of possession

Depending on whether or not possession is founded on a legal basis, legal and illegal possession are distinguished between (§ 34 PropLA). Further, depending on the circumstances of acquisition, possession may be arbitrary (in case it has been obtained by way of unlawful violation of possession or unlawful deprivation thereof – § 40 (2) PropLA), or non-arbitrary. Depending on whether the possessor knew or should have known that his possession lacks a legal basis or that another person has a better right to possess the thing, or did not and needed not be aware of such circumstances, possession in good faith and in bad faith is distinguished between (§ 35 PropLA).

The distinction between legal and illegal possession plays a prime role in the context of proprietary protection, being a decisive factor in whether or not an owner is entitled to revindicate the thing. Possession is deemed to be legal until the contrary is proved (§ 34 (3) PropLA). The arbitrariness of possession affects the possibilities of protecting possession: possession is protected against arbitrary action (§ 40 (1) PropLA) and possession acquired in an arbitrary way is not protected to the same degree as non-arbitrary possession (see 2.4. below). Whether the possession is in good or bad faith affects the responsibility of the possessor for the deterioration of the thing and delivery of the fruits derived from the thing in the case of revindication.

(d) The position of the person physically holding the asset

Where the person exercising actual control over a thing is subordinate to another person in the household or enterprise of the latter, and is bound to the instructions of the ‘principal’ in handling the thing, this person – called ‘servant in possession’, German Besitzdiener – is not considered a possessor (§ 33 (3) PropLA). It that case, the ‘principal’ is in the legal position of a possessor, whereas the ‘servant in possession’ has neither direct nor indirect possession within the meaning of the law. For example, an employee using a company car or other assets related to the employment relationship is considered a ‘servant in possession’ in the sense of § 33 (3) PropLA. Children are also considered ‘servants in possession’ for their parents as regards items of the household.66

The main function of treating the notion of ‘servant in possession’ differently than an actual possessor is, again, to widen the possibilities for the protection of possession. The ‘servant in possession’ has no independent power of discretion with regard to the thing; also, no immediate in-

66 PÄRNA (2004), § 33 comm 5, p 47.
2. Possession

Therefore, the remedies for the protection of possession can, in general, be exercised by the ‘principal’, ie the possessor. The ‘servant in possession’ is only afforded the right of self-help where the appropriate conditions are met.

(e) The intention of the involved persons

The PropLA also distinguishes between situations where a possessor holds a movable ‘as his own’, ie as an owner, as opposed to where the movable is held with the intention to exercise one’s right to possess a movable belonging to another, based on a contract or another legal ground. For example, possessing a movable ‘as one’s own’ is of legal significance in the case of acquisitive prescription, since § 110 PropLA requires that the acquirer by virtue of acquisitive prescription must have possessed the thing as if belonging to himself. An opposite example is the case of a relationship of direct and indirect possession, where the intermediary – the direct possessor – has to hold a movable as if it belongs to another – the indirect possessor – on the basis of the legal relationship out of which the right of possession arises.

The rationale of such differentiation can mainly be seen in the continuity function of possession. Possessing a movable ‘as one’s own’ is a prerequisite for some forms of original acquisition (acquisitive prescription, occupation), where the intention of the possessor should reflect his understanding that he has become the owner of the movable from the moment of taking it into his possession.

(f) A successor’s (heir’s) possession

According to § 38 PropLA, possession is transferred to the heir upon the occurrence giving rise to succession (ie the death of the bequeather). This type of possession arises regardless of whether the heir is in fact in the position to exercise actual control over the assets, or even whether he is aware of the succession situation. The importance of this type of possession lies in its protection and continuity function. Upon the death of a possessor, things in his possession will not become unpossessed, and the heir may rely on the remedies for the protection of possession as of the moment he learns about the opening of succession proceedings, regardless of the formalities necessary in order to accept and acquire the legacy. Items that have been excluded from the legacy without the consent of the heir cannot be acquired in good faith by third persons, as good faith ac-
acquisition is not possible where the owner has lost possession of the movable involuntarily.\textsuperscript{67}

2.2. Functions of possession

The functions of possession can be shortly summarised as follows:

First, possession has a signal function (publicity function). The creation of property rights in movables, in most cases,\textsuperscript{68} requires the delivery of possession to the person who is to acquire the entitlement: for example, in the case of a transfer of ownership by a transaction (§ 92 PropLA), as well as in the case of good faith acquisition (§ 95 PropLA); further, in the case of acquisition by occupation (§ 96 PropLA) or encumbrance of a movable by a possessory pledge (§ 282 PropLA). The delivery of possession can take place in various forms, whereas the function is always to indicate that the transferor is ready to give up his entitlement with regard to the movable. Depending on the method of delivery chosen (see 6.3.2. below on the delivery equivalents), the change in the legal regime concerning the movable will also be visible to third persons.

Second, there is a protective function of possession. This function is of significance in preserving the status quo and ‘legal peace’, thereby protecting the established legal situation with regard to things against arbitrary interferences. To realise this function, there are various remedies for the protection of possession – self-help, the right to search and the possessory actions (§§ 40-50 PropLA). As a general rule, the factual situation – an already established control over a movable – is protected, regardless of the legal entitlement of the possessor to hold the movable.

Third, a continuity function is attributed to possession. Continuous possession will, under certain conditions, build a basis for the acquisition of ownership, for example in the case of acquisitive prescription or finding – §§ 110 and 98 PropLA.\textsuperscript{69}

All these functions of possession support the principle of the legitimising appearance of possession. There is a presumption pursuant to which the possessor of a movable is deemed the owner of the thing during the period of his possession, unless the contrary is proven (§ 90 (1) PropLA). The purpose of this presumption is to enhance the principles of publicity and certainty in property law.

The requirements for possession are not entirely the same for all these functions. Although the transfer of ownership of movable property can

\textsuperscript{67} PÄRNA (2004), § 38 comm, pp 52-53.

\textsuperscript{68} Only such cases are excepted where the signal effect has been attributed to some other procedure, such as the entry into a register in the case of a registered pledge.

\textsuperscript{69} PÄRNA (2004), § 32 comm 3, p 42, Tiivel, pp 44-45.
2. Possession

take place using any of the available delivery equivalents, including such where the acquirer only obtains indirect possession, good faith acquisition requires the direct possession of the acquirer. The continuity function sometimes presumes possessing the movable ‘as if it belonged to the possessor’, for example in the case of acquisitive prescription. A slightly different degree of protection is afforded to direct and indirect possession.

2.3. Acquisition of possession

Since the delivery of possession is a prerequisite for the transfer of movable ownership according to § 92 PropLA, the acquisition of possession will be discussed in more detail in Part II (subsection 6.3.) of the report; only a short overview will be given here.

Whether the prerequisite of delivering possession to the acquirer has been satisfied is to be assessed according to §§ 36-39 PropLA. § 36 PropLA sets forth that possession is acquired by gaining actual control over a thing, or over the means which enable the exercise of actual control over the thing. However, a mere agreement between the current possessor and the acquirer of possession is sufficient where the acquirer is already in the position to exercise actual control over the thing. Such agreement must reflect the will of the parties to change the preceding situation regarding the possession of the thing; the previous possessor should express his intention to give up possession and the acquirer the intention to gain it. A mere possibility to access and exercise actual control over the thing does, as such, not qualify as possession. In case there is a previous possessor, the possession of that person should end so that the new possessor may acquire possession.

Pursuant to § 37 PropLA, indirect possession is acquired by assignment of the right to demand delivery of a thing to the acquirer, if the transferor of the thing himself or a third person remains in direct possession of the thing.

2.4. Protection of possession

The protection of possession is regulated in §§ 40-50 PropLA. According to these rules, possession is protected by law against arbitrary interference. Arbitrary interference is defined in § 40 (2) PropLA as an unlawful...

70 PÄRNA (2004), § 92 comm 3, p 180.
71 The termination of possession is regulated in § 39 PropLA. Resulting therefrom, possession is terminated if the possessor gives up the actual control over the thing or otherwise loses it. A temporary hindrance in the exercise of actual control will, however, not terminate possession.
violation of possession or an unlawful deprivation of possession without the consent of the possessor. Possession obtained in this manner is arbitrary possession. § 40 (3) PropLA also defines the violation of possession, which is to be understood as a hindrance to the possessor in the exercise of actual control over the thing, or an attempt or threat to deprive the possessor of the thing where there is reason to fear the realisation of such a threat.72

2.4.1. Judicial remedies for protection of possession

(a) Claims for the protection of possession

A claim arising out of a violation of possession73 is available to a possessor who has been arbitrarily hindered in the exercise of actual control over the thing, or where there has been an attempt or a serious threat to interfere with the possession. In the event of such violation, the possessor is entitled to claim the elimination of the violation and the omission of further interferences. The claim is directed against the violator, ie the person who has acted arbitrarily with respect to the possessor and whose will (intention) is decisive for the violation or the continuance thereof.

A claim arising out of a deprivation of possession74 is available to a possessor who has arbitrarily been deprived of possession. The claim is to be filed against the person who possesses the asset arbitrarily with respect to the claimant – ie the current direct or indirect possessor. Indirect possession is arbitrary if the indirect possessor has formerly kept the thing in his direct arbitrary possession. The same is true if arbitrary possession results from the activity of an ‘intermediary of possession’, ie a direct possessor holding the asset on the basis of a legal relationship, out of which the right to temporarily possess a thing belonging to another arises.

The respondent – the purported infringer of possession – may defend himself by proving that the violation or deprivation of possession was not arbitrary and that he was entitled to violate the possession of the claimant or to possess the thing (§ 46 PropLA), eg the law allows for the privation of possession, the claimant has agreed to the privation; also, where the preceding possession of the claimant was arbitrary with respect to the respondent and such possession had been acquired within a year before the privation thereof. However, the respondent cannot avert the claim by relying on a right to possess the thing on the basis of a property right or

72 Blocking the access to or exit of premises also amounts to a hinderance to the exercise of actual control, ie constitutes a violation of possession – Supreme Court decision No 3-2-1-154-01 (December 17, 2001).
73 § 44 PropLA, the wording fully overlaps with the text of § 862 BGB.
74 § 45 PropLA, the wording fully overlaps with the text of § 861 BGB.
an obligatory right (contract). For example, where a lessor arbitrarily recovers possession of the leased apartment after the lease contract has expired, and the lessee files a claim to restore possession, the lessor will not be relieved of the obligation to restore the lessee’s possession – the lessor must rather file a claim against the lessee with the object of recovering possession.75

A successor to possession and any other legal successor is also liable for the consequences of arbitrary possession if, upon acquiring possession, the latter knew of the arbitrariness of the possession of his predecessor.76

In contrast, the provisions on arbitrary possession are not applicable to a subsequent possessor in good faith who is unaware of the arbitrariness of the possession of his predecessor.

No judicial remedy for the protection of possession is available to a claimant (possessor) whose possession is arbitrary with respect to the respondent (the person who has infringed the possession of the claimant either by way of violation or deprivation) and was acquired within one year before the infringement took place. For example, if A steals a bike from its rightful possessor and owner B, keeping it to himself, and B finds the bike and recovers it within a year, A’s claim to restore his possession based on § 45 (1) PropLA shall be repudiated.

The judicial remedies for the protection of possession are available both to a direct and an indirect possessor. In case the direct possessor is deprived of the possession, the indirect possessor can demand that the possession of the direct possessor be restored. Where the direct possessor cannot, or is unwilling to, restore possession, the indirect possessor may demand the transfer of possession to himself (§ 47 PropLA).

A specific measure based on a ‘better right’ to possession (an actio publiciana) is not expressly provided for by law, but can indirectly be derived from the presumption of the possessor’s ownership (§ 90 PropLA), stating that also an earlier possessor is deemed to be the owner of the thing during the time of his possession. In case the respondent (the current possessor) cannot prove that he is entitled to possess the thing in respect of the claimant and the claimant is able to prove the bad faith of the respondent in acquiring possession, the earlier possessor in time should prevail.77

There is, however, no information on the application of such a scheme in the court practice.

75  PÄRNA (2004), § 46 comm 2, pp 63 -64.
76  § 40 (4) PropLA.
77  PÄRNA (2004), § 90 comm 2, p 177.
(b) Interim measures in protecting possession

When filing a claim for the protection of possession, interim injunctions can be applied for. This may be done either together with the filing of the main claim, or up to one month before the main claim is filed. According to § 377 (2) Code of Civil Procedure, the court may, pursuant to the procedure concerning interim injunctions, provisorily rule on a legal relationship in dispute, including the mode of the use of a thing where this is necessary to prevent material damage, arbitrary conduct, or it is necessary for other reasons. As an interim measure, the court may prohibit the respondent – the purported violator of possession – from committing certain acts, for example exercising control over a movable in certain ways or altogether. An application for an interim measure is decided, at the latest, on the business day following the filing of the application. As a rule, the defendant is not heard. The material legal position is not examined.

Decisions made on claims regarding the elimination of a violation of possession or omission of further interference or restitution of possession are declared immediately enforceable on the motion of the court, i.e., such decisions are enforceable, the claimant not having to exhaust all possibilities to contest a decision.

(c) Conclusion

As a general rule, possession as a factual situation is protected; therefore, no form of possession is per se excluded from the protective remedies. Possession acquired by arbitrary action is, however, not protected with respect to the person whose possession the claimant has violated. Certain peculiarities exist with regard to the position of an indirect possessor and in the case of common possession.

Remedies can be enforced against the violator of possession, i.e., the person who unlawfully hinders the peaceful exercise of actual control over the thing or who has unlawfully taken the thing away from the possessor. Remedies can also be enforced against a person who has acquired possession in the knowledge that his predecessor was an arbitrary possessor with regard to the claimant. Remedies are not excluded by the fact that the claimant, in the dispute over the protection of possession, is actually obliged to deliver possession to the violator; a right to possess the thing or to interfere with the claimant's possession thereover does not justify arbitrary action taken against the claiming possessor. Arbitrary conduct is

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78 § 468 (1) Code of Civil Procedure.
only tolerated if the claimant was himself an arbitrary possessor – to the effect that the claim for the protection of possession will be dismissed.

Remedies may already be taken before an actual violation has occurred, where there has been an attempt or a serious threat to violate possession. A lessee is entitled to rely on the judicial remedies for the protection of possession against a lessor who wants to recover the asset in breach of the leasing contract; and even after the expiry of the leasing contract, when the lessor has arbitrarily (without the lessee’s consent) taken the asset away from the lessee.79

2.4.2. Self-help

The right of the possessor to defend himself against dispossession or interference with possession by way of self-help is expressly provided for in § 41 PropLA. Possession may be protected against arbitrary action by using force, whereas the limits of self-defence are not to be exceeded. In case the possessor has been arbitrarily dispossessed of the movable, secretly or forcibly, the possessor may immediately recover the movable if the violator has been caught in the act ‘red-handed’ or the possessor catches the violator immediately after the violation has occurred. The main criterion is that the arbitrary interference has not yet been completed and it has not yet resulted in a complete loss of possession by the possessor.

The provisions of the PropLA on self-help are a specific form of self-defence. According to § 140 General Part, an action taken in self-defence is not considered unlawful as long as the limits of self-defence have not been exceeded. Further, if damage is caused in a state of necessity (emergency) in order to avert danger to oneself, to another person or to property, the action from which the damage results is not unlawful if it is necessary to prevent the danger and the damage is not disproportional to the danger (§ 141 General Part).

Action taken in self-help has to be immediate, i.e. without delay, whereas concrete time limits have not been provided, nor is there any known court practice in civil matters to determine the standard more precisely. The provisions could be interpreted in the way that self-help will still be acceptable (and therefore not qualify as arbitrary action) if action is taken within up to 30 minutes of the interference or dispossesion.

79 The Supreme Court noted, in its decision No 3-2-1-123-05 (November 30, 2005), that ‘even possession whose legal basis has expired or otherwise ceased to exist, can be protected by the judicial remedies of property protection.’
Self-help may not exceed the limits of self-defence, indicating the necessity of a proportionality test. The means chosen to protect one’s possession must not be disproportionate to the manner of violation and excessive damage must not be caused to the violator. Where there are several means available to avert the violation, the defender must choose the means that are least dangerous to the violator.80

A direct possessor, regardless of the existence of a legal ground for possession, as well as a ‘servant in possession’, are entitled to rely on self-help.81 The law does not expressly mention the right of an indirect possessor to exercise self-help.82

Self-help may be exercised against the person who arbitrarily interferes with possession or who has arbitrarily taken the thing from the possessor, in the latter case also against a legal successor of the violator.83 The exercise of self-help is not dependent on whether the violator can be regarded as a possessor (servants in possession, members of the organs of legal persons) or on whether they are capable of delict (children etc).

A specific type of self-help is the right to search, applicable in cases where a possessor has lost control over a movable and the movable makes its way to an immovable that is in the possession of another person. The possessor of the immovable is required to permit a search for the movable and the removal thereof, unless someone has taken possession of the movable in the interim.84

3. Nature of rights to hold or to acquire a movable and their protection

Whether a legal relationship allowing for the use of an asset belonging to another is a right in rem or an obligatory relationship basically depends on

81  Expressly: § 41 (4) PropLA.
82  A right of an indirect possessor to exercise self-help does not follow offhand from an interpretation of § 41 PropLA in conjunction with § 40 PropLA, the latter containing definitions of arbitrary interference of possession. Pursuant to these definitions, an arbitrary interference of possession is to involve an element of hindrance of the exercise of actual control over a movable, whereas an indirect possessor does not, by definition, exercise such control. The purposes of the provisions governing self-help (protection of the immediate factual situation) do not speak for the right of self-help of an indirect possessor either, since the latter only has ‘legal’ control over the thing based on a legal relationship.
83  Pursuant to § 40 (4) PropLA; a successor (heir) of an arbitrary possessor is also responsible for the consequences of arbitrary possession. Other legal successors are responsible if, upon the acquisition of possession, they were aware that their predecessor possessed the thing arbitrarily.
84  § 42 PropLA.
whether it was established as a right in rem or not. Due to the numerus clausus principle of property law, only such rights can be recognised as rights in rem whose content corresponds to the description provided for by law, and where the rules regarding the creation of property rights have been observed: a real agreement and the delivery of possession in the case of movables; a real agreement and the entry in the land register in the case of immovables. No new rights in rem can be ‘invented’ by agreements, meaning also that the parties cannot, by agreement, give a property law character to legal relations of their choice. Whereas in the case of immovables there is a choice between various rights in rem as well as contracts involving the transfer of the right of use of the immovable, in the case of movables the choice is restricted to obligatory contracts.

3.1. Rights in rem and their protection

The only restricted right in rem, out of which an entitlement to possess a movable belonging to another arises, is the possessory pledge (pawn). Yet, the pledgee is only entitled to use the pledged item if this has been specifically stipulated in the pawn agreement. In such case, that part of the legal relationship would still be governed by the rules on leases, loans for use or similar contractual instruments, in accordance with the nature of the relationship agreed upon. Originally, the right of usufruct with respect to movables existed, whereas in 2003 it was abolished with the reasoning that the right of usufruct in movables had very little, if any, practical importance and that the same economic results can be achieved by way of a lease contract.85

Rights in rem to hold, use or to acquire a movable available in Estonian property law are thus shortly concluded as follows: (1) rights to hold – the possessory pledge (pawn); (2) rights to use – none; (3) rights to acquire – none.

The protection of property rights was briefly dealt with above in sub 1.4.2. In the relationship inter partes, i.e. between the owner and the person entitled by a restricted real right, either party can rely on the agreement which they have concluded, in addition to measures arising directly from the law, which belong to the essence of the right. In that sense, proprietary relationships have an ‘obligatory’ dimension in that the parties are bound by their relationship and either party is entitled to claim performance. As regards relations to third persons, the rights of a person entitled to use a thing belonging to another on the basis of a restricted real right

are partially protected in the same way as ownership. In the case of a possessory pledge, being the only right in rem out of which the right to hold a movable belonging to another arises, there is no explicit in rem protection of the pledgee with regard to third persons insofar as the right to possess is concerned. The pledgee can rely on the provisions on the protection of possession. However, these same measures are available to any person possessing, or having possessed, the movable on whatever legal basis.

3.2. Obligatory rights of use and rights to hold and their protection

The various rights to hold or to use a movable belonging to another are practically always obligatory rights under Estonian law.

Rights to use arise, above all, out of the various contracts for use: leases and commercial leases, loans for use containing the entitlement to use an object gratuitously. Rights to hold can, for example, arise from contracts for services, contracts for the carriage of goods, deposit contracts or custody contracts. In these cases, holding the movable for the owner is normally in the interest of the latter, whereas the holder may be also interested in keeping the movable as a security for his claims against the owner arising out of the contract.

The main means of protection are the various remedies for breach of contract, as well as the claims for damages arising out of unlawfully caused damage (torts), including damage caused by wilful conduct that is contrary to good morals. Whereas the remedies for breach of contract can only be relied upon inter partes, a claim based on the unlawful causation of damage is also effective against a third intruder. Remedies for the protection of pos-

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86 Regarding rights concerning immovables: real servitudes and personal rights of use are protected by a quasi-negatory action, whereas a similar provision is missing for the case of the usufruct. The right of superficies is not mentioned here as it is in essence closer to the right of ownership in an immovable than to a restricted real right encumbering an immovable belonging to another.

87 Whereas, in the case of a lease, the lessee is entitled to use the object of the lease contract (§ 271 LObligA), in the case of commercial lease, the commercial lessee is, in addition to the right to use the object, entitled to acquire the usual benefits (fruits) arising out of the object (§ 339 LObligA).

88 § 389 LObligA.

89 For example, in the case of a deposit contract, the depositary has a right of security over the deposited thing in order to ensure reimbursement of the expenses and the claims for payment pursuant to § 888 LObligA.

90 Pursuant to § 1045 (1) 5) LObligA, the causing of damage is unlawful if it is a result of the violation of ownership, a right similar to ownership or possession, belonging to the victim.
session are also available to the user (eg lessee) or holder (eg depositary). As mentioned above, a quasi-proprietary protection is provided where a contract for the lease of an immovable is concerned, but no comparable protection is afforded to parties to contracts of lease in movables.

3.3. Rights to acquire in the case of movables

Rights to acquire are most often created by contracts of sale, sale by right of pre-emption and gift.

A contract of sale itself gives the buyer a right to claim delivery of the thing and the transfer of ownership thereof (§ 208 LObligA). However, since the obligation to transfer ownership is not an element of the transfer system, consisting of a real agreement and delivery of the movable (see further in Part II), a mere contract of sale does not guarantee to the buyer a position protected against further dispositions by the seller. A contract of sale does not restrict the seller in his right to dispose, although it does create an obligation to transfer the ownership of the asset in question to the buyer. In case the seller transfers ownership to a third person in breach of a previously concluded sales contract, the third person will typically remain the owner of the thing.

The various combinations of a contract of sale, with the following additional options: right of pre-emption, right to repurchase etc, can only be of an obligatory nature in the case of movables. In other words, if the movable asset is sold in breach of the right of pre-emption or repurchase, the prospective buyer will not be able to pursue his claim against the third acquirer. However, a right of pre-emption with respect to movables arising out of law can have a quasi-in rem effect: according to § 244 (6) LObligA, a disposition of a movable, which is subject to a right of pre-emption arising out of law, is void if the disposition is undertaken after the emergence of the right to exercise the right of pre-emption, thereby infringing the right of pre-emption.

The notion of Vorvertrag (ie agreement to conclude a contract later on – a ‘preliminary contract’) is regulated in § 33 LObligA. However, such agreement cannot establish a direct claim aimed at the transfer of ownership of a certain movable. A preliminary contract can, under certain narrow conditions, create a claim for the main agreement to be con-

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91 § 324 LObligA, allowing a lessee of an immovable to demand that a notation concerning the lease contract be made in the land register.

92 The rationale of this provision lies in the radical reforms of property and land initiated in 1991, and was introduced to protect the rights of certain groups of people affected by the consequences of these reforms. This provision has a vanishing impact on the general commerce, mainly affecting property referred to in footnote 11 above.
cluded.\textsuperscript{93} Even then, if the prospective seller sells the item to a third person instead of concluding a contract of sale as envisaged in the ‘preliminary agreement’, the disposition in favour of the third person will not be considered void. There is no prohibition by law to restrict the power of disposition of the seller bound by a preliminary agreement. Even if a ‘final’ contract of sale has been concluded but not yet performed, a sale and consecutive transfer to a third person in breach of the first agreement will not be rendered void.

Where a movable is sold under reservation of title, the position of the acquirer is secured through direct possession (allowing, \textit{inter alia}, for the reliance on the remedies of the protection of possession) as well as § 106 (2) General Part, which renders a disposition, made by a party to a conditional transaction during the pendency period\textsuperscript{94} upon the fulfilment of the condition, void if such disposition precludes or restricts the occurrence of a legal consequence related to the condition. Although this provision would be subordinate to the protection of rights acquired by third persons in good faith, the direct possession of the acquirer under a reservation of title will normally help to prevent the loss of rights to a third acquirer in good faith. The position of a purchaser under a reservation of title is recognised as an expectant right (\textit{Anwartschaftsrecht})\textsuperscript{95}, although the practical importance attributed thereto is minimal compared to that found in German law and literature.

\section*{4. Field of application and definitions}

\subsection*{4.1. Field of application}

The law differentiates clearly between the acquisition/transfer of obligatory positions and the acquisition/transfer of real rights, including ownership. The acquisition and transfer of obligatory rights is considered a matter of the law of obligations. The provisions of property law, on the other hand, only apply to things and to real rights pertaining thereto.\textsuperscript{96}

\textsuperscript{93} This is possible in cases where the preliminary contract comprises the terms of the prospective main agreement to such an extent that further negotiations are not necessary. KULL/KAERDI/KÖVE, p 88.

\textsuperscript{94} Ie the period of time between the entry into the transaction under a suspensive condition and the fulfilment of that condition.

\textsuperscript{95} KULLERKUPP (1998). Such position of the purchaser in a sale under retention of title has been recognised by the decision of the Supreme Court No 3-2-1-93-02 (September 30, 2002).

\textsuperscript{96} The law can provide for certain cases where provisions concerning things apply to rights (§ 49 (2) General Part). For example, § 241 (4) PropLA sets forth that provisions concerning an immovable are applied to the right of supercicies, unless otherwise stipulated.
Only things can be the object of the right of ownership or other rights in *rem*. The rules on ‘transfer of movables’ (§§ 92-95 PropLA) thus only apply to tangible (corpal) movable things.

### 4.2. Definitions

‘Object’ is the most general notion used in Estonian civil law. Pursuant to § 48 General Part, objects are things, rights, and other benefits that can be the object of a right. The notion of object thus covers all kinds of benefits that can be the object of a right (interest) in the context of civil law (commerce). Objects are subdivided into tangibles and intangibles. Things and patrimonial rights (claims) are the main types of objects.

Things are defined as corporeal objects\(^{97}\) as opposed to incorporeal objects (rights). All things that are not immovables – *ie* delimited plots of land together with the essential parts thereof, such as buildings permanently attached to land – are considered movables.

Things are objects in any physical form – solid, liquid or gas. However, the quality of a thing presupposes the determinability of an object in terms of space. This requirement is derived from the fact that legal positions in property law are, as a rule, expressed through possession, and it is remotely related to the principle of determination in property law as well. A movable should, therefore, be capable of being in someone’s possession. Liquids and gases fulfill this criterion if, for example, they are filled in a container. In the case of the provision of water or gas through pipelines or by similar means, the necessary corporeal determinability is missing. However, in these cases little importance can be attributed to the provisions of property law. For example, running tap water cannot be in anyone’s possession; therefore, the remedies for the protection of possession are inapplicable; rights in *rem* are also unimaginable without the possibility of possession. The situation is rather similar in the case of electricity, with the particularity that electricity has no ‘physical form’ at all. This missing core characteristic of a thing does not hinder the provisions governing sales contracts from being applied to products/services such as electricity, gas *etc*. Pursuant to § 208 (3) LObligA, provisions concerning the sale of a thing are applied, *mutatis mutandis*, to the sale of a right or other object, including the sale of energy, water, heat or the like through a provision network, unless this is contrary to the nature of the object. This does not imply the application of the rules on the transfer of ownership contained in property law but merely the rights and duties arising from a contract of sale as an obligatory relationship.

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97 § 49 (1) General Part.
Animals are not defined as things, yet they are subject to the provisions applicable to things, unless otherwise provided by law. In effect, animals are treated as movables, meaning that they can be transferred and encumbered in accordance with the same provisions as movables under property law. The special provisions on animal protection do not influence the rules on the creation and transfer of property rights with regard to animals.

Money is not considered to be a thing but rather a patrimonial right which has taken the form of a corporal thing. However, in the case of the transfer of cash money (banknotes and coins), the rules regarding the transfer of movable ownership have to be observed.

Securities, such as negotiable instruments, are not considered to be things either. § 917 LObligA defines securities as instruments (documents) to which a patrimonial right is attached in a manner precluding the exercise of the right without the instrument. However, in transferring securities, the provisions concerning the transfer of movable ownership are relevant: depending on their type, securities are to be transferred according to the provisions concerning the transfer of movables, whereas in the case of certain types the fulfilment of additional requirements is necessary for the transfer. The rules on the transfer of movables are not applicable to electronic securities.

The regime for the transfer of ownership is generally the same for all types of movable things. There is no separate regime for the transfer of registered movables.

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98 § 49 (3) General Part.
100 Pursuant to § 921 LObligA, bearer securities are transferred pursuant to the provisions concerning the transfer of movables. In case of an order security, an endorsement (allonge) is to be added in addition to the transfer of the security. Registered securities are to be transferred, pursuant to the provisions concerning the transfer of the corresponding right, concurrently with the transfer of the security.
101 § 917 (2) LObligA. Such securities assume shape and can be transferred only by making an entry in the register. For example, the shares of all public limited companies registered in Estonia only exist in electronic form.
102 See sub. 5.5. on the system for the transfer of ships.
5. Basic characteristics of the system of transfer

The system of transfer of ownership in Estonian law follows the German model in all of its basic features. The notion of ownership as well as the conditions for its transfer and the legal consequences thereof are thus very similar to those known in the German legal system. The arguments that have been used to justify the choice and to explain the characteristics of the transfer system also largely follow the prevailing opinion represented in German legal literature. However, since the current system of abstract transfer, consisting of a real right agreement and delivery, was adopted only in 1993, there are no rigidly settled views concerning the details of the system and the possibilities for discussion and flexible interpretation still remain open.

The Estonian transfer system is ‘unititular’/‘unitary’/‘uniform’, meaning that the various entitlements arising from the right of ownership – i.e. the right to possess, to use and to dispose of the thing – pass to the transferee at one moment in time, rather than at separate moments depending on the ‘stage’ of the transfer process. The key provision for the transfer of movable ownership is § 92 PropLA:

§ 92. Transfer of movable ownership
   (1) Movable ownership is transferred by way of transfer (disposal) if the transferor delivers possession of the thing to the acquirer and they have agreed that ownership will pass to the acquirer.
   (2) Where the movable is already in the possession of the acquirer, an agreement between the transferor and acquirer concerning the transfer of ownership is sufficient for the transfer.

This provision, together with the notion of ownership expressed in § 68 PropLA (see subsection 1.2.1. above), makes it clear that ownership is understood as a ‘unitary’ legal position which can be transferred as a whole, inclusive of all of its aspects.

The rules on the transfer of ownership are the same for all kinds of obligations, since the system of ownership transfer is a matter of property law (as distinguished from the law of obligations) and the type, or even the existence or validity, of an underlying obligation is not a constitutive element of the system of ownership transfer.\textsuperscript{104}

As already pointed out above, the Estonian transfer system has been modelled very closely to the German example. Therefore, the following general observations can be made about the basic transfer requirements under Estonian law:

- The underlying concept is that of an abstract transfer, meaning that the preconditions for the transfer of ownership are derived solely from the relevant provisions of property law, and the validity of the transfer is not contingent upon the existence or validity of a causa, out of which the obligation to transfer ownership arises;
- The system is delivery-based, ie a mere agreement is not sufficient to transfer ownership. The object of the transfer must be delivered to the acquirer in any of the recognised forms (delivery or delivery equivalent);
- A real agreement separate from the underlying obligation is required to transfer ownership;
- There is no requirement of payment as a prerequisite for the transfer of ownership, unless a reservation of title has been stipulated by the parties themselves. Payment of the price is considered a matter related to the law of obligations (performance of a contract) which does not as such influence the occurrence of legal consequences in property law.

There has been fairly little scholarly discussion on the requirements for the transfer of movable property. Although the concept of an independent and abstract real right agreement was unknown before the reform of 1993,\textsuperscript{105} the idea of an abstract transfer has been accepted by practice after some initial confusion. The Supreme Court has repeatedly emphasised that the principles of separation and abstraction have been applicable with regard to the transfer of movable ownership from 1993 on-

\textsuperscript{104} In case a duty to transfer ownership has been established by a court decision, the expression of will necessary to fulfil this duty can be substituted by the court decision establishing the existence of that obligation (§ 68 (5) General Part).

\textsuperscript{105} According to the Soviet civil law applied in Estonia from 1940 onwards, until replaced by the PropLA in 1993, the transfer of ownership was causal and a real right agreement was not recognised. The system applying in Estonia before World War II had also been causal. The introduction of an (abstract) real right agreement had been envisaged in a new Draft Civil Code for Estonia that had been completed by 1939, but was never realised in the form of a law due to the outbreak of World War II. This draft, however, served as a point of departure for the elaboration of new legislation in the early 1990's.
wards,\textsuperscript{106} even though an express provision with that respect (§ 6 General Part) was only introduced in 2002. The requirement of delivery (\textit{traditio}) already existed before 1993, whereas the modes of delivery (equivalents thereof) were regulated only rudimentarily.\textsuperscript{107}

6. Elements of transfer required by property law

6.1. Real agreement

Following the German model, the Estonian rules governing the transfer of rights – including ownership – are based on the idea that an obligation does not transfer ownership. A separate agreement containing the declarations of intention (will) directed at the transfer of ownership is required in order to effect a property law consequence such as the passing of ownership from the transferor to the transferee. As indicated above,\textsuperscript{108} the necessity of a separate agreement to transfer ownership is expressly set forth in § 6 General Part,\textsuperscript{109} regulating the foundations of legal succession:

General Part § 6. Legal succession
(1) Civil rights and obligations may transfer from one person to another (legal succession) if the rights and obligations are not inseparably bound to the person pursuant to law.
(2) Legal succession shall be based on a transaction or the law.
(3) Rights and obligations shall be transferred by a corresponding transfer transaction (disposition). Each right and obligation shall be transferred separately unless otherwise provided by law.
(4) The validity of a disposition is not contingent upon the validity of the transaction which requires transfer of the right or obligation.

\textsuperscript{106} Decisions of the Supreme Court No 3-2-3-6-05 (May 4, 2005), 3-2-1-84-00 (June 21, 2000) and 3-2-1-127-03 (November 10, 2003).

\textsuperscript{107} §§ 138-139 Civil Code of the Estonian SSR.

\textsuperscript{108} See sub 1.1.4 – other general principles of property law.

\textsuperscript{109} The current version of the General Part Act entered into force on July 1st 2002, together with the new Law of Obligations Act. Although this express provision was only introduced in 2002, the principles of separation and abstraction have already been applicable since the entering into force of the Property Law Act in 1993. This has repeatedly been recognised by the Supreme Court (decisions No 3-2-3-6-05 (May 4, 2005), 3-2-1-84-00 (June 21, 2000) and 3-2-1-127-03 (November 10, 2003)). As regards immovables, an express provision requiring a real agreement to transfer or encumber an immovable has existed since the PropLA entered into force in 1993 (§ 120 and § 64\textsuperscript{1} PropLA), whereas in the case of movables § 92 required an ‘agreement concerning the transfer of ownership’.

\textsuperscript{1} PropLA
A separate real right agreement is required regardless of the type of the underlying obligation. The obligation to transfer ownership may thus be based either on a contract or a non-contractual obligation arising by the operation of law, such as a claim ex unjustified enrichment or an obligation to re-transfer ownership after the termination of a contract.

A real right agreement is subject to all general provisions of the General Part and the LObligA (general contract law) governing the conclusion and validity of contracts. These provisions include rules on legal capacity, the making and interpretation of declarations of will (intention) as well as the termination thereof due to defects in the decision-making, representation, conditions and the emergence of a contract as a result of an exchange of declarations of will (offer and acceptance). A real right agreement to transfer movable ownership can either be made explicitly or implicitly (by conduct). The same holds true for the avoidance of a real right agreement. As regards termination, I consider such remedy to be inapplicable to the real right agreement. The legal grounds for termination are connected to the breach of a contract which is incompatible with the essence of the real right agreement. The parties may also agree on additional grounds, of their choice, for termination, but even in such cases ‘termination’ of a real right agreement would hardly amount to anything else than an agreement between the parties to the effect that the disposition has never taken place.

Inapplicable to the real right agreement are the provisions of general contract law, presuming the binding nature of contracts. According to the general definition of a contract contained in § 8 LObligA, a contract is a transaction between two or more persons (parties to a contract), whereby one party or both parties undertake to do something or refrain from doing something, and the parties are bound to fulfil the contract. Such definition is incompatible with the nature of a real right agreement, which can only consist in transferring ownership from the transferor to the transferee.

A transfer by transaction is always a bilateral act requiring the corresponding declarations of will of both of the parties. A unilateral act of the transferor is not sufficient since the transferee (acquirer) must also be willing to become the new owner of the thing.

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110 Same opinion: PÄRNA (2004), § 92 comm 4, p 181.
111 The declaration of intention to transfer movable ownership by implicit conduct is a general rule, whereas in the case of immovables a notarised form is required to conclude a real right agreement.
112 Although a separate avoidance is doubtlessly possible, it is not essential because a declaration of the will to avoid or terminate a transaction may likewise be expressed by implicit conduct.
113 § 101 (1) p 4 LObligA.
114 Similarly TIIVEL (2003), 1.5.1., p 23.
6. Elements of transfer required by property law

To determine at which point the real right agreement has been concluded, the declarations of will must be ascertained and interpreted. There is no requirement that the parties should be specifically aware that they are concluding a ‘real right agreement’ distinguishable from an underlying contract – it will suffice that they realise (believe) that, as a result of their conduct, ownership will pass.\textsuperscript{115} As a rule, an offer from the transferor to transfer ownership and an acceptance on the part of the transferee should be identifiable. However, in the case of movables, the declarations of will regarding the transfer of ownership are usually inferred from the implicit conduct of the parties. No conclusive generalisation can be made on the types of conduct that can be construed as expressing the will to transfer or receive ownership. However, the delivery of possession or the enabling of the transferee to otherwise obtain actual control over the thing often marks the will of the transferor to also transfer ownership (unless the contrary follows from the circumstances – eg a reservation of title has been agreed upon). The acceptance of the acquirer is most typically contained in the receipt of the thing or in making a counter-performance (eg payment). In the case of the so-called everyday transactions (eg making a purchase in a shop), all the elements of a transfer transaction (including the conclusion of an underlying contract) are usually contained in one, outwardly unitary act, but the elements can also occur at different points in time. The conclusion of a real right agreement will more typically coincide with delivery than with the conclusion of the underlying contract. Ownership passes only if both a real right agreement has been concluded and delivery (or one of its equivalents) has been effected, regardless of which element is realised first.

There has only been very little discussion on the concept of ‘real agreement’, correspondingly there is also no criticism that is worth highlighting. Occasionally the ‘artificial’ nature of the real agreement with regard to movables has been pointed out.\textsuperscript{116} The introduction of the concept of a real agreement has only been justified rudimentarily in literature as corresponding to the idea of the separation of property law from the law of obligations, consequently promoting clarity in proprietary relations.\textsuperscript{117}

\textsuperscript{115} For example, in the decision of the Tartu Circuit Court No 2-1-254/2003 (September 30, 2003) the court considered the perception of the parties that the buyer will become owner after he has paid the price sufficient.

\textsuperscript{116} PÄRNA has questioned the practicality of distinguishing a real agreement in the case of movables with the reasoning that, as a rule, the real agreement and the underlying contract are concluded simultaneously, and as a result a real agreement will rarely remain in force where the underlying obligation is invalidated. However, he acknowledges the role of the real agreement in the case of sales under reservation of title. PÄRNA (2004), § 92 comm 4, pp 181-192.

\textsuperscript{117} The fact that an express provision requiring a ‘real agreement’ in the case of the transfer of a right by transaction was inserted in 2002, ie almost 10 years after the
6.2. Right to dispose

The rule that the transferor must be entitled to dispose over the thing is implied. Where the transferor is not entitled to dispose over the thing, ownership can only pass according to the rules on acquisition in good faith. The entitlement to dispose may either be based on ownership itself or on an authorisation from the owner. Such authorisation, in turn, may be based on representation or a relationship involving an authorisation to act producing effects for the owner (e.g., an authorisation agreement – including a commission contract).

In case ownership is transferred by a person who is not entitled to dispose, the disposition is valid if the entitled person (the owner) had previously consented to the disposition. In case there was no prior consent of the entitled person (owner), the disposition will become valid if the owner ratifies the disposition. In the case of ratification, the legal consequences of the ratification apply as of the time of the entering into the transaction, i.e., retroactively, unless otherwise provided by law or agreement of the parties. The retroactive effect is, therefore, not mandatory – the parties can also agree that legal consequences (passing of ownership) only arise from the moment of ratification or another point in time preceding the ratification.

The unentitled ‘transferor’ might afterwards become entitled to dispose over the thing only by way of general legal succession, e.g., inheritance. In such a constellation, the preceding transfer undertaken by the unentitled transferor would not be valid as against the actual owner (the bequeather) and the thing would still belong to the legacy. In such a case, the originally unentitled ‘transferor’ would also be able to ratify the transfer with retroactive effect after the legacy has passed to him. Singular legal succession is, however, difficult to conceive: where the actual owner

118 PÄRNA (2004), § 92 comm 6, p 182.
119 Pursuant to § 692 (1) LObligA, a contract of commission obliges one person (the commission agent) to enter into a transaction in his own name and on account of another person (the principal), above all in order to sell an object belonging to the principal or to buy an object for the principal (the commission object).
120 § 114 (1) and (2) General Part.
121 § 113 General Part.
has neither consented to the transfer nor ratified it, the transfer is not valid and the actual owner is free to either ratify the transfer or transfer ownership to whoever he chooses – be it the ‘unentitled transferor’ or a third person.

6.3. Delivery of possession

Traidition, in one of the provided forms, is expressly required to transfer movable ownership by §§ 92-94 PropLA (see Chapter 5 for text of § 92).

6.3.1. Purposes of the delivery requirement

Publicity is usually referred to as the main function of the delivery requirement. At the same time, it is also recognised that the various delivery equivalents are not suitable for pursuing this purpose. Since real right agreements with respect to the transfer of movable ownership are practically never concluded expressly, the will to transfer ownership – which lies in the very essence of the real right agreement/disposition – mostly has to be inferred from the behaviour of the parties, ie implied declarations of will. The performance of the underlying obligation will most often reflect the implied will of the parties also to transfer and acquire ownership. Delivery of possession can, therefore, also often serve as an indication of the intention of the parties to transfer ownership where the nature of the legal relationship in question also gives such an indication.

Delivery of possession also helps create clarity in the relations between the parties: the acquirer is given, by the conduct of the transferor, a position allowing for the possession of the thing, corresponding to the intended change in ownership relations. By delivering the movable to the acquirer, the transferor can express his intention to relinquish ownership in favour of the transferee. By contrast, a different kind of possession is created if the thing is handed over on the basis of a contract for use, such as a lease agreement: the lessor only transfers direct possession, retaining indirect possession.

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122 See PÄRNA (2004) § 92 comm 2 (p 179), § 32 comm 3 (p 42), § 94 comm 1 (p 190); TIIVEL p 45, pp 190-191.
123 Similar: STAUDINGER-WIEGAND, vorbem § 929 et seq IV 2, No 21, p 134.
124 Similar: MÜLLER, p 778.
6.3.2. Forms of delivery and equivalents thereof

According to the basic conception of the legislator, movables should be handed over directly from the transferor to the transferee. However, several alternatives are provided for in case direct delivery does not correspond to the interests and needs of the parties to the transfer. The forms of delivery are not subsidiary to one another, ie the parties are free to choose the form they find convenient.

(a) Direct physical delivery as the main concept

§ 92 (1) PropLA envisages a situation where the transferor hands over the thing into the direct possession of the acquirer, losing any form of possession with respect to the thing. Decisive are the acquisition of a possibility to exercise actual control over the thing by the acquirer and the complete loss of direct or even indirect control by the transferor. No specific acts of delivery are, however, expected from the transferor – it is considered sufficient that the transferor is in the position to ‘create’ possession for the acquirer, even if he has never himself held the thing in his direct possession. On the other hand, it will suffice for the transferee to obtain a position enabling him to exercise control; no ‘active’ taking of control is expected.

Co-possession by the transferee and transferor is not sufficient because it does not contain a relinquishment of control by the transferor; the transferor retains actual control over the thing and he is favoured by the presumption of ownership of the movable.

The change of possession should take place voluntarily, a unilateral seizure of the movable by the acquirer will not qualify as delivery by the transferor. Delivery in the sense of handing over the movable is to be understood as a mere ‘factual’ act, ie no transaction quality is attributed thereto. Where the delivery of possession is substituted by a corresponding agreement between the transferor and transferee, such

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125 STAUDINGER-WIEGAND, § 929 III 3, No 63 = p 152.
126 Whether the acquirer has obtained possession is to be evaluated according to §§ 36 et seq PropLA, see subsections 2.1.1. and 2.3. above. The view that no ‘active’ taking of control by the transferee is required is based on § 36 (2) PropLA, pursuant to which an agreement between the former possessor and the acquirer is sufficient to obtain possession where the acquirer is already in a position allowing him to exercise actual control.
127 WESTERMANN § 40 II, 1, lk 312-313; BREHM/BERGER § 27, No 12, P 398.
128 Compare the wording of § 92 (1) PropLA: ‘[…] the transferor delivers possession of the thing to the acquirer […]’.
129 WESTERMANN, § 40 III 4, P 318.
130 Expressly allowed by law: § 36 (2), § 37, § 93, § 94 PropLA.
agreements are to be treated as transactions (legal acts) in the sense of § 67 General Part\textsuperscript{131} so that legal capacity is required.\textsuperscript{132}

(b) Handing over means of control over the thing

§ 36 (1) second alternative PropLA states that possession is acquired by gaining actual control over means that allow the exercise of actual control over the thing. Handing over the keys of a car is the most frequent example.\textsuperscript{133} There are no specific requirements with regard to the applicability of this delivery equivalent – the question is rather, whether actual control over the thing is possible both with and without those means/instruments. For instance, in case of a car it could be questionable whether handing over just the car (without the keys) would qualify as a delivery of possession as there would be no access to the physical use of (and, therefore, no actual control over) the car. Handing over just the keys would suffice if they alone enable the acquirer to take control of the car; vehicle documents would not be suitable for this purpose. Nor are there any specific requirements as to the quality of the means – they must be suitable for allowing actual control over the thing. § 36 (1) second alternative PropLA does not cover the handing over of pieces (items) that merely symbolise the object as long as such symbols do not facilitate the use of the thing.

The time of the transfer in the case of a delivery of such auxiliary means is to be evaluated according to the same standards as the time of the delivery of the thing itself: actual control over the means is acquired when the transferor has given up, and the transferee is in the position to exercise, physical control over the means. In case of multiple means (eg two keys), the question arises whether the transferor has given up possession of the thing – knowingly keeping a key to a warehouse for himself, he retains physical access to the goods, which is inconsistent with the idea of delivery.\textsuperscript{134} The question of codes enabling access to goods is somewhat difficult to solve according to the criteria applicable in property law, as these are designed to cover things, not mere information. By analogy, the intention of the transferor could be evaluated on the same terms as in the case of ‘open possession’ (see sub 2.1.1. above), where the

\textsuperscript{131} According to § 67 (1) General Part, a transaction is an act or a combination of interrelated acts which contains a declaration of will directed at bringing about a certain legal consequence.

\textsuperscript{132} PARNÄ (2004) § 36 comm 2, p 51; ERMAN-LORENZ § 854 comm 5 (No. 14) = p 3194.

\textsuperscript{133} PARNÄ (2004), § 92 comm 3, p 180.

\textsuperscript{134} Similarly PARNÄ (2004), § 36 comm 2, p 50.
goods actually remain accessible to all (including the transferor) but the latter has declared that he intends to give up his possession of the goods.

It is also possible that the transfer of ownership takes place when the transferor simply permits the transferee to take possession of the goods without undertaking any other act, provided that the transferee is in a position to exercise actual control over the thing. This follows from § 36 (2) PropLA, pursuant to which an agreement between the former possessor and the acquirer suffices for the acquisition of possession if the acquirer is able to exercise actual control over the thing.

A transfer by marking is not recognised as an independent delivery equivalent since it does not ensure the acquisition of actual control over the thing by the transferee and a surrender thereof by the transferor. Therefore, marking could basically only serve as an auxiliary indicator in case of transfers based on a permission of the transferor.

(c) Documents of title

It is possible to transfer ownership or other property rights by handing over documents of title, insofar as these documents ‘represent’ the goods and involve an entitlement of their legal possessor to claim delivery of the goods covered by it. There are no specific rules on transferring ownership by handing over documents of title, whereas rules on encumbering the goods by possessory pledge (pawn) in such manner do exist. However, since the documents of title can be said to ‘represent’ the goods and due the fact that they embody the right to claim the delivery of the goods, the acceptability of replacing the delivery of the goods by a delivery of the documents should be recognised. Such situation would be close to an acquisition by way of assignment of the right to claim delivery of the movable, which is expressly recognised as a delivery equivalent in § 93 PropLA. There is no exhaustive list of what kind of documents are to be treated as ‘representing’ the goods, but by analogy to § 282 (1\textsuperscript{2}) PropLA it may be deduced that documents of title to goods\textsuperscript{136} (German Warenpapiere) come into question. Pursuant to § 918 LOlbgA, securities

\textsuperscript{135} § 282 (1\textsuperscript{2}) PropLA sets forth that upon the pledging of a thing for which a document of title has been issued, the transfer of the document of title is equal to the delivery of the possession of the thing.

\textsuperscript{136} A definition of ‘documents of title to goods’ may be derived from the general definition of securities provided in § 917 LObligA – such would be instruments (documents) to which rights pertaining to (certain) goods are attached, whereby the exercise of such rights is only possible with the instrument (document).
are subdivided into bearer securities, order (negotiable) securities and registered securities.\textsuperscript{137}

(d) Carriage by third party

No specific rules concerning delivery are provided for cases where the movable is to be carried from the transferor to the transferee by a third party carrier. Rules do exist \textit{vis-à-vis} the seller's obligation to deliver,\textsuperscript{138} linking the passing of the risk to the moment of handing over the goods to the carrier, but this cannot be equated with delivery in the sense of property law. As a general rule, delivery should be deemed complete when the acquirer receives the goods from the carrier because it is only then that the acquirer finds himself in the position to exercise actual control.\textsuperscript{139} Delivery can be deemed to have occurred before the receipt of the goods by the transferee, if the carrier is a 'servant in possession' of the transferee, or if there has been an anticipated \textit{constitutum possessorium} between the transferee and the third party carrier.

(e) \textit{Brevi manu traditio}

Pursuant to § 92 (2) PropLA, no additional acts of delivery need to be undertaken where the acquirer is already in possession of the thing. In such a case, a mere real right agreement concerning the transfer of ownership will suffice. The rule also applies to cases where the obligation to transfer ownership does not arise from a contract.

(f) Assignment of the claim to recover the movable

According to § 93 PropLA, if the thing is in the possession of a third person, the transferor and the transferee may agree that the delivery of possession is to be substituted by the assignment of the right to claim

\textsuperscript{137} No information regarding the need of commercial practice in respect of the transfer of ownership by documents of title is available to the author. There are no specific rules on this kind of transfer.

\textsuperscript{138} §§ 210 and 214 LObligA.

\textsuperscript{139} Moreover, a real right agreement is usually also not concluded before the carriage of the goods has commenced; the dispatch of goods can usually be interpreted as an offer to transfer ownership (ie to conclude a real right agreement), whereby the receipt of the goods can be seen as the acceptance (ERMAN-MICHALSKI, § 929 8 (No 30) p 3332).
delivery of the thing by the transferor to the acquirer.\textsuperscript{140} By this assignment also ownership is transferred;\textsuperscript{141} the transferee acquires the indirect possession of the thing.\textsuperscript{142} To be valid, the assignment must take place according to the rules set forth in the law of obligations.\textsuperscript{143} A notice to the third person holding the movable is not required to effect the assignment.\textsuperscript{144} There has been no specific criticism of this in literature or elsewhere, but evidently the point can be raised that no publicity or clarity is achieved as to the passing of ownership. Ownership passes at the moment at which both the real right agreement has been concluded and the assignment of the claim to recover the movable has validly been assigned; normally these two agreements are concluded simultaneously. It is thereby possible to make the passing of ownership contingent upon a condition (eg reservation title), but it is not possible to agree on the transfer of ownership retroactively – ie that ownership has already passed in the past.

The interests of the third party are protected according to the provisions of the LObligA regarding the assignment of claims. The third person may resurrender the movable to the transferor (= the former owner) as long as, at the time of delivery, he was not aware nor was supposed to be aware of the assignment. The third person (direct possessor of the movable) may further raise against the transferee all defences he had against the transferor at the time of the assignment of the claim.\textsuperscript{145} In case the third person has incurred costs on the movable, the person who owned the movable at the time the costs were incurred is responsible for the refund of such costs.\textsuperscript{146}

\textsuperscript{140} The wording of § 93 PropLA corresponds to that of § 931 BGB.

\textsuperscript{141} Although a transfer always requires a real right agreement in addition to delivery (or an equivalent thereof), the two agreements will rarely be concluded separately.

\textsuperscript{142} PÄRNA (2004) § 93 comm 1, p 189.

\textsuperscript{143} §§ 164 et seq LObligA. Pursuant to § 164 LObligA, a creditor (obligee) may fully or partly transfer his claim to another person on the basis of a contract regardless of the consent of the obligor (assignment of claim). Upon the assignment of a claim, the new obligee assumes the position of the original obligee.

\textsuperscript{144} Whether or not the third person (obligor) is given notice only affects the position of the obligor (third person) in performing his duty to deliver the thing: where the third person delivers to the original owner and, at the time of delivery, did not know nor was supposed to know of the assignment, he is deemed to have performed to the correct obligee (§ 169 (1) LObligA). Where the third person has been notified of the assignment of the claim, the assignment is deemed to have been made to the third person even if the claim was actually not assigned or the assignment is invalid (§ 170 LObligA).

\textsuperscript{145} § 171 (1) LObligA.

\textsuperscript{146} Decision of the Supreme Court No 3-2-1-136-05 (December 20, 2005). By way of analogy to § 171 (3), the third person should be entitled to exercise a right of retention also \textit{vis-à-vis} the new owner.
The assignment of the claim to recover the movable is, in essence, rather similar to the transfer by handing over documents (see (c) above). The issuing of a tradition paper in itself does not hinder or exclude the transfer of ownership of the goods effected by way of simple delivery or assignment of the claim to recover the asset. However, resulting from the definition of a tradition paper (document of title), the documents should be handed over alongside with the goods, because the exercise of rights pertaining to the goods would be impossible without the documents.

The transfer of ownership of generic goods always requires identification (individualisation) by the party obliged to transfer ownership. In case the claim to recover the goods concerns already identified items, ownership of these items may pass with the assignment of the claim to recover.

(g) **Constitutum possessorium**

Where the owner (transferor) is the direct possessor of the thing, delivery of possession may be replaced by an agreement between the transferor and the transferee pursuant to which the acquirer (transferee) obtains indirect possession of the thing (§ 94 PropLA).\textsuperscript{147} Direct possession by the transferor and indirect possession by the transferee are expressly required. The wording of § 94 does not allow for its application in case neither of the parties is actually in possession of the thing (stolen or lost goods).\textsuperscript{148} Where a transfer of ownership by way of constitutum possessorium has already taken place (the relevant agreements have been concluded) and the transferee does not pay,\textsuperscript{149} the transferor will no longer be able to withhold the performance of his duty to transfer ownership (that has already passed), but he will nevertheless be able to refrain from handing the thing over into the direct possession of the transferee or even

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\textsuperscript{147} The wording of § 94 PropLA corresponds to that of § 930 BGB.

\textsuperscript{148} However, the transfer by way of assignment of the claim to recover the movable is deemed possible in the case of stolen or lost goods: the wording of § 93 PropLA does not require that the owner/transferor should be in any form of possession of the movable or that the acquirer/transferee should acquire indirect possession. Thus, there is a view that any kind of claim to recover the movable may be assigned in order to transfer ownership, including a claim for revindication against an unlawful possessor (a thief), or a finder in case the owner has lost the thing; even where the concrete location of the thing is unknown to the owner/transferor. PÄRNA (2004), § 93 comm 3, p 189-190, similar MÜLLER (3rd Ed), No 2368, pp 783-784.

\textsuperscript{149} Although fully possible, such situation would probably be rather untypical due to the experience that real right agreements concerning movables are usually concluded by implicit conduct; and a transferor is often not inclined to let ownership pass before counter-performance (payment) is granted.
withhold performance of duties imposed by the contractual relationship on the basis of which the transferee acquired indirect possession. In the case of a constitutum possessorium, the problem that publicity of the transfer is not achieved is mentioned.

6.4. Possibility of modifications

6.4.1. Party autonomy and the flexibility of rules

Party autonomy is largely restricted in the field of property law, including the rules on the transfer of property. This results primarily from the principles of numerus clausus and the fixation of types, as well as publicity, these being some of the prevalent principles of property law. It is thus not possible for the parties to create additional forms of transfer, and a transfer always has to include both compulsory elements – a real agreement concerning the transfer of ownership and the delivery of possession. However, with regard to the actual mode of performance of each of these elements, a certain degree of flexibility exists. As regards the real right agreement, it is largely treated as a (normal) transaction, which is subject to the general provisions concerning transactions – including the rules on legal capacity, declaration of will and the validity of such declarations as well as the interpretation thereof; also, acting through an agent (representative) and inserting conditions as to the occurrence of the legal consequences of the transaction. Therefore, it is also possible to postpone the moment in time of the transfer of title to a later one by inserting either a stipulation of time period or a condition. Since the declaration of will (intention) may also be implied, an ‘anticipated' real right agreement is also possible. As regards the delivery of possession, several forms of delivery equivalents are recognised, including the constitutum possessorium

150 The right of retention is provided in §§ 110 and 111 LObligA (law of obligations). Such retention is justified where the obligor's (the transferor's) claim (for payment) is not sufficiently secured and there is a sufficient link between the claim and the obligation of the obligor. A sufficient link exists between a claim and an obligation primarily if the obligations of the obligor and the obligee arise from the same legal relationship, a prior regular relationship between the obligor and the obligee or from another sufficient economic or temporal relationship. In the case of a mutual contract, a party may withhold performance until the other party has performed, offered to perform, secured or confirmed the performance.

151 PÄRNA (2004), § 94 comm 1, p 190.

152 Similarly TİVEL, p 36.

153 Of the same opinion: PÄRNA (2004), § 92 comm 4, p 181.

154 § 68 (3) General Part.

155 Different rules apply to immovables where transactions are subject to strict form requirements and the insertion of conditions and time limits is excluded.
(see sub 6.3.2. above). Although no position has been taken in court practice or legal literature elsewhere, the author is of the opinion that the construction of an anticipated constituutum possessorium is compatible with the given legal framework. In the case of a constituutum possessorium, no factual action is carried out and indirect possession is established for the acquirer solely on the basis of an agreement. No rule prevents such an agreement from being concluded in advance, whether by exchange of express or implied declarations of intention.

### 6.4.2. Registration

*De lege lata*, the only type of movable assets for which a system of transfer of ownership by registration exists are ships. The Law of Maritime Property Act (LMPA, enacted in 1998) sets forth a system of registration very close to the system of land registration applicable to immovables.

According to § 9 LMPA, the transfer of ownership of a registered ship presupposes a real right agreement\(^{156}\) and an entry in the ship register. The act of registration is therefore a constitutive one, actually transferring ownership. Furthermore, the ship register is public and the lack of knowledge concerning an entry in the register is not considered a defence (§ 5 LMPA). The correctness of entries in the ship register is presumed (§ 6 LMPA), and everyone is entitled to rely on the information available in the register (§ 7 LMPA).

The ship register is maintained pursuant to very much the same procedure as the land register.\(^{157}\) The ship register is kept by the departments of land registration in the courts of first instance.

The registration of ships in the ship register is required if the ship, broadly put, falls under the Estonian jurisdiction\(^{158}\) and exceeds certain size limits.\(^{159}\) Otherwise, registration is not compulsory, in which case the

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156 As a rule, the real right agreement must be notarised, except where the ship loses the right to fly the national flag of the Republic of Estonia by reason of the transfer.

157 The provisions of the Land Register Act are applied to the maintenance of the ship register, unless otherwise provided for (§ 37 Law of Ship Flag and Registers of Ships Act).

158 A seagoing vessel must be registered if it has to fly the national flag of the Republic of Estonia pursuant to law. An inland vessel must be registered if it is owned by a natural person who is permanently resident in Estonia or a legal person registered in Estonia. §§ 40 and 41, Law of Ship Flag and Registers of Ships Act.

159 Overall length over 12 metres or, in the case of sailing yachts and launches, over 24 metres.
ownership of the ship can be transferred according to the general rules governing the transfer of ownership of movables.\textsuperscript{160}

With regard to certain other assets such as motor vehicles and aircrafts, registers do exist, but entries in these registers are of purely informative significance and do not affect the transfer of ownership of these assets.\textsuperscript{161} Public reliance would hardly be conceivable in the case of such registers, although a presumption of the correctness of the entries could be imaginable to create a possibility to transfer registered movables by way of registration. However, so far no discussions have been initiated to introduce such an innovation.

7. Relationship between the disposition and the underlying obligation

7.1. Underlying obligation as the \textit{causa} of the disposition

The transfer of ownership can be based on any type of obligation: contract as well as non-contractual relationship. In all these cases, the transfer of ownership is still subject to the same rules (§ 92 \textit{et seq} PropLA).

As regards contracts, sale, barter and donation/gift\textsuperscript{162} are the main types of contract which typically involve a duty to transfer ownership. Contracts for services having at their object the manufacture or production of a thing also fall under this category.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{160} There is yet another specific provision regarding unregistered seagoing vessels: pursuant to § 921 PropLA, in order to transfer the ownership of a seagoing vessel not registered in a ship register kept by a court of Estonia, delivery of the vessel is not required if the transferor and acquirer have agreed on the immediate transfer of ownership.
\item \textsuperscript{161} For example, § 19 of the Government Regulation No 194 on the Establishment of the National Civil Aircraft Register and the Statutes for the Maintenance thereof, sets forth that in the event of a transfer of ownership of an aircraft, both the new and the former owner are to notify the Civil Aviation Board of the transfer within 10 days.
\item \textsuperscript{162} A donation/gift is considered a contract, being regulated in the section on transfer deeds in the LObligA and titled ‘Donation contract’ (§ 259 \textit{et seq} LObligA). Pursuant to the legal definition of donation/gift, one person (donor) undertakes to transfer an object in his ownership to another person (donee) and to facilitate the transfer of ownership to the latter, waive a patrimonial right in favour of the donee, or enrich the donee in another manner (§ 259 (1) LObligA). No special rules exist as to the transfer of title. A donation contract is to be concluded in written form, but will be deemed valid if the obligation arising out of the contract has been performed (§ 261 LObligA).
\item \textsuperscript{163} § 636 (1) LObligA.
\end{itemize}
7. Relationship between the disposition and the underlying obligation

A unilateral declaration of will gives rise to an obligation in the case of a public promise to pay.\textsuperscript{164} By making such promise, the intention to provide remuneration for the commitment of a certain act is declared, above all for the attainment of a certain goal. Instead of monetary remuneration, delivery of a certain asset might also be promised.

Other non-contractual obligations, such as unjustified enrichment, tort claims, obligations imposed by the law of succession etc may also be the \textit{causae} of a transfer of ownership. § 1028 LObligA establishes a basis for reclaiming property that has been transferred with the purpose of performing an existing or future obligation, if the obligation does not exist or has not been created, or if the obligation later ceases to exist. Thus, where ownership has been transferred without a valid legal cause, the transferor may reclaim ownership on the basis of § 1028 LObligA, whereas the retransfer is to take place in accordance with the general rules: real right agreement and delivery, or a delivery equivalent as the case may be.

The existence of a duty to transfer ownership may be ascertained by court order where such a duty actually results from the existing legal relationship between the parties. According to § 68 (5) General Part, a declaration of will may be substituted by a court decision whereby the existence of a duty to make a declaration of will with a certain content is ascertained.

7.2. Identification of the goods to be transferred

7.2.1. Attribution of the goods to the obligation and the functions thereof

The identification of generic goods is to be understood as a necessary element in order for the obligor/transferor (seller) to fulfil his duty to deliver the goods to the recipient (obligee/buyer).\textsuperscript{165} Distinctions are to be made between (1) the duty to deliver and the duty to take all necessary steps to let ownership pass to the buyer, and (2) the duty to deliver and the delivery of possession to the acquirer as a prerequisite for the transfer of movable ownership.

The seller’s obligation to deliver a thing to the purchaser is normally performed by placing the goods ready at the buyer’s disposal at the speci-

\textsuperscript{164} § 1005 \textit{et seq} LObligA.

\textsuperscript{165} Pursuant to § 208 (1) LObligA, a contract of sale obliges the seller to deliver a thing to the buyer and to facilitate the transfer of ownership to the buyer. The same ‘obligation to deliver’ also exists in the case of contracts by which the manufacture or production of a thing is ordered (except where material was provided by the customer ordering the goods) and gifts (§ 259 (1) LObligA).
fied place of performance, and by notifying the buyer thereof (§ 209 (2) LObligA). Whether possession has been delivered to the acquirer must, in turn, be evaluated according to the provisions of property law. There are important legal consequences connected with the performance of the seller’s duty to deliver the thing: first and foremost, the passing of risk of accidental loss or damage (§ 214 LObligA), but also the basis of calculation of the price in the case of generic goods (§ 213 (1) LObligA) and the allocation of benefits, costs and duties relating to the thing between the seller and the buyer (§ 216 LObligA). The time of delivery in the sense of the LObligA is further essential in order to judge upon the lack of conformity of the thing; moreover, it determines the time of the commencement of prescription for claims arising from the lack of conformity of the sold object and the time of the commencement of the sale warranty. As follows from the above, the functions of identification are of a purely obligatory nature, relating to issues of performance of the contract. Identification, therefore, has no independent significance with regard to the passing of ownership.

In transferring movable ownership, delivery of possession is one of the compulsory elements, being conceivable only with respect to individualised things. In the case of transfers, where the transferee originally only receives indirect possession (e.g., constitutum possessorium), it is of decisive importance whether the transferee is in the position to claim delivery of a certain individual thing on the basis of criteria that distinguish that thing from the rest of the bulk (for example, serial numbers). In such case, the acquisition of the claim for recovery of the thing may coincide with the identification. Yet, such cases are rare and a transfer by a constitutum possessorium is an exception in the case of generic things.

The same rules are also applied in cases of the revindication of goods after the termination of a contract. In the example where a number of goods have been delivered under reservation of title and the buyer pays only 50% of the contract price, whereupon the seller, after partially ter-

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166 This is the case where the goods are to be delivered at a specified place of performance (i.e., the buyer is to come to collect them). If the seller is obliged to take the goods to the buyer, the duty to deliver is performed by handing the thing over into the buyer’s possession. Where the carriage of the goods is stipulated, but not the duty of the seller to take the goods to the buyer, the duty to deliver is performed by handing the goods over to the carrier (§ 209 (4) LObligA).

167 § 218 (1) LObligA.

168 § 227 LObligA.

169 § 230 (2) LObligA.

170 Although the principle of determination (see subsection 1.1.4 above) excludes the possibility of transferring ownership in unidentified goods, identification for the purposes of ownership transfer does not have to take place in conformity with the contract law rules governing identification.

171 Similarly, BAUR/STÜRNER, p 583.
minating the contract, demands 50% of the goods back, identification is at the same time necessary to determine which goods of the bulk are to be returned to the seller and which goods become the property of the buyer as a result of the partial payment.\textsuperscript{172}

7.2.2. Requirements for the identification

Identification of movables in the case of a generic debt means that the obligor (transferor) has to clearly separate the goods to be transferred from the rest of the bulk with the purpose of delivering them. Such identification may occur by way of marking, shipping documents or otherwise (§ 209 (1) LObligA). Thus, identification is, as a rule, to be understood as a unilateral act of the transferor (seller). The requirement of the notification of the other party is only relevant with regard to the transferor's duty to deliver the goods;\textsuperscript{173} thus, notification does not belong to the elements of identification. However, the participation of the transferee in the identification process may be derived from the contract or the character of the obligation (such as the choice of the colour of a car).\textsuperscript{174}

It follows from the wording of the second sentence of § 209 (1) that identification only ‘in the transferor’s head’ is not sufficient. The goods to be delivered are to be ‘clearly identified’ either by marking, shipping documents or otherwise. Thus, there has to be a certain degree of publicity to third persons; knowledge of the transferee about the individualisation is not required. No exhaustive list of the accepted ways of identification is provided by law – marking and shipping documents are named exemplarily.

The seller (transferor) is generally entitled to replace the generic goods to be delivered with others until the moment of the passing of risk to the transferee. As the risk passes to the buyer after identification and the consecutive notification of the buyer, the seller is still in the position to replace the goods originally identified and prepared for delivery to the buyer before the latter has been notified.

\textsuperscript{172} According to § 116 (3) LObligA, a partial termination of a contract is possible where the contractual obligations are to be performed in parts (instalments) and a material breach of the contract concerns such part (instalment).

\textsuperscript{173} § 208 (1) LObligA in connection with § 209 (1) first sentence and (2).

\textsuperscript{174} KULL/KÄERDI/KÕVE, 8.3.6 (p 160).
7.3. Validity of the underlying obligation

7.3.1. Different forms of defects regarding the obligation and their effects on the transfer of ownership

(a) Lack of capacity

The lack of capacity of one of the parties results in the invalidity of the transfer with retroactive effect. Restricted legal capacity influences the validity of a transaction in case the legal representative of a person with restricted legal capacity has not consented to the entry into a transaction by the person with restricted legal capacity nor has approved of it. However, a transaction entered into by a person with restricted legal capacity is valid regardless of the absence of the consent or later approval of his legal representative, if no direct obligations for the person arise from the transaction (wording of § 11 (3) General Part). This wording should be interpreted\(^{175}\) to the effect that also dispositions undertaken by a person with restricted legal capacity are covered, even though they cannot contain any obligations due to their nature. Thus, if the person with restricted legal capacity acts as a transferor, a disposition (transfer of ownership) will need to be approved of by his legal representative. Acting as a transferee (acquirer), the person with restricted legal capacity will need no special protection and the transfer will be valid without approval. A transaction concluded by a person with restricted legal capacity without the consent or approval of his legal representative, where such consent or approval is necessary, is void, meaning that the transaction has no legal consequences from its inception and what has been received on the basis of a void transaction shall be returned pursuant to the provisions concerning unjustified enrichment\(^ {176}\).

If the underlying contract is void due to the lack of legal capacity of one of the parties to the transfer of movable ownership, the validity of the transfer itself will not be directly affected (§ 6 (4) General Part), but the validity of the transfer will have to be examined separately. In case the two transactions took place under the same circumstances, both will also be affected, except where the acquirer lacked legal capacity, in which case the acquisition will remain valid.

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\(^{175}\) By way of teleological reduction.

\(^{176}\) § 84 (1) General Part.
(b) Voidness

Void contracts have no legal consequences from their inception. Voidness may result from a breach of good morals or the public order (§ 86 General Part), the violation of a prohibition provided by law (§ 87 General Part), the violation of a restraint on disposition declared by a court or any other authority or official entitled to do so by law (§ 88 General Part), or a sham transaction (§ 89 General Part). Voidness of an underlying contract out of which the obligation to transfer ownership arises will not automatically affect the validity of the transfer (disposition); it must be examined whether the real agreement likewise suffered from the same defect that caused the voidness of the underlying obligation. As regards a violation of good morals, the Supreme Court has stated that the real right agreement, as a disposition, is, as a rule, legally neutral and could thus regularly not be contrary to good morals and void on that account. However, a contradiction of the real right agreement (the transfer) with good morals and its resulting voidness is not excluded – where the motive for the disposition or the disposition itself is in breach of good morals. The defect in the underlying obligation (where the disposition is not ‘plagued’ by the same defect), therefore, has an \textit{ex nunc} effect on the validity of the transfer and a duty to re-transfer ownership to the transferor is thereby created.

(c) Voidability

Grounds for avoidance of transactions are mistake, fraud, threat, violence and gross disparity (§ 90 General Part). In the case of avoidance, the transaction will be invalid from its inception (\textit{ex tunc}). Where only the underlying obligation is defective and therefore avoided on any of the above grounds, this will have an \textit{ex nunc} effect on the validity of the transfer, establishing a duty to re-transfer ownership to the transferor. Whether the real right agreement (transfer) is also defective, must be examined separately. Because in the case of transfer of movables the two agreements are often concluded simultaneously under the same circumstances, both transactions will generally be affected by the same problem. In the cases of fraud, threat, violence and gross disparity, the ‘identity of defects’ is generally presumed. \textit{Mistake} is a more arguable case. The Esto-

\footnote{Decision of the Supreme Court No 3-2-1-80-05 (from September 22, 2005). However, the Court refrained from taking a position on the question whether a disposition undertaken with the purpose of doing damage to the creditors would render the transfer void, but instead relied on the specific procedure of recovery in bankruptcy proceedings.}
nian regulation on voidability on account of mistake is based on Art 4:103 and 4:104 PECL:

General Part § 92. Mistake
(1) Mistake is an erroneous assumption relating to the actual circumstances.
(2) A transaction is entered into under the influence of a material mistake if upon entry into the transaction the mistake was of such importance that a reasonable person similar to the person who entered into the transaction would not have entered into the transaction in the same situation or would have entered into the transaction under materially different conditions.
(3) A person who entered into a transaction under the influence of a material mistake may avoid the transaction if:
   1) the mistake was caused by circumstances disclosed by the other party to the transaction, or by non-disclosure of circumstances by the other party if disclosure of the circumstances was required pursuant to the principle of good faith;
   2) the other party knew or should have known of the mistake and leaving the mistaken party in error was contrary to the principle of good faith;
   3) the other party to the transaction entered into the transaction on the basis of the same erroneous circumstances, except if the other party could have presumed, having the correct perception of the circumstances, that the mistaken party would have entered into the transaction even if he had known about the mistake.
(4) In the case of a unilateral transaction, the person at whom the declaration of intention contained in the transaction is directed and the person who acquires rights on the basis of the transaction is deemed to be the other party within the meaning of subsection (3) of this section.
(5) A person who has entered into a transaction is not entitled to avoid the transaction if according to the circumstances under which the transaction was entered into and the content of the transaction, the risk of mistake was to be borne by that person.

Avoidance on account of mistake is thus possible where the other party has in some way contributed to the conclusion of the transaction under the influence of a mistake and where the interests of the other party, therefore, should not be particularly protected.

In my opinion, the avoidance of a contract is also possible on account of mistake regarding relevant personal qualities of the other party, especially his solvency. If the transferor concludes a transaction and transfers ownership, it should be possible for the transferor to avoid the contract when it emerges that the transferee (acquirer), contrary to good faith, left the transferor in an erroneous assumption about his ability to pay for the
asset. In such a case there is no specific reason to protect the interests of the transferee with respect to the contract either.

(d) Termination

The termination of the underlying contract on account of non-payment, non-conformity or another relevant reason will have an ex nunc effect on the transfer that has already taken place. According to § 188 (2) LObligA, the termination does not affect the validity (continuity) of rights and obligations that have arisen from the contract prior to termination. Ownership already acquired by the transferee is not eliminated, but an obligation to re-transfer ownership to the transferor is created: pursuant to § 189 (1) LObligA, either party may reclaim all benefits delivered to the other party under the contract, whereas the re-transfers on either side are to take place simultaneously.

7.3.2. Conditional contracts

In case ownership is transferred on the basis of a contract subject to a condition (or time limit), for example, the transfer to a trustee for the purposes of administration or security, a ‘relapse’ of ownership to the original owner can be achieved by inserting a corresponding condition in the real agreement. The termination of the underlying contract can only have ex nunc effect. If no automatical relapse of ownership has been agreed upon, the trustee is required to re-transfer ownership to the original owner on the basis of their agreement.

In case of the reservation of title, a real agreement is concluded subject to the condition that the purchase price is fully paid, whereby a link is established between the contract of sale and the effects of the real agreement. Where the buyer fails to pay the price owed, the seller (transferor) may terminate the contract and reclaim the thing. Since ownership has not yet been transferred to the acquirer, the issue of the validity of the real agreement will not arise. According to § 233 (2) LObligA, a seller under a reservation of title may claim the restitution of the asset only if he has terminated the contract. Where the seller’s claim, secured by the reservation of title, has expired, the seller may claim the restitution of the thing in accordance with the provisions concerning the protection of ownership (revindication). Here, the will of the transferor to renounce the intention to dispose can be concluded from the circumstances (implicit conduct).

178 § 92 (3) 1) and 2) General Part.
7.3.3. ‘Piercing’ the abstract nature of the transfer system

Although the validity of the real agreement is not contingent upon the validity of the underlying obligation, the concurrent invalidity of both transactions sometimes results from the defective will (intention) upon which the transactions are based. As a result, the system may, in these cases, effectively function as a causal one. The causality of the transfer can sometimes also be achieved by way of party autonomy. The possible constellations of ‘piercing’ the abstract nature of the transfer system are:

1. Identity of defects: the same defect causing the voidness or voidability of a transaction has influenced the conclusion of both the underlying contract and the real agreement. The voidness of the transfer is not caused by the voidness of the underlying obligation but, evaluated separately, the real agreement turns out to be defective in itself.

2. Agreement that the validity of the real agreement is contingent upon the validity of the underlying contract (Bedingungszusammenhang): as the real agreement concerning the actual transfer of ownership can be concluded under a suspensive or a resolutive condition, the parties might agree that the transfer of ownership will not remain effective if the underlying contract turns out to be invalid. However, the parties must have been ignorant as to the actual validity of the causa.179

3. Unity of the underlying obligation and the real agreement: § 85 General Part states that the nullity of a part of a transaction does not render other parts of the transaction void if the transaction is divisible and it can be presumed that the transaction would have been entered into even without the void part. It is arguable whether a real agreement and an underlying contract can be ‘knotted’ together in this way, with the effect that the invalidity of the underlying obligation would cause the invalidity of the transfer, especially considering the explicit separation of both transactions emphasized in § 6 (4) of the General Part.

Evidently, the discussion and the possible arguments are overlapping with what is found in German legal materials, since the legal framework is similar as well. No further position has been taken on these issues in Estonian legal literature or court practice, as far as is known to the author.

7.4. Performance of the underlying obligation

There is no requirement that, unless there is an agreement to the contrary, the transfer of ownership is to require payment (an implied reserva-
tion of title). Payment of the price is considered to be a matter of the performance of the underlying obligation which, as such, will not influence the occurrence of legal consequences in property law.

Where the transfer is based on a mutual (synallagmatic) contract – such as a sale – a seller is entitled to refrain from transferring ownership until the buyer pays the price or assures the seller of his performance. A retention of title clause may also be inserted ‘unilaterally’ by the seller; in case the buyer does not accept this condition, there will be no real agreement at all and ownership will remain with the seller. However, once ownership has been transferred unconditionally, the seller will no longer be able to secure his claim for payment by retaining ownership.

There has been no discussion on the introduction of an implied reservation of title clause, although this would most likely correspond to the perception of laymen as to the moment ownership passes.\textsuperscript{180}

8. Rules on double or multiple selling

This chapter deals with the scenario where a seller – A – sells the same asset first to B and afterwards also to C.

The decisive question here is, whether by the time of the second transaction, ownership had already passed to B or not. If it had, A would have acted as an ‘unentitled transferor’ if subsequently selling the thing to C. If ownership had not yet passed, A would have acted as a fully entitled person with regard to the asset – his right to dispose of the asset was not restricted by the fact that he may have previously concluded a sales contract with B.

The prerequisites for the passing of ownership have generally been dealt with in chapter 5. A contract of sale (or any other type of underlying obligation) does not belong to the constitutive elements of an ownership transfer. Instead, a real agreement combined with delivery (or a delivery equivalent) is needed. Ownership will pass to that acquirer in whose case both of these elements are met first. It should be reminded that there is no compulsory order of sequence according to which the two elements are to be met (a real agreement may precede delivery, or \textit{vice versa}). If A and B agreed on the transfer of ownership (concluded a real agreement) and the possession is delivered to B, ownership passes. Delivery may take place either directly or indirectly, including by way of a \textit{constitutum possessorium}.\textsuperscript{181} In case ownership has already passed to B but

\textsuperscript{180} The Tartu Circuit Court made a similar remark in its decision No. 2-1-254/2003 (September 30, 2003).

\textsuperscript{181} Such situation was dealt with in the decision of the Tartu Circuit Court No 2-1-254/2003 (September 30, 2003): A sold an antique cupboard that stood in her apartment to B. The latter paid the price right away, but because he needed some
A is still able to deliver possession to C (e.g., if A and B agreed on a *constitutum possessorium* and A retains the direct possession of the asset), C can only acquire ownership if he is in good faith. Where ownership has not yet passed (i.e., only a contract of sale has been concluded between A and B, but either a real agreement or delivery – or both – are missing), C will also acquire ownership if he is in ‘bad faith’ (aware that A has previously undertaken to sell the asset to B). On such occasions, B might – under certain circumstances – be able to claim compensation for damage from C based on a deliberate conduct contrary to good morals (§ 1045 (1) p 8 LObligA). However, B would, most likely, not be able to claim ownership from C, since the fact that A transferred ownership to C, despite of his existing obligation to transfer to B, would not amount to a breach of good morals or the public order that might render the transfer invalid pursuant to § 86 General Part. The same applies to an acquisition by B where A has concluded a second sales contract with C. In conclusion, the knowledge about a rivalling sales contract will, as such, not influence the acquisition either by B or C, but where ownership has already passed to one of the buyers, the other buyer can only become owner pursuant to the provisions on the acquisition in good faith.

If the movable is delivered to C and C becomes insolvent after ownership has already passed to C, e.g., with delivery, the insolvency will not change the property law situation. The insolvency administrator will be entitled to decide whether or not C’s obligation to pay is to be performed. If the insolvency administrator decides to suspend performance, A may file his claim as a creditor in bankruptcy. A’s claim for payment is not a preferential claim in C’s bankruptcy.

### 9. Rules for ‘selling in a chain’

‘Selling in a chain’ is understood as a sequence of several sales transactions where each successive buyer sells on the movable to the next but, instead of handing on the movable along the chain, it is delivered di-

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182 See Chapter 14 below: good faith acquisition requires that C acquires the direct possession of the asset. The standard of good faith requires that C did not know nor should have known that A was not entitled to transfer ownership.

183 To rely on that cause, B would, for instance, have to prove that C acted with the intention to damage B.

184 § 46 (7) Bankruptcy Act.
9. **Rules for ‘selling in a chain’**

rectly from the first seller to the last buyer: A sells to B and B to C; A delivers the movable directly to C.

### 9.1. General rules, valid contracts

The matter of selling in a chain has, to the knowledge of the author of the report, not been handled in the court practice or legal literature of Estonia. The author is of the opinion that transfers in chain should, as far as possible, be treated in the same way as ‘normal’ transfers, despite of the fact that, for practical reasons, possession is delivered directly to C. Where A, B and C are all independent contractors (none of them act as an agent or a ‘servant in possession’ of the other), there is no legal ground for deviating from the requirements of transfer set forth by law. An opposite position might lead to an attitude, according to which rules can be ignored where practical reasons call for a more ‘flexible’ approach. Therefore, where there are two separate sales agreements (A – B and B – C), a corresponding number of transfers of ownership (real agreements) should also take place.

#### 9.1.1. Transfer of ownership from A to B

B’s offer to conclude a real agreement with A can be seen in his invitation to A to deliver the movable directly to C. By accepting and delivering the movable to C, A impliedly expresses his will to transfer ownership. Although B never acquires direct possession of the movable, C receives the movable on B’s instruction. Because delivery to C takes place on B’s instruction, B can be deemed to have acquired indirect possession of the movable.

#### 9.1.2. Transfer of ownership from B to C

The real agreement may have been concluded either together with the sales agreement or by the delivery from A to C, where A was acting on B’s instruction. C also acquires direct possession of the movable.

In a typical case ownership thus passes first to B for a ‘logical second’, then on to C. The ‘chain’ of transfers can be decomposed into a number of consecutive transfer transactions, each of which must meet the requirements of a valid transfer. It will therefore cause no difficulties if one of the parties ‘in the middle’ (B) transfers the asset subject to certain limitations, for example under a retention of title. Although C receives
possession directly from A, ownership will not pass on to C until he has fulfilled his obligation to pay vis-à-vis B.

A direct transfer of ownership from A to C can be construed where B (without having acquired ownership himself – thus acting as an unentitled person) transfers ownership to C subject to A’s consent or his later approval according to § 114 General Part.185 The requirement of delivery has been met as well as A having directly delivered possession to C.

Furthermore, a direct transfer is possible in case the relations between all participating actors are open and A makes a direct offer to transfer ownership to C. This would be a rare occasion since A is obliged to transfer ownership to B on the basis of a sales agreement, whereas A has no contractual relationship with C.

9.2. Rules when contracts fail

As on all occasions, the validity of the sales contracts (A – B and B – C) must be examined separately from the validity of the transfer as such, ie the real agreement. The invalidity of the contract of sale will not influence the allocation of ownership. If the sales contract A – B is invalid but ownership has already passed to C, B is unable to return ownership to A, and A will only be able to rely on a claim for damages ex unjustified enrichment.186 Where the disposition (real agreement) itself is invalid, B has never acquired ownership, but C may have acquired the thing in good faith. Where the agreement B – C is invalid, C is to return ownership to B even if he received the thing directly from A (the original owner).

In case both sales contracts are invalid, compensation claims based on the provisions concerning unjustified enrichment also move along the ‘chain’ of contractual relationships. Each ‘link’ in the chain is responsible in accordance with the legal relationship between himself and his legal predecessor, and bears the risk of a breach of contract or the insolvency of his contract partner.

185 According to § 114 General Part, a disposition of an object undertaken by an unentitled person is valid if the entitled person (actual owner) had either consented to the disposition in advance or ratifies the disposition later.

186 § 1037 (1) LObligA: A person who violates the right of ownership, another right or the possession of an entitled person by disposal, use, consumption, accession, confusion or specification thereof without the consent of the entitled person or in any other manner (a violator) shall compensate the usual value of anything received by the violation to the entitled person.
10. Transfer or acquisition by means of indirect representation

In the following, the constellation will be dealt with where a party – X – transfers or acquires a movable asset in his own name, but on account of or in the interest of another person, A.

Indirect representation is not expressly regulated by Estonian law – §§ 115 et seq General Part define representation as acting in the name of another person, which must be perceptible to the other party to the transaction. However, the effect of indirect representation is attained through § 114 General Part, as a result of which a transfer undertaken by a non-owner (X) is valid where the actual owner had consented thereto in advance or later approves of the transfer. Legal literature also recognises indirect representation in the case of everyday transactions where ownership is transferred to a person not known to the transferor (traditio ad incertam personam).\(^{187}\)

The legal framework is different depending on whether the intermediary (X – e.g. a commission agent) acts on behalf of a seller or a buyer.

In the case of a ‘commission to sell’, ownership of the asset to be sold is usually not transferred to the commission agent. Instead, the principal (owner) gives prior consent to the agent disposing of the asset,\(^{188}\) whereas such consent may be expressed impliedly. Therefore, ownership will be transferred directly from A (owner/principal) to the third party (B). The insolvency of the intermediary (X) would not prevent the transfer of ownership since X’s function in the transaction is close to that of a direct representative.

In the case of a ‘commission to buy’, however, ownership is transferred by the third person (B) to X (the commission agent), since the agent X acts in his own name. Therefore, legal relations are created between X and the third party (B). Where X has acquired an asset in the interest of A, he has to transfer ownership on to A pursuant to §§ 692 (2) and 626 LObligA.

A direct transfer of ownership from B to A via X is conceivable where a real agreement is concluded between A and B. However, this is hardly possible where X is acting in his own name. Instead, X should act in A’s name, which would come close to direct representation. There are sporadic views that the publicity requirement is dispensable in the case of representation in so-called everyday transactions, where the transferor (B) is indifferent as to the person of transferee – this is mainly where the contract is mutually performed ‘on the spot’.\(^{189}\) If X has the power of

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\(^{187}\) Parina (2004), § 92 comm 9, p 184.

\(^{188}\) § 114 (1) General Part.

\(^{189}\) Parina (2004), § 92 comm 9, p 184.
representation vis-à-vis A to conclude a real agreement and the intention to act on behalf of A, ownership passes directly from B to A.

II. Consequences of the insolvency of the transferor or transferee

II.1. General issues

As a result of the declaration of bankruptcy, the bankruptcy estate consists of the property of the debtor. 190 Items belonging to third persons do not form part of the bankruptcy estate and the entitled persons may exclude (reclaim) their property from the estate. 191 Thus, the allocation of property, determined pursuant to property law, is also decisive in bankruptcy law. If both parties to the transfer have already fully performed their obligations, arising from the legal relationship upon which the transfer is based, ownership will have passed to the transferee and the insolvency of either party will no longer influence their relations vis-à-vis the movable.

Difficulties can arise when, by the time of commencement of bankruptcy proceedings:

(a) There are outstanding claims arising from the legal relationship upon which the transfer is based. This involves both situations where the transferor has not yet fully performed his duty to transfer ownership and the transfer has been realised only partially (e.g., a real agreement has been concluded but delivery has not yet occurred), and cases where the transferee has received ownership but has not yet fulfilled his obligation to pay.

(b) The transfer or the underlying obligation proves to be defective or invalid, giving rise to claims for restitution (reversion).

An actio pauliana exists in bankruptcy proceedings in the following form: the insolvency administrator, acting in the name of the insolvent debtor, can file a claim for recovery, 192 on the basis of which the court can revoke transactions, which were concluded by the debtor before the declaration of bankruptcy and which jeopardise the interests of the creditors. If a transaction, whose revocation is requested, was concluded between the time of the commencement of the bankruptcy proceedings and the time of the declaration of bankruptcy, the transaction is deemed to jeopardise the interests of the creditors.

190 § 35 (1) p 1 Bankruptcy Act.
191 § 123 (1) Bankruptcy Act.
Bankruptcy Act § 110. General bases for recovery of transactions

(1) A court shall revoke transactions concluded:
   1) during the period from the commencement of the bankruptcy proceed-
      ings until declaration of bankruptcy;
   2) within one year before the commencement of the bankruptcy proceed-
      ings if the other party knew or should have known that the transac-
      tion damages the interests of the creditors;
   3) before commencement of the term specified in clause 2) of this subsec-
      tion if the transaction was concluded within three years before the
      commencement of the bankruptcy proceedings and the debtor inten-
      tionally damaged the interests of the creditors by the transaction and
      the other party to the transaction knew or should have known that
      the debtor damaged the interests of the creditors by the transaction;
   4) within five years before the commencement of the bankruptcy pro-
      ceedings if the debtor intentionally damaged the interests of the credi-
      tors by the transaction and the other party to the transaction was a
      person connected with the debtor and knew or should have known of
      the damage.

(2) If a transaction the revocation of which is requested was concluded within
six months before the commencement of the bankruptcy proceedings, the
other party to the transaction is presumed to have known that the debtor
damaged the interests of the creditors by the transaction.

(3) A person connected with a debtor is presumed to know that the debtor in-
tentionally damaged the interests of the creditors by a transaction.

There are further specific rules on recovery of gratuitous contracts (gifts),
partition of the jointly owned property of spouses, performance of mone-
tary obligations and granting of security. Recovery can also be pursued
against a legal successor of a party to the transaction. If a court revokes a
transaction by way of recovery procedure, the other party is required to
return what he received on the basis of the transaction to the bankruptcy
estate, together with fruits and other profits possibly yielded. If property
transferred by a recovered transaction has been destroyed or damaged or
cannot be returned for any other reason, the other party shall compensate
for the value or the decrease in the value thereof, if the party was or
should have been aware of the circumstances on which the recovery was
based.

11.2. Insolvency of the transferor

In the case of the insolvency of the transferor, the transferee is only fully
protected against the interventions of the transferor's creditors if owner-
ship has already passed to him, ie a real agreement has been validly con-
cluded and the asset has been delivered to the transferee (using any recognised form of delivery, including the delivery equivalents). In that case, there are no mutual claims left and the asset is excluded from the bankruptcy estate.\textsuperscript{193}

The main issue to be considered from the point of view of the transferee, in a case where the transferor becomes insolvent while contractual or other obligatory relations still exist between the transfer parties, is the interest of the transferee in becoming the owner of the asset, especially if he has already fully or partially performed his obligation to pay. Whether or not the obligation to transfer ownership will be fulfilled is subject to the insolvency administrator’s right of choice.\textsuperscript{194} In case the administrator opts for continuance of the contractual relationship, the transferee is required to perform his outstanding obligation. The obligation of the insolvent transferor thereupon becomes a consolidated obligation, giving the transferee a preferential status in the bankruptcy proceedings.\textsuperscript{195} In case the insolvency administrator refuses to perform the obligation of the insolvent transferor, the other party to the contract (buyer) may file a claim, arising from the failure to perform the contract, only as a creditor with no preferential position or property law protection in the bankruptcy proceedings.

A different situation arises where the transferor has already performed and (putatively) transferred the asset to the transferee, whereupon either the underlying obligation or the disposition itself turns out to be invalid due to voidness from the beginning or avoidance. In case only the underlying obligation is invalid but the disposition is effective, the transferee will be required to re-transfer ownership on the demand of the insolvency administrator pursuant to the provisions concerning unjustified enrichment. A corresponding claim of the transferee ex unjustified enrichment regarding the purchase price, which he had already paid, can only take

\textsuperscript{193} According to § 123 (1) Bankruptcy Act, objects belonging to third persons are not included in a bankruptcy estate. If a third person has a claim for the return of an object belonging to that person, the insolvency administrator shall return the object (exclusion of property). The person claiming the exclusion of the property is not treated as a creditor in the bankruptcy proceedings as regards the claim for exclusion.

\textsuperscript{194} § 46 Bankruptcy Act, whereas the wording of the provision does not exclude such a choice even if the transferee has fully performed his counter-obligation, eg paid the price.

\textsuperscript{195} § 148 (1) p 2 Bankruptcy Act. According to § 149 Bankruptcy Act, performance of a consolidated obligation may be claimed pursuant to the general procedure, i.e. outside the bankruptcy proceedings. Such obligations are performed out of the bankruptcy estate prior to the payment of money on the basis of distribution ratios, after claims arising from the consequences of exclusion or recovery of assets and maintenance support paid to the debtor and his or her dependants (§ 146 Bankruptcy Act).
the form of an ordinary claim in bankruptcy which is of a purely obligatory nature. As a result of the declaration of the insolvency of the debtor, the claims of creditors are transformed into claims in bankruptcy and will be settled pursuant to the bankruptcy proceedings, in accordance with the principle of *par conditio creditorum*, providing for the use of distribution ratios in the proceedings. A right of retention or a similar measure is not envisaged in order to protect the interest of the transferee in having the purchase price restituted. 196 The general rules of the law of obligations concerning the right of retention are not applicable in bankruptcy proceedings, since the creditors' claims are not settled pursuant to the general procedure.

In case the disposition, *ie* the real agreement, proves to be void or is avoided with retroactive effect, ownership is deemed never to have passed to the transferee. Ownership has thus remained with the (insolvent) transferor, whose insolvency administrator can reindicate the asset from the transferee. The transferee's claim for the restitution of what he has performed (purchase price) will be handled as an ordinary claim in bankruptcy.

### 11.3. Insolvency of transferee

In case the transferor (seller) has performed without holding any security, and ownership has already passed to the insolvent acquirer, the transferor is not entitled to reclaim the thing nor avoid the contract due to the insolvency of the transferee. The transferor's claim for counter-performance (purchase price) is treated as a regular claim in bankruptcy proceedings, providing no preferential status to the transferor. The same applies to all claims aimed at the transfer of certain assets having proprietary value, whether based on a contract or a non-contractual obligation. If ownership has been transferred on the basis of an obligation that, later on, proved to be invalid or non-existent, the title remains with the transferee as a result of the abstract nature of the disposition, and the unsecured transferor is left with a claim for re-transfer on the basis of provisions on unjustified enrichment.

Similarly, the transferor's rights to have the ownership of the movable re-transferred in the cases of *ex nunc* invalidity or termination of the contract are not particularly protected either, and the claims for re-transfer are of a merely obligatory nature. Which side invokes the invalidity of the contract does not influence the situation, as the re-transfer of

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196 A right of retention only exists in respect of a creditor whose contractual relationship with the debtor is being continued pursuant to the right of choice of the insolvency administrator, and where the counter-performance on the part of the debtor is not secured by the administrator (§ 46 (5) Bankruptcy Act).
the asset has to take place pursuant to the same rules as the original transfer, involving a real agreement and delivery of possession. The rules for the reliance on the actio pauliana (recovery) are the same as in the case of avoidance: in both cases, revocation of a transaction only has ex nunc effect.

Where the transferee has acquired ownership of the asset by way of original acquisition, the above remedies (all being connected with the validity or invalidity of a contract) will not be applicable and the transferor will be left with a merely obligatory claim for compensation, eg resulting from a breach of contract or ex unjustified enrichment.

However, if the disposition (real agreement) is invalid with retroactive effect, ownership is deemed never to have passed to the transferee and the transferor has a right to the exclusion of the asset from the bankruptcy estate.\textsuperscript{197}

12. Passing of ownership and passing of risk

Although the passing of risk and the passing of ownership to the transferee (buyer) may often temporally coincide in practice, there is no rule that this has to be so. The passing of risk has to be evaluated according to somewhat different criteria than the passing of ownership.

LObligA § 214. Obligation to pay purchase price when risk of accidental loss of or damage to thing passes to purchaser

(1) A purchaser shall pay the purchase price even if the purchased thing is accidentally lost or damaged after the risk of accidental loss of or damage to the thing has passed to the purchaser.

(2) The risk of accidental loss of or damage to a thing passes to the purchaser upon delivery of the thing.

(3) The risk of accidental loss of or damage to a thing also passes to the purchaser at the time when the purchaser is in delay with the performance of an act by which he or she is to facilitate the delivery of the thing, in particular if the purchaser fails to collect the thing. If generic goods are sold and in the case where the purchaser is in delay, the risk of accidental loss of or damage to the things does not pass to the purchaser until the things which are the object of the contract are separated and the purchaser is notified thereof.

(4) The risk of accidental loss of or damage to a thing sold in transit passes to the purchaser retroactively as of the thing being handed over to the first carrier. This does not apply when a seller, at the time of entry into a contract of sale, is aware or ought to be aware that the thing is lost or has been damaged and does not notify the purchaser thereof.

\textsuperscript{197} § 123 Bankruptcy Act.
(5) If, in the event of consumer sale, the seller is required to deliver a thing to the purchaser, the risk of accidental loss or damage does not pass to the purchaser before the delivery of the thing to the purchaser or before the purchaser is in delay in taking delivery of the thing.

(6) The right of a seller to withhold documents relating to a thing does not affect the passing of the risk of accidental loss or damage.

‘Delivery’ within the meaning of § 214 (2) does not necessarily refer to the handing over the physical control (possession) over the thing, but rather calls for an assessment of whether the transferor has fulfilled his obligation to deliver the goods.\(^\text{198}\) The passing of risk, therefore, depends on the way in which the transferor has to perform, ie deliver the goods that are being sold. According to § 209 LObligA, the seller’s obligation to deliver a thing to the purchaser is deemed to have been performed if the seller has placed the goods at the purchaser’s disposal at the specified place, and has notified the purchaser thereof. In the case of generic goods, there is the additional requirement that the goods must be clearly identified for delivery by the use of markings, shipping documents or the use of other means. Where the goods are to be delivered at a specified place and the characteristics of the goods do not allow for their separation by the seller before the purchaser collects the goods, the goods are deemed to have been delivered if the seller has done all that is necessary to enable the purchaser to collect the goods. If the seller is required to bring the goods to the purchaser, the seller has to deliver the possession of the goods to the purchaser. Where a contract provides for the carriage of goods but this does not involve the obligation of the seller to bring the goods to the purchaser, the obligation to deliver is deemed to have been performed upon the delivery of the goods to the carrier who is obliged to carry the goods from the place of dispatch to the place of destination.

In conclusion, the risk may pass to the transferee before ownership does – particularly in cases where the goods have been prepared for delivery by the seller and the buyer is to collect them himself; further, in cases where the seller is to arrange carriage of the goods (but is not obliged to hand over the goods to the buyer), as well as in the case of a sale under reservation of title.

\(^{198}\) See also subsection 7.2. above.
13. Acquisition by accession, commixture, specification

13.1. Accession of movables

Accession is defined as the joining of movables, belonging to several owners, in such a way that they become essential parts of an integrated thing (§ 107 (1) PropLA). According to § 53 General Part, an essential part of a thing is a component part, which cannot be severed from the thing without the thing or the severed part being destroyed or essentially changed.

Ownership of the new asset resulting from accession depends on whether or not one of the conjoined things forms a 'principal part' in relation to the other(s). A principal part is the component of the asset that determines the essence and (economic) purpose of the thing, whereas the absence of the other (minor) parts would not materially deteriorate the functionality of the principal part and such minor parts can only facilitate the purposive use of the thing. If one of the conjoined things is to be considered a principal part, the owner of that thing becomes sole owner of the integrated thing, created as a result of accession (§ 107 (2) PropLA). In case no principal part can be identified, the new integrated thing will fall into the co-ownership of the owners of the conjoined things. The sizes of their shares of co-ownership are specified according to the value of the conjoined things, which they had at the time of accession (§ 107 (1) PropLA). The good or bad faith of the owners of the original components of the integrated object is irrelevant with regard to the legal consequences of accession, since accession is not considered a transaction and it may occur either as a result of deliberate action or an accident, or even without any intervention of a human being. Compensation is possible according to the provisions on unjustified enrichment, whereas the duty to compensate does depend on the good faith of the violator.

200 PÄRNA (2004), § 107 comm. 1, p 218.
201 According to § 1037 (1) LObligA, a person who violates the right of ownership (or a comparable right or the possession) of another person by means of (inter alia) ac-
In case a movable is conjoined with an immovable, the ownership of the immovable extends to a thing that is conjoined with land, if the movable has become an essential part of the immovable. Pursuant to § 54 General Part, essential parts of an immovable are things permanently attached thereto, such as buildings, standing crop, other vegetation and unharvested fruit. However, buildings that are erected on the immovable belonging to another, on the basis of a real right, as well as things attached to the land for a temporary purposes, are not considered parts of the immovable pursuant to § 54 (2) General Part. Thus, a movable will lose its quality of being a separate (independent) thing if it is permanently attached to land, so that it cannot be removed without substantial physical effort and the attachment was not intended to serve a temporary purpose only.

13.2. Commixture and confusion

Commixture means a commingling of movables belonging to several owners in such way that the movables become inseparable or a separation would involve unreasonable costs (§ 107 (4) PropLA). It does not matter whether goods of the same kind or different kinds are mixed up. The acquisition of ownership is subject to the same rules as in the case of accession. As commixture usually involves fungible things and no principal part will be distinguishable from the other parts, co-ownership will most typically be created. Good faith is not required either and compensation is possible on the same terms as in the case of accession.

13.3. Specification (processing)

Specification is understood as reformation (rearrangement) or processing of original material, effected by the input of human labour, resulting in the creation of a new asset. The main criterion for the application of the provisions on specification is the creation of a new thing as a result of human labour. The new thing can often be distinguished by a new denomination, differing from that of the original material, a different form.
and description as well as a new (economic) purpose. Mere reparations are not regarded as specification as no new thing is created thereby.\textsuperscript{202}

The acquisition of ownership of the new asset depends on the good faith of the processor as well as the value of the labour and the result thereof. The processor acquires the new thing if he acted in good faith and if the work is more valuable than the original thing. Otherwise, the owner of the original thing will acquire the resulting object. To establish the value of the work, the value of the original thing (material) is to be deducted from the value of the new asset.\textsuperscript{203} If the processor acted in bad faith, the owner of the original thing is entitled to the new asset regardless of whether or not the work is more valuable compared to the original material.\textsuperscript{204}

The owner of the original thing is entitled to claim compensation from the processor in the amount of the value received by the processor as a result of the specification, if it was carried out without the consent of the owner. If the processor was not aware and was not supposed to be aware that he was not entitled to process the thing, he is relieved from the duty to compensate if he is no longer enriched by the time he learned or should have learned of the filing of the claim for compensation against him.

The person in whose name and in whose economic interest the processing takes place is generally considered to be the processor. If the processing is carried out by ‘servants in possession’ (eg employees of an enterprise), the employer is considered to be the processor.\textsuperscript{205} A processor acting independently (eg a contractor in the case of a contract for work and services) is, however, considered to be the creator of the new thing himself. Yet, in the case of processing on the basis of a contractual relationship (eg a contract for work and services), the person of the processor is of secondary importance because the contractor, as a rule, is (and should be) aware that the material belongs to the customer and would thus lack the good faith required to acquire ownership of the new thing.

### 13.4. Further general aspects

In case co-ownership has emerged, each co-owner is, at any time, entitled to claim the termination thereof. Upon the termination of co-ownership the asset is divided according to the agreement of the co-owners. If the

\textsuperscript{202} PÄRNA (2004), § 106 comm 1 and 4, p 216-217.
\textsuperscript{203} PÄRNA (2004), § 106 comm 1, p 216. Thus, the processor in good faith will acquire the result of his work if the value of the new thing, at least, twice exceeds the value of the original thing (material).
\textsuperscript{204} § 106 PropLA.
\textsuperscript{205} PÄRNA (2004), § 106 comm 3, p 217.
co-owners fail to reach an agreement with respect to the manner of division, a court shall decide, at the request of a co-owner, whether to divide the thing among the co-owners in the form of physical shares, to give the thing to one or more co-owners and impose on them the obligation to compensate the other co-owners for their shares in money, or to sell the thing by public auction or auction among the co-owners and divide the proceeds among the co-owners according to the size of their shares.

If ownership terminates as a result of accession or commixture, also other rights encumbering the original thing terminate, including third parties' rights in rem. However, if co-ownership is created as a result of accession, the rights that encumbered the original thing remain valid with respect to the co-owner's share in co-ownership (such rights do not extend to the new thing as a whole). If the owner of an encumbered thing becomes the sole owner of an integrated thing created as a result of accession (ie one of the conjoined things qualifies as a 'principal part'), the rights that encumbered the thing also remain valid with respect to the integrated thing (§ 107 (5) PropLA).

Rights (both ownership and limited rights in rem) lost as a result of accession, commixture or specification are compensated for according to the provisions on unjustified enrichment. Pursuant to § 1037 (1) LObligA, a person who violates the right of ownership, another right or the possession of an entitled person by the disposal, use, consumption, accession, commixture, specification or by other means without the consent of the entitled person, is to pay compensation to the entitled person, equivalent to the usual value of anything received as a result of the violation. However, a violator who was not aware nor supposed to be aware of the lack of justification for the violation, is relieved from the duty to compensate if he is no longer enriched by the value received as a result of the violation, by the time he becomes or should become aware of the filing of a claim for compensation against him (§ 1038 LObligA).

Legal capacity is required to acquire ownership as a result of specification but not so in the case of accession and commixture.

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206 Division into physical shares is only possible if this is compatible with the nature of the thing, ie if the remaining constituents of the formerly integrated thing remaining have an independent economic function.

207 §§ 76 and 77 PropLA.

208 PÄRNA (2004), § 106 comm 3, p 217. This view is arguable, as specification is a factual rather than a legal act (transaction) for which legal capacity is required. However, the requirement of good faith speaks in favour of the understanding that the processor should have legal capacity in order to be able to acquire ownership.

209 PÄRNA (2004), § 107 comm 1, p 218.
14. Rules on good faith acquisition

Issues relating to good faith acquisition typically arise where a non-owner (B) ‘transfers’ a movable to a potential good faith acquirer (C) without the actual owner (A) having consented to or, in any other way, having approved of the transfer.

14.1. General concept

PropLA § 95. Acquisition in good faith
(1) A person who has acquired a thing by transfer in good faith is the owner of the thing from the moment of gaining possession over the thing even if the transferor was not entitled to transfer ownership. […]

Good faith acquisition follows the rules on the ‘normal’ transfer of ownership, the only difference being that the the ‘transferor’ is lacking a right of disposition which is ‘substituted’ by the good faith of the acquirer. However, as will be outlined below, the requirements regarding the acquisition of possession by a transferee in good faith are stricter than where the actually entitled person disposes of the thing. As bona fide acquisition is based upon a mere ‘appearance of entitlement’, possible cases covered include all scenarios regardless of whether or not the unentitled ‘transferor’ B had previously ever been authorised to dispose of the thing. Insofar as the requirements of good faith acquisition are fulfilled, C can become the bona fide owner of the asset, if the transferor (B) was never owner, B’s right to dispose had been avoided or terminated with retroactive or ex nunc effect, as well as in cases of double sale (see also Chapter 8 above).

The main exception to the possibility of good faith acquisition are stolen and lost goods. According to § 95 (3) PropLA, acquisition pursuant to the rules on good faith acquisition does not occur if the thing was stolen from or lost by the owner, or the owner was otherwise dispossessed of the thing against his will. In case the owner was an indirect possessor, the same applies if the direct possessor loses possession of the thing against his will. However, this exception concerning lost or stolen goods does not apply to money, bearer securities or assets acquired at a public auction. The latter can, thus, be acquired bona fide even if the owner lost possession of the assets against his will.

14.2. Types of transactions covered

Good faith acquisition can only take place where the transfer of ownership is based on a transaction (a contract) as opposed to an acquisition by
virtue of law (original acquisition, inheritance etc). Good faith acquisition is deemed justified only in the case of transactions representing ‘legal and economic commerce’, meaning that the ownership should actually ‘change hands’. That is to say, the parties to the transaction should be different persons, both legally and economically.\textsuperscript{210}

Good faith acquisition is also possible if the thing is sold at a public auction – even if the owner of the thing was dispossessed thereof against his will by theft, loss or otherwise.\textsuperscript{211}

Acquisition in good faith will take place regardless of whether ownership was transferred for value or gratuitously. However, the position of the \textit{bona fide} acquirer is only fully protected where it took place in exchange for a counter-performance, \textit{ie} for value. In the case of a gratuitous transfer by a person not entitled thereto, the acquirer must re-transfer the thing to the entitled person even in case the disposition was otherwise valid.\textsuperscript{212} Whether or not the transfer was gratuitous must be evaluated in each individual case. There is no requirement that the price should have already been paid by the transferee, but the legal relationship between the parties to the transfer (B and C) should involve a counter-performance on the part of the transferee that is not merely symbolic.

The rules are the same when the good faith acquirer is a consumer – there are no specific rules regarding the position of a consumer in property law.

\section*{14.3. The requirement of physical control}

Besides the good faith of the acquirer, the concept of \textit{bona fide} acquisition is based on the ‘legitimising appearance’ of possession (\textit{Rechtsschein}).\textsuperscript{213} In order to give rise to a legitimate belief of the acquirer in the entitlement of the transferor to dispose of the thing, the ‘transferor’ must be in some form of possession thereof. This rule is further reinforced by the fact that the requirements concerning the acquisition of possession by the transferee are stricter in the case of \textit{bona fide} acquisition when compared to transfer of ownership effected by the owner (entitled person). Namely, the \textit{bona fide} acquirer only becomes the owner of the thing when the direct possession thereof is handed over to him.

\textsuperscript{210} \textit{PÄRNA} (2004), § 95 comm 8, p 198.
\textsuperscript{211} § 95 (3), third sentence, PropLA.
\textsuperscript{212} § 1040 LObligA. However, an acquirer in good faith who is no longer enriched in the extent of the (gratuitious) transfer by the time he learns or should have learned about the filing of a claim against him, is relieved of the duty to re-transfer the thing (§ 1038 in conjunction with § 1040 LObligA).
\textsuperscript{213} \textit{BAUR/STÜRNER} §52 A I 1 No 2 = p 591; \textit{PÄRNA} (2004), § 95 comm 1, p 193.
In the standard case, the transfer of ownership requires the delivery of direct possession besides the conclusion of a real agreement. Where the acquirer is already in possession of the thing, good faith acquisition will take place if the possession was previously derived from the ‘transferor’ (B). In case the non-owner B assigns a (supposed) claim to recover the movable to the acquirer C, ownership will only pass to the acquirer when he receives the direct possession of the thing from the third person and is in good faith at the time of the delivery of possession.\(^\text{214}\) Where a non-owner disposes of a thing by a \textit{constitutum possessorium}, the acquirer will become owner at the time of the delivery of the thing, also being in good faith at that time.\(^\text{215}\) As compared to an acquisition of ownership by virtue of a transfer by the entitled person (owner), the moment ownership passes is, thus, postponed in the case of good faith acquisition until the acquirer becomes the direct possessor of the thing. This solution can be seen as striking a better balance between the interests of the rightful owner and of the acquirer from an unentitled person. The \textit{bona fide} acquirer thus bears the risk of the ‘transferor’ not being entitled to dispose of the thing until obtaining actual control over it.

\subsection{14.4. Loss of possession by the original owner}

There is no specific requirement that the original owner should have ‘entrusted’ the movable to the ‘transferor’ B. Instead, it is presumed that the original owner lost (direct) possession willingly, until the opposite is proved. However, the owner is deemed to have lost possession unwillingly if the disposition is made by a person with limited legal capacity or a ‘servant in possession’ without the owner’s consent.\(^\text{216}\)

The good faith of the acquirer is capable of ‘correcting’ (‘replacing’) the transferor’s missing right to dispose, but no other defects in the transfer transaction, such as lacking legal capacity, lacking power of representation, breach of good morals or a prohibition by law must exist.\(^\text{217}\) The effectiveness of acquisition depends on whether the real agreement concluded between the (unentitled) transferor and the acquirer suffered from any defect causing the voidness or voidability thereof (see sub 5.3. above). In all cases where the real agreement proves to be void with retroactive effect, the acquisition in good faith will be deemed not to have occurred.

\begin{footnotes}
\item[214] Expressly: § 95 (1') PropLA.
\item[215] Expressly: § 95 (1') PropLA.
\item[216] PÄRNA (2004), § 95 comm 5, p 197.
\item[217] PÄRNA (2004), § 95 comm 1, p 193.
\end{footnotes}
Furthermore, the circumstances of the conclusion of the transaction can play a role in determining whether the original owner had lost possession of the thing against his will. If the original owner surrendered the movable on the basis of a contract concluded under mistake, fraud, duress or gross disparity, the owner is deemed not to have lost possession against his will. If, however, force was used against the original owner to dispossess him of the thing, the owner is deemed to have lost possession unwillingly.\footnote{PÄRNA (2004), § 95 comm 5, p 197.}

### 14.5. Good faith

As follows from the wording of § 95 (1) PropLA, the acquirer needs to be in good faith regarding the transferor’s right to dispose. Good faith regarding the transferor’s right of ownership is thus not required. Good faith in the entitlement of the transferor to dispose of the thing in his own name, derived from the owner on the basis of a transaction, is sufficient. A mere belief in the transferor’s right of representation of the owner is not protected.\footnote{Supreme Court decision No 3-2-1-121-98 (December 2, 1998).}

The acquirer is in bad faith if he knew or should have known that the transferor was not entitled to transfer ownership.\footnote{§ 95 (2) PropLA.} Actual knowledge, as well as gross negligence, will thus exclude an acquisition in good faith. To prove bad faith, some indication that the acquirer was aware of the transferor’s lacking right of disposition should be made plausible.\footnote{Supreme Court decision No 3-2-1-118-02 (October 31, 2002).}

To acquire ownership, the transferee must be in good faith both at the time of the conclusion of the real agreement and at the time of the delivery of possession. \textit{Bona fide} must exist in respect of both elements of the transfer, even if they take place at different moments in time.\footnote{Supreme Court decision No 3-2-1-160-01; same opinion PÄRNA (2004), § 95 comm, 4 p 196.}

A presumption of good faith is set forth in § 139 General Part and § 35 PropLA. The \textit{bona fide} acquirer, therefore, does not have to prove that he was in good faith and, instead, the burden of proof lies on the opposite party who must prove that the acquirer was not in good faith.

### 14.6. Exclusion of things that ceased to be in the owner’s possession against his will

In case the goods had been stolen from or lost by the original owner, or he had been dispossessed thereof in any other manner against his will, the
acquisition in good faith by a third person is permanently excluded.\textsuperscript{223} The actual owner retains the position to revindicate the movable regardless of how many times it has been alienated in the interim.

The burden of proof regarding the cessation of possession occurring against the owner’s will lies on the owner. An owner is deemed to have lost possession unwillingly if a movable was alienated by a person with restricted legal capacity unable to understand the legal consequences of his act\textsuperscript{224} or a ‘servant in possession’. Giving up possession on the basis of a transaction concluded under a mistake or fraud is not considered to be an act of dispossession against the owner’s will, whereas surrendering the movable under duress or violence is.

In the case of movables that ceased to be in the original owner’s possession against his will, a person in good faith may acquire ownership pursuant to the provisions on acquisitive prescription. If the acquirer is not aware and is not supposed to be aware of the circumstances that hindered him from becoming owner of the movable on the basis of a transaction (as a result of the movable having been stolen from or lost by the actual owner etc), he will acquire ownership after the passing of five years (see Chapter 15 below).

### 14.7. Consequences of good faith acquisition

The result of good faith acquisition is that the transferee acquires full and unencumbered ownership of the movable. The legal position of the transferee is not restricted by the rights of the former owner or any other persons, except in cases of gratuitous transfer (see 14.2. above). The \textit{bona fide} acquirer can, therefore, freely dispose of a movable or exercise any other entitlement of an owner pursuant to § 68 PropLA. The original owner (A) will have lost all of his rights in the movable.

No right of the original owner to buy back the asset from the good faith acquirer has been provided for by law.

As a general rule, rights of third persons encumbering a thing will terminate upon the transfer of the ownership of the thing. However, the acquirer has to be in good faith as to such rights, meaning that he must neither be aware nor supposed to be aware of the existence thereof.\textsuperscript{225} The good faith of the acquirer is presumed.\textsuperscript{226} Due to the legitimising

\textsuperscript{223} § 95 (3) PropLA, PÄRNA (2004), § 95 comm 5, p 197.

\textsuperscript{224} Since the entry into force of the current version of the General Part of the Civil Code Act in 2002, Estonian law no longer recognises the category of full legal incapacity. The ability of a person to understand the significance of his acts, therefore, always has to be evaluated individually.

\textsuperscript{225} § 95 (1) and (3) PropLA.

\textsuperscript{226} § 139 General Part.
appearance of possession, the acquirer is supposed to be aware of the existence of an encumbrance if the thing is in the direct possession of a third person. In case the acquirer is in bad faith with regard to the encumbrance, the right of the third person will not terminate and will, thus, continue to encumber the thing also with respect to the new owner.

15. Acquisitive prescription of movables

15.1. Functions of acquisitive prescription

Acquisitive prescription is considered necessary to avoid uncertainty in civil commerce with regard to situations where a non-owner possesses a thing for a considerable period of time, whereas the actual owner of the thing is not known or the owner shows no interest in the thing.\(^{227}\) Prescription is generally applicable in all cases where the possessor, having obtained the possession of the thing on the basis of what appeared to be one of the recognised modes of acquisition (derivative or original), sees himself as the owner of the thing in good faith and is unaware that, in reality, ownership did not pass to him.\(^{228}\)

The main constellations, to which the rules on acquisitive prescription may be applicable, are:
- cases where good faith acquisition is excluded because the owner lost possession of the thing involuntarily;
- cases where a transfer has suffered from a defect, such as the lacking power of representation, failure to comply with the form requirements applicable to the transaction, a lacking right of disposal of the transferor, lacking legal capacity of the transferor;
- where possession is acquired without a transfer transaction: a person erroneously takes possession of goods that appear to have been abandoned, things mixed up, or things erroneously held to be part of a legacy;
- where the actual owner is not able to prove his ownership by any other means.\(^{229}\)

So far, no criticism on the regulation of acquisitive prescription has been expressed. On the other hand, the provisions have not been applied very often by the courts either. Thus, acquisitive prescription is not causing any note worthy controversy in the literature or legal practice.

\(^{227}\) PÄRNA (2004), § 110 comm 1, p 221.
\(^{228}\) BAUR/STÜRNER, p 663.
\(^{229}\) PÄRNA (2004), § 110 comm. 2, p 221.
15.2. Requirements for acquisitive prescription

PropLA § 110. Content of prescription
Movable property ownership is created by prescription if a person possesses a movable without interruption for five years as an owner.

PropLA § 111. Preclusion of prescription
(1) Prescription is precluded if a possessor is in bad faith.
(2) A possessor is in bad faith if upon obtainment of possession, the possessor knew or should have known that he did not acquire the thing by the obtainment of possession or if he became aware of this before the end of the prescription period.

Resulting from the above provisions, a person claiming the acquisition of ownership by acquisitive prescription has to comply with three requirements: (1) proprietary possession (possessing the thing 'as an owner'), (2) good faith and (3) lapse of time. The cumulative effect of the aforementioned criteria is to correct any hidden defect in the process of acquisition that would hinder the acquirer from becoming the owner of the thing.

As a general rule, all types of movables are subject to acquisitive prescription, insofar as no specific rules are applicable to certain types of movables. As outlined above, de lege lata the only movables for which a specific regime of acquisition has been created are registered ships.230

The proprietary possession of the acquirer must be uninterrupted. Both direct and indirect possession will suffice. Outwardly, the elements of acquisition (whether derivative or original) must have been realised so that the acquirer can believe in good faith that he has already become the owner of the thing – thus, in most cases he will need to have, at first, obtained physical control over the thing; an acquisition by obtaining indirect possession is only possible in the case of (putative) transfers by transactions. It is presumed that if a person possessed a thing at the beginning and at the end of a given period, he was also in possession of the thing in the meantime231 – in other words, the continuity of the acquirer’s possession is presumed.

230 In the case of registered ships, the rules on acquisitive prescription are similar to the corresponding rules concerning immovables, the periods of prescription being shorter. Pursuant to § 12 MPLA, a person entered into the ship register as owner of a ship, without a legal ground, will become its owner if he possesses the ship as his own without interruption and in good faith for a period of ten years. According to § 13 MPLA, a person who has possessed a ship in good faith for ten years and without interruption may demand that he be entered into the ship register as the owner of the ship.

231 § 112 (1) PropLA.
15. Acquisitive prescription of movables

The acquirer must be in good faith with respect to his (reputed) ownership, i.e., he is not to be aware nor supposed to be aware that ownership actually did not pass to him. In other words, acquisitive prescription can only take place unbeknownst to the acquirer as he believes in good faith that he has already become owner of the thing. The formulation ‘knew or should have known’ is the same as is used in the case of good-faith acquisition (§ 95 PropLA). The wording, thus, suggests that it takes gross negligence to preclude acquisitive prescription (as is the case where good-faith acquisition is concerned). The standard is the same, both at the time of obtaining possession and during possession. This also follows from the wording of section (2), as both cases are covered by it.

Good faith must be present at the time the acquirer obtains the possession of the thing and must be preserved throughout the prescription period. Good faith of the acquirer is presumed pursuant to § 35 (3) PropLA and § 139 General Part. In the case of movables, no possibility of acquisitive prescription in ‘bad faith’ is provided.

As already mentioned above, the acquirer is to possess the movable ‘as an owner’, i.e., as belonging to himself. This presupposes the corresponding intention (animus) of the possessor with regard to the movable. The possession is not to be based on arbitrary behaviour such as violence, deceit or concealment (nec vi, nec clam, nec precario) and must originally refer to another mode of acquisition (e.g., transfer by transaction, occupation) which, however, failed to establish ownership for the acquirer.

15.3. The period for acquisitive prescription

The period for acquisitive prescription is five years, starting from the moment the acquirer thinks he acquired ownership; typically, from ob-

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232 Presumption that the thing is possessed in good faith, i.e., the possessor does not know and is not supposed to know that his possession lacks a legal basis or that another person has a better right to possess the thing.

233 Pursuant to § 139 General Part, if legal consequences are attached to good faith by virtue of law, good faith shall be presumed unless otherwise provided by law.

234 In contrast, the acquisition of an immovable by prescription is also possible in ‘bad faith’ if a person has possessed an immovable for 30 years without interruption, and the immovable has not been entered into the land register or the actual owner of the immovable is not apparent from the land register, or if the owner had died before the acquirer took possession of the immovable and during 30 years no entries have been made in the land register that require the consent of the owner (§ 124 PropLA). In all of these cases, the acquirer cannot be in good faith as to his ownership of the immovable, as he must know that he has not been entered into the land register as the owner of the immovable (pursuant to § 55 PropLA, the land register is public and ignorance to information contained in the land register constitutes no defence).

235 PPARNA (2004), § 110 comm 3, p 222.
tainment of possession.\textsuperscript{236} Where, during the prescription period, the movable is transferred to another person on the basis of legal succession,\textsuperscript{237} the period of prescription of the predecessor is added to that of the new possessor.\textsuperscript{238} The requirement of good faith applies to both the predecessor and the legal successor during their respective periods of prescription.

Acquisitive prescription does not commence or is suspended as of the moment when the prescription period is suspended by reason of a claim for the protection of ownership of the actual owner of the movable.\textsuperscript{239} The grounds for such a suspension include: the filing of a claim for the protection of ownership in court, or arbitration or negotiations between the parties concerning the claim, an agreement with the entitled person (obligee) allowing the obligor to withhold the performance of his obligation, during force majeure, for the time the entitled person’s legal capacity is restricted and he has no legal representative, in the case of inheritance – until the heir accepts the legacy or the insolvency of the legacy is declared, or a legacy administrator is appointed.\textsuperscript{240} Prescription continues upon the cessation of the circumstances that caused the suspension thereof.

Prescription is interrupted if the possessor loses his possession or when the actual owner takes action to recover his position either by filing a claim against the possessor (either the direct or indirect possessor or a ‘servant in possession’ erroneously taken to be the possessor) or by commencing the exercise of his right of ownership with the acquiescence of the possessor. In the case of action taken by a reputed owner, prescription is only interrupted with respect to the person who caused the interruption. Prescription is not interrupted by a temporary hindrance in the exercise of possession or due to a loss of possession if the possessor lost the control over the movable against his will and recovers possession within one year, or as a result of an action filed within one year of losing possession. After an interruption of the prescription period, the running of the prescription period will re-commence. The time that had passed up to the

\textsuperscript{236} § 110 PropLA, PÄRNA (2004) § 112 comm 1, p 223.
\textsuperscript{237} Legal succession is understood as the passing of civil rights and obligations from one person to another, either on the basis of a transaction or the law – § 6 (1) and (2) General Part. Whereas the transfer of rights by transaction is known as particular legal succession, general legal succession denotes the passing of all alienable rights and obligations by one subject to another, eg in case of inheritance, mergers of companies etc.
\textsuperscript{238} § 112 (2) PropLA.
\textsuperscript{239} § 113 PropLA.
\textsuperscript{240} §§ 160-167 General Part.
moment of the interruption will not count towards the new prescription period.241

15.4. Consequences of acquisitive prescription

The original owner may have a claim for delivery or compensation against the acquirer by virtue of acquisitive prescription after the fulfilment of all requirements for prescription, in case there is a corresponding contractual relationship between them. For example, if the underlying obligation and the disposition were invalid due to the same defect, causing the acquirer to obtain merely the possession of the movable instead of acquiring ownership, he would have to re-transfer the movable to the original owner on the basis of the rules on unjustified enrichment.242 This view is based on the situation where the acquirer would have found himself, had ownership passed to him immediately: there is no reason to treat the acquirer better after the prescription period has elapsed. Where there is no contractual relationship between the original owner and the acquirer by virtue of acquisitive prescription and no unjustified enrichment can be construed from the circumstances of the case,243 the original owner will have no claim for compensation.244 The latter will mostly be the result in cases of original acquisition by virtue of law rather than transfers by transaction.

The rights of third persons encumbering the movable shall terminate upon the completion of acquisitive prescription, provided that such rights were established before the commencement of the prescription period. Such rights will, however, continue to exist if the possessor (the acquirer by virtue of acquisitive prescription) knows or ought to know about the right of a third person at the moment of his acquisition of possession, or if he becomes aware of such a right during the prescription period.245 Thus, if the acquirer is aware of the encumbrances and erroneously takes himself to be the owner of the movable, the encumbrances will remain in force even after the acquirer has actually become owner as a result of acquisitive prescription.

241  § 114 PropLA.
242  § 1028 (1) LObligA.
243  le there is no basis for claiming the restitution of what has been delivered for the purpose of performing a reputed obligation (§ 1028 LObligA), nor for a claim for compensation as a result of the violation of ownership by the conduct of the defendant without the consent of the owner (§ 1037 LObligA).
244  ERMAN-EBBING, § 937 VI 2 a) No 10 = Pp 3347-3348.
245  § 1141 PropLA.
15.5. Prescription of ownership

It follows from the definition of limitation contained in § 142 of the General Part that only claims (ie rights to claim, from another person, the performance of a certain act or a refraining therefrom) are subject to limitation; therefore, the right of ownership itself can not be terminated by limitation. However, the claims resulting from ownership, ie the actions for the protection of ownership, are subject to the general rules on limitation. According to § 155 (1) of the General Part, the limitation period for a claim for the recovery of property, ie revindication, is 30 years from the moment of accruing. Where the owner has failed to make use of his right to revindicate within the period of limitation, the actual possessor (the respondent) may subsequently refuse to hand over the thing to the owner. Thus, although the owner retains the right of ownership, he will largely and permanently lose the possibility to exercise his right. However, the 30-year limitation period does not apply to cases where the thing is possessed by a person in bad faith: according to § 155 (2) of the General Part, the right of revindication against a possessor in bad faith will not be limited. According to § 35 (2) PropLA, possession is in bad faith if the possessor knows or ought to know that his possession lacks a legal basis or that another person has a greater right to possess the thing.

The negatory action can be subject to § 149, according to which the period of limitation for ex lege claims for the refrainment from certain conduct or actions is 10 years, starting from the violation of the duty to refrain.

16. Other forms of original acquisition

In addition to the modes of acquisition outlined above, the following forms of original acquisition are regulated in the Property Law Act:

16.1. Finding

Finding, as a mode of acquisition, is mainly characterised by the (expected) awareness of the finder that he has found and taken a movable, belonging to another person, into his control. To acquire the status of a finder, the person who discovers a lost movable must take it into his possession and take action to return the movable to its actual owner, either by notifying the loser or actual owner directly (if known to the
other forms of original acquisition

Finder) or by notifying the police. If the movable is found in a residential building, public establishment or means of transport, the person who discovered the movable is required to deliver it to the house owner, a tenant, an employee of the corresponding establishment, the driver of the means of transport or the police; in which case, the latter is deemed to be the finder (§ 98 PropLA). The finder is further required to keep the found movable in a manner ensuring its preservation (§ 99 PropLA). If the finder has performed the obligations of the finder set forth by law, and the actual owner has not been identified within one year after the notification of the finding, the finder acquires the ownership of the movable. The main difference between finding and acquisitive prescription is the mindset of the holder of the movable: whereas, in the case of prescription, the acquirer already takes himself as the owner on the basis of another form of acquisition, a finder recognises that he has found a movable belonging to another person who has lost the movable unwillingly and without the intention to give up ownership.

A form of acquisition, comparable to finding and occupation, is the acquisition of treasure, defined as ‘money or valuables, such as gems, pearls or precious metals buried in the ground or hidden in any other manner whose owner cannot be ascertained.’ What is meant here are items that were obviously hidden a very long time ago, so that no one can claim to be legally entitled to the treasure. As a general rule, the treasure belongs to the person on whose immovable or movable it was found. However, the provisions on the acquisition of treasures may only be applicable in marginal cases, as special rules exist for treasures with a special value. Ownerless items with historical, scientific, artistic or other cultural value belong to the state, regardless of on whose immovable they were found.

16.2. Occupation

Movable ownership can also be created by occupation where a person takes possession of an ownerless movable with the intention of becoming its owner. A thing is considered ownerless if it has not yet been in the ownership of anyone or if the former owner has abandoned the thing with the intention of relinquishing ownership. Wild animals, when free in nature, are considered ownerless. However, in respect of occupation

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246 There is no duty of notification if the value of the movable does not exceed 100 EEK (ca € 6,5).
247 One year after taking possession of the thing if the value of the movable does not exceed 100 EEK (ca € 6,5).
248 § 103 (1) PropLA.
249 § 105 PropLA.
possible restrictions provided for by law,\textsuperscript{250} as well as rights of other persons, must be observed (§ 96 PropLA).

16.3. Acquisition of natural fruit (separation)

Natural fruits\textsuperscript{251} fall into the ownership of the owner of the thing bearing the fruit, or a possessor thereof who is entitled to acquire the fruits of the thing upon the severance of the fruit from the thing. Where a person entitled to acquire the natural fruit is not in possession of the thing, he acquires the ownership of the fruit by taking possession thereof.\textsuperscript{252}

\textsuperscript{250} For example, hunting laws which regulate and restrict the right to ‘occupy’ wild animals by hunting.

\textsuperscript{251} \textit{Ie} products of a thing (either immovable or movable) that originate from the thing by virtue of nature or with human assistance – § 62 (2) General Part.

\textsuperscript{252} § 115 PropLA.
17. Rules on the reservation of title

17.1. General concept

Reservation of title is defined in § 233 (1) LObligA:

LObligA § 233. Reservation of title
(1) If, upon the sale of a movable, it is agreed that the ownership of a thing remains with the seller until payment of the purchase price, ownership is presumed to pass to the purchaser upon payment of the full purchase price (reservation of title).

From the point of view of property law, the stipulation of a reservation of title in respect of the transfer of ownership of a movable signifies the conclusion of an unconditional (ordinary) sales agreement between the transferor and transferee, whereas the taking effect of the real agreement is made contingent upon a suspensive or resolutive condition – mostly the full payment of the purchase price by the transferee. The possession of the movable is usually delivered to the transferee already at the time the sales agreement and/or the real agreement are concluded. That way, all elements of a derivative transfer can be completed at once, whereby the transferor will remain the owner of the movable until his claim for the counter-performance is satisfied.

Pursuant to § 105 (1) General Part, the rights and obligations envisaged by a transaction concluded under a suspensive condition will take effect upon the occurrence of the event specified as the condition. Similarly, in the case of a contract concluded under a resolutive condition, the rights and obligations resulting therefrom will discontinue upon the fulfilment of the condition. If the full payment of the purchase price is

\[253\] Defined in § 102 (2) General Part: a transaction is entered into under a suspensive condition if the occurrence of the legal consequences envisaged by the transaction is made contingent upon an uncertain event.

\[254\] § 102 (3) General Part: a transaction is entered into under a resolutive condition if the discontinuance of the legal consequences arising out of the transaction is made contingent upon an uncertain event.
specified as the suspensive condition, the fulfilment of the condition depends on the behaviour of the transferee alone. Upon payment of the final instalment, ownership will pass to the transferee automatically.

There are no specific requirements to make the reservation of title effective in relation to third parties. In fact, the requirements for the conclusion of a reservation of title agreement are no stricter than those concerning the real agreement as such: even an implied agreement will suffice.

Until the occurrence of the condition, *ie* the full payment by the transferee, the transferor retains the full ownership of the movable. However, whereas the owner's rights to possess and to use the movable are restricted on a relative basis (as a consequence of the agreement between the transferor and the transferee, pursuant to which the movable is delivered to the latter), the transferor's right to dispose is restricted with general and absolute effect. The legal position of the acquirer before the point of time of the passing of ownership is protected by § 106 (2) General Part, pursuant to which dispositions made by the transferor during the pendency period\(^{255}\) are void upon fulfilment of the condition, if such dispositions preclude or restrict the occurrence of the legal consequences (such as the passing of ownership) envisaged for the moment of the fulfilment of the condition.

If the buyer does not pay the price as agreed, the seller can enforce his security (the retention of title) by terminating the sales contract, whereupon he will be entitled to reclaim the movable from the buyer.\(^{256}\)

### 17.2. Consequences of insolvency or execution proceedings

As a rule, execution proceedings affect movables that are in the direct possession of the debtor as they can be seized by the bailiff. In the case of execution proceedings against the conditional seller, the movable sold under retention of title will typically be in the direct possession of the purchaser (and, therefore, only in the indirect possession of the seller); thus, as long as the purchaser keeps paying the instalments and the sales agreement has not been terminated, the seller's creditors will have practically no access to the movable.

If execution proceedings are initiated against the conditional purchaser, the seller can rely on his ownership and intervene as a third party by claiming release of the movable.\(^{257}\)

\(^{255}\) *ie* the period of time between the conclusion of the agreement and the fulfilment of the condition – § 106 (1) General Part.

\(^{256}\) § 233 (2) LObligA. Termination of the sales agreement is necessary because, while valid, the agreement authorises the buyer to possess the movable.

\(^{257}\) §§ 73 and 222, Execution Proceedings Act.
Where the movable has already been delivered to the purchaser, the latter is entitled to adhere to the contract and claim the performance thereof. If the purchaser continues to pay the instalments as agreed, he will obtain ownership of the movable upon payment of the last instalment. The insolvency administrator then has no right of choice, as specified in § 46 Bankruptcy Act.258

In case the conditional buyer becomes insolvent, the insolvency administrator is entitled to determine whether to continue the performance of the debtor’s obligations arising from the contract or to refrain therefrom.259 If the insolvency administrator steps back from the performance of the insolvent purchaser’s obligation to pay, the conditional seller may claim the exclusion of the movable from the bankruptcy estate on the basis of his ownership.260

17.3. Reservation of title in case of specification, accession and commixture

The ownership of the new thing is decided on according to the rules on specification, accession and commixture respectively: in the case of specification – depending on the value of the work as well as the good faith of the processor; in the case of accession and commixture – co-ownership, or sole ownership if there is a ‘principal part’. The reservation of title can, in principle, only influence a derivative transfer by postponing the moment ownership passes to the transferee, but its effects do not include the prevention of original acquisition. Therefore, a reservation of title can no longer apply after ownership relations have been re-determined as a result of specification, accession and commixture, and will extinguish.261

17.4. Specific forms of reservation of title

An ‘extended reservation of title’ has hardly been dealt with in legal literature or court practice, but the legal framework speaks in favour of recognition of such construction, eg where the conditional purchaser is a business having at its object the resale of goods. The seller may give the purchaser his prior consent to have the goods resold in the course of normal business, whereas the purchaser, in advance, assigns his (future)

258 § 49 (1) Bankruptcy Act.
259 § 49 (2) Bankruptcy Act.
260 § 123 Bankruptcy Act.
261 § 107 (5) PropLA. PÄRNA maintains that a retention of ownership will extinguish upon specification, accession and commixture 'under certain circumstances', PÄRNA (2004), § 92 comm 10, p 186.
claims that he holds against his customers for the purchase price resulting from such resale. If the purchaser buys the goods under a reservation of title with the purpose of processing them, he will not acquire the original ownership of the newly created goods by reason of the good faith requirement (see 13.3 above); original ownership is created for the seller instead (§ 106 (2) PropLA) and, thus, an ‘extended reservation of title’ will not be necessary.262

18. Abandonment

Ownership of a previous owner terminates when the ownership passes to another person on the basis of a transaction, or if another person acquires the movable by virtue of law (including all forms of original acquisition provided for in property law as well as other fields of law, eg inheritance law). Ownership also terminates if the thing is completely destroyed. Further, the owner can terminate ownership by giving up the possession263 of the movable with the intention of relinquishing ownership (§ 96 PropLA). Such abandonment is viewed as a unilateral transaction that can be expressed directly or that can implicitly follow from the circumstances, such as throwing the thing away or leaving it behind knowingly. Other requirements concerning the validity of transactions (declarations of will), for example the rules on legal capacity, apply as well. To abandon ownership, the right to dispose over the thing is required. The right to relinquish ownership may be restricted by law, especially in the case of environmentally hazardous substances.264

262 Instead, the interests of the conditional purchaser of the material will have to be protected as the seller will have acquired both the ownership of the newly produced goods as well as the instalments. Specification will not affect the obligations of the buyer arising from the sales agreement, but in order to effect the transfer of ownership of the goods produced in the course of specification, an additional transaction will have to be construed. Such transfer may occur on the basis of an ‘anticipated’ real agreement, concluded by the implied conduct of the parties, as the newly produced goods will be in the possession of the purchaser (specifier) anyhow.

263 Termination of possession is regulated in § 39 PropLA: possession terminates if the possessor gives up his actual control over the thing or loses it in any other manner. However, a temporary impediment or interruption in the exercise of actual control will not terminate possession.

264 PÄRNA (2004), § 96 comm 3, p 203.
19. Rules on the transfer of co-ownership

Estonian law recognises two types of shared ownership, in other words ownership belonging to two or more persons concurrently: common ownership and joint ownership. The fundamental difference between these types of co-ownership is that, whereas in the case of common ownership, the legal shares of each co-owner are determined by fractions (e.g., 1/3 and 2/3), the shares in a constellation of joint ownership are not determined. In conformity with this basic difference, the rights of the co-owners with respect to the common asset differ in the degree of the independence granted to each co-owner in possessing and using it, as well as in disposing thereof.

19.1. Common ownership

Common ownership expressed in legal shares confers on each co-owner the position of an owner with respect to the relationship to his share vis-à-vis the other co-owners, having consideration to the rights of the other co-owners. Vis-à-vis third persons, a co-owner has all rights of an owner with respect to the commonly owned thing (§ 71 PropLA). A thing in common ownership may be transferred or encumbered as a whole, and the thing or its economic purpose may only be changed significantly by the agreement of all co-owners (§ 74 PropLA). On the other hand, a co-owner may freely dispose over his legal share without requiring the consent of the other co-owners. Other than that, the general rules on the transfer of ownership apply. In case the object of common ownership is a movable, the possession of the shared thing must be transferred to the acquirer in any of the recognised forms (depending, inter alia, on the consent of the co-owners concerning the possession and use of the shared thing – if the thing is being co-possessed by the co-owners, the transferee of the legal share should obtain a position similar to the other co-owners), and a real agreement concerning the transfer of ownership has to be concluded.

Common ownership can be terminated on the demand of any one of the co-owners, whereas each co-owner is generally entitled to demand termination at any time without the need to bring forward any specific reason for the termination. Upon the termination of common owner-

\[\text{§ 73 PropLA. Yet, in the case of the co-ownership of an immovable, the other co-owners have statutory rights of pre-emption with regard to the share being transferred, unless the share is transferred to a descendant or an ascendant of the transferor.}\]

\[\text{§ 76 PropLA. The right to demand termination of co-ownership can be excluded by an agreement between the co-owners, in which case termination may only be}\]
ship, the thing is divided according to the agreement of co-owners. If there is no agreement between the co-owners with respect to the manner of division, a court may decide, at the request of one of the co-owners, whether to divide the thing among the co-owners into physical shares, to give the thing to one or more of the co-owners, imposing on them an obligation to compensate the other co-owners for their shares in money, or to have the thing sold by public auction or an auction between co-owners and to divide the money so received between the co-owners according to the size of their shares. Division into physical shares is only possible if the nature of the thing allows for it; ie independently functional parts can be derived from the former whole.\(^{267}\) Where the thing is divided into physical shares but the value of these shares does not correspond to the value of the legal shares belonging to the co-owners, the court may order a monetary set-off for the purpose of the equalisation of the shares, or may encumber individual shares with a servitude benefitting the other shares. Where necessary, the division of shares having been ordered by the court may also, in practical terms, be effected by drawing lots.\(^{268}\)

19.2. Joint ownership

Joint ownership only applies in specific cases expressly provided for by law: firstly, it builds the basis of the statutory marital property law between spouses,\(^ {269}\) and, secondly, it applies to property acquired on the basis of a partnership contract.\(^ {270}\) The rules on disposition as well as termination and separation of joint property are autonomous for each type of relationship covered (marital property law, partnership law), but it is generally characteristic of joint ownership that, in order to dispose over a conjointly owned item, a corresponding declaration of will, made by all joint owners, is required. An individual joint owner is not entitled to dispose of his undivided interest. Other than that, the general rules on the transfer of ownership apply.

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\(^{267}\) PÄRNA (2004), § 77 comm 1, Pp 156-157.

\(^{268}\) § 77 PropLA.

\(^{269}\) § 14 Family Law Act provides that property acquired by either spouse during the marriage belongs to the joint property of both spouses.

\(^{270}\) Pursuant to a partnership contract, two or more persons (partners) undertake to achieve a mutual (common) objective and to contribute to achieving that objective in the manner envisaged by the contract, primarily by making contributions (§ 580 LObligA). Contributions made by the partners, as well as property acquired for the partnership, become the joint property of the partnership (§ 589 LObligA).
20. Further rules applying to unspecified goods

20.1. Transfer of shares in an identified bulk

As already pointed out above, bulks of things cannot be the object of a transfer due to the principle of determination/specificity expressly provided for by § 6 (3) General Part. It follows from this principle that shares in bulks cannot be transferred either: since only individual things can be the object of ownership, each individual thing (i.e. the ownership of it) must be transferred separately. This, however, does not exclude the disposition over a number of things simultaneously – provided that all things to be transferred are identifiable on the basis of the real agreement. The transfer of fungible things\(^{271}\) may in fact resemble the transfer of a bulk as treating each particle (e.g. a grain seed) as an individual movable would unnecessarily burden the commerce. Yet, the object of transfer in the case of fungible things is not a bulk but rather a plurality of things that, due to their character, are specified on the basis of numerical criteria.

The transfer of shares in the property is only known in the case of common ownership by shares (see Chapter 19 above). Otherwise, a transfer is possible after the partitioning of a bulk whereupon each fraction formed attains the quality of an independent asset.

20.2. Floating charge – commercial pledge

A floating charge, known as commercial pledge, is provided for by the Commercial Pledges Act.\(^{272}\) It is designed as a general pledge encumbering all movable property of a business, either of a private entrepreneur or a company, including both corporal and non-corporal assets, such as claims against third persons.\(^{273}\) The commercial pledge covers all eligible

\(^{271}\) § 51 (1) General Part: Fungible are things which lack characteristics distinguishing them from other things of the same type and which, in commerce, are specified according to number, measure or weight; such as grains, liquids, e.g. petrol, sand etc.

\(^{272}\) Entered into force January 1st 1997.

\(^{273}\) Certain types of assets, however, are excluded by law from the scope of the commercial pledge. Excluded are monetary funds (cash), shares in companies as well as other securities, forms of intellectual property, motor vehicles and aircrafts – the latter three types of property being covered by other forms of registered pledge. Also excluded from the scope of the floating charge are accessories of an immovable covered by a mortgage, even where the mortgage is created after the emergence of a floating charge (priority of the mortgage). Pursuant to § 57 (3) General Part, it is presumed that mortgage will also encumber the accessories of the immovable, unless otherwise provided by law or stipulated by a contract (see also sub 1.5.3. above). Further excluded are movables encumbered by a possessory pledge (pawn) and property excluded by law from the proceedings of compulsory execu-
property belonging to the entrepreneur at the time of encumbrance as well as property acquired thereafter.\textsuperscript{274} Thus, the commercial pledge is an exception from the general principles of property law, according to which rights in rem can only arise and exist with regard to a particular, individual asset. A commercial pledge arises upon the conclusion of a real agreement relating thereto and a subsequent entry of the pledge in the register for commercial pledges, which is maintained in accordance with the procedures concerning the Commercial Register. Delivery of the encumbered property to the pledgee (the creditor) is not required. Neither does the commercial pledge presuppose the existence of a claim that is to be secured – it is a non-accessory type of pledge.

The business encumbered by a commercial pledge can continue to operate within the framework of its regular economic activity. Insofar as the regular trade of the business involves the sale of goods, such activity may continue to the usual extent (\textit{i.e.} the usual sales volume). Goods sold within the boundaries of regular trade, with respect to the sales volume, will be released from the scope of the commercial pledge upon their transfer to the buyer. If the transferee was in good faith as to the entrepreneur’s entitlement to dispose of the asset, the pledge will terminate even if the disposition exceeded the limits of regular economic activity.\textsuperscript{275} At the same time, new assets acquired by the pledgor during the existence of the commercial pledge will fall under the scope of the pledge from the moment their ownership is transferred to the pledgor.

Where the pledgor alienates the whole business, or a part thereof forming an organisational whole (an installation), the commercial pledge encumbering the assets shall not terminate with respect to those assets and will continue to encumber the property with respect to the new owner.\textsuperscript{276}

In the case of insolvency or execution against the pledgor, the pledgee may demand the satisfaction of his claim out of the property encumbered by the commercial pledge to the extent of the pledge limit,\textsuperscript{277} whereas claims secured by a pledge rank first in bankruptcy. If the encumbered property is intended to be used for the satisfaction of a claim not secured by a commercial pledge or of a claim of a commercial pledgee with an inferior ranking, the higher-ranking pledgee may demand the satisfaction of his claim, prior to the claim(s) of the creditor for whose benefit the execution proceedings were initiated, from the proceeds of the compulsory sale of the property or the result of any other method of liquidation.

\textsuperscript{274} § 2 Commercial Pledges Act.
\textsuperscript{275} § 5 Commercial Pledges Act.
\textsuperscript{276} § 6 Commercial Pledges Act.
\textsuperscript{277} \textit{i.e.} the maximum amount for which the pledged property constitutes a security. Such pledge limit must be agreed upon between the parties.
of the property even if his claim was not yet physically recoverable. Such right to satisfaction is only excluded if the property, remaining after satisfaction of the other claim, fully covers the claim of the pledgee.\textsuperscript{278}

\section{Consequences of restitution of the movable to the owner}

\subsection{Typification of cases}

The consequences of the restitution of the movable to the owner are somewhat different, depending on the type of legal relationship on which the restitution is based. It is to be distinguished between claims of the owner resulting from an expired contract, a failed contract (unjustified enrichment) or claims in cases where there is no predetermined relationship between the parties.

1. The first group – restitution after the expiry of the legal basis – involves cases where the movable (possession thereof) was transferred on the basis of a valid legal relationship (such as a lease contract), whereas such legal relationship has expired due to the lapse of time or another (resolutive) condition. In cases of contractual relationships allowing a non-owner to possess a movable, the particularities of restitution are mostly included in the provisions concerning that type of contract.\textsuperscript{279}

2. The second group covers cases of unjustified enrichment where the movable was originally transferred with the purpose of performing an obligation, whereas the obligation does not actually exist, does not arise or ceases to exist – including void and avoided contracts on transfer or use (in short, defect in the legal basis). In such cases, provisions on unjustified enrichment apply.\textsuperscript{280}

3. The third group involves cases of an owner-possessor-relationship in the stricter sense, where the relations between the owner and the possessor are neither based on a preceding contractual relationship (restitution after expiry of the legal basis), nor are the provisions on unjustified enrichment (defect in the legal basis) or \textit{negotiorum gestio} applicable. Such cases are covered by §§ 84-88 PropLA.\textsuperscript{281} The latter provisions provide certain modifications to the general law on torts and unjustified enrichment.

\begin{itemize}
\item \textsuperscript{278} § 10 Commercial Pledges Act.
\item \textsuperscript{279} For example, in the case of a lease contract, the return of the leased thing upon the expiry of the contract is regulated in §§ 334-338 LObligA.
\item \textsuperscript{280} § 1028 \textit{et seq} LObligA.
\item \textsuperscript{281} Such a conclusion may be drawn from the decision of the Supreme Court No 3-2-1-136-05 (December 20, 2005).
\end{itemize}
The third group has a relatively small sphere of application in two-party constellations, as most cases will be solved either pursuant to the rules concerning restitution after the expiry of or a defect in the legal basis. If the owner has surrendered the movable voluntarily, it will usually have occurred with the purpose of performing an actual or a putative obligation, whereby the question of restitution as the result of a defect in the legal basis (eg *condictio indebitti*) may arise. Where the owner has lost possession of the movable involuntarily, rules on unjustified enrichment (compensation in the event of a violation of the right – aka the ‘condiction against intervention’)[282]) will apply in most cases. The third group has a broader sphere of application in three-party constellations where there is neither a preceding contractual bond nor a relationship of unjustified enrichment or *negotiorum gestio* between the owner and the third party possessor – typical examples are the (1) alienation of the movable by an original owner to a new owner while the original owner had undischarged legal relations with a third party (possessor), and (2) the disposition of a thing by an unentitled person without the consent of the actual owner.

21.2. Entitlement to benefits (fruits) resulting from the movable

According to § 62 General Part, benefits deriving from an object are defined as fruits of the object and the advantages resulting from the use of the object (advantages of use). Natural fruits (ie products of the thing having come into existence by virtue of nature or with human assistance)[284] and civil fruits (income receivable from a thing or a right in accordance with the purpose thereof, or as a consequence of a legal relationship)[285] are distinguished. Pursuant to the general rules, if a person has the right to receive the fruit of a thing or right for a certain period of time, the products severed and the income received from the thing or right during such period belong to that person. In the case of periodical income, the entitled person will receive such part of the fruits that corre-

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282 In German: *Eingriffskondiktion*.
283 Same opinion: Pärna (2004), § 85 comm 1, p 172. §§ 1037-1040 LObligA: A person who violates the right of ownership, another right or the possession of an entitled person by disposal, use, consumption, accession, confusion or specification thereof or in any other manner without the consent of the entitled person (a violator) shall provide compensation in the amount of the usual value of anything received by the violation to the entitled person.
284 § 62 (2) General Part.
285 § 62 (3) General Part.
sponds to the period of time of the entitlement. The acquisition of natural fruits of a thing is specifically regulated by § 115 PropLA.

21.2.1. Two-party constellations

In the case of expired contractual relations, the allocation of fruits may be specifically covered by the provisions on the ‘liquidation’ of the contract after expiry, otherwise depending on whether the conduct of the party no longer entitled to use the movable constitutes a violation of ownership within the meaning of § 1037 LObligA. If such a party (possessor) keeps using the movable, he will be obliged to pay compensation to the owner in the amount of the usual value of the benefits received as a result of the use. According to § 1039 LObligA, the owner may further claim, from a possessor in bad faith (who is or should be aware of the lack of entitlement with regard to the movable), the transfer to him of any revenue received as a result of the violation, in addition to the usual value of the actual receipts.

In cases of a defect in the legal basis (eg voidness or avoidance of the contract on the basis of which a movable was transferred), § 1028 et seq LObligA will apply:

§ 1028. Bases for reclamation of that which is received as result of performance of obligation

(1) If a person (recipient) who has received something from another person (transferor) with the purpose of performing an existing or future obligation, the transferor may reclaim it from the recipient if the obligation does not exist or does not arise or if the obligation ceases to exist later. […]

Anything received plus any gains (profits) gained are covered. In the event of the destruction or consumption of, damage to or seizure of the transferred object, the owner may claim the transfer to him of what the transferee acquired by way of compensation for the object (§ 1032 LObligA).

286 § 62 (4) General Part.
287 § 115 specifies the moment as of which the ownership of the natural fruits is created. The owner of the thing or possessor of a thing belonging to another, who is entitled to the natural fruits of the thing, acquires ownership of the fruits as of the moment of the severance of the fruits from the thing. A person not in possession of the thing but entitled to the fruits acquires the fruits as of the moment of taking the fruits into his possession. See also Chapter 14 (other forms of original acquisition).
288 Such as § 360 LObligA in the case of the expiry of a commercial lease of an agricultural immovable, pursuant to which the lessee is not entitled to the fruits that have not been severed at the moment of the expiry of the commercial lease contract, but may claim compensation for expenses incurred in attempting to obtain the fruits.
The transferee is relieved from the duty to return what he received on the basis of the contract and from compensating for the value thereof in the case of the discontinuance of enrichment. However, this defence is generally not applicable in the case of synallagmatic contracts. Moreover, the discontinuance of the enrichment will not relieve the transferee if, at the time of transfer, the transferee knew or should have known about circumstances constituting the basis for the reclamation, pursuant to provisions on unjustified enrichment. Further, the defence of the discontinuance of the enrichment is not applicable where destruction, consumption or damaging of the assets has occurred after the transferee became aware or should have become aware of circumstances constituting a basis for a reclamation pursuant to the provisions on unjustified enrichment. If the transferee was aware or should have been aware of such circumstances, either at the time of transfer or before the discontinuance of the enrichment took place, the transferee is liable to deliver to the transferor the gains derived from the asset received, to pay interest in case money was received, and to provide compensation for any unmade profits that the transferee could have gained as a result of regular economic activity (management).

In cases of the involuntary loss of possession of the movable by the owner, e.g., theft, the rules on the condition against intervention (§§ 1037-1040 LObligA) will usually apply. The person who violated the owner's rights by the disposition, use, consumption, conjoining, commixture, specification or by other means is liable to compensate to the owner the usual value of what he received as a result of the violation. The violator is relieved from such duty if he was not aware nor was supposed to be aware of his lack of entitlement with regard to the movable, insofar as he is no longer enriched by the value gained as a result of the violation by the time he learned about the filing of the compensation claim against him. A violator in bad faith (i.e., violator who knew or should have known of his lack of entitlement with regard to the movable) is further liable to deliver the fruits (benefits) received in addition to the usual

289 Pursuant to § 1033 (1) LObligA, the receiver (transferee) is relieved from the duty to return the assets received or to compensate the value thereof, to the extent he is no longer enriched by the assets or their value as a result of destruction, consumption, damage or another reason.

290 In the case of the voidness of a synallagmatic contract, the transferee may only rely on the discontinuance of enrichment if the voidness of the contract results from the restricted legal capacity of the transferee or the contract was concluded under duress (threats or violence) on the part of the transferor – § 1034 (1) LObligA.

291 § 1035 (1) and (2) LObligA.

292 § 1035 (3) LObligA.

293 § 1038 LObligA.
value gained as a result of the violation. A person having obtained possession by way of arbitrary action is additionally required to compensate for such profits, which the owner would have received, had the owner been in possession of the thing.

21.2.2. Three-party constellations

The provisions of the PropLA, concerning the delivery of and the compensation for fruits in an owner-possessor relationship (§ 85), make an explicit reference to §§ 1037-1040 LObligA, ie the provisions on the condition against intervention (see above). Thus, the same rules apply to the relations between the owner and the violator of the owner’s rights, as are also applicable to the relationship between the owner and a (third party) possessor who are neither bound by a contractual nor a non-contractual relationship.

In case an unentitled person has disposed of the movable without the consent of the actual owner and the disposition is invalid, the owner may, instead of directing his claims against the third party possessor, demand compensation of the usual value of that what the latter received from the unentitled person, if he approves of the disposition, thus validating it. However, in the case of a gratuitous transfer by an unentitled person, the third party acquirer is required to deliver what he received to the actual owner (the entitled person), even if the disposition was valid; ie even if the conditions for good faith acquisition were met. The acquirer in good faith may rely on the defence of the discontinuance of the enrichment, whereas a bad faith acquirer, who knew or should have known that he did not acquire a right to the movable, is additionally required to deliver the benefits (fruits) derived from the movable to the entitled person.

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294 § 1039 LObligA. As regards the burden of proof concerning good faith, the general rule of § 139 General Part applies, pursuant to which good faith is presumed unless otherwise provided by law. The same follows from § 35 (3) PropLA. Thus, an owner asserting the bad faith of the possessor has to prove that the possessor was not in good faith.

295 § 85 (2) PropLA.

296 Ie the requirements for good faith acquisition are not met.

297 § 1037 (2) LObligA.

298 § 1040 LObligA.
21.3. Loss and deterioration of the movable

Upon the expiry of a contractual relationship, on which the possession is based, the liability for loss and deterioration may, as in the case of benefits (fruits), be specifically regulated by the provisions on that type of contract. For example, a lessee must return the leased thing, after the expiry of the contract of lease, in a condition conforming to the contractual use of the thing. The lessee is liable for the destruction and loss, as well as deterioration of the leased thing that occurred while the thing was in his possession, unless he proves that the loss or deterioration resulted from circumstances not attributable to him. The lessee is not liable for the natural wear or deterioration of the thing, or for changes which accompany the contractual use.299

In the case of a defect in the legal basis (condictio indebiti etc), the recipient (transferee) is required to compensate the transferor for damage resulting from the loss or deterioration of the thing, where such loss or deterioration was caused due to the fault of the transferee, provided that the transferee knew or should have known about circumstances constituting a basis for reclamation pursuant to the provisions on unjustified enrichment.300

In case the owner has lost possession of the movable involuntarily, the possessor may be liable according to the law of torts (delicts). In two-party constellations, this would mean that the possessor qualifies as a tortfeasor – ie person having caused unlawful damage to another person (victim) intentionally or negligently, or being otherwise accountable for the causation of the damage.

If the possessor is not liable for the loss or deterioration on the basis of tort law, as well as not otherwise liable in a three-party constellation, § 84 PropLA applies. Pursuant thereto, the possessor's liability for the destruction or deterioration of the thing depends on whether the possessor was in good or bad faith when the damage occurred. A possessor in bad faith is liable in accordance with the law of torts, ie for the unlawful causing of damage (§§ 1043 et seq LObligA), whereas a possessor in good faith is only liable for such damage that has occurred due to him, after becoming aware that the owner filed a claim for damages. A possessor, who acquired possession of the movable by way of arbitrary action, is liable for the destruction and deterioration of the movable, except where such destruction or deterioration would have even occurred in the case of the movable being in the possession of the owner.

299 § 334 LObligA.
300 § 1035 (4) LObligA.
21. Consequences of restitution of the movable to the owner

21.4. Reimbursement for improvements and expenses

The types of expenses made on an object are defined in § 63 General Part. Expenses made on an object are classified as follows:

1. necessary – if the object is thereby preserved or protected from complete or partial destruction;
2. useful – if the object is thereby significantly improved;
3. sumptuary – if the primary objective thereof is the comfort, amenity or beauty of the object.

In the case of contractual relations allowing for the possession (and use) of an asset belonging to another person, the allocation of expenses incurred and improvements made are often governed by a special regulation applicable to that type of contract. For example, in the case of a lease contract, the right of the lessee to make improvements to the leased object is regulated by lease law; in general, the consent of the lessor is required. If, upon the expiry of a lease contract, it becomes evident that the value of the object has increased considerably as a result of the improvements or alterations, made with the consent of the lessor, the lessee may claim reasonable compensation therefor. The lessee may claim compensation for expenses incurred without the consent of the lessor pursuant to the provisions regarding negotiorum gestio.301

Incurring expenses without a legal ground with regard to an object, belonging to another person, constitutes an independent basis for a claim ex unjustified enrichment (§ 1042 LObligA). This provision applies where the allocation of expenses is not covered by a contractual relationship between the parties.

LObligA § 1042. Claim for reimbursement of expenses

(1) A person who incurs costs with regard to an object of another person without a corresponding legal basis may demand compensation of the costs to the extent to which the person on whose object the costs are incurred has been enriched thereby, taking into consideration, inter alia, the fact of whether such costs are useful to the person and the intent of the person with regard to the object. Determination of the extent of enrichment shall be based on the time when the person with regard to whose object costs are incurred has the object returned or is able to begin to use the increased value of the object in any other manner.

(2) A person who incurs costs has no right of claim provided for in subsection (1) of this section if:

1) the person with regard to whose object costs are incurred demands the removal of improvements made by means of the incurred costs and if

301 § 286 LObligA.
the removal of such improvements is possible without causing damage to the improvements;
2) the person who incurs costs fails, due to circumstances for which he is responsible, to notify the other person in time of the intent to incur costs;
3) the person with regard to whose object costs are incurred has contested the incurrence of the costs in advance;
4) the incurrence of costs with regard to the object is prohibited arising from law or the contract.

In the case of a *condictio indebiti*, if the transferee believed in the continuation and has incurred costs on the object on the basis of his belief, he is only required to deliver the assets received or provide compensation in the amount of the value thereof, if he receives compensation for such costs in return. However, this defence is not available, where the transferee knew or should have known, at the time of transfer, of circumstances constituting a basis for the reclamation pursuant to the provisions on unjustified enrichment (*condictio indebiti*). Nor is the transferee entitled to keep the assets received if the costs were incurred after he became aware or should have become aware of such circumstances.

The right of a possessor, from whom the movable is revindicating on the basis of § 80 PropLA, to receive compensation for expenses incurred is further specified in § 88 PropLA. Pursuant thereto, a possessor is entitled to claim reimbursement of necessary expenses he has incurred on the thing, unless he obtained possession by way of arbitrary action. Other expenses (useful and sumptuary) can be reimbursed, if the requirements of § 1042 LObligA (unjustified enrichment – see above) are met. Instead of compensation the possessor may remove the improvements made on the thing, provided that the thing can be returned to the owner in its previous condition.

21.5. Possessor’s right to retain the movable

The possessor’s right to retain the movable as a ‘security’ for the reimbursement of expenses or other similar claims may be based on various grounds, depending on the type of legal relationship existing between the owner and the possessor.

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302 § 1033 (2) LObligA.
303 § 1035 (1) and (2) LObligA.
304 § 80 PropLA is the legal basis of a claim of the owner against anyone possessing a thing belonging to the owner without a legal ground.
21. Consequences of restitution of the movable to the owner

Again, such right may be derived from the provisions governing the concrete type of contract. For example, in the case of a lease contract, the lessee may retain the leased object until such expenses incurred by the lessee, which he is entitled to claim from the lessor, have been reimbursed.\(^{305}\)

In the case of a defect in the legal basis (\textit{condictio indebiti etc}), the possessor's right to retain the movable is specifically regulated with regard to synallagmatic contracts. If a synallagmatic contract is void, the parties are required to retransfer what they received on the basis of the contract, or to provide compensation in the amount of the value thereof simultaneously. Either party is entitled to withhold performance until the other party has performed, offered to perform, or secured or confirmed the performance.\(^{306}\)

Where there is no relationship ex unjustified enrichment between the parties, the right of the possessor to retain the movable until the owner reimburses the expenses incurred may be derived from § 110 LObligA. The prerequisite for such a right of retention is the existence of a sufficient link between the claim (for compensation or similar) and the obligation to deliver the movable.\(^{307}\)

21.6. Allocation of the expenses of the movable's restitution to the owner

The question of the expenses of restitution is specifically regulated for the case of claims based on unjustified enrichment (\textit{condictio indebiti etc}). Pursuant to § 1033 (3) LObligA, costs related to the redelivery of what was received, costs incurred when compensating for the value thereof, and the risk of accidental loss of or damage to what is to be redelivered is borne by the transferor. In the remaining cases, the general rule of § 90 LObligA applies, pursuant to which the obligor is to bear the costs relating to the performance of his obligation.

\(^{305}\) § 334 (3) LObligA. The right of the lessee to incur expenses and claim the reimbursement thereof are regulated in §§ 285-286 LObligA.

\(^{306}\) § 1034 (3) LObligA in conjunction with § 111 (1) LObligA.

\(^{307}\) Supreme Court decision No 3-2-1-136-05 (December 20, 2005). According to § 110 LObligA, a sufficient link is deemed to exist between the claim and the obligation, primarily if the obligations of the obligor and the obligee arise from the same legal relationship, a prior regular relationship between the obligor and the obligee, or from another sufficient economic or temporal relationship.
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<td>Comm.</td>
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<td>General Part</td>
<td>General Part of the Civil Code Act</td>
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<td>PropLA</td>
<td>Property Law Act</td>
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<td>LMPA</td>
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<td>LObligA</td>
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National Report on the Transfer of Movables in Italy

Alessio Greco
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I. Ownership and other property rights

I.1. General basics

I.1.1. The Italian codification, sources and structure of the Italian property law

The French *Code Civil* undoubtedly affected the codification of the Civil Law in Italy. Indeed, during the short Napoleonic domination, a translation of the *Code Civil* came into force. Then, after the fall of the Napoleonic empire and the European restoration, the *Code Civil* was immediately abrogated; however, it was immediately clear that reverting to the traditional canon and Roman law origins would be quite unsatisfactory. Consequently, the local authorities in Italy enacted new Civil Codes, which were basically modelled on the French Civil Code. Accordingly, it is fair to say that during the Italian ‘Risorgimento’ the French legal model was still predominant: whereas, at the beginning, the French legal model inevitably had to be accepted as a consequence of the Napoleonic conquests, but its spontaneous revival thereafter was due to its legal prestige. In fact, although the Italian pre-unitary states wanted to free themselves from the French influence, they wanted to endow themselves with efficient institutions and a more modern code, which could reflect the liberal ideals of the time better. Due to this close similarity between the French *Code Civil* and the different civil codes, which existed in the whole of Italy, the Italian jurisprudence did not have any problem of accepting comments and opinion of French scholars.

The first *Codice Civile* was elaborated after the Italian Unity and was enacted in 1865. As could be anticipated, the *Codice Civile* was quite similar to the *Code Napoléon*, the former adopting the structure of the latter: it was divided into three books; the first was *Delle persone* (On the

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1 The only exceptions were the Grand Duchy of Tuscany, the Papal States and the Kingdom of Lombardy-Venetia. The latter, being influenced by the Austrian Habsburg dynasty, adopted the ABGB, whereas the other two kingdoms returned to their pre-Napoleonic legal system.

2 A clear symptom of this phenomenon is the translation of all of the most famous treatises of the *École de l’Exégèse* into Italian.
1. Ownership and other property rights

person); the second *Dei beni, della proprietà e delle sue modificazioni* (On goods, on property and on property’s modification), the third *Dei modi di acquistare e di trasmettere la proprietà e gli altri diritti sulle cose* (On the way of acquiring and transferring property and other rights in goods).

However, at the end of the XIX century and the beginning of the XX century no substantial reforms had been carried out; consequently, it was considered necessary to find new models that were able to fill the gaps in the law without necessarily having to wait for the intervention of the legislator.

In this regard, the German pandectistic methodology was considered more rigorous and efficient than the French exegetic methodology. On the one hand, the Pandectistic School brought to light Justinian Roman Law and it was seen as a defence of one’s own origins and national pride; on the other hand, the pandectistic methodology developed a kind of reasoning, which supports the use of concepts such as subject, corporate personality (*personalità giuridica – Rechtspersönlichkeit*) legal relationship (*rapporto giuridico – Rechtsverhältnis*), defects of legal intent (*vizi della volontà – Willensmängel*) and facts (*fattispecie – Tatbestand*) in the interpretation of the law. The traditional interpretative instruments (literal interpretation, the intention of the legislator, etc. …) were, hence, integrated into instruments of a systematic nature (analogy, the use of general principles of the legal system, the policy of the law (*ratio legis*), etc. …).

The dogmatic methodology, therefore, did not conflict with the centralised Italian legal system. Indeed, scholars proposed the re-systematisation of the system, starting with the written law, *i.e.* the norms. They were not going to question the authority of the legislator, but they were going to give a certain authority to the scholars, whose duty was to organise and rationalise the law. The norms are the basis of the elaboration of concepts and general institutes, to which an unlimited series of concrete facts can be applied.

The profound changes and innovations in the Italian legal culture, together with the political changes, and the wish of the new Fascist government to affirm its own authority persuaded the legislator to enact a new *Codice Civile* in 1942.

In particular, Fascism considered the *Codice Civile* as being a form of legal monument to pass on to posterity, as had previously been the case with the *Code Napoléon*. The *Codice Civile* was completed in a short time. There was war and the code could probably facilitate the fascist propaganda, but the quickness with which it was enacted marginally damaged its systematic nature: especially the last book provided norms, which lacked systematic coherence. However, the originality of this code was to
unify both the Civil Law and Commercial Law\(^3\) in one text, which had been – up to that time – contained in two different Codes.\(^4\)

The Codice Civile of 1942 reminds – in its basic structure – of the Codice Civile of 1865 and, hence, is very close to the French legal model (e.g. the centrality of the law in the system of legal sources, the system of Property Law and Tort Liability, etc. …), but the language and concepts clearly derive from the Pandectistic model. It is, therefore, evident how much influence the two systems, the French and the German one, have had on the Italian Civil Law and the structure of the Codice Civile.

The Codice Civile of 1942 was still used after the end of World War II, its general layout being substantially liberal. However, from 1942 until now, the Codice Civile has been subject to many modifications and additions, imposed by the necessity to adapt it to the principles of the Constitution that was enacted in 1948. The principles of democracy, solidarity, equal protection, and social justice are the foundations of the Italian State. Consequently, all lower-ranking norms have to conform to these principles, on pain of unconstitutionality. Accordingly, those parts, which were affected by Fascist ideology, were expunged by legislative interventions and the Constitutional Court followed the legislator in its case law.\(^5\)

The modern Codice Civile can be divided into 8 parts:
1. General Part (Disposizioni sulla legge in generale);
2. Individual Rights and Family Law (Libro I – Delle persone e della famiglia);
3. Succession Law (Libro II – Delle successioni);

\(^3\) Such unification is quite particular to the Italian legal system: in fact, in the other Civil Law jurisdictions (e.g. Austria, France, Germany, France, Spain, etc. …) the separation between these two codes is maintained.

\(^4\) The Codice di Commercio (Commercial Code) was enacted in 1882, as consequence of the progressive modernisation and industrialisation of the Kingdom of Italy.

\(^5\) Many legislative interventions, international agreements, and EU law have modified, and have been integrated into, the code to such extent that the Italian Civil Law system is not exclusively contained in the Codice Civile. However, as concerns the field of Property Law, the Codice Civile was not subject to huge modifications in the last years. Consequently, nowadays Property Law is entirely regulated by the Codice Civile. Unfortunately, the Italian Government does not provide any official English translation of the Codice Civile, but an update online version of the code in Italian is available either on http://www.altalex.com/index.php?idnot=34794 or on http://www.jus.unitn.it/cardozo/Obiter_Dictum/codciv/Codciv.htm. An unofficial paper version of the Codice Civile translated into English is published by Oceana Publications (The Italian Civil Code and Complementary Legislation [edited by Susanna BELTRAMO], Oceana Publications, 2005). Finally, I would like to acknowledge that only a minor part of the enormous amount of literature on the subject could be taken into account in describing how transfer of movables works in the Italian legal system, but I hope that the sources cited are representative of the Italian legal doctrine.
1. Ownership and other property rights

4. Property Law (Libro III – Della proprietà);
5. Law of Obligations and Contract Law (Libro IV – Delle obbligazioni);
6. Labour Law and Company Law (Libro V – Del lavoro);
7. Protection of Individual Economic Rights (Libro VI – Della tutela dei diritti);
8. Implementing Provisions (Disposizioni per l’attuazione del Codice Civile e disposizioni transitorie).

For this report, the rules of Property Law are of principal interest. As mentioned above, in the Codice Civile Property Law provisions are provided in Book III art(s) 810-1172 (definitions, ownership, building lease, emphyteusis (long lease), life tenancy, right of use, housing right, servitudes, co-ownership, possession), and in Book VI art(s) 2643-2696 (registration), art(s) 2740-2906 (civil liability, grounds for priority among creditors or for the preservation of debtor’s assets) and art(s) 2907-2933 (mainly dealing with execution). There are no specific provisions of law concerning the ownership of movables and it is fair to say that the rules on movable and immovable property mostly follow common principles.

However, although Book III of the Codice Civile has rarely been affected by law reforms and the concept of property is not considered as one of the inviolable rights of human beings, the Italian Constitution mentions the principle of the ‘social function’ of property. According to this principle (art. 42(2) Const.), the law establishes the manner in which to acquire, enjoy and limit property, in order to guarantee its social function and to make it accessible to everyone. Therefore, the concept of social function has to be understood as a ‘way to promote a general improvement of conditions for human being’. In the legislator’s mind, there was (and there still is) the idea of limiting the owner’s power in order for the community to benefit from the goods (e.g. to support tourism, to create new jobs, to protect the environment, to foster the productivity of the goods, etc. …). However, even if the Constitution provides for a concept of property in sense of social solidarity, it is then the law that has to coordinate the relationship between the general public interests and the private ones. The legislator’s task is, consequently, to impose – where this is possible – a legal constraint, which guarantees the social utility of the goods and allows the owner to enjoy her own property right. Obviously, the solidarity principle of property is relativised by the fact that the Constitution, in art. 42, guarantees the existence of property rights. This means that the State cannot discretionarily limit property rights unless it pays an indemnity.

Finally, as to the relevance of ‘case law’ in general, the Corte di Cassazione’s decisions (i.e. the Italian Supreme Court’s decisions) are not binding for the lower courts’ judgments in analogous cases; courts are only bound by statutory law. However, in case the Corte di Cassazione decides in the Sezioni Unite (i.e. Unified Divisions), the decision has such authority as to be considered a ‘binding precedent’ (stare decisis principle), a concept quite strange to the Italian legal system. In case the decision is reached by a division of the Corte di Cassazione, this decision is intended to have a persuasive and exemplary value and it serves a didactic purpose for all judges in the system. The function of such a decision is called nomofilachia, by means of which the Corte di Cassazione tries to harmonise the jurisprudential interpretation of those laws, whose hermeneutic application is more ambiguous.

1.1.2. Characteristics of property rights
(rights in rem vs obligations propter rem)

The Italian expression diritti reali (hereinafter rights in rem) indicates the ‘absolute and direct’ power, which is conferred on someone over an object. The rights in rem are divided into rights in rem for enjoyment purposes (diritti reali di godimento) and rights in rem for security purposes (diritti reali di garanzia). The most notable right in rem for enjoyment purposes is ownership. Nonetheless, the owner’s right to enjoyment can be limited by other people’s rights: this is called right in rem in another person’s goods (diritto reale su cosa altrui). Such rights are the building lease, emphyteusis (long lease), life tenancy, right of use, housing right, and easements. The rights in rem for security purposes are the pledge and the mortgage.

A characteristic of rights in rem is the contextual presence of ‘immediacy’ (immediatezza), ‘absoluteness’ (assolutezza), and ‘inherence’ (inerenza). ‘Immediacy’ indicates that the goods are directly subject to the power of the holder of a right in rem, i.e. the holder of a right in rem exercises her power without other people’s participation or measures. ‘Absoluteness’ indicates that the holder of right in rem can protect her right against whoever questions it, undermines it or is the recipient of its effects (i.e. protection erga omnes); this means that the others have a general duty not to violate the legal position of the holder. ‘Inherence’ indicates the special nexus between the right and the goods, i.e. the right ‘is included’ in the goods, so that the holder can oppose her right against whoever is in possession of the goods or claims the goods, but it can be affected by the events characterising the goods.

Italian scholars have criticised the fact that such qualities should exist contextually. The most important criticisms are three.
A first criticism\(^7\) derives from the influence, which the Pandectistic School had on Italian scholars. Accordingly, a right \textit{in rem} is not characterised by immediacy; in fact, a right \textit{in rem} does not confer any power over the object, but only provides claims against third parties. Hence, a right \textit{in rem} is primarily characterised by absoluteness. Such criticism is not to be shared, because it only takes into account the external aspect of the relationship between the goods and third parties: in fact, it disregards that the third party’s general duty of refraining from interference does not determine the content of a right \textit{in rem}; on the contrary, the right-in-rem-holder’s power over the object is decisive.

According to a second criticism\(^8\) neither immediacy nor absoluteness characterises a right \textit{in rem}. Such criticism maintains that these two characteristics are not always present (e.g. a mortgage, or a servitude compelling one to refrain from adding a storey to a building, lacks the characteristic of immediacy; unregistered ownership lacks absoluteness), and sometimes it is possible to recognise them in other categories of rights (e.g. the lease, which is a typical example of a creditor’s claim). The only essential attribute of the right \textit{in rem} is its inherence, \textit{i.e.} the incorporation of the right-holder's power over the goods. The risk of accepting such criticism is extending the \textit{in rem} nature not only to the typical rights \textit{in rem}, but also to creditors’ claims, which are provided with the attribute of inherence, such as obligations \textit{propter rem}.

A third criticism tends to restrain the ambit of the rights-in-rem category. In this regard, scholars\(^9\) maintain that, although immediacy and absoluteness characterise a right \textit{in rem}, such characteristics cannot be found in mortgages and in negative servitudes. In fact, on the one hand, the mortgagee does not have any direct power over the object of the mortgage, but she has to ask for the intervention of a judge in order to satisfy her claim. On the other hand, a negative servitude does not give the entitled person a direct power to use the servient tenement, but only the power to prevent the owner of the dominant land from using it in a particular manner. Accordingly, they should be considered to be outside of the category of rights \textit{in rem}.


Scholars define an obligation\textsuperscript{10} \textit{propter rem}\textsuperscript{11} as being an obligatory relationship where the debtor is identified \textit{per relationem} (\textit{i.e.} by the title),\textsuperscript{12} or rather, the holder of the right \textit{in rem} is automatically identified as the debtor. In fact, with this kind of obligation, the obliged party changes whenever the right \textit{in rem} is transferred, since the obligation moves with the goods: this is the reason why such obligation is also called ‘ambulatory’\textsuperscript{13}. Therefore, the only way for the debtor to free herself from the obligation is the waiver of her right by way of abandonment of the goods or by transferring it to a third party. Nonetheless, although it is true that the attributes of immediacy and absoluteness are recognisable on the debtor’s part, it is not possible to say the same about the creditor’s part. The latter does not have any specific power over the goods from which the obligation derives. Accordingly, such obligation is denied an \textit{in rem} character nature by the prevailing scholars,\textsuperscript{14} since it is not possible to have immediate contact with the goods, which is, however, an essential characteristic of rights \textit{in rem}; consequently, the relevance of the second criticism is denied.

\begin{itemize}
\item\textsuperscript{10} An obligation is a legally binding relationship between two parties. It obliges the passive party (debtor) to adopt a certain behaviour (\textit{i.e.} to fulfil a certain duty) in order to satisfy the interests of the active party (creditor). The parties are generally identified \textit{ab initio} and they are the holders of contrasting interests, which the obligation aims at settling. Hence, it appears clear that an obligation does not have any \textit{in rem} character, \textit{i.e.} the creditor – in order to satisfy her claim – needs the collaboration of the debtor. The obligations are, consequently, included in the so-called \textit{diritti relativi} (\textit{i.e.} qualified rights), because the collaboration is a ‘specific’ duty not imposed on a general person but a specific person. The debtor is liable with all her assets \textit{ex art. 2740} C.C., unless the law provides otherwise.
\item\textsuperscript{11} Another concept close to that of the obligation \textit{propter rem} is that of the legal burden (\textit{onere legale}). It has the same characteristics as the obligation \textit{propter rem} but, in this case, the obligation always lies in the payment of either money or of other generic goods and it always concerns a right \textit{in rem} in immovables, which are exclusively used as credit security. Since the creditor has an immediate power over the immovable in order to satisfy her credit, the latter aspect brings the legal burden close to the rights \textit{in rem} for security purposes (particularly to the mortgage). An example of a legal burden is a co-operative contribution to the improvement of the property (art. 864 C.C.).
\item\textsuperscript{12} COMPORI Marco, \textit{Contributo allo studio del diritto reale}, Giuffrè, 1977, p. 309. On the opinion, according to which an obligation \textit{propter rem} is an ever-lasting constraint between the parties to obligation, and on goods and their peculiar nature, qualifying the obliged party as the holder of a right \textit{in rem} in the goods, see Cassazione, Division II, n. 11684/2000.
\item\textsuperscript{13} Examples of obligations \textit{propter rem} are the life tenant’s duty to reimburse the ground lessor for the extraordinary expenses or tax-expenses (art(s) 1005 and 1009 C.C.); the well-owner’s duty to carry out the necessary maintenance in order to enable the consumers to regularly draw water (art. 1091 C.C.); the co-owner’s duty to contribute to the payment of maintenance expenses in order to preserve and enjoy the co-owned goods (art(s) 1104(1) and 1123 C.C.), etc. ...
\item\textsuperscript{14} COMPORI, \textit{ibidem}, p. 310 et seq.
\end{itemize}
A fundamental principle concerning the right in rem is the numerus clausus principle, according to which the parties cannot create rights in rem other than those provided for by law. This principle is not expressly mentioned in the statutes, but is accepted by the prevailing scholars and by the courts. In fact, the attempt to extend the area of the contractual autonomy to rights in rem would undermine a basic social need, i.e. the necessity of not allowing parties to create constraints on goods, which could limit the usability and negotiability of these goods for future buyers. Moreover, if there were no numerus clausus, a ‘new right in rem’ would breach the ‘privity of contract’ principle.

An effort to modify the numerus clausus principle was made by scholars. Some of them criticise that such principle does not meet the requirements of a modern economy anymore. However, the idea of disregarding the numerus clausus principle is not to be shared, since the general interest of promoting the usability and negotiability of the goods prevails. Moreover, some scholars agree that this principle guarantees the social function of the property and protects parties from possible abuses by economically strong parties.

The numerus clausus principle is also extended to the obligation propter rem. The case law and most scholars, in fact, agree that new obligations propter rem cannot be created by contractual autonomy; they have to be provided expressly by the law. Moreover, if one looks at the nature of the obligation propter rem, i.e. at the fact that their effects extend beyond the original contracting parties, it is possible to argue – even in

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15 COMPORTI, ibidem, p. 287 et seq.
17 For example, the only ones that are allowed are the so-called rights in rem in another person’s goods. They are provided for by law but, above all, their effectiveness is not only limited in time but also functionally to the utility of other goods (e.g. servitudes).
18 An example is given by co-operative apartments (multiproprietà), whose tenant-shareholder has a right in rem in the building and also a right stemming from the lease agreement that was concluded in respect of her apartment. Since some of its specific rules conflict with some mandatory provisions of law regarding co-ownership, it has been held that the legal position of the tenant-shareholder should be redefined as an atypical right in rem. In this regard, see GAMBARO Antonio, Il diritto di proprietà, Giuffrè, 1995, p. 651 et seq.; see also Cassazione, Division II, n. 8797/1993; Cassazione, Division II, n. 8/1997; contra Cassazione, Division I, n. 3341/2003.
19 COMPORTI, ibidem, p. 287 et seq.
20 For instance, the costs necessary for maintaining and enjoying the commonly-owned parts of a building (Cassazione, Division II, n. 10214/1996; Cassazione, Division II, n. 8924/2001; Cassazione, Division II, n. 6323/2003) or for managing an urbanisation consortium (Cassazione, Division I, n. 4125/2003).
this case – that such obligations are contrary to the ‘privity of contract’
principle. However, it is also true that certain values (e.g. a better city
planning structure) are acquiring an increasing social relevance, so that it
was considered necessary to justify the imposition of constraints on pri-
ivate persons’ goods too. In this regard, the activity of the courts has also
been useful, they having identified cases not expressly provided for by
law. Nonetheless, it has to be mentioned that, in some cases, the courts
were not able to make a clear distinction between legal restrictions con-
cerning ownership and obligations propter rem.

1.2. Characteristics of ownership and its limits (atti emulativi)

Art. 832 C.C. states that ownership is the right to enjoy and use the
goods exclusively and completely, within the limits of and in conformity
with the duties established by the legal system. The right of enjoyment
includes every possible use of the goods. The owner has the maximum
power over the goods: hence, it also consists in the right of not using or of
destroying the goods (ius utendi et abutendi).

The characteristics of ownership are: 1) in rem nature (realità); 2)
completeness (pienezza); 3) flexibility (elasticità); 4) exclusivity (esclusi-
vità); 5) independency (indipendenza); 6) indefeasibility (imprecritti-
bilità); 7) perpetuity (perpetuità):
1. in rem nature. Ownership is a right in rem. Hence, it is immediate,
absolute, inherent (supra § 1.1.2.) and its object is a corporeal entity.

Cassazione, Division II, n. 15763/2004; Cassazione, Division II, n. 4905/2003,
regarding the obligation of the co-owners not to carry out any activity, on their
floor or a part of the floor individually owned by one or more of them, which may
damage the co-owned parts of the building; Cassazione, Division II, n. 6474/2005,
regarding the obligation to use some parts of a co-owned building, which are exclu-
sively owned by one co-owner, as a working and living place for the janitor. In
some cases, the courts have extended applicability of obligations propter rem with
the sole purpose of protecting the habitability in shared places. See e.g. Cassazione,
Division II, n. 2546/1994, concerning the binding nature of rules regulating con-
dominia (co-ownership of residential apartments) that also extend to the subse-
quent purchaser of premises; Cassazione, Division II, n. 11717/1997, with regard to
the work carried out by the co-owner of a building on the floor, or on the part of
the floor, exclusively owned by him; Cassazione, Division III, n. 4797/2001, con-
cerning the damage arising due to failure to maintain the roof terrace of a co-
owned building.

Cassazione, Tax Division, n. 17933/2004; Cassazione, Unified Divisions, n. 3672/1997,
concerning the obligation of the owner, ex art. 843 C.C., to allow neighbours
to cross her land; Cassazione, Division II, n. 16482/2002, concerning the possibility
given to Titius, ex art(s) 843(3) and 896(3) C.C., to enter Gaius’ neighbour land
in order to collect the fruit that has fallen from the branches of a tree growing on
Titius’ neighbour land.
It is immediate because the right can be exercised without the necessity of actions by other people. It is absolute, because other people cannot interfere with the owner’s right. It is inherent because the owner can oppose her right against whoever is in possession of the goods or claims to have acquired a right in the goods.

2. **completeness.** Ownership does not confer a specific, but rather a general power of enjoying and disposing of the goods, unless the law prohibits it, *i.e.* the owner is free to do whatever she wants with her goods within the limits established by the law.

3. **elasticity.** It is the aptitude of ownership to automatically re-gain its original extent in the event either a third party’s right in *rem*, or a constraint imposed by the general public interest, cease to exist.

4. **exclusivity.** The owner can exclude other people from the enjoyment of the goods or, even better, the other people cannot interfere with the owner’s enjoyment.

5. **independency.** The owner’s right is not subordinated to any other people’s rights, *i.e.* her right does not depend on the existence of other people’s rights.24

6. **indefeasibility.** Ownership is an imprescriptible right. Its indefeasibility finds its basis in the broadness of the owner’s right, as well as in the fact that the *rei vindicatio* (*i.e.* the act by which the owner claims for the recognition of her property and the recovery of the possession of such property from someone wrongfully in possession) is imprescriptible (art. 948(3) C.C.). If the owner can claim her goods at any time, this means that the owner’s right does not expire due to non-use. In fact, the possibility of non-use is one of the owner’s prerogatives.25

7. **perpetuity.** Ownership is eternal. However, the law establishes cases in which property is characterised by temporariness (*e.g.* the *fidei

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24 The fact that ownership is the greatest right in a movable that a legal system can grant to an individual is also called ‘autonomy’. Scholars argue that the autonomy of ownership does not just represent a completely free decision on how to enjoy or materially avail oneself of the thing since its use is being controlled by the legal system, but it lies in the impossibility of being interfered with and criticised when exercising one’s own power in accordance with the law. This impossibility distinguishes the owner’s prerogatives from the creditor’s ones. Moreover, the creditors are subject to duties of protection and fairness *vis-à-vis* the owner, therefore the violation of this duty always permits criticisms about the creditor’s conduct. See DE MARTINO Francesco, *Beni in generale – proprietà*, in *Commentario del Codice Civile* (a cura di Antonio SCIALOJA e Giuseppe Branca), Zanichelli, 1976, p. 146.

25 From this perspective, it appears unclear why property can be acquired by adverse possession (*usucapione*). Scholars justify the prescription of property rights, arguing that indefeasibility is not provided for by any norms and that a property right is protected as long as the owner effectively exercises her right and her exercise is consistent with and functional to the need of social solidarity provided for in art. 42(2) Const. See TROISI Bruno, *La prescrizione come procedimento*, Edizioni Scientifiche Italiane, 1980, p. 135.
commissum (art. 692 C.C.), the life tenancy (art. 979 C.C.); the ‘temporary’ building lease (art. 953 C.C.). In all of these cases, the time limit does not completely invalidate the content of the property right. Rather, it is a temporary share of ownership, which leads to a reciprocal compression of the objects of two different property rights (i.e. the object of the current owner’s right and the object of the future owner’s right). Instead, it is absolutely forbidden for private parties to create temporary property: this prohibition directly derives from the numerus clausus principle.

Although art. 832 C.C. provides a notion of ownership, according to which the owner has a broad power, it has to be underlined that the law can limit such power, when the latter conflicts with the social function of ownership (art. 42(2) Cost.). The mention of limits and duties imposed on the owner was a novelty of the Codice Civile of 1942. Scholars are inclined to distinguish the meanings of limit and duty. In their opinion, a ‘limit’ circumscribes the dimension of the right (i.e. the limit indicates what an owner can do or what a third party cannot do), whereas a ‘duty’ is something that supplements the object of an owner’s right (i.e. a duty is the behaviour required by the law in order to avoid committing a tort). However, some scholars consider such a distinction as being ephemeral, since a duty concerning ownership can be broadly considered as a form of limit, if it affects the owner’s right of enjoyment and transfer.

Limits and duties can either be of a public or private nature, depending on whether they protect general public interests (e.g. constraints concerning artistic goods, security and sanitary measures, etc.) or private interests (e.g. servitudes, constraints concerning the purpose of the property and neighbourliness, etc.). They are not of an exceptional nature, since they do not derogate any general rules, but simply define the ambit of property; consequently, this means that the ambit of property re-expands once the limits stop existing. Finally, it is to be pointed out that limits and duties are mandatory when they protect general public interests.

A further restraint on ownership is represented by the prohibition of abusive acts (atti emulativi – spiteful exercise of a legal right). In this regard, art. 833 C.C. states that the owner cannot carry out acts that are solely aimed at harming or disturbing other persons.

Case law has provided a rather restrictive interpretation of this provision (which is considered as an expression of the ‘general principle of the

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26 IRTI Natalino, Proprietà e impresa, Jovene, 1966, p. 41.
prohibition to abuse rights’), meaning that its constitutive elements are: 1) the exercise of one’s own property right; 2) the animus nocendi, i.e. the intention to harm or disturb other persons (subjective/psychological element); 3) the lack of usefulness of such behaviour to the owner; and 4) the harm to or the disturbance of other people’s interests (objective element). Hence, summing up, the owner performs his own right, but the result of the exercise of her ‘right’ does not satisfy an appreciable interest and is socially despicable. It is possible to seek an injunction against the abusive acts and damages for losses resulting from them.

1.3. Other rights in rem

1.3.1. Rights in rem in another person’s goods

As stated above, rights in rem in another person’s goods (diritti reali su cosa altrui) have to be considered as being part of the broad category of rights in rem. Such rights confer a certain and limited power, as well as the immediate enjoyment of another person’s goods, on the holder. They have the effect of restricting the owner’s right, which re-expands as consequence of reversion (consolidazione) after all interests in the property granted to others have terminated (supra § 1.2.). Generally, rights in rem in another person’s goods extinguish by reason of a 20 years non-use, a right-holder’s waiver, or confusion. Such rights can be opposed to all the owner’s successors in the interest by the actio confessoria (i.e. an injunction, by which a holder of a right in rem in another person’s goods can obtain the recognition of her right).

(a) Building lease (superficie)

A building lease is the right to build and maintain, above (and beneath) the soil, a building in favour of another person, who acquires the ownership of the building (art(s) 952(1) and 955 C.C.). Moreover, the owner

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29 In this regard, some scholars maintain that there is no abuse of rights if there has been a significant advantage to the owner, who carried out the act, even if her advantage is considerably smaller than the harm caused to the other party. See DE MARTINO, ibidem, p. 15.

30 Just to give an example: an emulative act is considered to be the positioning of a fake camera, directed at the neighbour’s land, by a neighbour. In the case of an easement altius non tollendi, the owner of the land cannot increase the height of her building, even if there is no real compression of the easement-holder’s right (Cassazione, Division II, n. 8151/2001).

31 Building has a broad meaning. It refers to everything made by man, which is linked to the soil.
of the soil can alienate the building (if she is the owner of it as well) separately from the ownership of the soil (art. 952(2) C.C.). The property right of the soil owner re-extends once the property right of the owner of the building has extinguished (due to the lapse of time, complete loss of the goods, 20 years non-use, accession, waiver by the owner of the building, or a rescinding clause). A building lease can derive from an agreement, a gift, a will, or prescription.

(b) Long lease (*enfiteusi*)

A long lease is the right to enjoy another person's land or building, but the long-lease-holder (*enfiteuta*) is obliged to improve it and to pay an annual rent, either in money or in kind (art. 957 C.C.). An emphyteusis can derive from an agreement, a gift, a will, or prescription. The lapse of time (art. 958 C.C.), the destruction of the property (art. 963 C.C.), 20 years non-use (art. 970 C.C.), a rescinding clause (art. 973 C.C.), a compulsory purchase of land, enfranchisement (*affrancazione* – art. 971 C.C.), reversion (*devoluzione* – art. 972 C.C.), or consolidation are reasons for the extinction of the emphyteusis.

(c) Life tenancy (*usufrutto*)

A life tenancy is the right to enjoy goods belonging to another person for the duration of one's own life (or for 30 years (art. 979 C.C.), if the subject is not a natural person). The life-tenant is obliged to respect the economic purpose of the goods (art. 981 C.C.). If the life tenancy is transferred, the moment of termination of the life tenancy will be determined with reference to the duration of the life of the transferring life-tenant. The object can be both an immovable and a movable. The life tenancy is established by law, by parties' agreement, by prescription, and by a court's decision. The life-tenant has the possession of the thing, a right to the fruits\(^{32}\) (art. 984) and the possibility to transfer her right.

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\(^{32}\) Art. 820 C.C. distinguishes between natural fruits and civil fruits, but it does not provide for an exhaustive list of cases due to the heterogeneity of the category “fruit”.

Art 820(1) C.C. defines natural fruits as being those derived directly from the thing, with or without the aid of man. The article provides as examples agricultural products, wood, newly-born animals as well as products of mines, quarries and turf pits. Moreover, art. 820(2) C.C. points out that the ownership of the fruits belongs to the owner of the principal thing. However, if the ownership is transferred to another person, the latter acquires the ownership at the moment of separation (art. 821 C.C.). This means that, until the fruits are joined to the principal thing, they can only be the object of a sales contract for future goods, so that the circula-
1. Ownership and other property rights

(art. 980 C.C.). She has to give a suitable guarantee to the owner and is obliged to make an inventory (art. 1002 C.C.); she is also obliged to custody, as well as to the management and to the ordinary maintenance (art. 1004 C.C.) of the goods subject the standards of reasonable care (diligenza del buon padre di famiglia – art. 100(2) C.C.). She has to pay tax and make every further expense to which the owner was obliged (art(s). 1008-1009 C.C.). The death of the life-tenant (art. 979 C.C.), the destruction of the goods (art. 1014 n. 3) C.C.), 20 years non-use (art. 1014 n. 1) C.C.), a rescinding clause, and the modification of the agreement are reasons for the termination of the life tenancy. The life-tenant can protect her right by an action for the recovery of the land (infra § 1.4.1.(a)), and by a general action for the declaration of her right.

Special rules are established for some particular goods:

1. Flock and cattle (art. 994 C.C.). At the end of the life tenancy, if some of the animals have died, the life-tenant has to give back a number of animals equal to the original one (the number of newborn animals will be subtracted from the number of the dead animals). If the whole flock or the cattle has died and this is not due to the negligence of the life-tenant, she will return either its fur or its economic value.
2. **Consumable goods** (*quasi usufrutto* – art. 995 C.C.). At the end of the life tenancy, the life-tenant does not have to return the goods, since they were consumed, but she has to pay an amount of money agreed on in advance between the parties.

3. **Credits** (art. 1000 C.C.), negotiable instruments (art. 1998 C.C.), shares (art. 2352 C.C.). In the case of credits and negotiable instruments, the life tenancy is extended to the premium, to any aleatory utility deriving from them, whereas, in the case of shares, the life-tenant has the right to vote and her right is extended to the new share issue.

4. **Firm** (art. 2561). The life-tenant is obliged to carry out the business under the original firm name and she has to preserve its reputation. Some scholars argue that, in the case of a firm, there is one life tenancy, which covers all the goods belonging to the firm, whereas others think that there is a life tenancy for each distinct thing.

(d) **Right of use (**uso**) and housing right (**diritto d’abitazione**)**

The right of use (**uso** – art. 1021 C.C.) is the right to use the property and if it is ‘fruit’-bearing, the right-holder can keep the fruits for herself and her family’s needs; the housing right (**diritto d’abitazione** – art. 1022 C.C.) is the right to live in a house as far as the right-holder and her family require it. These rights can neither be transferred nor rented out. In addition, it is compatible to apply the norms concerning long-term leases (art. 1026 C.C.).

(e) **Real servitude (**servitù**)**

The real servitude (**servitù** – art. 1027 C.C.) is the right to do something or the right to prevent something in respect of the real property of another (servient tenement) in order to guarantee a socially appreciable (either in the present or the future) advantage/utility to the owner of the dominant tenement. The real servitude cannot be mortgaged (art. 2810 C.C.). The real servitude can be imposed compulsorily by judgment or by law (in this case, the dominant tenement exercises its own power (**diritto potestativo**) over the servient tenement), and can also be voluntarily created by agreement, gift or will. The dominant tenement can defend her right by means of a general action for the declaration of her right and for the termination of any interference (**actio confessionis servitutis**). Moreover, she can ask for the restoration of the land to its former state and for damages. An easement extinguishes by reason of confusion (art. 1072 C.C.), waiver by the owner of the dominant land or by the servient one (art. 1070
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C.C.), 20 years non-use, lack of any utility (art. 1074 C.C.), a subsequent term or condition, complete loss of the land, and judgment.

1.3.2. Co-ownership (comunione)

Co-ownership describes a phenomenon where two or more people share the same right in rem in a thing (art. 1100 C.C.). The law considers three different cases:

1. voluntary co-ownership: two or more people voluntarily decide to share the same right in rem (e.g. two people buy a horse together);
2. accidental co-ownership: two or more people non-voluntarily share the same right (e.g. the heirs of one and the same testator's estate)
3. mandatory co-ownership: the co-owners are obliged by the law to share the same right in rem (e.g. the flat-owners of a condominium).

It differs from the accidental co-ownership, because in the latter case the co-owners can be released from co-ownership by virtue of their own will.

The co-existence of the same right in rem of many people is possible due to the fictitious division of the object into shares. Therefore, the object materially belongs to all co-owners without distinction, but the object is fictitiously divided into a number of shares equal to the number of co-owners. The share is, hence, a measure to identify both the duties and the rights of each co-owner (art. 1101(2) C.C.). The general presumption is that the shares have an equal value, unless the law provides, or the parties have agreed, otherwise (art. 1101(1) C.C.).

The use of the co-owned property appertains to each co-owner individually, who must not change its social economic function and who has to behave so as not to prevent the other co-owners from using the property (art. 1102 C.C.). The management of the co-owned property appertains to the co-owners collectively. In addition, art. 1105 C.C. estab-

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33 Cassazione, n. 1887/1962.
34 Cassazione, Division II, n. 3640/2004; Cassazione, Division II, n. 1072/2005. In this regard, it is interesting to note that, as to the termination and the discharge of the contract concerning the economic use of the co-owned goods, the court (Cassazione, Division III, n. 14772/2004) states that a co-owner – without having to ask for the other co-owners' consensus – has an independent power to raise a claim against a person, who asserts to have a right in rem for enjoyment purposes. Such power, in fact, is based on the co-owners' common interest to end another person's interference.

35 In this regard, it has to be underlined that the co-owners can act on their own initiative if the other co-owners do not take care of the co-owned goods. Accordingly, a co-owner, who has borne some expenses for the maintenance/preservation of the co-owned goods, can ask for the reimbursement; however, such reimburse-

lishes that the decisions are to be taken according to the principle of majority rule, once all the co-owners have been informed about the object of the deliberation (i.e. it is necessary that all the co-owners were formally called to a meeting). However, the majority is not computed from the number of co-owners but from the number of shares: this means that a co-owner, who has – for instance – a share equal to 51% of the whole, can impose her decision on the others, even if the number of the other co-owners is higher. As to the modification of the goods and the acts of extraordinary management, a qualified majority is necessary: i.e. the majority of the co-owners, representing at least 2/3 of the economic value of the property (art. 1108(1) and (2) C.C.).

According to art. 1109(2) C.C., the dissenting parties can bring a claim before the judicial authority in order to annul such decisions within 30 days from the resolution (or from the communication of the decision to the absent co-owners). The judicial authority can annul the decisions concerning the extraordinary management of the co-owned property, only if they are detrimental to the co-owned property; whereas the decisions concerning the ordinary management can be annulled if the court decides that such decision would be detrimental to the interests of one co-owner (art. 1109(1) C.C.). In fact, in these cases the judicial authority tends towards the unanimity principle in respect of all those decisions, which change the purpose of the co-owned goods and, hence, affect its social economic function.

Each co-owner can dispose of her own share as well as being able to create rights in rem for enjoyment purposes in favour of another person, without having to demand the consensus of the other co-owners. On the contrary, as to either the transfer or the creation of both rights in rem in the entire co-owned thing and lease contracts for more than 9 years, the unanimous consensus of the co-owners is necessary (art. 1108(3) C.C.).

The co-owners can always ask for the division of the co-owned thing (art. 1111(1) C.C.), unless the thing, once divided, loses its social economic function.

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37 Cassazione, Division III, n. 1662/2005.
39 Cassazione, Division II, n. 2815/1990; Cassazione, Division II, n. 4965/2004. An interesting example is the case of the vindicatio of a co-owned object. In this regard, the court (Cassazione, Division II, n. 11691/1990) states that if the co-owned property has been seized by one of the co-owners, the defendant can oppose her legal title to a share in the object, which derives from one of the other co-owners. Accordingly, the defendant can be ordered to release only that share in the object, which is not considered as deriving from her title.
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Economic function (art. 1112 C.C.). Moreover, the judge can grant an adequate extension (for not more than 5 years) for the purpose of the cancellation of co-ownership. In addition, the agreement, by which the co-owners decide to be bound, cannot subsist for more than 10 years (art. 1111(2) C.C.).

The division of co-ownership has to be effected in natura (art. 1114 C.C.), i.e. transforming the incorporeal shares into corporeal shares in the goods, but if this is either impossible or if it is difficult to proceed with this transformation, the goods will be either assigned to one of the co-owners, who is obliged to pay to the other co-owners an amount equal to the economic value of their shares, or can put the movable up for auction and the proceeds of the auction will be distributed among the co-owners.

1.3.3. Rights in rem for security purposes

Rights in rem granted for security purposes are pledges and mortgages. They give the creditor the power to satisfy her own claim directly out of the debtor’s goods, these being the physical security. Such rights are accessory rights to the credit right, since their life depends on the existence of a credit; hence, they extinguish when the credit right terminates. In this regard, they constitute grounds for priority among creditors as concerns the debtor’s civil liability; accordingly, it is correct to state that they are a limit to the par condicio creditorum (i.e. the equal treatment of creditors). This aspect is another element supporting the numerus clausus principle. Moreover, they are characterised by the right of pursuit (diritto di sequela), since the creditor has the power to expropriate the thing and satisfy her claim out of the proceeds of the sale (so-called ius distrahendi), even though the object has been transferred to another person.

42 Within the grounds for priority among creditors, pledges and mortgages should be distinguished from the institute of privilegio (it can be roughly described as a lien), since the latter does not create an independent and accessory right to the credit, but is a particular type of the credit right. Moreover, a privilegio can be exercised over the debtor’s entire assets (this means that a privilegio does not have an in rem nature), whereas pledges and mortgages always concern a single object (it is what Italian lawyers call specialità). Another difference is that a privilegio automatically derives from the law, whereas pledges and mortgages need a constitutive title, which derives from parties’ intentions.
43 This means that the creditor, who is secured either by a pledge or by a mortgage, has the right to be preferred over the other creditors at the time of the distribution of the proceeds of the sale (so-called ius praelationis).
Finally, the most relevant differences between the pledge and the mortgage lie in their object and dispossession. The exclusive object of the pledge is a movable; the object of a mortgage can be both an immovable and a registered movable. As to the dispossession, the pledge is constituted once the possession of the movable is transferred to the creditor, whereas the mortgage is constituted once the creditor enters her right in the register. Such difference is due to the fact that, in the case of a pledge, the owner’s dispossession provides the publicity, which, in the case of a mortgage, is derived from the registration in the Public Land Register.

An important aspect that characterises pledges and mortgages derives from art. 2744 C.C., which provides for the prohibition of an agreement of forfeiture (divieto di patto commissorio), unless the parties agree that the creditor, once she has acquired the ownership of the object, has to return the difference between the economic value of the goods and the non-repaid credit (so-called patto marciano) to the debtor.

(a) Pledges (pegno)

Pledge is the security right in a movable belonging to either the debtor or another person. A universitas of movables and other rights (e.g. life tenancy), whose object is a movable, can be given as security. A pledge on the pledge (suppegno) is not allowed (art. 2792(1) C.C.).

The pledge does not require the fulfilment of specific formalities but, since the constitutive pledge agreement is effective once the goods, or the documents representative of the goods (art. 1996 C.C.), are delivered to the pledgee, the dispossession of the pledgor is necessary. The possession of the pledge can also be exercised by another person, who is ap-

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44 The agreement of forfeiture consists in the automatic transfer of the ownership of the mortgaged or pledged goods to the creditor, if the debtor does not pay. The rationale of this prohibition is to avoid that the debtor can transfer goods to the creditor, the economic value of which is higher than the value of her debt. In fact, once the creditor is satisfied out of the proceeds of a public auction, the residual sum can be distributed among the other unsecured creditors.

45 The element of dispossession is not always required. For instance, in the case of PDO hams, the producer, who wants to get a loan, can constitute a pledge on the unprocessed pieces of pork, but she is not subject to dispossession of these unprocessed pieces of pork. In fact, she may continue using them in the production process but, in order to give notice to the third parties of the existence of the pledge, she has to affix an indelible seal on the relevant piece of meat and has to indicate the creation of the pledge in a specific register authenticated on a yearly basis (art. 1 Law 24th July 1985 n. 401).

pointed, in this respect, by the mutually consenting parties. Moreover, if the goods are in the common custody of both of the parties, the pledgor has to be in a position of using the goods only with the consent of the pledgee. However, although the pledge is a real agreement, in order for the pledgee to be preferred over another creditor of the pledgor, it is necessary that the constitutive agreement is in writing, indicates the sum of the credit and the pledged goods, and has a certified date (so-called pre-emption right (diritto di prelazione) – art. 2787(3) C.C.).

The duties of the pledgee are the following: 1) preserving (art. 2790(1) C.C.); 2) not using or not disposing (art. 792 C.C.); and 3) restituting the movable (art. 2794 C.C.). The pledgee, hence, can be compared to the person of the bailee with the difference that she can dispose of the movable only in default of payment. Finally, the pledgee has the right to keep the fruits, imputing them first to the expenses, second to the interest, and third to the capital.

The pledge is accessory to the secured credit, so that if the credit agreement is void, also the pledge will be considered void because of the lack of a causa.

As to the pledge on a claim or of another right, the written agreement between the pledgee and pledgor plus the notification to the debtor, or the debtor’s acceptance by means of a documented act with a certified date, is necessary. The pledgee has to collect the interest and the periodic performance of the debtor, imputing the amount collected first to the expenses and the interest, and then to the principal, as well as performing the acts necessary to preserve the credit (art. 2800 C.C.). The pledgee has to collect what is due to her by virtue of the agreement and if the claim consists in money or other fungible goods, she has to deposit these at the place indicated in the agreement between the debtor and pledgor/her creditor (art. 2803 C.C.). In case of the lack of such indication, the judicial authority will decide the place. In addition, if the repayment of the credit is due, the pledgee can retain the quantity of goods necessary to satisfy her right, if the sum repaid by the debtor does not suffice (art. 2803 C.C.). If the pledge consists of fungible goods, the rules

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48 She can use the goods only if this is necessary to preserve the goods.
49 The pledgee can dispose of the goods only in one case: when the pledge has as its object fungible goods (e.g. money), the pledgee, exceptionally, acquires both the possession and the ownership thereof. Once the pledgor pays, the pledgee has to return a quantity of goods equal to the amount of the same kind of goods given before (tantundem eiusdem generis). On the contrary, if the pledgor does not pay and the pledge consists in money, the pledgee has to return the quantity of money exceeding the sum of the guaranteed credit; in other cases, the pledgee can satisfy her claim by means of a forced sale. This institute is called irregular pledge (pegno irregolare). See Cassazione, Division III, n. 10000/2004.
50 For a clear explanation of the concept of causa in Italian Law, infra § 6.1. n. 2).
of art(s) 2797-2798 C.C. will be applied. Hence, if the pledgor does not pay, the pledgee can satisfy her claim out of the proceeds of a forced sale of the goods by way of public auction (art(s) 2796-2797 C.C.), or by asking the judge to have the goods delivered to her, the quantity of goods corresponding to the sum of the credit (art. 2798 C.C.).

In addition, the debtor can assert all those exceptions against the creditor/pledgee, which she could assert against her own creditor/pledgor, but if she unconditionally accepted the agreement between the pledgee and pledgor, she cannot oppose the set-off, which possibly occurred before the pledgor constituted the pledge in favour of the pledgee (art. 2805 C.C.). However, she can assert the exceptions concerning the validity and effectiveness of the pledge against the creditor/pledgee. Finally, she cannot ask for the redemption of a credit, which she claims from the pledgee, unless the pledgor agrees to it.

As concerns the creation of a pledge on future goods, as well as a pledge on co-owned goods, the scholars maintain that in both cases the agreement is not effective until the goods come into existence or there is a physical division of the goods. Hence, they are considered being cases of a developing legal situation. In fact, up to the point of the delivery of the goods, the agreement between the parties only produces obligatory effects, but once the goods exist or are divided between the co-owners and, consequently, are delivered to the pledgee, the agreement will produce its real effect. However, in order for the pledge to be – in the meantime – opposable to third parties, art. 2787(3) C.C. will be applied (supra).

Finally, one has to consider the case of pledges of credits and negotiable instruments in favour of the bank. When a person constitutes such a pledge in favour of the bank, a particular term, which extends the security right of the bank to all the future credits or future negotiable instruments of the client, is usually inserted in the agreement (so-called pledge omnibus). However, in order for the pledge omnibus to be effective, some adequate parameters, which allow for the determinability per relationem of all the future credits or future negotiable instruments of the client, are necessary; otherwise, art. 2787(3) C.C. would be violated and, consequently, the pledge omnibus would be inadmissible. Accordingly, the case law tends to consider such a term as being a term of art, whose voidness

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51 GAZZONI Francesco, Manuale di diritto privato, Edizioni Scientifiche Italiane, 2004, p. 646
52 The creditor – whenever she wants – can demand the division of the goods, in order to exercise her security right on the share of the pledged goods.
does not affect the whole agreement, so that, in the case of a pledgor's
non-performance, the bank can exercise its pre-emption right only on
those goods, which were sufficiently indicated in the agreement. The
reason for such a provision is that the legislator wants to avoid that the
bank can discretionally substitute its own pledge with another one of a
higher value\textsuperscript{55} to the detriment of the other creditors.

A particular kind of pledge, mostly used as a security in ancillary
banking and financial services, is the floating charge (both called pegno
rotativo or pegno fluttuante).\textsuperscript{56} It is a contract by means of which a person,
in order to obtain credit or to make a guarantee for her own future debts,
offers as a pledge valuables, negotiable instruments, or goods. The charac-
teristic of this kind of pledge is the so-called floating term (clausola di
rotatività), by means of which the parties agree on the possibility to substi-
tute the pledged goods without this causing a novation of the security
relationship between the pledgee and pledgor. The advantage of this form
of pledge is that it secures a credit without immobilising, for a long time,
the pledged movable. In this case, the debtor, who is mostly an entrepre-
neur, is freed from the worst inconvenience of the pledge, \textit{i.e.} the impos-
sibility to regularly use her own goods. In fact, the floating charge allows
the pledgor to release, after a fixed time, the pledged goods and to substi-
tute other goods with the same economic value. However, in order for the
floating term to be effective \textit{vis-à-vis} another person \textit{ex art}(s) 2787 and
2800 C.C., the agreement has to indicate, \textit{ab initio}, the floating mecha-
nism and the parameters for subsequently identifying the goods to be
pledged. The lack of a formal replacement of the old security agreement
by another one is due to the fact that the bank is interested in protecting
the specific economic value. Accordingly, the economic value of the
movable, and not its identification, is relevant:\textsuperscript{57} in fact, the movable,
which is offered as a substitute, has to have at least the same value as the
previously pledged movable.

In this regard, case law and scholars have expressed different opinions.
On the one hand, some case law\textsuperscript{58} disfavoured the validity and effective-
ness of the floating charge in the Italian legal system. They had doubts as

\begin{itemize}
  \item \textsuperscript{55} Cassazione, n. 5562/1999.
  \item \textsuperscript{56} GABRIELLI Enrico, \textit{Il pegno anomalo}, CEDAM,1990, p. 182, footnote 139.
  \item \textsuperscript{57} Scholars emphasise that the ‘security project’ and not the security in \textit{se} is important
  in this security model. In this regard, with the expression ‘security project’, one has
to allude to the will of the parties to plan, in the long term, a mechanism for the
protection of their own interests: on the one hand, the entrepreneur’s interest to
obtain funding more easily, on the other hand, the bank’s interest to easily protect
its own position in credit agreements. Cfr MESSINETTI Davide, \textit{Le strutture for-
  \item \textsuperscript{58} Cassazione, n. 5334/1983. See also GALANTI Enrico, \textit{Garanzia non possessoria e
controllo della crisi d’impresa: la floating charge e l’administrative receivership}, in Qua-
derni di ricerca giuridica della consulenza legale, Banca d’Italia, 2000, n. 51, p. 120.
\end{itemize}
to the possibility of substituting a movable with a non-homogeneous movable, even if they have the same economic value. Secondly, they maintained that the lack of effect of the novation is detrimental to the *par condicio creditorum*. Actually, because of the floating charge, the bank can easily substitute the object of the pledge, having been granted the privileges that are derived from the old pledge. In fact, the floating term aims at backdating the effects of the creation of the pledge in order to save the newly pledged movable from the *actio Pauliana*, since it is not possible to configure a new pledge, out of which the other concurrent creditors can equally satisfy their own claim.

On the other hand, in the light of some recent rulings of the *Corte di Cassazione*, scholars maintain that the economic value of the pledged goods is the object of the pledge. Accordingly, the floating term is valid if the constitutive agreement of the pledge has a certain date, indicates the pledged movable, and the economic value of the newly pledged movable is equal to the previous one. Moreover, the confirmation of the validity of such a pledge is derived from other norms in the *Codice Civile*. For instance, art. 2742 C.C. provides that the pledge is automatically transferred to the insurance premium, if the goods deteriorate or are destroyed during the time period of the guarantee, whereas – as seen above – art. 2803 C.C. provides that the pledgee can retain the quantity necessary to satisfy her right out of the sum of money provided by the debtor. Accordingly, the scholars argue that the same legal context is in favour of the effectiveness of floating charges without the necessity to fulfil the formalities that required for the creation of the pledge anew. However, nowadays the floating charge finds its own acknowledgement in art. 34(2) Decreto Legislativo (hereinafter D.Lgs.) n. 213/1998. This norm provides that pledges (according to the wording of the text *i vincoli di ogni genere*, *i.e.* every kind of legal tie) of negotiable instruments are constituted by the registration in a specific account managed by a financial intermediary, but it is also possible to constitute a general pledge on all the negotiable instruments registered in the account of the client. In addition, the debtor/pledgor can substitute – with the creditor's/pledgee’s

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consent – the financial instruments in order to obtain the maximum profitability.61

(b) Mortgage (ipoteca)

Mortgage is the security right granted to the mortgagee, with which she can expropriate the mortgaged goods (ius distrahendi) and be preventively satisfied out of the proceeds of the sale (ius praelationis). Besides having the typical characteristics of a right in rem, a mortgage is characterised by further elements: 1) speciality (i.e. it always concerns a well-determined object – art. 2809(1) C.C.); 2) indivisibility (the security concerns the whole property and it persists up to the satisfaction of the debt – art. 2809(2) C.C.); 3) the object can be either an immovable, a registered movable, government annuities, rights in rem for enjoyment purposes in an immovable (except for easements), or a share in a tenancy in common (art. 2810 C.C.). The mortgage extends to improvements and to accessories (accessorium sequitur principale – art. 2811 C.C.).

The mortgage can be legal (if its entry in the register is provided for by law, e.g. a mortgage in favour of the seller, the co-owner after division, and the State as against a criminal defendant or a civilly liable party – art. 2817 C.C.), judicial (if constituted by a court’s decision – art(s) 2818-2820 C.C.), or voluntary (if it is spontaneously constituted by the debtor or by a third mortgagor – art(s) 2821-2826 C.C.).

The entry in the register has constitutive effect (art. 2808(2) C.C.) and it is effective for 20 years, unless it is renewed (art. 2847 C.C.). If an object constitutes a security for more than one mortgage, the oldest entry in the register has priority over the more recent ones (art(s) 28552-2853 C.C.). However, the creditors can agree to hold different registration numbers in respect of one and the same object that constitutes the security, if this does not harm the other creditors’ interests.

As consequence of the right of pursuit being a right in rem, the person who acquires mortgaged goods, although she may not be the debtor, can be subject to the expropriation of the goods. Accordingly, in order to avoid such a case, the buyer of mortgaged goods can

1. pay the mortgagees (art. 2858 C.C.),
2. release the mortgaged goods in order to preempt expropriation; rather, it will be the curator, appointed by the court, who will have to face expropriation (art. 2861 C.C.), as well as
3. redeem the goods by means of a special procedure called purgazione (redemption of the mortgage). In particular, the buyer will pay to the mortgagees the sum previously paid by her for the object(s) in ques-

61 GAZZONI, Manuale, ibidem, p. 1205.
tion, or will pay an amount equal to the declared value if the goods were handed over by way of gift (art(s) 2889-2890 C.C.).

The mortgage can exist on another person’s goods. Unless agreed otherwise, the third mortgagor does not enjoy the benefit of discussion (beneficio di escussione – art. 2868 C.C.).

Both the buyer of the mortgaged goods and the third mortgagor can bring an action for contribution (i.e. they can demand reimbursement from the mortgagor), if they paid or transferred the mortgaged goods to the mortgagees (art(s) 2866(1) and 2871 C.C.). Moreover, the buyer of the mortgaged goods enjoys the right of subrogation (diritto di subingresso) in respect of the other mortgages registered in favour of the satisfied mortgagee (art. 2866 C.C.).

A mortgage is extinguished by cancellation, non-renewal (art. 2847 C.C.), repayment of the credit, loss of the goods (art. 2742 C.C.), waiver by mortgagee (art. 2879 C.C.), lapse of time, or by the occurrence of a condition subsequent, as well as by judicial order, by virtue of which, at the end of an auction, the ownership of a mortgaged thing is transferred [decreto di trasferimento – art. 586 Codice di Procedura Civile (Codice di Procedura Civile hereinafter C.P.C.)].

I.4. Protection of ownership rights

The Third Book of the Codice Civile dedicates chapter 4 to the claims for the protection of ownership rights. Since they mostly concern actions for the protection of rights in rem, scholars have observed that the Italian legal system offers a thorough set of protection instruments. Indeed, the code offers the possibility to resort to compensation, the recovery of the property, the seeking of injunctions by the owner, as well as the possibility of bringing mere declaratory actions; whereas the possibility to claim for a set-off, as a result of the enrichment ‘in rem’, remains on the backstage of the judicial practice.

Since most of these actions refer to immovables, the jurisdiction is allocated to the judge responsible for the district in which the goods are located (art. 5 Law n. 218/1995), and the action has to be registered (art. 2653 C.C.). Moreover, since the object of these actions is prejudicial to the right in rem of the right-holder, she is the only one actively legitimated to sue, so that, if the plaintiff does not bring the claim as the

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62 It is the right by which the person, who provides surety for another, can claim that the creditor must do her best to compel the performance of the contract by the principal debtor, before the provider of the surety can be called on.

63 GAMBARO, ibidem, p. 871 et seq.
holder of the right in rem in question, her action will be declared non-actionable, whereas if, during the procedure, it is discovered that she is not the holder, her action will be dismissed. In order to achieve the complete protection of the right in rem, these actions have the purpose of recovering, restoring as well as compensating, provided that the plaintiff uses her title to the right as the basis for her action and demands compensation in the light of the impossibility of the recovery or restoration of the goods. However, the protection of property can also be achieved by a claim in tort, if the claim for compensation is based either on non-performance or on a tort committed by the defendant. In fact, in this regard, it cannot be denied that claiming damages is another way of obtaining the protection of a right in rem. Obviously, there is a substantial and procedural difference between these two forms of protection. Indeed, a claim in tort is a remedy against a tort committed by another person and it is necessary to prove that the damage was caused either by the fraud or the negligence of the defendant, whereas a claim for the protection of property rights exclusively concerns the damage to the property or other right in rem, the act constituting the violation being an objectively illegal act, regardless of the negligence and the legal capacity of the tortfeasor (i.e. the plaintiff only has to prove her title and the damaging act).

Therefore, an action in tort is based on the existence of an obligatory relationship between the person who claims the loss of or the damage to her property right, and the person who is presumed to be the tortfeasor. In fact, whereas the standard actions for the protection of a right in rem aim at protecting an absolute right, the actions in tort are characterised by a dynamic process, which aims at accommodating the relative interest deriving from the loss of or the damage to the property right. Finally, a residual possibility that is always open is to take recourse to a pre-trial remedy where urgency requires this ex art. 700 C.P.C., in order to prevent the judicial decision as to the protection of the property right being ineffective.

1.4.1. Actions for the protection of ownership rights

(a) Vindicatio (azione di rivendicazione)

Vindicatio\textsuperscript{64} is the action by means of which the owner\textsuperscript{65} asserts her own property right, when another person is unlawfully in possession or in

\textsuperscript{64} In addition, in order to protect ownership rights, the Codice Civile considers two actions, which are particular to immovables. These are the action for determining estate boundaries (azione di regolamento di confine – art. 950 C.C.) and an action for the positioning of the estate boundaries (azione per apposizione di termini – art. 951 C.C.).
detenzione (custody) of the goods (art. 948(1) C.C.). The cause of the action (causa petendi) is the violation of the ownership right. The controversial issue (petitum) is whether the defendant should be ordered either to restore the goods or whether she should be ordered to pay a sum representing the monetary value of these if she has been unable to recover the property after its alienation. The action is imprescriptible, unless the controversial issue concerns an ownership right in the goods, which were acquired by another person by acquisitive prescription (art. 948(3) C.C.).

The burden of proof falls on the plaintiff; particularly by reason of the defendant, when lacking a title, being able to simply oppose her actual possession (possideo quia possiedo principle). Hence, the plaintiff has the duty to prove that both she and her transferor legitimately acquired the goods ab initio. Consequently, the plaintiff has to prove either that she acquired the claimed goods by virtue of an original title (e.g. acquisitive prescription) or that she obtained them from another person, who in turn acquired either against the background of an uninterrupted series of valid transfers or by acquisitive prescription (e.g. the plaintiff bought the goods from Titius, Titius obtained the goods from Gaius by way of gift, Gaius inherited the goods from Sempronius, Sempronius acquired ownership by acquisitive prescription). This is the so-called probatio diabolica.

Both of the actions aim at defining the boundaries of an estate, but they differ in respect of the element of the certainty: i.e. the action for the determining the estate boundaries is brought when there is uncertainty as to the demarcation line between two neighbouring estates, whereas the action for the positioning of the land boundaries is brought when one of the owners of the neighbouring lands does not challenge the position of the demarcation line, but she wants to position boundary stones in order to prevent either the possible encroachment on or future disputes over the boundary.

The co-owner as well as the long-lease-holder and the life tenant are actively legitimated to sue. In this regard, some scholars doubt that the long-lease-holder and life tenant have such an entitlement because, although they have the material possession of the goods, their position should be more correctly qualified as the detenzione on behalf of the owner and the long-lease-provider. Cfr CARPINO Brunetto Guido, Rivendicazione (azione di), in Enciclopedia giuridica, Treccani, vol. XVII, 1991, n. 1-5.

Since the vindicatio is directed at the restitution of the goods, it suggests that the owner does not have the availability of them. However, the reason why the owner does not have the possession of the goods is not relevant. It can derive both from the fact that she was dispossessed and from the fact that she gave the goods to another person as a consequence of a contract. In this regard, some scholars argue that if the transferring contract is unenforceable or avoidable, the seller-owner can alternatively exercise either the vindicatio or the action for the unjustified enrichment (art. 2033 C.C.). See BIANCA Cesare Massimo, La vendita e la permuta, UTET, 1993, p. 25.

Cassazione, Division II, n. 14448/2003; Cassazione, Division II, n. 11521/1999, according to which the production of a derivative title in the trial does not suffice
The onerous nature of the burden of proof is alleviated, if the defendant, who opposes her own original acquisition without concretely proving it, implicitly recognises that the plaintiff’s transferor was the previous owner of the goods. In this event, the plaintiff has to simply prove that he has validly acquired from the same transferor, who the defendant recognises as being the original owner, and that her acquisition was never interrupted by a qualified possession, since the occurrence of such an interruption would allow the defendant to acquire the goods by means of an original title.

Finally, if the goods were sold after the beginning of the proceeding, and the defendant is ordered to recover the goods, the owner can sue both the defendant, who sold the goods, and the buyer. If the owner cannot recover the goods from the buyer (assuming that now the latter is the actual possessor), the seller has to compensate an amount equal to the economic value of the goods as well as the potential damage inflicted on the owner. However, if the owner can recover the goods from the buyer, she has to return the sum representing the difference between the compensation payment received by her and the price she paid when buying her goods back, if the former exceeds the latter. This rule is based on the principle that the owner cannot receive double compensation for the same damage (it would be an unjustified enrichment!). If the goods are destroyed after the beginning of the proceeding, the owner will receive compensation in the amount of their economic value. If the object was either sold or destroyed before the beginning of the proceeding, the owner cannot exercise the *vindicatio*, but can only bring an action based on the contractual agreement that was perhaps concluded with the defendant, an action for damages, or an action for unjustified enrichment, in order to obtain compensation in the amount of its economic value.

**Action to eliminate interference (**zione negatoria**)**

This action has a dual objective. It aims at the declaration of the inexistence of another person’s rights as well as aiming to prevent this person from causing possible interferences and disturbances in the future, but it cannot have at its object the restitution of the goods (art. 949 C.C.). In fact, in this case the owner has to resort to the *vindicatio*. Depending on the kind of interference or disturbance, the owner can seek damages as well. The action has an *in rem* nature and it is imprescriptible. The owner

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as a proof that her direct transferor was the actual owner of the goods if the entire series of transfers has not been proved.
of the goods as well as the long-lease-holder and the life-tenant are entitled to bring the action, but they do not need to be in actual possession of the good. The person who claims a right in rem in the owner’s goods or interferes with and disturbs them, has a standing to be sued. On the contrary, a person who has only a personal right of enjoyment cannot be the correct defendant of the action: in fact, in this case there is a lack of personal interest in the protection of the ownership right. However, an interest to voluntarily intervene in the proceeding can be acknowledged to this person, in order to support the causes of one of the parties (art. 105(2) C.P.C.). The plaintiff has to prove her ownership: however, the burden of proof is less rigorous than the one for the vindicatio, i.e. the plaintiff can prove her right simply on the basis of a valid title; this is possible with the use of a mere presumption. On the contrary, the defendant will prove the existence of her right, denying the plaintiff’s one, according the general rules on the burden of proof (art. 2697(2) C.C.). If the judge recognises the admissibility of plaintiff’s claim as well as the justification of the claim for compensation (i.e. the plaintiff proved that the defendant’s behaviour was detrimental), the judge will order the defendant not only to stop the interferences, but also to pay damages. If the judge rejects the plaintiff’s claim, there will not be any conclusive judicial decision (res judicata); this means that if the plaintiff has new evidence, she can bring the claim again.

(c) Action for restitution (azione di restituzione)

This action can be exercised by the person, who mistakenly gave a thing to another person on the grounds of an obligatory title (e.g. gratuitous loan for use, bailment, lease). This action has a personal character: this means that it can be exercised only against the person who is bound by the obligation. It is subject to the ordinary limitation period (10 years) and it is sufficient to prove delivery. The existence of a title is not relevant for the purpose of proving delivery. However, if the delivery is not

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68 However, in case the party having the right to sue is either a long-lease-holder or a life tenant, the sentence will produce its effects on the owner only if the court – on their motion or on the owner’s initiative – has ordered the joinder of the plaintiff. Cassazione, Division II, n. 11222/1991. For instance, if a person wants a declaration confirming the existence of an easement (actio negatoria servitutis), the action has to be directed against the owner of the land that is supposed to be the dominant one. Therefore, the action against the tenant of the presumed dominant land lacks the legitimatio ad causam (the standing to be sued) and has to be declared non-actionable. In this regard, see Cassazione, Division II, n. 5984/1979.

69 In this regard, the law case indicates that a presumption has to be serious, precise and concordant. See Cassazione, Unified Divisions, n. 409/1992; Cassazione, Division II, n. 4803/1992; Cassazione, Division II, n. 10149/2004.
based on a title (e.g. the title was invalid from the beginning or an intervening cause caused the voidness of the title), the action will be qualified as being an action for unjustified enrichment.

If the thing is destroyed, the transferee who receives the thing in bad faith has to provide compensation in the amount of its economic value; if the thing merely deteriorated, the transferor can ask either for the monetary equivalent of the object or for the restitution of the object plus an indemnity for the reduction in its value (art. 2037(2) C.C.). The transferee in good faith (i.e. she was convinced that the debt still existed or she had not recognised the mistake of the transferor) is not liable for the deterioration or the loss of the thing, even if it is caused by her. She can be asked to pay an indemnity only if she was unjustly enriched (art. 2037(3)-2041 C.C.).\footnote{Cassazione, Division II, n. 1813/1982.}

If the transferee has alienated the goods before gaining knowledge of her obligation to return it, she is obliged to return the money she received. If the buyer has not paid yet, the transferee steps into the shoes of the transferor (art. 1203 n. 5) C.C.). If the delivery is the consequence of a donation, the donee is liable within the scope of her enrichment (art. 2038(1) C.C.).

If the transferee has sold the object either in bad faith or knowing that she would have to return the goods, she is obliged to return an equivalent object or the economic value of the object sold by her.\footnote{It is the case of an alternative obligation, where the choice belongs to the debtor.} However, the transferor, who transferred the goods when the transfer was not due, can demand payment of the purchase price or ask for a direct retransfer of the goods (art. 2038(2) C.C.). If the delivery is the consequence of a donation, the donee is liable – within the scope of her enrichment – to pay compensation to the transferor, unless the latter has successfully levied execution against the donee (art. 2038(2) C.C.). Moreover, if the goods are still part of the assets of the third person, the transferor can ask for the application of art. 2041(2) C.C. (restitution of the goods due to unjustified enrichment). In this case, the third person can preserve her acquisition only if she proves that she registered her title before the delivery between the transferor and the transferee was declared void (art(s) 2652 n. 6), 1445, 1452, 1458(2) C.C.), or that she acquired the goods by acquisitive prescription or in accordance with the possession vaut titre principle (art. 1153 C.C.).\footnote{Cassazione, Division II, n. 2161/2005.}
(d) Action for mere declaration (azione di mero accertamento)

By means of this action the owner of the goods, of which she is in possession, is legitimated to obtain the judicial recognition of her property right as against the person who interferes with or denies her right. Even though there do not exist any express norms, scholars and case law unanimously agree on accepting this form of protection of the property right. However, the Italian system provides specific cases of merely declaratory actions (e.g. the azione negatoria above or, in footnote 64, the azione di regolamento di confine). The goal of this action is to eliminate any uncertainty about the legitimacy of the claimant’s right in the goods. Hence, it does not modify the factual situation existing prior to the action, but it consists in a declaration about the conformity of the factual situation with the legal situation. The claimant has to exhaustively prove that the defendant does not have any right in the goods, since the object of the action is the declaration of her ownership title. In fact, although the claimant can be in possession of the goods, she always has the duty to show and prove her acquisitive title.

1.4.2. Actions in tort

(a) Action for damages

A tort is an act that either violates legal duties or infringes another person’s subjective right and results in the tortfeasor having to compensate for the possible damage. Whereas a liability in contract (responsabilità contrattuale) derives from the infringement of an obligation, a liability in tort (responsabilità extra-contrattuale) derives from the realisation of an unlawful act/omission, which creates an obligatory relationship between the two subjects (creditor/party suffering damage and the debtor owing compensation/tortfeasor). Accordingly, in the case of a liability in contract, an obligation to compensate either substitutes or adds to a previous

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74 Such an action is called azione confessoria if it concerns the protection of a right in rem in another person’s goods. It is directed at affirming the existence of the claimant’s right as against the owner or any other person, who denies the exercise of her right. For instance, art. 1079 C.C. concerns the protection of real servitudes. In this regard, the action aims not only at recognising the right of the owner of the dominant land, but also at stopping possible interferences and disturbances and to restore the previous state if possible.

75 Cassazione, Division III, n. 2479/1979


obligation, which has been either completely or partially violated (perpetuo obligationis), whereas in the case of an obligation in tort the obligation to compensate is a new one.

Art. 2043 C.C. states that any negligent or fraudulent act, which causes unlawful damage to another person, obliges the tortfeasor to compensate for the damage. It is easy to notice that a tort is not typified under Italian law: in fact, the above-mentioned article concerns all negligent or fraudulent acts, which cause unlawful damage. Accordingly, scholars agree in considering this article a general clause, which gives power to the judge to determine, in each single case, if a specific behaviour constitutes a violation of the basic principle neminem laedere. However, the judge is not completely free to identify a tort; in this regard, art. 2043 C.C. provides for some requirements, which can be considered ‘constitutive’ of a tort and they are:

(i) **Fact (fatto):** it is a human behaviour, which can either be commissive (i.e. the person’s behaviour is active) or omissive (the person omits to do something in spite of a concrete duty imposed on her by law).

(ii) **Causation (nesso di causalità):** it is the relationship between cause (human behaviour) and effect (damage), so that the damage would not have occurred had there been no active human behaviour (condicio sine qua non). However, if there are other relevant and external facts that interrupt causation, the human behaviour cannot be considered the cause of the damage; in fact, another characteristic of causation is that the damage will be traced back to the specific human behaviour only if the effect is an immediate and direct consequence of that behaviour.

(iii) **Fault (colpa):** it is the psychological nexus between the behaviour and the event. The fault can either consist of negligence (i.e. the failure to exercise the degree of care, which is, in specific circumstances, required by social and professional parameters) or intention (i.e. intentional deception resulting in damage suffered by another person). The tortfeasor can be considered liable even if she is not to be considered guilty. In these cases, since the relation between the person, who is considered to be liable, and the person or the object that causes the damage is relevant in order to determine the fault, scholars speak of presumed liability (responsabilità presunta). Examples are the custodian, the parents’ liability for their children, a person who intentionally became inebriated, the keeper of animals or goods, the owner of a car, the owner of a derelict building. Scholars also speak of strict liability (responsabilità oggettiva), when a person is responsible for the damage and loss caused by her acts and omissions regardless of her fault (e.g. the employer’s or the contractor’s responsibility for her employee). However, both presumed liability and strict liability may be forms of vicarious liability.

(iv) ‘Unjust’ damage (danno ingiusto): the norm provides that the behaviour has to be such as to have caused ‘unjust’ damage. In this regard,
some scholars thought that the institute of tort law aimed at imposing sanctions in respect of all those cases, where a violation of a legal duty had been realised. Accordingly, the negligence or the fraud of the tortfeasor was considered relevant and only rights that were absolute by their nature could be susceptible to damage, since they expressly grant protection against everybody (*tutela erga omnes*). Successively, the principle of *neminem laedere* was considered a form of protection that was not expressly provided for. This means that a judge’s duty is to identify and select all those interests worthy of protection; in fact, the judge is the person who decides whether the risk of damage should be transferred from the aggrieved party to the damaging party by means of a comparison of the conflicting interests. Some examples of unjust damage are:

- double sale (if the 2nd buyer has persuaded the seller not to fulfil her obligations *vis-à-vis* the 1st buyer, the 1st buyer can sue both the seller and the 2nd buyer, since they have infringed her property right);78
- damage to the property’s integrity (*supra* §§ 1.4.1.(a), 1.4.1.(b), and 1.4.1.(c));
- damage to possession (even if the person, who is in possession of the goods, lacks a title), if it is not possible to recover this possession.79

In addition, according to case law, when the aggrieved person brings such an action, she does not need to prove her proprietary title, since the action is not aimed at proving the existence of a title, but rather the injustice caused by the damage, which is neither necessarily linked to the ownership of the aggrieved object nor to the existence of any other right that is protected *erga omnes*.80

(b) Action for unjustified enrichment

The prerequisite for such an action is that a person is unduly enriched to the detriment of another person. In this case, the unduly enriched person has to pay an indemnity to the person suffering the loss, the former being liable within the scope of her enrichment (art. 2041 C.C.). If the enrichment concerns a specific thing, the unduly enriched person not only has to pay the indemnity, but also has to return the thing. Except for justified cases, such rules have the explicit goal of avoiding that the transfer of wealth from one person’s estate to another’s is detrimental to one of the parties. Hence, it is the principle of equity that constitutes the basis of this action.

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79 *Cassazione*, Division II, n. 1211/1996.
The first characteristic of this action is its generality, since it can concern an infinity of potential cases of unjustified enrichment. Nonetheless, the concrete circumstances in which this action can be brought are quite limited: indeed, an action for unjustified enrichment is excluded whenever it is the consequence of a legal agreement,81 a judicial decision, or the application of a provision of law, i.e. whenever it is the consequence of a legal title, which justified a modification in the person’s own assets. In fact, if the above-mentioned titles were void, the ‘provisional’ enrichment would be restituted by an action for money had and received (azione di ripetizione dell’indebito – art. 2037 C.C.).

Accordingly, scholars argue for the residual character of such an action, since it is not possible to bring an action for unjustified enrichment if the person who suffers the loss can bring another action in order to obtain the restitution of her asset (art. 2042 C.C.). Another requirement for bringing such an action, is the ‘uniqueness of the facts’ that have caused the loss suffered by one of the parties and, at the same time, have resulted in the enrichment of the other. Moreover, both a strict causal nexus and the immediacy between the act and the enrichment are necessary. This means that the act is the immediate and direct cause of both events (the enrichment and the loss). The act, moreover, has to be lawful; otherwise, art. 2043 C.C. will be applied (compensation for unlawful acts). This is also the reason why art. 2041 C.C. states that the party suffering the loss can only receive an indemnity but not compensation. In fact, although both indemnity and compensation are debts, the indemnity is computed considering both the market value of the ‘enrichment’ and the loss.82

The action prescribes in 10 years and the period commences with the day of the enrichment. Moreover, the action for unjustified enrichment can be brought together with any action for the protection of a property right, subordinating the attainability of the former to the non-attainability of the latter.

1.4.3. Urgent pre-trial remedy

The aim of this remedy, regulated by art. 700 C.P.C., is to neutralise the risk that a judgment on the merits of the case, which is arrived at subsequently, may be too late or ineffective by reason of a possible change in the factual situation or due to the non-satisfaction of her right through-

81 Cassazione, Division II, n. 2884/2002.
82 The loss is computed without taking into account the loss of profits (lucro cessante) or the possible negligence of the party suffering the loss (art. 1227 C.C.).
out the entire duration of the trial. Moreover, it has to be pointed out that such remedy is atypical, i.e. the remedy’s object is not defined by law and its admissibility is left to the discretion of the judge, who has to find – within the ambit of her discretion – the most suitable measure to defend the right in question.

It is fair to say that art. 700 C.P.C., hence, is a closing rule of the system or, rather, that this article has a subsidiary power, since it tries to fulfil those precautionary needs, which are not specifically protected by law. The requirements for the application of art. 700 C.P.C. are the so-called *fumus boni juris* and the *periculum in mora*.

In fact, the granting of the remedy presumes that the judge has verified – by way of a verdict that is necessarily simplified when compared to the judgment on the merits of the case – the existence of the claimant’s title (i.e. *fumus boni juris*). As concerns the *periculum in mora*, the law is quite precise. It establishes that the potential damage occurring during the trial has to be ‘imminent’ and ‘irreparable’. The imminence of the damage means that the damaging event or its subsequently damaging effects have already occurred or are most likely about to occur. Accordingly, such remedy cannot be sought, when the claimant was inactive during the time period in which she could have claimed for the protection of her right by using other already available legal remedies, unless she proves the existence of new detrimental effects. As concerns the irreparability of the damage, there a rigorous limit to the protection has been established *ex art.* 700 C.P.C., being a confirmation of the legislator’s intention to use such remedy only in very marginal cases. Accordingly, the parameters of irreparability have to be interpreted as being a synonym for damage, which cannot be easily or wholly repaired when the trial will have ended. Nevertheless, such parameters do not need to be interpreted strictly in the sense of the irreversibility of the potential damage, but the extreme difficulty to precisely restore the *status quo ante* is sufficient.

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85 According to case law, damage is irreparable not only when it is not possible to compensate for it with a monetary equivalent but also when an inhibitory form of protection is necessary in the light of the nature of the potential damage. In the case of noise pollution, see Tribunale Venezia, 27 settembre 2000, Società Autostrade Venezia-Padova vs Agnoletto et alii, in CASSANO Giuseppe, *La giurisprudenza del danno esenziale*, La Tribuna, 2002, p.299.

1.5. Transferability of movable assets

Generally, there is no limit to the transferability of movables. However, in some cases the law can expressly provide that some movables may not be transferred. This is, for instance, the case for weapons, explosives, medicines and drugs, whose transferability is limited on the basis of considerations of health and public security. Indeed, in all of these cases, transferability will only be possible with the permission of the competent authority and with a record of the transaction. Moreover, the law prohibits the transfer of human organs and blood against remuneration: such transfers are considered lawful only if they are the result of solidary behaviour, i.e. the transfer has to be effected free of charge. It immediately appears quite evident that the state has an interest in protecting, on the one side, the buyer against purchasing a ‘bad quality product’ and, on the other side, the seller against selling parts of her body, which are fundamental for her survival.

In addition, the Italian legal system provides for limits as to the subjective characteristics of the buyer. In this regard, art. 1471 C.C. prohibits some persons, who hold a specific office, from buying goods that are under her direct control or management, or in her custody, whether by way of private transaction or public auction (even if she acquires the goods via a third party). Such persons are the following: 1) the trustee of an estate belonging to the State, a governmental or a local entity; 2) a civil servant (e.g. liquidator/trustee in bankruptcy); 3) a person who is entrusted with the management of another person’s estate, either by virtue of law or administrative provisions; 4) an agent, unless she has been expressly authorised to do so by the principal.

As concerns the effectiveness of a contractual provision, which binds the parties to either transfer or to limit the transferability of goods, art. 1379 C.C. states that such a stipulation is binding only on the parties to the agreement, i.e. it produces purely internal effects. In this regard, case law has clearly affirmed that the provision of art. 1379 C.C. – being the expression of a general principle – applies to all those agreements that impose a severe limitation on the ownership of a property right\(^87\) (e.g. agreements which impose a restraint on the purpose of the movable; the agreement between a manufacturer and his wholesaler prohibiting the latter to sell at a price other than the one determined by the former).\(^88\)

\(^{87}\) Cassazione, Division III, n. 3082/1990; Cassazione, Division II, n. 12769/1999.

Furthermore, the above-mentioned article states that such a contractual term is not valid if it has no appropriate time limit and does not serve a valuable interest\(^{89}\) of one of the parties.

In addition, it has to be pointed out that the bound party is always free not to respect the limit imposed by the contractual constraint. However, even though the contract fully produces its effects between the contracting parties, an infringement of this contractual constraint cannot be enforced against a third party. In fact, the third party acquires full title, since she has acquired from a person who had a perfectly valid title too. Accordingly, the only action that can be granted to a person, in whose favour the contractual constraint produced its effect, is the one for compensation \textsc{ex 2043} C.C. The latter can bring such an action against the violating party and against the third party only if she is able to prove that the third party induced the violating party not to fulfil the contract.\(^{90}\)

\subsection{1.5.1. Appurtenances}

Article 817 C.C. defines as an appurtenance (pertinenza) goods that are assigned in a durable way\(^{91}\) in order to serve or ornament another object\(^{92}\). Such a purpose can either be determined by the owner of the principal thing or by a person\(^{93}\) who enjoys a right \textit{in rem} in the principal thing. The code is not clear on the issue, but well-consolidated case law\(^{94}\) and scholars\(^{95}\) agree that the power to connect one thing to another can

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\(^{89}\) An interest is considered valuable if there is a congruence between the means (\textit{i.e.} the prohibition) and the aim (\textit{i.e.} the interest is immediately protected by respecting the prohibition); in particular, this means that the economic advantage, which is derived from such a constraint on one of the parties, can be achieved only if the obliged party respects such a ‘specific’ contractual constraint.

\(^{90}\) Cassazione, Division I, n. 5958/1985.

\(^{91}\) The requirement of durableness has to be interpreted not as temporal perpetuity but as a means of ensuring the functional stability of the appurtenance. Accordingly, such requirement is missing when the goods are used as ornaments at occasional events (\textit{e.g.} a cinematographic or pictorial exposition).

\(^{92}\) A clear distinction must be drawn between appurtenance and principal thing. As opposed to an appurtenance, a principal thing has its own autonomous functionality; whereas, the functionality of a compound thing depends on the aggregation of all its individual components. See Cassazione n. 169/1973.

\(^{93}\) Her legitimisation to define an object as an appurtenance is derived from her power to make improvements to the thing. However, the connection between the principal thing and the appurtenance ends with the creation of right \textit{in rem} for enjoyment purposes (\textit{e.g.} if a tenant decorates the garden of a villa with a statue, the testamentary provision, by which the owner of villa disposes in favour of third party, does not include the statue).

\(^{94}\) Cassazione n. 475/1971.

\(^{95}\) DE MARTINO, \textit{ibidem}, p. 43.
Ownership and other property rights

be exercised only by the person, who either has the ownership of, or another right in rem in, both of the goods; on the other hand, a minority of scholars\(^\text{96}\) argue that it is possible that the determination of the purpose can also be effected by a person who is not the owner. This interpretation, however, contradicts the basic rule, according to which the purpose modifies the legal status of the appurtenance, subjecting it to the status of the principal thing. This confirms that the legitimacy of using something as an appurtenance depends on whether the person has a right in rem in the object.

What is important is that the link has to be functional to the improvement of the utility and beauty of the principal thing; consequently, goods for personal use (e.g. radio, TV set, furnishings, etc. ...) are not considered to be appurtenances.\(^\text{97}\) Some doubts have been expressed as to the case of machinery and equipment in an enterprise. In this regard, some scholars point out that the concept of ‘appurtenance’ presumes a relationship of the subordination of one thing to another, whereas the concept of ‘enterprise’ presumes that all the goods that are part of it fulfil a purpose of complementarity so that they all contribute equally to the functional productivity of the enterprise, i.e. they constitute a universitas juris, in which none of the goods can be classified as ‘principal’ or ‘accessory’.\(^\text{98}\)

In addition, an appurtenance does not need to be physically linked to the principal thing, i.e. it is not necessary that it is physically part of the principal thing. According to case law, the main difference between the notions of ‘part’ and ‘appurtenance’ does not lie in the possible existence of a relationship that is based on a physical link, but rather in a different position of the functional nexus between the appurtenance and the main asset. Such link indicates the purpose of the appurtenance which is to complete the principal asset, in order to meet the necessities, for which it was created, within a certain period of time and against a certain social background, so that it can be said that such an appurtenance would be commonly deemed to be an essential part of the principal asset. As to the appurtenance, the functional link consists in the ‘service’ or ‘ornament’ that the appurtenance is rendering to or representing for a composite asset; it is useful in itself. It is, therefore, an element that does not go to the essence of the asset, but, rather, is relevant for its economic management or its aesthetic shape.

\(^{96}\) CONTURSI LISI Lycia, Le pertinenze, CEDAM, 1952, p. 29.

\(^{97}\) However, some case law states that furnishings in an apartment as well as in a caravan have to be considered as being appurtenances because they increase the habitability. Cassazione, Division III, n. 6866/1993.

The basic rules governing appurtenances are:

1. The appurtenance is affected by the events experienced by the principal thing (art. 818(1) C.C.). Therefore, if the principal thing is sold, the transfer also concerns the appurtenance (art. 1477(2) C.C.); a life tenancy or mortgage (art. 2810(1) C.C.) extends to the appurtenance as well.

2. The transfer of the principal thing does not infringe another person’s right in the appurtenance (art. 819 C.C.). This rule derives from the principle of the ineffectiveness of acts, which aim at transferring another person’s rights.

3. An appurtenance can be the object of separate legal relations (art. 818(2) C.C.). If the principal thing and the appurtenance are sold separately, a conflict between the owner of the principal thing and the owner of the appurtenance can arise. The conflict can be solved by means of the publicity provided by the register, if the appurtenance is an immovable (the person who registers first prevails), or by means of the temporal priority principle, if the appurtenance is a movable (the person who acquired first prevails). However, if the principal thing is an immovable or a registered thing, a third party can oppose her right in the appurtenance to the good faith buyer of the principal thing only if her right derives from a written and dated document (e.g. Titius sells agricultural machinery used on his land to Sempronius; subsequently, Titius sells the land to Gaius; Gaius ignores that the machinery has already been sold; if Sempronius, the owner of the machinery, can only produce an undated document, Gaius will be considered the rightful owner of them). Finally, it has to be pointed out that the principle of possession vaut titre always applies.

An object ceases to be an appurtenance when its utility and ornamental function terminates. However, it is not opposable to persons who acquired rights in the principal thing before the dissolution of the relationship between the principal thing and the appurtenance occurred.

1.5.2. Accessories

Case law also makes a distinction between appurtenances and accessories. Theoretically, accessories are a wider category than the one of appurtenances. It is true that an accessory, as well as an appurtenance, is a thing that stands in a subordinate functional relationship to a principal thing, but the concept refers to both physical and legal entities that depend on different components or elements, leaving any intentional act of disposition, which is required in respect of appurtenances, out of consideration.
This broad definition mainly finds its expression in some rules of the Codice Civile:

1. The transfer of credit (art. 1263(1) C.C.) and of negotiable instruments (art. 1995 C.C.) includes all related accessory rights such as privileges (privilegio), security and interest rights, as well as remedies against non-performance;

2. The transfer of the ownership (art. 1477(2) C.C.), as well as the conclusion of a lease contract (art. 1617 C.C.), includes all those accessories that are necessary for the normal use and enjoyment of the thing, even if they are non-existent at the moment of the formation of the contract (e.g. a car dealer has to, at the moment of delivery, hand over to the buyer or the lessee a car equipped with a spare wheel, headlights and a log-book). In addition, as to the transfer of ownership, the aforementioned rule does not apply to legacies and gifts. In fact, they include all those accessories, which exist at the moment of the probate or at the moment of the formation of the contract, since the rights of the beneficiary only extend to the object as it exists in the deceased’s or the donor’s estate.

3. A property seizure includes the accessories, the appurtenances, and the fruits of the seized object (art. 2912 C.C.) (e.g. the land surrounding a seized building; the stock located on agricultural land, the rent).

1.5.3. Universitas of movables

A universitas of movables (universalità di mobili) is a multitude of movables belonging to the same person and having the same unitary purpose (e.g. a collection of stamps; a flock of sheep). It has to be pointed out that each element of a universitas is perfectly operative and it is clearly distinct from the elements of a compound thing, in which each element lacks its own functionality. In order to clarify this statement, it is enough to consider the difference between a flock of sheep and a car: each sheep can perfectly be an object of separate enjoyment, but headlights, wheels and seats are enjoyable and acquire a value only when they are assembled in a car.

Moreover, in order to have a unitary purpose it is important that the owner acts in such a way as to show the intention of considering the elements of a universitas as functionally joint. This means that if the owner’s intention is non-existent, but the elements are accidentally joined together (e.g. the volumes of an encyclopaedia), this compound of goods cannot be considered a universitas.99

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A universitas of movables is also called universitas facti (universalità di fatto), because it is, indeed, the result of a person’s activity. In addition to that, the universitas juris (universalità di diritto) has to be mentioned. It concerns not only movables but also every kind of tangible and intangible property (e.g. rights, obligation, etc. …) and the functional joining depends both on the activity of natural persons as well as on the law. The estate of a deceased person and the assets of an enterprise (azienda) are the only two cases of a universitas juris.

Finally, it has to be said that a universitas is subject to the rules provided for immovables and registered movables (art. 1156 C.C.), especially as concerns its transfer, its protection (art. 1170 C.C.) and adverse possession (art. 1160 C.C.).

2. Possession
2.1. Notion of possession

Possession can be described as a factual situation, which is substantiated in a relationship between the person and the thing, implying, at least potentially, an interference of the person with the thing and a steady abstention from interfering by another person.

Art. 1140(1) C.C. defines the possession as the power over the thing, which is manifested in an activity corresponding to the exercise of either a property right or of another right in rem. As a consequence, there is a difference between the title and the exercise of ownership, between being the owner of a thing and behaving like the owner of a thing.

Generally, the property right and the corresponding possession are concentrated in the same subject: accordingly, it is fair to say that the owner is also the possessor; therefore, not only she has title to the object, 100 This cannot be compared with the possession of immaterial goods. For instance, in the case of a Television Audio Frequency band, a private television company can be in possession of another’s private television company’s T.A.F. band, when they overlap (Cassazione, Division II, n. 7553/2000), but possessory protection is denied when one of the television companies is RAI (Italian public service broadcaster), because of the public nature of the company (Cassazione, Division II, n. 4243/1991). Possessory protection is also recognised in case concerning airspace if the airspace, as being an expression and a projection of one’s own property right in land, can be the subject of possession (Cassazione, Division II, n. 926/1997). In the case of electricity, no possessory protection can be granted when the act, which interrupts the supply of energy, occurs in the part of the electricity meter that is in the sphere of control of the consumer. If the power supplier exerts influence on another part of the electricity network, this cannot be a case of the dispossession of electricity. The consumer can only bring an action for breach of contract by the power supplier (Cassazione, Division II, n. 9312/1993).
but she also concretely exercises her right in respect of it. These rules, nevertheless, admit numerous exceptions since, according to reality, ownership and possession are often divided. In fact, in some cases it occurs that the exercise of the ownership right can be effected by a person with no title, solely acting with the authorisation of the person having a title (e.g. the enjoyment by a tenant of a leased object is the effect of an authorisation given by the lessor/property owner). It can also happen that the person without a title exercises another person’s right without or against the will of the latter (e.g. in the case of theft, the owner of the thing is always the victim, but she has lost the possession, whereas the thief has obtained the possession of the thing, the latter now behaving like the owner not having the right to do so!).

Therefore, in the case of possession, the ownership title to the right is left out of consideration, because possession, by definition, can lack in a title supporting the right. Under art. 1140(2) C.C., one can exercise possession in two ways: 1) either by means of direct possession, so that one considers the thing as being one’s own; 2) or by means of indirect possession, i.e. by means of another person who has the custody of the thing. In this second circumstance, it can occur that the owner is also the possessor, or that the possessor is not the owner (e.g. the possessor of a car continues to be in possession of the vehicle, even if it is parked in a metered and guarded car park).

Constitutive elements of possession are the corpus possessionis and the animus possidendi. The corpus possessionis, which constitutes the objective element of possession, is the factual and concrete power of the person over the thing. In this regard, case law has pointed out that a continuous relation with the thing is not necessary, but it is important that the person concretely has the possibility to use the thing without another person having the power to exclude her from the enjoyment of the thing (e.g. the possessor of a book continues to possesses it even when she has placed it on the bookshelves). The circumstance of having possession implies several advantages (so-called commoda possessionis), such as the possibility of acquiring either the ownership or another right in rem by means of acquisitive prescription, but also brings with it the capacity to be sued in the case of a vindicatio for the purpose of possessory protection.

The animus possidendi is not expressly mentioned in art. 1140 C.C., but it is considered to be a subjective element of possession by constant case law. It is manifested in the intention to exercise a power over the thing corresponding either to ownership or to another right in rem. The

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101 The two above-mentioned elements are fundamental in order to constitute possession for the person who does not have title to the right in rem. For the person who has title to the right in rem, the corpus element is sufficient in order for her to be qualified as the possessor.

102 Cassazione, Division II, n. 7538/2004
animus possidendi is a psychological element, which has to be presumed juris tantum (i.e. unless differently proved) and has to be intended, such intention corresponding to the intention to hold the thing as if it belonged to the holder or as the exercise of an own right. Therefore, the animus cannot be said to be lacking if the possessor subsequently becomes aware of the existence of another person’s right.

Besides including the possession of a property right (so-called full possession, possesso pieno), art. 1140(1) C.C. considers the possession of other rights in rem (so-called ‘minor possession’, possesso minore). In fact, one can have possession of life tenancy, right of use, building leases, pledges, etc., i.e. one can behave like the life-tenant, the building-lease-holder, whether one has a title or not (art. 1153(3) C.C.). In this case, scholars speak of the possession of a right (possesso di diritti).

2.2. Distinction between possession and detenzione

Detenzione (custody) is different from possession. The distinctive element is the existence of the animus possidendi. In fact, detenzione occurs when a subject has a mere de facto control over the goods in favour of the possessor (nomine alieno), i.e. her detenzione of the goods lacks the animus of exercising something comparable to a right in rem, but she recognises another person’s stronger right in the goods (so-called laudatio possessoris). Detenzione, hence, consists of two elements:

1. a relation of physical contiguity between the subject and the goods (corpus); and
2. a different and special animus detinendi, which consists in the intention of having the goods at one’s own disposal without the intention of exercising any power that is typical of the power of an owner or of a holder of another right in rem.

With detenzione, the de facto power of the holder (detentore) always derives from the delivery and a non-transferring title, which does not constitute a right in rem, but only produces obligatory effects (e.g. lease, bailment, and employment contract).

104 Cassazione, Division II, n. 9562/2005.
105 The carrier, the garage owner, the car mechanic, or a friend to whom one has lent a book, are example of subjects, who have mere detenzione of the goods. It is fundamental, therefore, to identify the existence of a title justifying the exercise of de facto power over the goods, in order to distinguish it from detenzione and possession. In fact, if the goods are used on the basis of a title deriving from a personal right for enjoyment purposes, we face a situation qualifiable as detenzione, whereas, if the
Some scholars\textsuperscript{106} observed that the distinction between possession and detenzione cannot be based on an element of an uncertain psychological nature, and that the element of animus is not relevant in the positive law. Accordingly, they suggested that such differentiation should be made on the basis of the manner in which the separate legal relations have been created against the background of social reality or, rather, they suggested that only the title is relevant so that detenzione would be a legal situation whereas possession would be a factual situation.

_Detenzione_ can be exercised in one’s own interest (e.g. the tenant holds a thing on the lessor’s/possessor’s behalf as well as in her own interest) and it is defined either as qualified or as autonomous detenzione (detenzione qualificata od autonoma), but it can also be exercised in another person’s interest (e.g. the employee who uses – for the purposes of her work – the employer’s tools); in the latter case, it is defined as unqualified detenzione (detenzione non qualificata). In addition, one can exercise detention on the grounds of hospitality.\textsuperscript{107}

For reasons of certainty, the legislator has, by means of art. 1141(1) C.C., introduced a presumption according to which the person who exercises _de facto_ control over the goods is to be considered as a possessor. However, this is a _juris tantum_ presumption, since it is always possible to prove that the person has started exercising such power as a simple detentore. The proof of the _detenzione_ can be easily brought forward by means of analysing the title, which empowers one to the relationship with the goods, regardless of the _animus_ (e.g. if the title stems from a lease contract or a gratuitous loan for use, one can be sure that this is a case of _detenzione_).\textsuperscript{108}

\textsuperscript{106} SACCO Rodolfo, Possesso (dir. priv.), in Enciclopedia del diritto, Giuffrè, 1985, vol. XXXIV, p. 491.

\textsuperscript{107} This classification has an important effect within the Italian property law system. In fact, art. 1168(2) C.C. recognises the right of claiming for the restitution of the goods (azione di spoglio) from the detentore as well, unless the _detenzione_ is in another person’s interest or is exercised on the grounds of hospitality. There is some doubt as to the latter case, since an occasional guest is not considered a detentore, whereas the tenant’s relatives, who constantly live with her, are considered detentori who are entitled to the abovementioned action even when brought against the tenant. As to the person who lives _more uxorio_, there are some contrasting opinions on whether she should be considered as a codetentore.

\textsuperscript{108} Cassazione, Division II, n. 6221/2002. According to the Cassazione, the tenant is considered to be a qualified detentore and, therefore, she has the right to protect herself from eviction by another. In the cited case, the tenant had the right to the supply of energy and, therefore, also had a right to the access to the common room where the electricity meter was located in order to restore her access to the supply of energy.
In addition, it has to be pointed out that the *detentore* can maintain that the *detenzione* was transformed into possession, but, in this case, she has to bring forward proof *ex art. 1141(2) C.C.*, i.e. she has to prove either the modification of the title or her own manifest opposition to the owner and/or possessor. This phenomenon, *i.e.* the change in the *animus* of the *detentore*, is called ‘reversion’ (*interversione*) in Italian law.

In such case, the title can be modified either with the consensus of the possessor or the non-possessor/third party. The latter can be the owner who does not have the possession of the goods and transfers her right to a *detentore* by an *inter vivos* or *mortis causa* act. In this case, the *detentore* who acquires the ownership becomes possessor (and owner as well). However, it is possible to hypothesise that another person sells or transfers the goods, even though she is not the owner. In this case, the *detentore* will not acquire ownership but only possession.\(^\text{109}\)

Art 1141(2) C.C. describes a second case of the reversion of one’s own relationship with the goods. Particularly, it states that the reversion of another’s own position can occur when the *detentore* denies another person’s possession either by way of an explicit declaration (*opposizione espressa*) or by way of her own concrete and unequivocal behaviour (*opposizione tacita*). In this way, the *detentore* manifests her intention not to continue holding the goods *nomine alieno* (in another person’s interest) anymore, but *nomine proprio* (in her own interest).\(^\text{110}\)

Of course, the phenomenon of reversion is applicable to the possessor as well. In fact, art. 1164 C.C. states that the person, who exercises a right *in rem* in another person’s goods, can acquire the ownership of the goods by way of acquisitive prescription, she merely having to change her *animus*. Similarly to the provision governing *detenzione*, the article establishes that this change is either the consequence of a modification of her title, or of a manifest opposition to the owner's right.

### 2.3. Acquisition, maintenance and loss of possession

In order for a concrete acquisition of possession to occur, an initial act of ‘appropriation’ is necessary, which allows the subject to exercise the typical features of ownership and other rights *in rem* in a steady and durable manner. In this regard, it has to be underlined that the possession of the goods can be exercised by means of another person’s *detenzione*. The code

\(^{109}\) For instance, the bailee/detentore of a movable acquires it from a person, who has transferred the movable by a gratuitous or pecuniary contract to the former, even though the latter is not the real owner.

\(^{110}\) For instance, such behaviour can be noticed in the case where the tenant prevents the owner from entering the immovable in order to perform extraordinary maintenance works.
is clear in providing a definition of the indirect possessor: indeed, art. 1140(2) C.C. states that an indirect possessor is the person who exercises the possession of the goods through another person, the latter having the de facto disposability of the goods.\footnote{111}

Accordingly, it is not necessary that the subject has physical control over the goods at all times, since the mere possibility to enjoy the goods whenever she wishes is sufficient. This means that the maintenance of possession that has been acquired \textit{animo et corpore} does not require the exercise of a continuous and actual enjoyment or the exercise of possession \textit{per se}, since it is sufficient that the possessed asset is deemed to practically be at the disposability of its possessor with regard to its nature and social economic purpose, meaning that the latter can take up the physical relationship to it whenever she so decides. Case law\footnote{112} underlines that physical control over property is necessary only at the beginning. Subsequently, this control can be replaced by the simple possibility of regaining the physical disposability over property (\textit{possessio solo animo retinetur}).

The possession of the goods can either be acquired originally if there is no relationship between the previous and the subsequent possessor, or acquired derivatively by means of a transfer of the possession effected by the previous possessor.

Possession is original when there is a physical seizure of the goods coupled with the \textit{animus rem sibi habendi}. It can occur either as a result of an act of dispossession (\textit{i.e.} the original possessor seizes the goods against the will of the rightful possessor) or as a result of the appropriation of goods that do not belong to anyone. This last case is addressed by art(s) 923 et seq. C.C. as a way of acquiring possession and, subsequently, ownership of movables (\textit{e.g.} animals). Another way of acquiring original possession derives from reversion (\textit{supra} § 2.2.). However, acts tolerated by another person cannot be considered to be grounds for the acquisition of possession (art. 1144 C.C.). The characteristics of toleration are its transitoriness, its discontinuity and the actual possessor's behaviour.

Derivative possession either occurs as a result of delivery (\textit{traditio}) or succession. The delivery is an intentional legal act by means of which the previous possessor (\textit{tradens}) puts the subsequent possessor (\textit{accipiens}) in possession. It can either be real, when there is physical delivery of the goods coupled with the intention to transfer possession (\textit{e.g.} in the case of movables), or symbolic, when delivery is only virtual; for instance, a

\footnote{111} For instance, in the case of a lease contract the property owner exercises indirect possession through the \textit{detenzione} of the tenant.


\footnote{113} Although the actual possessor's behaviour can be passive, it is such as to cause the "trespasser's" conviction of the possessor's permission. \textit{Cfr Cassazione}, Division II, n. 8194/2001.
delivery of the document representing the goods or a delivery of the keys (so-called *traditio ficta*).\(^{114}\)

In addition, there are two types of *traditio ficta* where the transferee is the possessor of the goods at all times, but it is her *animus* that changes; for instance, after the transfer of ownership she starts behaving like a possessor. These are the *traditio brevi manu*\(^{115}\) and the *constitutum possessorium*.

In the case of the *traditio brevi manu*, the goods are already in the *detenzione* of the transferee who, after the conclusion of the agreement with the transferor, acquires the possession of them as well. This is, for instance, the case when a tenant buys an apartment from the lessor/possessor; indeed, the tenant already has the *detenzione* of the apartment by virtue of the lease contract. Another example is the buyer, who inserts a retention of title clause in a sales contract: here, the buyer is the *detentore* by virtue of the delivery, but she becomes possessor only when she acquires the property by means of the payment of the last instalment. In both examples, there is no physical transfer, since the transferee already has the physical enjoyment of the goods; what really changes is her *animus*.

The *constitutum possessorium* is the acquisition of possession by means of the consent to the indirect possessor’s position. The *constitutum possessorium* comprises two cases: 1) the acquisition of the possession of goods that are in another person’s *detenzione*; 2) the acquisition of the possession of goods, which remain in the *detenzione* of the seller.\(^{116}\)

In the first case, either the owner or the holder of a right in rem for enjoyment purposes sells the goods that are in the *detenzione* of another person (e.g. Titius sells a bulk of goods to Gaius, these goods are stored in a warehouse, Gaius has the indirect possession of the goods as a result of

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\(^{114}\) The transfer of the possession cannot occur in the context of the transfer of the ownership. For instance, the in rem effect of a sales contract consists in the transfer of the property right in the goods at the moment of the parties’ consensus. The following transfer of possession is the manifestation of the seller’s duty to allow the buyer to enjoy the goods, which are already included in the buyer’s assets. At the moment of the contractual agreement, the buyer only has the *jus possidendi* (the right to be put in possession), but at the moment of the delivery she has the *jus possessionis* (the right to possession).

\(^{115}\) Another case is the *traditio longa manu*, which occurs when the goods – despite being physically delivered – are only identified and put at transferee’s disposal. However, there are not so many cases of *traditio longa manu* and, in this regard, there is an interesting contribution by Ghirardi (cfr GHIRARDI Giovanni, *Interpretazione della realtà del mutuo*, in Giust. civ., Giuffrè, 1973, I, p. 1009). He argues that the case of a loan contract, where the disposability over a sum of money is given to the borrower/transferee by the bank/moneylender/transferor is an example of *traditio longa manu*. Cfr Cassazione, Division III, n. 12123/1990, Cassazione, Division I, n. 5193/1991.

\(^{116}\) Cassazione, Division II, n. 242/1985; Cassazione, Division II, n. 1156/1996.
the warehouse keeper’s *detenzione*, once this person knows of the transfer). It is important to underline that the *constitutum possessorium* distinguishes itself from the sales contract, since it manifests itself in the buyer’s actual appropriation. This means that it can occur even if the sales contract is not effective. In fact, the *constitutum possessorium* is a factual situation that is subject to the rules on consensus, i.e. the possession is not transferred by the mere agreement of the parties, but only once the goods have been placed under the buyer’s control (e.g. the seller of a machinery, Titius, is not its owner, but she sells it to Gaius all the same. However, the machinery is subsequently leased to Sempronius and Sempronius has, until now, considered lessor Titius to be the owner. However, as a result of the agreement between Titius and Gaius, Sempronius will consider Gaius as the new ‘lessor’. Accordingly, Gaius acquires indirect possession by virtue of Sempronius’ *detenzione*).

In the second case, the sold goods are in the *detenzione* of the transferee, but on behalf of the transferee (e.g. the seller undertakes to hold the custody of the sold goods). Also in this case, the transferee has to be considered to be an indirect possessor. It is important to note that the transformation of possession into *detenzione* is not an automatic consequence of the transferring contract, but is the effect of a specific intention of the parties, according to which the transferor agrees to change her own *animus* from one of being a possessor into one of being *detentore*.117

Succession is the second way in which to acquire derivative possession. Derivative possession can result either from a case of universal succession when, after the possessor’s death, the possession is transferred to her heir (art. 1146(1) C.C.),118 or from singular succession (a so-called accrual of possession – *accessione del possesso*), when the transferee combines the effects of her own possession with the effect of the transferor’s possession (art. 1146(2) C.C.). As to the accrual of possession, it has to be added that the union of the abovementioned effects means that the transferee can take the transferor’s possession into account in her computation in order to achieve the time of possession that is necessary both for acquisitive prescription and for possessory protection.119

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117 The investigation concerning this change in the *animus* involves a case-by-case analysis of parties’ intention, contractual terms, as well as parties’ behaviour after the agreement. Cfr Cassazione, Division II, 6095/1994.

118 It is important to underline that the heir’s good or bad faith will be based on the quality of the deceased’s faith. This means that if the deceased was a bad faith possessor, the heir will be considered in bad faith even if the latter was unaware of infringing another person’s right.

119 E.g.: 1) Titius buys a movable from Gaius, who is not the owner; Gaius was in possession of the movable for 4 years; Titius was in possession of the movable for another 6 years and acquires ownership by way of acquisitive prescription, since he can add his time of possession to Gaius’ one. 2) Titius buys a movable from Gaius;
an accrual requires an abstractly suitable title for the transfer of the right as well as the identifiability of the goods being the object of possession.

Finally, the accrual has to be distinguished from universal succession, because it does not transfer to the transferee the defects inherent in the previous possession, i.e. if the new possessor ignores the past infringement of another person’s right, she will be in good faith even though the previous possessor was in bad faith.

In addition, the legislator has provided some presumptions as to the computation of the time of possession and the proof thereof. The basic rule is that the burden of proving possession is on the person, who wants to benefit from the achievement of the effects of the possession; this rule is derived from the general principle of art. 2697 C.C., according to which the person who claims a right has to prove the facts on which her claim is based. Accordingly, such rule establishes a presumption of possession in favour of the person who has physical power over the goods. Nevertheless, as already seen, such presumption can be rebutted if the claimant can prove that the possessor had exercised his possession on another person’s behalf, hence becoming a mere detentore (supra § 2.2. – art. 1141(1) C.C.).

Art(s) 1142 and 1143 C.C. specify two other rules concerning the presumption of possession. Art. 1142 C.C. states that if the current possessor had been in the possession of goods previously at one point in time, she is considered to have also been in possession in the entire meantime (i.e. from the time of the commencement of possession onwards). This is called the presumption of intermediary possession (presunzione di possesso intermedio). On the contrary, art. 1143 C.C. states that, although the current possession is not an absolute piece of evidence proving the previous continuous possession (in fact, possession is a factual situation subject to potential mutation), the moment of the commencement of possession is, however, presumed from the date indicated in the title. This is called the presumption of previous possession (presunzione di possesso antecedente).

Finally, the loss of possession can occur either due to the lack of corpus or the lack of animus. As to the corpus, this happens when the person does not have the availability of the goods (e.g., due to dispossession, intentional delivery, abandonment, loss, or restitution of goods). As to

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120 The loss of an object (e.g. in a restaurant, in a friend’s apartment, etc…) does not automatically imply the loss of possession as long as the lost object can be recovered by means of the possessor’s direct appropriation, or as long as it remains in the custody of the person who discovered it. In particular, the person who hosts a guest (e.g. a restaurant owner) has a duty of protecting the latter. Such a duty includes...
the animus, it is necessary to exteriorise, by means of clear and unequivocal signs, the intention to give up possession (so-called animus dereliquendi).

2.4. Possession in good or bad faith

Italian law distinguishes between legitimate (or ‘titled’) and illegitimate possession. Possession is legitimate when there is a title by means of which the owner or another possessor formally transfers possession (e.g. Titius transfers a movable to Gaius by reason of an agreement of bailment or sale). In this way, the possessor has the possibility of bringing forward an objective proof together with the presumptions that are provided by art. 1141 et seq. C.C. In the case of a unilateral appropriation, when there is lack of a title, the possession is illegitimate. However, such possession can be protected as well. However, the possessor can defend herself against the owner, who wants to re-obtain the dispossessed goods, by relying on the principle possideo quia possideo.121 The illegitimate possession can be exercised in good faith (art. 1147 C.C.) as well as in bad faith.

However, it has to be underlined that the element of good or bad faith is fundamental and, since it is difficult to investigate the parties’ subjective state of mind, the legislator provides some rules in this regard.

Indeed, art. 1147 C.C. determines the requirements as to good faith. In its first paragraph, it expressly states that the possessor is considered to be a possessor in good faith if she possesses without knowingly infringing another person’s right. In addition, the second paragraph states that, if the ignorance is the result of gross negligence, good faith cannot be presumed. This is, therefore, a limit to the first paragraph of art. 1147 C.C., which has the aim of avoiding that grossly negligent behaviour might be considered irrelevant, when the time has come to evaluate the awareness of the possessor of infringing another person’s right.

In fact, although – in some cases – a mistake (either of law or of fact) will not be an impediment to good faith acquisition, it cannot be acceptable that a mistake is the result of blatant ignorance (i.e. gross negligence) and, therefore, it is not acceptable that it violates the rules regarding diligent behaviour that are to be followed by everyone in society.

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121 This principle corresponds to the French legal maxim possession vaut titre, i.e. in the case of a claim, the possessor can limit her defence by relying on her own possession, without giving any other justification or by forcing the claimant to prove her right (art. 2697 C.C.).
The mistake has to be excusable and must be evaluated according to lenient and pre-determined criteria, but it is necessary to take into account the social category and the working activities of the possessor as well as the time and place of her acts plus all other circumstances, which the judge will consider relevant. Accordingly, a simple doubt or a suspicion obliges the judge to conduct a thorough investigation.

The third paragraph aims at avoiding a complex investigation whenever the judge has to analyse psychological and subjective elements. In fact, it is presumed that the power over the goods is exercised on the basis of a possession title (art. 1141 C.C.); further, it is presumed, all the same, that the possession is exercised in good faith \textit{ab initio}, unless the contrary is proved (the evidence can even be either presumptive or purely circumstantial evidence).\textsuperscript{122}

In addition, it is sufficient that the good faith exists at the moment of the acquisition, so that \textit{mala fides superveniens non nocet}, \textit{i.e.} it is irrelevant that the original good faith subsequently turns into bad faith, such being the consequence of the intervening awareness of infringing another person’s right.

2.5. Restitution of the goods and effects of possession

As stated above, possession has particularly important function. In fact, since the aim of the legislator is the certainty of law, the factual situation of being in possession is the initial requirement for acquiring ownership and other rights \textit{in rem} in the goods. However, the possessor loses her entitlement as soon as the holder of the right \textit{in rem} or the owner of the goods brings a claim on the basis of her own title against the possessor. In fact, it is clear that possession, which consists in behaving like the owner of a thing but – in itself – does not constitute a right, has to succumb to the ownership right or to others right \textit{in rem} of the entitled person. Accordingly, the \textit{Codice Civile} deals with the effects of possession when this factual situation ends and, consequently, the goods have to be returned to the entitled person. In fact, the notion of possession is relevant for the acquisition of fruits\textsuperscript{123}, the reimbursement of expenses made for improvements or additions, good faith acquisition, as well as acquisitive prescription.

As stated above (\textit{supra} § 1.4.1.(a)), when the possessor is not the owner, the legitimate person, providing proof of her ownership right, can

\textsuperscript{122} In this concern, the court (\textit{Cassazione}, n. 3754/1968; \textit{Cassazione}, n. 2961/1971; \textit{Cassazione}, n. 3365/1971) states that the presumption of good faith can be rebutted by means of simple presumptions, provided that they are serious, precise, and concordant.

\textsuperscript{123} \textit{Supra} footnote 32.
exercise the *vindicatio* ex art. 948 C.C. and, consequently, she can have the goods restituted to her. Similarly, the holder of a right *in rem* can claim that the factual situation of possession corresponds to her right. Once the owner, or the holder of the right *in rem*, succeeds in the action, the possessor is obliged not only to return the goods but also to compensate for the deterioration of the goods (art. 948(1) C.C.), whether or not the possessor was negligent. However, the possessor is not always in the position to return the goods, either because she sold the goods to another person or because the goods were lost. In the former case, the possessor, who sold the goods after the beginning of the *vindicatio*, has to provide compensation of a sum equal to the economic value of the goods as well as having to compensate for the potential damage inflicted on the owner. In the other case, if the goods are destroyed after the beginning of the proceedings, the owner will receive compensation in the amount of their economic value. Finally, if the object was either sold or destroyed before the beginning of the proceedings, the owner cannot recover the goods, but can only bring an action based on the contractual agreement that was perhaps concluded with the defendant, an action for damages, or an action for unjustified enrichment, in order to obtain compensation in the amount of its economic value.

This rule shows the intention of the legislator to consider the possession of another person’s goods as being something unlawful without the possibility of making any distinction between a possessor in good faith and one in bad faith. However, the possessor in good faith receives a better treatment in the case of the restitution of the fruits or the reimbursement of the expenses incurred for the goods, since the legislator, nonetheless, considers it unjust to subject a person, who used the goods, in the firm belief that she was the owner, to further “punishment” in addition to the restitution of the goods.\(^{124}\)

In this regard, the law provides that, in the case of the restitution of the goods to the owner, the possessor in good faith has to return the natural fruits harvested and the civil fruits having matured after the date of the claim (art. 1148 C.C.). The possession, which legitimates the acquisition of fruits, can either be direct or indirect, but, in the case of an indirect possessor, the latter is legitimated only to recover civil fruits. Possession and qualified *detenzione* have to be put on an equal footing. The equalisation of the two entities derives from the exigency of protecting the expectation of the person who uses fruit/interest-bearing goods in good faith, and of removing the culpability of the possessor’s behaviour on the basis of the owner’s inactivity. The owner has, therefore, a right to the fruits, but if she does not exercise her right, it is more reasonable to

protect the possessor in good faith, who uses the goods without the intention of harming another person and thereby achieves a purpose of social utility.

On the contrary, the possessor in bad faith is not socially justified in keeping fruits belonging to another person. In this case, if the possession derives from a tort, the possessor will be liable under tort law and the restitution of the goods and their fruits will be of a compensatory nature (supra § 1.4.2.). In fact, it must be considered that the possession of another person’s goods is a detrimental situation, which obliges one to pay compensation, if the existence of the situation is brought about with the awareness of harming the legitimate owner’s right. Nonetheless, if possession is obtained by means of a wrongful transfer, the possessor will be passively legitimated to the actions for the protection of property, the result of which will depend on the good or bad faith of the possessor (supra § 1.4.). In particular, the possessor in bad faith will always have to return the fruits (art. 2033 C.C.), whereas the possessor in good faith will have to return the fruits yielded only as from the date when the claim is brought. In fact, from the moment of the bringing of the claim, the latter is considered as being in bad faith and in default. Accordingly, within this specific time period, she is not exempted from behaving correctly vis-à-vis the goods, in order not to cause damage to the owner or the holder of a right in rem, who will only be able to fully enjoy her title at the end of the proceedings. In addition, it has to be underlined that the possessor in bad faith has the duty of returning the value of the fruits, which she would have received, had she acted with ordinary care.

These rules can also be applied to the qualified detentore. In fact, if the detentore derives her title from a non-legitimated person, the detenzione will either infringe the right of the owner or of the person, who has a right in rem for enjoyment purposes. Accordingly, the detentore can be subject to a vindicatio, but it is fair to say that her position is equal to the one of the possessor in good faith, if she did not know of the infringement of another person’s right. Similar to the possessor in bad faith, the detentore in bad faith is obliged to return the fruits, which she has received and which she would have received.

Despite the possibility of being considered liable for the deterioration of the goods or for the impossibility of returning them, the possessor can claim for the reimbursement of the expenses and for an indemnity either from the owner or from the holder of a right in rem for enjoyment pur-
poses. In this regard, one must distinguish between the reimbursement of the expenses that were incurred in the production and harvest of the fruits, for ordinary acts of maintenance as well as extraordinary repairs, and the indemnity for the costs of improvements and additions.

The reimbursement of the expenses incurred in the production and the harvest of the fruits (art. 1149 C.C.) and for the purpose of ordinary maintenance (art. 1150(4) C.C.) has to be made to the person who is obliged to the restitution of the fruits (the possessor or detentore in bad faith\textsuperscript{127} and the possessor in good faith only as from the date of the vindicatio) within the limits of the value of the fruits owed to the claimant (art(s) 1149 and 821(2) C.C.). The reimbursement is based on the principle of unjustified enrichment, since such expenses have to be considered as management costs, which decrease the net utility deriving from the use of the goods. Additionally, the possession of goods cannot be transformed into a source of profit for the owner; nevertheless, she should not bear the burden of inappropriate expenses of production and harvesting incurred by the possessor.\textsuperscript{128}

The reimbursement of the extraordinary expenses (art. 1150(1) C.C.) has to be made to the possessor and/or detentore, regardless of whether the latter is in good faith or in bad faith. The duty to do so is placed upon the owner, since the incurrence of these expenses benefits her and, as stated before, the reimbursement is based on the unjustified enrichment principle.

The owner has to pay an indemnity to the possessor for any improvements made by the latter, if they still exist at the moment of restitution (art. 1150(2) C.C.). The good faith possessor has a right to an indemnity equal to the appreciation value of the goods (i.e. this can result in a profit, if the appreciation value is higher than the costs); whereas the possessor in bad faith has a right to an indemnity equal to either the appreciation value or the expenses incurred by him, whichever of the two sums is the lesser (1150(3) C.C.).

As to additions (e.g. plantations, constructions, \textit{etc.} ...), the rules on accession ex art. 936 C.C. will apply. The owner has the right either to accept the additions or to oblige the possessor to remove them, but if the owner decides to accept them, she can choose to pay an indemnity equal to an amount of money that either represents the costs of work or the

\textsuperscript{127} However, some case law (Cassazione, Division II, n. 12627/1993) underlines that such rules (art. 1150 \textit{et seq.} C.C.) exclusively refer to the possessor as the person legitimated to ask for a reimbursement and an indemnity; moreover, these being rules of an exceptional nature, they cannot be applied analogously to the person of the detentore.

\textsuperscript{128} Indeed, the owner cannot be subject to the effects of an anti-economic production, which – technically – occurs when the revenues (\textit{i.e.} fruits) can not cover, subject to market conditions, all the input (\textit{i.e.} costs of the production).
appreciation value of the land after the addition. However, the good faith possessor always has the right to obtain an indemnity equal to the appreciation value of the land, if the addition can be considered an improvement (art. 1150(5) C.C.). If the owner asks for the removal of the additions, the removal has to be paid by the possessor, who can also be ordered to pay damages (art. 936(3) and 1150(5) C.C.). However, the owner cannot enforce the right to demand removal, either if she knew of the additions and did not object to them, or if they were made by the possessor in good faith (art. 936(4) C.C.), or if six months have passed from the day the owner obtained knowledge of the additions (art. 936(5) C.C.). As concerns the obligation to indemnify, the case law tends to consider it as being a value debt, since it aims at reintegrating the estate of the possessor, who incurred in the expenses; consequently, the judge has to determine the indemnity according to market value parameters and to the potential currency devaluation.129

The possessor’s right to be indemnified for repairs, improvements, and additions130 could place a heavy burden on the owner or holder of the right in rem for enjoyment purposes, since the latter could be unable to immediately pay it. Consequently, the law provides for the possibility of paying this indemnity (art. 1151 C.C.) by instalments but this has to be decided by a judge, taking into account the circumstances of the case and the possibility of offering adequate security (art. 1179 C.C.).

The non-payment of the indemnity gives a right of retention (i.e. possessory lien) to the good faith possessor (art. 1152(1) C.C.). Such a right is given to the possessor in good faith in order to secure the indemnification of the expenses incurred for improvements and repairs, since such expenses have to be considered as acts benefiting the goods. However, the good faith possessor does not have any right of retention, if the expenses are incurred in the production or harvesting of the goods, since the possibility to keep the fruits is an alternative way to recover compensation. The right of retention has to be considered as a form of self-help,131 but since the Italian legal system is based on the principle that


130 Although the norm refers only to indemnity, some scholars maintain that the word ‘indemnity’ is intended to be interpreted in a broad sense, so as to include reimbursements as well. Cfr BIANCA, La proprietà, ibidem, footnote 36, p. 778.

131 Another case of self-help considered by the Codice Civile is when the buyer has reason to fear that the goods or part of it can be revindicated by a third person. In this case, the buyer can withhold payment of the price, unless the seller provides adequate security (art. 1481 C.C.). According to art. 1482 C.C., the same right is guaranteed to the buyer in case it appears that the goods sold are encumbered by an in rem agreement or by liens resulting from attachment (pignoramento or sequestro), which have not been declared by the seller and are not known to the buyer. In this case, in addition to withholding the payment of the price, the buyer can request the court to set a time limit, at the expiration of which, if the goods are not re-
nobody can take the law into her own hands, self-help has to be considered as being of an exceptional nature. Accordingly, this right is not given to the detentore; however, law n. 12627 of 3rd May 1993, concerning agricultural lease contracts, extends the right to the agricultural tenant. Art 1152(1) C.C. provides three prerequisites for the right of retention: 1) good faith; 2) a claim for indemnity brought at the time of the vindicatio proceeding; 3) the general proof of the existence of repairs and improvements. The exercise of the right of retention postpones the duty of returning the goods, but the owner's vindicatio turns the position of the possessor into that of the detentore nomine alieno. This means, therefore, that the person who exercises the right of retention has to diligently take care of the goods, otherwise she will be considered liable for the loss that occurs as a result of her own negligence or intentional conduct. However, she will not be considered liable in the case of a supervening impossibility that is not caused by her: in fact, the exercise of the right of retention (and, hence, the non-restitution of the goods to the owner) excludes the possibility of her being considered to be in default in fulfilling her obligations. Consequently, the rule concerning the passing of the risk of loss ex art. 1221 C.C. to the defaulter cannot be applied.

2.6. Acquisition of a movable by means of possession in good faith

Art. 1153 C.C. states that the purchaser of movables from a person, who is not legitimated to transfer them, becomes owner by way of possession in good faith. This rule is also known as possession vaut titre and introduces a way of acquiring original ownership, i.e. the possessor in good faith acquires ownership originally, independent of the previous owner's right. This principle is an answer to the exigencies of certainty and rapidity in respect of the circulation of movables. In fact, in the legislator's opinion, such social exigency prevails over the protection of ownership.
However, it has to be underlined that the authentic owner can always claim compensation for damage or loss from the wrongful owner. The universitas of movables\textsuperscript{136} as well as registered movables\textsuperscript{137} are excluded from the scope of these rules (art. 1156 C.C.). The requirements for the application of the principle \textit{possession vaut titre} are: 1) the non-legitimisation of the transferor; 2) possession; 3) good faith; and 4) a title abstractly suitable for transferring ownership.

As to the non-legitimisation of the transferor, scholars\textsuperscript{138} tend towards a restrictive interpretation, \textit{i.e.} art. 1153 C.C. is not to be applied if the transferor is a person different to the one pretending to be the owner. Therefore, the good faith transferee would be left without protection when attempting to acquire from a person, who pretends to be authorised by the owner to effect the transfer (\textit{i.e.} fake agent). On the contrary, case law\textsuperscript{139} affirms that, since art. 1153 C.C. liberates the transferee from having to conduct complex investigations about the legitimacy of the transferor's title, she can take advantage of the \textit{possession vaut titre} principle, if the transferee proves that she was not grossly negligent in investigating the transferor's entitlement to dispose. Hence, for instance, if the transferor who pretends to be an agent for the owner produces a skilfully falsified entitlement, or other circumstances support her apparent legitimisation to transfer, the transferee can acquire in good faith: if not, the non-protection of the good faith transferee would result in unreasonably different treatments of substantially equal situations.

Some additional words are needed with respect to the case of an owner who lacks the power to dispose, \textit{e.g.} a bankrupt owner. Art. 44 of the Regio Decreto (hereinafter R.D.) n. 267/1942 (so-called Bankruptcy Law) states that the acts of the bankrupt are ineffective \textit{vis-à-vis} the creditors after the declaration of bankruptcy. This rule seems to prevail over art. 1153 C.C. However, art. 2913 C.C. expressly states that, with reference to pledged movables, good faith possession can be prejudicial to creditors. And since the constraint on the possibility to dispose, which is placed on the bankrupt, is similar to the one imposed on the pledgor, the principle of \textit{possession vaut titre} has to be extended by way of analogy even though the Bankruptcy Law does not mention art. 2913 C.C.

\textsuperscript{136} Due to the particular socio-economic importance of a universitas and the fact that it is rarely exposed to circulation comparable to the one a movable is exposed to, the legislator tends to protect the interests of the owner of a universitas better.

\textsuperscript{137} Such goods are subject to a special standard of publicity, which confirms the non-necessity of fast transactions or the certainty that is typical for the movables, since such aspects are accommodated by virtue of a notary's intervention and the registration in a public register.


\textsuperscript{139} Cassazione, n. 1483/1956.
As to possession, scholars agree that it has to be direct. Such requirement finds its justification in the fact that if it was sufficient that indirect possession should solve the conflict among different transferees, it would result in the fact that the direct possessor in good faith would lose her movable to another possessor, who indirectly acquired the movable (art. 1155 C.C.).\textsuperscript{140}

As to good faith, art. 1153 C.C. states that the buyer must not be grossly negligent. The 'lack of gross negligence' is intended to be interpreted as the awareness of a lack of circumstances that would enable the transferee to presume the illegitimate origin of the goods.\textsuperscript{141} In fact, the law is inclined to protect the trust of the buyer in the lawfulness of the transfer and the correctness of the facts as they appear. Moreover, the first paragraph of the article underlines that such a good faith has to exist at the moment of delivery but, since art. 1147(3) C.C. establishes that good faith is relevant at the moment of the acquisition of possession, this means that in order to identify the existence of the good faith it is necessary to consider the moment at which the transferee actually acquires the possession of the goods (e.g. in the case of a shipping sale, this moment can be when the transferee receives either the goods or the shipping documents). Accordingly, the supervening bad faith is not relevant, since the transferee has already acquired possession.

The last requirement of the principle \textit{possession vaut titre} is an 'abstractly' suitable title. This means that the title, by means of which the ownership is transferred from the transferor to the transferee, has to be 'abstractly' valid \textit{per se}, i.e. the title should fulfil all those requirements that are cumulatively suitable for the 'abstract' creation of a legitimate

\textsuperscript{140} For instance, Gaius acquires a movable from Titius; it is physically transferred to Gaius. Sempronius claims the movable on the assumption that that she first acquired indirect possession by virtue of a bailment agreement with Titius, Titius having the \textit{detenzione} of the movable (example of \textit{constitutum possessorium}). If the indirect possession was sufficient, the direct possession of Gaius would succumb to Sempronius’ claim. In this way, it would insufficiently meet the exigency of certainty in the circulation of movables, which is fundamental to the rule \textit{possession vaut titre}. This mechanism is based on the reasoning that, even if ownership is transferred by mere consensus \textit{ex art. 1376 C.C.}, the \textit{possession vaut titre} principle has to be understood as a criterion that helps to solve the conflict between two or more buyers. By virtue of this principle, the buyer who did not acquire possession loses the ownership and the seller re-acquires the legitimisation to transfer the ownership right. Hence, the acquisition of ownership by the buyer, who first acquires the possession, has to be considered as a derivative acquisition. It implies that any other person’s rights in the movable will be eradicated entirely.

\textsuperscript{141} For instance, even though the transferee believes that the transferor has acquired the ownership of stolen goods by acquisitive prescription (and, hence, she is in good faith!), the awareness of the illegitimate origin of the goods makes the position of the transferee less worthy of protection (art. 1154 C.C.).
Hence, if the contract is void or ineffective, as well as voidable or rescindable, the *possession vaut titre* principle cannot be invoked, since the contract would be incapable of transferring the ownership. However, if the first transfer is invalid and if a subsequent transferee cannot find adequate protection in contract law, she can invoke art. 1153 C.C.

Moreover, it has to be pointed out that the good faith transferee is not obliged to acquire the real owner's goods. For instance, *Cassazione*, n. 6626/1988 has stated that the transfer of goods of an illicit origin to a buyer in good faith has to be considered as being a sale of goods different to the ones indicated in the contract. It entitles the buyer to demand the termination of the contract for non-performance, even if the buyer acquired possession by means of delivery. However, if the buyer decides to keep the goods, she has to make a payment to the real owner and not to the seller: indeed, in the conflict between the unlawful seller and the owner, the law favours the protection of the owner's interests.

### 2.7. Possessory actions

Italian law provides special actions for protection against unlawful dispossession and interference. Dispossession and interference are torts to which the possessor can react by possessory actions (*azioni possessorie*), allowing the possessor to rapidly obtain a judicial order for the restitution of possession and for the end of the interference.

Such protection is guaranteed to the possessor *per se*: indeed, it is irrelevant whether the possessor is or is not able to prove that she is the owner of the goods. Likewise, the qualification of the goods that are the object of private ownership is irrelevant, since possessory protection is also granted to the possessor of public goods, of which she can never be the owner.

The rationale of possessory protection is quite complex. On the one hand, there are superior exigencies of public order and social peace: in fact, if everyone could freely take possession of goods owned by another person, dispossession would become legitimate and the public order would be compromised.

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142 *Cassazione*, n. 3684/1955.

143 It is necessary to take into account that the possession of goods is part of a complex socio-economic structure. Consequently, a sudden dispossession can be prejudicial to a possessor, such prejudice going beyond the economic value of the goods and can include an infringement of an entire system of interests, decisions and expectations. It is sufficient to consider, for instance, either the prejudice to a craftsman, who is dispossessed of her tools, or to a family which is deprived of their home.
Therefore, the legislator resorts to the principle, according to which the possessor, even if she was not the owner, can obtain the protection of a factual situation. It is a principle that only indirectly protects the possessor, since its goal is to secure the peace among individual members of society. With these actions for the protection of individual interests, the legislator pursues superior interests. However, another reason for protecting possession is that the possessor is mostly a person who has a legitimate title to the goods and these actions offer fast protection compared to the actions for the protection of property, since the claimant is exempted from having to prove ownership.\textsuperscript{144}

The possessor can bring the possessory actions even against the owner. In this regard, we can infer from art. 705 C.P.C. that the defendant in a possessory action cannot argue that she is owner of the goods, since any defence based on the legitimacy of possession is irrelevant to the judgment in a possessory action. The rationale of this exception is based on the prohibition of private self-help:\textsuperscript{145} the owner who has been dispossessed surely has the right to reobtain her own goods, but she does so only if she makes use of the \textit{vindicatio} and obtains a judgment, which affirms her ownership right and orders the possessor to release the goods. The owner, therefore, cannot take the law into her own hands; otherwise, she could be convicted for the arbitrary exercise of her own right \textit{ex art. 392 et seq.} Criminal Code.

Similarly, the buyer who – by virtue of the principles of consensus – is already the owner of the purchased goods, cannot take possession of the goods against the will of the seller, if the seller refuses to perform her contractual duty. In this case, the buyer has to claim for performance and must obtain a judgment, which orders the seller to deliver. Obviously, the protection of the possessor against the owner is only temporary: in fact, although the possessor succeeds in the possessory action and obtains the restitution of the goods, she will fail in an action for the protection of ownership and she will be forced to finally deliver the goods to the owner.

A possessory action, hence, paralyses an action for the protection of the property. There is, however, one exception established by the Italian Constitutional Court (\textit{Corte Costituzionale} 3\textsuperscript{rd} February 1992, n. 25). In

\begin{footnotesize}
\textsuperscript{144} Cassazione, Division II, n. 6093/1997.

\textsuperscript{145} The only subjects that are authorised to use self-help are the government departments; they can use the security forces to recover the possession of goods or to stop any interference, without the need to resort to the courts first, but only when the goods are public goods; in other cases, the government departments have to resort to the possessory actions in the capacity of a private individual. The private possessor of public goods can bring a possessory action only against other private individuals, but not against a government department, unless the act of appropriation is an exercise of arbitrary power by the administration.
\end{footnotesize}
the Court’s opinion, the action for the protection of property is not inhibited by a possessory action, when the outcome of the possessory proceedings would have the effect of irreparably compromising the possibility for the owner to subsequently vindicate her own property. In such a case, the owner can ask for the affirmation of the existence of her property right before a decision is made in the possessory proceeding. In addition, the Italian Constitutional Court considers two cases to be within the scope of this exception:

1. when the possessory action concerns the restitution of movables. The harm for the owner consists in the fact that the illegitimate possessor, who has obtained the restitution of the goods as a result of the possessory proceeding, could effectively alienate and deliver the goods to another good faith acquirer. Consequently, the latter would acquire the goods on the basis of the principle possession vaut titre and the owner would be definitively deprived of the goods;
2. when the possessory action concerns immovables and the owner’s behaviour consists in constructing a building; the damage for the owner would consist in the fact that she would be forced to remove/destroy the building.

As stated before, the damage to possession can take two forms: dispossession and interference. One can bring an action for the recovery of goods (azione di reintegrazione) against the dispossessor, and an action to restrain interference (azione di manutenzione) against the interferer. Theoretically, it is not possible to simultaneously bring both actions, since it is not plausible that the impossibility to enjoy the goods derives from both a dispossession and an interference simultaneously. Nevertheless, in practice, it is possible to bring the two actions simultaneously, when it is left to the judge to evaluate and to give the correct nomen juris to the facts.146

Possession can be protected by two other actions, which aim at preventing an impending damage147 and not at punishing behaviour detrimental to possession. Therefore, they are restrictive actions and are also called quia timet actions (azione di denuncia di nuova opera and azione di denuncia di danno temuto); the actively legitimated parties are the owner, the holder of a right in rem for enjoyment purposes and the possessor, but not the detentore.

Art. 1171 C.C. refers to the azione di denuncia di nuova opera, which is an action that can be brought by a person to prevent that the continuation of an ongoing detrimental activity, taking place either on her own land or on another person’s land, causes actual damage. If the new work is

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146 Cassazione, Division II, n. 980/2000.
147 Usually, case law concerns the damage caused by buildings, trees, and any other corporeal goods, which are located on a plot of land.
already being carried out, this action cannot be brought, since it cannot
accomplish its preventive function. The judge – after a brief assessment of
the facts – can prohibit the continuation of the work or order that appro-
priate precautions against the causation of potential damage be taken if
the defendant is allowed to continue with the work in question.

Art. 1172 C.C. refers to the azione di denuncia di danno temuto, which
cconcerns an action that can be brought to prevent potential future dam-
age, which is about to be caused to the claimant’s existing goods. In this
case, after a brief assessment of the facts, the judge can either order the
removal of the impending peril or the taking of appropriate precautions
against potential damage, if the defendant is allowed to to continue with
the work in question.

A common characteristic of these actions is that they are aimed at
both the protection of ownership and of any other right in rem, as well as
the protection of possession. Only the subsequent legal proceedings aim
at concretely protecting either possession or ownership. As stated above,
they only have a restrictive effect, which means that the outcome is the
obtainment of an interim injunction that is functional to the next step of
the proceeding.

2.7.1. Action for the recovery of the goods (azione di reintegrazione)

The object of this action is the recovery of possession and it is available
to the possessor who has, either violently or clandestinely, been dispos-
sessed (art. 1168 C.C.). Where it is impossible to recover possession, the
claimant can claim damages. The constitutive elements of dispossession
are an objective one and a subjective (or psychological) one. The objec-
tive element consists in any (even partial!) deprivation of possession
caused by another person. Such deprivation can manifest itself either in
the dispossession of the goods or in any behaviour, which restrains, re-
duces, or impedes the exercise of the power over the goods. The dispos-
session can either be a positive act (i.e. doing something) or an omission
(i.e. not doing something). The subjective element is the so-called animus spoliandi, i.e. the awareness of the dispossessor that she is acting ei-
ther contrary to the rights of the possessor or detentore. The burden of
proof is placed on the claimant. In addition, the law specifies that dispos-
session can either be the result of violence (i.e. the lack of the dispos-
sessed person’s consensus) or of clandestineness¹⁴⁹ (i.e. the lack of the
dispossessed person’s awareness of the dispossession).

¹⁴⁹ The dispossessor’s behaviour has to be such that it is impossible for the dispossessed
person to be aware of it, in accordance with the ordinary standard of care.
Art. 1168 C.C. states that the action for recovery can be exercised either by the possessor against whoever threatens her possession, or by the *detentore* unless the latter has the *detenzione* of the goods for reasons of hospitality or work.\(^{150}\) The *detentore* is insufficiently legitimated by a mere relationship of work or hospitality, due to the insufficient persistence of the relationship between the goods and the worker/guest.

The action has to be directed against the dispossessor, who can either be the physical or moral perpetrator. Moreover, the law states that it is possible to exercise the action not only against the dispossessor but also against the person, who acquired possession derivatively and is aware of the dispossession (art. 1169 C.C.).

Accordingly, the physical perpetrator is the person, who – on another person’s behalf – concretely effects the dispossession.\(^{151}\) The moral perpetrator is either the instigator or the person who *ex post* used the result of the dispossession for her own interest, substituting the dispossessed person’s possession with her own possession.\(^{152}\)

In addition, art. 1168 C.C. states that the action for recovery has to be exercised within one year of the dispossession or the discovery of the dispossession, if it was clandestine. Such a short period of time\(^{153}\) is justified by the nature of the action, which aims at preventing behaviour detrimental to the social status quo.

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\(^{150}\) The bailee, the tenant, the subsequent tenant, the tenant of an entrepreneurial cluster of property, and the independent contractor are qualified *detentori* and, hence, they can claim for recovery against the possessor as well. The custodian, the trustee and the agent are unqualified *detentori* and, consequently, they are protected only against the dispossession made by any person different to the possessor.

\(^{151}\) In order to be able to consider the physical perpetrator as the passively legitimated party, it is necessary that she has such autonomy as to make her aware of the unlawfulness of her behaviour (*i.e.* animus spoliandi); otherwise she will have to be considered a mere executive tool who is at the moral perpetrator’s disposal.

\(^{152}\) Dispossession is a tort. If the commission of such a tort is attributable to different persons, they will be jointly liable *ex art.* 2055 C.C.; another case is considered by art. 1146 C.C., according to which the heir is the passively legitimated party in an action against the dispossession that was effected by the deceased testator, even the former was not aware of it.

\(^{153}\) This term is to be considered a substantial term and, hence, it is not subject to legal suspension during the Court’s recess (from 1st August to 15th September). In addition, as to the *dies a quo*, if different sets of behaviour can be considered as one act of dispossession, dispossession will be assumed to have commenced with the first act; otherwise, each act would constitute an autonomous act of dispossession. As to the *dies ad quem*, in order to verify if the action was brought on time, the day of the deposit of the statement of claim is considered crucial.
2.7.2. **Action to restrain interference (azione di manutenzione)**

This action aims at protecting possession against any interference, which is either caused or about to be caused by another person. The action, therefore, is not based on any existing damage, but it is sufficient that there is an impending peril. The actively legitimated party is the person, who is disturbed in her possession of an immovable, right *in rem* for enjoyment purposes or her right in a *universitas* of movables (art. 1170 C.C.). This action differs from the previous one, because there is no real dispossession, but an unlawful limitation on the exercise of the possession. In fact, as opposed to dispossession, interference does not affect the goods, but it is rather the possessor's enjoyment of them that is being restricted. The objective element is a person's behaviour that negatively affects the possessor. There can be a physical interference when such behaviour affects the integrity of possession, as well as an interference with a right when a person unjustifiably brings a claim against the possessor.

The subjective element is the *animus turbandi*, i.e. the conscious intention to interfere with the possession of a legitimated person. Such action can only be brought by the possessor, but not by the *detentore* who is protected only by a general action under tort law (art. 2043 C.C.). Even in this case, as in the case of an action for recovery, the possession has to have existed for one year, has to have been continuous, must not have been interrupted, and must neither have been acquired by force nor secretly\(^{154}\) (art. 1170(2) C.C.); the passively legitimated party is the perpetrator of the interference and, similar to the action for recovery, it is possible to distinguish a physical perpetrator from a moral one. As to the time period in which the action to restrain interference can be brought, what has been said in § 2.7.1. above is applicable.

3. **Boundary between rights *in rem* and rights *in personam***

As stated above, a right *in rem* is considered an absolute right, which establishes a relationship between a person and a thing. Secondly, its exercise does not necessarily require the collaboration of another person in order to fulfil the purpose of the right *in rem*. Indeed, the behaviour of the person who is obliged to respect an object-holder's right *in rem* assumes the form of a mere and general duty of the abstention from interference. In addition, it has to be underlined that this duty is imposed\(^{154}\)  

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\(^{154}\) In case the possession has been acquired by force and secretly, the possessor can only bring such an action when these obstacles cease to exist.
upon everyone and, hence, is characterised by the possibility for the holder of a right in rem to claim protection *erga omnes* (*i.e.* the holder of right in rem can bring an action against whoever interferes with her right). Accordingly, scholars agree in considering the right in rem as a ‘definitive situation’, since the holder’s interest is automatically protected.

On the other hand, there are the rights *in personam*. They have completely different characteristics. In fact, a right *in personam*, also known as a relative right, aims at establishing rights in a thing that is not owned by the holder of such right but by another person. A right *in personam* implies the legitimate appropriation of another person’s ‘use’ and, therefore, it does not only require the cooperation of a third party but, above all, her consensus. Once the purpose of the right in personam is met, there a change in the contracting parties’ estates takes place. Such change can be either physical (*e.g.* credit right)\(^{155}\) or virtual (*e.g.* *diritto potestativo* – power).\(^{156}\)

Different from rights *in personam*, which fully adhere to the principle of the freedom of contract *ex art.* 1322 C.C., the parties cannot create new rights in rem. As mentioned above, the *numerus clausus* principle expresses precise policy guidelines: the legislator’s intention is both not to encumber property with further constraints that are not expressly regulated by the *Codice Civile*, and also to protect the transferee, so that the latter has knowledge of the extent of rights acquired by her.\(^{157}\)

However, among scholars the debate as to the distinction between rights in rem and credit rights is quite animated. Many of them doubt that this distinction is always valid. In fact, nowadays some rights in personam are becoming similar to rights in rem (*e.g.* locazione ultranovennale – lease over nine years\(^{158}\)) and some rights in rem are becoming increasingly similar to rights in personam (*e.g.* legal burden).\(^{159}\) Moreover, if one looks at the concept of ‘possession’, one can distinguish between a *de facto* power,

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155 The interest in obtaining a sum of money is an element that is clearly constitutive of the transfer of an object from between one party’s estate and another party’s one (hence, this also causes a material modification of reality).

156 A landowner has the power to demand the co-ownership of the wall built by the neighbour. It causes a legal modification in both of the parties’ assets (or rather, in the relationship between the object and the person), but the physical reality of ownership does not change.


158 The tenant with a lease contract, which runs for more than nine years, can oppose her right to the buyer of the immovable if the tenant’s right is registered. If the lease contract was not registered, the tenant can nevertheless oppose her right to the buyer and enjoy the immovable for a period of nine years from the beginning of the lease contract (*art.* 1599(3) C.C.).

159 *Supra* footnote 11.
which coincides with the exercise of a right in rem (i.e. possession) and a de jure power, which coincides with the exercise of a obligatory right (i.e. detenzione).

Accordingly, it seems appropriate to deal with some examples in order to understand such overlaps between rights in rem and rights in personam.

3.1. Lease

According to Italian law, a lease is a contract by means of which a party (lessor) is obliged to let another party (lessee) enjoy either a movable or an immovable. It is a consensual agreement from which an obligatory relationship between the lessor and the lessee is derived (i.e. a right in personam for enjoyment purposes); in particular, the parties are obliged to the reciprocal performance: the lessor has to enable the lessee to enjoy the goods and the lessee has to periodically pay the lessor a certain amount of money.

The lessee can be qualified as a detentore. Accordingly, she has to keep and use the goods as a person of reasonable prudence would, and she is liable for the loss of the goods, unless she can prove that the loss was not caused by her. As to the enjoyment of the goods, since the lessee is considered a detentore she herself can bring an action against a person who physically interferes with her enjoyment of the goods (art. 1585(2) C.C.). However, in order to be able to protect her own interest autonomously, the lessee has to have the detenzione of the goods, obtained by means of delivery ex art. 1617 C.C.: in fact, before that moment she obviously will not have any entitlement to exercise any of the possessory actions ex art(s) 1168-1170 C.C. As to legal interferences, which deprive the lessee of the enjoyment of the goods, the lessor is the only person legitimated to claim in order to protect her own interest and the lessee’s right. In this case, the law provides that the lessee has to immediately inform the lessor of another person’s interference, otherwise the lessee will be considered liable for the potential loss (art. 1586(1) C.C.).

Another aspect to be considered is the issue of improvements and additions (e.g. electric installation, heating system, plumbing system, etc. …). If there is no agreement between the parties, the lessee does not

160 For instance, as to physical interferences, one can consider the case of branches of a bush, which complicate the entrance to the garage; in this case, the tenant of the garage is autonomously entitled to claim for the restoration of full access to the garage. See Cassazione, Division III, n. 7609/1987 and Cassazione, Division II, n. 939/1995. As to legal interferences, one could consider the case of a third person, who brings a claim either on the basis of a right in rem or right in personam that is incompatible with the lessee's right. See Cassazione, Division I, n. 8005/1990.
have any right to be reimbursed for the costs of the improvements and she has to remove them without damaging the principal thing. Moreover, if the lessee has to pay damages for the deterioration of the goods, the lessor has to deduct the costs of the improvements from the damages he is entitled to. If the lessor has retained the improvements without reducing the amount of damages, the lessee will have a right to bring an action for unjustified enrichment ex art. 2041 C.C.\(^{161}\) (art. 1592(2) C.C.). As to additions, art. 1593 C.C. states that the lessee has the right to remove the addition but without causing any damage. If this is not possible and the addition can be considered as an improvement, the lessor can keep it,\(^{162}\) but she has to pay an indemnity to the lessee equal to the expenses incurred or the value of the additions, whichever of the two sums is the lesser.\(^{163}\)

Finally, the termination of the lessor’s right has to be considered (e.g. consider the termination of the life-tenant’s right); the lessee can enjoy the thing for another three years at the most, but it is necessary that the lease contract has a certain date (art. 2704 C.C.) and is of a non-fraudulent nature (art. 1606 C.C.). In addition, the lease contract does not end if the thing is transferred to another person, but also in this case the certainty of the date of the contract is necessary (art. 1599(1) C.C.). However, this principle, which is also called *emptio non tollit locatum*, is not applicable if the transferee has acquired possession in good faith (art. 1599(2) C.C.).

Another interesting norm that indicates the hybrid nature of a lease contract is art. 1380 C.C. This article provides a rule for solving the conflict between parties who acquire different rights *in personam* from the same person (e.g. a conflict between the lessee and the bailee). It states that the person, who either acquired possession first\(^{164}\) or who is able to produce a title with a certain date *ex art(s)* 2643 and 2644 C.C., will be preferred. If no one of them can prove to have obtained the enjoyment of the goods, the previous title-holder will be preferred, but only if she has brought a claim for the transferor’s performance before the subsequent title-holder obtained the enjoyment of the goods and the previous title-holder’s claim has obviously been allowed.

\(^{161}\) *Cassazione*, Division III, n. 7627/2002.

\(^{162}\) Case law has underlined that the behaviour of the lessor, who decides to retain the possession of an addition fulfilling the requirements of art. 1593 C.C., but without the lessee’s consensus, cannot be considered as being an eviction according to art. 1168 C.C. See *Cassazione*, Division II, n. 10477/1991.

\(^{163}\) *Cassazione*, n. 842/1960.

\(^{164}\) In this case, good faith *ex art.* 1155 C.C. is not relevant, since no one of them aim at acquiring ownership.
3. Boundary between rights in rem and rights in personam

3.2. Gratuitous loan for use

It is a contract by means of which a person gratuitously delivers to another person either a movable or an immovable, so that the transferee can use the goods for a determined period of time and for a specific purpose with the duty to return it (art. 1803 C.C.). The contract is effective only by virtue of delivery whereas, before delivery, a gentlemen's agreement can be said to exist between the parties; consequently, if the lender does not fulfil her contractual duty, she can be liable within the limits of pre-contractual liability (culpa in contrahendo).

It is a unilateral contract, since there is only an obligation on the transferee. Indeed, the latter has the duty to return the goods when the contract has expired. The loan for use is essentially gratuitous, but if the parties agree upon a price, the contract falls within the category of leases.

The object of the contract can only be non-fungible and inconsumable goods. However, a gratuitous loan for use of fungible and consumable goods can exist if the transferee undertakes not to consume them (so-called gratuitous loan for use ad pompam vel obstentationem).\(^\text{165}\)

The transferee has the detenzione of the goods and their use is limited by the nature of the goods or the terms of the contract. She cannot deliver the goods without the consensus of the lender.

The transferee is not liable for the loss of the goods, unless otherwise provided by law (art(s) 1805 and 1806 C.C.). In addition, if she was negligent, she is obliged to compensate the lender for any deterioration, unless it is beyond the normal wear and tear (for example, a faultless causing of damage) (art. 1807 C.C.). The transferee has the right to seek reimbursement of extraordinary expenses if those were made out of urgency or necessity, but not of expenses incurred in the normal use of the goods (art. 1808 C.C.).

3.3. Pre-emption right

Two parties can agree that one of them (the so-called assignor) will prefer the other party (the so-called pre-emptor) – other conditions being equal – to other people, if the former decides to start negotiating.\(^\text{166}\) In this regard, it is important to underline that the grantor of the pre-emption right is free not to fulfil his promise, i.e. the pre-emption right does not have any real effect. In fact, there is no transfer of ownership at the moment the promise to the pre-emptor is made, but one can distinguish

\(^{165}\) For instance, one can consider the case of a quantity of ‘San Daniele’ hams, lent for the purpose of a ‘Slow Food’ exposition.

\(^{166}\) Infra § 6.4.3.
between two different duties: the first consists in informing the pre-emptor about the intention to conclude the contract under certain conditions (so-called \textit{denuntiatio}), the second consists in not concluding any contract with other people either before or during the \textit{denuntiatio}.

Since the \textit{denuntiatio} has to be considered as a mere invitation to negotiate and not as an option to conclude a contract, if the grantor breaks her promise, the pre-emptor cannot oppose her right but can only, if at all, bring an action for damages against the grantor and, \textit{ex art.} 2043 C.C., against the third party who was aware of the pre-emption right; however, she cannot claim for the conclusion of the contract with the grantor of the pre-emption right \textit{ex art.} 2932 C.C. The extinction of the \textit{pre-emption} right occurs when the period of time agreed on by the parties lapses. The refusal of the pre-emptor to accept the offer after the \textit{denuntiatio} does not cause the termination of the pre-emption right, both if the grantor does not immediately concludes the contract with another person, and if the grantor is about to conclude the contract with another person, but it does terminate if such a long period of time passed from the point in time of \textit{denuntiatio} that the contractual terms have substantially changed. However, the point in time at which the acceptance occurs is usually determined according to the nature of the business and the commercial custom.

However, there are many cases where a pre-emption right is expressly provided by law. One can consider the pre-emption right in the case of an inheritance (\textit{retratto successorio} – \textit{art.} 732 C.C.), the land pre-emption right granted to the farmer who is the tenant of a field or to the owner of a neighbouring field (\textit{art.} 8 L. n. 590/1965 and \textit{art.} 7 L. n. 817/1971), the pre-emption right granted to the tenant of a non-commercially used immovable (\textit{art.} 38 L. n. 392/1978), the pre-emption right granted to the State for historical and artistic goods (\textit{art(s)} 60 \textit{et seq.} D.Lgs. n. 41/2004).

The legal pre-emption right has real effects and can be opposable to third parties (right of pursuit/\textit{diritto di sequela}). In this regard, one has to point out that, if the grantor does not declare the intention to transfer ownership (\textit{denuntiatio}), the transfer will be effective since the agreement between the grantor and the third party is perfectly valid. In fact, if the pre-emptor exercises her pre-emption right and consequently pays the price demanded from the third party, the agreement between the grantor and the third party is not considered as having terminated, but the pre-emptor automatically steps into the shoes of the third party. This means that there is no termination of the contract between the grantor and the third party and, therefore, neither the creation of a new contract with the pre-emptor nor a transfer of ownership from the third party to the pre-emptor. Indeed, the making of a unilateral statement in the exercise of the pre-emption right results in a fictitious situation in which a contract had always existed between the assignor and the pre-emptor. However,
such a substitution only occurs once the judge ascertains the correctness of the pre-emptor’s claim in the proceedings, which are initiated by her for purposes of obtaining recognition of her pre-emption right.

The time period within which the legal pre-emption right can be exercised varies and is provided by law for each category of goods. However, for all categories the time period starts to run on the day the contract is registered. Once the pre-emptor knows about the conditions of the transfer, she can waive her own pre-emption right, but a lack of the knowledge of such conditions causes the voidness of such waiver.

In addition, in two cases there can be said to be real effects, although they are not provided for by law but are a result of the mere stipulations of the parties. They concern the transfer of shares (art. 2355 bis C.C.) or equity (art. 2469 C.C.). Indeed, in these cases the transfer to a third party is not effective and, consequently, the buyer will be forced to return the ownership of the shares/the equity to the shareholders/partners. The purpose of this rule is to prevent the entry of potentially unwanted shareholders/partners into the company. However, the law undermines the effects of such right once the articles of association (statuto) of the company have been deposited with the official company register (registro delle imprese). Moreover, this right can be exercised within 5 years in the case of shares and 2 years in the case of equity, unless provided otherwise by the articles. However, the articles cannot extend the abovementioned time periods.

4. Field of application and definitions

The Codice Civile defines goods (beni) as being whatever can be the object of a right (art. 810 C.C.). Hence, the term ‘goods’ refers to both corporeal entities (e.g. things) and incorporeal entities (e.g. artistic works), as long as these are suitable for becoming objects of legal relations. Incorporeal goods are generally the product of a creative process (so-called corpus mysticum), although they are characterised by corporeal elements (so-called corpus mechanicum). In the Codice Civile, there are no specific provisions that define a movable. In fact, art. 812 C.C. which is entitled ‘distinction between the goods’, after listing all goods that should be considered as immovables, states that all goods that are not included

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167 In the case of the coheirs’ pre-emption right, art. 732 C.C. states that the co-heir can exercise such a right within two months of the last communication that is made by her to the other co-heirs of her intention to transfer her own share in the inheritance to another person.

168 In fact, it is only when the documents of the incorporation of the company are deposited at the official company register that the company acquires legal personality; only then can its articles of incorporation be opposed to third parties.
in the category of immovables are deemed to be movables. In this regard, art. 812 C.C. defines soil, wellsprings and streams, trees, buildings and other constructions (even if they are only temporarily joined to the soil!) and whatever is contained in the soil, either as a result of human acts or by virtue of the forces of nature, as being immovable. In addition, it states that mills, baths and floating buildings, which are joined firmly and long-term either to the shore or to the riverbed, have to be considered as immovables. However, for movables a specific rule exists; it is art. 814 C.C., which expressly states that natural energy, having economic value, is considered as being a movable.

From this outline, it appears clear that the distinction between movables and immovables is based on naturalistic reasoning. In fact, once it has been established that soil is the only true immovable in nature, the legal notion of immovable is extended to all those goods, which are joined to the soil. On the contrary, all those movables, which can be moved from one place to another without the necessity of modifying their own shape and substance, are considered – by a process of elimination – movables.

Registered movables are a particular category of movables. They differ from normal movables, since the legislator provides for the application of different norms once they are entered into a specific register. Where the registration regime does not apply, the general norms applicable to movables, already described above, will apply (art. 815 C.C.).

The distinction between movables, registered movables, and immovables is characterised by a number of differing legal regulations. However, where there is no specific provision, it is obvious that legal provisions for immovables will apply analogously.

First, as opposed to the case of movables, all acts concerning either the transfer or the creation of rights in rem in immovables have to be effected by way of writing, regardless of whether the document is a public or a private one, or else they will be void. In addition, the acts, which have at their object either an immovable or a registered movable are effective vis-à-vis other people only if they are entered in the applicable register (art(s) 2643 et seq. and 2683 C.C.). On the contrary, the transfer of movables is facilitated by the rule possession vaut titre (art. 1153 C.C.), so that a publicity system, as provided for immovables and registered movables, is completely unnecessary.

The norms concerning the calculation of the periods of time necessary for acquisitive prescription are different for immovables, movables, and registered movables, as well as the creditor having to initiate different proceedings when she seeks execution against the debtor’s movables or immovables. Moreover, as already seen, an action to restrain interference can only be brought by the possessor of an immovable or of a universitas of movables.
4. Field of application and definitions

The law also considers the case of an object, which is made up of different specific goods. In this case, these goods lose their own legal and economic individuality and become part of a unique and different product in order to serve a new purpose (e.g. a car, a hi-fi set, a camera, etc.). Their individuality can resurface once the possessor decides to dismantle this new product into the separate elements of which it is made up. Moreover, the new product loses its own economic value even if it is deprived of only one of the elements of which it is made up (e.g. a car without wheels, a hi-fi set without speakers, a camera without lens, etc.).

As mentioned before (supra § 1.5.3.), a universitas (art. 816 C.C.) is a set of movables, being autonomously complete, belonging to one person and having a unique functional purpose (e.g. frame and painting, car and radio, set of tools, etc.). A universitas differs from a thing made up of other specific goods, because all separate parts that constitute a universitas can be the object of separate enjoyment (in fact, each of them retains its original functionality!); it also differs from an appurtenance, because they are functionally independent.

As mentioned above (supra § 1.5.1.), one speaks of a relationship of appurtenance (art. 817 C.C.) when either the owner or the holder of another right in rem creates a particular functional relationship between the principal object and the accessory object. The accessory object (appurtenance) has to effectively facilitate a better functioning and use of the principal object. In accordance with the principle accessorium sequitur principale, the main legal effect of creating a relationship of appurtenance between goods is the extension of the effects of legal acts to objects that are accessory to the principal object (art. 818 C.C.).

In addition, the cases of shares in a public limited company (azioni)\(^ {169}\) as well as the case of shares both in an unlimited partnership\(^ {170}\) and in a private limited company (quota)\(^ {171}\) have to be mentioned; indeed, according to case law, shares are considered as intangible movables. They represent an interest to which an economic value can be ascribed and also form part of a person’s estate. Accordingly, they can be the object of rights on the basis of the definition of goods provided by art. 810 C.C. In this regard, case law underlines, for instance, that a transfer of shares by the transferor to the transferee is effective regardless of the entry of the transfer in the shareholders’ register (libro dei soci). In fact, the shareholders’ register is not a public register, since it can be viewed only by the shareholders and the entries only have the function of making the registered transaction effective vis-à-vis the company. Moreover, if there is

\(^{169}\) Cassazione, Division I, n. 2103/1982.
\(^{170}\) Cassazione, Division II, n. 934/1997.
\(^{171}\) Cassazione, Division I, n. 7409/1986; Cassazione, Division I, n. 697/1997.
uncertainty as to their ownership, the parties can make use of all those possessory remedies that are provided for movables as well as being able to seek the appropriation of them. Like shares, negotiable instruments are also considered movables, though their circulation is subject to special rules.

5. General overview of the modes of acquiring ownership: ‘derivative’ acquisition and ‘original’ acquisition

The acquisition of ownership concerns all those circumstances, which allow a person to acquire the ownership of a thing. The Italian Constitution, in art. 42(2), establishes that ownership can be acquired only in the ways provided for by law. In this regard, art. 922 C.C. lists eight modes of acquisition: 1) occupancy (occupazione); 2) invention (invenzione); 3) accession (accessione); 4) processing (specificazione); 5) confusion (unione e commistione); 6) acquisitive prescription (usucapione), 7) contract (contratto), and 8) succession on death (successione a causa di morte). However, this list is not exhaustive; in fact, at the end of the list, the article underlines that ownership can also be acquired by other means recognised by law.

In addition, a profound analysis of the aforementioned modes of acquisition allows the reader to deduce the existence of a further classification of the modes of acquisition:

(a) modes which require either the ownership or another right in rem of the purchaser (e.g. accession, processing, the acquisition of a treasure by the landowner/finder, confusion, the acquisition of fruits, accretion);

(b) modes which require neither the ownership of the purchaser nor the ownership of other people (e.g. the appropriation of ownerless goods (res nullius) and abandoned goods (res derelicta));

(c) modes which require the ownership of a third party but do not require delivery (e.g. processing, the acquisition of a treasure by the find-

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172 BIANCA, La vendita e la permuta, ibidem, p. 10.
173 See Cassazione, n. 3398/1972, Cassazione, Division II, n. 10525/1992, Cassazione, Division II, n. 2751/2005 as to the co-ownership of a street, See T.A.R. Puglia Lecce, Division II, n. 4916/2004 as to the acquisitive prescription of an immovable arbitrarily occupied by the Public Administration. See Cassazione, Division III, n. 11563/2003 as to the acquisition of ownership at a public auction ordered by a criminal court. Seizing, ordering, forfeiting, and nationalising are other modes of acquiring property rights (art. 42 Ita.Const. and art 834 C.C.) and they are the expression of the diminishing power of the Public Administration.
174 GAZZONI, Manuale, ibidem, p. 235.
er/person other than the landowner, the acquisition of lost goods by the finder, acquisitive prescription); (d) modes which require the transferor’s ownership as well as delivery (e.g. contracts and succession on death).

In accordance with this classification, art. 922 C.C. clearly makes a distinction between modes of ‘derivative’ acquisition and modes of ‘original’ acquisition.

In the case of an ‘original’ acquisition, which can be easily identified in points (a), (b), and (c), ownership is acquired autonomously and independently of the right of another previous owner. In fact, the purchaser’s right does not depend on the previous owner’s right, i.e. the events, which affect the right of the latter (e.g. either the inexistence or the voidness of her right, or of another person’s right limiting the enjoyment of her right), have no effect on the ownership acquired by the purchaser. The property, therefore, is acquired free of whichever right another person could claim. One can, hence, deduce that the acquired right prevails over the right of a potential previous owner; consequently, the right of the latter, as well as other rights in rem and the pre-existing security rights, are extinguished unless they are obligations propter rem or legal burdens.

In the case of a ‘derivative’ acquisition in accordance with point (d), the property right is acquired by means of the transfer of the right from the transferor to the transferee. It can be effected either by means of a contract, the law recognising the effectiveness of such a contract to effect a transfer ex art. 1376 C.C., or can occur by virtue of succession. These two cases are not the only way to transfer ownership: one can also consider, for instance, a barter (permuta – art. 1552 C.C.), a donation, as well as datio in solutum. But, also a decision of the court can be a valid way to transfer ownership (art. 2930 et seq. C.C.).

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176 GAZZONI, Manuale, ibidem, p. 235.

177 The datio in solutum is a particular kind of performance. The general rule is that the debtor cannot free herself from the obligation by a performance different from that which is due, even if the performance in se is of equal or greater value. However, art. 1197 C.C. provides that such different performance is valid if the creditor consents. Only in this case the obligation is extinguished. In addition, the article establishes that in the case that the different performance consists in the transfer of ownership or of another right, the debtor is liable for eviction and for defects. In case these two events occur, the creditor can demand the original performance and damages, but the security, which was offered by a third party, cannot be revived.

178 In particular, art. 2932(2) C.C. provides that in the case a person is bound to make a contract for the transfer of ownership of specified goods or for the establishment or transfer of another right, a party can obtain a court decision producing the same
mode of acquiring a property right is that the transferor only transfers the specific rights that can be derived from her title. Indeed, the law does not allow the transferor to transfer a right, which she either does not have or the extent of which is purportedly wider than it actually is, according to the Roman law principle *nemo plus iuris ad alium transferre potest, quam ipse haberet*. Moreover, both the voidness and the extinction of the transferor's title affect the transferee's title, so as to cause the extinction of the transferee's acquisition since, in Italian law, the principle of the dependence of the transferee's rights on those of the transferor applies (*resoluto iure dantis, resolvitur et ius accipientis*).

The proof of the transfer of a property right is different depending on whether the transfer is the result of a ‘derivative’ or an ‘original’ acquisition. In the case of a ‘derivative’ acquisition, it is necessary to prove the existence of an adequate, effective, and valid acquisitive title. Moreover, if there is uncertainty as to the validity of the title, the law requires the proof of the transferor’s entitlement from the transferee as well as the proof of a chain of legitimate transfers, which extends from the last transferor to the person who first acquired the property right in question by means of an ‘original’ acquisitive title. However, such proof is quite difficult (in fact, scholars often speak of the *probation diabolica*) and case law tends to attenuate the rigidity of this rule of evidence in the actions for the protection of ownership rights (*supra* § 1.4.1.). In the case of an ‘original’ acquisition, it is enough to prove the requirements provided by law for each link in the chain of transfers.

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effects as the contract which has not been concluded, if she has already carried out her performance, or if she offered to perform according to the formalities prescribed by art. 1208 et seq. C.C.
6. Contracts: a general overview

As mentioned above and provided by art. 922 C.C., the contract is one of the modes of derivatively acquiring ownership. The basic notion of the contract is contained in art. 1321 C.C., which defines the contract as being the agreement between two or more parties for the purposes of either constituting, regulating or terminating a proprietary legal relationship inter se. Scholars\textsuperscript{179} underline that such definition is not satisfactory, since it does not highlight the transferring effects of rights in rem and obligatory rights. In fact, this quality cannot be deduced from the expression ‘to constitute ... a proprietary legal relationship’ but, at the most, from the expression ‘to regulate’, which is used in connection with a pre-existing relationship between parties.\textsuperscript{180}

As to the legal relationship, the Codice Civile states that it has to be of a proprietary nature. This means that the contract has to have at its object goods or services, which can be economically valued, \textit{i.e.} in order to obtain these, the parties have to agree on the payment of a certain amount of money that is equal to their economic value. This is one of the principles governing performance, the object of an obligation, and it also affects the notion of 'goods' (\textit{e.g.} art. 814 C.C. expressly states that en-


\textsuperscript{180} The wide extent of this definition is due to the decline in the influence of Roman law in the first Italian codification period. In this regard, one has to consider that the system of Roman law was not adequate for meeting the needs of a modern industrialised society: in fact, the Roman legal system was based on the preservation and enjoyment of property and not on the production of wealth. The Roman upper class, indeed, sustained its power by virtue of the utilisation of ‘goods’ with the aid of a property law system that maintained the status quo. On the contrary, the contract was considered only as a mode for either acquiring or transferring ownership, and the legal provisions on contracts aimed at protecting the interests of the contracting parties as owners when transferring part(s) of their property. Nowadays, the contract is not only linked to property but it has gained a new function, brought about by the need to satisfy the exigencies of a modern and industrialised society, \textit{i.e.} the contract becomes the means by which the members of our society produce and transfer wealth. In this regard, see GALGANO Francesco, \textit{Diritto privato}, CEDAM, 1985, p. 176.
ergy is considered as being a movable if can be valued economically). Hence, the requirement of the proprietary nature of the relationship is imposed by the very fact that the contract is one of the modes of acquiring a right in rem, and that it is the source of the obligation.

6.1. Elements of the contract

The contract is characterised by mandatory and optional elements (elementi fondamentali ed accidentali del contratto). In order to understand what the mandatory elements of the contract are, it is important to read art. 1321 C.C. in conjunction with art. 1325 C.C.; accordingly, the requirements are:

1. parties’ agreement;
2. objective justification of the contract (causa);
3. object;
4. form, if it is required by law.

These elements are the minimum requirements, which a contract must fulfil in order to be valid; the non-fulfilment of one of them will cause its formal voidness.

1. Parties’ agreement: The agreement is one of the fundamental constitutive elements of the contract, since it is materially perceived as the exchange of declarations of intent between parties. Consequently, the complete non-existence of such agreement prevents the formation of a contract, i.e. no contract exists. Indeed, the Italian legal system also dictates the reaching of a consensus, i.e. in the parties’ agreement, resulting in the fact that the objective justification of the contract, the object, and the form of the contract can deviate from the contents of the mandatory contracts that are provided for by law (art. 1322 C.C.). However, some scholars\textsuperscript{181} prefer to speak of a ‘contractual’ rather than a ‘consensual principle’, i.e. the existence and the identifiability of all constitutive contractual elements ex art. 1325 C.C. are sufficient to produce not only obligatory but also real effects between the parties. To support this argumentation, it is enough to cite art. 1376 C.C., according to which a right in rem is transferred and acquired by means of the parties’ mutually and ‘legitimately’ manifested consent,\textsuperscript{182} the adjective ‘legitimate’ referring to an agreement, which completely fulfils the requirements of art. 1325 C.C.

\textsuperscript{181} ARGIROFFI Carlo, Caducazione del contratto ad effetti reali, Edizioni scientifiche italiane, 1984, passim.

\textsuperscript{182} In this regard, one can notice that there are situations where the consensus is self-evident but where none of the other requirements of art. 1325 C.C. are fulfilled, so that the principle of party autonomy (i.e. freedom to conclude contracts which do not fit in the schemes provided for by law) is not sufficient to produce legal effects.
6. Contracts: a general overview

In this respect, the notion of the freedom of contract is closely related to the principle of party autonomy, which has a dual nature: on the one hand, none of the parties can be either deprived of their own goods or forced to perform to another person against their will; on the other hand, parties can decide to either dispose of their own goods or perform to other people, either by using the contractual models provided by law, by stipulating the terms of the contract within the limits provided by law, or by creating new contractual models (so-called innominate contracts/contratti atipici). Accordingly, the contract is not only the product of the parties’ autonomous agreement, but it is the result of a combination of the parties’ contractual autonomy and the mandatory provisions of law; in fact, the Codice Civile, in art. 1374 C.C., states that the parties are bound not only by their declarations of intent, but also by the mandatory provisions of law, custom and reasonableness.

2. ‘Causa’: The Report on the Codice Civile that was made to the Italian King defined ‘causa’ as being the objective justification for party autonomy, i.e. the ‘socio-economic function’ of the contract. In fact, no transfer of property is effected and no obligation is created, if the contract lacks such justification, the parties’ declarations of intent not being sufficient. For instance, the causa of a sale (art. 1470 C.C.) is the exchange of goods for money, i.e. the transfer of property is effected not only by virtue of the parties’ agreement but also because the transfer is contingent upon the payment of the price, there being a functional nexus between the transfer and the obligation; whereas the causa of a barter (art. 1552 C.C.) is the exchange of one object for another. Obviously, not all contracts presuppose an exchange: in fact, on the one hand, there are simple contracts, whose causa is based on the exchange of performance (contratti a titolo oneroso); on the other hand, there are gratuitous contracts, where performance is not reciprocal (contratti a titolo gratuito). The law distinguishes between contracts, whose causa conforms to the

These are mere ‘gentlemen’s agreements’. In such cases, the parties’ interests are not so noteworthy as to deserve legal protection. Accordingly, in order to overcome this obstacle to party autonomy and to the worthiness of protection of the parties’ interests (art. 1322 C.C.), the law has provided some legal models (e.g. gratuitous loan for use and bailment). Cfr BALLORIANI Massimiliano (Roberto DE ROSA – Salvatore MEZZANOTTE), Manuale breve. Diritto civile, Giuffrè, 2006, p. 445.

183 One has to notice that such freedom can be limited either in order to protect the weaker party (e.g. standard consumer contract) or because of administrative powers, which aims at protecting a superior interest (e.g. contracts, which deal with determined convenience goods and public services, can be affected by the ‘advizes’ of specific Public Authorities).

184 Relazione al Re, n(s) 8-79.


186 GALGANO, Diritto civile e commerciale, ibidem, vol. II/1, p. 179.
models provided by the code, (so-called contratti tipici) and contracts, whose causa does not conform to any model (contratti atipici).\textsuperscript{187} As to the latter, the transfer of a right as well as the causa of an obligation will only be valid if the judge acknowledges the worthiness in terms of the socio-economic function of the contract, i.e. the judge has to ascertain whether the interests addressed by the contract deserve legal protection. In order to understand the purpose of such judicial control, it is appropriate to consider a case where the judge will hold the contract void due to the lack of a causa. A typical example is the gratuitous transfer of ownership of high-value goods: here, the contract does not stipulate a price, as well as it not being possible to consider the transfer as a form of gift, since the parties are in a commercial relationship and it is not possible to infer any intentions of generosity. It has to be classified as an innominate contract for a gratuitous transfer of ownership, but since it is not possible to identify a legitimate causa (either a price or a justification for the gratuitousness), the judge will hold the contract void in order to protect the weaker party. In this case, the judge will be quite convinced that such a transfer – not founded on any objective justification – could be the result of duress.\textsuperscript{188} However, one has to mention that most of these innominate contracts are based on models frequently used in international commerce; this means that the judge will face difficulties in denying the worthiness of the causa because of the conformity of the contract to international contractual models, the validity of which is widely recognised.

Accordingly, scholars and case law agree on the inadmissibility of so-called abstract contracts (i.e. contracts, which produce effects only by virtue of the parties’ declarations of intent in the light of the non-existence of a causa).\textsuperscript{189}

\textsuperscript{187} Sometimes, the parties use contractual schemes, which combine aspects of different established models. Scholars prefer to refer to these as mixed contracts (contratti misti) instead of atypical contracts. In fact, an atypical contract has its own autonomous characteristics, which the judge has to evaluate without reference to analogous established models. In this regard, one can deduce from art. 1374 C.C. that, in default of legal provisions and custom, the interpreter has to make use of the standards of reasonableness and not analogy when identifying the parties’ obligations. On the contrary, a mixed contract is the combination of different, mutually interdependent models. GAZZONI, Manuale, ibidem, p. 799.


\textsuperscript{189} In this regard, for instance, case law is uniform in holding that both the recognition of a debt and the promise of payment, these having to be considered as ‘abstract’ unilateral statements, cannot produce obligatory effects but, at the most, procedural effects in the sense that they exempt the person, to whom it is made, from proving the existence of the underlying relationship (i.e. the burden of the proof will be reversed). On the contrary, such a procedural effect cannot result from an ‘abstract’ transfer of ownership, from other rights in rem or from the recog-
3. Object: There is no precise definition of the object of a contract: some maintain that the object is the content of the contract, i.e. the set of terms that are either stipulated by the parties or automatically inserted into the agreement by mandatory provisions of law, custom and reasonableness; others think that the object of a contract is either the transfer of a right or the performance in favour of a party, in accordance with the terms of the contract. Apart from these differing dogmatic interpretations, art. 1346 C.C. states that the object must be feasible, lawful, and either determined or determinable. Some more words must be said concerning the features of feasibility, and determinateness or determinability.

As to the ‘feasibility’ of the contract, case law agrees that the object is unfeasible when the parties, their behaviour conforming to the normal standard of care, cannot perform the obligation created by the contract, as well as when the contract does not deserve legal protection. However, if the contract is either subject to a condition precedent or a condition subsequent, feasibility has to be evaluated with reference to the moment at which the contract is to produce its effects; this has the consequence that a contract will be considered valid if the performance – potentially impossible at the moment of the conclusion of the contract – becomes possible before the realisation of the condition or before the expiration of time.

The contract is unlawful when it is contrary to mandatory provisions, the public order and / or mos. For instance, a statement made by the co-owner, according to which another person is to acquire co-ownership too, does not have any legal effect. Cfr GALGANO, Diritto civile e commerciale, ibidem, vol. II/1, p. 195; contra GRAZIANI Carlo Alberto, Il riconoscimento dei diritti reali. Contributo alla teoria dell’atto ricognitivo, CEDAM, 1979; GRANELLI Carlo, La dichiarazione ricognitiva di diritti reali, Giuffrè, 1983.

190 The contract is unlawful when it is contrary to mandatory provisions, the public order and / or mos. Cassazione, Division II, n. 8528/1996 on the prohibition of a sale of mere possession. Cfr GAZZONI, Manuale, ibidem, p. 875.

192 This is the case of future goods (e.g. fruits, ship under construction, etc…), which – according to art. 1348 C.C. – can be sold, unless the law provides otherwise (art. 458 C.C. on the prohibition of a sale of the right to an inheritance; art. 771 C.C. on the prohibition of a gift of future goods). In this regard, art. 1472(1) C.C. states that the ownership will pass to the buyer at the moment of the coming into existence of the goods. The most recent jurisprudence considers the sale of future goods as being a contract with ex post / or real effects. In fact, the seller is not bound by a further obligation (i.e. the transfer of the goods at the moment of their creation) due to the consensus principle of the Italian contract law. In fact, the transferring effect occurs automatically and immediately as soon as the goods exist. In addition, art. 1472 C.C. considers two cases: on the one hand, the so-called emptio rei speratae, according to which the parties agree to sell and buy goods which will come into existence in the normal course of events (in this case, the contract has a standard degree of risk); on the other hand, the so-called emptio spei, whose object is the expectation that
As to the ‘determinateness’ of the object of the contract, it is exists when the parties’ will is clear and unambiguous, even if it is necessary to resort to interpretative tools. However, when the law requires a specific form (so-called \textit{forma ad substantiam}), the object of the contract has to be either determinate or determinable in respect of terms of the written contract. On the contrary, the object of the contract will be considered determinable, when it can be identified by means of either legal or conventional criteria.\footnote{A contract with a determinable object is considered a \textit{contratto per relationem}, since the parties do not exchange declarations of mere intent \textit{inter se}, but rather refer to an external source. Two of the most important \textit{contratti per relationem} are arbitration and \textit{blanc seing}, in which the task of determining the object of the contract is assigned to a third party.} However, if the object cannot be identified by means of these criteria, the judges will be reluctant to declare the voidness of the contract; instead, they will consider the parties to still be in the phase of negotiation.\footnote{\textit{Cassazione}, Division I, n. 3389/1985.}

4. Form: The general principle is that the expression of the parties’ intent does not have to be effected in any specific form, unless the law provides otherwise, \textit{i.e.} the parties are free to decide the most suitable manner for externalising their intent either to perform an obligation or to transfer a right, except in the case where the law expressly prescribes a specific form. If the form requirements are not fulfilled, the contract has to be considered void; however, in some cases the law provides for voidability. In addition, scholars distinguish between a form \textit{ad substantiam} and a form \textit{ad probationem}; the former is a constitutive element of the contract, whereas the latter is required only in order to prove the existence of an agreement between the parties. In this regard, one has to consider that – due to the principle of the freedom of form – the parties can conclude the agreement without the need to do so in writing. Accordingly, the parties’ agreement is fully valid and effective, but if one party denied the existence of the unwritten agreement the proof thereof would become difficult, since the existence of the agreement could only be proved by means of avowal (art. 2730 and 2735(2) C.C.) and oath (art. 2739 C.C.), but not by means of witnesses (art. 2725 C.C.) or presumption (art. 2729(2) C.C.). The law provides for the following forms \textit{ad substantiam} of

tiam: 1) public record\textsuperscript{195} (art. 2699 et seq. C.C.), 2) private deed\textsuperscript{196} (art. 2702 et seq. C.C.), 3) private deed with authenticated signature\textsuperscript{197} (art. 2703 C.C.), and 4) IT document\textsuperscript{198} (Decreto del Presidente della Repubblica (hereinafter D.P.R.) n. 445/2000).

The expression ‘optional elements of the contract’ refers to those elements that the parties are free to insert into the contract, so as to modify an existing general contractual model and in order to give legal relevance to the personal reasons that caused them to enter into the negotiation process.\textsuperscript{199} Once they are inserted, the parties are obliged to respect them. The most common ones are the condition and the time limit, which are regulated by art(s) 633 et seq. and 1353 et seq. C.C.

6.1.1. Condition

Condition concerns a future and an uncertain event, on which the parties decide to make either the commencement (condition precedent) or the termination (condition subsequent) of the effects of a contract dependent on. Therefore, in both cases, the contract has been perfected but in the case of a contract subject to a condition precedent, it will be ineffective until such a condition has been realised; however, in the case of a contract that is subject to a condition subsequent, the contractual effects will cease once the condition has been realised. However, in both cases the fulfilment of the condition will be deemed to have occurred at the moment of the conclusion of the contract (retroactive effect),\textsuperscript{200} unless either the parties agreed otherwise or the nature of the relationship is such that the effects of the contract (or its termination) have to be deemed to have occurred at a different moment (art. 1360(1) C.C.).\textsuperscript{201} This is an important aspect of Italian private law since the retroactive effect, which can make the non-fulfilment during the pending period irrelevant, has

\textsuperscript{195} A public record is a document drafted, in accordance with the prescribed form, by a public notary; first, it serves to prove that the documents have been drafted by a public notary, and second, that its content conforms to the parties’ declarations in the presence of the notary, unless one party commits a fraud.

\textsuperscript{196} A private deed is a document drafted by the parties themselves.

\textsuperscript{197} In this case, the parties affix their signature in the presence of a public notary.

\textsuperscript{198} An IT document is any computer or telecommunications device that represents a legally relevant fact or act.

\textsuperscript{199} GAZZONI, Manuale, ibidem, p. 907.

\textsuperscript{200} Cassazione, Division II, n. 1192/1987. In the case of the division of the deceased person’s estate, if the will assigns the ownership of an heirloom to a person under a condition precedent and subordinately to another person in case the condition is not fulfilled, there is no retroactive effect if the previous assignee acquired the ownership in \textit{medio tempore} by means of acquisitive prescription.

\textsuperscript{201} Cassazione, Division I, n. 2167/1980; Cassazione, Division II, n. 3415/1999.
real effects, i.e. it can be opposed to everybody, since its effects extend beyond the contracting parties.\textsuperscript{202}

From the voluntary condition (\textit{condicio facti}), which is regulated by the \textit{Codice Civile}, one has to distinguish the legal condition (\textit{condicio juris}), which is an element of mandatory law.\textsuperscript{203} In addition, the condition can be discarded if it is stipulated in the interest of only one party (a so-called unilateral condition).

It is important to underline that during the pending period the party, who has acquired a right subject to a condition precedent, as well as her heir, has the right to protect her expectations by means of precautionary remedies. The same right (against the transferor) appertains to the party, who acquired subject to a condition subsequent, and can also be enforced against whoever interferes with the former’s expectations (art. 1357 C.C.); this can be deduced from art. 1358 C.C., according to which, during the pending period, each party must behave diligently so as not to prevent the fulfilment of the condition.

Accordingly, if the condition is not fulfilled because of the culpable and intentional behaviour of a party, preventing the fulfilment of the condition, it will still be considered as having occurred (\textit{finzione di avveramento della condizione}).\textsuperscript{204} Obviously, the condition cannot be unlawful, or contrary to the public order and social custom. In such a case, the contract will be void. Moreover, the contract that is subject to an impossible condition precedent will be void, whereas the contract that is subject to an impossible condition subsequent will be deemed to have never contained such a condition (art. 1354 C.C.).

\textsuperscript{202} For instance, the parties agree to transfer the ownership of a thing under a condition precedent and also that the payment has to be effected by means of a banker’s draft during the pending period. If, for instance, the buyer pays by means of a foreign cheque, the seller could allege the non-fulfilment of the contractual obligation in respect of payment and, consequently, could transfer the right to another person. However, due to the retroactive effect of the fulfilment of the condition precedent, the acquisition of the right by another person part is invalid, unless she has already acquired possession thereof in the case of a movable, or her title has already been entered in the land register in the case of an immovable.

\textsuperscript{203} For instance, the validity of the will and, hence, the transfer of property rights in the deceased’s estate, is conditional on the death of the testator; the purchase of goods in international trade is conditional on an administrative import authorisation, without which the purchase is ineffective. However, scholars maintain that all those events, on which the perfection of a contract is made dependent, cannot be considered \textit{condicio juris}, since the individual events constitute parts of the ongoing development of the case in point. \textit{Cfr} RESCIGNO Pietro, \textit{Condizione (dir. vig.)}, in \textit{Enciclopedia del diritto}, Giuffrè, 1961, VIII, p. 768 et seq.

\textsuperscript{204} \textit{Cassazione}, Division II, n. 8584/1999; see GAZZONI, \textit{Manuale}, ibidem, p. 913.
Finally, the condition can be either express or implied; in the latter category, scholars\textsuperscript{205} include prerequisites, which are circumstances independent from the will of the parties, but on which the parties – although not expressly – make the effectiveness of the contract dependent on.

6.1.2. Time limit

Time limit is a future and certain event, on which either the commencement (termine iniziale) or the termination (termine finale) of the contractual effects depends. The moment at which the effects commence is called dies a quo; whereas, the moment up to which the effects occur is called dies ad quem. As to the quality of certainty, one can distinguish between an event that will occur at a certain time (dies certus an et certus quando), and an event that is certain to occur but the parties do not know when (dies certus an et incertus quando). As to the effects, one has to point out that during the pending period the buyer’s contractual right cannot be exercised immediately. For instance, in the case of a sale subject to a starting time-limit, the seller immediately transfers the ownership and the transfer is effective vis-à-vis all people, but the exercise of the buyer’s property right is postponed to a future point in time, so that in medio tempore (i.e. in the meantime) the buyer’s proprietary right will be considered as only being a temporary right in rem in another person’s goods.

6.2. The registration of the contract

A particular publicity requirement has to be fulfilled in the transfer of immovables and registered movables in order to make the existence of the contract public. Accordingly, registration plays an important role. Its typical function is mainly to solve conflicts between different persons (transferee/avente causa), who claim the same right against a common assignor (transferor/dante causa). Registration, hence, is a due act not only for immovable goods, but also for certain types of movable goods, whose value and function can affect the national economic system. Such movable goods are ships (and floaters) and aircrafts.

Even if the registration practices for movable goods and immovable goods are very similar (e.g. the types of acts subject to registration or the effects of registration) the registration of movable goods differs from the registration of immovable goods in a basic aspect. In fact, the register of immovable goods (registro immobiliare or catasto) gives information on the

current right-holder (i.e. the register does not display all characteristics of the property, but rather contains registration entries that affect the legal status of the current right-holder); on the contrary, the registers of movable goods give detailed information on the movable in question. Each page in a register of movable goods can only refer to one thing and the events that affect the proprietary status of its owner/keeper should be inserted in chronological order. Moreover, the register’s information should be continuous. This means that the person who was the previous transferee and the person who now is the transferor should be identical.

Obviously, the contract is fully valid as between the parties even in the case of a lack of publicity: hence, the unregistered contract transfers ownership, creates a right in rem in another person’s goods, i.e. an unregistered contract can produce all the potential effects of a registered contract. However, only a registered contract can be enforced against third parties, i.e. the contract, being an expression of the parties’ private sphere, leaves its ‘local’ dimension in order to become a legal fact, which is presumed to be known by everybody (so-called presunzione legale di conoscenza). Consequently, in the case of either the transfer or the creation of a right in rem, the general public – once the contract is registered – has to take into account a potential lack of title on the part of the transferor.

As to the nature of the transfer of registered movables, a very clear statement has been made by the Court of Cassation. In this regard, the Court states that the registration of a sales contract ex art. 6 Regio Decreto Legge (R.D.L.) n. 436 of 13\textsuperscript{th} March 1927 is not a prerequisite for the effectiveness of a transfer of ownership. The judges maintain, moreover, that registration does not have any constitutive effect, but it is a form of declarative publicity for the purpose of protecting third parties in good faith who want to acquire a right in the goods. In fact, the sale of a registered movable can be effected by means of the application of the general provisions of the Codice Civile: this means that consensus is per se sufficient for effecting the transfer and it can be proved by any kind of evidence (e.g."

\footnotesize{206 In the case of a transfer mortis causa the ‘continuity requirement’ is fulfilled by the registration of the acceptance of an inheritance or a legacy.}


\footnotesize{208 Cassazione, n. 2445/1993; Cassazione, n. 6599/1998; Cassazione, n. 10133/2004.}

\footnotesize{209 Cassazione, n. 5954/1996.}

\footnotesize{210 Even though the transfer agreement does not have to be in writing, the law requires the fulfilment of certain other form requirements in order to be able to proceed with registration. However, in the light of the lack of a written agreement, a substitutive declaration containing an authenticated signature of the seller is sufficient ex 13 R.D. n. 1814 [29/07/1927]. See Cassazione, n. 862/1962; Cassazione, n. 777/1967; Cassazione, n. 145/1984; Cassazione, n. 698/1984.}
witness, avowal, etc. …). However, despite the clarity of this statement, scholars have always demonstrated a certain aversion to it, since they have had some difficulty in classifying the nature of an acquisition in the case of simultaneously competing parties. This difficulty arises from reading art. 1376 C.C. in conjunction with art. 2644 C.C. 211

Hence, according to scholars there is a lack of coherence in the relationship between art(s) 1376 and 2644 C.C. In particular, art. 1376 C.C. establishes that the buyer acquires a right in rem in goods by mere consensus, whereas art. 2644 C.C. states that in the conflict between several assignees the losing party will be the one who registers too late. What we could argue is that even if the simple consensus is sufficient to acquire a right in the goods, it is insufficient for the purposes of keeping it, unless she has registered immediately after acquiring it.

This lack of coherence has been interpreted in different ways by scholars. However the majority argues that the second transferee (however, being the first one to register his right) acquires the right on the basis of a complex procedure.

1. Some argue that the second transferee does not acquire the right in rem in the movable a non domino. In fact, if it was an a non domino acquisition it would not be possible to meet the principle according to which there should be continuity between the previous and subsequent registration, i.e. the previous transferee and the present transferor should be one and the same person (art. 2688 C.C.).

2. Other scholars argue that such an interpretation cannot be accepted because it is based on the idea that the agreement, by which a person transfers her own right, can be binding on some but not others. It would seem that, by virtue art. 1376 C.C., one transfers not a right in rem but a right in personam. Accordingly, the transferring act is relatively ineffective.

Accordingly, it seems more correct to argue that the second transferee acquires a non domino, but the registration – if it is effected immediately – has the power of a legal resolutive condition, which disposes of the effects produced by the first (but not registered) transferring act. Of course, the first transferee can seek damages from the transferor. The court maintains that, if we accept the ‘inter-partes-ineffectiveness of the transferring act’ thesis, the transferor is liable for her negligence, as she has neglected her duty not to sell twice; 212 whereas, if we accept the ‘acquisition a non do-

211 Art. 2644 C.C. appertains to the chapter on immovable goods; however, art. 2694 C.C. states that the provisions, which are not considered to appertain to the section on registered movable goods, can be applied if they are compatible with the rules on registered movable goods.

212 According to art. 1476 C.C., the seller’s duties are:
1. to let the buyer acquire the ownership of the goods;
mino’ thesis, the transferor's liability is non-contractual ex 2043 C.C., since the transferor has prevented the first transferee from exercising her right in the movable. In both cases, the first (losing) transferee can seek compensation ex art. 2043 C.C. from the second transferee, if the latter was in bad faith at the time of her acquisition.

However, it has to be underlined that the registration of the contract has the same effect as physical possession in the case of unregistered movables. In fact, if several buyers purchase the same movable from one and the same seller, the buyer who first acquired possession will be considered as the legitimate owner (art. 1155 C.C.); whereas, if the aforementioned cases concerned immovables and registered movables, the buyer who first entered the contract in the register would be the one to acquire possession. In fact, even if she was the last to acquire the goods, she can oppose her acquisition to the other acquirers by reason of having immediately fulfilled the registration requirement (art. 2644 C.C.). Immediate registration is only possible if the contract takes the form of a public record, a private deed with an authenticated signature, or an IT document with a digital signature (art. 2657 C.C.); otherwise, if the contract takes the form of a private deed or an IT document with a normal electronic signature, the judge must verify the authenticity of the signature.

To sum up, in spite of all potential arguments brought forward by scholars, the consequence of not registering movable goods in civil law is that the first transferee, who did not promptly register the good, cannot oppose her right to the second transferee in good faith, who benefits from the presumption of ownership that emerges from registration per se, and from being first and fastest in registering the movable.

6.3. Effects of the contract

In contract law, the basic principle is that a contract, once concluded, has the force of law as between the parties (art. 1372(1) C.C.), i.e. although the contract is an expression of private autonomy, once the par-
ties decide to conclude the contract they are forced to respect the agreement just as if they were obliged to do so by law (the so-called binding force of the contract). This means that the parties who are not willing to respect the terms of the contract anymore have to conclude an agreement in the same form as the unwanted contract, the former being directed at extinguishing the effects of the latter (*mutuo dissenso*).

However, the contract can provide for terms, which allow one party to terminate the contract regardless of the consensus of the other party (*unilateral rescission of the contract/recesso unilaterale* – art. 1373 C.C.); accordingly, the contract will be terminated once one of the parties thereto informs the other party of her intention to terminate the contractual obligation. Obviously, it is possible to rescind the contract if one party has not yet started performing her contractual obligations (art. 1373(1) C.C.). Once such performance has commenced, the parties cannot rescind the contract anymore but have to return the performance they have already received.

A different principle is applied to the continuing obligation; here, rescission is always possible, but – unless provided otherwise – it does not affect the performance already rendered or that is being rendered (art. 1372(2) C.C.). The rescission of the contract does not have any retroactive effect and the parties cannot seek the restitution of what they have already transferred.

In addition, as mentioned above, the contract is not only a source of obligations, but it is also a manner of acquiring/transferring ownership, and other rights in rem as well as being a mode of constituting rights in rem in another person’s goods. Accordingly, scholars speak of the obligatory effects of a contract with respect to the obligations deriving therefrom (*e.g.* the seller’s obligation to deliver the goods and the buyer’s obligation to pay the price), whereas they speak of the real effects of a contract with respect to the transfer of ownership from the seller to the buyer, which immediately occurs once the parties have concluded the contract.

In this regard, on the one hand, some contracts are only sources of obligations for one or all the parties (*e.g.* lease, gratuitous loan for use, etc. ... ) and they are classified as contracts with obligatory effects (*contratti ad effetti obbligatori*); on the other hand, some contracts not only have obligatory effects, but also transfer rights in rem (*e.g.* gift, sale, barter, etc. ...) and they are called contracts with real effects (*contratti con effetti reali*).

However, as to contracts with real effects, the Italian legal system is based on the so-called consensus principle (*principio consensualistico*).\(^{217}\) In

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\(^{217}\) Generally, the agreement between the parties is sufficient in order to ‘perfect’ the contract; however, in some cases, also the delivery of the goods is necessary. Con-
fact, art. 1376 C.C. states that in those contracts, which aim at transferring either ownership or another right in rem, or at constituting any right in rem, the concerned rights are either transferred or acquired by means of the parties’ legitimately expressed consensus. This means, for instance, that even if the delivery or the payment is deferred to a future point in time, the transferee has already acquired a power equal to the acquired/transferred right in rem. 218

The justification of this system is based on the idea that if the acquisition of ownership were deferred to the moment of payment, this would result in an excessive protection of the seller/owner’s interest: in fact, the latter would not be required to give up the ownership of the goods, until the point in time at which the full payment of the purchase price is effected by the buyer. Moreover, a legal system where the transfer of the ownership occurs at the moment of payment would require a market where payment is always made in cash and the buyer makes such a payment at the moment the contract is signed. 219 On the contrary, nowadays people supply and buy on trust; consequently, if the buyer had to make a cash payment in order to become the legitimate owner of goods, she would not have complete power over the goods between the time of the conclusion of the sales agreement with the vendor and point in time at which she makes the respective cash payment.220

Accordingly, in order to be able to grant full power to the buyer, the law protects the seller’s interest in a different way. As to immovables and

tracts, which are considered perfect by virtue of a simple agreement between the parties, are called ‘consensual’ contracts (contratti consensuali), whereas contracts where the delivery of the goods is the necessary requirement for the effectiveness of the contract (e.g. gratuitous loan for use, bailment, pledge), are called ‘real’ contracts (contratti reali). In this regard, Francesco MESSINEO (Contratto (dir. priv.) in Enciclopedia del diritto, Giuffrè, vol. IX, 1961, p. 784) underlines that a lack of delivery in respect of real contracts does not make these void but simply incomplete in itinere, i.e. the contract is simply deemed to be an uncompleted or unexecuted transaction; hence, it does not produce any effects until delivery is effected and delivery has to be intended to be a condicio iuris precedent in order to perform the agreement.

218 However, Rodolfo SACCO (La consegna ed altri atti di esecuzione, in Trattato di Diritto Privato (di retto da Pietro RESCIGNO), UTET, vol. 10/XI, p. 347) argues that the consensus principle cannot be considered as a dogma, but rather as being a general tendency of the Italian legal system. In fact, this statement is supported by the fact that, for instance, the consensus principle is not applicable to the right in rem for security purposes (where the delivery of the goods to the creditor is necessary – art. 2786 C.C.) and to the transfer of movables. In the latter case, the buyer who is not in possession of the movable is exposed to the risk of losing the ownership of it if another buyer has, originally and in good faith, acquired the possession of it (art. 1155 C.C.).

219 It is only in this case that the higher protection of the seller would not compromise the distribution of wealth and, consequently, the circulation of goods.

220 GALGANO, Diritto civile e commerciale, ibidem, vol. II/1, p. 244.
registered movables, the seller has the opportunity to register a mortgage on the goods, whereas, in respect of movables, the seller can require the sales agreement to contain a reservation of title clause. \(^{221}\) In addition, as to the case of bankruptcy, the seller of goods, which have not yet been paid for, is protected by the so-called right of stoppage in transitu. In fact, a seller, as soon as she receives notice of the fact that the buyer has not fulfilled her obligation, or is in actual and immediate danger of insolvency, can recover the possession of the sold goods, while they are still in the hands of a carrier or middle-man in the course of their transit to the buyer, and before they get into the buyer’s actual possession (art. 75 R.D. n. 267/1942).

Another aspect of the consensus principle is that it is applicable only if the parties have identified the goods to be transferred. On the contrary, if the goods are fungible ownership will be transferred once there is an ascertainment of the goods (individuazione),\(^{222}\) which usually occurs at the moment of delivery\(^{223}\) and is based on what the parties contractually established (art. 1378(1) C.C.).

If the contract concerns a bulk of goods (so-called vendita per aversionem, e.g. all the goods in a warehouse), ownership is transferred according to the consensus principle and the ascertainment of the single items that make up the bulk is not necessary, even if, for purpose of determining the transferring effects, it is necessary to proceed to the measuring, the numbering and the weighing of the single constituents of the bulk (art. 1377 C.C.).\(^{224}\)

\(^{221}\) Cassazione, Division II, n. 1808/1984.

\(^{222}\) Cassazione, Division II, n. 5537/1981; Cassazione, Division I, n. 8861/1996. For instance, in Cassazione, Division II, n. 31/1985 the court stated that, if one purchases a new car, the contract between the buyer and the dealer is considered as concerning the sale of a generic object, since the buyer, when filling in one of the pre-printed sales contract forms in the presence of the car salesman, just stipulates a contractual limitation by indicating the car model. Indeed, the ascertainment occurs once the car dealer, or her agent, ascertains the vehicle identification number of the car to be delivered (the specific vehicle is then identified to the contract).

\(^{223}\) In this regard, one could think of the case of a driver who fills up with petrol. The contract is perfected once the filling station attendant decides to supply the quantity of petrol demanded by the driver; but, at the moment of the agreement, the contract only concerns a sale of generic goods, the contract therefore not (yet) transferring any property. The transfer of ownership only occurs once the petrol is transferred from the filling station’s petrol pump to the fuel tank of the car, i.e. only then have the goods been ascertained.

\(^{224}\) In this regard, in Cassazione n. 2546/1959, the court underlines that the difference between a sale of generic goods and a sale in bulk is derived from the fact that the parties attribute a different nature to the object of the contract, i.e. in the case of a sale in bulk, the agreement has at its object a quantity of both homogeneous and non-homogeneous goods, which are considered as being a unit and which are sold for and purchased with one lump sum, without considerations of weight, number or size.
If the contract concerns goods that have to be shipped, the ascertainment, and consequently the transfer of the ownership, occurs once the goods are handed over either to the carrier or to the shipping agent (art. 1378(2) C.C.). Moreover, it is obvious that in the case of a sale of goods, which still have to be delivered to the carrier, it is necessary that the ascertainment is effected either in the presence of or with the contribution of both of the parties or their agents. An exception to this principle is when the parties have mutually agreed on the taking of other apposite measures in order to effect the ascertainment of the goods and to make sure that the shipping agent cannot, by any means, substitute the goods once separated from the bulk.

However, a sale of future goods does not produce any in rem effects (ownership is transferred as soon as the movable exists); nor does the sale of another person’s goods (ownership is transferred as soon as the goods appertain to the seller’s estate); nor does a sale of alternative substitutes (ownership is transferred as soon as the buyer makes her choice); nor does a sale subject to a condition precedent (ownership is transferred as soon as the decisive event occurs); nor does a sale under a reservation of title (ownership is transferred as soon as the buyer pays the last instalment).

The moment of the transfer of ownership is particularly relevant with respect to the risk of loss of the goods, which generally has to be borne by the owner (res perit domino). This means that if the seller is still the owner, she has to bear the potential risk of loss, unless she has already transferred ownership to the buyer. In addition, it has to be underlined that, except for the cases where the parties agree to transfer ownership at

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225 For instance, in Cassazione, Division III, n. 15389/2002, the court affirmed that, as to movables, which are identified only by the genus and concern goods that have yet to be shipped, the transfer of ownership occurs once the movables are delivered either to the carrier or to the shipping agent. The eventuality that the parties have stipulated a FOB term does not affect the decisive moment of the transfer of ownership of the movable, since this term only refers to the way the parties share the costs that were incurred in the process of transport as well as in the protection against potential risks.

226 Cassazione, Division I, n. 5768/1981.

227 For instance, in Cassazione, Division I, n. 8861/1996, the court stated that the proof of a tacit agreement as to the mode of ascertaining the goods is not provided by sending the instructions, which the seller has given to the bailee, to the inactive buyer (in the specific case, the instructions were contained in three letters; the seller ordered to deliver – on simple demand by the buyer, or by her agent – three parcels of coffee, each one composed of 150 bags of coffee). In fact, the court maintained that an agreement as to the ascertainment of goods that have yet to be shipped together with other homogeneous goods can be tacitly concluded, insofar as the buyer’s behaviour is unambiguous and incompatible with a contrary intention, instead clearly expressing the intention to adhere to the mode of ascertainment proposed by the seller.

228 BIANCA, La vendita e la permuta, ibidem, p. 285 et seq.
a later point in time, the effects of the contract immediately occur and, hence, ownership is usually acquired by the buyer before the damaging event occurs. Accordingly, even if the goods were lost and the seller did not cause the loss, the person who acquired the ownership of them has to fulfil her corresponding contractual obligation all the same. In fact, art. 1465(1) C.C. states that the buyer is obliged to render her own counter-performance, even though the goods were not delivered to her due to an inevitable accident.\(^{229}\) Indeed, the duty to deliver the goods is purely accessory and functional to the perfection of the contract: one must not forget that ownership and possession can be acquired at two different moments. The buyer's duty to pay is essential and is derived from the synallagmatic effect of the seller's consensus; in fact, whereas the seller 'theoretically' fulfils her duty as soon as she agrees to transfer ownership, the buyer is not released from her duty until she pays the purchase price.\(^{230}\)

More precise information is necessary as to the sale of generic goods. In this case, the risk passes to the buyer as soon as the ascertainment of the goods occurs, so that it is not sufficient that the seller has merely placed the goods at buyer's disposal without physically separating the buyer's goods from the rest of the bulk.\(^{231}\) However, if, prior to the ascertainment of the goods, the obligation of the seller has become unfeasible due to an inevitable accident, the latter cannot claim the buyer's counter-performance. In fact, since there was no transfer of ownership the negative economic effect of the inevitable accident, which caused the non-performance of the contract, has to be borne – according to the general principle of art. 1463 C.C. – by the party who was obliged to make the ‘unfeasible’ performance (in this case, the seller).

### 6.4. Effects of the contract on other persons

As seen above, the general principle is that the contract is binding on the contracting parties, but does not affect another person's legal sphere (art. 1372 (2) C.C.), unless there is an express intention of the latter to the contrary. In the following paragraphs, some specific cases of the expression of the freedom of contract by contracting parties, which is provided for by art. 1322 C.C., will be dealt with. Even though, in these cases, another person's property can be potentially affected, these cases are examples of how the law intervenes in order to prevent another per-

\(^{229}\) Cassazione, Division, n. 3838/1968, according to which the burden is on the seller to prove that the non-performance was caused by an inevitable accident.


\(^{231}\) Cassazione, Labour Division, n. 4611/1982; Cassazione, Division I, n. 11834/1996.
son from being obliged to fulfil an obligation or losing a right against her will.

6.4.1. Promise of another person’s performance

In this case, the law establishes that the promise is valid, but an obligation is imposed only on the promisor, i.e. the promisor shall behave in such way that the third party is able to keep the promised performance (e.g. the co-owner sells her share and promises that the other co-owners will also sell their shares).

Accordingly, if the promisor is not able to perform to the third party, the former is obliged to pay damages (art. 1381 C.C.) equal to the expected value of the performance, unless the parties have already contractually agreed on the amount of potentially payable damages. A binding promise can only be derived from a certain and unambiguous agreement, which can take any form. The promise of performance rendered by another person is a phenomenon that is analogous to the contract on another person’s property (contratto sul patrimonio del terzo).

Both the sale (art. 1478 C.C.) and the mortgage (2822 C.C.) of another person’s goods are examples of a contract on another person’s property: in fact, the contract will only produce effects if the other involved party has voluntarily accepted either to sell or to mortgage her own goods. It is clear that such transfer or mortgage cannot have any effect merely by virtue of the conclusion of an agreement between the original parties, since the goods are not part of the seller’s/mortgagor’s property. The agreement between the original parties only imposes an obligation on the seller/mortgagor to make the goods available. Once the goods have been acquired by the seller/mortgagor, the sale or the mortgage will be effective.

6.4.2. Provision in restraint of alienation (pactum de non alienando)

According to art. 1379 C.C., the parties can create an obligation inter se not to sell certain goods once these have been transferred. It is clear that such a term is an open violation of the general principle of the free circulation of goods, but the Italian legal system permits the insertion of such a clause into a contract. Its effectiveness depends on the fulfilment of

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certain conditions: first, the creditor has to have an interest worthy of protection (art(s) 1174 and 1322(2) C.C.), and, second, such clause cannot be perpetually effective. However, despite respecting the validity of such clauses, the legislator always looks at such clauses with disfavour; hence, art. 1379 C.C. emphasises that the pactum de non alienando has absolutely no effects on third parties. This constraint on the effectiveness of such a clause is founded on the numerus clausus of rights in rem and on the principle that the contract produces effects only on the contracting parties (art. 1372 C.C.). The requirements of art. 1379 C.C. apply not only to contractual terms that provide an absolute prohibition of sale, but also to other terms extensively influencing the availability of goods. Accordingly, case law agrees on the examination of an agreement, in accordance with the provisions of art. 1379 C.C., by which a party is obliged to sell at a fixed price.\textsuperscript{235} In addition, art. 1379 C.C. has to be extended to sales made to, or not made to, certain persons (preference agreements),\textsuperscript{236} as well as to the sale of goods that are destined for a particular location.\textsuperscript{237}

6.4.3. Pre-emption right

As stated above (supra § 3.3.), this is an agreement by which one party makes a promise to the other party to make a sale of certain goods to the latter – all things being equal – in the event the former should, at all, wish to sell the goods in question.

\textsuperscript{235} Cassazione, n. 4266/1974; Cassazione, Division II, n. 5024/1994. In both cases, the court affirmed that a retailer is free to sell goods (clothes) at a price lower than the one determined in the supply contract once such contract has been terminated. In fact, the term, according to which the retailer is obliged to sell the goods at a fixed price after the termination of the contract, violates the principle of the free circulation of goods.

\textsuperscript{236} Art. 1567 C.C. states that, if the supply contract contains an exclusive rights clause in favour of one supplier, the purchaser cannot obtain the same goods/services from third parties or resort to produce those goods herself (Cassazione, n. 2718/1976). Art. 1568, instead, states that, if the supply contract contains an exclusive rights clause in favour of the purchaser, the supplier cannot offer the same goods/services to third parties while the contract is effective (Cassazione, Division I, n. 3076/1997). Nonetheless, the failure to perform such duties can give rise to claims for damages, but does not affect the transfer of property rights to third parties.

\textsuperscript{237} Cassazione, Division I, n. 3082/1990; Cassazione, Division II, n. 12769/1999.
6.4.4. **Contract in favour of a person to be indicated**

(*contratto per persona da nominare*)

This contract concerns an agreement between contracting parties to subsequently nominate the person (*electio amici*) who is to acquire the right transferred by the contract, once concluded (art. 1401 C.C.),\(^{238}\) either within the time period provided for by law (three days) or a time period established by the parties. The clause stipulating the nomination of an alternative party to the contract (*riserva di nomina*) causes the partial subjective uncertainty of the contract: in fact, a binding relationship exists as between the original contracting parties, but such a clause provides that a third party can replace the transferee and, hence, retroactively acquire all contractual rights and duties.

Moreover, since the contract is perfectly valid as between the original parties, it has *in rem* effects as well. Consequently, the goods become part of the transferee’s assets and also her creditors can exercise their rights in the goods in question; however, the full satisfaction of their rights depends on the lapse of the relevant time period. In fact, only when such time period has expired, will the goods effectively belong to the transferee.

The aim of such a contract is to avoid a double transfer of ownership. The nomination of another transferee, as mentioned above, has to be made within three days, unless the contract provides otherwise\(^ {239}\) (art. 1402(1) C.C.); also, the acceptance of the ‘substitute transferee’ is necessary (art. 1402(2) C.C.). From art. 1402 C.C. one can deduce that the nomination is effective if the intermediary party is entitled to influence the legal sphere of the party to be nominated. Hence, granted by the appointed party, the intermediary must have a power of attorney (*procura*). Powering the absence of a power of attorney, the nomination will be effective only if the third party accepts it. Secondly, the nomination has to fulfil the same publicity and form requirements as the contract between the original contracting parties. In the meantime, the contract only produces effects between the original contracting parties, but once the third party accepts the nomination, the contract will retroactively produce its effects on the nominated party (art. 1404 C.C.).\(^ {240}\)

In this regard, scholars\(^ {241}\) agree that the effects produced by the acceptance of the nomination by the nominated party are equal to the ratification of a contract concluded by a *falsus procurator*, *i.e.* the nominated

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\(^{238}\) Cassazione, Division I, n. 8410/1998; Cassazione, Division I, n. 14460/2002.

\(^{239}\) However, for tax purposes, if the nomination is made after the lapse of three days, there are two transfers to consider: one from the seller to the intermediary, and one from the latter to the nominated person.

\(^ {240}\) Cassazione, Division III, n. 1998/1981.

party (like the principal in the case of agency) accepts the rights and the
duties established by the contract as from the date of its conclusion. In
addition, if the nominated party does not accept the contract, it will
produce its effects between the original contracting parties (art. 1405
C.C.);\textsuperscript{242} in that respect, it is different to the contract made by the falsus
procurator, since, if not ratified, the contract made by the falsus procurator
will never be effective. Finally, it has to be underlined that, since the
nomination has ex tunc effect, the acquisition by the nominated person
prevails over the precautionary measures taken by the creditors of the
intermediary, as well as prevailing over the transfer by the intermediary
to a person other than the nominated one in the interim, unless the
appointment is opposable.\textsuperscript{243}

6.4.5. Contract for the benefit of a third party

It is a contract by which the original contracting parties agree on the
legal effect a contract will have on another person. The original contract-
ing parties are the promisor who promises to perform to a third party
(beneficiary), and the promisee who accepts the promise of the promisor.
Although the beneficiary does not take part at all in the conclusion of
the contract, she directly acquires the right from the promisor by virtue of
the negotiations between the original contracting parties (art. 1411(2)
C.C.).\textsuperscript{244} The contract will have retroactive effect on the original con-
tracting parties (art. 1411(3) C.C.),\textsuperscript{245} if the beneficiary refuses to recog-
\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{242} Cassazione, Division II, n. 1823/1992; Cassazione, Division I, n. 6952/2000.
\item \textsuperscript{243} For instance, if the contract has to be registered, also the nomination of the bene-
ficiary has to be included in the registration, so that if the act of nomination occurs
within the three days prescribed by law (or within a different time period as agreed
upon by the original contracting parties), the nomination cannot be opposed to
other third persons who, in the meantime, acquired the goods from the intermedi-
ary.
\item \textsuperscript{244} In the case of air freight, the court (Cassazione, Division III, n. 18074/2003) has
stated that, once the air carrier has delivered the goods to the company in charge
of the handling service of an airport, such relationship can be qualified as a con-
tract of deposit for the benefit of a third party. The duty of the handling service
company is to preserve the goods in the consignee’s interest and to deliver them on
demand. If the goods are damaged, the consignee can directly claim damages from
the handling service company.
\item \textsuperscript{245} For instance, the court (Cassazione, Division III, n. 118300/2003) has stated that in
the case of the carriage of goods, when the consignee is different from the con-
signor, such contract has to be qualified as a contract for the benefit of a third
party (consignee), between the consignor and carrier. In this case, the benefici-
ary/consignee can benefit from the contract only when delivery has been effected
and the goods are physically placed in the designated warehouse. Consequently, if
the consignee does not demand that delivery of the goods be made to the carrier
\end{itemize}
\end{footnotesize}
nise the nomination of her person\textsuperscript{246} or if the promisor – before the beneficiary declares her intention to accept nomination of her person – revokes or modifies the effects of the agreement. However, the original contracting parties are free to stipulate that the contract will have a different aim to what the Codice Civile provides in this respect. Finally, it is important to point out a third party can benefit insofar as she has an interest in the assignation.

6.5. Invalidity of the contract

A contract is invalid when it is contrary to law; there are two types of invalidity, \textit{i.e.} the contract can either be void (\textit{nullo}) or voidable (\textit{annulabile}). The difference between the nullity of the contract and its voidability is that the former causes the non-existence of all potential contractual effects (\textit{i.e.} as if the contract was never concluded); the latter is a less serious anomaly. In fact, the voidable contract produces effects until one of the parties demands the annulment of the contract and the judge recognises the correctness of her action for annulment.

The following categories of void contracts are differentiated:

1. when it is contrary to mandatory rules;
2. when it lacks one of the requirements provided by art. 1325 C.C.;
3. when either the causa or the motives\textsuperscript{247} of the agreement are unlawful (art. 1345 C.C.);
4. when the object of the contract is unfeasible, indeterminate, or indeterminable (art. 1346 C.C.);
5. all other cases provided by law.

The partial nullity of the contract (or the terms of the contract) causes the invalidity of the whole contract, if the parties were not likely to have concluded the contract without the void terms (art. 1419 C.C.). However, the nullity of single terms does not cause the invalidity of the whole contract, when the law provides that such terms can automatically replaced by optional legal terms. Moreover, unless the law provides other-

\textsuperscript{246} In order for the beneficiary to be able to correctly manifest her intention to benefit from or refuse to accept the effects of the contract, it is necessary that the original contracting parties communicate the conclusion of such contract to the potential beneficiary. The beneficiary is obliged to communicate her intention to both parties.

\textsuperscript{247} The motives of the parties for entering into negotiations are never relevant but, if the parties have decided to conclude a contract that has an exclusively illegal purpose, the contract does not deserve protection although it fulfils all the requirements of art. 1325 C.C.
wise, everyone who has an interest can bring an action based on the nullity of the contract, as well as the judge being able to declare it unenforceable on his own initiative during the proceedings (art. 1421 C.C.). Such action is not subject to limitation; only the action for restitution is subject to limitation. Moreover, a third party who acquired the goods by means of acquisitive prescription (art. 1158 et seq. C.C.) is not affected by the action for nullity (art. 1422 C.C.).

The ruling, which declares the nullity of the contract, has retroactive effect; in fact, it eliminates all contractual effects on the relationship between the original contracting parties, as well as all contractual effects on the relationship between the original contracting parties and third parties, up to the point in time of the judgment (even if the third parties were in good faith, i.e. they were not aware of the nullity-causing facts!). Consequently, the contract is deemed never to have been concluded. Accordingly, a third party who has possibly already acquired proprietary rights, cannot exercise her acquired right anymore.248

However, it has to be pointed out that the retroactive effects of such a decision are limited if the principles of original acquisition are applicable; the third party who has acquired a proprietary right by means of acquisitive prescription or possession in good faith cannot be obliged to return the goods. In this case, the principles of original acquisition will prevail.

Finally, the void contract cannot be validated, unless the law provides otherwise (art. 1423 C.C.). It can, however, produce the effects of a different contract (this is always subject to the fulfilment of the requirements of art. 1325 C.C.) if, taking into account the purpose pursued by the parties, one can presume that the parties would have concluded such contract had they known of the nullity of the originally intended contract (so-called conversion of the void contract/conversione del contratto nullo – art. 1424 C.C.).249

The following categories of voidable contracts are differentiated:
1. the lack of capacity (art. 1425 et seq. C.C.);
2. the defects of will (art. 1427 et seq. C.C.). They can occur when the consensus results from

248 For instance, if a sales contract is declared unenforceable, the rights possibly acquired in the meantime by a subsequent buyer are compromised, so that the subsequent buyer will not receive any goods under the void contract and the buyer is forced to return the goods to the seller.

249 The legislator extends the principle of affirmation of unenforceable contracts to the cases of contracts with more than two parties (art. 1420 C.C.), so that the unenforceability of the contract for one of the parties does not affect the whole contract, if her participation is not essential and, hence, the remaining parties can perform the contract. The same reasoning can be applied to the affirmation of voidable contracts with more than two parties (art. 1446 C.C.).
(a) mistake, and the mistake is fundamental and recognisable to the other contracting party (art. 1428 et seq. C.C.);
(b) duress, even if it was exercised by a third party (art. 1434 et seq. C.C.);
(c) fraud, i.e. the tricks used by one party were so persuasive that, without them, the other party would not have consented to the conclusion of the contract (art. 1439 C.C.);
3. the conflict of interests between the principal and the agent (art. 1394 C.C.), and
4. other cases provided by law in respect of specific contracts.

The voidability of the contract can only be claimed by the party who is entitled to avoid the contract – an exception is the case of the lack of capacity of an imprisoned individual (no entitlement to bring a claim); other than that, a claim can be brought by whoever has an interest (art. 1441(2) C.C.). The action for voidability is subject to a 5-year limitation period, as provided by the statute of limitations. When voidability is caused by a lack of capacity or defects of will, the limitation period starts to run on the day the person reaches the age of majority, or on which the state of incapacity or duress ceases to exist, and on which knowledge of the mistake/fraud is obtained. In all other cases, the period starts to run at the moment of the conclusion of the contract (art. 1442 C.C.).

The voidable contract can be validated by the party, who is entitled to the avoidance of the contract, by means of a deed, which names the contract, the grounds for voidability and the declaration of her intention to validate it (art. 1444 C.C.). The contract is also validated, if this party has rendered contractual performance, being conscious of the facts causing the invalidity. Voidability, which is not the result of a lack of capacity, does not jeopardise the rights acquired by third parties in good faith, except for the effects caused by the registration of the action for the voidability (art. 1445 C.C.).

The judgment, which declares the voidability of the contract, has retroactive effect on the parties but, contrary to the declaration of nullity of a contract, it affects only third parties in bad faith who knew or should have known the voidability-causing facts according to a normal standard of care.250 This rule, however, is subject to some limits. In fact, if a third party has acquired rights on the basis of a gratuitous contract (e.g. gift, gratuitous loan for use, etc. ...) or if voidability is caused by legal incapac-

250 Citing the examples in footnote 248, if the contract is declared voidable, the subsequent buyer will not receive any goods only if she was in bad faith.
ity, the declaration of voidability will have the same effect as a declaration of nullity (art. 1445 C.C.).

Once the contract has been declared void or voidable, the parties have a right to claim the restitution (supra § 1.4.1.(c)) of what they have, possibly, already performed. However, one has to highlight the effects of a judgment that declares the nullity of a contract, can be frustrated by the rules on restitution. In fact, the action for restitution is subject to a 10-year limitation period, as provided by the statute of limitations, so that if the action for restitution has already prescribed, the decision declaring the nullity of the contract does not entitle the parties to recover what they have already performed. The applicability of the rules on the effects of a voidability-declaring decision can be influenced by the rules on the action for restitution if a contract has been avoided by reason of one party's incapacity. Art(s) 1443 and 2039 C.C. provide that a capable party can recover what she already performed, if she can prove that her performance was made in the incapable party's interest. Finally, the capable party cannot recover in excess of the benefit accruing to the incapable. However, the right to bring an action for unjustified enrichment is granted to the former.

6.6. Performance with transferring effect

Some more information as to the so-called performance with transferring effect is necessary (pagamento traslativo). This issue is much debated in legal theory and it addresses performance, by means of which the obliged party transfers the ownership of a specific thing to another person. In order to understand the concept of performance with transferring effect, one should consider the following examples:

1. Titius is Gaius' agent without power of attorney. Titius bought a specific object on Gaius behalf. He has to transfer the ownership of the object to Gaius by virtue of the obligation ex art. 1706 C.C.
2. Titius gratuitously, in compliance with an agreement governing the division of the family's assets after divorce, transfers the ownership of an object to his child.

251 Cassazione, n. 318/1965.
3. Titius and Gaius agree that Titius will gratuitously transfer the ownership of an object to Gaius, because the latter already acquired another object from Titius’ wife and paid a price higher than the market price.

The doubts of scholars concern the nature of the act by means of which the goods are transferred. In fact, in both cases the transfer of ownership is the fulfilment of an already previously existing obligation. However, the fulfilment of such a duty has to be distinguished from the performance ex art. 1476 n. 1) and 2) C.C., since, according to art. 1476 n. 1) C.C., the in rem effect occurs as soon as the parties express their consensus (i.e. the obligation of delivering the goods under a sales contract has to be distinguished from the obligation to enable the buyer to acquire the ownership of or the right in a thing if the acquisition is immediately effected with the conclusion of the contract); however, art. 1476 n. 2) C.C. (to be read in conjunction with art. 1478(2) C.C., according to which the buyer of goods belonging to a third party can acquire ownership once the seller/transferor has acquired ownership from the third party) concerns a perfected sales contract producing obligatory effects.

Previously, scholars tended to maintain that the subsequent act, by means of which a right in rem in goods is transferred, had to be qualified either as a gift, as a sham contract (contratto simulato), or as a contract in which the buyer’s consensus to such transfer had already been given in a previous agreement (i.e. a pre-contract and a definitive contract). Such an interpretation aimed at preserving both the consensus principle and the numeros clausus principle in respect of rights in rem. Hence, the previous contract is only the source of a mere obligation to subsequently conclude a contract but does not constitute an obligation to perform (as scholars argued later on!).

Obviously, the acceptance of the aforementioned only occurred gradually. On the one hand, the subsequent contract could neither be considered as being a gift, since the transfer was not effected as the result of an intention to bestow (animus donandi), nor as being a sham contract, because this would have implied a violation of the principle of certainty of contract. On the other hand, the principle of freedom of contract ex art. 1322 C.C., combined with the numeros clausus of rights in rem, could only apply if there was an ‘external’ causa suitable for transferring property.

On the basis of such argumentation, scholars253 started arguing that the payment with transferring effects had to be considered as a unilateral act, which consisted in an obligation to contract i.e. consisted in the fulfilment of a previous obligation. In fact, nowadays scholars, when referring to a ‘payment with transferring effect’, speak of the transfer of

253 GAZZONI, Manuale, ibidem, p. 806.
ownership when it occurs solvendi causa. On the one hand, the transfer of ownership is effected in order to fulfil a duty arising from a previous agreement; on the other hand, the causa of this new legal act (i.e. the present transfer) is exclusively derived from the previous agreement. Consequently, the transferee’s consensus is not necessary at this stage, but she still has the possibility to reject the transfer within a certain time period that is determined by the nature of the business and commercial custom.

In the present case, the possibility to subsequently fulfil the duty of transferring ownership is derived from the fact that the parties can derogate from art. 1376 C.C., according to which – as stated above – ownership is transferred by virtue of the parties’ consensus if the contract is one with real effects. Therefore, the parties are free to differentiate the moment at which the transfer of the right in rem occurs; further, delivery has to be effected in order to provide a counter-performance for performance already received (e.g. payment of the purchase price); therefore, the possibility to postpone the transfer of ownership by means of a further act exists. Accordingly, the act, by means of which the previous obligation is fulfilled, has to be considered as being a modus adquirendi of a right in rem. Moreover, case law has supported this argumentation by repeatedly confirming the possibility of having atypical contracts with real effects solvendi causa. The atypical character is mainly due to the fact that the causa can only be found in the previous agreement. Accordingly, it is necessary, at the subsequent moment when delivery is effected, that the transferor expresses the purpose of her performance, i.e. that her performance aims at fulfilling a duty established by a previous agreement, so to provide the subsequent act of delivery with a legal causa.

Consequently, in the light of the lack of such declaration, the transferring agreement will be void since the Italian legal system does not recognise abstract contracts, i.e. contracts without a causa. The invalidity of the previous contract that establishes the causa results in an undue transfer of property, thus affecting the preservation (and not the production) of the contractual effects. As a result, the transferor can claim the return of the unduly transferred property (azione di ripetizione – supra § 1.4.1.(c)), but is not entitled to bring an action of vindicatio. This has important consequences, as an action for restitution is a personal action. Consequently, such an action can be brought only against the person who undertakes to perform the obligation, so that, if in the meantime the transferee has in good faith transferred the goods to another person, the transferor cannot bring an action against the subsequent transferee due to the restrictions established by art. 2038 C.C. The transferor only has a

possibility to recover the goods when the transferee was in bad faith: in this case, she can file a claim for recovery of the goods both against her transferee and her transferee’s transferee.

6.7. Option to repurchase

Art(s) 1500-1509 C.C. provide specific rules as to a sale effected by means of a repurchase agreement (riscatto convenzionale). In this case, the parties actually agree to transfer a right in rem in a precarious manner, i.e. the seller can reserve the right to reacquire ownership of the sold goods by way of restitution of the purchase price and the reimbursement of the expenses borne by the buyer in the meantime. In addition, art. 1500(2) C.C. establishes that an agreement to pay a price higher than the one stipulated in the sales agreement is void as to such excessive sum. The buyer, once having acquired the ownership of the goods, can perform all acts characteristic of her right, except for those that would jeopardise the seller’s capability to recover the ownership of the goods.255

In this regard, the parties’ position within the period of time between the transfer of the right and the exercise of the repurchase right strongly resembles the position of the parties during the pendency of a condition. Accordingly, it is fair to say that art. 1358 C.C. is applicable in favour of the seller who holds the rights to repurchase, so that the buyer is obliged to act in accordance with the standards of good faith during the pendency of the condition in order to safeguard the other party’s interests.

Once the right of repurchase has been legitimately exercised (i.e. the seller has to reimburse the buyer for the price, for the expenses, for any

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255 Typically, the option to repurchase is used when the creditor wants such sold goods to constitute a security for a sum of money lent to the vendor of these goods. Accordingly, contextually similar to the conclusion of a loan agreement, the borrower sells to the lender her own thing subject to the right of repurchasing it, once she will have paid back the loan. The sales price is equal to the sum of money lent plus interest and expenses because of the impossibility ex art. 1500(2) C.C. to conclude a contract under a repurchase clause with two different prices: the selling price (equal to the loan) and the repurchase price (equal to the loan plus interests and expenses). However, case law (Cassazione, Unified Divisions, n. 1611/1989; Cassazione, n. 10648/1994; Cassazione, n. 10175/1996; Cassazione, n. 9900/2001) disagrees with this form of security. In fact, the courts state that, when the transfer of a sum money is made in order to repay a loan (and not paying a sales price) and the delivery of these goods aims at creating a temporary guarantee in favour of the buyer/lender, who will irrevocably acquire the ownership only in the case of the borrower/seller’s non-performance, this is a violation of the prohibition of foreclosure agreements (pactum commissorium). In this regard, art. 2744 C.C. provides that any agreement establishing that, upon the failure to pay the sum within a specified period of time, the ownership of pledged or mortgaged property is to pass to the creditor, is void.
other justifiable payment made with respect to the sale, for the costs of necessary repairs, for the appreciation value of the goods, and for the costs of improvements that have increased the value of the goods – art. 1502(2) C.C.), the seller automatically and fully recovers the right in rem, which she previously transferred. In this regard, it is not sufficient that the seller has declared his intention to repurchase the goods, although the buyer has knowledge of such intention. According to art. 1503 C.C., the notification by the seller of her intention to repurchase does not suffice if she fails to pay the reimbursement sum that is composed of the purchase price, expenses, and any other justified expenses incurred in connection with the sale. It is clear that if such a reimbursement sum is incorrect, no repurchase can be effected and the buyer’s refusal to return the goods is considered to be legitimate. In fact, the Code expressly states that in such a case the buyer has the right to retain possession of the goods until she is reimbursed for necessary and justifiable expenses incurred. In addition, the court can grant deferred payment as to the reimbursement of justifiable expenses, as well as order, if necessary, that appropriate security be provided (art. 1502(2) C.C.).

The repurchase has retroactive effect, so that the termination of the previous sales contract results in the termination of rights potentially acquired by third parties in the meantime. Accordingly, if Titius sells a movable to Gaius subject to a repurchase option and Gaius subsequently sells the movable to Sempronius during the period of time within which it is still possible for the original seller (Titius) to exercise her right to repurchase the sold movable, the right of Titius will prevail over the right of Sempronius. Hence, once the seller has repurchased the sold movable she is considered to be the real owner: consequently, she can bring an action for the recovery of the movable against anyone (art. 1504 C.C.). Such an action is comparable to the vindicatio action. Nonetheless, it has to be underlined that, in respect of sales of movables, the option to repurchase will always be subject to the possession vaut titre principle (art. 1153 C.C.). Therefore, the original seller cannot recover the movable if her transferee’s buyer has already acquired possession. Moreover, in the case of registered movables (as well as immovables) the right of repurchase cannot be opposed to a subsequent transferee if the original seller registered the exercise of her option to repurchase at a later date in relation to the registration by the transferee’s seller of the latter’s acquisition of the goods; further, the right of repurchase also cannot be exercised after the expiration of a time period of 60 days as from the lapse of the contractu-

256 Cassazione, n. 2895/1975.
257 In the respect of sales of immovables, the option to repurchase is opposable to the subsequent buyer only if the contract was registered.
ally stipulated period of time within which a repurchase would have been possible (art. 2653 n. 3) C.C.).

Once the repurchase is effected, the seller recovers the goods free of any encumbrances or mortgages that may have come into existence after the time of the original sale, unless art. 2653 n. 3) C.C. is applicable; however, the original seller cannot oppose leases created non-fraudulently, provided that the lease agreement is dated and the lease term does not exceed 3 years. According to art. 1501 C.C., the option to repurchase can be exercised within 2 years of the original sale in the case of movables.258

Finally, the code establishes specific rules for repurchase agreements which have at their object co-owned property. According to art. 1506(1) C.C., the co-owner who demands the partition of co-owned property has to inform not only the co-owner who purchased such property under a repurchase option but also the seller, so as to enable the latter to exercise her right and to become co-owner at the point in time at which partition is effected. Nonetheless, if the chattel is not easily divisible and a sale by auction is to take place, the seller who has failed to exercise her right of repurchase prior to the decision that a sale will be made by way of auction loses it, even if the auctioned property is purchased by the person who the seller contracted with originally (art. 1506(2) C.C.). The rationale of such a norm is to avoid the right of repurchase being exercised against the successful bidder in order to recover such co-ownership share, which was the subject of the repurchase option. In fact, if in this case the right of repurchase was allowed, this would cause depreciation in the value of the auctioned property. On the contrary, the repurchase option can be exercised after an in natura partition has been effected, because the seller will exercise her right in relation to an ascertained share in the property. In addition, when two or more persons have jointly sold an undivided object by means of one and the same subject to a repurchase option (art. 1507(1) C.C.), or the deceased seller left behind more than one heir (art. 1507(2) C.C.), any party with an interest in the object can exercise her right only in relation to the share belonging to her. The buyer can require that all co-sellers or co-heirs jointly exercise their rights in relation to the entire undivided property; if they fail to reach a consensus, the repurchase right can be exercised only by the person or persons who offer to repurchase the property in its entirety (art. 1507(3) C.C.). Nonetheless, if the co-owners have failed to jointly sell the property in its entirety, but each one of them has sold only her own share, they can separately exercise the right of repurchase in relation to the share appertaining to each of them, and the buyer cannot require all co-sellers or co-heirs to jointly exercise their rights in relation to the entire property.

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258 This period is extended to 5 years as to the sale of immovables.
(art. 1508 C.C.). Such a solution is justifiable because the object of each sales contract was just a share in the property and not the property in its entirety. Finally, if the buyer has left behind more than one heir, the right of repurchase can be exercised against any of them only in relation to the share that appertains to her, even though the sold property is still undivided. On the contrary, if the deceased’s estate has been divided and the goods have been allotted to a single heir, the right of repurchase can be exercised against that heir only in relation to the property in its entirety (art. 1509 C.C.).

6.8. Sale of goods belonging to another person
(vendita di cosa altrui)

As mentioned above, art. 1478 C.C. provides for the case of a sale of goods belonging to another person (vendita di cosa altrui).

This means that, if the transferor is not the owner of the sold goods, she is obliged to acquire them first and transfer the thing to the transferee subsequently. For example: Titius and Gaius, both co-lessees of an oil tanker belonging to Sempronius, stipulate an agreement according to which Titius will sell half of his ownership share to Gaius once Sempronius has sold the oil tanker to both of them.

As to the transfer of ownership, it is obvious that the sale cannot have any immediate transferring effects notwithstanding the consensus of the parties ex art. 1376 C.C., due to the fact that the thing does not yet belong to the transferor. Accordingly, the sale of another person’s goods is considered as being an obligatory sale, since the agreement between the parties simply obliges the potential seller to enable the buyer to acquire the ownership of goods (art. 1478(1) C.C.).

As a consequence, the general rules concerning sales contracts and the protection of the buyer may be applied only when the potential seller has acquired the ownership of the goods from the former owner.

In the case that the seller conceals the fact that the goods belong to another person, her behaviour will be considered as violating the general principles of correctness and fairness in the law of contract. However, the buyer may bring an action against the seller only when the latter is not able to legally enable the buyer to acquire the ownership of the goods.

Accordingly, art. 1479 C.C. establishes that, if at the time the contract was concluded the buyer did not know that the goods were not owned by the seller and the seller, in the meanwhile, has not enabled her to acquire ownership of them, the buyer can immediately request the termination on the grounds of breach of contract. On the other hand, the termination of the contract in the case of art. 1478 C.C., i.e. when the buyer knows that the goods were not owned by the seller, can be re-
quested, when it is clear that the seller is unable to acquire the goods from the actual owner.

In both cases, art. 1479(2) C.C. provides that the buyer can, in addition, request damages according to the general rule of art. 1223 C.C. This means that damages paid may compensate for incurred losses as well as lost profits insofar as they are a direct and immediate consequence of the seller’s non-performing behaviour.

Consequently, if the contract is terminated, the seller has to return to the buyer the price even though the value of the goods has diminished or the goods in se have deteriorated, as well as compensate for the expenses incurred in performing the contract. If the diminution in value or the deterioration have been caused by the buyer, the seller is entitled to deduct a sum representing the value of the buyer’s use of the goods. Finally, the seller is bound to reimburse the buyer any necessary or justifiable expenses incurred in relation to the goods and, if she was in bad faith, also any unnecessary expenses.

The sale of another person’s goods can also refer to a case where the goods partially belong to the transferor (e.g. co-ownership) but, in this case, similarly to the case of a sale of goods entirely belonging to another, one has to distinguish two cases: on the one hand, the case where the transferor has declared that the goods belong to another person and the case where the sale occurred without the transferor declaring the lack of a full ownership of the goods. In the former case art. 1478 C.C. will be applied, whereas in the latter case art. 1480 C.C. will be applied.

In fact, art. 1480 C.C. provides that the buyer can demand the termination of the contract and claim damages ex art. 1479 C.C. if, at the time of the conclusion of the contract, she did not know that the goods were not owned by the seller and she would not have acquired the goods without also acquiring that part of the goods of which she has not become the owner by reason of the transferor’s lack of full title. On the other hand, if the buyer has been interested in acquiring even only a part of the goods, she can only obtain a reduction in the price as well as damages ex art. 1223 C.C.

7. Sale of movables

7.1. General provisions

The provisions of this part of the Codice Civile generally apply to the sale of movable goods, without taking into account the status of the contracting parties. However, specific rules apply as to the protection of the buyer in the case of a sale of consumer goods. They are included in the Codice del Consumo D.Lgs. 6th October 2005, n. 206) and essentially concern the
7. Sale of movables

protection of the interests, health and safety of consumers in the internal market; however, they not deal with the transfer of ownership, which is governed by the rules of the Codice Civile. The sale of movables is neither subject to specific formalities nor to any particular publicity requirements, except in the case of registered movables (i.e. vessels and aircraft), which require the entry in a specific register as well as the existence of a written agreement, if they are engine-powered and weigh more than 10 tons, or if their weight exceeds 25 tons.

The issue of delivery is of remarkable importance to the transfer of ownership of movables. According to art. 1510 C.C., if the parties did not make any specific stipulations as to delivery or there is no custom to the contrary, delivery of the movable has to be made at the place where the movable is situated at the time of the sale if that place was known to the parties; otherwise, delivery has to take place either at the seller’s place of abode or on her business premises. It has to be pointed out that these specific rules prevail over the general provision of art. 1182 C.C., according to which delivery has to be effected at the place where the object was situated when the respective contractual obligation was created. Art. 1510 C.C. is applied when the object of the sale is an ascertained (e.g. all the wine in the cellar X) or a future object, but it cannot be applied when the object is not yet certain; then, the parties cannot actually know the place where the object will be situated.

In addition, the second paragraph of art 1510 C.C. provides a specific rule as to movables, which have to be transported from one place to another. It establishes that the seller discharges her duty to deliver by handing the movable over to the carrier or the forwarding agent. Accordingly, it is fair to state that the Codice Civile is inclined to offer measures of specific protection to the parties by reason of the peculiar nature of movables and their transfer. In particular, in order to invoke specific remedies in favour of the performing party, the possibility of non-fulfilment has to be examined. In this regard, art. 1511 C.C. states that as to the sale of movables, which have to be transported, the term for notifying the seller of defects or evident deficiencies in quality start to run not on

259 The provision derogates to the general rule of art. 1228 C.C., according to which the debtor, who avails herself of the service of third persons in the performance of the obligation is also liable for their malicious, fraudulent or negligent acts, unless otherwise intended by the parties. However, art. 1510(2) C.C. does not prevent the seller from being considered liable for acts committed by the carrier or the forwarding agent when the characteristics of the latter are different to those stipulated by the contracting parties. However, the parties can disregard the provision of art. 1510(2) C.C., if they have agreed on terms such as ‘delivery at the buyer’s place of abode’. Moreover, the seller does not free herself from the risk of the loss of the goods by handing the movables over to the carrier where fungible goods have been shipped by the seller in bulk. See Cassazione, n. 74/1985; Cassazione, n. 8345/1990.
the day of their discovery (this is usually the case – see art. 1495 C.C.),
but on the day of delivery. This is comprehensible if one considers the
fact that the performance of the selling obligation has to be effected at a
place different from that where the contract was concluded. This is due to
the fact that the handing over of the movable to the carrier cannot be
considered as being an allowable form of delivery, since the carrier is not
able or entitled to bring a claim for defects and manifest deficiencies in
quality; these can be only discovered when the buyer has the opportunity
to verify the contents of the cargo.

According to art. 1512 C.C., the seller can warrant the proper func-
tioning of the movable for a specified time period. This rule is mainly
applied to inconsumable but perishable movables, which are destined for
being used several times. By virtue of such a guarantee, the buyer can be
certain that in the case of a functional defect that occurs within the pe-
riod of warranty, the movable will be either repaired or substituted. It has
to be underlined, nonetheless, that such a guarantee does not exist in
relation to the entire life span of goods; such a guarantee is already pro-
vided for by art. 1490 C.C. and art. 1497 C.C., which regulate the conse-
quences of non-conformity in respect of those qualities promised by the
seller, or those essential to their intended use.

Once the buyer has notified the seller of the malfunctioning of the
movable, the judge, ex art. 1512(2) C.C., can grant the seller a certain
period of time in which she has to either substitute or repair the movable.
However, the buyer is always protected by the possibility to claim dam-
ages as well as being able to rescind the contract, when the repair or the
substitution of the movable is unfeasible or the seller defaults. Art. 1512
C.C., moreover, contains two additional provisions: one concerns the
notice of defects and evident deficiencies in quality and the other con-
cerns the prescription of the buyer's right to have the movable either
repaired or substituted. Accordingly, the buyer – unless otherwise agreed
– has to notify the seller of the malfunctioning within 30 days or else the
right is forfeited. Moreover, the claim is subject to a 6-month limitation
period, which starts to run at the time of delivery.

If the buyer does not turn up to collect the movable at the agreed time
of delivery, art. 1514 gives the seller the right to place the movable in a
public depository (art. 77 Implementing Provisions C.C.); the court in
charge over the area where delivery should have been effected may also
select a location suitable for storing the movable. By virtue of this, the
seller can avoid being in default and free herself from any further obliga-
tion: in fact, the seller's incapability to fulfil her obligation was caused by
the buyer's passive behaviour, i.e. the seller cannot be held responsible
for this. However, the seller is always obliged to give the buyer prompt
notice of the deposit, so that the latter can recover the goods without
incurring any further expenses. The time period in which notice of de-
fects and evident deficiencies in quality can be given starts to run when the seller notifies the buyer of the deposit.

Art. 1513 C.C. provides an instrument to avoid possible conflicts and disagreement arising between the seller and the buyer as to the quality of the movable. It enables a party to apply to the courts for a technical examination and a judicial inspection of the movable, which are to be carried out in accordance with art. 696 C.P.C. In addition, the judge – on the demand of an affected person – can order either the deposit, the seizure, or the sale of the movable in favour of the party having a right in it, as well as establish the terms of sale. The deposit and the seizure of such movable aim at preventing the parties manipulating the movable; whereas the examination serves to verify the condition the movable is in.

It is fair to state that the sale of the movable in favour of the party having a right in it is the most proper remedy when the movable is perishable. In fact, it enables the conversion of the goods into money, protecting the parties’ interests regardless of the judgment (ordering either the performance or the rescission of the contract). According to art 1513(2) C.C., the party who failed to demand the inspection of the movable must rigorously prove the identity of the movable and its condition if these are objected to.

In addition, art. 1515 C.C. states that, under certain conditions, the seller can proceed with the forced sale of the movable in the name of the defaulting buyer, whereas art. 1516 C.C. states that, under certain conditions, the buyer can proceed with the purchase at the expense of the defaulting seller. The sale/purchase of the movable in the name and at the expense of the defaulting seller or buyer aims at guaranteeing the payment of the price. The sale or the purchase are effected by a person authorised to make such sales (e.g. stockbrokers, agents whose name is entered in the registers that are held by the Chamber of Commerce) or, in the absence of such a person, by a judicial officer who is in charge of the district where the sale is to be made (ufficiale giudiziario). The applicant party has to immediately inform the defaulting party of the modalities of the sale or purchase. The sale has to be made by way of auction; if the movable has a market value, the sale does not have to take the form of an auction. If the seller does not immediately inform the defaulting buyer, she is liable for potential losses suffered by the other party. Once the sale has been perfected, the seller’s credit and the buyer’s debts are set off, and if the selling price exceeds the sum contractually due to the seller, such excess has to be paid to buyer, since the sale was made in the name of the buyer; however, if the selling price is lower than the contractual purchase price, the seller has the right to demand a sum representing the shortfall. Different from the sale, the possibility to purchase a movable, such purchase being potentially prejudicial to a defaulting seller, is limited to fungible movables with a market value. Similar to what has
been said about the sale, if the purchase price is higher than the one contractually agreed on, the buyer has the right to demand the difference.

Art. 1517 C.C. provides that seller can offer the delivery of the movable and the buyer can offer the payment of the price before the lapse of the period, which the parties have agreed on for the fulfilment of their contractual duties. In this case, the party, who has fulfilled first, can rescind the contract, if the other party does not perform her obligation in due time. In addition, the law requires the performing party, in order to concretely benefit from a rescission by the operation of law (risoluzione di diritto), to declare her intention to terminate the contract within 8 days of the expiration of the time period in which delivery should have been made (art. 1517(3) C.C.); otherwise, the general rules on the rescission of contracts for non-performance are applicable (art. 1453 et seq. C.C.). Moreover, art. 1517(2) C.C. implicitly provides that the seller can instruct the buyer to make an appearance either in order to take delivery of the movable sold to her or in order to consent to the movable that was placed at her disposal. In particular, this norm states that when the time period, in which delivery should have been made, lapses and the buyer does not appear in order to take delivery of a movable previously offered to her, or if she refuses to accept it, this results in a rescission by law, although the buyer's obligation to pay the purchase price has not yet become due.260 This is an exception to the general rule, since in this case the law considers the buyer as being in default, even though her performance is not yet due.

Finally, art. 1518 and 1519 C.C. contain two further special rules. The first provides that if the object of the sale has a market value (art. 1515(3) C.C.) and the contract is rescinded due to the non-performance by one of the parties, the amount of compensation is calculated by determining the difference between the price agreed upon and the market value in relation to the place where and the time when delivery was due, unless the aggrieved party can prove the existence of greater damage (art. 1518(1) C.C.). Moreover, if the performance of a sales contract is periodic, damages are calculated on the basis of the market value in relation to the place where and the time when each separate perform-

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260 In this regard, it has to be underlined that in relation to the sales contract the courts (Cassazione, n. 2283/1968; Cassazione, n. 3405/1986) recognise not only the seller's right to seek a forced sale due to the buyer's non-performance, ex art. 1515 C.C., but also the possibility to resell the movable, without having to fulfil any formalities, when the non-performing buyer has not yet acquired ownership. In fact, the seller is not obliged to hold in custody the movable during the pendency of trial, in which the buyer's non-performance has to be established. In this case, the seller can freely sell the movable in her own name, thereby exercising a legitimate power (legittimità della rivendita libera), which the buyer cannot oppose.
7. Sale of movables

The party, who brings a claim for compensation, has to prove the existence of an agreement as to the price.

The seller can deliver the movable without yet having received payment of the purchase price; however, in such a case she waives her right of retention, which would otherwise be exercisable until the point in time when the buyer performs her obligation (art. 1460 C.C.). In this regard, art. 1519 C.C. offers a specific possessory remedy. It consists in the possibility for the seller, who has not yet been paid, to recover the possession of the sold movable within 15 days after delivery. In order for the seller to benefit from this possessory remedy, the movable still has to be in the possession of the buyer, the parties must not have agreed to defer payment to a later date time (i.e. subsequent to delivery), and the movable must be in the same condition as it was at the time of delivery.

Moreover, art. 1519 C.C. states in its second paragraph that the right to recover the possession of a movable cannot be exercised in a way that would prejudice the privileges provided for by art(s) 2764 and 2765 C.C. (claims of the lessor of an immovable for sums not yet paid by the lessee and claims resulting from contracts of share cropping (so-called contracts of mezzadria and colonia). Art. 1519 C.C. is not applicable if the claimant can prove that at the time the movable was brought into the house, or onto the leased land, or onto land that is the object of a share cropping agreement, the privileged creditor knew that price was still due. The same provision is applied to the buyer’s creditors, so that the latter cannot benefit from an action for the recovery of those movables that were seized or incorporated by the buyer, if they cannot prove that, at the time of such seizure or incorporation, they did not know that the payment of the price was still due.

7.2. Sale on approval (vendita con riserva di gradimento)

Art. 1520 C.C. provides that when the seller sells movables that are subject to approval, the sale is not perfected until the buyer is given notice that they have been approved. The peculiarity of this sale is the effect that the buyer's approval has. In fact, the lack of the approval or disapproval causes the imperfectness of the agreement, so that ownership is only transferred once the buyer expresses her satisfaction with the movable.

The second and the third paragraph of art. 1520 C.C. address the issue of the location of the movable at the point in time when the potential buyer expresses her intention to examine the movable. If the movable is

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261 Even though the rule is located in the chapter on the sale of movables, one can extend its application to the sale of immovables.
in the seller's possession, she can withdraw from her binding offer if the buyer does proceed with the examination within a period of time established by the contract. Moreover, if the parties did not determine any such period, its determination will be based on custom, or will be determined by the seller subject to the standards of reasonableness. If the movable is in the buyer's possession and she does not express her approval or her disapproval within the abovementioned time frame, the approval is deemed to have been obtained.

7.3. Sale on trial (vendita a prova)

According to art. 1521 C.C., a sale on trial is presumed to have been concluded under a condition precedent. This means that the effects of the sale depend on the approval or disapproval of the buyer, who has to test the specific qualities of the movable and its fitness to serve the intended use. Such a sale enables the parties to verify if the movable that is the object of the sale, has the qualities required by the buyer. Such an agreement is quite prevalent in sales of industrial machineries, complex instruments, or goods with special characteristics.\(^{262}\)

The wording of the law, according to which the sale on trial is presumed to have been made under a condition precedent,\(^{263}\) does not seem appropriate. In fact, a conditional term refers to an objective and uncertain event. On the contrary, a sale on trial depends on the buyer's subjective decision. Therefore, the uncertainty simply concerns the ascertainment of these qualities on the buyer's part: accordingly, it seems more appropriate not to speak of a condition but rather of a voluntary requirement for effectiveness (presupposto volontario di efficacia), which is based on a subjective circumstance and is certain as it depends on objective circumstances. Nonetheless, art. 1521 C.C. expressly states that the rules on conditions have to be applied to the sale on trial.

The second paragraph of art. 1521 C.C. establishes that the trial must be carried out by the buyer within the time frame and in the manner established by the contract or custom. In addition, both seller and buyer have to behave in such a way as to facilitate and conduct the trial, since any converse behaviour would be considered as a violation of the principle of fairness and good faith (art. 1375 C.C.). In particular, if the trial is not realised due to a cause imputable to a party who pursues a contrary interest, the trial is deemed to have been conducted (art. 1359 C.C.). The purpose of applying this norm is to serve the legislator's intention

\(^{262}\) However, such an agreement is also used in the sale of immovables, the quality of which the buyer also wants to verify.

\(^{263}\) Cassazione, n. 3384/1969.
not only to punish the party's intentional or negligent unlawful behaviour but also to safeguard the typical effects that a sales contract on trial has.

The trial consists in the buyer's activity of verifying the existence of essential (or at least expected) qualities as well as the absence of defects. It is a legally relevant activity, since the positive result of the verification causes the contract to be effective: hence, if the buyer is satisfied with the results of the trial, the contract will be effective as from the moment of the conclusion of the agreement.\textsuperscript{264} In the case of negative result, the contract is considered ineffective, unless the buyer, in whose interest the trial has been conducted, expresses her intention to be bound by the contract. There are no other consequences for the seller, unless she – in bad faith – omits to inform the buyer about the defects and real qualities of the movable that is to be sold. In such case, the pre-contractual liability of the seller cannot be excluded, \textit{i.e.} liability for damage suffered by the buyer in relying on the descriptions of the seller (\textit{interesse negativo}), since it is clear that the buyer does not have any interest in wasting time on negotiations that could be foreseen by the seller as being futile. Finally, it has to be underlined that the seller bears the risk of the loss of the goods if such a loss occurs before the trial and is not imputable to the buyer’s behaviour (art. 1465(4) C.C.).

\subsection*{7.4. Sale by sample and by type of sample (\textit{vendita su campione e su tipo di campione})

Art. 1522 C.C., in its first paragraph, provides for the so-called sale by sample. By virtue of this agreement, the parties in advance determine the characteristics and the qualities of the movable that will be the object of negotiations by means of a sample; thereby, the sample becomes relevant for the purposes of comparing it with the movables that are actually delivered to the buyer subsequently. In addition, art. 1522(1) C.C. gives the buyer the entitlement to ask for the rescission of the contract if the movable differs from the sample, since the sample exclusively determines the quality standards, which have to be met in relation to the movables delivered under the contract.

On the contrary, the second paragraph of art. 1522 C.C. provides that the sample can have to purpose of just roughly indicating the quality and the type of movable that is the object of negotiations, if this is evident from the parties’ agreement or custom. Such a sale is called ‘by type of sample’.

\textsuperscript{264} Cassazione, n. 1318/2003.
It is important to underline the difference between the two types of sale: in fact, whereas in the case of a sale by sample any difference between the sample and the movable delivered is relevant, in the case of the sale by type of sample the complete identity between the delivered movable and the sample is not required.\textsuperscript{265} Indeed, in the case of a sale by type of sample the rescission of the contract can only be demanded when the deviation can be considered as ‘remarkable’. The remedies of protection typically granted to the buyer are not specific: This means that the buyer can invoke all the general contractual remedies as well as all specific remedies existing in the area of sales contracts (e.g. warranty against defects and lack of promised qualities). However, the third paragraph of art. 1522 C.C. establishes that the buyer, who wants to invoke these remedies, is affected by the provisions of art. 1495 C.C. on waiver and prescription, i.e. the buyer waives the right of warranty if she fails to notify\textsuperscript{266} the seller of the defects of the movable within 8 days from their discovery, unless a different time period is established by the parties or provided by law.

7.5. Sale under reservation of title
\textit{(vendita con riserva della proprietà)}

The sale under reservation of title may have at its object either a non-consumable movable,\textsuperscript{267} an immovable, or an enterprise. In this special form of sale, the buyer acquires ownership once she has paid the last instalment of the purchase price, but she bears the risk of loss as from the moment of delivery (art. 1523 C.C.). The common opinion is that this type of sale has a security function: in fact, although the buyer immediately acquires ownership, the law grants the seller a right \textit{in rem} for guarantee purposes (so-called reserved title/patto di riservato dominio). According to another opinion,\textsuperscript{268} the buyer merely acquires possession and only subsequently, by virtue of the last instalment payment, acquires full ownership. In addition, it has to be underlined that, in order not to compromise the seller’s right \textit{in rem} for guarantee purposes, the buyer may nei-

\textsuperscript{265} Cassazione, n. 4540/2003.

\textsuperscript{266} Notification is not necessary if the seller has acknowledged the existence of defects or has concealed this (art. 1495 C.C.).

\textsuperscript{267} It is the common opinion not to consider the reservation of title as existing in relation to moveables that can be consumed or used in a process of transformation or incorporation into another product, unless the reserved title is extended to the final product and the transformation or incorporation takes place before payment has been made.

ther damage, nor ruin, destroy, or hide the goods; else, she would lose the benefit provided to her by art. 1168 C.C., i.e. in the case of a violation, the buyer is obliged to immediately pay the sum due; if she fails to do so, the seller has the right to recover the goods, if they are still existing.

In the case of non-payment, the seller can either claim for payment or for termination of the contract. However, if she claims for payment from the buyer or claims for the redelivery of the goods, which are the object of the contract, she cannot claim for the termination of the contract. In fact, the claim for payment is an implicit manifestation of having released the ownership of the goods. If the seller could simultaneously claim both for the retransfer of ownership of the goods and for payment, she would interfere with goods, which are already part of the buyer’s property; this would make no sense, unless such enforcement can be said to result from an action for restitution, the judge having recognised the termination of the contract.

Once the buyer is obliged to retransfer the goods, the seller is obliged to retransfer the instalments already paid, unless the parties agreed that the paid instalments should be retained by the seller as an indemnity for the use of the goods or as compensation for possible damage suffered by these (art. 1526(1) C.C.). In this case, the judge will compute the economic value of either the use or the damage and then deduct these from the sum of the instalments already paid, so that the court could order a reduction in the agreed indemnity according to the circumstances (art. 1526(2) C.C.). This rule is also applicable to lease contracts where the parties have stipulated that, at the end of the lease term, ownership of the goods is to pass to the lessee by virtue of the payment of the contractually agreed rent (art. 1526(3) C.C.).

Finally, some more information is necessary as to the requirements that have to be fulfilled in order to enforce the reservation of ownership against third parties. The first paragraph of art. 1524 C.C. provides that the reservation of ownership by the seller will be effective against the buyer’s creditors only such reservation is evident in a written and dated

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269 However, art. 1525 C.C. states that the seller can demand the termination of the contract only if the buyer’s unfulfilled due debt is equal to or exceeds 1/8 of the purchase price. Moreover, the buyer retains the benefit of the time limit in relation to the subsequent instalments, i.e. the creditor cannot demand the buyer’s payment of the entire outstanding sum, since a non-performance that is equal to the non-payment of 1/8 of the price is not an indication of the uncertainty of the buyer’s performance (art. 1186 C.C.). Thereby, the Code modifies the general principles ex art(s) 1453, 1455 and 1456 C.C. applying to the rescission of contracts for non-payment.

270 There is some uncertainty on the legal nature of such an agreement: apparently, it is a lease, but actually it is adequate describe the transfer of ownership as being a sales contract (though under a reservation of title). In this case, scholars speak of a lease subject to the agreement of a future sale (locazione con patto di vendita futura).
document, such date having to precede the attachment/incorporation/processing. The second paragraph of art. 1524 C.C. addresses a specific type of movable, i.e. industrial machinery. It states that the reservation of ownership can be also effected against a third person who acquired the machinery, provided that the reservation of title agreement was registered in a special register that is kept in the office of the court officer who is in charge over the area in which the machinery is located, and provided that, when the machinery was acquired by the third person, it was still in the location indicated by the register.

Finally, art. 1524 C.C. states that the provisions as to registered moveables remain unaffected; consequently, the effectiveness of the retention of title clause vis-à-vis third parties is contingent on the entry of the sales contract in the register.

As to moveables, the possession vaut titre principle ex art. 1153 C.C. renders the retention of title clause ineffective vis-à-vis a good faith subsequent transferee, who has acquired the movable on the basis of an ‘abstractly’ adequate title.

7.6. Sale by documents and by payment against documents (vendita su documenti e con pagamento contro documenti)

The sale by documents is a particular tool which permits the ‘securitisation’ (cartolarizzazione) of goods that are the object of a sales contract; in fact, the seller is released from her duty to deliver the movable by handing over to the buyer the documents of title to the moveables as well as other documents provided for in the contract or, in the absence of such contract, as provided by commercial custom (art. 1527 C.C.).

Even a sale by documents ex art(s) 1527 et seq. C.C. conforms to the consensus principle provided in art. 1476 C.C.; in fact, the right in rem is transferred by means of mere consensus. Accordingly, the delivery of the document of title to the moveables simply replaces physical delivery. Thereby, the legal possession of the goods appertains to the person to whom the document(s) of title to the goods have been handed over: in fact, the document authorises the buyer, who automatically becomes the owner of the movable by way of consensus, to claim the physical delivery of the moveables from the detentore, who can be either the carrier, the depositary, or even the seller. It is clear that the object of the sale is the

271 Indeed, nowadays the sale under a reservation of ownership has gained relevance in relation to machinery. Accordingly, the fulfilment of the requirements ex art. 1524(2) C.C. and the registration of documents, attesting the sale and the existence of a retention of title claim ex 2762 C.C., confers on a special privilege to the seller vis-à-vis the other creditors of the buyer, even if such machinery is incorporated in or affixed to an immovable owned by the buyer or by a third person.
movable and not the document, which is simply an instrument to enforce the buyer’s right to delivery of the movables.

Art. 1528 C.C. states that, unless an agreement or commercial custom provide otherwise, payment of the price and incidental charges must be at the time when, and at the place where, the documents of title are delivered. Indeed, the norm does not make any exception: hence, delivery has to comprise not only the document of title to the movable, but also those documents that are accessory to the title (e.g. delivery note, invoice, etc. …).\(^\text{272}\) In the absence of the delivery of all documents, the buyer may refuse payment. According to the second paragraph of art. 1528 C.C., if the documents are correct and complete, the buyer cannot refuse the payment of the price by relying on arguments, which concern the quality or condition of the goods, unless such allegations can be proved.\(^\text{273}\)

Therefore, the seller has the duty to deliver the documents of title, and the buyer cannot refuse payment, even if she had reason to suspect or had knowledge of defects inherent in the goods or the lack of promised qualities; the buyer can only refuse to perform when the faulty quality or condition of the goods was already evident.

The general principle concerning the passing of risk of the loss of the movable is provided in art. 1465 C.C. This principle can be artificially summarised in the expression *res perit domino*. Accordingly, once the sale has been perfected and ownership has been transferred by virtue of consensus, the buyer bears the risk of the eventual loss of the movable, regardless of whether the physical delivery of the movable has already been effected or not.

This principle also applies to the sale by documents, so that, although physical delivery does not immediately occur, it fictitiously occurs by way of the ‘securitisation’ of the goods. In addition, art. 1529 C.C. provides that if the sale concerns goods which are in transit and the insurance

\(^{272}\) In this regard, it has to be pointed out that art. 1996 C.C. defines documents of title to goods as documents conferring upon their holder the right to take delivery of the goods specified in the document, the possession of the goods, and the power to dispose of them by transferring the instrument. Such title can be identified in the duplicate of the bill of lading ‘to order’ or in the shipping receipt ‘to order’ (art(s) 1684 and 1691 C.C.), which are transferred by means of endorsement, in the bill of lading or in the bill of lading received for shipment (art(s) 458 et seq. *Codice della Navigazione*), in the air consignment notice (art. 956 *Codice della Navigazione*), in the warehouse receipt and in the pledge certificate (art(s) 1790 et seq. C.C.).

\(^{273}\) The principle in art. 1528 C.C. is deduced from the general principle *solve et repete* provided in art. 1462 C.C., according to which the parties can include a clause in the contract, which provides that either of the parties cannot invoke defences for the sole purpose of avoiding or delaying due performance. Such a clause, however, has no effect on the defences that are based on voidness, voidability, and the rescission of the contract.
policy covering the carriage risks is among the documents delivered to the buyer, the risks to which such goods are exposed have to be borne by the buyer as from the time when the delivery of the goods to the carrier takes place; whereas, the second paragraph of art. 1529 C.C. provides that if the seller knew that the goods had been lost or damaged at the time of the sale and, in bad faith, failed to disclose this to the buyer, she will bear the risk of the loss of the goods.

Finally, art. 1530 C.C. provides that payment can be made via a bank, so that the seller cannot demand payment from the buyer until the bank, upon presentation of the documents (having to conform to the contractual stipulations or commercial custom), has refused to pay the purchase price.

8. Selling in a chain

Selling in chain is the sale of one and the same thing from Titius to Gaius, subsequently from Gaius to Sempronius and so on. Therefore, each party (except for the first seller and the last buyer) at first assumes the position of a buyer and, subsequently, the position of a seller in relation to one and the same object. The Italian legal system does not provide any specific rules. In fact, according to the consensus principle, the transferee acquires ownership when the parties conclude the sales agreement, so that Gaius and Sempronius, respectively, become owners by virtue of their mere consensus.

In particular, it has to be underlined that neither scholars nor case law are inclined to consider a sale in a chain as being a unique legal device. In this regard, there is a tendency to adhere to the principle that each sale is autonomous. By virtue of this fact, a direct transfer of property from Titius to Sempronius, without Gaius ever acquiring ownership, must be excluded. Accordingly, only the parties to a transfer are bound by their agreement inter se; no obligations or duties in relation to potential future acquirers are thereby created.

In particular, according to art. 1476 C.C. the seller fails to fulfil his contractual obligation either if he does not deliver the movable to the buyer, if he does not enable the buyer to acquire ownership or any other eventual right in the thing, or if he does not protect the buyer against eviction. Accordingly, one can consider two constellations: 1) the contract between Titius and Gaius, but not the contract between Gaius and

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274 The bank does not assume any obligation to pay the seller, since it is the buyer's agent. However, nowadays, it is quite common that the relationship between the bank and the seller corresponds to an overdraft agreement guaranteed by documents (apertura di credito documentario), which aims to facilitate national and international negotiations.
Sempronius, is invalid; and 2) the contracts between Titius and Gaius and between Gaius and Sempronius are both invalid.

In the first case, one has to consider two other sub-cases: 1) the goods are still in the possession of Titius; 2) the goods are already in the possession of Gaius. In sub-case n. 1), there is no contract between Titius and Gaius; thus, Gaius does not acquire the ownership of the movable; however, the contract between Gaius and Sempronius is still valid and, according to art. 1476 n. 2) C.C., Gaius is not freed from his obligation until he enables Sempronius to acquire the ownership of the movable. Therefore, the events affecting the contract between Titius and Gaius do not affect the Gaius’ duty vis-à-vis Sempronius. In sub-case n. 2) Gaius has the possession of the movable. If he delivers the movable to Sempronius, Sempronius acquires ownership a non domino ex art. 1153 C.C. (infra § 11.6.). However, if Sempronius will be forced to return the goods because of Titius’ successful action for the recovery of the movable against Gaius (supra §§ 1.4.1.(a) and 1.4.1.(c)), according to art. 1476 n. 3) C.C., Sempronius can bring a claim against Gaius for reimbursement of the purchase price and for damages, unless Gaius and Sempronius formerly agreed to exclude any warranty against eviction (art. 1488 C.C.).

In the second case, neither of the parties can demand the other party’s contractual performance; in particular, Gaius has never acquired ownership of the movable and, therefore, he is not entitled to transfer ownership to Sempronius in the event of him having entered into possession of such a movable. In fact, Gaius is obliged to return the movable due to the invalidity of the contract. However, if he delivers the movable to Sempronius, one has to distinguish the case of the contract between Gaius and Sempronius being void or voidable. In fact, any person with an interest can claim the voidness of the contract (art. 1421 C.C.), as well as the court being able to declare such voidness on its own initiative; however, the voidability of the contract can only be claimed by a party to the agreement (i.e. a legitimated party) (art. 1421(1) C.C.), and can be declared by the court only if such voidability has been the object of a specific plea made by the legitimated party in the proceedings. However, one has to always take into account that although Titius can obtain a judgment declaring the invalidity of the contract between Gaius and Sempronius, the effect of such a judgment is not practicable and can be frustrated by the fact that Sempronius can have acquired ownership a non domino ex art. 1153 C.C., or by acquisitive prescription (infra §§ 11.6. and 11.7.).

275 As to registered movables, the right of Sempronius, who is in good faith, will not be frustrated if Sempronius has registered her agreement with Gaius and Titius has not filed a registered action for the ascertainment of the invalidity of the former agreement within 5 years from the registration of the agreement between Gaius and Sempronius (art(s) 2690 and 2652 C.C.).
recover the movable, she has to specifically bring an action for the recovery of the goods (supra §§ 1.4.1.(a) and 1.4.1.(c)).

In addition, one has to consider the case in which Gaius sells a movable acquired under a retention of title clause to Sempronius, so that Titius is still the owner of it. As stated above, art. 1153 C.C. is applicable. In fact, this article states that a buyer, who acquires a movable from a non-owner, shall acquire ownership by means of possession, provided that he was in good faith when the delivery was made and an abstractly adequate title exists (supra § 2.6.; infra § 11.6.).

However, a subsequent buyer always has the right to bring a claim against all previous sellers by way of subrogating his direct seller/transferor. Thereby, in fact, the subsequent buyer can ensure the fulfilment of his claim, and can preserve his right in the movable by bringing those actions and exercising those rights, which his seller failed to exercise (art. 2900 C.C.). Such a claim can be brought in conjunction with a claim for damages.276

9. Indirect representation and the falsus procurator

According to art. 1703 C.C., a mandate (mandato) is the contract whereby one party (the agent) is obliged to effect one or more legal transactions on another party’s behalf (the principal). The mandate can include the power of representation and consists in the fact that the agent is able to negotiate “in the name and on behalf” of the principal, upon whom the contract directly produces its effects (art. 1704 C.C.). However, the agent does not always have to declare to be acting on behalf of another person. Consequently, third parties are approached by a person who cannot clearly be identified as acting for another. This situation is called indirect representation (rappresentanza indiretta or mandato senza rappresentanza), since the negotiations do not produce any effects on the principal’s asset, but rather directly affect the agent’s asset.277 Subse-


277 A particular legal institute is the negotiorum gestio (art. 2028 et seq. C.C.), whereby an individual (so-called gestore – manager) has spontaneously acted on behalf of another, i.e. not at the latter’s request and without remuneration. According to the Codice Civile, once an individual spontaneously takes on the management of an affair on another person’s behalf, she is bound to continue in this management and bring it to an end, until the point in time when the interested person is in a position to carry on the management (art. 2028(1) C.C.). It is important to underline that the manger is subject to the same obligation as would arise under a mandate (art. 2030 C.C.). Accordingly, it is relevant whether the negotiorum gestio was effected in the name of the interested person (contemplatio domini). In fact, in the
quently, the agent who has acted in the principal’s interest has the duty to transfer the rights evolving from the negotiations to the principal. In this case, one speaks of an agent who acts only ‘on behalf’ (but not in the name) of another person, and it is discernible that the modification of the principal’s assets occurs not immediately but rather indirectly.

In this case, an agent who starts negotiating on behalf of another person but without disclosing the name of this person acts on the basis of a mandate, i.e. a contract by virtue of which the agent merely assumes the obligation to act in the interest of the principal.

Hence, the effects of representation (the direct transfer of rights acquired by the agent for the principal) occur only when the agent is entitled to disclose the principal’s name (so-called contemplatio domini) by means of the power conferred upon her by the latter (the so-called procura). On the contrary, in the case of the lack of procura, the agent,

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279 Procura is a unilateral act by means of which the agent becomes entitled to represent the principal; the procura does not produce any effects, if it does not fulfil the
thereby acting exclusively in her own name, acquires the rights and assumes the duties arising from the transaction entered into with a third person, even if she knew of the existence of a mandate (art. 1705(1) C.C.). Therefore, the principal has no contractual relationship with those persons from whom his agent acquired contractual rights or assumed contractual duties. However, by virtue of the power of agency the agent is not only obliged to transfer the rights which acquired in own name to the principal, but also if she fails to take adequate measures of protection on behalf of the principal, the latter, by stepping into the agent’s shoes, can bring claims, the entitlement to do so resulting from the exercise of the power of agency, directly against the defaulting debtor.\(^\text{280}\)

In addition, the *Codice Civile* provides specific rules as to the acquisition of movables that is made by an agent. In particular, art. 1706(1) C.C. states that the principal has a right to claim movables that have been acquired by an agent on behalf of the principal, even if the agent had acted in her own name when effecting the purchase. However, the principal’s claim cannot be prejudicial to the rights acquired by third persons by way of good faith possession. Moreover, if the negotiations concern a movable identified only by type, third parties’ rights are only protected if the movable has already been identified (art. 1378 C.C.). Accordingly, where the agent does not fulfil her duty of transferring the goods, acquired by her for the principal, to the principal, a third person having acquired a right in such goods will be protected ex art(s) 1153 and 1155 C.C., in case she possesses these in good faith. In fact, the transaction can either give rise to an acquisition *a non domino* (in this case the agent is the *non dominus*), or to a case of double sale. On the contrary, if

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formalities in relation to the legal act which the agent is to carry out (art. 1392 C.C.). Accordingly, the *procura* can be both created by writing and orally, as well as it being possible to create it impliedly, if such implication is discernible from conduct that shows the principal’s intention to confer such a power on the agent. It is also an act, which becomes effective by virtue of the agent’s acceptance (so-called *atto recettizio*), and it can be special if it is issued for the accomplishment of a specific and determined business task; in other cases, it will be general. It is important to underline that the *procura* concerns the external relationship between the principal and the agent; on the contrary, the mandate concerns the internal relationship between the principal and the agent and the limits of this relationship are relevant for third parties only if the latter have knowledge of the mandate relationship in form of a *procura*.

\(^\text{280}\) In this regard, the Italian Supreme Court (*Cassazione*, n. 11118/1998) has highlighted that, the principle ex art. 1705(2) C.C. is an exception to the general rule, according to which the effects of a contract concluded with a third party only affect the agent. In fact, in order to protect the principal’s interest this article allows the principal to bring an action directly against the defaulting third party in order to satisfy her rights. However, the court maintains that the principal cannot bring the actions for rescission (due to breach of contract) and damages by stepping into the shoes of the agent.
the movable acquired by the agent is entered in a public register and the agent fails to fulfil her duties, the provisions governing the enforcement of an obligation to contract apply (art(s) 1706(2) and 2932 C.C.). Accordingly, the principal can obtain a judgment producing the same effects as the act that has not been performed by the agent.281

As to the agent’s creditors, they are not able to enforce their rights over property, which the agent has acquired in her own name but in the exercise of her power of agency. In particular, such a limitation is effective only when the power of agency is evidenced by a written and dated document. According to art. 1707 C.C., the date of the document’s creation is qualified in the following way:
1. in the case of movable property, in relation to which there do not exist any registration requirements, the date of the document’s creation has to precede its attachment; or
2. in the case of the registration, either of the transaction effecting the transfer of ownership, or of the bringing of the claim for the purpose of enforcing the demanded transfer, the date of the document’s creation has to precede the attachment of the movable property, which has been entered in the public registers.

It has to be underlined that the mandate is not an intuitus personae contract, i.e. the contract is not concluded on a personal basis. In fact, even

281 For the purposes of explaining these remedies, some scholars (GALGANO Francesco, Il negozio giuridico, Giuffrè, 1988, pp. 358-359) agree on their exceptional nature as well as on fact that the relationship between the principal and the agent does not have to be necessarily external in order for the power of agency to produce an immediate effect. In fact, art(s) 1705(2) and 1706 C.C. are the result of combinations of the rules on indirect representation and the consensus principle ex art. 1376 C.C. In particular, the principles of indirect representation imply that the principal cannot bring an action that has its basis in the contractual relationship between the agent and a third party. On the contrary, according to the consensus principle, the rights, which the agent has acquired on the principal’s behalf, are transferred to the principal. Therefore, although the acquisition of ownership or other rights in rem is not the immediate consequence of a sales contract (art. 1476 n. 2) C.C.), such an acquisition rather being postponed to a subsequent moment after the agent and the third party have already expressed their consensus, the principal acquires ex art. 1376 C.C. the entitlement to bring all those actions ex re that serve to protect her own property right (e.g. vindicatio). However, all those actions that are aimed at the performance of the sales contract ex art(s). 1705(2) and 1706 C.C. continue to be agent’s exclusive concern. On the contrary, other authors (SANTAGATA Carlo, Crediti ex mandato e sostituzione del mandante, in Riv. Dir. Civ., CEDAM, 1963, I, p. 648) agree that the action against the defaulting agent has to be qualified as an action for rei vindicatio utilis. In fact, the principal who is not directly affected by a contract concluded between the agent, thereby acting in the interest of the principal, and a third party is ex lege legitimated to recover the benefit that she would have received had the agent fulfilled her duties vis-à-vis the principal.
if the contract is characterised by a relationship of trust between the principal and the agent, the latter can transfer her agency function to another person, merely having to inform the principal of such substitution, the latter having to approve it. Accordingly, if these requirements are not fulfilled, the principal has the right to reject the new agent and the transaction she will enter/has entered into, unless the principal has already benefited from these, which results in the agent acquiring the contractual rights and being liable to the third party. Such a liability is extended also where the agent appoints a substitute when this is not necessary in the light of the nature of the task to be performed (art. 1717 C.C.). However, if the principal has authorised the agent to effect such substitution without the necessity of obtaining the principal’s consent to it, the agent is liable for the damage suffered by the principal as a result only if her behaviour in making the selection was blameable (art. 1717(2) C.C.). In addition, the principal has a direct action against the agent’s substitute (art. 1717(4) C.C.), but she cannot bring a claim for contractual liability against the substitute; however, a claim is possible where the substitute’s behaviour gives rise to liability in tort.

According to art. 1716 C.C., the mandate can be given to more than one person and usually the aim pursued thereby is to cause the agents to act jointly so that the transaction will only be binding and effective if all agents agree to it. In case the mandate provides that the agents can act separately, the principal, once notified of the completion of the transaction, has to give notice thereof to the other agents. In case of the omission of or delay in such a communication, she is liable for the damage, which the agents potentially suffer as a result.

The agent has to perform her duty with the diligence of a reasonable man, but if the mandate is exercised gratuitously, a liability for negligence

282 Cassazione, n. 7888/1999. However, the court underlines that there can be no substitution where this is expressly forbidden by the contract or the act is based both on a relationship of mutual trust and intuitus personae.


284 For instance, the court (Cassazione, Division III, n. 4302/1980) rejected a principal’s action for contractual liability that was brought against the agent’s substitutes. In this case, the principal gave a painting to her agent in order for the latter to deliver it to the owner. The agent, in her turn, delivered the painting to another person, the latter being entrusted with the task of delivering it to the owner (the substitute), so that the agent would be able to fulfil her duty vis-à-vis the principal. The substitute, in her turn, delivered the painting to another person (the 2nd substitute) for the same purpose. While the painting was with the 2nd substitute, it was destroyed. Subsequently, the principal sued both the agent and the other two substitutes ex art. 1717(4) C.C., claiming that the 2nd substitute, according to art. 1718 C.C., had been negligent in that she failed to keep the painting in safe custody; damages were thereby claimed ex contracto. The court – as stated above – denied the possibility of bringing an action for contractual liability directly against the substitutes.
is not as easily established (art. 1710 C.C.). Additionally, the agent cannot exceed the limits specified in the mandate, unless the principal ratifies the outcome of the negotiations. In this regard, in the case of indirect representation, the external relationship between the agent and the third party is not affected, since the agent who acts in her own name is always the one to whom the effects of negotiations are attributable, and is, therefore, always the one who is liable to third parties. On the contrary, in order for the effects of negotiations to be attributed to the principal, the latter needs to ratify the former’s activities.

If the mandate is accompanied by a power of representation and the agent exceeds both the mandate contract and the procura, the rules concerning agency without authority apply. The principal will acquire the contractual rights only after ratifying the outcome of the agent’s negotiations (art. 1399 C.C.), otherwise the agent will be considered liable for the damage, which a third party suffers because of having, without fault, relied on the validity of the contract (art. 1398 C.C.). Indeed, as long as the principal does not ratify the agent’s activity, the latter will be considered as a falsus procurator and the contract cannot produce its effects, since the agent had declared to act in the principal’s and not in her own name. The case law considers that the contract, concluded by the falsus procurator, is temporarily ineffective, or rather in the process of creation. Consequently, the contract is only effective if the principal ratifies the agent’s activity (art. 1399(1) C.C.). The ratification is a unilateral act directed at the third party, by virtue of which the principal declares her intention to accept the effects of the contract. Consequently, case law is inclined to qualify the ratification as being a procura a posteriori. In addition, it must have the same form as the contract to be ratified. It has retroactive effects, but – due to the rule possession vaut titre – the rights, which a third party has already potentially acquired in a movable in pe-

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285 On the contrary, if the agent only exceeds the limits of the mandate, but not those of the procura and the principal ratifies the agent’s transactions, the principal will directly acquire the rights resulting from the successful negotiations and will be liable vis-à-vis third parties; however, she can bring a claim for damages against her agent. This is a consequence of the fact that mandate concerns the internal relationship between the principal and the agent and, consequently, its limits cannot be opposed/applied to third parties (see Cassazione, Division III, n. 982/2002).

286 Cassazione, Division II, n. 11396/1999, Cassazione, Division II, n. 410/2002, Cassazione, Division III, n. 3782/2004. The only subject legitimated to bring a claim for the ineffectiveness of the contract is the quasi-principal. The other party can only claim for damages, due as a result of having relied on the validity of the contract.

287 In order to avoid that the uncertainty about the effectiveness of the contract lasts perpetually, the contracting third party can demand from the principal that she make her decision as to the ratification of the contract known. She can set a time period for this purpose; when it lapses and no declaration has been made by the principal (i.e. in case of silence), ratification can be deemed to have been denied (art. 1399(4) C.C.).
period of time preceding the principal’s ratification, remain unaffected (art. 1399(2) C.C.).

The agent is obliged to inform the principal of any supervening circumstances, which might cause the revocation or modification of the mandate (art. 1710(2) C.C.). She can also depart from the instructions that were given to her, if she cannot adequately communicate the existence of any supervening circumstances to the principal, or if she has no knowledge of any such circumstances, or when it can be presumed that the principal would have consented (art. 1711(2) C.C.).

Finally, the code states that if the parties did not provide otherwise, the agent who acts in her own name is not liable to the principal for the performance of the obligations assumed by persons, with whom the mandatory contracted unless, at the time when the agent concluded the contract, she knew or should have known of the insolvency of such persons (art. 1715 C.C.). The principal is obliged to reimburse the agent for expenses incurred plus interest, as well as to pay the agent’s fees if these were agreed upon (art. 1720 C.C.), to provide the means necessary to perform the mandate and to fulfil the obligation which the agent has undertaken in her own name (art. 1719 C.C.). However, if the principal fails to perform her duties vis-à-vis the agent, the latter has the right to satisfy her claims, having priority over the principal and her creditors, out of the claims resulting from the transactions entered into by her (art. 1721 C.C.).

10. Actions for the purpose of protecting credits affecting rights in rem: Fraudulent conveyance alias Actio Pauliana (azione revocatoria)

10.1. Ordinary Actio Pauliana (azione revocatoria ordinaria)

The Actio Pauliana is a legal instrument for preserving the creditor’s right to the debtor’s performance. It is regulated by art. 2901 C.C. and it consists in the power of the creditor to demand that acts, by means of which the debtor disposes of her assets to the prejudice of the creditor’s rights, are declared as being ineffective for her.

In order to enforce such a remedy, the following conditions have to be met:
1. the existence of a credit;
2. the creditor’s prejudice (eventus damni);
3. the debtor’s awareness that the act would cause prejudice to the creditor’s rights;
4. the third party’s awareness of the prejudice to the creditor’s right in the case of a non-gratuitous act.
A further element is required where the act preceded the coming into the existence of the credit. This consists in the fact that the act was fraudulently planned by the debtor and by the third party (the latter only in the case of non-gratuitous acts) to prejudice the creditor's right.

The law provides that the Actio Pauliana can be exercised when there is a credit. However, it is not necessary that the court has already confirmed that credit is certain, determined in its amount, due and payable. In fact, according to case law, art. 2901 C.C. introduces a wide notion of credit, since the Actio Pauliana does not have an exclusively restitutionary nature, but aims at preserving those securities, which a potential creditor can enforce vis-à-vis the debtor.

Therefore, all those acts, which negatively affect the debtor's estate, so as to increase her indebtedness, are the object of such an action. However, the law provides for some exceptions. In fact, art. 2901(3) C.C. states that the payment of a matured debt is not subject to the Actio Pauliana as well as the sale of goods for the purpose to recover the money necessary to pay off a matured debt not being revocable. On the contrary, all those acts – apart from performance – extinguishing an obligation (e.g. datio in solutum, novation, compensation, etc. ...) are always revocable. In addition, those acts, affecting the goods that are considered by the Codice di Procedura Civile to be excluded from execution (art(s) 514 and 545 C.P.C.), cannot be revoked. The same exemption applies to those acts of management and enjoyment, by which the debtor exercises her own property right. However, in order to prove the inability of the debtor to reimburse the creditor, it is necessary to verify the creditor's status at the moment when the debtor disposes of her asset. In fact, in case the creditor's claim is hedged, for instance, by adequate securities, pre-emption rights or by the right of pursuit, the action is not enforceable due to the lack of the creditor's prejudice.

As stated above, the subjective prerequisites for applying the Actio Pauliana are the debtor's awareness and the third party's awareness in the case of non-gratuitous acts. The law presumes the debtor's awareness without the necessity of a specific investigation in cases where the coming into existence of the credit precedes the act. In fact, whenever an eventus damni is recognisable, the debtor's awareness is objectively presumed. However, if the act occurs before the parties agree on the obligation, the creditor has the duty of proving that the debtor had fraudulently planned the act for the purpose of prejudicing the satisfaction of her credit right. The law does not require the debtor's intentional fraud (i.e. the debtor consciously disposes of her asset in order to prejudice the

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creditor), but a generic fraud is sufficient (i.e. the debtor disposes of her asset, accepting that the act could potentially prejudice the creditor). A further requirement has to be met in the case of a non-gratuitous act. In this case, the debtor’s awareness is insufficient to revoke the act. In fact, it is necessary to prove that the third party was aware of the said prejudice (scientia fraudis) and, if the act preceded the coming into existence of the credit, it is necessary that she participated in the fraudulent planning of it (partecipatio fraudis). This can be proved by presumptions.291

Consequently, the qualification of each disposing act becomes particularly relevant. In fact, the gratuitous or non-gratuitous nature of these acts causes a different application of art. 2901 C.C. This is the reason why the legislator took care to underline, in art. 2901(2) C.C., that transactions for security purposes, even if made in relation to another person’s debts, are considered to be non-gratuitous acts when they contextually arise with the credit they secure. Indeed, in the absence of such a rule, the gratuitousness or non-gratuitousness should be evaluated case by case, taking into consideration the security-provider’s estate and the effects that either the security or other acts, which may be functionally linked to this, have had on her estate. Accordingly, if such acts are considered gratuitous, they will always be revoked once the eventus damnii has been proved.

As mentioned before, the Actio Pauliana does not aim at restoring the debtor’s real estate, but it makes the disposing act relatively ineffective. In this regard, it is important to underline the meaning of the expression ‘relatively ineffective’.292 Indeed, the Actio Pauliana is useful only to the claimant creditor and not to the general body of creditors. Moreover, the action does not make the entire disposing act ineffective, but only those effects of the act that prevent the creditor from enforcing her own right. In fact, the declaration of ineffectiveness does not produce the effect of restoring the goods, or the rights subject to the disposing act, to the debtor’s estate, but it is an intermediary step in bringing those actions, which can either satisfy or preserve the claimant creditor’s right.

Particularly with respect to art. 2902(1) C.C., it is arguable that a creditor – after having obtained a declaration of ineffectiveness of the prejudicial act – can institute, vis-à-vis the transferee, enforcement proceedings (art. 2910 C.C. – espropriazione) if the credit is already due; on the contrary, she can exercise, vis-à-vis the transferee, precautionary measures, if the credit is not yet due (art. 2905 C.C. – sequestro conserva-

Actually, once these proceedings start, the transferee is not left without protection. Indeed, she can use, against the creditor, all those defences that were available to the debtor/transferor. However, if the decision, which declares the ineffectiveness of the transfer, has become final, the transferee is deprived of such extensive defences. Consequently, she can only prove either the lack of the *eventus damni* or the transferor’s subsequent performance, but cannot take advantage of those exceptions arising from the relationship between the creditor and the transferor.

In addition, since the claimant creditor has the possibility of satisfying her own claim over the transferee’s asset, when the latter is in the possession of the thing, a conflict of interests can arise between the claimant creditor and the transferee’s creditor, who can enforce the same security right in the thing now forming part of the transferee’s estate. In this case, scholars argue that the claimant creditor’s security has priority over the claims of the transferee’s creditors. In this regard, in a case where the transferee’s creditors have started an enforcement proceeding over the asset of the transferee, the claimant creditor, who takes advantage of the *Actio Pauliana* in order to protect a credit right not yet due, can claim for the freezing of a sum of money corresponding to the sum of her credit or, alternatively, can claim for the transferee’s creditors offering adequate security in order to preserve her own credit right. In addition, the creditor can bring a claim against the transferee on the basis of tort law if the latter has fraudulently provoked the debtor’s non-performance as well as having damaged or sold the thing.

Art. 2901(4) C.C. regulates the effects of the declaration of ineffectiveness on the subsequent transferee. It states that the ineffectiveness of the act does not prejudice those rights non-gratuitously acquired by third persons (the subsequent transferee) in good faith, if the latter registers the acquisition before the beginning of the *Actio Pauliana*. Consequently, as to the transfer of registered movables, in case the subsequent transferee has acquired them non-gratuitously, her acquisition deserves protection if she acquired without knowing that the first transfer was prejudicial to the original transferor's creditors. However, if the creditor cannot recover the thing from the transferee, she can always bring an action for unjustified enrichment against the transferee in order to recover the payment, which the latter received from the subsequent transferee in good faith. As to the transfer of such movable, scholars do not have concordant opinions. In

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particular, some scholars agree that art. 2901(4) C.C. has to be applied only to registered movables and immovables, so that the subsequent transferee of a movable would find protection within the limits of art. 1153 C.C. According to other scholars, art. 2901(4) C.C. is indistinctively applicable to movables and immovables, so that the subsequent transferee deserves protection only if she has been in good faith or if the case involves a non-gratuitous transfer.

In addition, if the transferee has originally acquired the thing and the original title is declared ineffective by virtue of the *Actio Pauliana*, art. 2901(4) C.C. is not applicable, since the defect in the transferee's original title is also transferred to the subsequent transferee's derivative title. Consequently, it does not matter whether or not the subsequent transferee was in good faith. In this case, the subsequent transferee can preserve her acquisition only if the requirements of art. 1153 C.C. are fulfilled. Finally, art. 2902(2) states that the subsequent transferee can satisfy her claim after the creditor, who demanded the revocation, has been satisfied in relation to her credit right. However, the subsequent transferee can always bring a claim against the transferee in order to obtain either the restitution of what she paid or damages.

Finally, if the creditor does not bring the *Actio Pauliana* within 5 years from the date of the act, the right to bring the action prescribes. Moreover, for the purpose of prescription, it is not relevant whether the creditor had knowledge of the prejudicial act.

### 10.2. Actio Pauliana for bankruptcy (azione revocatoria fallimentare)

The above-mentioned rules refer to the ordinary *Actio Pauliana*, *i.e.* an action that can be used in all those cases where the creditors – fearing the debtor's potential non-performance due to prejudicial acts of disposition – have to restore the debtor's estate. If the debtor is an entrepreneur who has been declared insolvent, art(s) 64 et seq. R.D. n. 267/1942 (hereinafter B.L. – Bankruptcy Law) provide specific rules.

In particular, art. 66 B.L. expressly provides that the trustee in bankruptcy can bring the *Actio Pauliana* ex art. 2901 et seq. C.C. However, the ordinary *Actio Pauliana* has a field of application that is more limited than the *Actio Pauliana* for bankruptcy. In this regard, art. 67 B.L., which regulates the *Actio Pauliana* to be used in the case of bankruptcy, provides for the revocation of specific acts without the necessity of the buyer having

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297 NICOLÒ, Azione surrogatoria e revocatoria, *ibidem*, p. 252.
been aware of the insolvency status of the person with whom she contracted. Indeed, since the third party's knowledge of the debtor's insolvency status is not relevant, the difference between the two actions is clear. In the Actio Pauliana for bankruptcy, therefore, the requirement provided by art. 2901 no. 2) C.C., according to which the creditor can claim for the revocation of the prejudicial non-gratuitous acts by proving that the buyer was aware of the prejudice, is missing. In bankruptcy, in fact, this specific knowledge is presumed. This presumption is juris et de jure, so that the trustee in bankruptcy, who wants to bring this action, does not need to prove the debtor's insolvency status. In fact, if the buyer wants to avoid the effects of the revocation, she is obliged to prove her unawareness of the debtor's insolvency status.\(^{298}\) In particular, the article provides for the revocation of the following acts:

1. non-gratuitous acts made 1 year before the beginning of the bankruptcy proceedings, if either the bankrupt's performance or obligation exceeds \(\frac{1}{4}\) of the performance made to her (the counter-performance);
2. acts which extinguish mature and receivable debts by means of payment instruments other than money, if they were committed 1 year before the beginning of the bankruptcy proceedings;
3. pledges, antichresis, voluntary mortgages created in the year before the commencement of bankruptcy proceedings in order to secure pre-existing but not yet mature debts;
4. pledges, antichresis, and mortgages created within 6 months before the commencement of bankruptcy proceedings in order to secure mature debts.

In addition, the second paragraph of art. 67 B.L. provides that the payment of mature debts, non-gratuitous acts, and acts which create a pre-emption right contextually linked to the acceptance of the obligation are revocable, if they are performed within 6 months before the commencement of bankruptcy proceedings. Finally, art. 67-bis B.L. states that the acts, which affect an estate assigned to a specific business ex art. 2447-bis(1) l. a) C.C., are revocable if they prejudice the company's assets. However, in these two cases, ex art(s) 67(2) and 67-bis B.L., the trustee in bankruptcy has to prove that the buyer was aware of the debtor's insolvency status.

On the other hand, the law provides for some other exceptions. In particular, according to art 67(3) B.L., the following acts are excluded from the applicability of the Actio Pauliana for bankruptcy:

\(^{298}\) Although, in the Actio Pauliana for bankruptcy, the burden of proof is placed on the buyer, in the case where the trustee in bankruptcy wants to exercise this action against a subsequent buyer, she is obliged to provide evidence in order to revoke the act and, therefore, has to prove the bankrupt’s insolvency status.
1. the payment of goods and services in the course of the normal entrepreneurial activity;
2. remittances which have not heavily increased the bankrupt's indebtedness vis-à-vis the bank;
3. the sales and the pre-sales of immovables for habitation purposes, entered into the register ex art. 2645-bis C.C., unless – within one year from the date agreed between the parties for the entering into a definitive contract and, in any case, within three years from the said registration of the contract – the registration of the definitive contract or of any other act representing a fulfilment of the preliminary contract, or the acts referred in art. 2652(1) n. 2) C.C., is not carried out;
4. the acts committed, payments made and security given by the debtor's estate, when an officially registered auditor testifies that they aim at restoring the debtor's estate ex art. 2501-bis C.C.;
5. the acts committed, payments made and security given in the execution of an agreement with the creditors (i.e. concordato preventivo, amministrazione controllata and accordo omologato ex art. 182-bis B.L.);
6. the payment of the debtor's employees;
7. the payment of mature debts in order to have access to simplified forms of bankruptcy proceedings.

Furthermore, art. 68 B.L. states that the payment of a bill of exchange can not be revoked if the holder of the bill had to accept it in order not to lose the action for recovery against the previous endorsees. In this case, the endorsee, who received the payment after the endorsement was made, has to return the money if the trustee in bankruptcy proves her knowledge of the debtor's insolvency status.

Art(s) 64 and 65 B.L. respectively deal with the ineffectiveness of non-gratuitous acts and advance payments. Art. 64 B.L. establishes that gratuitous acts made two years before the commencement of bankruptcy proceedings are ineffective vis-à-vis the bankrupt's creditors. Gifts made and acts effected either for the fulfilment of a moral duty or for the purpose of benefitting the public are exempt from the said provision, unless they are disproportionate to the size of bankrupt's estate. The law does not require the ascertainment of the scientia or participatio fraudis of the bankrupt person and the beneficiary. In fact, the ineffectiveness of these acts is established by law, so that if the third party does not spontaneously return the goods, the trustee in bankruptcy can bring a claim by means of which the judge – once having ascertained the bankruptcy – will automatically order the third party to the restitution. The same rule is applied to the subsequent transferees if the third party has, in her turn, transferred the goods. However, the subsequent transferee is exempted from this rule, if she acquired the possession of the movable in good faith ex art. 1153 C.C., or if she enters the non-gratuitous acquisition of a regis-
tered movable in the register before the commencement of bankruptcy proceedings. In this case, art. 2901(4) C.C. will be applied. Finally, art. 65 B.L. also provides that if, within two years from the commencement of bankruptcy proceedings, the debtor pays back debts in advance, which mature on the day of the judicial order or subsequent thereto, these payments will be legally ineffective.

A specific rule is provided for those transactions made between spouses when one of them is an entrepreneur. In particular, art. 69 B.L. states that the acts subject to revocation are those provided by art 67 B.L. as well as the gratuitous ones. As to both categories, the necessary prerequisite is that these acts were made during the entrepreneurial activity of the bankrupt. Moreover, as to the gratuitous act the law requires that these must have been made two years before the commencement of bankruptcy proceedings.

The *Actio Pauliana* for bankruptcy is subject to prescription. In particular, the action cannot be brought after three years from the commencement of bankruptcy proceedings. However, if the act, which should be subject to revocation, was made more than 5 years ago, it cannot be revoked at all (art. 69-bis B.L.). However, it is easy to notice the difference. In fact, as regards the exercise of the ordinary *Actio Pauliana* the prescription period starts to runs on the day of the act, as regards the exercise of the *Actio Pauliana* in bankruptcy the prescription period starts to run on the day of the commencement of bankruptcy proceedings.

The revocation of the act by means of the *Actio Pauliana* for bankruptcy produces the same effects as the ordinary *Actio Pauliana*. Once the revocation of the above-mentioned acts is effective, this produces effects vis-à-vis the person who has benefited from the performance, even if the transaction was carried out by an agent (art. 70(1) B.L.). Therefore, the buyer cannot claim the right deriving from the act against the trustee in bankruptcy. Moreover, once the judge decides on the insolvency status, the bankruptcy proceeding entitles the trustee to recover the goods and their eventual fruits. However, if the goods were sold, the trustee can satisfy the creditors’ claims out of the price paid by the buyer. The buyer, who has returned the goods as a result of revocation, is entitled to recover what she paid (art. 70(2) B.L.). Indeed, the law establishes that the buyer assumes the status of a creditor, so that her credit right has the same value as the rights of the other creditors. Accordingly, there is a difference between the ordinary *Actio Pauliana* and the one for bankruptcy. In fact, whereas the former subordinates the buyer’s claim to the one of the creditor, who claims for the revocation of the prejudicial act, the latter aims at achieving the *par condicio creditorum*, i.e. the buyer, like the other
creditors, has the same right to satisfy her claim out of the debtor’s assets, unless there are legitimate grounds for priority among the creditors.\(^{299}\)

In addition, the law provides specific rules for those contractual relationships existing before the insolvency but which have not yet been performed. In particular, art. 72(1) B.L. states that the trustee, who is, however, bound by the creditors’ decision, has to declare the intention to perform the contract, if the contract has not yet been performed. In the meantime, the performance of the contract is considered as being temporarily pending. However, if the trustee is late in declaring the creditor’s intention to perform the contract, the contracting party – according to art. 72(2) B.L. – can bring a default action against the trustee and ask the judge to establish a term not exceeding 60 days, at the end of which the contract shall be considered as having terminated. In this case, the contracting party is entitled to add the bankrupt’s liabilities to the credit, which she can claim vis-à-vis the non-performing bankrupt, but she is not entitled to damages (art. 72(4) B.L.).

However, the provision of art. 72(1) B.L. is not applicable to the case of a contract concerning the transfer of a right in rem. In fact, the consensus principle automatically effects the transfer of ownership. Therefore, this means that the creditors cannot any longer consider the goods as being part of the bankrupt’s estate in order to satisfy their claim. Consequently, if the transferor is the bankrupt and the possession has not yet been transferred, the transferee can request to be entered into the list of the persons who lay claim to a right in rem in the goods (art. 87-bis B.L.),\(^{300}\) subject to the condition that the transferee fulfilled her duty. On the other hand, if the transferee is the bankrupt and the possession of goods has already passed, the transferor will be considered as one of the other creditors with the right to be reimbursed first only if there are legitimate grounds for priority vis-à-vis the other creditors. However, if the goods are still in the possession of the carrier, the transferor can benefit from the right of ‘stoppage in transitu’ (\textit{supra} § 6.3.) \textit{ex art.} 75 B.L., unless she decides to perform the contract or the trustee decides to pay the full price.

As to instalment sales under a reservation of title, art. 73 B.L. states that in the case of the buyer’s bankruptcy, if the parties agreed either on a payment by instalment or a deferred payment, the trustee in bankruptcy

\(^{299}\) GAZZONI, \textit{Manuale}, ibidem, p. 1472.

\(^{300}\) According to these rules, the movables, in relation to which third parties can either claim a right in rem or a right in personam, can be returned by means of a judicial order at the request of the interested third party and by virtue of the assent of the trustee and the body of creditors. Accordingly, such goods shall not be included in the bankrupt’s inventory. On the contrary, the goods, which belong to the bankrupt but in relation to which the \textit{detentore} has a right of enjoyment shall be entered into the inventory but shall be left in the custody of the \textit{detentore}.
can step into the buyer's shoes, unless the creditors do not agree. In any case, the seller can ask for adequate security, unless the trustee immediately pays the price, which does not include the legal interest. If the trustee terminates the contract, the seller is obliged to return the instalment that she has already received, but she has the right to be compensated for the use of the goods. The seller's bankruptcy does not cause the termination of the contract. This different treatment is understandable if one considers the nature of a sale under a reservation of title. In fact, the effects of the contract depend on both parties correctly performing their duties. In fact, whereas in the case of seller's bankruptcy the seller's performance is effected by means of the acquisition of the possession, so that buyer is not discharged from her duty once she has acquired the possession of the goods under reservation of title; in the buyer's bankruptcy, the latter is no longer in the position to make periodic instalment payments, so that the contract has to be terminated for non-performance of the buyer, unless the trustee promises to perform. Moreover, if the contract is terminated, the seller is obliged to return what she received, since a transfer of ownership never occurred. In fact, since she is already entitled to receive the goods back, it would amount to an unjustified enrichment if she could also keep the instalments paid by the buyer.

As to the forward and supply contacts (vendite a consegne ripartite and contratto di somministrazione), the first and the second paragraphs of art. 72 B.L. are applicable. This means that the contract will be suspended until the trustee makes the decision whether to continue or terminate the contract, unless the solvent contracting party imposes a time limit for the making of this decision. If the trustee accepts to continue performing the contract, she has to pay the price of the services which have already been supplied.
Part III: ‘Original’ acquisition of ownership

11. On the manner of originally acquiring ownership

An original acquisition of ownership can be achieved by: 1) occupancy (occupazione); 2) finding (invenzione); 3) accession (accessione); possession of movables in good faith; 4) acquisitive prescription (usucapione). As stated above, original acquisition occurs when the right in rem is acquired independently from the right of a previous owner. It can occur not only when the goods are ownerless or when they have been abandoned by their previous owner, but also when the goods belong to another person and the right of the latter is deemed to have been subdued to the right of a person acquiring by original acquisition. Since an original acquisition of property enables one to acquire the property free of any other person’s right, it also causes the extinction of both rights in rem and rights in rem for security purposes, with which the goods were previously charged.

11.1. Occupancy

Occupancy (occupazione) is a mode of acquiring ownerless movables (res nullius). It requires the fulfilment of two elements: a mental one (the intention to possess the movable) and a physical one (the appropriation). Only movables can be the object of occupancy, since ownerless immovables (beni vacanti) automatically belong to the State (art. 827 C.C.).

The Codice Civile classifies the types of res nullius that are susceptible to occupancy in two categories: abandoned movables (res derelictae) and wild animals that can be hunted or fished (art. 923 C.C.).

As to abandoned movables, they become res nullius at the point in time when the owner abandons them: the giving up of possession also manifests the owner’s intention to relinquish ownership. A special case of a res derelictae is that of a tamed animal, which escapes (art. 925 C.C.). If the owner does not claim it within 20 days of knowing where the animal is, one can presume that she has relinquished the ownership of it, so that anyone is entitled to take possession of it and, consequently, to originally acquire its ownership. The same rule is applied to a swarm of bees; the
only difference is that the period to capture the swarm is reduced to 2 days (art. 924 C.C.).

However, these rules are only applied to animals whose behaviour can be classified as conforming to the so-called *consuetudo revertendi*, i.e. animals that, even if they are allowed to move freely outside of the enclosures, tend to return to their habitation. Accordingly, if – by chance – they do not return, the owner does not lose the ownership of them and she is authorised to pursue them, even if this involves entering another person’s land.

The rules applicable to migratory animals are different. The *Codice Civile* considers rabbits, pigeons, and fishes as being migratory animals; however, it is obvious that these rules can also be applied to all animals whose behaviour cannot be classified as conforming to the *consuetudo revertendi*. Art. 926 C.C., indeed, establishes that if these animals leave their enclosures, their owner automatically loses the ownership of them, and the owner of the land onto which these animals have strayed acquires the ownership of them. In addition, the Code provides that an acquisition of ownership by the latter cannot be effected if she has fraudulently attracted the animals.

The second paragraph of art. 923 C.C. considers animals that can be hunted or fished. Here, more precise information is necessary. In fact, due to the need of environmental protection, Law n. 968/1977 has changed the legal classification of wild animals, so that they are not considered as *res nullius* anymore but as a part of the unpurchasable property of the Italian State. Consequently, they cannot be the subject of occupancy. Accordingly, the second paragraph of art. 923 C.C. can only be residually applied to the occupancy of fish.

Another case, not mentioned by the Code, is that of the occupancy of another person’s movable, the latter consenting to this occupancy. Examples of this hypothesis can be the gathering of flowers, wood, truffle or fishing on another person’s property. According to Italian law, in fact, flowers, wood, truffle, fishes, etc. … are fruits of nature that belong to the owner of the land on which they are situated; however, the consensus of the latter facilitates the occupancy of these. The consensus can be either given expressly or tacitly: Nevertheless, in both cases the consensus

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301 Cassazione, Division I, n. 9990/1992, Cassazione, Division I, 2338/1994. In this regard, the court (Cassazione penale, Division VI, 25th November 1982) has stated that taking possession of wild animals outside the hunting season, as determined by the State’s hunting legislation, is a crime (a theft committed against the State).

302 In this regard, the law establishes some requirements which allow for the presumption of the landowner’s consensus. For instance, the Laws n. 568/1970 and n. 7512/1985 establish that truffle can be freely gathered in woods or on uncultivated land, unless the owner has expressly prohibited such activity by the affixing
legalises an action that would otherwise be illegal. In this regard, it is interesting to underline the distinction between original acquisition and derivative acquisition. In this particular case, the person only acquires ownership by way of original acquisition if the consensus of the landowner has been given and the original acquirer personally takes possession of the movable; however, if the landowner is the person who transfers the possession of the movable (e.g. by personally handing it over to the acquirer), the other party will acquire ownership by way of derivative acquisition (i.e. gift).\footnote{303}

11.2. Finding

The rules on finding (invenzione) apply to lost goods. In this regard, it is necessary to distinguish between abandoned and lost goods. In fact, in the case of lost goods, the owner has lost possession but has not yet relinquished the ownership of the lost object. Consequently, lost goods are not ownerless and cannot be acquired by way of occupancy. Therefore, whoever finds an object that has been lost has the duty to return it to its owner; if the owner is unknown, the finder has to deposit the movable with the mayor (i.e. the local lost-property office), who has to publicise the finding on the Town Hall’s public notice board (art. 927 C.C.). If the finder demands a reward, the owner has the duty to pay her a sum\footnote{304} equal to 1/10 of the value of the lost object\footnote{305} or to a value determined by the judge in accordance with her prudent evaluation (art. 930 C.C.). The possessor and the detentore have the rights and duties of an owner: hence, they have a right to the restitution of the lost goods, as well as having a duty to pay the finder’s reward (art. 931 C.C.).\footnote{306}

If, after one year of the publication of the notice, no one has laid claim to the found object, the previous owner loses ownership of it; the ownership is then acquired by the finder by virtue of her having found the object as well as the lapse of one year (art. 929 C.C.).\footnote{307}
Different rules are applied to the finding of wrecks, and flotsam and jetsam (art. 933 C.C.): the finder has a right to a reward but, if after the lapse of one year, no one has laid claim to the wrecks, these will be put up for auction and the sum thereby realised will be deposited with a bank. If, after 2 years, nobody has laid claim to the deposited sum of money, this sum will either be transferred to the National Social Security for Seamen (Cassa nazionale per la previdenza marinara) or to an Aid Fund that benefits employees engaged in activities carried out on national waters (Casse di soccorso per il personale della navigazione interna) (art. 508 Codice della Navigazione).

Finally, one can also acquire the ownership of a treasure by way of finding (art. 932 C.C.). The law states that a treasure can be any movable that has a value and in relation to which nobody is able to prove her ownership. If the treasure is found by the landowner, she will be considered as the owner of the treasure; if the treasure is found by another person, it will be co-owned by the landowner and the finder (a 50%-share appertaining to each of them). However, art. 932 C.C. is not applicable to movables of historical and archaeological interest, since the law states that such objects belong to the State (art. 826(2) C.C.).

11.3. Accession

Accession is regulated by art. 934 et seq. C.C. and it concerns the acquisition of ownership of a movable by the owner of an immovable (so-called vertical accession). This means that the proprietary right of the immovable’s owner is extended to a movable that is physically joined to (art. 934 CC) and has become an integral part of the former (so-called attrazione reale). Therefore, accession is a mode of original acquisition that benefits the person who is already owner. Accession can be effected either by means of natural fusion (unione organica), as in the cases of planting or mechanical installations (impianto meccanico); equally, accession takes this form in relation to the constructions of a building. The acquisition of ownership occurs automatically, without the owner of the immovable manifesting her intention to extend her proprietary right to the movable. Therefore, a judgment, which recognises the extension of

\[\text{public notice board has the effect of correcting the defective acquisitive title so that, after the lapse of one year, the finder can legitimately acquire the ownership thereof.}\]


309 In order to understand this mechanism, some examples could be useful. If a seller transfers land to a buyer, without informing the latter of the existence of several buildings on the land, it is fair to say that the buyer acquires the land by means of a derivative acquisitive title; however, at the same time she acquires the buildings by
the right in rem of the immovable’s owner to the movable, only has declarative effect.\(^{310}\)

Art. 934 C.C. cannot be applied if a title (e.g. art. 952 CC as to a building lease) or a provision of law (e.g. art(s) 975(3), 986(6), and 1150(5) C.C. – improvements and additions made by the long-leaseholder (enfiteuta), the life-tenant (usufruttuario) and the possessor respectively) provide otherwise.

The basic principles of accession are adapted to specific cases:

1. **Works performed by the landowner with another person’s materials (art. 935 C.C.).** Generally, the owner of the materials can seek the separation of or demand payment in the amount of the monetary value of the materials; however, she cannot seek separation if this damages the work or, for example, causes the loss of planting. Finally, the owner of the materials cannot bring a claim after the lapse of a period of six months from the moment when she gained knowledge of the accession.

2. **Works performed by another person using her own materials (art. 936 C.C.).**\(^{311}\) The landowner has the right to retain either the building or the planting, as well as being entitled to seek its removal from the person who constructed it. However, if the landowner decided not to seek such removal, she can choose to pay an amount of money equal either to the cost of the work, or to the increase in value of the soil after the building or the planting\(^{312}\) have been placed on it. If (a) the constructor was in bad faith, or (b) the constructor was in good faith,\(^{313}\) but the landowner was simply unaware of the building or planting activity and, consequently, could not oppose it, the landowner can oblige the constructor to remove the building or the plantation. However, the building or the plantation cannot be removed after a period of six months has lapsed from the point in time at which the landowner gained knowledge of the accession.

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\(^{310}\) Cassazione, n. 3103/1987.

\(^{311}\) Cassazione, n. 1754/1987.

\(^{312}\) Case law (Cassazione, n. 4970/1978) states that such an indemnity cannot be awarded by the judge on her own initiative, but can only be granted as a result of a successful claim, brought by the owner of the materials, for such an indemnity.

\(^{313}\) Case law agrees on considering good faith as being the guiltless ignorance of the fact that another person’s rights were violated as provided in art. 1147 C.C. See Cassazione, n. 845/1997; Cassazione, Unified Divisions, 1484/1997.
3. Works performed by another person using a third party’s materials (art. 937 C.C.). The owner of the materials can bring a claim for the physical restitution of the materials against the user of these materials; also, possible expenses have to be borne by the latter. Nonetheless, if damage either to the work or the land (i.e. where separation is not physically possible) is likely to be caused by an in natura restitution, the landowner and the user are jointly liable to pay a sum that is equal to the value of the materials used. In addition, the owner of the materials can claim compensation in the form of monetary payment from a landowner, who has used such materials in good faith, if latter undertook to buy these from the former, but has not paid for them yet. Separation cannot be claimed after a period of six months, starting with the moment when the owner of the materials gained knowledge of the accession, has elapsed. In addition, it has to be underlined that the parties can contractually agree to regulate their relationship differently, so as not to avoid the applicability of art 937 C.C.314

4. Reversed accession (art. 938 C.C. – accessione invertita). This is when a building is intended to be constructed solely on one’s own land but, due to a mistake made in good faith,315 one builds (has built) it built also on part of the neighbouring plot of land. If the neighbouring landowner does not oppose the building activity within 3 months of its commencement, the judge – on demand of the ‘occupying’ landowner – can grant the ownership of the ‘occupied’ part to the latter, obliging her to pay a sum equal to double the value of the occupied land, as well as potential damages, to the person whose land is ‘occupied’. The existence of the good faith on the part of the ‘occupying’ landowner is not presumed and it is neither proved by the fact that the neighbouring landowner failed to oppose the ‘occupation’, nor by the fact that the ‘occupying’ landowner believed that there a tacit consensus had been given. Indeed, the ‘occupying’ landowner has to provide unconfutable evidence as to the reasonableness of her belief of only having built on her own land.316 In a case of reversed accession, ownership is not automatically acquired: in fact, this right has to be granted by a judge and, in such case, the judgment has constitutive effect. If the requirements prescribed by art. 938 C.C. are not fulfilled, art. 936 C.C. cannot be applied and the neighbouring landowner has the right to seek for the restitution of the land after removing the building from it.

A variant of minor importance is called horizontal accession; it concerns the following two categories:

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314 Cassazione, Division II, 1606/1981.
315 Case law (Cassazione, Division II, n. 4774/2005; Cassazione, Unified Divisions, n. 3351/1984) has clearly stated that good faith has to subsist until the building has been completed.
5. Alluvium (art. 941 C.C. – alluvione). Rivers and other flowing waters imperceptibly transport soil or other sediments from mountains to valleys, thereby changing the character of the riparian lands: the owner of the land situated in a valley thereby benefits from an increase in the soil, and therefore, in the size of his land.

6. Avulsion (art. 944 C.C. – avulsione). This concerns a sudden, considerable and recognisable loss of land as well as the transportation of large amounts of soil to a plot of land owned by someone else. This phenomenon is typically caused by the flow of water. The person who receives such accretion becomes the owner of it, but she has to compensate the person who has lost the ‘washed away’ land. This is a simple application of the unjustified enrichment principle.

11.4. Confusion

Confusion (unione e commistione) consists of two special cases of the accession of one movable to another. These are regulated by art. 939 C.C. However, in both cases the two moveables have to form an inseparable entity.317

The first instance of confusion is when moveables, which belong to different owners, are united but do not lose their individuality (e.g. a precious stone placed on a ring, the air conditioning system of an apartment, the paint on the chassis of the car); this first instance is called ‘union’.

The second instance of confusion is when moveables, which belong to different owners, are mixed up and it is no longer possible to identify the separate components (e.g. eggs and wheat flour contained in a cake; Titius’ petrol confused with Gaius’ petrol in one and the same tank; the iron and coal contained in a steel bar); this is aptly called ‘commixture’.

The general rule is that the owner of the principal thing becomes the owner of the entire entity that results from the confusion, but she has to pay a sum representing the value of the ‘accessory’ thing to the owner of the latter. If the owner of the most valuable object has no knowledge of the confusion of her property with another less valuable object, she can choose to pay a sum equal to the value of the ‘accessory’ object, or the appreciation value that has resulted from the confusion of the goods, to the owner of less valuable object.318 If none of the goods that were con-

318 This means that
1. if the value of object \((i)\) is equal to X, and
2. if he value of the object \((ii)\) is equal to Y, and
3. if the value of the object that is the result of the confusion is higher than the arithmetical sum of the value of each of these goods (i.e. \(X + Y + Z = G\)), and
4. if one now assumes that the object \((i)\) is the principal thing,
fused can be considered the principal one, co-ownership will result, its constitutive shares being proportional to the value of each separate constituent object.

11.5. Processing

Processing (specificazione) is when a person, who uses an object that belongs to another person, in order to create a new entity (e.g. a sculptor who sculptures a statue out of a block of marble that belongs to someone else; a goldsmith, who improves a ring by using precious stones); such person acquires the ownership of the object/materials she uses in order to create a new entity.

The manner in which ownership is acquired, however, does not take into account the good faith of the ‘creator’, who acquires ownership regardless of whether she had knowledge of the fact that the processed object(s) belonged to another person. Of course, she has to pay compensation in the amount of the value of the material used. If the value of the labour is lower than the value of the material, the ‘creator’ does not acquire the ownership of the newly created entity.\(^{319}\) Moreover, this rule is not applicable in the light of an agreement, regulating proprietary and contractual aspects, between the ‘creator’ and the owner of the material.\(^ {320}\)

The novelty of the newly created entity has to be evaluated in accordance with social and economic principles but not naturalistic principles, i.e. the law requires that the new entity must have a socio-economic identity of its own. One example is conceptual art, in which the concept(s) or idea(s) involved in the process of the creation of a new identity are central.

In a famous Italian case, the Court of Cassation\(^ {321}\) stated that the requirement of novelty was not fulfilled when the constituent objects were merely utilised so as to achieve a particular effect. Therefore, the court confirmed the decision that was made on the merits of the case in the previous instance, rejecting the novelty of a work of art called ‘Olive-stone’ by Joseph Beuys (he merely decided to place five stone tanks, used by farmers in the region of Abruzzo to decant oil, in the luxurious halls of Castello di Rivoli in order to intensify the contrast between the poorness and simplicity of the tanks and the luxuriousness of the castle’s halls).

\(^{319}\) Cassazione, n. 875/1951.
\(^{320}\) Cassazione, Division II, 1606/1981.
### 11.6. Possession of movables in good faith

The good faith possession of movables is another manner in which ownership can be immediately acquired by virtue of an original title. The principle is based – as previously stated in the introductory notes – on the need to increase the speed and security of the circulation of movables. In fact, the requirement of possession facilitates the original acquisition of the movable if there is an obstacle to the transfer due to the existence of a derivative title.

In addition, it has to be emphasised that the rules that will be discussed in this paragraph, are derived from the consideration that it is not always easy for a buyer to discern the transferor's right to dispose from her title. Moreover, the speed with which hand-to-hand transactions nowadays occur does not always allow one to have a complete track record of the transfers relating to the movable. Finally, it has to be added that trade is based on trust so that, if these rules did not exist, the certainty and stability in the parties' legal positions, which are required by law, would be seriously undermined by the continuing threat of vindicatio by an unknown owner against the current possessor.

The principles governing the good faith possession of movables are applied in two instances: 1) in an acquisition of a movable from a non-owner (so-called acquisition a non domino); 2) in a simultaneous sale of one and the same movable to different buyers.

The first instance is when a person buys a movable from a non-owner. Art. 1153 C.C. establishes the requirements that must be fulfilled in order for the buyer's acquisitive title to be validated; here, the transferee had the possession of the movable and she was in good faith at the moment of delivery, as to the modalities of delivery, case law (Cassazione, n. 11719/2002) has affirmed that the special way of acquiring the ownership of a movable ex art. 1153 C.C. requires the physical delivery of the movable. It is not enough that the transferor

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322 The acquisition of an immovable by virtue of its possession is possible too, but this requires a further element to be fulfilled, i.e. the lapse of a certain period of time. In the paragraph on acquisitive prescription, the issue will explained in more detail.

323 The rules concerning good faith possession can be applied analogously to all those cases, in which a person acquires other rights in rem in the movable (e.g. pledge, life tenancy, etc. ...).

324 Case law (Cassazione, n. 516/1966; Cassazione, n. 7202/1995; Cassazione, n. 9782/1999) underlines that the concept of good faith in art. 1153 C.C. is equal to the one in art. 1147 C.C., i.e. it contains psychological and ethical features. Accordingly, good faith cannot be relied on if the transferee, being grossly negligent, ignored the damage that was caused to another person's right. Such gross negligence is discernible when the transferee failed to conform to a minimal standard of care, which would have allowed her to gain knowledge of the damage that was being done to another person’s right.

325 As to the modalities of delivery, case law (Cassazione, n. 11719/2002) has affirmed that the special way of acquiring the ownership of a movable ex art. 1153 C.C. requires the physical delivery of the movable. It is not enough that the transferor
adequate to transfer ownership\textsuperscript{326} (e.g. a sales contract, a gift, etc. . . .). An example can be useful to clarify the above explanations. For example, Titius sells a movable to Gaius. However, Titius is not the owner of the movable, either because – for instance – his acquisitive title was void, or because – for instance – he stole the movable. In this case, Titius does not have any right in rem in the movable and consequently, according to the principle \textit{nemo plus iuris ad alium transferre potest quam ipse habet}, does not have the power to transfer the movable since it does not belong to him. As a result, Gaius cannot acquire the movable by means of a derivative title; however, if the requirements for an original acquisition (i.e. possession, good faith, and an ‘abstractly’ adequate title) are met, Gaius can acquire the ownership of the movable. This means that Titius has the physical possession of the movable and was not aware of violating the real owner’s proprietary right at the moment of the conclusion of the contract. Moreover, it is fundamental that the contract produces effects, i.e. it cannot be flawed with defects: in fact, the contratacu1 defects can cause the voidability of the contract and, consequently, Gaius would not have any ‘abstractly’ adequate title for acquiring ownership, even if he was in good faith and had the physical possession of the movable.

The second instance is when a person, by virtue of different contracts, sells her proprietary right in a movable to different people. The basic rule is that the person, who acquires the physical possession of the movable, acquires the proprietary right even if her contract has been concluded at a time after the contracts with the other potential buyers/owners were concluded (art. 1155 C.C.). This rule is an extension of the aforementioned principle governing the \textit{a non domino} acquisition. In fact, a subsequent buyer would buy the movable from a seller, who no longer has the right to sell the movable, since the latter has lost her ownership by virtue of the conclusion of a sales contract. On the other hand, the fact that the subsequent buyer has the physical possession of the movable and does not know that the movable was sold to another person as well (i.e. she is in good faith – see art. 1147 C.C. and \textit{supra} § 2.4.) allows her to acquire ownership by virtue of an original title.

\textsuperscript{326} Cassazione, n. 1250/1981.
It is important to stress that original acquisition frees the movable from another person’s potential rights, if these are not mentioned in the transfer of title and the transferee is in good faith (art. 1153(2) C.C.). This point is particularly important, since the simple fact that the transferee, by behaving in conformity with a reasonable standard of care, could have gained knowledge of the existence of another person’s right, could constitute an obstacle to her acquisition.

The fact that, by means of original acquisition, the movable is acquired free of another person’s right, indeed, increases the trust in the persons active in the trade of movables. In fact, if the derivative acquisition is void and the requirements of art. 1153 C.C. are fulfilled, the buyer will acquire by way of original acquisition and will not bear the risk of possibly having return the movable to another person who maintains to be the real owner. This principle has particular consequences in relation to stolen movables. On the basis of this reasoning, the victim of a theft has to accept the fact that her right in the movable will be eradicated; although the police can trace the thief and find out where the stolen goods are, if the person who has purchased the movable from the thief was in good faith, she is not obliged to return the movable to the legitimate owner.327

These principles can also be applied in order to prove an original acquisition by the subsequent transferee. The normal case is a chain of sales. Accordingly, if the good faith of the subsequent transferee, as well as the good faith of her previous transferors, is proved, the subsequent transferee will acquire a non domino. It is important to notice that the good faith of the transferor and transferee, as well as the subsequent transferees’ good faith, is presumed and it is the claimant who must provide evidence so as to rebut the presumption (art. 1147(3) C.C.).328

Moreover, it can be the case that the transferee knows that the movable has been stolen or acquired in bad faith from a previous transferor. As stated above, the law allows the transferee to acquire by means of an original title, when she has the possession of the movable and she is in good faith at the moment of delivery. However, in such a case, good faith

327 Scholars argue that even if a person receives the movable from a thief by way of gift, she is not obliged to restitute it. In fact, although art. 771 C.C. states that a gift, having at its object another person’s movable, is legally unenforceable the fulfilment of the requirements provided in art. 1153 C.C. results in the unenforceable gift being effective. See MENGONI Luigi, Gli acquisti a non domino, Giuffrè, 1975, p. 221 et seq. Cfr SACCO Rodolfo [Raffaele CATERINA], Il possesso, Giuffrè, 2000, p. 383, footnote 11.

328 MENGONI, ibidem, p. 377 et seq. In this regard, the court (Cassazione, n. 13642/2000) has stated that in order to rebut the presumption of good faith ex art. 1147(3) C.C., the claimant must provide evidence, which proves that transferee should not only have had a mere suspicion of the illegitimacy of the transfer, but a real doubt founded on serious, concrete and non-hypothetical circumstances.
is not sufficient to enable her to acquire ownership originally. In fact, even though she is in good faith, she also knows that the movable was stolen or acquired in bad faith; consequently, the law does not provide protection to her in such a situation; rather, the real owner will always be preferred to such an acquirer. The only way to prevent the real owner from successfully bringing a claim and having the movable returned is to prove that the transferee's transferor had already acquired the full ownership of the movable. Here, a mere belief in the full acquisition of ownership by such a transferor will not suffice (art. 1154 C.C.). An example can be provided at this point in order to understand this mechanism. Assuming that a person knows that a movable was stolen or acquired in bad faith and she mistakenly believes that the current owner has already acquired the ownership of the movable by means of acquisitive prescription (assuming that the presumed owner has already transferred the movable to the transferee in good faith), the transferee will not benefit from her own good faith or from the physical possession of the movable.

Moreover, in order for there to be possession for the purposes of acquisitive prescription, it is necessary that the object of such possession is a movable, which is capable of being owned by private persons; therefore, in relation to all those goods that are designated to be owned either by the State or by another administrative authority (art. 822 C.C.), the rule in art. 1153 C.C. is not applicable.\(^{329}\) Moreover, it is not possible to acquire ownership ex art. 1153 C.C. of a universitas of movables (e.g. books in a library or paintings in a gallery) as well as of movables whose transfer is subject to registration. In fact, the former are not usually destined to be traded in an ‘ordinary’ market and the latter are subject to specific publicity requirements (\textit{supra} § 6.2.).\(^{330}\)

Finally, some more information is necessary as to negotiable instruments. In the Italian legal system, a credit per se, which substantially is an intangible entity (in fact, it simply consists in the creditor's right to the debtor's performance), is considered as being a movable. Consequently, it


\(^{330}\) In this regard, it is interesting to notice that case law (Cassazione, Division II, n. 5600/2001; Cassazione, Division III, 15810/2002) has followed a different trend, contravening the principle provided by art. 1156 C.C. In fact, in its first decision, the court stated that a registered movable (e.g. a car) is subject to art. 1153 C.C. and the good faith of the buyer is not invalidated by the mere non-existence of a logbook or other necessary documents. In fact, since these documents are essential requirements that have to be fulfilled in order to be able to use the movable, and consequently they have to be considered as its appurtenances, they are ipso facto acquired by the owner of the principal thing (art. 818 C.C.). In its second decision, the court stated that if a specific movable has to be registered but was not validly registered due to a manipulation of the vehicle identification number, the buyer will still acquire ownership if the requirements of art. 1153 C.C. have been fulfilled.
can be transferred and the transfer of the entitlement to exercise the right ‘incorporated’ in the title is effected once the transferee obtains the possession of the document certifying the existence of the credit agreement. Hence, although the assignment of the credit occurs when the parties simply mutually consent to such a transfer (i.e. by means of a contract/derivative acquisition), the document certifying the existence of the credit agreement can be acquired originally, since a credit is a movable. Therefore, the principle possession vaut titre is applied; nonetheless, acting in accordance with art. 1153 C.C., which contains the basic requirements in relation to an acquisition of movables, is insufficient, since negotiable instruments are subject to a special system of circulation. In this regard, art. 1994 C.C. provides that the valid title requirement, according to which the title must be abstractly suitable to transfer the right ‘incorporated’ in the document, is exchanged with the requirement to conform to the rules regulating the circulation of the document when effecting a transfer.331 Therefore, Italian scholars prefer speaking of ‘qualified possession’ (possesso qualificato). This rule has important effects. In fact, every transfer of a negotiable instrument is evaluated without reference to the previous transfer. As a result, the issuer cannot oppose the defects in previous transfers against a creditor/possessor in good faith332 (art. 1994 C.C.).

331 In particular, bearer negotiable instruments are simply transferred by means of the delivery of the document (art. 2300(1) C.C.); negotiable order instruments are transferred by means of delivery and a corresponding endorsement (art. 2011(1) C.C.); registered negotiable instruments are transferred either by means of delivery in conjunction with either an endorsement that is made on the document or an entry in the register that is held by the issuer, by means of issuing a new document bearing the holder’s name (art. 2022 C.C.), or by virtue of an endorsement that is certified either by a notary or by a stockbroker (art. 2023 C.C.). Moreover, as to the endorsement, the transfer is not effective vis-à-vis the issuer of the negotiable instrument, until the endorsee’s name is entered into the issuer’s register (the entry is only possible if the endorsee can prove an uninterrupted chain of endorsements – art. 2023(3) C.C.).

332 In this respect, it has to be pointed out that the notion of good faith in art. 1147 C.C. is based on mental and ethical criteria and does not have any objective elements. Accordingly, the law only requires that, in order for the transferee to be considered as being in good faith in the case of an a non domino acquisition, the transferee’s mistake must not have been caused by gross negligence and she must have been firmly convinced that the transferor was the legitimate owner. On the contrary, good faith cannot be presumed where the transferee should have had reasonable doubts as to the transferor’s entitlement to transfer as well as to the origin of the title. Cfr Cassazione, n. 2011/1980.
11.7. Acquisitive prescription

Acquisitive prescription is a way of acquiring, by means of possession, any rights in rem in goods, which do not belong to the inalienable property of the State or other public entities (art(s) 828-830 C.C.); acquisitive prescription cannot have a right in rem for security purposes at it object. In addition, acquisitive prescription is a mode of original acquisition, since there is no nexus between the person who acquires a right by way of acquisitive prescription and, either the contextual loss, or the contextual acquisition of the same right by the previous right-holder.

The rationale of acquisitive prescription is the need for certainty and stability in people's legal positions, as well as the need to protect the person who (instead of the official inactive right-holder) actually manages and makes use of the goods. Therefore, by means of the acquisitive prescription, the legislator wanted to eliminate the uncertainty in contractual relationships, which was caused by the contrast between a factual position and a legal position.

Although it is a fact that the judge has to affirm the valid completion of an acquisitive prescription, it occurs automatically: in fact, the judgment does not have any constitutive effect, but merely publicity effects.

The fundamental requirements in relation to acquisitive prescription are possession and the lapse of a period of time; on the contrary, good faith and a derivative title (e.g. contract, gift, or will) are not necessary. However, their existence can affect the length of the period of time that has to elapse until one can acquire ownership.

As to possession, it must be continuous, uninterrupted, non-violent, and public. The purpose of these requirements is quite clear. The person, who acquired possession violently or surreptitiously, also acquired the possession of the goods against the will of the rightful owner; consequently, such a person does not deserve to be preferred to the latter, since the latter was illegitimately deprived by the former of the use of the goods. Moreover, the deprivation may either occur with or without the knowledge of the person who is deprived of her right (i.e. the rightful owner).

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There are some doubts as to an acquisition of negotiable instruments by way of acquisitive prescription. In this regard, FOSCHINI Marcello (in Usucapione dei titoli di credito, Riv. Dir. Com., Vallardi Editore, 1960, I, p. 38) underlines that acquisitive prescription is only possible if the rules concerning the circulation of the negotiable instrument are complied with. In fact, in the case of the non-compliance with such rules, the person holding the negotiable instruments has to be qualified as being a detentore. Consequently, the latter is not in the position to exercise any power over the 'movable'. In addition, MARTORANO Federico (Titoli di credito in genere, in Enciclopedia del diritto, Giuffrè, vol. XLIV, 1992, p. 606) maintains that acquisitive prescription is limited to bearer negotiable instruments and to negotiable order instruments with a blank endorsement.
In addition, the Codice Civile provides that possession has to be continuous and uninterrupted (art. 1167(1) C.C.). The word ‘continuous' refers to the fact that the possession was uninterrupted. This means that the possession was neither transient nor discontinuous. Moreover, possession has to have been held uninterruptedly for more than one year. In this regard, it has to be underlined that there is a difference between ‘discontinuous' and ‘uninterrupted': in fact, a discontinuity is caused by the possessor’s behaviour, whereas an interruption is caused either by another person’s behaviour or an act of nature. The interruption of possession can be natural (interruzione naturale) or legal (interruzione civile). It is natural if the possessor has been deprived of her possession for a period exceeding one year, either by means of a legal act or by means of eviction. However, the Codice Civile states that the possessor does not lose possession if she brings an action for the recovery of the goods within one year from moment of eviction (art. 1167 C.C.). The interruption is legal if the possessor is deprived of her possession by means of a legal act, which is incompatible with the possessor’s intention to enjoy the goods as if she was the owner of them (art. 1165 C.C.).

As concerns the requirement of possession, moreover, it has to be added that the possessor has to expressly and unequivocally manifest her intention to use the goods as if she was their owner. An example is when goods are co-owned but can be used and managed independent of one another; here, the co-owner who wants to acquire by way of acquisitive prescription has to manifest her intention to exclude the other co-owners from the enjoyment of the goods. This is confirmed by art. 1164 C.C., which, in accordance with art. 1141 C.C. (supra § 2.2.), states that a person who has a right in rem in another person’s goods cannot acquire by way of acquisitive prescription, unless she either proves the occurrence of a change in her title or she expressly challenges the owner’s rights (so-called interversione del possesso).

The lapse of a certain period of time is also required by law in order to acquire a right in rem in goods. As stated above, the length of time is

335 The recognition, of the rightful owner’s right to have full control over the property, by the possessor (Cassazione, Division II, n. 18207/2004), or an action for the declaration of a property right (Cassazione, n. 2707/1983) and the possessory action (Cassazione, n. 1580/1999).
determined by whether the possessor is in good or bad faith.\textsuperscript{339} In particular, as to movables the law provides that the person, who claims to have acquired a right in rem, has to have had the possession of the goods for 10 years (art. 1161(1) C.C.). However, if the possessor was in bad faith, she will acquire the right in rem after the lapse of 20 years (art. 1161(2) C.C.). It is important to underline that acquisitive prescription of movables can occur only in the absence of a suitable document or transaction; however, if there is an abstractly suitable title, the possessor will acquire the right in rem by virtue of art. 1153 C.C. (possession vaut titre), and if the title is indeed a concretely suitable title, the possessor will acquire the right in rem in the goods by way of derivative acquisition. Therefore, acquisitive prescription is excluded in these two cases.

A different period of time is provided in relation to a universitas of movables; here, possession has to have been exercised for 20 years (art. 1160 C.C.). As to registered movables, possession has to have been exercised for 10 years (art. 1162(2) C.C.). As stated above, the good or bad faith of the possessor does not have any relevance on the effects of acquisitive prescription. In fact, no matter whether or not the possessor knows that the goods belong to another person, she will acquire the right in rem once the acquisitive prescription period has elapsed. Accordingly, even the thief can acquire a proprietary right in goods if she meets all requirements prescribed by law. However, it has to be pointed out that, also in this case, the good or bad faith of the possessor can affect the length of the prescription period. In fact, in order for the possessor to benefit from a shortened acquisitive prescription period (\textit{usucapione abreviata}), three further requirements have to be met: one is the good faith of the possessor (art. 1147 C.C.); the other one is a valid title, which is abstractly suitable to transfer the right in rem; however, in this case, such a title is ineffective because the transferor is not the rightful owner; finally, the title has to be entered in the register if the transfer concerns a registered movable. Accordingly, the right in rem in a registered movable will be acquired after the lapse of 3 years (art. 1162(1) C.C.), whereas the

\textsuperscript{339} As concerns good faith (where it is required!), this notion is explained in art. 1147 C.C. \textit{(supra § 2.4. and (subsequently) § 11.6.). In this regard, art. 1147 C.C. expressly provides that
1. the one, who possesses without knowing that she prejudices another's right, is a possessor in good faith;
2. good faith does not apply if the lack of such knowledge is the result of 'gross negligence';
3. good faith is 'presumed' and it is sufficient that it 'existed at the time of acquisition'.
In addition, one has to consider that the burden of proof is always on the party who intends to assert her own right. Accordingly, in the case of acquisitive prescription, the dispossessed person has to prove the bad faith of the possessor.
right in rem in a universitas of movables (art. 1160(2) C.C.) will be acquired after the lapse of 10 years.

The acquisitive prescription period starts to run on the day after possession was taken and it ends on the last day of the acquisitive prescription period established by law. In order to calculate the period, the current possessor can add the time period of her possession to the possession periods of her previous transferors (accrual of possession – supra § 2.3.). In this respect, if the title is either void or voidable, there will be no accrual of possession, so that the current possessor will not be in the position to benefit from the possession periods of her previous transferor(s). Finally, it has to be added that if a person acquires possession violently or secretly, the period will start to run at the moment the violence ceases or possession is exercised publicly (art. 1163 C.C.).

Acquisitive prescription is a mode of acquiring any right in rem (subject to some exceptions, as mentioned in the introduction of this paragraph). However, the acquisition of a right in rem depends on the quality/contents of possession. Accordingly, ‘full’ possession (where the possessor behaves as if she was the owner) facilitates the acquisition of ownership of goods, whereas limited possession (e.g. life tenancy) merely allows the possessor to acquire a right in rem for enjoyment purposes, unless the latter can prove the interversione del possesso (art. 1164 C.C.). In addition, the effects of acquisitive prescription have to be considered. Indeed, the general principle states that a previous legal position is eliminated by a new incompatible legal position. Accordingly, the acquisition of ownership does not free the new owner from claims made and rights enforced by other people if these concern rights in rem for enjoyment purposes, since the co-existence of compatible proprietary rights is always possible.

It is interesting to notice that, although acquisitive prescription does not have retroactive effect, the previous right-holder can claim the fruits, which the new right-holder has acquired in bad faith (supra § 2.5.).

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341 In this last case, it is not sufficient that the official right-holder knows of the intention of another person to possess the goods as an owner, but it is required that the latter publicly exercises the right in rem (Cassazione, n. 1910/1970; Cassazione, n. 1021/1973).
342 Cassazione, n. 4412/2001. Cfr BIANCA, La proprietà, ibidem, p. 817. Contra GAZZONI, Manuale, ibidem, p. 243. According to the latter, if a person acquires a proprietary right by way of acquisitive prescription and she was in good faith, the goods are automatically acquired free of another person’s right in rem, even if the previous owner had already created and transferred rights in rem for enjoyment purposes to other people (so-called usuccapio libertatis).
343 In this regard, Antonio MASI (Il possesso e la denuncia di nuova opera e di danno temuto, in Trattato di Diritto Privato (diretto da Pietro RESCIGNO), UTET, vol. VIII, 2002, p. 628) underlines that acquisitive prescription cannot have retroactive
Finally, as to movables, case law admits the possibility of abandoning rights created by acquisitive prescription by means of irrefutable and decisive physical acts. In fact, due to art. 1165 C.C., which provides for the applicability of the statute of limitations, one can also consider art. 2937(2)(3) C.C. as being applicable; according to the latter, once the acquisitive prescription period has elapsed, the right-holder can relinquish the rights she acquired by way of acquisitive prescription (e.g. ownership); she merely has to manifest her own intention not to benefit from the effects of acquisitive prescription. Accordingly, it is fair to say that once a person relinquished the rights created by acquisitive prescription, the rights of the previous right-holder revive. However, a third party (e.g. a creditor), who has an interest in the prescriptive acquirer accepting the effects of acquisitive prescription or enforcing the rights thereby acquired, can oppose the 'realised but rejected' acquisitive prescription to the previous right-holder (art. 2939 C.C.). In addition, one can also consider art. 2936 C.C. to be applicable in such a case, according to which any agreement intended to modify the applicability of the statutory provisions on acquisitive prescription is void. It is evident that such a rule aims at protecting the party from severe contractual impediments being imposed on her. This rationale is also reflected in art. 2937(1) C.C., according to which a person who has lost the entitlement to validly dispose of a right, cannot undo the occurred prescription of the right (e.g. the previous right-holder).

Moreover, art. 1165 C.C. adds that the rules relating to the causes of suspension and interruption (art. 2941 et seq. C.C.) of the prescription period are observed to the extent provided. Thereby, the so-called time limit *ad usucapionem* by one of the factors indicated in art(s) 2941 and 2942 C.C. To be more precise, art. 2941 C.C. states that prescription is suspended: 1) between spouses; 2) between those who are in a relationship characterised by the exercise of parental authority ex art. 316 C.C.; 3) between the guardian and the minor or legally completely incapable person; 4) between the curator and the mature minor (*minore emancipato*) or other disabled person; 5) between the heir and the inheritance, which has been accepted conditionally (*accettazione dell’eredità con beneficio d’inventario*); 6) between persons whose property is subject to the administration by other persons and those who exercise such administration by virtue of the provisions of law or other judicial orders, until the valuation of the insolvent estate has been submitted and finally approved; 7) between legal persons and their administrators, for as long as the latter hold office, in relation to actions for liability against the latter; 8) be-

effect, because the acquisition (hence, the transfer of the right *in rem*) occurs only when the statutory acquisitive prescription period has elapsed. However, the theme of the retroactive effect of acquisitive prescription is widely discussed. For more details see BIANCA, *La proprietà*, ibidem, p. 818-820.
tween the debtor who has fraudulently concealed the existence of the debt and the creditor, for as long as the fraud has not been discovered.

In addition, art. 2942 C.C. adds two other factors that can suspend acquisitive prescription: 1) in cases where this would prejudice minors and legally incapable persons for reasons of mental infirmity, for the period during which they lack a legal representative, as well as for the period of 6 months following the appointment of such representative or the termination of the state of incapacity; and 2) in times of war, where acquisitive prescription would prejudice members of the Italian army, whether permanently or temporarily, as well as those who, by reason of the office they hold, are attached to the Italian army, for a period of time indicated by the wartime laws.\textsuperscript{344} Prescription is also suspended by virtue of the causes indicated in art(s) 2943 and 2944 C.C. (service of the statement of claim to commence legal proceedings; actions brought in the course of a legal proceeding; acts capable of placing the person, who has to re-transfer possession, in default; the acknowledgement of the right by a person against whom such a right can be enforced) and also by virtue of the deprivation of possession for a period exceeding one year (art. 1167 C.C.). In the latter case, if an action to recover possession was brought and possession has been recovered, the interruption is treated as if it had never occurred (see art. 1167 C.C.). Finally, when prescription is not pleaded as a defence, the court may not take account of it \textit{ex officio} (art. 2938 C.C.).

\textsuperscript{344} However, according to art. 1166 C.C., this rule does not apply in relation to the 20-year acquisitive prescription period for immovables.
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Part I:
Basic information on property law

I. Different property rights

I.1. General basics

'Sedis materiae' is the **Code of Property law** (Stvaropravni zakonik\(^1\)) which has become effective on the 1\(^{st}\) January 2003.\(^2\) Some legal regulations of property law are included in special statutes due to their specific nature:\(^3\) These are, for example, the Code of Maritime Law (Pomorski zakonik\(^4\)), the Law of Obligations and Property Law in the Aeronautics Act (Zakon o obligacijskih in stvarnopravnih razmerjih v letalstvu\(^5\)), the Book Entry Securities Act (Zakon o nematerializiranih vrednostnih papirjih\(^6\)) and the Land Registry Act (Zakon o zemljiški knjigi\(^7\)). According to the SPZ, there is a limited number of property rights (numerus clausus): Right of ownership, pledge, encumbrance, servitude, land charge and building lease (Art. 2 SPZ). The parties can neither create new property rights nor change the contents of existing property rights.\(^8\)

The object of a property right is an **asset**\(^9\) (Art. 3/I SPZ). Assets are independent physical objects which can be controlled by man.\(^10\) Pecuniary rights can also be object of a pledge or a usufruct (Art. 3/II SPZ).\(^11\) If a pecuniary right is the object of a property right, the regulations concerning ‘assets’ have to be applied analogously (Art. 3/III SPZ).

Rights in rem (= **property rights**) are absolute rights; as such, they are effective against everyone (erga omnes effect, Art. 5 SPZ) and provide the

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1. Hereinafter SPZ, Uradni list Republike Slovenije (Official Journal of the Republic of Slovenia) no. 87/2002. A translation of the most important provisions of this statute is provided as an annex to this report.
9. The term ‘asset’ coincides with the term ‘thing’.
1. **Different property rights**

A legitimate person with direct control over the physical asset. Obligatory rights are generally only binding on the parties to the agreement (*inter partes* effect). However, some obligatory rights can be entered in the land register and thus attain absolute effect. Obligatory rights arise from an agreement (*consensus ad idem*) between the parties; furthermore, property rights presuppose publicity.

Below, additional principles of property law are listed: According to the **principle of priority** (ranking, Art. 6 SPZ), older property rights have priority over younger ones of the same kind – *prior tempore, potior iure*. As a result of the **speciality principle** (Art. 7 SPZ), property rights can exist in relation to ascertained assets. The **principle *superficies solo cedit*** (Art. 8 SPZ) indicates that everything, which is permanently connected to the immovable intentionally, or is situated above or below it, is a component of the immovable unless the law provides otherwise.

The **principle of the assumption of bona fides** (good faith) (Art. 9 SPZ) represents a rule of evidence in those cases where the good faith of a party is a prerequisite for the occurrence of a certain legal effect (e.g. acquisition of the property from an unentitled party, acquisition by prescription). According to the **principle of confidence in the land register**, third parties in good faith can rely on the information entered in the land register (material principle of publicity, Art. 10 SPZ) and, according to Art. 12/I/II SPZ, the conclusion can be drawn from the **ban on the abuse of law** that the exercise of a property right exclusively and obviously for the purpose of causing damage is prohibited. Art. 11/I/II SPZ establishes the assumption that a proprietary possessor (possessor, who has the intention of becoming owner) is the owner of a movable.

The regulations on the acquisition, the transfer, the protection and the extinction of the right of ownership apply analogously to other property rights existing in an asset (principle of the use of the provisions of the right of ownership, Art. 13 SPZ). If the SPZ requires a **notarial deed**, then this formal requirement is fulfilled if the legal transaction has been concluded in the form of a judicial settlement or any other agreement.

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13 Rijavec, Sachenrechtsreform in Slowenien 821 (830) in Österreichische Notarkammern (editor), Freiheit, Sicherheit, Recht, Notariat und Gesellschaft, Festschrift Georg Weissmann (2003); See question 3.
14 Cf. Berden, Načela stvarnega prava, Podjepte in delo 2000/6-7, 1447.
17 Juhart in Juhart et al., Stvarno pravo (2007) 83 et seq.
18 Juhart in Juhart et al., Stvarno pravo (2007) 84 et seq.
21 Juhart in Juhart et al., Stvarno pravo (2007) 89 et seq.
arrived at in court (assumption of fulfilment of formal requirements, Art. 14 SPZ).

1.2. Notion of ownership

According to Art. 37/I SPZ, the right of ownership includes the right to own an asset, to use it, to benefit from a right of usufruct in such an asset in the most extensive way and to dispose of it.\footnote{Cf. Keresteš, Skupnosti v civilnem pravu, Podjetje in delo 2005/2, 334 (336 ff.).} Assets are, in principle, physical objects.\footnote{Cf. Tratnik, Definicije osnovnih stvarnopravnih pojmov, Podjejte in delo 2000/6-7, 1436 (1440).} The owner can use, transfer or destroy an asset. He can pledge the asset or subject it to a servitude, rent it out or lease the asset. The owner is entitled to demand that his right of ownership be respected by everyone. As to the protection of rights of ownership, see chapter 1.4. In exercising his property right, the owner must not violate other persons' rights of ownership or any legal provisions. The owner of an asset is restricted by rights. The right of ownership has to be exercised in accordance with the principles of the SPZ and the nature of the asset (Art. 12/I SPZ). A general restriction on the exercise of the right of ownership results from the ban on the abuse of law (Art. 12/II SPZ). Further restrictions arise from various statutes, e.g. the Water Act (Zakon o vodah), the Agricultural Real Estates Act (Zakon o kmetijskih zemljiščih) or the Forest Act (Zakon o gozdovih).\footnote{Tratnik, Stvarnopravni zakonik (2002) 56.}

1.3. Other property rights

Among others, the pledge, the usus and the ususfructus are potential rights in movable property. Servitudes in rem can only exist in relation to immovables. For a complete insight into the Slovenian property law system, also some basic information on property rights, which can only be created in immovables, has to be provided in this chapter. These are encumbrances, servitudes in rem, the land charge and the building lease.

The pledge (Art. 128-191 SPZ) is the right of the creditor to obtain repayment of a sum made up of the credit amount, interest and costs at a
1. Different property rights

This right is secured by the value of the pawned object and has priority over all other creditors. The objects of a pledge can be assets, but also rights and securities, as long as they are disposable and have a net asset value. The pledgor can put in pledge his property for the purposes of using a thereby obtained credit himself or a third party’s debt. The SPZ’s provisions on pledges comprise: General regulations (Art. 128-137 SPZ), the pledge over real property – mortgage (Art. 138-154 SPZ), the dead pledge (pignus, Art. 155-169 SPZ), the non-possessor pledge over movables (Art. 170-177 SPZ), the pledge over claims (Art. 178-186 SPZ), the pledge over securities (Art. 187-189 SPZ) and pledge over other assets (Art. 190-191 SPZ), e.g. the right to hold company shares (e.g. general partnership, limited partnership, private limited company) or intellectual property rights (copyright).

The encumbrance (Art. 192-200 SPZ) is a new legal instrument, which was introduced into Slovenian law by the SPZ; German law has thereby served as a model (die Grundschuld). The encumbrance is the right to claim payment of a certain sum of money, which is secured by the value of real property and has priority over all other creditors; also, this claim is not contingent on the fulfilment of any condition. The encumbrance is independent of the arisal or existence of a certain claim (unlike the mortgage, the encumbrance is not accessory).

Servitudes are the rights to use third parties’ assets or to benefit from the usufruct of a third party’s right. The owner is obliged to refrain from, or tolerate, something. Following the general regulations (Art. 210-212 SPZ), the Act regulates real servitudes (Art. 213-226 SPZ) and personal servitudes (general regulations: Art. 227-229 SPZ; usufruct: Art. 230-243 SPZ; right of use: Art. 244-246 SPZ; residential right: Art. 247-248 SPZ).

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29 Art. 15 SPZ: An asset is an independent physical object which can be controlled by man.
33 Tratnik, Zastavna pravica (2006) 201 et seq.
34 Tratnik, Zastavna pravica (2006) 257 et seq.
The **land charge** (Art. 249-255 SPZ – *stvarno breme*)\(^{40}\) was regulated by the SPZ for the first time and obliges the owner of the charged real estate to render performance, or carry out certain acts, in the future. The land charge was, however, not unknown to the Slovenian law prior to the SPZ; indeed, provisions of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB – *Reallast*) were applied. In the case of a land charge, the creditor’s claims are secured by real estate, the owner of which is obliged to fulfil his obligations.\(^{41}\)

The **building lease** (Art. 256-265 SPZ) is the right to have a building constructed on or under a third person’s land. The building lease is transferable and must not last longer than 99 years.\(^{42}\) The building lease has also been newly introduced into the Slovenian legal system by the SPZ.

### 1.4. Protection of property rights

Under the title ‘protection of the right of ownership’ the SPZ regulates three types of civil actions: ‘*rei vindicatio*’, ‘*actio publiciana*’ and ‘*actio negatoria*’.

#### 1.4.1. Rei vindicatio

According to Art. 92/I SPZ, the owner can claim for the redelivery of an individually ascertained asset by bringing an action that is based on the right of ownership (*rei vindicatio*). This right does not become time-barred (Art. 92/III SPZ).\(^{43}\) Both the direct proprietary possessor and the person who directly exercises possession for another can be defendants to this action.\(^{44}\) If the defendant directly exercises possession for another person and if the plaintiff claims the (return) restoration of an asset, it is usually easier to base the action on the legal relationship that exists between the parties (bailment: *E.g.* rent, lease; see 2.1).\(^{45}\) The plaintiff has to prove

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\(^{41}\) Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 249, 987 et seq.


his right of ownership in the individualised asset (Art. 92/II SPZ), meaning that the owner has to prove that he originally acquired ownership (title) or a valid succession in title. If he has acquired the asset by succession in title, he has to prove the previous holders’ right of ownership dating back to the original acquisition of ownership (chain of title).

The plaintiff, moreover, has to prove the defendant’s actual control over the asset at the point in time when he files the action (Art. 92/II SPZ). The direct possessor with a standing to be sued can refuse to restore the asset to the owner, if he has a right of possession. This regulation also applies if a direct possessor derives his right of possession from an indirect possessor, who has a right of possession vis-à-vis the owner (Art. 93 SPZ). The indirect possessor must be entitled to transfer possession to the direct possessor. A right of possession can result from the provisions of property law or the law of obligations. Examples: Tenant, pledge creditor, party entitled to a residential right, trustee, buyer subject to a reservation of title clause.

If the indirect possessor is not entitled to transfer the possession of an asset to a direct possessor, the owner can bring a claim for the restoration of the asset, to be made to the owner himself or the indirect possessor, against the direct possessor, provided that the indirect possessor is not willing or able to recover possession from the direct possessor.

A person, who possesses the asset for somebody else, can protect his possession by disclosing the name of the indirect possessor or previous holder (‘nominatio auctoris’).

If the possessor is obliged to return the asset that is the object of the ‘rei vindicatio’, one has to make a distinction as to the legal status of the possessor, thereby considering whether he is a proprietary possessor in good faith (Art. 95 SPZ) or a possessor in bad faith (Art. 96 SPZ). According to Art. 28 SPZ, a possessor is in bad faith if he knew or should

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51 Art. 93 (unlike § 986 BGB) does not provide any regulation on this issue although, according to Berden in Juhart et al., Commentary on the SPZ (2004) Art. 93, 484, this regulation should also be covered by the SPZ.
53 Examples are included in Tratnik in Juhart et al., Stvarno pravo (2007) 299.
have known that he is not entitled to possession. The proprietary possessor in good faith becomes a possessor in bad faith as of the service of process. However, the owner has the possibility to prove that the possessor had already been in bad faith before the service of process (Art. 95/VIII SPZ).

The proprietary possessor in good faith is obliged to return the asset to the owner including the fruits not yet separated therefrom (Art. 95/I SPZ). He is not obliged to pay for the utilisation of the asset (Art. 95/II SPZ). The proprietary possessor in good faith is not liable for the deterioration or destruction of the asset, if it occurs during the period of good faith possession (Art. 95/II SPZ). The issue of costs, arising in relation to the asset, is regulated in Art. 95/III-VI SPZ: One has to distinguish between necessary costs, useful costs and embellishment costs (luxury expenses). The proprietary possessor in good faith can claim for the reimbursement of costs, the incurrence of which was necessary for the maintenance of the asset (necessary costs, Art. 95/III SPZ). The proprietary possessor in good faith has a right to the reimbursement of useful costs, but only to the extent to which the value of the asset was increased (Art. 95/IV SPZ). The increase in value is an objective criterion. However, the owner is obliged to reimburse necessary and useful costs only to the extent to which these costs exceed the economic benefit drawn from the use of the asset (Art. 95/V SPZ). Pending the refund of necessary and useful expenses incurred in the maintenance of the asset, the proprietary possessor in good faith has the right to retain the asset (Art. 95/VII SPZ). Unlike the right of retention in the meaning of the Code of Obligations (Obligacijski Zakonik), the right of retention in the meaning of Art. 95/VII SPZ does not grant any entitlement to satisfy one’s claims out of the asset (exploitation right). The claim for the reimbursement of necessary and useful costs prescribes after the lapse of a period of three years from the restoration of the asset (Art. 95/IX SPZ). Luxury expenses have to be refunded only to the extent to which they increased the asset’s value. Provided that luxurious improvements/additions can be separated

56 This applies regardless of whether or not the possessor was at fault. Cf. Vrenčar in Juhart et al., Commentary on the SPZ (2004) Art. 95, 487.
57 Tratnik in Juhart et al., Stvarno pravo (2007) 300 et seq.
60 Example from Vrenčar in Juhart et al., Commentary on the SPZ (2004) Art. 95, 489: The proprietary possessor in good faith of a vineyard has reaped the fruits and thereby benefited from the use of the asset. The owner is not obliged to refund expenditure for insecticides.
from the asset without damaging it, the good faith proprietary possessor has the right to seize and keep them (‘ius tollendi’, Art. 95/VI SPZ).

The regulations in Art. 95 SPZ can be applied analogously to the good faith possessor who exercises possession for another person.\(^6^2\)

The legal position of the **possessor in bad faith** is regulated in Art. 96 SPZ. Bad faith (the possessor knows or should know that he is not entitled to possession) can relate to the proprietary possessor (e.g. thief) as well as to the possessor who exercises possession for another person (e.g. leaseholder).\(^6^3\) The possessor in bad faith is obliged to return all fruits (Art. 96/I SPZ) as well as the asset. He is obliged to compensate for the value of the separated (reaped) fruits, which he has consumed, sold or destroyed, but also for the value of fruits, which he failed to collect. In the case of civil fruits (benefits or claims not yet due, or due but not yet paid), he has to assign the claim to the owner or compensate for the value of the already collected fruits (benefits, e.g. satisfied claims).\(^6^4\)

The possessor in bad faith is obliged to compensate for damage caused by the deterioration or destruction of the asset, unless the damage to the asset would have also occurred had the asset been in the owner’s possession (Art. 96/III SPZ).

The possessor in bad faith can claim for the reimbursement of necessary costs, which also would have also been incurred had the asset been in the owner’s possession (Art. 96/IV SPZ). He can claim for the reimbursement of useful costs only if they are useful to the owner (Art. 96/V SPZ). This is a subjective criterion.\(^6^5\) The claim for the reimbursement of these costs prescribes three years after the restoration of the asset has been effected (Art. 96/VII SPZ). The bad faith possessor has no right to be reimbursed for the luxury expenses he incurred. Provided that the luxury expenses can be separated from the asset without damaging it, also the possessor in bad faith has the right to seize and keep them (‘ius tollendi’, Art. 96/VI SPZ).

The owner’s claim for the restoration of the asset and the natural fruits does not prescribe (Art. 92/III SPZ). However, the owner’s claim for compensation in the amount of the value of already separated (collected) fruits, which the possessor in bad faith has consumed, sold or destroyed, as well as the claim for compensation in the amount of the value of fruits, which the possessor in bad faith failed to collect, prescribe

\(^6^2\) Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 95, 487 referring to Art. 97 SPZ, which, in particular, regulates the position of the good faith possessor who exercises possession for another person.


\(^6^5\) Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 96, 492.
after the lapse of a period of three years from the restoration of the asset (Art. 96/II SPZ).

The possessor in bad faith has no right to retain the asset on the basis of his counter-claims.66

If the indirect possessor was in bad faith but the direct possessor did not know or was not able to know this fact, the direct possessor is liable as a proprietary possessor in good faith (Art. 97/I SPZ). Example: A, a legally incompetent person, sells an asset to B. B knows that A is legally incompetent and leases the asset to C, who is in good faith. A’s legal representative sues C for the restoration of the asset (Art. 95 SPZ). According to Art. 96 SPZ, the owner can assert his claim against the indirect possessor in bad faith within one year of the restoration of the asset (Art. 97/II SPZ).

Property law’s provisions on the owner’s claim for restoration and on the possessor’s possible counter-claims are ‘leges speciales’ to the regulations on unjust enrichment (Art. 190-198 Code of Obligations).67 The latter have to be applied only if an issue is not expressly regulated in the SPZ.68

1.4.2. Actio Publiciana

The ‘actio publiciana’ is – like the ‘rei vindicatio’ – a petitory action. Both are ‘actiones in rem’. According to Art. 98/I SPZ, the good faith proprietary possessor (presumed owner) of an asset can also claim, in the case of his dispossession, for the restoration of the asset against a proprietary possessor in good faith, who possesses the asset on the basis of a weaker title. This claim does not prescribe (Art. 98/III SPZ). The ‘actio publiciana’ concerns the right of possession. The plaintiff is successful against the possessor if the latter has a weaker or no title. The owner can also claim for the restoration of an asset by means of bringing the ‘actio publiciana’. The advantage lies in the fact that the ‘actio publiciana’ – contrary to the ‘rei vindicatio’ – does not require the claimant to prove his ownership to the court.69 Art. 95, 96 und 97 are also applied analogously to the ‘actio publiciana’.70

68 Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 95, 487.
If both the plaintiff and the defendant can be presumed to be owner of the one and the same asset, the one who has purchased the asset for money will have a better legal title. If both titles are equally good, the title of the party, who has direct possession of the asset, will prevail (Art. 98/II SPZ).

1.4.3. Actio negatoria

The ‘actio negatoria’ is a petitory action. The owner and the presumed owner are entitled to bring it. It is a claim for the termination and future prevention of an unlawful disturbance that, however, is not a dispossesion (Art. 99/I SPZ). The disturbance can be caused by legally due conduct or its omission.\(^{71}\) Not only the interferer but also the person who ordered or approved of a disturbance can have a standing to be sued.\(^{72}\) In fact, one co-owner can bring the ‘actio negatoria’ against another co-owner.\(^{73}\) The defendant must not be entitled to the act or omission constituting the disturbance. The prohibition of further disturbances requires that the plaintiff proves the danger of recurrence.\(^{74}\) The plaintiff must prove his ownership\(^{75}\) and the existence of a disturbance. Not only the evident but also the presumed owner can bring the ‘actio negatoria’. If somebody is possessor of an asset, but not its owner or presumed owner, he cannot bring the ‘actio negatoria’. Examples:\(^{76}\) Usufructuary, tenant of an apartment, leaseholder, bailee or another possessor who exercises possession on the basis of a legal transaction.

The admissibility of the ‘actio negatoria’ in a case where a disturbance has not occurred yet, but is imminent, is not discussed in literature as far as can be discerned. Frantar\(^{77}\) states that it has to be an actual interference. Tratnik\(^{78}\) points out that a non-recurrent disturbance does not enti-

\(^{72}\) Judgment and decree of the Apeal Court Koper no. 1 Cp 502/2005, 30.5.2006; Judgment of the Supreme Court of Croatia no. Rev 1326/88, 16.2.1989 (published in the Review of the Supreme Court of Croatia no. 44/90, 53). When becoming independent, Slovenia decided to retain the legal system of Yugoslavia, deciding to reform it gradually with the introduction of new legislation. Therefore, several principles and considerations of the ex-Yugoslavian jurisprudence are still applicable.
\(^{75}\) Judgment of the Supreme Court of Republic of Slovenia no. II Ips 276/93, 12.1.1994.
\(^{77}\) Frantar, Stvarno pravo 64.
\(^{78}\) Tratnik in Juhart et al., Stvarno pravo (2007) 304 et seq.
tle an aggrieved person to bring the ‘actio negatoria’; equally, there is no such entitlement in a case where the disturbance has already ceased. However, the same purpose can be achieved with an ‘actio popularis’ on the basis of Art. 156 OZ. According to this provision, anyone is entitled to demand the removal of a source of danger if damage is imminent.

If the disturbance has caused damage, the owner can claim for the compensation of the damage pursuant to the regulations of the Code of Obligations (Art. 99/II SPZ). The interferer has to compensate for the damage even if he was not negligent.79 The ‘actio negatoria’ does not prescribe (Art. 99/III SPZ); on the other hand, the claim for the compensation of damage prescribes according to the provisions of the Code of Obligations.80

1.4.4. Further protection

Ownership can be additionally protected within the framework of the protection of possession. Any possessor is entitled to bring the action for disturbance of possession (cf. possession), regardless of his particular right of possession.

Another possible claim could aim at the restoration of an asset transferred on the basis of a contract of obligation (e.g. tenancy agreement), or on the basis of unjustified enrichment (condictio).

Furthermore, the owner can bring a claim for damage suffered against the damaging party (tortfeasor) on the basis of Art. 131 et seq. Code of Obligations. If the claim for damage is admitted pursuant to these regulations, the damaging party is obliged to re-establish the pre-damage condition (restoration, Art. 164/I Code of Obligations). The aggrieved party can, however, claim financial compensation instead of restoration. The court does not have to admit the former claim, if the circumstances of the specific case justify a restoration (Art. 164/IV Code of Obligations). This applies where financial compensation is not adequate in the light of the circumstances of the specific case.81

If an asset is destroyed by force majeure in the case of an unjustified dispossession, the person liable for the dispossession of the asset has to

79 Judgment of the Supreme Court of Croatia no. Rev 1424/90, 6.11.1990 (published in the Review of the Supreme Court of Croatia no. 51/92, 129). When becoming independent, Slovenia decided to retain the legal system of Yugoslavia, deciding to reform it gradually with the introduction of new legislation. Therefore, several principles and considerations of the ex-Yugoslavian jurisprudence are still applicable.


financially compensate for the asset (Art. 166 Code of Obligations). Art. 166 Code of Obligations provides for liability in a ‘casus mixtus’.\textsuperscript{82}

The provisions of property law on the owner’s claim for restoration and the counter-claims of the possessor are ‘leges speciales’ in relation to the provisions on unjustified enrichment (Art. 190-198 Code of Obligations). The corresponding provisions of the Code of Obligations have to be taken into account only if an issue is not specifically regulated by the SPZ.\textsuperscript{83}

The Slovenian Code of Obligations is based on the unitarian concept in relation to the regulation of unjustified enrichment (Art. 190-198).\textsuperscript{84} The general regulations (Art. 190/I-III Code of Obligations) are followed by the regulations on restitution to/compensation of the party who has a claim on account of unjustified enrichment; these regulations are particularly applicable to the ‘condictio’ and to an ‘enrichment in another way’.

The prerequisites for an enrichment claim are: The (unjustified) enrichment, a loss suffered by another person as a result (the party who has an unjustified enrichment claim), causation and the lack of a legal justification.\textsuperscript{85} In both cases (condictio and enrichment in another way), the redelivery (restoration) of an asset can be claimed as far as it still exists.\textsuperscript{86} Where one party is enriched, without any legal justification, to the disadvantage of another party, he is obliged to return the received asset where this is possible; otherwise, he is obliged to financially compensate for the value of the asset (Art. 190/I Code of Obligations). The obligation to redeliver (restoration) an asset or financially compensate for the value of it also arises where somebody received an asset on the basis of a legal relationship which is frustrated or rescinded subsequently (Art. 190/III SPZ).

As mentioned already, an ‘actio negatoria’ cannot be brought where no disturbance has occurred yet, even if such a disturbance is imminent. According to Frantar,\textsuperscript{87} an actual disturbance is required.

\textsuperscript{84} Polajnar-Pavčnik in Juhart/Plavšak, Code of Obligations with Commentary (2003) introduction to unjustified enrichment 44.
\textsuperscript{87} Stvarno pravo 64. In the SPZ commentary on Art. 99 (actio negatoria), this problem is not discussed. The focal point is always an actual disturbance or the fulfilment of the prerequisites for the prohibition of future disturbances.
1.5. Transferability of movable assets

1.5.1. Transferability

The negotiability of assets can be restricted or completely excluded. In accordance with Art. 4 SPZ, only those assets are incapable of being the object of a property right for which this is expressly provided by law. Restrictions exist e.g. on the acquisition of real estate by foreigners according to Art. 68 of the Slovenian Constitution (Ustava Republike Slovenije), as well as on the purchase agricultural real estate pursuant to the Agricultural Land Act (Zakon o kmetijskih zemljiščih). Public property can be used by anyone in accordance with its intended use (Art. 19/I SPZ). It is determined by law which assets are public property as well as which prerequisites have to be met for the use of public property. Public property cannot be acquired by good faith acquisitive prescription (Art. 44/I SPZ). It is also determined by law whether someone has a special right of use of public property, as opposed to the common right of use (Art. 19/III SPZ). In most cases, this special right of use is the servitude; however, also a building lease can be granted.

The agreement between the parties to transfer the ownership of an asset (the disposition) is the prerequisite for the passing of title (Art. 40 SPZ). If the parties agree that ownership shall not pass, it remains with the original owner. In principle, the passing of title cannot be subjected to any condition (Art. 37/II SPZ). There is an exception for the reservation of title to a movable, and another exception for the transfer of ownership for security purposes (fiducia cum creditore contracta, Art. 63 SPZ).

Parties can stipulate a restriction on the right to dispose of the ownership of movables and immovables. Such a restriction can result in the total prohibition of transfers and submissions of property to charges and encumbrances on the basis of a legal transaction (Art. 38/II-IV SPZ).

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1. Different property rights

SPZ).\(^{97}\) This prohibition can also be established by will. In both cases, a the imposition of a temporary limitation on the prohibition is permitted. The total prohibition of transfers and submissions of property to charges and encumbrances only has to be observed by the first owner, but not his successors;\(^{98}\) therefore, they terminate, at the latest, when the party who is bound to observe the prohibition dies. Basically, the total prohibition of transfers and submissions of property to charges and encumbrances only has an \textit{obligatory effect}. A transfer carried out or charge established nevertheless is effective and results in claims for damages.\(^{99}\) A \textit{third party effect} exists in the case of immovables, if the prohibition was established between specific persons (between spouses or extramarital partners, between parents and children, between adopted children and adoptive parents), and is entered in the land register.\(^{100}\) Art. 13/II/1/1 Land Registry Act (\textit{Zakon o zemljiški knjigi})\(^{101}\) regulates the entry of the prohibition in the register. In such a case, a transfer of or charge on real estate is ineffective. In this respect, real estate is regarded as a ‘\textit{res extra commercium}’.\(^{102}\)

§ 364c ABGB has served as a model for the imposition of a total prohibition of transfers and submissions of property to charges and encumbrances, which is contained in Art. 38/II-IV SPZ.\(^{103}\)

1.5.2. Components, accessories, fruits

According to Art. 15/I SPZ, an asset is an independent physical object, which can be controlled by man.\(^{104}\) An asset’s \textit{component} is everything that, ‘according to the general opinion’, can be qualified as being a constituent part of an asset (Art. 16/I SPZ). The SPZ contains a uniform definition of the term ‘component’ and does not distinguish between essential and unessential components.\(^{105}\) Components share the legal

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\(^{100}\) Juhart in Juhart et al., Stvarno pravo (2007) 169.


\(^{104}\) Cf. Tratnik, Pojem stvari, njenih sestavnih delov in pritiklin, Pravna praksa 1999/29, 4 (6).

\(^{105}\) Cf. Tratnik, Pojem stvari, njenih sestavnih delov in pritiklin, Pravna praksa 1999/29, 4 (8); Juhart in Juhart et al., Stvarno pravo (2007) 64.
status of the asset to which they appertain. Components can become the object of a property right only after their separation from the principal asset (Art. 16/II SPZ). The general opinion is therefore substantial for the determination of the proprietary status of an object (i.e. by determining whether or not it is a component). The expression ‘general opinion’ will have to be put into concrete terms by academic opinion and judicature. This criterion is, at all events, fulfilled if the principal asset and the component are so firmly connected with each other that they cannot be separated without damaging either of them or both, or if the principal asset can be regarded as being incomplete or unfinished without the component (e.g. the wheel of the car).

The accessory is a movable, which is dedicated – ‘according to the general opinion’ – to the economic use or the embellishment of the principal asset (Art. 17/I SPZ), e.g. agricultural machines are, inter alia, the accessories of a farm. According to Tratnik, both criteria have to be determined objectively. According to Juhart, the relationship between the accessory and the principal asset has to be determined objectively and subjectively, especially in the case of the embellishment of the principal asset. The owner of the principal asset does not need to be owner of the accessory. Unlike a component, an accessory is an independent asset connected with the principal asset only functionally or spatially. On the contrary, components are installed in the principal asset or physically connected to it. In case of doubt, the accessory, as an independent asset, shares the legal status of the principal asset (Art. 17/II SPZ). If the owner of mortgaged real estate (principal asset) is not the owner of a certain accessory at the time of the creation of the mortgage, the mort-

108 Cf. Tratnik, Definicije osnovnih stvarnopravnih pojmov, Podjetje in delo 2000/6-7, 1436 (1442).
109 In regard to this and the following, see Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 16, 119 et seq.
111 Cf. Tratnik, Pojem stvari, njenih sestavnih delov in pritiklin, Pravna praksa 1999/29, 4 (8); Tratnik, Definicije osnovnih stvarnopravnih pojmov, Podjetje in delo 2000/6-7, 1436 (1444).
116 For the delimitation see Tratnik, Pojem stvari, njenih sestavnih delov in pritiklin, Pravna praksa 1999/29, 8.
gage does not extend to include this accessory. If the real estate owner acquires ownership of the accessory, the mortgage is automatically extended to include the accessory.\textsuperscript{119}

**Natural** (*fructus naturales*) and **civil fruits** (*benefits, fructus civiles*)\textsuperscript{120} are direct and indirect products of an asset. The regulations on the acquisition of fruits (Art. 59, 82, 83 SPZ) only apply to natural fruits (e.g. vegetables, milk, rocks from a quarry).\textsuperscript{121} The law of obligations applies to civil fruits (benefits), e.g. rent, interest.\textsuperscript{122} Until the separation from the principal asset is effected, fruits remain components of the principal asset; by virtue of separation they become independent assets (Art. 20 SPZ)\textsuperscript{123} and fall into the ownership of the owner, proprietary possessor in good faith, usufructuary or tenant of the principal asset.\textsuperscript{124}

2. **Possession**

2.1. **Notion of possession**

2.1.1. **Requirements**

Possession is the direct **actual control over an asset** (direct possession, Art. 24/I SPZ). The intention to hold an asset as one’s own (*animus rem sibi habendi*) is not mandatory; the actual control (*corpus possessionis*) is sufficient. The SPZ therefore follows the objective concept of possession,\textsuperscript{125} on which also the German *Bürgerliches Gesetzbuch* and the Swiss *Zivilgesetzbuch* are based. Again, the ‘general opinion’ is the relevant criterion to determine whether or not there is actual control.\textsuperscript{126} The following persons are regarded as possessors:\textsuperscript{127} Owner, thief, robber, tenant, leaseholder, lessee, pledgee pawning a movable, a person who exercises his right of retention\textsuperscript{128} over an asset.

\begin{itemize}
\item \textsuperscript{119}Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 17, 123.
\item \textsuperscript{120}Berden, Temeljni pojmi stvarnega prava, Pravna praksa 2003/24, 8; Juhart in Juhart et al., Stvarno pravo (2007) 71 et seq.
\item \textsuperscript{121}In this sense Vrenčar in Juhart et al., Commentary on the SPZ (2004) Art. 20, 130; Juhart in Juhart et al., Stvarno pravo (2007) 72. does not comment on it.
\item \textsuperscript{122}Vrenčar in Juhart et al., Commentary on the SPZ (2004) Art. 20, 130.
\item \textsuperscript{123}Juhart in Juhart et al., Stvarno pravo (2007) 71.
\item \textsuperscript{124}Judgment of the Supreme Court of Croatia no. Rev 423/82, 31.3.1982 (published in the Review of the Supreme Court of Croatia no. 21/82, 64).
\item \textsuperscript{125}Vrenčar in Juhart et al., Stvarno pravo (2007) 96 et seq.
\item \textsuperscript{126}Tratnik, Stvarnopravni zakonik (2002) 42; Tratnik in Berden et al., Novo Stvarno pravo (2002) 42.
\item \textsuperscript{127}Examples from Tratnik, Stvarnopravni zakonik (2002) 43.
\item \textsuperscript{128}Tratnik in Berden et al., Novo Stvarno pravo (2002) 45.
\end{itemize}
2.1.2. Forms of possession

(a) Direct and indirect possession

According to the SPZ, the possessor is the person who exercises direct actual control over an asset. If the possessor exercises this control personally, this is direct possession\(^{129}\) (Art. 24/I SPZ); if he exercises control over the asset through someone else, this is indirect possession. Art. 24/II SPZ provides that also a person, who exercises actual control over an asset through a person, the latter having obtained direct possession on the basis of a legal title (legal transaction or law),\(^ {130}\) is to be considered as being a possessor. The prerequisite for indirect possession is that there is a relationship of bailment between the direct possessor and the indirect possessor, e.g. a tenancy agreement (the lessor is indirect possessor, the tenant is direct possessor).\(^ {131}\) Other possible relationships, which relate direct with indirect possession, are:\(^ {132}\) Lease, lending of assets, transportation of an asset, contract of service, order contract, commission, commercial agency, brokerage contract, reservation of title, (non-possessory) transfer of ownership by way of security.

The relationship established between the direct and indirect possessor does not have to be legally valid.\(^ {133}\) What is substantial is that the indirect owner has the intention to bail (Besitzmittlungswille).\(^ {134}\) The direct owner must accept the overriding possession of the indirect owner.\(^ {135}\) For this reason, there is no corresponding relationship between the owner of an asset (who loses possession) and the thief of this asset (direct possessor).

(b) Possession of rights

The SPZ in particular only regulates the possession of tangible assets (Sachbesitz) but does not include regulations on the possession of rights.\(^ {136}\) This is due to the fact that, as a rule, the possessor of a right has direct

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\(^{130}\) Tratnik, Stvaropravni zakonik (2002) 45 et seq.


\(^{132}\) For examples see Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 24, 149.


\(^{134}\) Tratnik, Stvaropravni zakonik (2002) 45.

\(^{135}\) Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 24, 149.

\(^{136}\) According to Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 24, 149 this would not be incompatible with the objective concept of possession.
possession of the asset, to which his right relates. For example, a tenant possesses the right of tenancy and is, at the same time, the direct possessor of the asset which he has rented. As regards a non-possessor pledge, a (non-possessory) transfer of ownership by way of security or a reservation of title, it is assumed that the pledgee, the secured party and the vendor are indirect possessors; with respect to a real servitude, it is assumed that the party entitled to the servitude is the possessor of the immovable.

(c) Detention

According to the SPZ, the possessor is the person exercising actual control over an asset. In addition to this, the SPZ contains the term ‘detentor’. A detentor is the person exercising actual control over an asset for someone else and is obliged to follow the instructions of this person (Art. 26/I SPZ). Consequently, the prerequisites for detention are: The detentor has to exercise the control for someone else (= possessor) and an obligation to follow the latter’s instructions must exist. With respect to the asset, the detentor represents somebody else’s interests, the latter person being considered as the possessor of the asset. The obligation of the detentor to follow the possessor’s instructions in exercising control over the asset must be recognisable to third persons. Examples of detentors are: A shop assistant in a department store, a waiter in a restaurant, an employee generally, a child living in the same household with its parents and using assets owned by them, a nanny, a housekeeper, a cleaner, a guest using the host’s cutlery, a policeman or a soldier with respect to their service uniform.

A detentor is neither possessor, nor does he himself exercise control over the asset. This distinguishes the detentor, for example, from the tenant who himself exercises control over rented asset and who is as-

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142 Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 26, 167 contains the terms ‘possession master’ (Besitzherr) for the (direct) possessor, and ‘servant in possession’ (Besitzdiener) for the detentor.
sumed to be the direct possessor. This ‘independent position’ of direct possession distinguishes the possessor from the detentor. The control exercised by the detentor is of ‘inferior quality’ in comparison with the control exercised by the possessor.

This extensive definition of the term ‘possession’, based on the objective concept – ‘corpus is sufficient, animus is not required’ – in the end leaves little space for detention.

The detentor neither has the legal protection of possession vis-à-vis the possessor nor vis-à-vis a third person. According to Art. 26/II SPZ, the detentor nevertheless has the right of self-redress (Art. 31 SPZ), which he is entitled to exercise while acting on orders of the possessor. The detentor has no right of self-redress vis-à-vis the possessor.

The presumption that a proprietary possessor (possessor who intends to own; Eigenbesitzer) is the owner of a movable (Art. 11/II SPZ) cannot be applied to the detentor. An acquisition of ownership in good faith (Art. 64 SPZ) is impossible, because the detentor is not a person to whom the owner has transferred an asset for the purposes of the former’s exercise of direct possession for the latter.

(d) ‘Proprietary possession’

Analogous to the German Bürgerliches Gesetzbuch, the terms ‘proprietary possession’ (‘Eigenbesitz’) and ‘possession in another’s interest’ (‘Fremdbeisitz’) were introduced into the SPZ. A proprietary possessor is a person, who possesses an asset as if it was his own (Art. 27/I SPZ). A possessor in another’s interest is a person, who possesses an asset although he has no intention to own it, and who acknowledges the greater legal power of the indirect possessor (Art. 27/II SPZ). The intention of

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145 Referring to this, see Vrenčar, Varstvo posredne in neposredne posesti ter detencije, Pravnja praksa 1999/23-24, 18 and concerning the legal position before the introduction of the SPZ, see Vrenčar, Posredna in neposredna posest stvari, Podjetje in delo 1999, 1040.
147 Tratnik in Berden et al., Novo Stvarno pravo (2002) 44.
149 Vrenčar in Juhart et al., Stvarno pravo (2007) 118 et seq.
153 According to Tratnik in Berden et al., Novo Stvarno pravo (2002) 46, the terms ‘proprietary possession’ and ‘possession in another’s interest’ is equivalent to the terms ‘possession of property’ and ‘possession of rights’, due to the influence of Austrian law.
154 Cf. Vrenčar, Lastniška posest, Podjejte in delo 2000/6-7, 1454.
the possessor is substantial. Anyone acting like an owner or believing to be the owner, notwithstanding whether or not he is actually the owner, is a proprietary possessor. Thus, also a thief is a proprietary possessor. The distinctions between ‘proprietary possession’ and ‘possession in another’s interest’ can (but do not necessarily have to) correspond to the distinction between the ‘direct possessor’ and the ‘indirect possessor’ (Art. 24 SPZ). This means that the proprietary possessor does not necessarily have to be the direct possessor. Thus, the lessor of an asset is an indirect proprietary possessor; on the contrary, the tenant is a direct possessor in another’s interest.

As the distinction between proprietary possession and possession in another’s interest is based on the intention to hold an asset as one’s own (animus possidendi), the implementation of this distinction is, according to Tratnik – and unlike Vrenčur – a return to a subjective concept of possession.

Art. 9 SPZ includes the general principle that good faith is presumed until the contrary has been proved. Art. 28 SPZ contains a regulation concerning the good faith of the possessor. The possessor is in bad faith, if he knows or should have known that he is not entitled to possession. The term ‘should have known’ refers to the negligence of the possessor. In pertinent literature, no analysis has been made on whether good faith is already excluded by reason of slight negligence. The definition of bad faith applies to the proprietary possessor as well as to the possessor in another’s interest, although the SPZ presupposes good faith only for the proprietary possessor in its other provisions. The possessor’s good faith

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156 Tratnik in Berden et al., Novo Stvarno pravo (2002) 44.
157 Cf. Vrenčur, Lastniška posest, Podjetje in delo 2000/6-7, 1455.
159 In Juhart et al., Commentary on the SPZ (2004), Introduction 143. According to Vrenčur, the direct possessor in another’s interest (e.g. tenant) is not a possessor of rights, but a proprietary possessor who exercises direct control over an asset, nevertheless respecting the greater legal power of the indirect possessor.
160 Tratnik in Berden et al., Novo Stvarno pravo (2002) 47. The ‘proprietary possessor’ according to the objective concept corresponds to the ‘possessor’ according to the subjective concept, while the ‘possessor in another’s interest’ and the detentor according to the objective concept correspond to the detentor according to the subjective concept; Tratnik, Pridobitev lastninse pravice s priposestovanjem, Pravna praksa, Priloga 2003/42-43, I (V).
161 Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 28, 178, discusses the ‘negligent ignorance’ of specific circumstances, which precludes possession in good faith.
162 Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 28, 178; Tratnik, Stvarnopravni zakonik (2002) 48. A good faith possessor in another’s interest (e.g. tenant) is a person, who does not know and did not have to know, that he had no right to possess the asset.
is substantial for the possibility to acquire a right of ownership by adverse possession (Art. 43 SPZ),\textsuperscript{163} the possibility to acquire a servitude (Art. 217 SPZ), for the right to keep the separated fruits (Art. 59/II SPZ),\textsuperscript{164} for the owner’s ‘rei vindicatio’ claims (Art. 95 SPZ), for the ‘actio publicana’ (Art. 98 SPZ) and for the ‘actio negatoria’ (Art. 99 SPZ).

\textbf{(e) Keeping possession}

According to Art. 24/I SPZ, the term ‘possession’ means the direct control over an asset (direct possession). The ‘exercise of direct control’, however, does not have to be understood literally. The owner does not necessarily have to be in permanent physical contact with the asset. It is substantial that he is capable of exercising control.\textsuperscript{165}

\textbf{(f) Taking possession}

The person who takes possession of an asset with the intention to acquire its ownership, acquires ownership if a movable, which has been abandoned (= has no owner), is concerned, unless the law provides otherwise (Art. 50 SPZ). The prerequisite for such an acquisition of ownership are, therefore, the acquisition of possession and the intention to own, the latter being manifested in the taking of possession of the movable as a proprietary possessor (cf. Art. 27 /I SPZ). The acquisition of possession may be effected directly by a ‘finder’, or, on his behalf, by another person (here, the ‘finder’ is the indirect proprietary possessor; the acquirer of possession for the ‘finder’ is a direct possessor in another’s interest).\textsuperscript{166} The direct acquisition of the possession of an asset, which is not controlled by anyone, can be considered in relation to a ‘res nullius’ and a ‘res derelicta’. Wild animals (e.g. deer, rabbits, and fish) are no examples of ‘res nullius’, because they are the property of the Republic of Slovenia. Therefore, fishing and hunting do not have any connection to the occupation according to Art. 50 SPZ.\textsuperscript{167}

For the transfer of possession, see 2.3.

\textsuperscript{163} Vrenčur in Juhart et al., Stvarno pravo (2007) 111.
\textsuperscript{164} Vrenčur in Juhart et al., Stvarno pravo (2007) 111.
\textsuperscript{165} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 24, 148, mentioning the following example: The real estate owner, who has spent several years abroad does not thereby lose his status as a possessor.
\textsuperscript{166} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 50, 290.
\textsuperscript{167} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 50, 291.
The SPZ does not include the term ‘possession of rights’ (‘Rechtsbesitz’).\textsuperscript{168}

2.2. Functions of possession

The functions of possession are discussed in relation to movables.\textsuperscript{169}

In principle, the transfer of the possession of an asset is the mode of the acquisition of a property right (\textit{function of transfer}).\textsuperscript{170} The acquisition of the ownership of movables can be realised by actual delivery (‘\textit{traditio vera}’, Art. 60/I SPZ), symbolic delivery (Art. 60/II SPZ), ‘\textit{brevi manu traditio}’ as well as the ‘\textit{constitutum possessorium}’ (Art. 60/III SPZ) and the ‘\textit{longa manu traditio}’ (Art. 60/IV SPZ).

According to Art. 11/II SPZ, it is presumed that the proprietary possessor (cf. Art. 27/I SPZ) of a movable is its owner (\textit{presumptive function}). This is equally presumed if the proprietary possessor is in bad faith. The possessor is in bad faith if he knows or should have known that he is not entitled to possession (Art. 28 SPZ).

The possibility to acquire in good faith from a person not entitled to dispose of possession has the effect of ‘authorising’ the latter to dispose. An acquirer in good faith may assume that the person delivering an asset is the owner of it (\textit{function of good faith}, Art. 64 SPZ).

Proprietary possession in good faith (Art. 27/I SPZ and Art. 28 SPZ) is the prerequisite for the acquisition of a movable by way of acquisitive prescription (Art. 43/II SPZ).

The proprietary possessor in good faith or the possessor in another’s interest (\textit{e.g.} the leaseholder or the usufructuary) acquires ownership of the fruits after their separation from the principal object (Art. 59/II SPZ).

In the context of an owner’s ‘\textit{rei vindicatio}’ claim, a distinction between a good faith proprietary possessor’s counter-claim (Art. 95 SPZ) and the counter-claim brought by a possessor in bad faith (regardless of whether he is a proprietary possessor or a possessor in another’s interest; Art. 96 SPZ) has to be made.

The ‘\textit{actio publiciana}’ or the ‘\textit{actio negatoria}’ are reserved for the proprietary possessor in good faith (Art. 98 and 99 SPZ).

\textsuperscript{168} Vrenčur in Juhart et al., Stvarno pravo (2007) 97.


\textsuperscript{170} Vrenčur in Juhart et al., Stvarno pravo (2007) 99 et seq.
2.3. Acquisition of possession

The *derivative acquisition of direct possession* presupposes an intention to deliver, an intention to acquire possession and the delivery of the asset. The capacity to contract is not required with regard to the intention to acquire possession.\(^{171}\) Possible modes of delivering direct possession are physical delivery, symbolic delivery or the ‘*traditio brevi manu*’.

A *derivative acquisition of indirect possession* of a movable occurs\(^{172}\) when the direct possessor transfers direct possession to another person (e.g. by a tenancy agreement, lease contract, reservation of title); in the case of the acquisition of possession by a representative (Art. 62 SPZ), by way of ‘*constitutum possessorium*’ or by ‘*traditio longa manu*’.

An *original acquisition* of possession takes place when the acquirer obtains the actual control over the asset.

2.4. Judicial protection of possession

In the context of possession, the SPZ contains provisions on self-redress (Art. 31 SPZ) and the judicial protection of possession (Art. 32-34 SPZ).

The possessor can seek the *judicial protection* of his possession disturbance or an unlawful seizure of his possession.\(^{173}\) This right is available to the direct as well as to the indirect possessor *vis-à-vis* third persons, who disturb or seize possession. The defendant is not only the person who has directly disturbed the possession of the plaintiff, but also a person who ordered such a disturbance and benefited from it.\(^{174}\) As concerns the legal relationship between the direct and the indirect possessor, the direct possessor can demand judicial protection from interfering acts committed by the indirect possessor; also, the indirect possessor can seek such protection from interfering acts committed by the direct possessor.\(^{175}\)

The possessor has to bring action not later than 30 days after having obtained knowledge of the disturbance and the identity of the interferer, but, at the latest, one year after the occurrence of the disturbance. Although possession is not a right but rather the actual control over an asset, it has to be protected against arbitrary disturbance or the arbitrary

\(^{171}\) Tratnik, Stvaropravni zakonik (2002) 50.


2. Possession

Judicial protection of possession is granted referring to the status existing before the disturbance. The legitimacy of possession and the good faith of the possessor are not the subject of such proceedings. Rather, the purpose of these is the provisional protection of an existing status. Therefore, the possessor who has obtained the possession of an asset by force, deceit or secrecy, is also protected. This regulation does, however, not apply against the “interferer” (= the former possessor), from whom the possessor has acquired possession by force, deceit or secrecy, if the “interferer” (the former possessor) has regained possession by regular self-redress. Moreover, the possessor is granted no judicial protection of possession, if the disturbance or seizure of the possession is lawful. As measures of the judicial protection of possession, the court orders the prohibition of further disturbances, the return of the seized asset, or other measures which are necessary for granting effective protection from further disturbances.

Notwithstanding the judicial protection of possession, a petitory action is permitted on the basis of the ‘right of possession’ (Art. 36 SPZ). Both proceedings in court – based on the possessory and petitory act – can take place at the same time.

2.5. Self-redress (self-help)

The basic type of the protection of possession is the judicial protection of possession. The **right of self-redress** (Art. 31 SPZ) is, however, provided as an exception and has to be interpreted in a restrictive way. The owner has the right of self-redress if somebody unauthorisedly disturbs his possession or unauthorisedly seizes his movable. This right is granted to the direct as well as to the indirect possessor _vis-à-vis_ a third person who disturbs or seizes the possession. Apart from the possessor, also the detentor of an asset is entitled to exercise the right of self-redress against the interferer for the benefit of the possessor (Art. 26/II SPZ). As to the relation between the direct and the indirect possessor, the direct possessor can demand judicial protection from the indirect possessor’s interfer-

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ing acts; equally, the indirect possessor can demand judicial protection from the direct possessor’s interfering acts.181

However, the exercise of self-redress is only lawful if, furthermore, the following prerequisites are satisfied cumulatively:182 Existence of a direct danger, self-redress must be exercised immediately, the exercise of self-redress must be necessary and the way of exercising it must be proportionate to the danger. If one of the prerequisites is missing, the exercise of self-redress will constitute an inadmissible intervention with a third person’s possession.183

3. Obligatory rights – rights in rem

3.1. Basic characteristics

According to Art. 2 SPZ, there is a limited number of property rights (numerus clausus).184 The parties can neither create new property rights nor change the contents of existing property rights.185 Rights in rem (= property rights) are absolute rights; as such, they are effective against everyone (erga omnes effect, Art. 5 SPZ).186

Obligatory rights are only effective between the parties to a contractual relationship (inter partes effect).187 However, some obligatory rights can be entered in the land register and, thus, attain absolute effect.188 Due to the entry in the land register, the basically relative obligatory rights achieve an absolute effect to a limited extent (obligatio in rem scripta).189 The entry in the register, however, does not change their status as obligatory rights.190

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188 Rijavec, Sachenrechtsreform in Slowenien 821 (830) in Österreichische Notariatskammer (editor), Freiheit, Sicherheit, Recht, Notariat und Gesellschaft, Festschrift Georg Weissmann (2003); See question 3.
189 Tratnik, Stvarnopravni zakonik in obligacijsko pravo, Podjetje in delo 2002/6-7, 1392 (1396 ff.).
3.2. Tenancy and lease

According to Art. 13/II Land Registry Act (Zakon o zemljiški knjigi), the following obligatory rights in immovables can be entered in the land register: The tenancy, the lease, the right of pre-emption and the right of re-purchase. The principle of publicity applies to an ‘obligation in rem scripta’ as well as to property rights. Consequently, a specific obligatory right also binds the future acquirer of an immovable, if it was entered in the land register (positive principle of publicity). If the obligatory right (tenancy, lease, the right of pre-emption and repurchase) was not entered in the land register, it is not effective against a third person in good faith (negative principle of publicity). This means that if a third person knows of the right or should have known of it, it is also binding on him, even though it was not entered in the land register.

The right of tenancy and the right of lease are regulated uniformly as to movables and immovables in Art. 587 et seq. Code of Obligations. The tenancy agreement and the lease contract are pecuniary contracts according to the definition in Art. 587/I Code of Obligations.

According to Art. 13/II/2 Land Registration Act (Zakon o zemljiški knjigi), the entry in the register of a right of tenancy or a right of lease in an immovable is possible. The requirement of the tenancy or lease having to run for a minimum term, as a prerequisite for its entry in the land register, is not imposed by the Land Registration Act. Also, no differentiation on the basis of whether such a legal relationship is temporary or permanent is made.

As the right of lease or the right of tenancy in a movable or immovable is, according to the provisions of the Code of Obligations, not only effective between the parties, the publicity achieved by entering the tenancy or lease agreement in the land register and, therefore, also the positive and negative principle of publicity, is of subordinate importance. If the leaseholder or tenant has already taken possession of the rented or leased (movable or immovable) asset, his right of lease, or right of tenancy, is also effective against the acquirer of the rented or leased asset; the acquirer enters into the tenancy or lease agreement by virtue of the legal provisions (Art. 610 Code of Obligations). However, if the asset is not delivered to the tenant or the leaseholder but rather to the acquirer, the latter only enters into the agreement if he had knowledge of the existence of the tenancy or lease agreement at the time of the conclusion of the sales agreement (Art. 612 Code of Obligations). If the right of...

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193 Vrenčur in Berden et al., Zemljiškoknjižno pravo (2002) 84 et seq.
lease or tenancy in an immovable has already been entered in the land register, the acquirer is deemed to already have knowledge of this right.  

3.3. Right of pre-emption

The owner of a movable or immovable asset (vendor) binds himself by contractually agreeing on a right of pre-emption, which comprises the owner’s duty to inform the pre-emptor of his intention to sell the asset to an identified third person, thereby having to offer the asset to the pre-emptor on the same terms/conditions, which apply to the third person (Art. 507 Code of Obligations). The right of pre-emption is non-hereditary and non-transferable, unless the law provides otherwise. A right of pre-emption can also be agreed on as an individual contract or together with a lease contract concerning the asset which is the object of the right of pre-emption. A right of pre-emption can be agreed on for money or gratuitously. The parties are entitled to limit the scope of the right of pre-emption. If the parties did not agree on the duration of the right of pre-emption, the right expires five years after the conclusion of the contract (Art. 511 Code of Obligations).

The entitled party can demand the dissolution of the contract and the sale of the asset to him (on equal terms) within six months from the day on which he gained knowledge of the contract of sale (Art. 512/I Code of Obligations), if the obliged party (vendor) had sold and transferred the right of ownership in the asset to a third person without notifying the pre-emptor, and if the third person knew or should have known of the right of pre-emption. This right itself expires, at all events, five years after the transfer of ownership to a third party (Art. 512/III Code of Obligations).

According to Art. 13/II/2 Land Registration Act (Zakon o zemljiški knjigi), the entry of a contractually agreed right of pre-emption in an immovable in the land register is possible. The principle of publicity applies if the right of pre-emption has been entered in the land register. A registered right of pre-emption, however, does not constitute a total prohibition on the transfer of the immovable; this has to be taken into account by a land registry court. This regulation only applies to rights of pre-emption in immovables, which serve the public benefit (Art. 38/III

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197 Cf. Vrenčur, Vpisovanje obligacijskih pravic v zemljiško knjigo, Pravna praksa, Priloga 2006/26, VIII (IX).
3. Obligatory rights – rights in rem

Land Registry Act). According to Art. 512/I Code of Obligations, the party holding a right of pre-emption in relation to an immovable can claim for the rescission of the existing sales contract, as well as for the conclusion of a sales contract between himself and the vendor (on equal terms). This right itself expires, at all events, five years after the transfer of ownership to a third party has been effected (Art. 512/III Code of Obligations).

If the right of pre-emption in relation to an immovable was entered in the land register and if the person holding such a right of pre-emption is not summoned to a compulsory sale by auction, he can claim for the cancellation of the auction (Art. 510 Code of Obligations).

3.4. Right of re-purchase

The owner can agree to purchase a specific (movable or immovable) asset under the agreed conditions to a third party on demand. As a result, this is a restriction of the right of ownership by the owners intention. The right of repurchase is non-transferable and non-hereditary; it expires with the death of the either party to the agreement, although the right can be temporally limited (Art. 38/V SPZ). According to Art. 13/II/3 Land Registration Act (Zakon o zemljiški knjigi), the entry of a contractually agreed right of repurchase in an immovable in the land register is possible. By virtue of such an entry, a right of repurchase in an immovable is also effective against third parties (Art. 38/VI SPZ). A right of repurchase entered in the land register does not impede the transfer of ownership of an immovable. However, the right of repurchase, which is entered in the land register, is effective against a subsequent acquirer of the immovable; the party, who has been granted the right of repurchase, can still exercise his right and thereby alter a third party’s legal position by virtue of a mere unilateral declaration.

203 Cf. Vrenčur, Vpisovanje obligacijskih pravic v zemljiško knjigo, Pravna praksa, Priloga 2006/26, VIII (IX).
4. Fields of application and definitions

4.1. ‘Asset’

The object of a property right (‘right in rem’) – therefore, also the right of ownership – is an asset\(^{206}\) (Art. 3/I SPZ). According to the legal definition in Art. 15/I SPZ, an asset is an independent\(^{207}\) physical object, which can be controlled by man. The qualification of an object as an ‘asset’ (in the meaning of the SPZ) is dependent on the fulfilment of two prerequisites: An asset must be a ‘physical object’ and the ‘control of the object’ must be possible. ‘Control of the object’ means that a person is capable of committing acts related to the possession of the asset.\(^{208}\)

**Incorporeal objects** do not fit in this definition; for this reason, rights cannot be qualified as ‘assets’ in the meaning of Art. 15/I SPZ.\(^{209}\) Intellectual creations such as computer programs (software), compositions, paintings or literary works are not regarded as assets in the meaning of the SPZ. However, as a rule, intellectual creations are materialised in the form of CDs, books or tape recordings and these data carriers can be qualified as assets.\(^{210}\)

**Animals** are assets according to the SPZ.\(^{211}\)

According to Art. 15/II SPZ, the term ‘asset’ is extended to cover various forms of the energy as well as mere vibrations (waves), which can be controlled by man. The requirement of an asset having to be a ‘physical object’ is not applicable in this case. It is the possibility to ‘control of the object’ that is required\(^{212}\). Examples:\(^{213}\) Electricity, radio waves or telephone impulses.

As **rights** are not assets pursuant to the SPZ (because they are not physical objects); in principle, therefore, they cannot be the object of a property right (exception: Art. 3/II SPZ); a right cannot be owned, but merely held.\(^{214}\) Claims are transferred from the assignor to the assignee by

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\(^{206}\) The term ‘asset’ coincides with the term ‘thing’.

\(^{207}\) According to the speciality principle (Art. 7 SPZ), only individually identifiable assets can be the object of a property right, unless the law provides otherwise.


\(^{209}\) Tratnik, Stvarnopravni zakonik (2002) 36. For Art. 3/II SPZ see below.


\(^{214}\) Berden, Temeljni pojmi stvarnega prava, Pravna praksa 2003/15-16, 11; Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 22, 136; which states that this should not be confused with detention in the meaning of Art. 26 SPZ; Juhart in Ju-
way of assignment. In principle, the assignment is regulated in Art. 417-426 Code of Obligations. However, the SPZ regulates the transfer of claims for security purposes (fiduciary assignment) in Art. 207-209 SPZ. The provisions of the Code of Obligations can be applied to an fiduciary assignment analogously. As concerns the transfer of security rights, one has to distinguish between bearer securities (bearer bonds), registered securities and instruments payable to order. The right in a bearer security is transferred by the delivery of the paper (Art. 218 Code of Obligations). The right in a registered security is transferred by assignment. However, a ‘lex specialis’ determines that this right can also be transferred by endorsement (Art. 219/I and II Code of Obligations). Rights in order papers are transferred by endorsement (Art. 220 Code of Obligations).

In principle, only assets (physical objects, which can be controlled) can be the object of a property right (Art. 3/I SPZ). However, Art. 3/II SPZ makes an exception in that pecuniary rights can also be the object of a right of pledge (‘pledge in rem’) and a right of usufruct, which means that it is possible to establish a right of pledge\(^{215}\) or right of usufruct in pecuniary rights. As far as a pecuniary right is the object of a property right, the provisions on assets can be applied analogously (Art. 3/III SPZ). In the context of the SPZ, a pecuniary right is defined as a right, which is transferable and can be valued in money (Art. 22 SPZ). This is the case with claims, pecuniary rights in incorporeal assets (e.g. intellectual property rights), rights in company shares (e.g. shares in a private limited company, a limited partner’s interests) and author rights.\(^{216}\) Consequently, rights that are – by their nature – closely connected with the person holding them are excepted.

It is controversial, whether Art. 3/II SPZ has to be interpreted strictly. According to \textit{Tratnik},\(^{217}\) the regulation must not be interpreted literally. He advocates the opinion that a right of pledge and a right of usufruct can be established in all pecuniary rights and that the building lease, when seen as a pecuniary right,\(^{218}\) could also be object of an encumbrance (\textit{zemljiški dolg}) or land charge (\textit{stvarno breme}). According to \textit{Juhart},\(^{219}\) however, only two types of property rights can be established in pecuniary rights, namely the right of pledge and the right of usufruct.


\(^{217}\) \textit{In Juhart et al., Commentary on the SPZ (2004) Art. 3, 76 et seq.}

\(^{218}\) By virtue of Art. 2 SPZ, the building lease belongs to the group of property rights.

The SPZ regulates the pledge rights (Art. 178-186 SPZ), the pledge over securities (Art. 187-189 SPZ) and the pledge over other pecuniary rights (Art. 190-191), e.g. rights in company shares or author rights. The pledge over dematerialised securities is regulated by the Dematerialised Securities Act (Zakon o nematerializiranih vrednostnih papirjih – Art. 43-48).

The right of usufruct in assets and pecuniary rights is regulated in Art. 230 et seq. SPZ.

4.2. Movables – immovables

In principle, as mentioned already, the SPZ contains a narrow definition of the term ‘asset’. The term only includes independent physical objects that can be controlled by man (Art. 15/I SPZ). Movables, as well as immovables, can be considered to be physical objects. The SPZ contains a legal definition of the term ‘immovables’. According to Art. 18/I SPZ, immovables are spatially measured parts of the earth’s surface, as well as all of the latter’s contents. This definition is based on the principle ‘superficies solo cedit’ (Art. 8 SPZ): Everything that is intentionally and durably connected to an immovable or is durably situated on an immovable, as well as above or below it, is a component of the immovable unless the law provides otherwise. An express mention of components in Art. 18/I SPZ would not have been necessary, as Art. 8 SPZ and Art. 16 SPZ already determine that components share the ‘legal fate’ of the immovable. The term ‘immovables’ coincides with the term ‘real estate’ or ‘plot’ in the meaning of the Land Registration Act.

All other assets, which are not immovables, are regarded as movables (Art. 18/II SPZ).

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222 Cf. Tratnik, Definicije osnovnih stvarnopravnih pojmov, Podjetje in delo 2000/6-7, 1436 (1446); on the legal position before the introduction of the SPZ Juhart, Pojem nepreminčine in načelo superficies solo cedit, Podjetje in delo 1995, 560.
223 According to Juhart in Juhart et al., Stvarno pravo (2007) 68 this definition is incomplete.
224 Art. 16/I SPZ: A component is everything that is/forms part of an asset by virtue of the ‘general opinion’.
In some cases, the **distinction** between movables and immovables is of importance. Examples: The general provisions on the acquisition of ownership apply to movables as well as immovables (Art. 39-46 SPZ); Art. 47-49 SPZ are only applicable to the acquisition of ownership of immovables; Art. 50-64 SPZ are only applicable to the acquisition of ownership of movables. Comparable regulations exist for the acquisition of pledges: Art. 128-137 SPZ contain common provisions for movables and immovables; Art. 138-154 SPZ regulate the mortgage, Art. 155-177 SPZ the acquisition of pledges over movables. The period of acquisitive prescription is 3 years for movables and 10 years for immovables (Art. 43 SPZ). Only movables can be acquired in good faith (Art. 64 SPZ). The provisions on the transfer of ownership by way of security (*fiducia cum creditore contracta*, Art. 201-206 SPZ) and those on the reservation of title (Art. 520 and 521 Code of Obligations) only apply to movables.

For ‘registered movables’ see 5.5.
5. Transfer of ownership

5.1. Basic characteristics and overview

5.1.1. Unitary concept

The object of the right of ownership is an asset. An asset is an independent, physical object, which can be controlled by man. The right of ownership entitles the owner to possess the asset, to use it and to dispose of it. The acquirer of an asset also obtains these competences, if the following prerequisites are fulfilled: The negotiability of the asset, the capability of the acquirer to acquire the asset, a title for the acquisition of ownership.228 Possible titles for the acquisition of the right of ownership are, according to Art. 39 SPZ, the legal transaction (Art. 40 SPZ), succession (Art. 41 SPZ), the decision of a public authority (Art. 42 SPZ) or the law itself. Due to the ‘numerus clausus’, the parties cannot create additional legal titles.229 If a legal transaction is the basis for an acquisition of a right of ownership, then the competences arising from a right of ownership are transferred to the acquirer as soon as the prerequisites are fulfilled.230 Neither the division of the acquisition into its separate stages nor the division of the right of ownership into its constituent competences is provided for in the SPZ.

5.1.2. Different rules for different titles

Depending on the title for acquiring the right of ownership (legal transaction, provision of law, succession or a decision by a public authority), different provisions are applied as to the acquisition; the differences be-

tween the titles themselves justify such a differential treatment. If the acquisition of ownership is based on a legal transaction (executory transaction), in principle, Art. 40 and 60 SPZ are applicable to movables, Art. 40 and Art. 49 SPZ to immovables.

In the following examples, the acquisition of the right of ownership is based on provisions of law: Acquisitive prescription (Art. 43-46 SPZ), finding lost property (Art. 51 and 52 SPZ), and good faith acquisition (Art. 64 SPZ).

The acquisition of the right of ownership by succession constitutes a derivative universal succession. According to Art. 41 SPZ, the acquisition of the right of ownership takes place ‘ipso iure’ at the moment of the decedent’s death. The fulfilment of further prerequisites is not necessary to effect the transfer of the right of ownership.

If the decision of a public authority is the legal basis for the acquisition, Art. 42 SPZ provides that the acquisition of the right of ownership occurs by virtue of a corresponding final judicial decision, or by virtue of a final decision arrived at by an administrative body, unless the law provides otherwise (Art. 42 SPZ). The decision of a public authority has constitutive effect.

5.1.3. Basic transfer requirements

Two contracts are required for the transfer of the right of ownership, if it is to occur by way of legal transaction (principle of division – Trennungsprinzip). The executory transaction (underlying obligation) and the

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231 Cf. chapter 13.
232 Tratnik in Juhart et al., Stvarno pravo (2007) 266 et seq.
233 Cf. chapter 12.
234 Legal succession or testamentary succession; Tratnik in Juhart et al., Stvarno pravo (2007) 292 et seq.
236 Cf. Rijavec, Stvarnopravni zakonik in dedno pravo, Podjetje in delo 2002/6-7, 1373.
238 E.g. the transfer of the asset as a result of a forced sale or in a case of bankruptcy. Cf. Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 42, 256 et seq.
240 In this case, an acquisition of ownership may also occur against the will of the previous owner.
242 There is no exception to this rule; cf. Tratnik in Juhart et al., Stvarno pravo (2007) 224 et seq.
disposition\textsuperscript{244} (real agreement).\textsuperscript{245} The \textbf{executor transaction} establishes an obligation to transfer ownership\textsuperscript{246} and represents the title ('titulus') for the transfer. The \textbf{disposition} is the agreement (in property law) between the transferor and the acquirer that a right of ownership shall pass. The disposition is causal (Art. 40 SPZ).\textsuperscript{247} If the executory transaction is not valid, the right of ownership cannot be transferred.\textsuperscript{248} Due to the applicability of the principle of publicity in relation to movables, the delivery of the asset ('\textit{traditio}') to the acquirer is required. The prerequisites for an acquisition of ownership by way of legal transaction are a valid obligatory act (executor transaction or \textit{causa traditionis}), an agreement of the parties to transfer the right of ownership, as well as the compliance with 'further regulations' provided by law and the power of disposal\textsuperscript{249} of the person delivering the asset.\textsuperscript{250} The term 'further regulations' refers to delivery as being a 'real act', \textit{i.e.} the outward manifestation of a disposition of movables. The delivery ('\textit{traditio vera}'), in its quality of being a 'real act', is evident to third parties and ensures the publicity of property law relationships.\textsuperscript{251}

The \textbf{full payment of the purchase price} is not a prerequisite for a transfer of the right of ownership by way of legal transaction. The seller and the purchaser can, however, agree on a reservation of title.\textsuperscript{252} The seller delivers the asset to the buyer, but remains the owner of the asset until full payment of the purchase price has been made. Where no reservation of title has been agreed upon, the seller can repudiate the sales contract for non-payment of the purchase price. The repudiation of the

\textsuperscript{243} Below, the term 'executor transaction' is used (German: '\textit{Verpflichtungsgeschäft}') according to Romain/Byrd/Thielecke, Dictionary of Legal and Commercial Terms, 4th edition, C.H.Beck – Helbing & Lichtenhahn – Manz, 2002.

\textsuperscript{244} Below, the term 'disposition' is used (German: '\textit{Verfügungsgeschäft}') according to Romain/Byrd/Thielecke, Dictionary of Legal and Commercial Terms, 4th edition, C.H.Beck – Helbing & Lichtenhahn – Manz, 2002.

\textsuperscript{245} Tratnik, Stvarnopravnik zakonik, Pravna praksa, Priloga 2002/36, I (IV).

\textsuperscript{246} Judgment of the Supreme Court of Republic of Slovenia no. II Ips 821/94, 16.5.1996.

\textsuperscript{247} Concerning the discussion cf. Sladić/Sladić, K razpravi o novem Stvarnopravnem zakoniku, Pravna praksa 2001/19, 35. Concerning the advantages and the disadvantages of the causal or abstract tradition cf. Tratnik/Vrenčur, O sistemu abstraktno ter kavzalne tradicije v stvarnem pravu, Pravnik 1999, 6-8, 333.


\textsuperscript{249} Tratnik in Juhart et al., Stvarno pravo (2007) 224, 239 et seq.

\textsuperscript{250} Tratnik, Stvarnopravni zakonik (2002) 1; Tratnik in Juhart et al., Stvarno pravo (2007) 224.

\textsuperscript{251} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 68, 71.

\textsuperscript{252} Art. 63 SPZ, Art. 520, 521 Code of Obligations.
sales contract has the consequence that no valid acquisitive title has been passed to the purchaser; therefore, the seller can demand the restitution of the asset.

5.2. General issues

5.2.1. Identification of the movables

The speciality principle applies to dispositions. As to the executory transaction, it is sufficient if the object of the obligation is determined or determinable (Art. 34/II Code of Obligations). In the case of an indeterminate obligation (genus), unascertained goods have to be appropriated in order to treat the obligation as a determinate one (species). Pending such appropriation, the principle ‘genus perire non censetur’ has to be applied. The appropriation, at all events, takes place when the debtor performs; i.e. when the debtor delivers the asset to the creditor (e.g. purchaser).

As to the place of performance, in a case of doubt, the domicile of the debtor (seller) is relevant (Art. 451 Code of Obligations in the context of a contract of sale). The time of delivery also determines when the risk under the contract passes. For the contract of sale, Art. 436/I Code of Obligations (optional) provides that, until delivery of the asset has been made, the vendor bears the risk of accidental deterioration or destruction; however, with the delivery of the asset the risk passes to the purchaser.

Concerning the case of the purchaser’s default, Art. 301/I Code of Obligations provides that the risk of accidental deterioration or destruction shall pass to the purchaser. When generic goods (genus) are the object of a contract, these have to be identified so that it can be determined which of these goods were specifically allocated to the performance of the contractual obligation (delivery).

If, in the case of a sales contract, a movable was not delivered because the buyer was in default, the risk shall pass to the buyer at the moment at which he starts defaulting (Art. 437/I Code of Obligations). When specified assets (species) are the object of a contract and the purchaser defaults under the contract, the risk shall pass to the purchaser at the moment at which the vendor has segregated the assets that are to be delivered to the, now defaulting, purchaser, and has notified the purchaser of this segregation (Art. 437/II Code of Obligations). The notification contains the communication of the accomplishment of the segregation and of the

place where the object of the contract is located. The delivery of the notification must precede an accidental damage or destruction of the asset.\footnote{Juhart in Juhart/Plavšak, Code of Obligations with Commentary (2003) Art. 437, 78.} Art. 437/III Code of Obligations specifically regulates unascertained goods (\textit{genus}), in respect of which – due to the nature of the asset(s) to be transferred – a segregation, and thus an appropriation, is not possible in a case when the purchaser is in default. Examples are liquids or gases, which cannot be decanted into smaller units. In order for the risk to pass, it is sufficient that the vendor does everything necessary to enable the purchaser to take delivery of the asset and informs the purchaser of the possibility of taking delivery. The burden of proving that an appropriation by way of segregation was not possible is on the vendor.\footnote{Juhart in Juhart/Plavšak, Code of Obligations with Commentary (2003) Art. 437, 78.}

5.2.2. Party autonomy

In part 1 (Art. 1-14) of the SPZ, the principles of property law are specifically laid down. The principle of party autonomy is not expressly mentioned. According to Art. 5 SPZ, the holder of a property right can assert his right against anyone. This provision requires that the property right in question is discernible to third parties; this is a statutory prerequisite for the establishment and transfer of a property right. The publicity of the property right requires a delivery (‘\textit{traditio}’) in the case of movables, and an entry in the land register in the case of immovables.

Art. 2 SPZ contains an exhaustive list of property rights (‘\textit{numerus clausus}’), as these have an absolute effect (Art. 5 SPZ). The parties, therefore, are not entitled to create any new property rights. Also, the content of property rights is determined by law; therefore, the parties only have limited possibilities to modify property rights (e.g. concerning servitudes). Thus, the provisions of property law are, in principle, of a mandatory nature.\footnote{Tratnik, Stvarnopravni zakonik (2002)31; Berden in Berden et al., Novo Stvarno pravo (2002) 18, 20.}

The SPZ also provides an exhaustive list of legal bases for the acquisition of ownership. According to Art. 39 SPZ, these can be: A legal transaction (executory transaction), succession, a provision of law and the decision of a public authority. Just like for the various types of property rights, there exists a closed list of legal bases for the acquisition of owner-
ship. Art. 39 SPZ is also analogously applicable to the acquisition of other property rights (Art. 13 SPZ).

The types of delivery available for the purposes of acquiring the right of ownership in a movable are listed exhaustively in Art. 60 SPZ, which is analogously applicable to the acquisition of other property rights (Art. 13 SPZ).

The right of ownership cannot be subject to a deadline or a condition, unless the law provides otherwise (Art. 37/II SPZ). This results from the principle that the right of ownership is the most extensive property right. An exception is provided in Art. 63 SPZ exclusively for the case of movables. The transfer of the right of ownership can be made subject to a suspensive or resolutive condition. Two examples are mentioned in Art. 63 SPZ: The transfer of the right of ownership for security purposes (fiducia cum creditore contracta) and the reservation of title. In the first case, the transfer is subject to a resolutive condition, in the second case it is subject to a suspensive condition. As in Art. 63 SPZ, the transfer of ownership by way of security and the reservation of title are listed taxatively (‘particularly’); also other types of conditional transfer of ownership are permitted.

An anticipatory transfer of the right of ownership is permitted. The possibility of an anticipatory transfer of the right of ownership generally results from Art. 61 SPZ: If a movable was delivered at a point in time when the person delivering it had no power to dispose of it, but only subsequently acquired the power of disposal, the right of ownership is still deemed to have been acquired at the point in time of delivery. With regard to an asset, which has not yet become the property of the transferor, the prerequisites for a subsequent transfer of title (at the point in time of the acquisition of property by the transferor) can be fulfilled with the help of an anticipatory disposition (real agreement) and a ‘constitutum possessorium’. First of all, the parties can dispense with all formalities with regard to the transfer of the right of ownership. The purchaser acquires the right of ownership a ‘logical second’ after the transferor has

262 Juhart, Eigentumsübertragung Republik Slowenien (2006) 186 et seq.
263 Vrenčur, Pridržek lastninske pravice, Podjetje in delo 2005/6-7, 1366.
265 For Art. 61 SPZ, cf. Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 61, 313 et seq.
266 Vrenčur in Berden et al., Novo Stvarno pravo (2002) 73.
obtained the power to dispose.\textsuperscript{267} The anticipatory ‘constitutum possessori-um’ is not regulated in the SPZ. An anticipatory ‘constitutum possessori-um’, in practice, often occurs in the context of the transfer of the right of ownership for security purposes (non-possessory transfer of ownership by way of security; Art. 201-206 SPZ),\textsuperscript{268} as well as in the context of a reservation of title with a processing clause.\textsuperscript{269}

The ‘constitutum possessori-um’ is regarded as problematic due of the lack of publicity, as it facilitates abuses at the expense of third parties, especially in cases of non-possessory fiduciary transfers of ownership by way of security.\textsuperscript{270} For this reason, the prerequisite for a non-possessory transfer of ownership by way of security is the conclusion of an agreement in the form of an immediately enforceable notarial deed (Art. 202/I SPZ).

5.3. Causal or abstract system

5.3.1. Types of obligations

According to Art. 40 SPZ, the prerequisites for an acquisition of ownership by way of legal transaction\textsuperscript{271} are the creation of an obligation to transfer the right of ownership, which must arise from a valid legal transaction (executory transaction), as well as the fulfilment of other conditions provided by law. The requirement of a valid legal transaction (= executory transaction) results from Art. 40 SPZ. In practice, the most frequent type of bilateral legal transaction is the sales contract.\textsuperscript{272} Also,
barter agreements\textsuperscript{273} or gift contracts,\textsuperscript{274} which aim at the transfer of ownership of an asset, are legal transactions in the meaning of Art. 40 SPZ. A gift is (according to the Code of Obligations) a contract, by which a person (donor) contractually binds himself to gratuitously transfer a right of ownership or other right to another person (donee), or to enrich the donee in any other way at his own costs, and the donee agrees to that (Art. 533/I Code of Obligations). If the donor does not immediately surrender the power of disposition over the bestowed asset or right to the donee, the gift contract has to be in writing (Art. 538/I Code of Obligations).

In Art. 40 SPZ, the term ‘legal transaction’ (= executory transaction) is used without restriction to bilateral legal transactions. Therefore, \textit{unilateral legal transactions} as well as \textit{multilateral legal transactions} can be considered as executory transactions.\textsuperscript{275} There are no special regulations governing an acquisition of ownership by way of unilateral legal transaction.

Multilateral legal transactions, \textit{e.g.} contracts for the foundation of a corporate enterprise or a civil law association, under which the partner (shareholder) binds himself to make a contribution in kind, are also considered as executory transactions.\textsuperscript{276}

There are no specific transfer rules where the obligation to transfer ownership arises from a claim for \textit{unjustified enrichment}, a claim for damages or a ‘\textit{negotiorum gestio}’.

The acquisition of the right of ownership by way of \textit{succession} connotes \textit{derivative universal succession}\textsuperscript{277} and occurs, according to Art. 41 SPZ, at the time of death of the decedent. There are no further statutory prerequisites for the transfer of the right of ownership.\textsuperscript{278}

When it is the decision of a public authority that grants a title of acquisition, Art. 42 SPZ provides that the acquisition of the right of owner-
ship is effected by a final judicial decision\textsuperscript{279} or a final decision of an administrative body,\textsuperscript{280} unless the law provides otherwise (Art. 42 SPZ).\textsuperscript{281}

5.3.2. Validity of the contract

The prerequisite for an acquisition of ownership by a disposition is, according to Art. 40 SPZ, a valid legal transaction (executory transaction) from which the obligation to transfer the right of ownership arises. If the executory transaction is a sales contract, it is not required, in order for the sales contract to be valid, that the seller is to be owner of the asset (subject-matter of the sale) at the time of the conclusion of sales contract (Art. 440 Code of Obligations). The seller can also meet all further prerequisites for the acquisition of the right of ownership subsequent to the conclusion of the executory transaction.\textsuperscript{282}

In the case of a transfer of the right of ownership in a movable, the executory transaction must be valid at the point in time of the delivery of the asset. Thus, the executory transaction does not have to be valid \textit{ab initio}.

Equally, the prerequisites for an effective executory transaction are not satisfied, if an effectively concluded executory transaction is subsequently annulled with ‘\textit{ex tunc}’ effect because, in this case, it is presumed that the executory transaction was never validly concluded.\textsuperscript{283}

If one of the parties lacks capacity\textsuperscript{284} at the time of the conclusion of the executory transaction and the defect is not remedied, the executory transaction is voidable (Art. 94 Code of Obligations). The executory transaction is also voidable in the case of mistake,\textsuperscript{285} duress,\textsuperscript{286} or fraud\textsuperscript{287} (Art. 94 Code of Obligations). A successful action for voidability results in the ‘\textit{ab initio}’ annulment of the contract (\textit{ex tunc}) (Art. 95 and 96 Code of Obligations).\textsuperscript{288}

\textsuperscript{279} E.g. transfer of an asset as a result of a forced sale or bankruptcy. Cf. Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 42, 256 et seq.

\textsuperscript{280} E.g. expropriation or regional planning measures. Cf. Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 42, 258 et seq.

\textsuperscript{281} This acquisition of ownership can also occur against the will of the former owner.

\textsuperscript{282} Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 40, 244; Juhart, Eigentumsübertragung Republik Slowenien, 178.


\textsuperscript{284} Art. 41/II and III Code of Obligations.

\textsuperscript{285} Art. 46-47 Code of Obligations.

\textsuperscript{286} Art. 45 Code of Obligations.

\textsuperscript{287} Art. 49 Code of Obligations.

If the executory transaction is void (Art. 86 Code of Obligations), it has no legal effect (‘quod nullum est nullum producit effectum’);\(^{289}\) as is the case with an voidable executory transaction that has been anulled, the annulment of an executory transaction that is void has an ‘ex tunc’ effect.\(^{290}\)

The question whether a mistake as to the issue of solvency can be considered a mistake, which entitles one to rescind the contract, is controversial and has been discussed with reference to German civil law. A final decision to address this issue in the Slovenian Code of Obligations has not been made yet.\(^{291}\)

If the seller is authorised to rescind the contract for non-payment of the purchase price,\(^{292}\) this rescission for the non-performance of a non-recurring obligation (Zielschuldverhältnis) is effective ‘ab initio’\(^{293}\) (ex tunc)\(^{294}\).

If the asset suffers from a defect and the consequence is a rescission of the contract by the purchaser,\(^{295}\) this rescission for the non-performance of a non-recurring obligation (Zielschuldverhältnis) is effective ‘ab initio’\(^{296}\) (ex tunc).\(^{297}\)

The definition of a ‘condition’ and its effects are regulated in Art. 59 Code of Obligations. If the contract was concluded under a resolutive condition, its effects cease when the condition is fulfilled (Art. 59/III Code of Obligations). Usually, the fulfilment of the condition regularly is effective from now on (“has ‘ex nunc’ effect, but the parties can also agree that it is to have ‘ex tunc’ effect.”\(^{298}\) Art. 59/III Code of Obligations also applies to gift contracts.

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\(^{292}\) Art. 103 Code of Obligations.

\(^{293}\) Art. 111 Code of Obligations.


\(^{295}\) Art. 477 Code of Obligations.

\(^{296}\) Art. 477 Code of Obligations refers to Art. 111 Code of Obligations as to the effect of a rescinded contract.


\(^{298}\) Tratnik, Stvarnopravni zakonik (2002) 62, footnote 111.
In principle, the transfer of the right of ownership cannot be subjected to any condition (Art. 37/II SPZ). An exception exists e.g. for the transfer of the right of ownership for security purposes (Art. 63 SPZ). The transfer of the right of ownership for security purposes is a way of providing security for claims, whereby the movable remains in the direct possession of the transferor or third party acting for him (Art. 201/I SPZ). Unless there is an express declaration to the contrary\(^\text{299}\) as to the disposition (real agreement),\(^\text{300}\) the secured party immediately acquires the right of ownership on the resolutive condition that the transferor or third party acting for him will pay the secured debt (Art. 201/II SPZ). If the debt is repaid, ownership automatically reverts back to the party providing the security. The provisions of the law of obligations (actually: Art. 59/III Code of Obligations) apply also to dispositions. Therefore, in case of doubt, it is assumed that the fulfilment of the resolutive condition is effective henceforth (ex nunc).

5.4. Delivery and delivery equivalents

5.4.1. Purposes of the delivery requirement

The delivery (‘traditio’) of a movable – besides the effective executory transaction, an effective disposition and the entitlement to dispose – is another prerequisite for the acquisition of ownership.\(^\text{301}\) The purpose of delivery is the publicity of the transfer of ownership. Property rights are absolute rights and their transfer is subject to the fulfilment of specific prerequisites.\(^\text{302}\) The delivery of the right of ownership should be discernible to third persons and serves to guarantee the publicity of property law relationships.\(^\text{303}\)

The presumption in Art. 11/II SPZ that the proprietary possessor of an asset is its owner, is a manifestation of the publicity principle. The actual physical control over a movable is the external manifestation of the proxi-

\(^{299}\) The parties can also agree on an ‘unconditional’ acquisition of ownership. After the payment of the contractual sum, the transferor can reclaim the asset. The transfer takes place by way of ‘traditio brevi manu’, because the asset is already in the transferor’s possession.

\(^{300}\) Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 201, 838.


\(^{302}\) Berden, Načela stvarnega prava, Podjetje in delo 2000/6-7, 1447 (1451); Tratnik in Juhart et al., Stvarno pravo (2007) 231.

imity of the relationship between an asset and a certain person. Possession is, therefore, a basic element of the right of ownership.\(^{304}\)

According to some parts of legal doctrine, delivery is the element of a disposition, which is real and perceptible; that’s why a disposition is only completed when delivery has been effected.\(^{305}\) According to another view in legal doctrine, delivery is an independent, real act necessary for the acquisition of the right of ownership in a movable and has to be dealt with separately from the disposition.\(^{306}\) Therefore, all authors agree that delivery is not a legal transaction but rather a real act. This act is to be discernible to third parties and shall guarantee the publicity of property law relationships concerning movables. Different regulations apply to different types of delivery, as set out in Art. 60/III and IV SPZ (‘traditio brevi manu’, ‘constitutum possessorium’ and ‘traditio longa manu’ – as to these, delivery is effected by a corresponding expression of intentions).\(^{307}\)

5. Transfer of ownership

5.4.2. Forms of delivery

(a) General issues

The SPZ does not specifically define the various ‘types of acquisition’,\(^{308}\) instead, Art. 40 SPZ paraphrases these as ‘[…] other prerequisites, which are determined by law’.\(^{309}\) According to Art. 60 SPZ,\(^{310}\) the types of delivery are: Actual delivery (‘traditio vera’), symbolic delivery, delivery ‘brevi manu’ (‘traditio brevi manu’), the ‘constitutum possessorium’ and the delivery ‘longa manu’ (‘traditio longa manu’). The parties are not entitled to create any new types of delivery. The enumeration in Art. 60 SPZ is exhaustive and this provision is mandatory.

\(^{304}\) Vrenčur, Lastniška posest, Podjetje in delo 2000/6-7, 1447 1454 (1456).

\(^{305}\) Juhart, Pridobitev lastninske pravice, Podjetje in delo 2000/6-7, 1461 (1465); Juhart in Juhart et al., Commentary on the SPZ (2004) Art. 40, 248, who notices that the differences in academic theory should not be overestimated as both views lead to the same result. Tratnik, Zastavna pravica (2006) 41.


\(^{308}\) Tratnik, Stvaropravni zakonik (2002) 60.

\(^{309}\) Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 308.

\(^{310}\) The headline of Art. 40 SPZ and Art. 60 SPZ reads as follows: ‘Acquisition of the right of ownership by legal transaction’. In this context, the term ‘legal transaction’ refers to a ‘disposition’. Cf. Tratnik, Stvaropravni zakonik (2002) 61.
(b) Traditio vera – symbolic delivery

According to Art. 60/I SPZ, the right of ownership in a movable is transferred by a delivery into the possession of the acquirer (‘traditio vera’). The symbolic delivery (Art. 60/II SPZ) is a special type of actual delivery. As compared with actual delivery, the symbolic delivery is not a subsidiary type of transfer. The remaining forms of delivery (‘traditio brevi manu’, ‘constitutum possessorium’, ‘traditio longa manu’) are all exceptions to actual delivery. Their contractual applicability is not presumed but has to be expressly agreed upon. However, they are primary and not subsidiary types of transfer.

Art. 60/II SPZ regulates the symbolic delivery (traditio symbolica): A delivery of a movable is also presumed to have been effected by the delivery of a document entitling the acquirer to dispose of the movable, by the delivery of a part/component of the movable or by segregating or identifying the movables. The symbolic delivery is not – in comparison with the actual delivery – a subsidiary way of acquiring possession. Rather, it is a special form of actual delivery.

According to Art. 62 SPZ, the delivery of an asset into the possession of the acquirer can also be effected by a representative, who either acts exclusively for the transferor, or exclusively for the transferee, or for both the transferor and the transferee.

In principle, according to Art. 60/I and II SPZ, the prerequisite of delivery is satisfied when the transferor has done everything necessary to facilitate the commencement of the transferee’s exercise of possession, being his direct physical power over the asset. In some cases, the conclusion of an agreement between the parties may already suffice. According to Art. 60/I SPZ, an actual delivery can be presumed to have been effected, if the transferor (being the direct possessor of the movable) has delivered it directly into the hands of the acquirer. Equally, an actual delivery can be presumed to have been effected, where the seller of a book has placed it on the shop counter, intending the acquirer to take the book himself. The prerequisite of delivery is also fulfilled by the conclusion of a simple agreement between the transferor and the transferee. A transfer of the direct possession, having occurred on the basis

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of an agreement for the transfer of ownership, is deemed to have occurred when the acquirer is able to exercise direct physical control over the asset.\footnote{Vrenčur in Berden et al., Novo Stvarno pravo (2002) 71.} Vrenčur\footnote{Vrenčur in Berden et al., Novo Stvarno pravo (2002) 71.} and Tratnik\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 308; Tratnik in Juhart et al., Stvarno pravo (2007) 233.} provide as an example a certain quantity of felled timber, which has remained in the forest.

The delivery has to be in accordance with the disposition (= real agreement).\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 308 (solution for case 1).}

According to Art. 60/I SPZ, the types of delivery provided for in Art. 60/II SPZ are special types of actual delivery. Art. 60/II SPZ includes three variants. According to variant 2, delivery is presumed to have been effected by the delivery of any part of the asset. For example, a car can be acquired by accepting the delivery of the key and/or the car documents. There are no special requirements as to the quality of these instruments (i.e. the parts/components of the asset that are delivered). It is substantial that the delivery of a certain part/component of the asset enables the transferee to exercise actual physical control over the asset.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 309.}

Delivery is deemed to have been completed with the delivery of the according ‘part of the asset’. At this point in time, the transferee acquires the physical control over the asset.

According to my opinion, Art. 60 SPZ is based on the idea that the transferor transfers the exclusive physical control over an asset to the transferee by transferring it into the possession of the latter. For this reason, it is essential that, for instance where several keys to the same asset exist, the transferor delivers all keys to the transferee. If the transferor retains a key, he cannot be said to have an intention to transfer the right of ownership.

The question of codes (information), which facilitate the physical control over an asset, is, in my opinion, an issue which is analogous to the case of the car keys. This question is not discussed in Slovenian legal literature as far as is known.

The direct transfer of possession to the transferee by way of the transferor granting a simple permission to the transferee is not provided for by law. An agreement between the transferor and the transferee is mandatory. The transfer of direct possession on the basis of an agreement is valid, if the acquirer is capable of exercising direct control over the asset.\footnote{Vrenčur in Berden et al., Novo Stvarno pravo (2002) 71; Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 309.}
According to Art. 60/II variant 3 SPZ, the delivery of a movable can also be effected by way of segregation or another kind of identification of the asset. The SPZ neither contains any criteria for the assessment of facts ‘… indicating delivery …’, nor any guidelines on which point of view is to be decisive. In my opinion, the general opinion is substantial for the issue whether an identification or segregation can be equated with delivery, as the delivery of an asset serves to provide publicity of the property law relationships.

As already mentioned, delivery by way of identification or segregation is not a subsidiary type of delivery. According to Art. 60/II SPZ, there are no detailed criteria as to the kind (type) of identification. In general, it is stated that the identification is synonymous with delivery. For the reasons already mentioned, the general opinion is, in my opinion, substantial. According to Art. 60/II SPZ, the identification or segregation of an asset does not necessarily have to be carried out by the transferor. This regulation neither prescribes an additional notification requirement, to be fulfilled by the transferor vis-à-vis the transferee, nor the necessity of an agreement between the parties as to the notification. According to Tratnik, the delivery of a movable by way of identification or segregation is regarded as having been effected as soon as the transferee is able to exercise actual control over the asset. According to Vrenčur, Art. 60/II SPZ addresses the case when a delivery of direct possession is effected by way of a simple agreement on the transfer of possession. The transfer of direct possession by way of agreement is valid, if the transferee is able to exercise direct control.

The subsequent cancellation of identification by the transferor or a third party is not discussed in legal literature. This problem extends to cases where the ‘identifying act’ is an entry in a register.

According to Art. 60/II variant 1 SPZ, the delivery of a movable can also be effected by delivering a document with which the transferee is able to dispose of the asset. The regulation does not contain any examples of such a document. The acquisition of a right of ownership by way of disposition is regulated in Art. 60 SPZ, which contains, in its paragraphs I to IV, the modes in which delivery, which is required for the acquisition of ownership, can be effected (these are ‘other prerequisites’ in the sense of Art. 40 SPZ). After the asset has been delivered into the possession of the transferee, the latter becomes the new owner of it. According to my opinion, it can be deduced that Art. 60/II variant 1 SPZ only addresses

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those documents whose possession enables the transferee to dispose of a movable like an owner (negotiable documents of title).

This also corresponds to a decision concerning the forerunner of Art. 60/II SPZ, namely Art. 37 of the Act on the Basic Relationships in Property Law (Zakon o temeljnih lastninskopravnih razmerjih).

In relation to this, the following views can be found in legal literature: According to Cigoj, a symbolic delivery is effected by handing over a bill of lading or a warrant for goods. Vrenčur states that the handing over of a document of title can constitute a ‘cessio vindicationis’ or a symbolic delivery. The delivery of a document of title represents a symbolic delivery, which effects the transfer of a property right, if an agreement has been concluded between the parties as to the transfer of the right of ownership in the asset.

Art. 60/II variant 1 SPZ does not establish any formal requirements that have to be fulfilled by the documents. For this reason, documents in electronic form are, in my opinion, possible. Furthermore, the SPZ does not contain any further regulations apart from Art. 60/II SPZ, which concerns the delivery of documents.

In the literature on the SPZ, the case in which the transferor disposes of several documents of the same type for one and the same movable is not discussed. If the transferee is required to obtain exclusive control in order for there to be an effective transfer of title to him, all documents have to be handed over (in relation this problem, please refer to the above-stated).

In my opinion, it is not possible to conclude from Art. 60/II SPZ, that the transferor is able to validly effect the delivery of a movable into the possession of the transferee by way of the mere delivery of a document of title to the latter (according to Art. 60/II variant 1 SPZ), as soon as such has been issued. Basically for this reason, also the other delivery modes provided by Art. 60 SPZ have to be considered. As far as is known, this problem has not been discussed in legal literature.

(c) Third party carrier

The SPZ does not contain any provisions on the passing of title where a movable is despatched by the transferor, and transported to the transferee by a third party (carrier). This problem is solved by applying Art. 62 SPZ,

327 Cf. Art. 37/I SPZ: The right of ownership is the right to possess an asset, to use it, to enjoy the usufruct of it in the most extensive way and to dispose of it.
which determines that the delivery (in the meaning of property law)\textsuperscript{332} to the transferee may be carried out by a \textbf{representative}. Art. 62 SPZ only regulates delivery in the sense of property law. If the representative is supposed to conclude the executory transaction as well as effect the physical disposition, the Code of Obligations’s regulations on representation also have to be taken into account.\textsuperscript{333}

The carrier can represent the transferor (e.g. seller) or the transferee (e.g. purchaser).\textsuperscript{334} If the seller is obliged to arrange for transportation, the carrier will be his representative and the delivery will be regarded as having been effected when the carrier has handed over the product to the purchaser (or his representative). If, however, the purchaser is obliged to arrange for transportation, the carrier will be his representative and the delivery will be regarded as having been effected when the seller (or his representative) has handed over the product to the carrier.\textsuperscript{335}

The carrier plays no ‘independent role’\textsuperscript{336} in property law. He neither concludes an executory transaction with the transferor, which might be the basis for an acquisition of ownership by himself, nor effects a disposition, \textit{i.e.} he does not transfer the right of ownership. According to Art. 62 SPZ, the carrier is only a representative (and a direct possessor on someone else’s behalf), who delivers a movable in place of another person. He does not acquire any right of ownership in the asset, which he would, if this were the case, have to transfer to the transferee.\textsuperscript{337}

\textbf{(d) Traditio brevi manu}

The ‘\textit{trditio brevi manu}’ is regulated in Art. 62/III/1 SPZ. The delivery of a movable without the occurrence of actual delivery is regarded as having been effected by way of agreeing on the real agreement (= disposition) if the movable has already been in the possession of the transferee prior to the conclusion of the real agreement (=disposition). In a case of ‘\textit{trditio brevi manu}’, the delivery is effected by an agreement as to the transfer of proprietary possession. This agreement cannot be equated with an actual disposition.\textsuperscript{338} However, from the wording of Art. 62/III (first sentence) SPZ, it can be deduced that the disposition – in a case of ‘\textit{trditio brevi

\begin{itemize}
\item\textsuperscript{332} The delivery in the sense of property law cannot be equated with the duty to deliver the asset in the meaning of the law of obligations.
\item\textsuperscript{333} Cf. Vrenčur in Berden et al., Novo Stvarno pravo (2002) 75.
\item\textsuperscript{334} Tratnik in Juhart et al., Stvarno pravo (2007) 238 et seq.
\item\textsuperscript{335} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 76; Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 62, 316.
\item\textsuperscript{336} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 62, 316.
\item\textsuperscript{337} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 76.
\item\textsuperscript{338} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 72, 76, footnote 26.
\end{itemize}
manu’ – constitutes, at the same time, the delivery.\textsuperscript{339} Art. 62/III/1 SPZ does not apply to cases where the obligation to transfer ownership does not arise from a contract.

(e) Constitutum possessorium

According to Art. 62/III/2 SPZ, the delivery of a movable, without an actual delivery being effected, is regarded as having been carried out by the conclusion of a legal transaction, which has at its object the transfer of the right of ownership (= disposition), if the parties have agreed that the movable is to remain in the possession of the transferor even though the right of ownership is to be transferred to the transferee.\textsuperscript{340} The ‘constitutum possessorium’, therefore, typifies a delivery being effected by the conclusion of a simple agreement; equally, the disposition, in the case of a ‘constitutum possessorium’, at the same time constitutes the delivery of the asset.\textsuperscript{341} The ‘constitutum possessorium’ is not a subsidiary mode of delivery in relation to other types of delivery. There does not exist a legal presumption of a ‘constitutum possessorium’.\textsuperscript{342}

The delivery by way of ‘constitutum possessorium’ presupposes that the movable remains in the possession of the transferor. The transferor can be a direct or indirect possessor.\textsuperscript{343} According to the SPZ, the possessor is a person who has direct actual control over an asset. If this person personally exercises such control, this is a case of direct possession (Art. 24/I SPZ); if he exercises such control through someone else, this is a case of indirect possession (Art. 24/II SPZ). The prerequisite for indirect possession is the existence of a legal relationship (bailment) between the direct and indirect possessor (e. g. a tenancy agreement: The lessor is the the indirect possessor; for example, in the case of a lease the tenant is the direct possessor). This legal relationship does not need to be valid.\textsuperscript{344} What is decisive is that the indirect possessor has the intention to be bound by the bailment agreement.\textsuperscript{345} The direct possessor has to recognise the indirect possessor’s overriding possession.\textsuperscript{346} For this reason, a corre-

\textsuperscript{339} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 310.
\textsuperscript{341} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 310.
\textsuperscript{342} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 72. The same applies for the ‘traditio brevi manu’ and the ‘traditio longa manu’.
\textsuperscript{344} Vrenčur in Juhart et al., Commentary on the SPZ (2004) srt 24, 149 et seq.; Tratnik in Berden et al., Novo Stvarno pravo (2002) 43.
\textsuperscript{345} Tratnik, Stvarnopravni zakonik (2002) 45.
\textsuperscript{346} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 24, 149.
sponding legal relationship between the owner of an asset and the thief of it (direct possessor) cannot be said to exist. Therefore, the ‘constitutum possessorium’ is not a permitted form of delivery between the transferor of a stolen asset and a third person (transferee of the stolen asset). If an asset is lost by its owner (not a case of theft), he will neither be the direct nor the indirect possessor of the lost asset. In my opinion, an anticipated ‘constitutum possessorium’ is possible; when the transferor regains possession of the asset, the ‘constitutum possessorium’ becomes effective again.

The anticipated ‘constitutum possessorium’ is not expressly regulated in the SPZ. However, its validity is generally accepted and the, in practice, most common case of its application is the non-possessory transfer of ownership by way of security. The disposition, as well as the ‘constitutum possessorium’, can be exercised in advance. They do not have any proprietary effect at the time of the conclusion of the agreement between the transferor and the transferee, but only attain such effect when the transferor obtains the entitlement to dispose.

The question of whether the transferor has a right of retention (Art. 261 Code of Obligations) against the transferee, in a case where delivery is effected by way of ‘constitutum possessorium’, is not discussed in legal literature as far as is known. The right of retention is the right of the creditor of a due monetary claim, holding an asset belonging to the debtor, to retain it until the claim has been satisfied. The right of retention provides, to the person holding it (comparable to the pledge), a preferential position in relation to third parties as concerns the satisfaction of his claims. The prerequisites for a right of retention are: The existence of an effective relationship between the creditor and the debtor, the maturity of the claim, the debtor’s right of ownership in the asset and the creditor’s direct possession of the asset. According to Art. 262/I Code of Obligations, the right of retention does not, however, exist, if the asset was transferred to the creditor for custody purposes or on the basis of a gratuitous lease contract.

If the purchaser does not pay the purchase price, the vendor has the right to rescind the contract. This results in a annulment of contract ‘ex tunc’ with the consequence that no effective executory transaction has ever existed. Thus, also the transfer of the right of ownership is ineffective. The vendor has remained the owner of the asset and actually does not need to exercise a right of retention in this context.

347 Tranik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 309 solves this problem (case) by means of Art. 60/II variant 1 SPZ: the delivery of a movable by handing over a document, which entitles the transferee to dispose of an asset.


350 Vrenčur, Retencijska pravica in pridržek lastninske pravice na nepremičninah, Pravna praksa 2002/9, 7.
A legal pledge is effective if it is constituted in favour of a person who has been ordered to perform (a) certain work(s) (Art. 647 Code of Obligations), a carrier (Art. 697 Code of Obligations), a custodian (Art. 753 Code of Obligations), a contractor (Art. 780 Code of Obligations), a commission agent (Art. 803 Code of Obligations), a sales agent (Art. 829 Code of Obligations) or a forwarding agent (Art. 870 Code of Obligations).

The ‘constitutum possessorium’ is regarded as problematic due to the lack of publicity, as it facilitates abuses at the expense of third parties, especially cases of non-possessorial transfers of ownership by way of security. For this reason, the prerequisite for a non-possessorial fiduciary transfer of ownership by way of security is the conclusion of an agreement in the form of an immediately enforceable notarial deed (Art. 202/I SPZ). Additionally, there exists a special provision on good faith acquisition, addressing the case where delivery is made pursuant to the ‘constitutum possessorium’.

(f) Traditio longa manu

The SPZ’s regulations on the ‘tradicio longa manu’ are contained in Art. 60/IV. This type of delivery has to be considered where an asset, which is subject to be delivered, is not in the transferor’s direct possession but rather in the possession of a third party. In the case of a ‘tradicio longa manu’, the transferor transfers his indirect possession to the transferee. The delivery is effected by notifying a third party (directly possessing the asset) of the transfer of the right of ownership. The title passes to the transferee at the moment the third party, who is the direct possessor of the asset, is notified. The transfer of possession (and right of ownership) does not only occur by virtue of the mere conclusion of an agreement between the transferor and the transferee. This agreement becomes effective only at the moment of notification. Notification ensures the publicity of property law relationships. It is unimportant who informs the third party of the transfer; all that is necessary is that the third party ‘somehow’ gains knowledge of the transfer.

The third party, however (as the direct possessor of the asset), retains the right to raise all claims arising from the bailment relationship; he is entitled to enforce his rights, granted to him by the bailment contract,

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against the transferor as well as against the transferee. The transferee enters into the bailment relationship.\footnote{Vrenč ur in Berden et al., Novo Stvarno pravo (2002) 74.} The direct possessor can, therefore, rely on a right of retention (Art. 261 Code of Obligations) or on a legal pledge (Art. 647 Code of Obligations) \textit{vis-à-vis} the transferee.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 312.}

In relation to the modes of delivery mentioned above, the ‘\textit{traditio longa manu}’ is not a subsidiary type of transfer.

With respect to generic goods, Art. 7 SPZ has to be taken into account; this provision determines that, in principle, only individually acertained, separated assets can be the object of a property right.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 7, 82.} As long as an object, which is only determined quantitatively (e.g. 500 kilograms of the, most recent, harvest’s fruits) has not been individualised, the ‘\textit{traditio longa manu}’ is ruled out as an effective mode of transferring ownership.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 7, 217.}

### 5.5. Registration

The transfer of ownership of movables is generally not subject to registration. The main mode of transferring ownership is, of course, the transfer of possession (\textit{i.e.} delivery, \textit{traditio}).\footnote{See more Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 60, 221.} Exceptions to this general rule include aircrafts, ships and securities governed by special laws. Despite the existence of a register for motor vehicles, delivery (\textit{traditio}) is sufficient to transfer the ownership of cars and other motor vehicles.\footnote{Decree of the Appeal Court Koper no. I Cp 274/2003, 3.2.2004; Judgment of the Supreme Court of Bosnia and Hercegovina no. Rev 136/85, 11.4.1985 (published in the Bulletin of the Supreme Court of Bosnia and Herzegovina no. 2/85, 13); Judgment of the Supreme Court of Croatia no. G2 680/75, 20.11.1975 (published in the Review of the Supreme Court of Croatia no. 9/76, 20). When becoming independent, Slovenia decided to retain the legal system of Yugoslavia, deciding to reform it gradually with the introduction of new legislation. Therefore, several principles and considerations of the ex-Yugoslavian jurisprudence are still applicable.} On the other hand, registration is required for the creation of the non-possessory pledge, \textit{i.e.} when movable property is of such a type that is capable of being identified in a uniform manner and is listed as a subject to registration of non possessory pledges.\footnote{These are mostly motor vehicles and machines. Cf. Decree on the register of non possessory liens and seized immovable property (\textit{Uredba o registru neposestnih zastavnih pravic in zarubljenih nepremičnin}), Official Journal of the Republic of Slovenia, no. 23/2004, 66/2006.)} If the parties intend such a movable to remain in the transferor’s possession the notarial deed estab-
lishing the pledge has to be presented for registration (Art. 170/4 SPZ). The notary himself has to apply to the registry in order to get the non possessory pledge on the movable registered. The entry of a pledge in this register has an originating (‘constitutive’) effect. Both contractual and compulsory pledges of this type of movable property are created by the entry of the pledge in the register. The creation of a compulsory pledge is the consequence of an enforcement or securitisation procedure.\(^\text{362}\) Generally, the result of a seizure of movable property is the creation of a pledge with the same characteristics as a contractual pledge. Unless the movable property concerned requires registration, a compulsory pledge, in order to be effective, must be first entered in the register of pledges at the request of the bailiff (private enforcement agent); registration will be effected on the basis of the enforcement decree, which has to be produced together with the record of seizure (Art. 81/III ZIZ). As the case may be, the registering authority also officially informs the authority, which is competent for the maintainance of the official register of vehicles or vessels, of this fact. The pledge must also be recorded in the register of vehicles as well as on documents, which serve as a proof of ownership. The debtor has to submit these documents within three days of receiving a corresponding request from the authority; otherwise, the bailiff can forcefully obtain the documents (Art. 81/IV ZIZ).

The register guarantees the order of precedence and facilitates multiple pledges over movable property. The register’s data is publicly accessible (Art. 177/III SPZ). The register contains the following information:

- Identification of the movable property;
- Seizure and prohibition of its alienation as a result of an ongoing enforcement procedure;
- Identifying information regarding the judicial enforcement proceedings and information as to the status of these proceedings;

\(^{362}\) Enforcement of Judgments in Civil Matters and Insurance of Claims Act (Zakon o izvršbi in zavarovanju), referred to as ZIZ, Official Journal of the Republic of Slovenia, no. 51/1998, 72/1998, 11/1999, 89/1999, 11/2001, 75/2002, 87/2002, 70/2003, 132/2004, 46/2005, 96/2005, 17/2006, 30/2006, 69/2006, 115/2006. ZIZ, regulates two kinds of procedure: enforcement and securitisation. In the latter case, there are two different legal measures available: preliminary rulings and provisional rulings. Additional to this the compulsory pledges on movable and non movable property are provided to secure monetary claims. By preliminary and provisional measures the pledge can’t be created, as they are usually taken before a judgment is arrived at. After obtaining an enforcement title (e.g. judgment, notarial deed or court settlement), the creditor of a monetary claim has the choice. For a start, he can only apply for the creation of a compulsory pledge and after getting it, wait in security for the next opportunity to initiate the sale of the debtor’s property in a civil enforcement procedure. In case the creditor with the enforcement title intent to start the enforcement in whole, he gets the compulsory pledge with the seizure of a movable. If the movable is of certain type subject to registration the seizure needs to be presented for registry. The pledge is created with its entry into the register.
• Identifying information regarding the debtor and creditor (Art. 177/II SPZ).

A pledge over movable property, which cannot be identified in a uniform manner, is created by the creditor’s obtainment of the possession of it or by producing a Notarial deed of the non possesory pledge, or in the context of an enforcement proceeding, by way of seizure.\footnote{Rijavec, Izvršba na premičnine, Izbrane teme civilnega prava (Ljubljana: Inštitut za primerjalno pravo pri Pravni fakulteti, 2006) 187-207.}

5.5.1. Ships

Possession is not required to create a pledge over a ship; such should be created by registration. The registration procedure is established in the Maritime Code of the Republic of Slovenia\footnote{Maritime Code of the Republic of Slovenia (Pomorski zakonik), Official Journal of the Republic of Slovenia, No. 26/2001, 21/2002, 110/2002-ZGO-1, 2/2004, 98/2005, 49/2006.} (\textit{Pomorski zakonik}; hereinafter referred to as PZ). The structure of and the principles governing the ship register derive from the land register. It requires the buyer to produce the written sales contract, which must identify the ship. Certification is not required.

The act of registration is considered to be ‘constitutive’ for the transfer of ownership or the establishment of a pledge (Art. 221 PZ). The priority of pledges is determined by the moment in time at which the application for their entry in the register is made. If the ownership of a ship was acquired by way of public auction or succession, an entry in the register only has a declaratory effect (Art. 222 PZ). The registration of rights as the result of a judicial decision can be effected only after the decision has the force of law (Art. 264 PZ).

Ownership and other rights can only be registered with regard to an entire ship or a share in such a ship. A pledge over a share in a ship cannot be registered if the ship only has one registered owner (Art. 257 PZ).

The ship register contains folios A, B and C, just as the land register does. Folio A contains the data of the ship, which is to become the object of a pledge, B information regarding the ship’s ownership status, and C information on pledges and other encumbrances. The ownership of a ship under construction encompasses all parts that have already been incorporated into the ship, as well as parts situated within the shipyard that are exclusively allocated to the construction of the ship.

The registration process can be divided up as follows:

• First, the entry of the ship in the Slovenian ship register if this has not previously been done;
• The entry, in folio A, of the ship’s identifying data as well as its technical characteristics;
• Registration of the property rights;
• Prenotice (prenotatio) of entries, whose validity has to be confirmed within a certain period of time;
• Notice of facts, which are relevant for the transfer of the ownership of ships.

5.5.2. Aircraft

Registration is also the sole method of contractually acquiring rights in aircraft; such contracts are regulated by special laws. Aircraft, as well as aircraft under construction, are movable property, which may be the object of ownership (Art. 164 and 165 ZOSRL). Registration of an airplane is effected at the request of the aircraft owner. A written request, complying with the corresponding form requirements, must be submitted; this request must be accompanied by documents, which prove the applicant’s ownership of the airplane and fulfil other legal requirements (Art. 24 ZLet).

The ownership of, as well as mortgages on, aircraft can only be acquired through registration of the aircraft in the official aircraft register (Art. 169 ZOSRL). The main principles of the registration procedure are the same as those applying for land and ship registration. The point in time at which the competent authority receives the registration request is decisive for the determination of the order of priority of rights. The legal transaction has to be in writing, but does not need to be certified, in order to be valid (Art. 169/III ZORSL). If rights in the aircraft have been acquired by way of succession or public auction, registration only has a declaratory effect (Art. 170 ZORSL).

Aircraft can be co-owned in shares. If one co-owner decides to sell his share, the other co-owners have a right of pre-emption (Art. 176 ZOSRL).

In principle, the owner of a Slovenian aircraft has to be a Slovenian or EU Member State's citizen but, under special legal conditions, foreigners can acquire ownership too (Art. 171 ZORSL). In order to mortgage one’s share in an aircraft, the approval of the majority of the co-owners is required (Art. 183 ZORSL).

365 The laws regulating aircraft: Act on Obligations and Property Rights in Relation to Aviation (Zakon o obligacijskih in stvaropravnih razmerjih v letalstvu), Official Journal of the Republic of Slovenia, No. 12/2000 (hereinafter referred to as ZOSRL), and the Aviation Act (Zakon o letalstvu), Official Journal of the Republic of Slovenia, No. 18/2001 (hereinafter referred to as ZLet).
5.5.3. Financial instruments

A detailed list of financial instruments is contained in the Securitisation Act (Zakon o finančnih zavarovanjih). Financial instruments are stocks and other securities, bonds and debentures, which are to be traded on the capital markets; serial securities entitle the holder to purchase, sell or exchange those securities for other securities (except for currency instruments), which may include transferable mutual fund coupons, money market instruments, as well as debentures issued by the Bank of Slovenia (Art. 3/II ZFZ).

In the past, securities took the form of certificates, which were considered to embody all rights conferred by them; therefore, they were considered to be movable property. The transfer of a security was effected by a transfer of the possession of the certificate. This principle switched completely in the era of information technology. Rights were no longer represented by physical material (paper), but could be transferred non-physically by effecting an electronic registration. This required the establishment of special registers of non-materialised securities to ensure the provision of information as to each of the security’s characteristics (the issuer, the rights conferred by the security, the chain of holders and possible rights of third persons). The transfer of a security is now effected by the entry of the transfer in a central register (Art. 6/I ZNVP). The registration of a new holder is the ‘modus acquirendi’ in the case of an acquisition of rights in the security. This effect is equivalent to the one produced by the registering property rights in real estate with the land registry.

Security holders’ rights are of the same nature as property rights in movables, with the exception that rights in securities are transferred by registration. Registration has constitutive effect for the acquisition of rights in securities. Registration determines the order of priority among creditors as well as other holders of rights (other transferees) in the non-materialised securities in question. One of the fundamental principles governing central registers is the principle of publicity, but the public access to information regarding securities is restrained. Information on which securities have been issued (Art. 90/II ZNVP) and data contained in shareholder registers or bondholder registers are open to all.

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368 Plavšak, Zakon o nematerializiranih vrednostnih papirjih s komentarjem (1999) 134.
5. Transfer of ownership

The central register is maintained by the Central Securities Clearing Corporation, which is provided for by law. Securities trading is heavily regulated by the authorities. The national Securities Market Agency is authorised to continuously monitor the activities of the Central Securities Clearing Corporation (Art. 1 ZTVP-1; and, since 11\textsuperscript{th} August 2007, regulated by Art. 1 ZTFI).

5.5.4. Conclusion on registration

The cases described above point out the exceptions which exist to the traditional methods of obtaining rights in movable property. In addition to being a means of obtaining rights in movable property, registration (also imposing the necessity to comply with two other formalities: Written form and delivery) is intended to ensure publicity. Publicity protects creditors from fraud and from subsequently faked evidence. In some cases, publicity also hinders the debtor from selling, or giving in pledge, an asset twice; this is something which might actually seem rational from debtor's point of view to avoid bankruptcy. It is also argued that publicity ensures that creditors can obtain information, upon which they can act in order to reduce their risks, for example by terminating their credit contracts.

5.6. No ‘consensual’ system

As elaborated in more detail in chapter 5.4. above, a transfer of ownership under Slovenian law does not take place automatically upon the conclusion of the contract, but, in principle, requires delivery.

5.7. Disposition (real agreement)

An acquisition of ownership on the basis of a valid disposition (real agreement) requires a valid executory transaction (underlying obligation, ‘\textit{titulus}’). Further prerequisites are the transferor's power to dispose and the delivery of the asset (‘\textit{traditio}’). The executory transaction (e.g. sale, gift, barter) constitutes the obligation to transfer the ownership (Art. 40

\footnote{Securities Market Act (\textit{Zakon o trgu vrednostnih papirjev}), hereinafter referred to as ZTVP-1, official consolidated text in the Official Journal of the Republic of Slovenia, No. 51/2006.}

\footnote{Securities Market Act (\textit{Zakon o trgu vrednostnih papirjev}), hereinafter referred to as ZTVP-1, Official Journal of the Republic of Slovenia, No. 51/2006.}

\footnote{Market in Financial Instruments Act (\textit{Zakon o trgu finančnih instrumentov}), hereinafter referred to as ZTFI, Official Journal of the Republic of Slovenia, No. 67/2007.}
SPZ). The disposition (real agreement) is the property law agreement as to the passing of title from the transferor to the transferee. The transferor declares that he will transfer the right of ownership and the transferee declares that he will take delivery of the right of ownership. The disposition is causal, i.e. the disposition can only be effective, if the executory transaction (causa traditionis) is valid.

The difference between the executory transaction and the disposition lies in the effect achieved. The disposition (real agreement) is not expressly mentioned in SPZ; however, it is unanimously accepted by theory and case law. Since the disposition is a legal transaction, the Code of Obligations' general provisions on the validity of legal transactions are analogously applicable. For example, the provisions on legal capacity, the capacity to contract, the conclusion of contracts, imperfect expressions of intention or the power of agency have to be taken into account, just like for the executory transaction. For this reason, a disposition may be void or voidable.

The disposition is not subject to special form requirements. It can be concluded expressly or even implicitly, e.g. when the transferor delivers a movable to the transferee and the transferee takes delivery of it, it is assumed that they have already previously expressed their intention to transfer and take delivery of the right of ownership, respectively.

According to parts of the academic theory, delivery is the real, perceptible part of a disposition; that is why a disposition is only complete when delivery has taken place. According to other parts of the academic theory, the delivery is an independent real act in process of acquiring a right of ownership in a movable and, therefore, has to be treated sepa-

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372 Juhart, Pridobitev lastninske pravice, Podjetje in delo 2000/6-7, 1461 (1464); Tratnik, Stvarnopra{vni zakonik (2002) 63.
377 Exception: According to Art. 202/1 SPZ, a notarial deed is required for transfers of the right of ownership for security purposes.
378 Tratnik, Stvarnopra{vni zakonik (2002) 64.
379 Juhart in Juhart et al., Commentary on the SPZ (2004) Art 40, 248, who is of the opinion that the differences in academic theory should not be overestimated, as both solutions lead to the same result; Juhart, Eigentums{"ubertragung Republik Slowenien (2006) 182 ff.
rately from the disposition. The modes of delivery provided for in Art. 60/III and IV SPZ (‘traditio brevi manu’, ‘constitutum possessorium’ and ‘traditio longa manu’) are not real acts because, in those cases, delivery is effected by an expression of intention.

The disposition can be made at the time the executory transaction is concluded. The disposition may also be concluded at a later point in time, e.g. when the asset is delivered. The prerequisites for the valid conclusion of a contract have to be proved separately for both the executory transaction and the disposition, if they were not concluded at the same time. In this case, it is, however, not required that the transferor is entitled to dispose of the asset at the time of the conclusion of the executory transaction. Example: A sells the asset of a third party to B. Before the conclusion of the disposition agreement and the delivery of the asset to B, he acquires this asset.

The authors of the SPZ have opted for the separation of the executory transaction from the disposition. This concept (principle of separation) had already been taken into account in the previous Basic Property Law Relations Act of 1980 (Zakon o temeljnih lastninskopravnih razmerjih). Until 1980, the provisions of the Austrian Allgemeines Bürgerliches Gesetzbuch (Občni državljanski zakonik) have been applicable in Slovenia as general principles of law. The principle of separation is, therefore, part of the legal tradition in Slovenia. According to Berden, the principle of separation provides – at least apparently – a higher degree of certainty of law than the concept underlying the Roman legal system.

5.8. Payment

The prerequisites for an acquisition of ownership by way of a legal transaction are a valid executory transaction, a valid agreement on the transfer of the right of ownership (disposition), the fulfilment of other statutorily

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381 Vrenčur in Berden et al., Novo Stvarno pravo (2002) 75.
382 Known also as the principle of separation (Trennungsprinzip).
385 Cf. generally for the principle of separation as well as for the causal and abstract tradition: Juhart, Zavezovalni in razpolagalni pravni posli – Med kavzalnostjo in abstraktnostjo, Zbornik znanstvenih razprav Pravne fakultete v Ljubljani, Ljubljana 1995, 131; Tratnik/Vrenčur, O sistemu abstraktno ter kavzalne tradicije v stvarnem pravu, Pravnik 1999/6-8, 333.
determined prerequisites and the transferor’s power to dispose. The full payment of the purchase price is, therefore, not a prerequisite for the transfer of ownership. This aim can be achieved if the seller of a movable agrees with the purchaser that the right of ownership in the delivered asset shall only pass to the purchaser with the payment of the full purchase price (reservation of title). The payment can be made in different ways: The payment of the purchase price by the debtor himself or by a third party, a set-off, the deposit of the purchase sum with the court, cancellation of the debt, ‘novatio’ and ‘confusio’ (Art. 271, 302, 311, 319, 323, 328 Code of Obligations).

5.9. Power to dispose

5.9.1. Owner – another person

In the SPZ, the requirement of the existence of a power to dispose is not expressly mentioned. It is, however, beyond any doubt that the entitlement to dispose is a prerequisite for the acquisition of the right of ownership by way of a legal transaction. This already results from the principle ‘nemo plus iuris ad alium transferre potest, quam ipse habet’. If the entitlement to dispose does not exist, the disposition is ineffective. An owner’s entitlement to dispose results from his right of ownership. Another person’s entitlement to dispose can be based on a legal transaction (assignment by the owner of the entitlement to dispose) or on a statutory regulation (e.g. administrator of a bankrupt’s estate).

The owner can, therefore, empower another person to dispose; therewith, the latter is subsequently entitled to successfully transfer the right of ownership. Practical examples of this are the commission agent

388 Tratnik, Stvarnopravnik zakonik, Pravna praksa, Priloga 2002/36, I (IV).
392 According to Art. 37/I SPZ, the right of ownership includes, among other rights, the entitlement to dispose.
5. Transfer of ownership

5.9.2. Lack of the power to dispose

If a person transfers a movable without the entitlement to dispose, but only acquires such entitlement subsequently, the acquisition of the right of ownership becomes effective at that moment (Art. 61/1 SPZ). If the movable has been transferred to several transferees, the one to whom the asset was transferred first acquires the right of ownership in it (Art. 61/II SPZ). According to the principle ‘nemo plus iuris ad alium transferre potest,’

394 The factoring agreement is regulated in Art. 788-806 Code of Obligations.
quam ipse habet’,\textsuperscript{402} the transferee does not acquire the right of ownership at the time of delivery, but only when the person delivering the asset obtains the right to dispose.\textsuperscript{403} The transferee does not acquire the right of ownership directly from the third party, who – at the time of the transferor’s delivery to the transferee – was owner of the movable. The right of ownership first passes to the transferor for a ‘logical second’;\textsuperscript{404} subsequently, the right of ownership automatically passes to the transferee. In such a way, the \textit{anticipatory delivery} becomes effective.

In practice, the anticipatory delivery usually occurs in the form of a ‘\textit{constitutum possessorium}’.\textsuperscript{405} An example:\textsuperscript{406} A (transferor) buys a movable from B, who reserves the right of ownership in the asset until full payment of the purchase price (reservation of title). Before the purchase price is paid, A transfers the right of ownership for security purposes (\textit{fiducia cum creditore contracta})\textsuperscript{407} to C (transferee). C acquires the ownership of the asset as soon as A has paid the full purchase price.

Another example of the application of Art. 61 SPZ is the blanket assignment of claims for security purposes (blanket assignment for security purposes).\textsuperscript{408}

Consequently, the transferee does not acquire the right of ownership by way of a legal transaction, if the transferor has never become the owner of the movable. This also holds true if the transferor becomes the owner but has lost the right to dispose before point in time when he acquired the right of ownership (\textit{e.g.} due to the commencement of bankruptcy proceedings).\textsuperscript{409}

The SPZ does not contain any express provisions on a \textit{subsequent right to dispose}, granted by the owner, which is to be enforced by the ‘non-owner’ of his asset (\textit{i.e.} an asset belonging to A, the owner, is sold by B, the ‘non-owner’, on the basis of a right to dispose granted by the former to the latter). According to Tratnik, the owner can authorise the disposal of his asset retrospectively.\textsuperscript{410} In Slovenian legal literature, it is

\textsuperscript{402} Juhart in Juhart et al., Stvarno pravo (2007) 93 et seq.
\textsuperscript{403} Vrenčur in Berden et al., Novo Stvarno pravo (2002) 77; Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 61, 313.
\textsuperscript{404} Tratnik, Kolizije neposestnih premičninskih zavarovanj, Pravna praksa 2003, 27-28, I (II).
\textsuperscript{405} Vrenčur, Anticipiran posestni konstitut, Pravna praksa, 2000/35, 8; Tratnik in Juhart et al., Stvarno pravo (2007) 238.
\textsuperscript{406} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 61, 314.
\textsuperscript{407} According to Art. 210 SPZ, an asset transferred for security purposes remains in the direct possession of the transferor.
\textsuperscript{408} For the fiduciary assignment cf. Vrenčur, Globalna fiduciarna cesija, Pravna praksa, Priloga 2001/32-33, XII; Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 207, 864 et seq.
\textsuperscript{409} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 61, 314.
\textsuperscript{410} Tratnik, Stvarnopravni zakonik (2002) 71.
6. ‘Double selling’

The owner can conclude several executory transactions concerning one and the same movable.\textsuperscript{411} With the \textit{first effective disposition} he loses his \textit{entitlement to dispose} of the asset.\textsuperscript{412} The prerequisites for an effective disposal are an effective disposition, the power to dispose and the delivery of the asset.

The case of the \textit{subsequent acquisition} of the right of ownership is regulated in Art. 61 SPZ. If an asset was delivered at a point in time when the transferor lacked the right to dispose, but gained this right subsequently, the acquisition of ownership takes place at the moment he actually obtained the right to dispose (Art. 61/I SPZ). If the movable was transferred, without the right to dispose, to several transferees, the one to whom the asset was delivered first acquires the right of ownership in it (Art. 61/II SPZ). The regulation mentioned last regulates cases of multiple anticipated transfers of ownership.\textsuperscript{413} In my opinion, this principle can also be applied to the case, in which the transferor concludes several executory transactions and already has the power to dispose at the time of delivery. The person, to whom the asset was delivered first, acquires ownership.

According to the regulations of the Code of Obligations, a person who has concluded an executory transaction with the transferor, but to whom the asset has not been delivered, has a claim for damages against the transferor, arising from a breach of contract.

\textsuperscript{411} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 38, 225.
\textsuperscript{413} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 61, 315.
The good faith of the person to whom the asset is delivered does not play any role as regards the acquisition of ownership.

7. Selling in a chain

The issue of the ‘selling in a chain’ of movables is, at the moment, not regulated by Slovenian legislation; nor can we find any particular case law or legal literature on this issue. This issue was previously regulated by the former Land Registry Act in relation to immovable property (Art. 17/II),414 where it was provided that the last acquirer in a chain of owners can file an application for the direct registration of the title of ownership in his name, if such title is capable of being entered in the Land Register, upon having presented all necessary documents relating to the chain of owners. Even in cases where bankruptcy proceedings were commenced against the seller before the last acquirer in the chain filed his application with the Land Registry, it was accepted by legal theory and case law that a purchaser could still acquire the title of ownership.415 Nevertheless, the new Land Registry Act (ZZK-1)416 no longer contains any provisions comparable to Art. 17/II of its forerunner. According to the existing legislation, there does not exist any provision on the issue of ‘selling in a chain’, even as regards immovable property.

For movables, it is, therefore, only possible to provide a hypothetical answer, which is most likely to be accepted by the courts. In a case where A sold movables to B, and B to C, but where A has to deliver the movable directly to C, there have been concluded two real agreements, one between A and B and one between B and C. When A delivers the object to C, C is deemed to be B’s representative, the latter obtaining the right of ownership for ‘logical second’. Immediately afterwards, ownership passes, via a ‘brevi manu traditio’, to C. However, when A sold a movable to B under a reservation of title clause and B sold his expectant right (Anwartschaftsrecht) in the movable to C, ownership will pass directly to C when the movable is delivered to C and the purchase price is paid to A. In the last case, B does not obtain the ownership of the object, not even for a ‘logical second’.

When the contract A – B is invalid, C can obtain the right of ownership only by way of a good faith acquisition (Art. 64 SPZ, see also chapter 12). When the contract B – C is invalid, the right of ownership is only

417 The term ‘equitable interest’ coincides with the term ‘inchoate title’.
acquired by B, whereas C could acquire ownership only by way of acquisitive prescription, if he has possessed the movable in good faith for a period of three years (Art. 43 SPZ, see also chapter 13). If both contracts (A – B and B – C) are invalid, neither B nor C can acquire the ownership of a movable.

8. Transfer or acquisition by means of indirect representation

In Slovenian law, indirect representation is expressly regulated in the provisions on the Commission contract (Art. 788-806 Code of Obligations). The commission agent transfers or acquires assets (including moveables) in his own name, but on account or in the interest of a principal (consignor). Although neither the provisions of the Code of Obligations nor the provisions of the SPZ provide an explicit answer to the question of the passing of ownership in the case of a Commission contract, certain solutions have been developed in practice. The question of whether the commission agent acquires the movable(s) is answered differently in different situations, depending on whether he sells or acquires moveables for his principal. It is generally accepted that a commission agent does not become the owner of a movable if he sells a principal’s movable to a third party. He only acts as a direct representative and, therefore, does not acquire ownership. It is less clear how one should judge a situation where a commission agent acquires a movable for his principal. Nevertheless, the majority opinion is that, even in this case, a commission agent does not acquire ownership.418 This solution is well-maintainable by reason of Art. 806 Code of Obligations, which gives the principal a right of release419 (exclusion) in the case of the Commission agent’s bankruptcy, as well as by reason of Art. 803 Code of Obligations, giving the commission agent a right of pledge for security purposes in every movable that is in his possession (which would not be necessary if he had the ownership of them). Nevertheless, different opinions are also to be found in legal theory.420

The situation in respect of claims is somewhat different. Here, there exists a clear rule that a principal has no right to bring any claims against the third party until the commission agent has transferred (assigned) such right to him (Art. 804/I Code of Obligations).

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419 The term ‘right of release’ coincides with the term ‘right of separation’.
When the indirect agent is not a commission agent, the principal can only obtain the right of ownership, if the indirect agent (middleman) acquires the ownership of a movable at least for a ‘logical second’.

9. The consequences of insolvency of one of the parties involved

9.1. General rules

9.1.1. Insolvency procedures

The insolvency procedures existent in Slovenia are the forced settlement, bankruptcy or liquidation. These are regulated in the Compulsory Settlement, Bankruptcy and Liquidation Act (Zakon o prisilni poravnavi, stečaju in likvidaciji). Only issues, which are relevant to movables, will be dealt with when discussing these bankruptcy procedures.

9.1.2. Two groups of creditors

As a general rule, the creditors of an insolvent debtor are divided into two groups: Creditors secured by rights in rem and unsecured creditors. The first group of creditors – by virtue of their right in rem – can either claim for the separation of their property from the insolvency estate (ownership) or for the separate satisfaction from the debtor’s estate (pledge, right of retention…) (Art. 131 ZPPSL. On the contrary, the ordinary (unsecured) creditors only have an (obligatory) right to be satisfied out of the remaining assets of the debtor (after the secured creditors have been satisfied); these have to be distributed among all unsecured creditors.

(a) Right of separation

The right of separation (izločitvena pravica) is the right to demand the release of assets not belonging to the debtor from the bankruptcy estate (Art. 131/I ZPPSL). It has to be applied for within two months after the declaration of bankruptcy (Art. 137 ZPPSL). If no such application is made within this term, the creditor who has failed to make such applica-

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tion will be effectively precluded from any further participation in the bankruptcy proceedings. According to a legal opinion on preclusion, it does not lead to the owner's loss of property rights. Therefore, the precluded creditor may only enforce his right of ownership against the bankruptcy debtor on the basis of the general rules of substantive law. His claim for the return of goods may become unenforceable, if these have already been sold by the bankruptcy debtor; according to the express provisions of the SPZ, the purchaser acquiring from a bankrupt debtor acquires property rights in goods originally. The precluded creditor can only claim for monetary compensation, relying on the fact that the bankruptcy estate is unjustifiably enriched by a sale of goods, which did not belong to the insolvency debtor. The question is whether such a claim should be based on a right to claim compensation for costs incurred as a result of the bankruptcy. According to legal theory, this question can be answered in the affirmative.\footnote{Vrenčur, Izguba pravic izločitvenih upnikov, Podjetje in delo 1996/8, 1364-1371; Plavšak/Prelič, Zakon o prisilni poravnavi, stečaju in likvidaciji s komentarjem (2000) 389.}

\(\text{b) Right of separate satisfaction}\)

The payment of creditors with a right of separate satisfaction (ločitvena pravica) originates from a pledge over movables. If the right of separate satisfaction is based on a pledge over movables, it must be pointed out that registration will be the only permissible mode of creating a pledge over a certain type of movables.\footnote{See the chapter on Registration.} The pledge acquired by enforcement or securisation procedure within last two month before the beginning of bankruptcy ceases to be in force. The earlier pledge acquired within civil enforcement procedure remains valid and the enforcement can proceed upon the decree of bankruptcy senate (Art. 131/IV ZPPSL).

9.1.3. Claim in bankruptcy (actio Pauliana)

Besides the general rules, the claim in bankruptcy has to be outlined. The creditors and the bankruptcy administrator are entitled to claim for the annulment of every legal transaction effected by the debtor within one year before the declaration of bankruptcy, if it caused the unbalanced or diminished payment of creditors, or if some of the creditors were privileged\footnote{The creation of a pledge in favour of one creditor constitutes an act, which gives unjustified priority over other unsecured creditors to such a creditor.} and the benefited party was or should be aware of the weak finan-
cial situation of the debtor (*actio Pauliana*). There is a presumption that the creditor knew or should have known of the debtor's weak financial situation if the transaction was effected within three months before the declaration of bankruptcy (Art. 125 ZPPSL).

With annulment of transaction(s) giving unjustified priority to some creditors, the insolvent debtor is entitled to have his contractual performance retransferred to him. This also causes that the privileged creditor's claim revives; however, his claim will be an unsecured one.\(^\text{425}\) The insolvent debtor's claim for returning unjustified benefits is established with the annulment of the challengeable legal actions, on the other hand the original claim of the privileged creditor derives from the time before the bankruptcy and only revives with the annulment.

(a) **Gratuitous disposal**

If the object of a voidable transaction is a, completely or partially gratuitous, disposal of goods, the consequence will be the **annulment** of such a contract. If the case involves counter-claims, these can be compensated; in the majority of cases, however, there will only be one claim, brought by the insolvent transferor against the transferee on the basis of the (partially or completely) gratuitous nature of the contract (Art. 126/I ZPPSL). If the transferee wishes to retain the goods and **pay an amount exceeding the real value**, this is possible, provided the bankruptcy senate consents; this does not contravene the purpose of the bankruptcy procedure, having at its aim the transformation of assets into money.\(^\text{426}\)

(b) **Delivery of goods to be sold for payment**

Priority can be given to certain creditor also by privileged delivering goods which he can sell for his recompensation. For this type of delivery, the applicable rules are the same as in the case of the **assignment for collection** (Art. 425 Code of Obligations, *datio pro solvendo*). Since the creditor has not yet sold the goods, this transaction is voidable by reason of constituting a preferential treatment. If the sale has been effected and the creditor has been paid, this will only give rise to an action based on

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9. The consequences of insolvency of one of the parties involved

9.1.4. Termination of the contract by the insolvency administrator

If neither the insolvent debtor nor the benefited party, at the moment of the beginning of the bankruptcy proceedings, completely fulfilled their obligations arising from the bilateral contract, the bankruptcy administrator is entitled to:

1. Perform the insolvent seller’s obligation and claim for the benefited party's performance, or

2. Rescind the contract (termination) within three months after the beginning of the bankruptcy proceedings (Art. 121 ZPPSL). The rescission has the effect of the cancellation of the contract and both parties have to return what they received from each other under the contract. If any mutual obligations arose out of such a rescinded contract, these are supposed to be compensated for/satisfied on the basis of the principles of unjustified enrichment. In principle, also non-monetary claims can be satisfied in a situation of bankruptcy, transformed into monetary ones (Art. 117/4 ZPPSL). The benefited party's claim may be increased on the basis of the rules governing the costs, which are inherent in bankruptcy proceedings. In the case of a potential claim

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for damages, beneficiary will only have the status of an ordinary creditor in the bankruptcy proceedings.\textsuperscript{428}

Since the aim of bankruptcy proceedings is the liquidation of the bankruptcy estate in order to satisfy the creditors, the bankruptcy administrator will, in the majority of cases, opt for performance in cases where pecuniary claims against the benefited party exist.\textsuperscript{429} Despite this being a contractual agreement providing for the creditor’s prepayment, it is valid in cases of simultaneous performance (Art. 121 ZPPSL).

In cases of contracts where performance can be rendered with a specific time period, there is a rule that the expiry of the term automatically leads to the rescission of the contract. If the insolvent debtor has not fulfilled the contract in time, the contract is terminated without the necessity of any express acts by the bankruptcy administrator. The benefited party has the right to claim for recovery, according to a special regulation on recovery, only allowing for the recovery of the difference between the contractual and the average market price of goods; the relevant location is the place where performance is to take place and the relevant date is the one on which delivery is to be effected (Art. 121/VI ZPPSL).

\subsection*{9.1.5. Invalidity of contracts}

Besides the annulment of the voidable transactions effected by the insolvent debtor by reason of these causing detriment to the bankruptcy creditors (\textit{actio Pauliana}), the creditor or the debtor in bankruptcy can also claim for the \textit{annulment of the contract} for other reasons pursuant to the law of obligations. In such cases, a set-off between two claims for return is possible, since both of them originate from an annulment, which took place after the declaration of bankruptcy.\textsuperscript{430} If the annulled contract has been performed only by the creditor, the satisfaction of his claim for return is supposed to be added to the costs of bankruptcy proceedings, as this claim arose as a result of the annulment of the contract after the beginning of the bankruptcy proceedings. The court’s decision, declaring the contract null and void, results in a claim for return, which is presumed to have arisen at the agreed time of performance. If a claim arose before the declaration of bankruptcy, it will only be an unsecured one.

\begin{flushright}
\textsuperscript{428} Plavšak/Prelič, Zakon o prisilni poravnavi, stečaju in likvidaciji s komentarjem (2000) 457.

\textsuperscript{429} More about Plavšak/Prelič, Zakon o prisilni poravnavi, stečaju in likvidaciji s komentarjem (2000) 456.

\textsuperscript{430} Plavšak/Prelič, Zakon o prisilni poravnavi, stečaju in likvidaciji s komentarjem (2000) 453.
\end{flushright}
Pursuant to the general rules, the claim is established at the moment when legal facts, decisive for establishment of a right claim performance, come to light (the conclusion of the contract). The moment in time for the claim for unjustified enrichment’s creation is determined by:

- If performance was made without a legal title or on the ground of null and void legal title, it will be the point in time of such a performance;
- If performance was made on the ground of legal title, which has been subsequently eliminated or terminated, it will be the day on which the title is eliminated or terminated (rt. 190 Code of Obligations).

From the debtor’s point of view, the costs of the proceedings are expenses incurred after the declaration of bankruptcy. Within this framework, also claims against the insolvent debtor can be included, which arose after the commencement of bankruptcy, unless the ZPPSL provides otherwise. An exception to the rule is the provision on recovery in cases of the rescission of non-performed contracts (Art. 121/III ZPPSL).

9.1.6. One-sided fulfilment of the contract in favour of the insolvent debtor before the bankruptcy

If one of the parties to the agreement performed his obligation properly but has not received counter-performance before the bankruptcy was declared, he has to bring his claim within the timeframe provided by law, in order to be satisfied as an ordinary creditor in the bankruptcy proceedings, unless his claims are insured otherwise. Non-monetary claims are automatically converted into monetary ones (Art. 112/II ZPPSL).

9.2. Insolvency of the transferor

9.2.1. Acquisition of ownership

With the commencement of bankruptcy proceedings, all assets belonging to the insolvent debtor fall into the bankruptcy mass (estate). The assets previously transferred into the ownership of the transferee do not fall into the mass (Art. 104 ZPPSL). It is also possible that some goods were in the possession of the bankrupt debtor, although they are owned by some other person. The owner is entitled to claim the separation (release) of such goods from the bankruptcy estate. However, the moment of the acquisition of ownership is decisive for the protection of the transferee

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in case of transferor’s insolvency. The transferee’s ownership of the moveable is acquired with the fulfilment of the tradition or registration requirements, as the case may be. The problem in insolvency cases is often that some of the requirements, which are prescribed by the specific mode of acquisition used have not been fulfilled at the point in time of the commencement of the bankruptcy proceedings; this influences the position of the transferee considerably, especially when the goods have already been paid for. These situations will be explained later on in this chapter.

9.2.2. Agreement on a certain moment for ownership to pass

When delivery requires transportation, different types of agreements on the moment of the acquisition of ownership are possible, subject to, of course, the prerequisites of the tradition principle. The passing of risk sometimes corresponds with the acquisition of ownership, but does not do so as a rule. The agreement stipulating the specific date on which ownership shall pass to the transferee without, however, fulfilling the ‘traditio’ requirements is ineffective.

9.2.3. Specific goods – generic goods

The tradition requirements are applicable to both specific and generic goods (there are some exceptions in cases where registration is required see 5.5).

9.2.4. Special situation concerning stocks

The problem of stocks is their identification, because they change constantly. The stocks are specified by the transfer of their possession, which is established by special requirements relating to the disposition of stocks. In court practice, cases involving the acquisition of ownership of stocks mainly involve bankruptcy situations. In the case considered here, the moment at which the transferor was to make delivery (this moment was contractually agreed on between the parties) was decisive for the acquisition of ownership of the stocks. They agreed to mutually supervise the stock’s condition, intending that the transferor should be the one to deliver the goods directly to the transferee’s clients at the latter’s request.432

9.2.5. Future goods

A contract can also be concluded for future goods. However, the acquisition of ownership is still subject to the principles of delivery or registration. A special regulation can only be found in the PZ. The ship can be registered and become the object of rights, even before its construction has been completed. The ownership of a ship under construction comprises all parts already incorporated into the ship, but also parts to be installed if they are located in the shipyard, provided that they are to serve as components exclusively for the ship in question (Art. 223 PZ).

9.2.6. Transfer of goods prior to the transferor acquiring ownership (subsequent acquisition of the power to dispose)

A legal transaction cannot take effect with the transfer of possession, when, at this moment, the transferor has no power to dispose of the goods. This effect occurs later, when the transferor acquires ownership at least for a ‘logical second’ (subsequent acquisition of the power to dispose). Anyway, bankruptcy can change this scheme completely. This can be illustrated with the following example. A buys a truck on credit and the seller S secures his claim for the purchase price with a reservation of title. Before the debt has been paid off, A transfers the truck into bank B’s fiduciary ownership as security for another loan. According to Art. 61 SPZ, the bank acquires ownership at the moment of the full payment of the purchase price, which is the precondition that has to be fulfilled in order for A to acquire ownership and become able to dispose of the asset. If the bankruptcy proceedings have been commenced at an earlier point in time, the truck will fall into A’s bankruptcy estate. B cannot acquire any property right, despite the fact that A subsequently paid the purchase price. That is to say, the bankruptcy prevents A from obtaining the power to dispose. The seller S can enforce his right of separation on the basis of his reservation of title, if he was not paid because the bankruptcy administrator rescinded the contract.

9.2.7. Goods not yet delivered to the transferor – selling in a chain

If the insolvent transferor does not yet possesses the moveables, which he purchased previously from another seller, the transferee cannot acquire the ownership of goods; clearly, the transferor lacks the power of disposal.

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433 Tratnik, Kolizije neposestnih premičinskih zavarovanj, Pravna praksa 2003/27, 23.
If the transferor already owns goods, which have not yet been delivered to him, the transferee can acquire ownership through a *longa manu traditio*. The transferee can claim for the separation of these goods from transferor’s bankrupt estate only in this last case; in all other cases, he is treated as an ordinary bankruptcy creditor.

### 9.2.8. Different types of obligations

The *traditio* requirement applies to all types of contractual acquisitions. With this solution, it is often not necessary to define a contract in terms of the type of obligation, which it has at its object. For example, it is not necessary to determine whether the contract in question is a sales or a donation contract. However, there are differences between different types of contracts, where such a distinction is, in many respects, decisive for the degree of protection available against creditors, such as in the case of gratuitous obligations. For example a gift can be claimed back if the donor gets into economic difficulties.

### 9.2.9. Gratuitous contracts, unilateral promises, acts of foundation

There are no special rules for these types of legal transactions either. Likewise, they have to be effected in one of the modes of transfer (*delivery or registration*), in order to protect the goods from falling into the bankruptcy estate, or in order to obtain the right of exclusion from the bankruptcy estate.

### 9.2.10. Call options and put options

The *traditio* requirements must also be fulfilled when it comes to optional obligations. If tradition is effected in advance, the recipient of performance under the obligation will have priority over all other creditors as of the moment at which the condition is fulfilled.

### 9.2.11. Insolvency of a deceased

In principle, the deceased’s debts must be paid before the heir can enter upon his inheritance. A bequest by last will can, therefore, become effective if the remaining estate is large enough. Slovenian law regulates the *bequest* as an obligatory right to claim the bequeathed goods from the person, who is bound by the bequest in the will. Succession does not
automatically result in the legatee’s direct ownership of the bequeathed object(s). On the other hand, the ownership of all assets, belonging to the deceased’s estate, is transferred automatically to his heirs at the moment of his death (\textit{ipso iure transfer of the estate to the heirs}). Therefore, the co-heirs are indivisibly and solidarily liable for the decedent’s debts, as well as for his estate’s debts as of the moment of his death. According to the principle of solidarity, a decedent’s creditor can demand payment from any of the co-heirs, but only up to the value of his/her share of the inheritance. The latter can also demand payment from any or all of the co-heirs (recourse) in proportions determined by him-/herself.\footnote{Zupančič, Dedno pravo (1991) 178.} Among each other, the heirs pay an amount proportionally to their inheritance share, unless the will provides otherwise (Art. 142/IV ZD).\footnote{Inheritance Act (Zakon o dedovanju), hereinafter referred to as ZD, Official Journal of the Socialist Republic of Slovenia, no. 15/1976, as amended by 23/1978; as amended by Official Journal of the Republic of Slovenia, no. 17/1991-I, 13/1994, 40/1994, 82/1994, 117/2000, 67/2001, 83/2001.} The liability of heirs for the decedent’s debts is limited up to the value of their inherited share. In this frame an heir is liable with the estate as well as with his own assets (liability \textit{pro viribus hereditatis}).\footnote{Brox, Erbrecht (1998) para 612.} The heir’s liability is limited regardless of whether an inventory or a validation of the estate was made.

Currently there are no special rules on the proportional payment of all creditors, as Slovenian law does not regulate cases of bankrupt decedents’ estates. The administrator of the decedent’s estate does not represent the creditors, but rather the heirs and is not obliged to take care of the formers’ rights. However, he has to adhere to the principles of good faith and honesty. The new insolvency legislation will enact the rules for bankruptcy of the inherited estate.

In case of an heir’s insolvency the decedent’s creditors can avoid to be outpassed by heir’s creditors or to being subject to the heir’s autonomy by proposing the separation of the decedent’s estate from the heir’s own property (\textit{separatio bonorum}). If the court allows the creditors’ claim, they can satisfy their claims out of the decedent’s estate only; In addition, only those creditors, who have claimed for the separation, will be able to do so. The administrator of the estate, who is nominated by the court, clears debts only \textit{cum viribus hereditatis} (Art. 143 ZD). If the goods are in the possession of the heir at the time of the decedent’s death, he will have to hand the goods over to the estate, even if there is a will in his favour. As soon as the estate has repaid all due sums to the creditors, who claimed for the separation, the remainder can be distributed among the heirs. These are, furthermore, liable to the remaining creditors (i.e. the creditors, who did not claim for a \textit{separatio bonorum}).
The creditors are not the party in the procedure, they can only attend the probate when they have claimed for a separatio bonorum. Otherwise, they have to demand the payment of the deceased's debts from the heirs outside of the probate proceedings. If they do not reach a consensus with the heirs, the creditors are obliged to demand justice by bringing a lawsuit.

Although, in Slovenia, the heir is liable to the creditors from the moment of the decedent's death, the clarity and reliability of legal relations would be greatly improved, if the possibility that the creditor be paid out of the estate according to the bankruptcy rules are introduced. Following the Austrian example, it might be effective to statutorily provide for the convocation of all creditors (convocatio creditorum, Art. 813 ABGB) – a convocation of all the decedent’s creditors at the request of the heir, with the consequence that only thereby registered claims will be satisfied. The estate can also be handed over to the creditors in lieu of payment (in iure crediti). Such measures also provide better protection to the heirs.

9.2.12. Natural obligation

This term is used for obligations, which cannot be enforced (before a court), but can be validly fulfilled (if the debtor ‘voluntarily’, or by mistake, decides to do so). In Slovenian law, the obligations, which are invalid due to the non-compliance with form requirements, are also ‘natural obligations’ (for example, promise of gift). The payment is considered as being valid and, as long as there are no grounds for recovery, such as the transferor intending to favour the transferee at the expense of his creditors (actio Pauliana, Art. 125 ZPPSL), the payment to the beneficiary has priority.

9.2.13. Decision of a judge or other public authority

Two types of decisions are possible. Ownership can be acquired as the result of a legally binding court decision (a decision on the acquisition of ownership having constitutive effect, Art. 42 SPZ), but the court, in the majority of cases, answers the question whether a contract should be fulfilled in the affirmative, by ordering the defendant to deliver the goods to the claimant on the basis of an existing obligation, regardless of which type of obligation it may be (delictual obligations, i.e. torts, are

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438 Rijavec, Dedovanje, Procesna ureditev (Succession, Procedural Rules), (1999), 81.
439 The application of these rules was already considered in the non-contentious procedure existing in the Kingdom of Yugoslavia.
9. The consequences of insolvency of one of the parties involved

Included as well). Upon such a decision, the civil enforcement proceedings can commence. With the start of bankruptcy proceedings, individual civil enforcement becomes impossible because, ex lege, the civil enforcement procedure is stayed in such a case (Art. 11/II ZPPSL).

9.2.14. Acquisition through an indirect agent who goes bankrupt

If a person acquires ownership through an indirect agent, who goes bankrupt before having delivered the goods to the acquirer, the relationship between the buyer and the third party depends on the status given to the indirect agent. If the agent is acting as a commission agent (Art. 788 ff. Code of Obligations), the acquirer (commissioner) can claim the movable from the bankruptcy estate (Art. 806 Code of Obligations). If a third party holds the movable for the indirect agent and the latter goes bankrupt, this results in a legal assignment (cessio legalis) of the claim to recover the movable to the commissioner (gesetzliche Abtretung des Herausgabeanspruchs). Consequently, the claim to recover the movable does not fall into agent’s bankruptcy estate.

However, if the claims of the commission agent’s creditors have originated in connection with the acquisition of rights and moveables for the principal’s account, the commission agent’s creditors can encroach on those rights and moveables in the case of the agent’s bankruptcy (Art. 805 Code of Obligations).

When an indirect agent acquires moveables for the principal and they did not conclude a commission agency contract, the property rights in or claims on the movable (e.g. claim to recover the movable) acquired by an indirect agent for his principal’s account fall into the indirect agent’s bankruptcy estate.

9.2.15. Suspensive and resolutive conditions

The tradition requirements must be fulfilled also when it comes to conditional obligations. If the traditio is effected in advance and the suspensive condition was agreed upon, the acquirer will get priority from the moment the condition is fulfilled (ex nunc effect). This is the case when parties stipulate a reservation of title clause (Art. 520 Code of Obligations).

Parties can agree that the acquirer is to obtain the ownership of a movable under a resolutive condition (Art. 63 SPZ), i.e. that he is the owner of the movable as long as the condition is not realised. This is

especially the case when they agree on a fiduciary transfer of ownership (\textit{fiducia cum creditore contracta}) in order to secure a claim, \textit{e.g.} a loan (Art. 201 SPZ).

9.2.16. Deliveries of movables on the basis of invalid contracts

If the contract is invalid, but the movables have already been delivered to the transferee, who already paid the purchase price, the transferee in possession of the movables is protected against the transferor’s bankruptcy. He has the right to retain the delivered movable until his counter-claim is paid off (\textit{right of retention}, Art. 261 Code of Obligations). The transferee may be paid out of the value of the movables in the same manner as a pledgee, but must notify the debtor of such an intention in time, prior to realising his intentions (Art. 264 Code of Obligations). The beginning of the bankruptcy proceedings does not have any influence on the transferee’s right of retention (Art. 131 ZPPSL).

9.2.17. Bankruptcy of the seller with a reservation of title

The \textit{reservation of title} is mainly approached from the point of view of the seller’s protection. However, also the opposite case, the bankruptcy of the seller, is possible. In this situation, an important issue is also the protection of the buyer’s legal position, particularly because he obtained a so-called \textit{inchoate title}\footnote{The term ‘inchoate title’ coincides with term ‘equitable interest’.} (\textit{pričakovalna pravica, Anwartschaftsrecht}). In the case of the seller’s bankruptcy, the bankruptcy administrator, contrary to the case of the buyer’s bankruptcy, does not have a choice over whether to rescind the contract or perform it. He can only demand the performance of the contract and is not entitled to rescind it, as he cannot claim the re-transfer of the movable from the buyer.\footnote{Vrenčur, Pridržek lastninske pravice v pogojih insolventnosti in izvršbe, Pravna praksa 2002/17, V.}

9.2.18. Termination of the contract after delivery to the transferee

A contract might be terminated after delivery of the goods to the transferee has been effected. If the reason for termination is \textit{breach of contract} (non-payment by the transferee – buyer), this will be an issue of the transferee’s protection from the insolvency of the transferor. Very often, the cause for the termination of the contract after the delivery of mova-
ble has been effected is that the goods are **defective**. The buyer is then, at least, entitled to rescind the contract and claim for the return of the paid purchase price, as well as for damages; however, he has to return the goods. With the termination of contract, the transferee obtains a claim for unjustified enrichment against the insolvent transferor. As this does not constitute an action, which prejudices the general creditors, the transferee is entitled to be paid a sum; this expense will be added to the costs of the bankruptcy proceedings.

### 9.3. Insolvency of the transferee

#### 9.3.1. Transfer of ownership

As already mentioned in the chapter on the transferor’s insolvency, the tradition principle is used to describe the formalities that an acquirer of movables generally has to fulfil to acquire right in rem. Depending on type of asset, either the formalities of the physical transfer of possession (traditio) or the formalities of registration have to be fulfilled.

#### 9.3.2. Original acquisition

An **original acquisition** of ownership could have the effect that the seller **is not protected** and not given priority in the case of the buyer’s bankruptcy. If the buyer mixes up assets of another with his own (confusion), the seller will only have a **claim for damages** in the case of the buyer’s bankruptcy unless there exists a previous **reservation of title** agreement, stipulating that the new movable shall be co-owned by the seller and the buyer. An ordinary reservation of title will not protect the seller if the buyer acquires original ownership by manufacturing the raw material into a new product. Where the buyer sells the goods, which are the object of the seller’s right of separation, to a good faith acquirer, the seller will also only have a claim for damages in the case of the buyer’s bankruptcy. However, if the money the buyer received from such a sale is traceable, it could be argued that the seller should have priority in recovering the sum of money.443

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443 Vrenčur, Pridržek lastninske pravice v pogojih insolventnosti in izvršbe, Pravna praksa, 2002/17, VI; Cf. Right of Release in the chapter on The Consequences of Insolvency of One of the Parties Involved.
9.3.3. Reservation of title

When the movables are delivered, the seller loses the ownership of them and can only claim for payment. Once delivered to the buyer, the seller may, however, by means of a special contractual provision, have reserved title to the ownership of the assets until full payment of the purchase price is made. The reservation of title only has effect against the buyer's creditors, if the buyer's signature on the contract containing the reservation of title clause was authenticated by a notary prior to the occurrence of the buyer's bankruptcy or the attachment of the movable property (Art. 520 Code of Obligations). The requirement of authentication by a notary has been imposed in order to avoid the possibility of abuses as well as avoid the giving of unjustified preference to certain creditors. E.g. when a buyer has purchased goods, and the his signature on the corresponding contract of sale has not been authenticated by a notary, he is able to antedate the reservation of title clause with the purpose of giving priority to a certain creditor of his choice in the case of his bankruptcy. The seller, who has reserved title, already obtains priority over the buyer's creditors by virtue of concluding the contract and may, therefore, demand the separation (release) of those movables from the bankruptcy estate if the purchase price has not been paid.

In Slovenian bankruptcy law, there still does not exist any special provision on the legal position of the seller who has reserved title, although the issue certainly requires express regulation. That is why the solution to this issue can be only be arrived at by applying the general rules of bankruptcy and property law. The seller is the owner of goods but his ownership is subject to the resolutive condition of payment of the purchase price. The buyer has an inchoate title (Anwartschaftsrecht) to the ownership of the movable (a right subject to a suspensive condition), when the purchase price has been paid. Thus, both the buyer and the seller are conditional owners. Neither the seller nor the buyer has fulfilled his contractual obligation yet. For this reason, the bankruptcy administrator is entitled to act in the same way as in the case of a non-performance of a reciprocal contract. He can either rescind the contract or perform it and demand counter-performance (Art. 121 ZPPSL). However, if he performs the contract, the seller is not be entitled to claim release of the movable from bankruptcy estate.445 In practice, this solution

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444 Vrenčur, Stvarnopravni zakonik in stečajno pravo, Podjetje in delo 2002/6-7, 1404 et seq.
445 This solution is derived from German law. The right of release of goods from an estate revives only if the administrator terminates the contract (§ 47 InsO). If the administrator upholds the contract, the rest of the purchase price has to be paid by the estate with priority (§ 55 InsO).
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is not contemplated; rather, the seller, as a rule, will immediately claim
for the release of goods under a reservation of title from the estate.\footnote{\vrenčur, Stvaropravni zakonik in stečajno pravo, Podjetje in delo 2002/6-7, 1406.}

9.3.4. Insolvency before perfection of delivery

As to reciprocal contracts, there is general rule that neither party shall
be obliged to perform his own obligations if the other party does not
simultaneously perform his obligations, or is unwilling to do so, unless
something else is agreed, the law provides otherwise, or the nature of the
transaction determines something else (Art. 101 Code of Obligations).
The law establishes the right of the creditor to rescind the contract under
certain circumstances.

If it is agreed that one party shall perform his obligation first but, after
the contract has been concluded, the financial circumstances of the other
party deteriorate to such an extent that it is uncertain whether the latter
will be able to perform his obligation, or such an uncertainty exists for
other serious reasons, the party who undertook to perform the obligation
first can postpone his performance until the other party performs, or until
the latter provides sufficient security for his postponed performance. In
such cases, the party who was to perform first may request security within
a reasonable period of time; if this deadline is not met, the party may
rescind the contract (Art. 102 Code of Obligations).

In the case of a sale of movables, where the movables have been dis-
patched already but the buyer’s financial circumstances have changed to
such extent as to give rise to a justifiable doubt over whether the buyer
will be able to pay the purchase price, the seller may prevent delivery of
the goods being made to the buyer; this is the case even where the docu-
ment, by virtue of which the buyer is entitled to demand delivery, is al-
ready in the buyer’s hands (right of stoppage in transit, Art. 457 Code of
Obligations).

If, within the time period, which starts to run with the commence-
ment of bankruptcy proceedings, neither the transferor nor the transferee
has completely performed the reciprocal contract, the bankruptcy ad-
ministrator is entitled to perform or rescind the contract. Where he
upholds the contract, the transferor is entitled to request simultaneous
performance or provision of adequate security. Where he rescinds the
contract, the seller will also be entitled to claim damages for breach of
contract as an ordinary creditor in bankruptcy (Art. 120 and 121
ZPPSL).
9.3.5. **Deferral of delivery during transport of goods**

When a movable, which is the object of a sales contract, is to be delivered to the seller by a carrier, the seller may defer the dispatch of the movable until payment of the purchase price is made, or may dispatch the movable while reserving the right to dispose of it during its transport. If the right to dispose of the movable during its transport is reserved, the seller can determine that its delivery to the agreed location is to be postponed until the purchase price has been paid (Art. 456 Code of Obligations).

9.3.6. **Right of pursuit**

If the seller did not receive full payment of the purchase price, he can claim for the retransfer of goods, which were dispatched for delivery to the buyer's premises prior to the commencement of the bankruptcy proceedings, and which have not arrived at the buyer's premises after the point in time of the commencement of these proceedings, or if the buyer has not yet taken delivery of them at such a point in time. Also the commission agent, who has been ordered to purchase goods, has a right of pursuit (Art. 124 ZPPSL).

9.3.7. **Termination by the buyer**

If the seller has sold the goods on credit and has already delivered these to the buyer, who subsequently goes bankrupt, the seller will only have a claim in the bankruptcy proceedings as an ordinary bankruptcy creditor (unless the title to ownership has been reserved). Thus, in the majority of cases, there is no reason why the buyer should terminate the contract in such a situation. However, if the buyer succeeds in terminating it, the goods must be returned.

9.3.8. **Invalidity and termination of the contract**

There are two types of invalidity of contracts that are known to Slovenian law: Null and void contracts and voidable contracts. A contract, which contradicts the Slovenian constitution, mandatory rules or public morals is null and void, if the purpose of the violated rule does not provide for any other sanction, or if the law does not provide otherwise for the specific case in question (Art. 86/I Code of Obligations). A null and void contract can never become valid, even if the grounds for nullity
and voidness subsequently cease (Art. 90/I Code of Obligations). On the other hand, a contract is voidable if it has been concluded with a party, who has limited capacity to contract; or, if defects of intention resulted in the conclusion of a deficient contract (mistake, fraud, threat); or, if the law expressly provides for voidability (Art. 94 Code of Obligations). A voidable contract is valid until it is annulled by a court (Art. 95/I Code of Obligations). The annulment has an ex tunc effect. Since two legal transactions are required for the transfer of the right of ownership, the executory transaction (underlying obligation, causa traditionis) and the disposition (real agreement), and since their mutual relationship is causal, both contracts have to be valid in order to complete a transfer of title.

Something similar applies in the case of the termination of the contract. For instance, if the seller performed his obligation and delivered the goods, but the buyer has not yet paid the purchase price, the seller is entitled to rescind the contract subject to certain conditions determined by law (termination of the contract). The termination of the contract has a retroactive (ex tunc) effect. Consequently, the transferor’s ownership is deemed to have never passed to transferee. Termination on grounds other than the risk of non-payment is not very common, and is especially rare in combination with a transferee’s insolvency. This issue is not much dealt with. If the contract has been terminated on another ground before the making of delivery, the issue of the seller’s protection would not arise. The seller would keep the goods.

Annulment has as a consequence that both of the parties have to return what they received under the contract (Art. 96 Code of Obligations). The same applies in cases of null and void contracts (Art. 87 Code of Obligations). However, for the legal position of the creditor, the point in time at which the claim for the return of such property is brought is relevant. If both claims arise from an annulment after the commencement of bankruptcy proceedings, parties’ claims can be satisfied with monetary compensation, if the appropriate prerequisites have been met.

If the annulled contract has been performed only by the creditor, the satisfaction of his claim for return is supposed to be added to the costs of bankruptcy proceedings, as this claim arose as a result of the annulment of the contract after the beginning of the bankruptcy proceedings. The court’s decision, which declares the contract null and void, results in a

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447 Tratnik, Stvarnopravnik zakonik, Pravna praksa, Priloga 2002/36, I (IV).
claim for return, which arise at the time performance is rendered. A claim, which arises before the commencement of bankruptcy proceedings, can only be considered as a non-priority claim. However, it has to be stressed that cases, involving both insolvency and contractual invalidity, have not really been dealt with in Slovenia. When the transferee is bankrupt and the goods have been delivered, it is likely that the transferee will not rely on the contractual invalidity. In fact, the transferor should, in principle, rather be obliged to pay damages to the transferee for not performing as agreed; however, the damages would be set off against the sum received as a result of a successful claim for the purchase price.)

10. Passing of risk and passing of ownership

The Passing of Risk is regulated in Art. 436 Code of Obligations. The notion of risk encompasses the accidental destruction of or damage to a movable object. The risk passes from one party to the other (e.g. from the seller to the buyer) by means of the delivery of goods (Art. 436/I Code of Obligations). However, such a delivery is not a delivery in the meaning of property law, but rather a special notion of delivery, which is to be found in Law of Obligations. Nevertheless, especially in the field of movables there will, in practice, usually be no difference between both forms of delivery (real and contractual). In a standard situation, the contractual delivery of movable goods is usually accompanied by the transfer of ownership. The difference between both delivery modes (for movables) is only apparent in special forms of contracts such as, for instance, a sale under a reservation of title; this would be a situation where contractual delivery precedes the transfer of ownership (real delivery). A delivery in the sense of Art. 436 Code of Obligations corresponds to a transfer of possession to the other party or his agent. Hence, it does not necessarily correspond to a transfer of ownership.

Nevertheless, the risk does not pass to the other party if this party terminated the contract due to some defect in the movable, or if he demanded the replacement of the delivered movable (Art. 436/II Code of Obligations). This rule is designed to protect a party from risk in a case where the other party is liable for the breach of a contract.

We can find a special rule on the buyer’s default (Art. 437 Code of Obligations). If no delivery takes place by reason of the buyer’s default, the risk passes to him even without a delivery having been made (Art. 437/I Code of Obligations). The seller is only obliged to do whatever is necessary to enable the buyer to take delivery of the movable.

object, which is the object of the sales contract. In the case of the sale of ascertainment movables, this means that the seller has to separate the movables to be delivered from the others, e.g., in the case of a bulk cargo of goods, (Art. 437/II Code of Obligations); where generic movables are the object of the sales contract, the seller has to make a specify or individualise the movables to be delivered, and perform all acts necessary so as to enable the buyer to take delivery of these (Art. 437/III Code of Obligations). In both cases, the seller has to inform the buyer about such steps or measures taken by him.\footnote{Cf. Juhart in Juhart/Plavšak, Code of Obligations with Commentary (2003) Art. 437, 76.}
Part III:
‘Original’ acquisition

II. Acquisition by commixture, processing etc.

II.1. General

In Slovenian law, there are different ways in which to obtain the ownership of movables by original acquisition. In the SPZ, the following forms of original acquisitions are regulated: Appropriation (i.e. original occupancy – prilastitev ali okupacija), finding (najdba), treasure trove (najdba zaklada), accession (prirast), confusion (pomešanje), commixture (spojitev), specification (izdelava nove premičnine), acquisition of the ownership of fruits (pridobitev lastinske pravice na plodovih), acquisitive prescription (priposestvovanje) and acquisition of title from a non-owner (pridobitev lastinske pravice od nelastnika). All of these forms of acquisition of title are treated as original in Slovenian law; hence, a title is acquired at the moment when all statutory conditions are met.

II.2. Acquisition by accession, commixture and confusion

In Slovenian law, accession is a situation where movable property becomes a component of real property (Art. 54 SPZ). In such a situation, a movable falls into the ownership of the real property owner. This is accession in the narrow sense. In a wide sense, the accession also encompasses situations of commixture and confusion.\textsuperscript{453} When accession takes place between movables (i.e. the accessory and the principal objects are movables), this is regarded as a special form of commixture (Art. 55/II SPZ).

Accession, as described in Art. 54 SPZ, is well-anchored in different articles of SPZ. The speciality principle of property law (Art. 7 SPZ), providing that only an individually determined, self-dependent physical object can be the object of property rights (rights in rem). This principle is closely related to the principle ‘superficies solo cedit’ (Art. 8 SPZ), which provides that everything, which is continually connected with real prop-

\textsuperscript{453} Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 54, 294, footnote 441.
11. Acquisition by commixture, processing etc.

Property on purpose, is a component of the latter. According to both of these principles of property law, it is clear that every movable, by virtue of its incorporation into real property, loses its quality of being an independent physical object and will therefore fall into the ownership of the real property owner. A third important provision is the definition of 'component', which is to be found in Art. 16 SPZ. A component is everything, which, according to the 'general opinion', is regarded as being part of another physical object. Slovenian law does not separate components into essential and unessential ones.454

For a movable to accede to real property, it is necessary to be continually connected with such real property on purpose. Continuous connection is an intended and lasting connection. Slovenian law does not impose a requirement of indivisibility. The connection can also be only functional (e.g. hanging a door on the hinges suffices in order for accession to occur, according to Art. 8 SPZ in conjunction with Art. 54 SPZ).455 In a case of accession, ownership is always acquired by the owner of the principal physical object, i.e. the real property owner; also, the movable is acquired in its entirety.

In Slovenian law, commixture can occur when movables, which are owned by different persons, combine in such a way that they become the components of a new movable, which is the product of this combination. Such new movable will be co-owned by the owners of its components. The co-owners’ shares will be proportional to the value of the components they contributed to the new movable (Art. 55/I SPZ). Another form of commixture (which is actually a form of accession) exists when one of components could be regarded as being the principal movable. In such a situation, it is the owner of the principal movable who becomes the sole owner of the new movable (Art. 55/II SPZ). In practice, there might be some doubt as to which movable is the principal one. According to the SPZ, the general opinion decides which one is the principal movable (Art. 55/III SPZ). The value of a movable can be important as it influences the general public opinion, but it is not a direct criterion for determining which movable is the principal one and which one is not. It is perfectly possible that a less valuable movable will be regarded as the principal one and more valuable one as its component.456 In the case of the commixture (and accession) of movables, there is requirement of the impossibility of separation.

Confusion is a special form of commixture; it occurs in the case of substances, which appear in liquid or powder form, or are comprised of

455 Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 8, 84.
456 For example, when a new engine is placed into an old car. Usually, a new engine would be more valuable than an old car (car body and chassis). However, a car is, without doubt, the principal movable object, according to the general opinion.
very small particles, which cannot be further separated, or if a such separation causes disproportionate costs. Confusion leads to the movable, which results from such a confusion, being co-owned by the owners of its components (Art. 56 SPZ). However, it is also possible that confusion occurs in a case where there are two substances and one of them has a disproportionately higher value than the other, or where a larger amount of one of the substances has been confused with a smaller amount of another substance. Such a (movable) substance can be regarded as the principal movable and could, consequently, result in its owner solely owning the entire product of confusion. 457 Whether or not equal or different substances are confused does not make any difference. The only important thing is that they belong to different owners.

What is very important is that, in relation to the acquisition of ownership by way of commixture, the existence of good or bad faith is irrelevant. This is a new development in Slovenian law introduced for the first time by SPZ. The property law consequences of accession, commixture and confusion are strictly regulated by SPZ. However, claims for unjustified enrichment are a corrective in the field of the law of obligations.

11.3. Acquisition by specification

Specification is a form of the original acquisition of ownership, and takes the form of the creation 458 of a new movable. Mere repairs, which do not result in a new movable, do not suffice. Here, we have to distinguish between two situations. It is possible that a person manufactures a new movable from his own materials. In such a situation, he acquires the sole ownership of the new movable object (Art. 57/I SPZ). The same situation arises, if one person instructs another to manufacture a new movable for him using his (i.e. the former person’s) own material. The owner of the material becomes the owner of the new movable. 459 The situation, where a person manufactures a new movable from material, which is co-owned by more than one person, is more complex.

If someone manufactures a new movable from another person’s material, he acquires the ownership of such a new movable if the value of work is not substantially lower than the value of the material. The same is the case when a person, by way of contract, instructs another to manufacture a new movable from the latter’s own material. A new movable falls into the ownership of the instructing party, unless the value of work

458 A new movable can also be created by superficial acts, such as writing, drawing, painting, printing, engraving or any other similar technique (Art. 57/IV SPZ).
11. Acquisition by commixture, processing etc.

is not essentially lower than the value of material (Art. 57/II SPZ). Therefore, the person manufacturing a new movable and the person instructing the former to do so are treated alike. If the value of the work is substantially lower than the value of the material, a new movable belongs to the owner of the material.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 57, 303.}

A similar situation arises when a new movable is created from material belonging to more than one person. If all persons are distinct from the person manufacturing the new movable, or from the instructing party, the solution is the same as in the case where the material belongs to only one person, who is neither the manufacturer nor the instructing party. The second situation is when the material partly belongs to the manufacturer and partly to another person. Here, the SPZ is somewhat unclear, as it provides that Art. 55 and 56 SPZ apply with adjustments. In fact, Art. 56 SPZ states the same and it is only Art. 55 SPZ which can provide us with an answer. Paragraph I provides that commixture results in the co-ownership of a new movable; paragraph II provides that accession, in a case where exclusively moveables are concerned, results in sole ownership. There has been no case law on this issue yet and legal doctrine has, so far, been of the opinion that such a situation results in the manufacturer’s sole ownership.\footnote{This is position of Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 57, 302.}

The existence of good or bad faith is irrelevant for the purposes of the acquisition of ownership by specification.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 57, 302, Vrenčar in Berden et al., Novo Stvarno pravo (2002) 95.} However, if a new movable has been created, using another person’s materials, the latter will have a personal claim on the basis of unjustified enrichment.

11.4. General aspects

The original acquisition of ownership is a mandatory regime aimed at clarifying complex situations with the help of clear rules regulating the issue of who is to be the owner. Therefore, generally this issue cannot be agreed upon by the parties inter se. The only exception is made in the case of specification, where it is possible for the manufacturer and the owner of the materials to agree on their respective shares of co-ownership on the basis of the value of former’s work and value of materials used.\footnote{Vrenčar in Berden et al., Novo Stvarno pravo (2002) 94.}

Slovenian law on original acquisition of the ownership of moveables is generally very hostile towards reservation of title agreements. It is, therefore, possible that a seller, who sells his goods under a reservation of title,
Slovenia

loses his ownership as a consequence of specification, accession or commixture). Instead of acquiring ownership, he only obtains a personal claim on basis of unjustified enrichment.

Any co-ownership, which results from an original acquisition of ownership, will constitute a case of ‘regular co-ownership’ as is regulated in Art. 65-71 SPZ. A division can be effected by agreement or, on the petition of an interested party, in a non-contentious procedure before the court. In such a procedure, a court divides a movable in kind, if possible; otherwise, the sale of the movable and the subsequent division of proceeds can be ordered.

There are no special provisions in SPZ on the legal effects of the original acquisition of third parties’ rights in rem. Therefore, only the general rule that, by way of original acquisition, new ownership is created and all previous ownership is extinguished, is applicable in such a case. Hence, it can be concluded that any third parties’ rights in rem can be affected by an original acquisition; namely, such rights will cease to exist.

Legal capacity is not required to acquire ownership by way of accession, commixture, confusion or specification.

12. Good faith acquisition

12.1. Field of application

A general rule of Slovenian law is that only owners are entitled to transfer ownership to other persons. Nevertheless, an important exception to this rule is the possibility of good faith acquisition. A special provision on the good faith acquisition of ownership of moveables from a non-owner does exist; this is Art. 64 SPZ. First, there are three conditions that have to be met for such a good faith acquisition to be possible. Even if these three conditions are met, there are only three situations in which the ownership of moveables can be acquired in good faith.

The three requirements of the ‘good faith acquisition’ rule are (a) it has to be an acquisition of a movable; (b) the acquisition has to be for money (value); and (c) the acquirer has to be in good faith at the moment of acquisition. An additional requirement is that the standard conditions for an acquisition of ownership by agreement have to be met (Art. 64/I SPZ).464

464 However, the constitutum possessorium is not a valid equivalent to delivery. Tratnik in Juhart et al., in the Commentary on the SPZ (2004) Art. 64, 324. In the case of such a delivery, an acquisition is valid only when the acquirer obtains possession of the movable, subject to the condition that he still is in good faith at such a point in time (Art. 64/III SPZ).
If the above-stated conditions are met, it is possible to acquire the ownership of movables from a non-owner in three particular situations:

- A movable is bought at a public auction;\footnote{The sale of a car on a car fair cannot be treated as a sale by public auction. Judgment of the Supreme Court of Croatia no. Rev 679/90, 1.8.1990 (published in the Review of the Supreme Court of Croatia no. 52/92, 64). When becoming independent, Slovenia decided to retain the legal system of Yugoslavia, deciding to reform it gradually with the introduction of new legislation. Therefore, several principles and considerations of the ex-Yugoslavian jurisprudence are still applicable.}{465}
- A movable is purchased from a person in the course of the latter's (registered) commercial activity\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 64, 325.}{466} of selling such movables (ordinary business); and
- The owner has voluntarily transferred the movable into the seller's possession.\footnote{This would also apply to a sale of goods, where the goods have already been delivered but the contract suffers from some serious defect.}{467}

Therefore, it is possible in Slovenian law that A is the owner of a movable and B transfers this movable as a non-owner to the good faith acquirer C. It does not matter if C is a consumer. Such a transfer from B to C has to be for money and C has to be in good faith at all times, until he has obtained possession of the movable. However, such good faith acquisition is only possible in the case of a public auction, sale by a registered commercial vendor, or if A has voluntarily entrusted this movable to B. It is not an express requirement of good faith acquisition that there should be pre-payment of the purchase price. The mere existence of an agreement on payment suffices. The acquisition of ownership by a person in good faith occurs by way of delivery. Delivery can be any kind of transfer of the physical control (i.e. possession), with the exception of the \textit{constitutum possessorium} (where a movable remains in the direct possession of the transferor). As long as a movable is in the possession of the transferor (non-owner), it is still possible for a real owner to reclaim the movable. Any protection of acquirer would, therefore, not be adequate.\footnote{Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 64, 325.}{468} Nevertheless, the acquisition in good faith by a person is possible in cases where a movable is in the hands of a third party or other delivery equivalents have been made use of.

### 12.2. Good faith

The good faith of an acquirer means that he does not, and is not supposed to, know that the transferor (non-owner) is not capable of transferring...
ownership to the acquirer. This can involve that he reasonably believes that the transferor is the owner of the movable, or that the latter has been authorised by the real owner to dispose of it. The basis of the transferee’s good faith is the sole possession of the transferor, which creates an appearance of ownership. Such good faith has to exist up to the moment of the delivery of a movable. Good faith is also related to the standard of care, which has to be met in legal transactions. Usually, the standards of ordinary and reasonable people have to be met. According to Art. 9 SPZ, good faith is always presumed, until the contrary has been proved. The burden of proving that the acquirer was not in good faith is, hence, on the real owner.

12.3. Lost and stolen goods

In the case of stolen or lost goods, negotiable instruments, money or bulks, there are no exceptions to these rules. A good faith acquisition is possible if the general preconditions have been met. However, the position is somewhat different in the case of registered movables. Public registers prevent the possibility of good faith acquisition according to Art. 64 SPZ.

However, it is possible to apply Art. 64 SPZ to lost or stolen goods. Usually, it is not possible for a thief to transfer ownership to a third person in good faith. Nevertheless, if all three (in addition to the general) requirements of Art. 64 have been met, and the case in question can be characterised as falling under one of the three statutorily envisaged situations, the principles of good faith acquisition can be applied to stolen and lost goods as well. It is therefore possible that B has stolen a movable from A and then sells it to C, who is in good faith, in the course of his ordinary registered commercial business. If C remains in good faith until taking delivery of the movable, he acquires ownership on the basis of Art. 64 SPZ.

12.4. Right of the original owner to repurchase the asset from the good faith acquirer

There is a specific exception to the rule of Art. 64 SPZ. Where a movable of special importance to the real owner (family jewels, etc.), was disposed of by a non-owner, the former has the right to repurchase the movable from such an acquirer at market value. This is a personal right granted by the law of obligations, which expires one year after the loss of ownership by the real owner (Art. 64/V SPZ).
12.5. Good faith acquisition free of encumbrances

Art. 64/IV SPZ expressly provides that good faith acquisition free of encumbrances affects all third persons’ rights in rem in a movable, which has been transferred, provided that the acquirer was also in good faith as regards the existence of such rights. All third persons’ rights in rem are extinguished at the moment of good faith acquisition.

13. Acquisitive prescription

13.1. Functions of acquisitive prescription

In Slovenian law, acquisitive prescription serves to ensure legal certainty. It enables factual relationships to become legal relationships by the lapse of time. It is also provided that every owner has the duty to look after his property and, if he neglects this duty, he will suffer the negative consequences of such neglect.

In Slovenian law, the concept of acquisitive prescription has not been subject to any substantial criticism.

13.2. Requirements of acquisitive prescription

Acquisitive prescription is possible in relation to almost all movables, including registered goods. However, it is neither possible to acquire movables, whose legal transferability is excluded (res extra commercium) nor public property (Art. 44/I SPZ) by way of acquisitive prescription.

As to the acquisitive prescription of movables, there is a requirement of 3 years of proprietary possession in good faith (Art. 43/I SPZ). Proprietary possession is when a person possesses a movable with the intention to own it, i.e. as an owner (Art. 27/I SPZ). Good faith possession is when a possessor does not and is not supposed to know that he is not entitled to possession (Art. 28 SPZ). Good faith possession is presumed (Art. 9 SPZ). There is a special rule for legal entities; their good faith is based on the good faith of their representatives (Art. 46 SPZ).

The three-year period starts running from the first day of good faith proprietary possession, and terminates after the lapse of three years from the date of the commencement of such possession. The good faith of the possessor has to persist throughout the whole period (Art. 45/I SPZ);

470 These are cultural goods, protected natural resources, etc.
however, the periods of time, for which the ancestors of the present possessor were in the good faith proprietary possession of the movable in question, can be credited to the present possessor’s time period of good faith proprietary possession (Art. 45/II SPZ). Certain interruptions of possession can occur during this period, but these do not affect the lapse of time. Art. 45/V SPZ provides that a period, in which a possessor was involuntarily unable to exercise possession, will also be included in the three-year acquisitive prescription period. Such interruptions can result from a possessor’s fiduciary transfer, or loss of, a movable, or when the movable has been stolen from him. These periods of interruption are credited to his three-year acquisitive prescription period.471 In Slovenian law, it is neither required that a good faith proprietary possessor’s acquisition should be based on a valid obligation, nor that he should have a valid title in order to acquire ownership. An invalid title also suffices if a possessor excusably did not know and was not supposed to know that his title was invalid.

The possession has to be acquired in a certain manner by the possessor; practically, all forms of delivery are suitable with the exception of constitutum possessorium.472 Possession can also be inherited (Art. 29 SPZ). Possession neither has to be public nor overt.

In Slovenian law, there is no connection between acquisitive prescription and unjustified enrichment or tort law. The good faith acquirer does not have to compensate the original owner for his loss of property.

Acquisitive prescription is a form of original acquisition, which affects third parties’ rights in rem (e.g. pledge, etc.). The acquirer, when all requirements have been met, acquires the movable free of all encumbrances. If he erroneously believes that he is the owner but is aware of existing encumbrances, it is important to point out that no definite solution to this problem has been provided by Slovenian statutory provisions, case law or legal doctrine.

13.3. The prescription of ownership

In Slovenian law, ownership has not been subjected to any limitation (i.e. prescription) periods.

14. Other forms of original acquisition

14.1. Acquisition by appropriation and acquisition of fruits

It is possible to acquire the ownership of ownerless movables (res nullius) by taking possession of such movables with the intention of acquiring an ownership title (Art. 50 SPZ). An ownerless movable is one, which is not yet being owned by anyone, having been abandoned by its owner (res derelicta). Usually, the acquisition by appropriation is more specifically regulated by other Acts. For example, the Fresh Water Fishery Act (Zakon o sladkovodnem ribištvu, hereinafter referred to as ZSRib)\(^{473}\) declares fish as a natural resource, which is under the special protection of the state (Art. 7 ZSRib). This Act establishes prerequisites that have to be met for fishing; it further provides that if these prerequisites are met, a fish will fall into the ownership of the person who has caught it (Art. 21 ZSRib). A similar regulation exists for salt water fishery.

An abandoned movable is one, in relation to which its owner has unambiguously expressed his will to relinquish ownership (Art. 102 SPZ). The most prevalent example of such abandonment is the dumping of movables. However, a lost movable does not fall into this category; it is not possible to acquire the ownership of such movable by way of appropriation (see below under ‘finding’).

To acquire ownership by appropriation, certain conditions have to be met. In order to acquire ownership, it is necessary to take the movable into one’s possession. The point in time of the acquisition of ownership is the moment of the acquisition of possession. However, in relation to possession, an additional condition has to be met. The possession has to be qualified, i.e. a proprietary possession;\(^{474}\) i.e. possession with the intention to own (Art. 27/I SPZ).

A special form of acquisition is the acquisition of (natural) fruits. Fruits are the direct products of movables and, until they are separated from the principal movable, they are regarded as forming part of the latter (Art. 20/I SPZ). With separation, they become independent movables. In general, the owner of the principal movable automatically acquires the ownership of the fruit, which it produces, by separating the latter from the former (Art. 59/I SPZ). The same can be said of a proprietary possessor in good faith (Art. 59/II SPZ). If fruits, in the process of separation,

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\(^{474}\) Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 50, 290; Judgment of the District Court Zadar Gz 969/87, 11.5.1988 (published in the Review of the Supreme Court of Croatia no. 39/88, 56). When becoming independent, Slovenia decided to retain the legal system of Yugoslavia, deciding to reform it gradually with the introduction of new legislation. Therefore, several principles and considerations of the ex-Yugoslavian jurisprudence are still applicable.
fall onto the neighbouring land, the neighbouring land owner acquires ownership by virtue of the special provision of Art. 82 SPZ.

14.2. Acquisition by finding

Acquisition by finding is possible in relation to lost movables and treasures. Lost movables are those which are neither being possessed nor have been abandoned. If a finder is not sure about whether such a movable has been abandoned, it is to be treated as a lost movable. Every finder has a duty to inform the owner or presumed owner of his find; otherwise, he must report his find to the police (Art. 51/I-II SPZ). An exception to this rule is only made when the value of such movable is insignificant. Such find has to be reported to the owner or presumed owner, but not to police (Art. 51/V SPZ). If the corresponding finder’s duties have been fulfilled, the ownership of the movable is acquired after the lapse of one year from the notification of the owner/presumed owner, or report to the police, subject to the condition that the owner has not claimed the lost movable and that it is still in custody of the police or the finder (Art. 52/I SPZ). The same rule applies to movables of insignificant value but the time limit begins to run at the moment when the owner (or presumed owner) is notified or, in case the identity of the latter is unknown, at the moment of the find (Art. 52/2 SPZ).

There are different regulations on treasure trove. This is a special case of find, where the owner is never known. Therefore, such a find always has to be reported to the police (Art. 53/III SPZ), since a treasure is always deemed to be something of greater value, which has been concealed for such a long period of time that it is no longer possible to identify its owner (Art. 53/II SPZ). Where the owner is identifiable, such a find is not regarded as a treasure, but merely as an ordinary find of a lost movable. If the finder of a treasure is also the owner of the movable or immovable, in which the treasure was found, he acquires ownership at the moment of his find. If a treasure is found within an object that belongs to another person, the finder and the owner of such an object will acquire ownership of the treasure in equal shares (Art. 53/I SPZ). However, such a situation is rare in practice because, usually, there is special legislation to regulate such a situation. For example, Art. 58 of the Act on the Protection of Cultural Heritage (Zakon o varstvu kulturne dediščine, hereinafter...

475 The police can take such movable into custody, or let it remain in the custody of the finder (Art. 51/III SPZ).
Other forms of original acquisition

ter ZVKD)\textsuperscript{477} provides that every found movable, which is supposed to be part of the cultural heritage, falls into the ownership of the state.\textsuperscript{478}

\textsuperscript{477} Official Journal RS, no. 7/1999 and supplements.
15. Reservation of title

Slovenian law is familiar with the concept of reservation of title. This concept is regulated in the Code of Obligations (Art. 520 and 521). The stipulation of a reservation of title is possible by means of a special agreement between the seller and the buyer; it is never legally presumed.\(^{479}\) Its effect is that even after the delivery of a movable to the buyer, the seller retains his ownership of such movable. A reservation of title clause can also be stipulated in a barter agreement, but this is rare.\(^{480}\)

The agreement of a reservation of title makes the transfer of ownership contingent on the fulfilment of a condition by the debtor. Mostly, this condition will be the payment of the purchase price, but it can also be the satisfaction of some or all of the seller’s claims against the buyer (extended reservation of title).\(^{481}\)

A reservation of title has effect: (a) between the parties, and (b) against third parties.

To have effect between the parties, the agreement of a reservation of title does not need to fulfil any requirements of form. The mere existence of such an agreement suffices in order for it to become effective. The seller retains ownership as well as indirect possession, and the buyer receives direct possession as well as an expectant right (inchoate title) in the ownership of the goods. If the purchase price is not paid to the seller, the latter has a right to rescind the contract and reclaim the goods. There are no special benefits of agreeing a reservation of title to be discerned from the contractual relationship between the buyer and the seller;\(^{482}\) the seller will get his title back as a result of rescinding the contract. Importantly, the seller has a right in rem, which he can assert in claiming for the retransfer of the goods.

The most important benefits of agreeing a reservation of title are discernible from the relationship between the seller and the buyer's creditors. However, in order to have effect against the buyer's creditors, a special form requirement has to be met pursuant to Slovenian law. The **signature of the buyer** on a contract, including a reservation of title clause, has to be **attested by a notary** at a point in **time preceding buyer's bankruptcy** or **seizure** of his assets (Art. 520/II Code of Obligations). The purpose of this form requirement is to prevent the conclusion of antedated reservation of title agreements, which are intended to give the appearance of having been created before bankruptcy.\(^{483}\)

In Slovenian law, a reservation of title is a retention of ownership in the narrow sense. In the case of the buyer's bankruptcy, the seller has the right to claim for the delivery of goods (i.e. he does not have a mere security right).\(^{484}\) In the case of an individual enforcement by the buyer's creditors against a movable, which is subject to a reservation of title, the seller can object to this (for more information see chapter 9: The Consequences of the Insolvency of One of the Parties Involved).

There is a special rule in the Code of obligations for physical objects, which are registered in public registers. Subjecting such objects to a reservation of title is only possible if the special provisions, contained in the Acts regulating these registers, allow this (Art. 520/III Code of Obligations). Irrespective of the reservation of title agreement, the risk of incidental destruction or damage passes to the buyer at the moment of delivery (Art. 521 Code of Obligations).

Accession, confusion, commixture and specification do affect the retained title. If a movable, whose title was retained, is mixed up with another movable (e.g. the buyer's), this results in co-ownership; the reserved title is partially extinguished. It is even worse in the case of the accession of movables (commixture with a principal movable). In such a situation, a reserved title is extinguished completely. The same can be said of confusion. Specification will usually lead to the new movable falling into the ownership of the manufacturer; accession of a movable to an immovable will lead to the movable falling into the ownership of the real property owner. All of these occurrences curtail or completely extinguish the reserved title.

An extended reservation of title is not expressly regulated by legislation. However, it is used in autonomous agreements and is considered as being a recognised legal concept in Slovenian law. This concept has been extensively elaborated by legal doctrine\(^{485}\) (mostly under the influence of

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Slovenia

German legal concepts); so far, however, there has not been any case law on this issue.

16. Abandonment; further ways of losing ownership

In Slovenian law, it is possible that the owner of a corporeal movable abandons it by a unilateral act (Art. 102 SPZ). This presupposes that the owner expresses, beyond any doubt, his intention to abandon a movable.\textsuperscript{486} In the majority of cases, such expressions of intention are manifested (indirectly) by a certain conduct; for example, when a person places a movable in a waste bin.

Situations where dangerous goods are abandoned are regulated by special administrative legislation on the protection of the environment.

Another way of losing ownership is by the destruction of a movable. Nevertheless, the remnants of the destroyed movable can still be subject to the right of ownership (Art. 103 SPZ).

17. Co-ownership

17.1. Forms of co-ownership

Exclusive ownership cannot be shared between several individuals; they can only either own a movable in shares, or be joint owners thereof. The difference between the two is that in the former case, none of the co-owners can claim to own a specific part of the movable; rather, each of them own a determined fraction/share of the movable in its entirety, and each co-owner is free to dispose of his or her share. In the case of joint ownership, the owners' shares have not been determined; joint owners can only dispose of a jointly-owned movable by joint consensus. Joint ownership only arises where this is explicitly provided by law, e.g. joint property of spouses (Art. 51 ZZZDR),\textsuperscript{487} plurality of heirs (Art. 145 ZD).

\textsuperscript{486} Vrenčur in Juhart et al., Commentary on the SPZ (2004) Art. 102, 511.

17. Co-ownership

17.2. Ownership by shares

17.2.1. Acquiring a co-ownership share

Co-ownership can be acquired in the same way as exclusive ownership: By legal transaction, by the decision of a public authority (e.g. a court) or by virtue of a provision of law (Art. 39 SPZ).

Since each share is a separate object in property law, each co-owner can dispose of his share in a movable independently of the others, i.e. without the consent of the other co-owners. However, the co-owners have the right of pre-emption if one of them decides to sell their co-ownership share (Art. 66 SPZ). The shares can be transferred in accordance with the general rules on transfer of title in movables (explained in Part II, chapter 5).

By virtue of the decision of a public authority, a co-ownership share can be obtained in cases where a court divides joint ownership in the course of a non-contentious civil procedure (Art. 128 ZNP) – in such a case, the court will determine the size of each co-owner’s share.

By virtue of the provisions of law, co-ownership in shares is created by joining or blending things (commixtio or confusio, Art. 55 and 56 SPZ), as well as in the case of a treasure trove (Art. 53 SPZ). A co-ownership share can also be acquired by way of acquisitive prescription when more than one individual is involved in such an acquisition (Art. 43 SPZ).

17.2.2. Enforcing property rights in a movable in its entirety

Co-owners have the same rights as exclusive owners, which are: To possess an asset, to use it, to enjoy the usufruct of it in the most extensive way, and to dispose of it (Art. 37/I SPZ). Since these rights belong to all co-owners collectively, special rules regulating their relations inter se are necessary and are, therefore, provided in the SPZ (Art. 65 SPZ et seq.).

All co-owners by share are entitled to collectively have complete legal control over the co-owned movable. Each of them is free to exercise all of his rights, but only in accordance with their share and without intolerable interference with the other co-owners’ rights.

489 Cf. Keresteš, Skupnosti v civilnem pravu, Podjetje in delo 2005/2, 334 (336 ff.).
The property rights in a movable in its entirety can only be disposed collectively by all co-owners. Otherwise, the transaction will not be legally effective due to the lack of the transferor’s power of disposal, unless the prerequisites for good faith acquisition are met. One co-owner, by himself, will usually not be entitled to sell or encumber the entire movable. Furthermore, such a person will neither be entitled to pledge the entire movable, nor subject it to a personal servitude.

On the other hand, each co-owner is free to dispose of his share in the co-owned movable. Although the share, which is the object of the transfer is only a legal fiction, it is actually treated as a movable. Consequently, it should be transferred according to the rules on the transfer of movables, rather than the rules on the transfer of rights. The share in the movable has its own value and can also be the object of enforcement.

17.2.3. Right to division

Each co-owner has an inalienable right to demand the division of a certain movable at any time, unless the chosen moment is inappropriate. The SPZ allows co-owners to waive the right to division, but only for a short, limited period of time. Such a waiver not only binds the co-owner but also his successors. A long-term waiver of the right to the division of co-ownership is null and void (Art. 69 SPZ).

The division can also be sought by the co-owner’s creditors in a non-contentious procedure.

17.2.4. Types of divisions

(a) Division agreement

In the case of an extrajudicial division, all co-owners should agree on collectively. Co-owners can agree on dividing a movable in kind (physical division), or to sell it and distribute the proceeds of such a sale inter se, according to the size of their co-ownership shares (legal division).

Physical division comprises a loss of the co-ownership share in the undivided thing and a simultaneous acquisition of exclusive ownership of one of the new movables, which are the product of such a division, e.g. two co-owners agree to divide 2 kilograms of co-owned cheese into equal parts, so that each of them obtains the exclusive ownership of 1 kilogram of cheese. In order to acquire the ownership of a tangible movable by

491 Wieling, Sachenrecht (2001) 90.
means of a division agreement, the same rules apply as for the transfer of ownership of movables, which are owned exclusively by one person (Art. 70/I SPZ).

(b) Judicial division

When co-owners cannot reach an agreement on the way in which co-ownership shall be divided (physical or legal division), any co-owner is entitled to seek a judicial division of co-ownership, which will decided on in a non-contentious procedure. The court takes into consideration the interests of all co-owners and, if possible, divides the tangible movable in kind. If the physical division of the tangible movable is not possible, or possible but inadequate because the value of the movable would be substantially diminished, the court will order the sale of the movable and distribute the proceeds of such a sale between the co-owners according to the size of their shares (Art. 70/IV SPZ).

In the case of a physical division, the court will declare the occurrence of an acquisition of ownership in relation to each co-owner, who will obtain a physical fraction of the entire movable, or can declare that one of the co-owners is to obtain the full ownership of the entire movable, subject to the condition that he pays the other co-owners off (Art. 70/V SPZ). In a judicial procedure, ownership is obtained by virtue of the court's final decision. A mode of acquisition (modus acquirendi), which is required in the case of an agreement to divide a movable in kind, is not necessary here (Art. 70/II in conjunction with Art. 42 SPZ). The court's decision can be implemented against the will of one or more co-owners by way of commencing an enforcement procedure.

17.3. Joint ownership

17.3.1. Definition of joint ownership

When several persons jointly own a tangible movable, they can only exercise their rights collectively, since their co-ownership shares in the movable have not been determined. Since there is no provision establishing the possibility of explicitly agreeing to create joint ownership, it is deemed that joint ownership can be created only where this is explicitly permitted by law. In most cases, joint ownership is created where strong personal ties between individuals exist, e.g. joint property of spouses (Art. 51 ZZZDR), plurality of heirs (Art. 145 ZD). In other words, A and B, who are only friends, cannot simply agree to buy a car together and jointly own it. They can only agree to buy a car and own it in shares.
If the law does not provide otherwise, the rules of ownership by shares apply analogously to joint ownership as well (Art. 72/V SPZ).

17.3.2. Good faith of third party

In general, joint ownership is harder to detect than ownership by shares, since the internal relationship (shares) between the joint owners is indiscernible to third parties, whereas, in the case of co-ownership by shares, the co-ownership shares are transferable. A third person can acquire the ownership of a jointly owned movable by way of *bona fide* acquisition. However, because the joint ownership is difficult to discern, the law *presumes* that a third party (acquirer) is not in good faith, if he merely knew of the fact that the tangible movable was co-owned and that the counterparty (e.g. seller) did not obtain the consent to the sale from the other joint co-owners. Thus, the third party is not obliged to inquire whether the seller obtained the consent of the other joint co-owners in order to acquire ownership in good faith (Art. 72/III SPZ).

17.3.3. Exercise of property rights by an individual joint owner

Joint owners are allowed to possess, to use, to enjoy the *usufruct* of, as well as to dispose of a tangible movable only collectively. A single joint co-owner cannot dispose of his undefined share. He cannot even transfer an individual joint owner's rights to a third party, which could potentially be individually exercised, because only persons determined by law can exercise rights arising from joint ownership. In other words, someone who is not an heir cannot be a member of the community of heirs, which is a community of joint owners, and, thus, can neither use nor enjoy the usufruct of the jointly owned movable. However, on the other hand, one heir's share can be transferred to his co-heir, the latter adopting the former's legal position in the community of heirs. Similarly, matrimonial joint ownership can emerge only in the case of a married couple, and the property rights in movables falling into matrimonial joint ownership can be exercised only by the spouses.

17.3.4. Division

Since the joint co-owners are closely connected, it is clear that the dissolution of a community of joint owners cannot occur for just any reason. Matrimonial joint property owned by the married persons, is usually divided in cases of *divorce* or *annulment of a marriage*. Joint ownership
18. Rules on unspecified goods

The rules on unspecified goods in Slovenian law are new, and have been introduced only by the SPZ (in 2003). Since their introduction, there has not really been any case law on the issue of unspecified goods. An assembled movable is a type of unspecified movable (Art. 21 SPZ). An assembled movable consists of more than one movable goods; the latter are, according to the ‘general opinion’, perceived as being one physical object. This means that the object of property rights is one assembled movable. The most typical case of assembled movables are stocks.  


18.1. Transfer of shares in an identified bulk

Slovenian property law does not provide any special rules regarding the transfer of shares in an identified bulk. The same rules apply as for the transfer of rights in individual objects or shares. Due to the recentness of the SPZ, there has been no case law on this issue yet.

18.2. Floating charge

The SPZ has introduced a type of floating charge. A non-possessory pledge over stocks is recognised in Slovenian law (Art. 173/I SPZ). The requirement of the individualisation of an object is met by issuing a request that all stocks should be located in one and the same place. The location of the stocks facilitates their individualisation. This pledge is created by its entry in a register of non-possessory pledges.\(^{495}\)

A pledgor is responsible for renewing the stocks and to has to enable the pledgee to check the status of these, as well as informing him about the any changes in quantity of the goods in stock (Art. 173/II SPZ). In case the pledgor neglects his duties, the pledgee can demand the delivery to him, or to his agent, of the pledged goods (Art. 174 SPZ).\(^{496}\) The rights of a pledgee are the same as any other lienee’s, regardless of the type of lien; he is given a priority right to payment in execution and insolvency proceedings.

19. Consequences of the restitution of the movable to the owner

In case of an avoided (annulled) or void contract, each party has to return to the other everything it has received from the latter (Art. 187/II Code of Obligations). No other special cases of restitution are regulated in Slovenian law besides those mentioned below.

19.1. Entitlement to benefits (‘fruits’) derived from the movable

Slovenian law recognises both natural and civil fruits (Art. 20/II SPZ). The rules on the acquisition of fruits refer to natural fruits only.\(^{497}\) Fruits


\(^{497}\) Tratnik in Juhart et al., Commentary on the SPZ (2004) Art. 59, 305.
are regarded as being components of a physical object and, hence, share the legal fate of this item, until the moment of their separation. The right of separation usually appertains to the owner. A good faith possessor can also acquire ownership by way of the separating the fruits from the principal movable. Good faith must exist at the moment of acquisition; it can be cease when an action is served.

A bad faith possessor cannot acquire the ownership of the fruits. He has to return all fruits to the owner (Art. 96/I SPZ). A good faith possessor only has to return those fruits, which have not yet been separated (Art. 95/I SPZ). A bad faith possessor has to reimburse the owner for all fruits he has separated, or could have separated, but failed to do so, during the period of his possession. This claim prescribes after the lapse of three years (Art. 96/II SPZ).

19.2. Loss and deterioration of the movable

A good faith possessor is not liable for reimbursing the owner for his use of a movable, nor nor does he have to reimburse him for any deterioration or the destruction of the movable (Art. 95/II SPZ). This cannot be said of the bad faith possessor. He has to reimburse the owner for any losses caused by the deterioration or destruction of the movable, unless such loss(es) occurred when the movable was in the hands of the owner (Art. 96/III SPZ).

19.3. Reimbursement for improvements and expenses incurred whilst possessing the movable

A good faith possessor is entitled to a reimbursement of all costs, the incurrence of which was necessary in order to maintain the movable (Art. 95/III SPZ). He is also entitled to the reimbursement of all beneficial costs, which have contributed to increasing the value of the movable (Art. 95/IV SPZ). Such claims for reimbursement are set off against the benefits that a possessor gained from the movable (Art. 95/V SPZ). Costs incurred by a good faith possessor for the purposes of embellishing the movable or for pleasure, are only reimbursed if they have contributed to an increase in the total value of an item (Art. 95/VI SPZ). The bad faith possessor has a right to claim reimbursement only for necessary costs incurred, which the owner of the movable would also have been forced to incur, had the movable been in his possession (Art. 96/IV SPZ). A bad faith possessor is only entitled to a reimbursement of beneficial costs, if these were beneficial to the owner of the movable (Art. 96/V SPZ). A bad faith possessor is not entitled to claim for the reimbursement of any
costs he incurred for pleasure, or for the purposes of embellishing the movable. However, he can also opt to remove such items, if such a removal does not damage the principal movable (Art. 96/VI SPZ).

19.4. Possessor’s right to retain the movable

A good faith possessor has the right to retain a movable until all of his incurred necessary and beneficial costs have been reimbursed (Art. 95/VII SPZ). A bad faith possessor does not have such a right.498 This type of retention right is merely obligatory.499

19.5. Who bears the expenses of the restitution of the movable to the owner?

A good faith possessor is not liable to make any reimbursements for the destruction of a movable (Art. 95/II SPZ). However, a bad faith possessor is liable to compensate for the destruction of the movable, unless the destruction occurred when the movable was in the hands of the owner (Art. 96/III SPZ).

Table of Statutory Provisions

SPZ (Property Code)\textsuperscript{500}

Basic Principles

Contents of the Act
Article 1. This Act lays down the basic principles of property law, possession and real rights and the method of their acquisition, transfer, protection and extinguishment.

Real rights
Article 2. Real rights are:
– ownership,
– lien,
– land debt,
– easement,
– right of encumbrance,
– right of superficies.

Object of a real right
Article 3. (1) The object of a real right is a thing.

(2) The object of a lien and a usufruct may also be a property right.

(3) If a property right is the object of a real right the provisions applying to a thing shall apply \textit{mutatis mutandis}.

Capacity of a thing
Article 4. The object of real rights may not be a thing which the law explicitly prohibits from being the object of real rights.

\textsuperscript{500} The editors wish to thank the Ministry of Justice of the Republic of Slovenia for providing us with this translation and allowing it to be published. The translation is not official. It has been prepared by the Government Translation Service and there has not been any review or correction by the Ministry of Justice of the Republic of Slovenia. The status of the translated text of the Property Code is as of 16 December 2003. Slight linguistic improvements have been made by the editors, after consultation of the authors of this report, in articles 57 (1) and (2), 64 (2) and 93.
Effect of real rights
Article 5. Holders of a real right may enforce their right against any person.

Principle of speciality
Article 7. Only an individually defined independent thing can be the object of real rights, except where this Act provides otherwise.

Presumption of good faith
Article 9. Good faith is presumed unless indicated otherwise.

Presumption of ownership
Article 11. (1) It shall be presumed that the owner of an immovable is the person entered in the land register.

(2) It shall be presumed that the proprietary possessor of a movable is its owner.

Possession

Concept
Article 24. (1) Possession is direct, actual control over a thing (direct possession).

(2) Possession is also held by a person who exercises actual control over a thing through some other person who has direct possession based on any form of legal title (indirect possession).

Joint possession
Article 25. Possession can be exercised by more than one person either by them possessing the thing together or by each of them exclusively possessing a specific part of the thing.

Holding
Article 26. (1) Anyone who exercises actual control over a thing for another person and is obliged to act in accordance with that person’s instructions does not have possession (holder).

(2) A holder can exercise self-help for the possessor.

Proprietary and non-proprietary possession
Article 27. (1) Anyone who has a thing in his possession as his own is the proprietary possessor.

(2) Anyone who has a thing in his possession without wishing to have it as his own and who recognises the higher legal control of an indirect possessor is a non-proprietary possessor.
Good faith of the possessor
Article 28. The possessor is in bad faith if he knew or could have known that he was not entitled to possession.

Self-help
Article 31. The possessor has the right to self-help against a person who without justification disturbs his possession or deprives him of it, on condition that the danger is direct, that the self-help is immediate and urgent and that the method of self-help is appropriate to the circumstances in which the danger exists.

Dispute over disturbance
Article 32. Judicial protection against disturbance or deprivation of possession can be claimed within thirty days of the day on which the possessor learned of the disturbance and of the perpetrator and no later than one year after the disturbance originated.

Judicial protection of possession
Article 33. (1) The court shall give judicial protection with respect to the last state of the possession and any disturbance that has occurred. In this regard the right of possession and the good faith of the possessor are not taken into account.

(2) Even a possessor who obtained possession by force, secretly or by abuse of trust has the right to protection, except against the person from whom he gained possession in this manner if that person exercised permitted self-help as referred to in Article 31.

(3) The possessor shall not have legal protection if the disturbance or dispossession was based on a law.

Scope of judicial protection
Article 34. In a decision on a claim for protection from disturbance of possession the court shall order a prohibition against further disturbance of possession or order the return of possession and other measures necessary for protection against further disturbance.

Protection in the case of two or more possessors
Article 35. In relations between two or more possessors of the same thing any action which arbitrarily alters or hinders the way in which the possession has been exercised until that point shall be considered to be a disturbance.

Protection on the basis of a right
Article 36. A dispute over disturbance of possession (Article 32) notwithstanding, judicial protection of possession may be claimed on the basis of the right of possession.
Ownership

Concept of Ownership

Ownership
Article 37. (1) Ownership is the right to possess a thing, to use and enjoy it in the fullest manner, and to dispose of it. Restrictions on use, enjoyment and disposal can only be determined by law.

(2) Ownership cannot be tied to a time limit or a condition unless otherwise determined by law.

Restriction on ownership at the will of the owner
Article 38. (1) The owner may restrict his right for any purpose which is not prohibited unless otherwise determined by law.

(2) A prohibition against the disposal or encumbrance of a thing or a real right by means of a legal transaction or will shall be binding only on the first owner and not also on his legal successors.

(3) A prohibition against disposal or encumbrance may be limited in time.

(4) A prohibition against disposal or encumbrance may only be entered in the land register if it is agreed between spouses or cohabiting partners, parents and children, and adopted children and adoptive parents. In this case the prohibition also has effect against third persons.

(5) By means of a legal transaction the owner may undertake to sell a certain thing to the other contracting party on request under agreed conditions (right of repurchase). A right of repurchase cannot be transferred. A right of repurchase may be limited in time. A right of repurchase extinguishes upon the death or the dissolution of the other contracting party.

(6) A right of repurchase has effect against third persons if it is entered in the land register.

Acquisition of Ownership

General

Acquisition of ownership on the basis of a legal transaction
Article 40. Acquisition of ownership requires a valid legal transaction from which the obligation to transfer ownership derives, and the fulfilment of other conditions laid down in law.

Acquisition by prescription
Article 43. (1) A proprietary possessor of movable property in good faith acquires ownership of it after three years.
(2) A proprietary possessor of immovable property in good faith acquires ownership of it after ten years.

(3) If a proprietary possessor in good faith, under the conditions referred to in the previous paragraph, exercises possession on part of the immovable, that part is subject to independent possession by prescription.

**Restriction on possession by prescription**

Article 44. (1) Ownership of property in the public domain and things outside legal transactions cannot be acquired by prescription.

(2) A right acquired by prescription may not be detrimental to a person who in good faith and trusting in the public records acquired a right before the right acquired by prescription was entered in the public record.

**Calculation of the prescriptive period**

Article 45. (1) The prescriptive period begins to run on the day when the possessor obtained proprietary possession of the thing in good faith and ends at the end of the last day of this period. The possessor must be in good faith for the entire duration of the prescriptive period.

(2) The prescriptive period also includes the time when the possessory predecessors of the current proprietary possessor in good faith had possession of the thing as proprietary possessors in good faith.

(3) In the case of co-ownership being acquired by prescription the good faith of each co-owner is judged independently.

(4) If a possessory predecessor was in bad faith the good faith of the possessory successor is judged independently.

(5) The prescriptive period also includes the time when the possessor was temporarily unable to exercise possession for reasons independent of his will.

**Good faith of a legal person**

Article 46. The good faith of a legal person is judged according to the good faith of its bodies and other persons for whom, with regard to their area of work, it is important that the thing belongs to the legal person.

**Acquisition of Ownership of Movable Property**

**Merger**

Article 55. (1) If movables belonging to different owners are merged in such a way that they become elements of a unified movable, the previous owners acquire co-ownership of the new thing in proportion to the values of the individual movables at the time of the merger.

(2) If one of the movables can be considered to be the principal thing the owner of the principal thing shall become the owner of the unified movable.
(3) The principal thing is the thing which in accordance with general conviction is deemed to be the principal thing.

**Mixing**

Article 56. If movables of different owners are mixed or combined in such a way that they can longer be separated, or in such a way that their separation would incur disproportionate costs, the provisions of Article 55 of this Act shall apply mutatis mutandis.

**Making of a new movable**

Article 57. (1) Anyone who, using his own material, makes or has made for himself a new movable acquires ownership of it.

(2) If someone using another’s material makes or has made for himself a new movable he acquires ownership of it provided the value of the work is not substantially lower than the value of the material.

(3) If the material belonged to different owners the provisions of Articles 55 and 56 of this Act shall apply mutatis mutandis.

(4) Writing, drawing, painting, printing or engraving on a surface or treating it in some other way shall also be deemed to be the making of a new movable.

**Rights of third persons**

Article 58. (1) With the extinguishment of ownership of a movable on the basis of Articles 55 to 57 of this Act other rights in respect of the movable shall also extinguish.

(2) If a former owner acquires co-ownership of a unified or new movable or becomes its sole owner the rights which encumbered the movable that belonged to him shall be resuscitated in respect of his co-ownership share or in respect of the unified or new movable.

**Acquiring ownership on the basis of a legal transaction**

Article 60. (1) Ownership of a movable is acquired with its delivery into the possession of the acquirer.

(2) Delivery of a movable is also deemed to be accomplished with the delivery of a document on the basis of which the acquirer may dispose of the movable, as well as with the delivery of part of it, or with the exclusion or any other designation of the thing which implies its delivery.

(3) Delivery of a movable is deemed to be accomplished with the concluding of a legal transaction on the transfer of ownership without its actual delivery:

– if prior to the concluding of the legal transaction the movable was already in the possession of the acquirer (traditio brevi manu);

– if the parties agree that despite the transfer of ownership the movable is to remain in the possession of the transferor (constitutum possessorium).

(4) If a thing is in the possession of a third person delivery is deemed to be accomplished at the moment when the third person was informed of the transfer of
ownership (traditio longa manu). The transferor thereby transfers his indirect possession to the acquirer.

Subsequent acquisition of ownership
Article 61. (1) If a movable was delivered when the transferor did not have the right to dispose of it but subsequently acquired this right then ownership is also acquired at that time.

(2) If a movable was delivered in this way to two or more acquirers then ownership is acquired by the acquirer to whom the movable was delivered first.

Delivery through a representative
Article 62. Delivery of a movable to an acquirer is deemed to have been accomplished if the movable was delivered to the acquirer’s representative.

Conditional transfer of ownership
Article 63. Transfer of ownership of a movable may be tied to a resolutory condition or a suspensive condition, in particular as transfer of ownership as security or reservation of title.

Special cases of acquisition
Article 64. (1) Ownership of a movable is acquired even if the transferor did not have the right to dispose of the thing if the acquirer was in good faith at the moment of delivery and acquired the thing on the basis of an onerous legal transaction, and the other conditions laid down in Article 40 of this Act are fulfilled.

(2) Ownership is acquired in the manner described in the previous paragraph only if the movable was sold at a public auction, if the transferor put such movables into circulation as part of its commercial activity or if the transferor acquired possession of the movable by the intention of its owner.

(3) If the delivery was accomplished by means of constitutum possessorium the acquirer acquires ownership when the transferor delivers the thing into his direct possession, unless he is no longer in good faith at that time.

(4) With acquisition of ownership in accordance with the provisions of the previous paragraphs of this article all other rights in respect of the thing shall extinguish if the acquirer believed in good faith that these rights did not exist.

(5) Within one year of the extinguishment of ownership the previous owner may require the acquirer to sell the movable to him at the market price if it has a special importance for him.

Protection of Ownership

Claim for return
Article 92. (1) The return of an individually specified thing may be demanded from anyone by its owner.
(2) The owner must prove that he has the right of ownership of the thing whose return he demands and that the thing is in the actual possession of the defendant.

(3) The exercise of a claim referred to in the first paragraph of this article shall not be subject to the statute of limitations.

Possessor's objections
Article 93. The direct possessor may refuse to deliver a thing to its owner if he or the indirect possessor for whom he is exercising the right to possession is entitled to possession.

Appointment of a predecessor
Article 94. Anyone who possesses a thing in another’s name may object to the plaintiff’s claim by appointing an indirect possessor or predecessor.

Legal position of a proprietary possessor in good faith
Article 95. (1) A proprietary possessor in good faith shall return a thing to its owner together with the fruits that have not yet been gathered.

(2) A proprietary possessor in good faith is not obliged to pay for use of a thing and is not liable for deterioration or destruction of the thing caused during the time when he had the thing in his possession in good faith.

(3) A proprietary possessor in good faith has the right to reimbursement of the costs necessary for maintenance of the thing.

(4) A proprietary possessor in good faith may claim reimbursement of beneficial costs to the extent by which the value of the thing has been increased.

(5) The owner of the thing must reimburse a proprietary possessor in good faith for necessary and beneficial costs as referred to in the third and fourth paragraphs of this article to the extent to which these costs are not covered by the benefits which he gained from the thing.

(6) A proprietary possessor in good faith has the right to reimbursement of costs which he incurred for his own satisfaction or in order to embellish the thing only to the extent that its value has increased. If what he did for his own satisfaction or in order to embellish the thing can be separated from it without damage then the proprietary possessor in good faith has the right to separate it and retain it for himself.

(7) A proprietary possessor in good faith has the right to retain the thing until such time as he is reimbursed for the necessary and beneficial costs which he incurred in connection with its maintenance.

(8) A proprietary possessor in good faith shall be in bad faith from the moment a suit is served on him and the owner can prove that he became a possessor in bad faith even before the suit was served.

(9) A claim for reimbursement of necessary and beneficial costs shall lapse pursuant to the statute of limitations three years from the day on which the thing was returned.
Legal position of a possessor in bad faith

Article 96. (1) A possessor in bad faith must return all the fruits to the owner of the thing.

(2) A possessor in bad faith must repay the value of all fruits collected which he has consumed, alienated or destroyed as well as the value of the fruits which he has not collected. This claim shall lapse three years after the return of the thing.

(3) A possessor in bad faith must make compensation for damage caused through the deterioration or destruction of the thing, unless the damage would also have occurred if the thing had been with the owner.

(4) A possessor in bad faith may claim reimbursement of necessary costs that would also have been incurred by the owner if the thing had been with him.

(5) A possessor in bad faith shall have the right to reimbursement of beneficial costs only if they are of benefit to the owner.

(6) A possessor in bad faith shall not be entitled to reimbursement of beneficial costs which he incurred as a result of his satisfaction or embellishment of the thing, but may take away a thing which he built in for his satisfaction or embellishment of the thing if it can be separated from the principal thing without damage.

(7) A claim for reimbursement of costs by a possessor in bad faith shall lapse pursuant to the statute of limitations three years from the day on which the thing was returned.

Bad faith of an indirect possessor

Article 97. (1) If an indirect possessor was in bad faith and the direct possessor did not know or could not have known this, the direct possessor shall be liable as a proprietary possessor in good faith.

(2) In the case referred to in the previous paragraph the owner may pursue claims against the indirect possessor in bad faith within one year of the return of the thing.

Claim for return by the presumed owner

Article 98. (1) In the event of dispossession a proprietary possessor in good faith (presumed owner) of a thing also has the right to claim its return from a proprietary possessor in good faith who has the thing with a weaker legal title.

(2) If two persons are deemed to be the presumed owner of the same thing the person who acquired the thing against payment has the stronger legal title. If their legal titles are of equal strength the person who has direct possession of the thing shall have priority.

(3) A claim under the first paragraph of this article shall not lapse.
Protection against disturbance

Article 99. (1) If a third person unlawfully disturbs the owner or presumed owner in some way other than by dispossessing them of the thing, the owner or the presumed owner may file a suit demanding the cessation of the disturbance and the banning of any further disturbance.

(2) If the disturbance referred to in the previous paragraph caused damage the owner shall have the right to compensation for the damage under general rules on compensation for damage.

(3) A claim under the first paragraph of this article shall not lapse.
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ZNP  Zakon o nepravdnem postopku / Non-contentious Civil Procedure Act
ZNVP  Zakon o nematerializiranih vrednostnih papirjih / Book Entry Securities Act
ZOSRL  Zakon o obligacijskih in stvarnoprahnih razmerjih v letalstvu / Obligations and Real Rights in Air Navigation Act
ZPPLPS  Zakon o posebnih pogojih za vpis lastninske pravice na posameznih delih stavbe v zemljiško knjigo / Act Determining Special Conditions for Registering the Ownership of Individual Parts of Buildings with the Land Register
ZPPSL  Zakon o prisilni poravnavi, stečaju in likvidaciji / Compulsory Settlement, Bankruptcy and Liquidation Act
ZSRib  Zakon o sladkovodnem ribištvu / Freshwater Fishing Act
ZTFI  Zakon o trgu finančnih instrumentov / Market in Financial Instruments Act
ZTVP-1  Zakon o trgu vrednostnih papirjev / Securities Market Act
ZVKD  Zakon o varstvu kulturne dediščine / Cultural Heritage Protection Act
ZZK-1  Zakon o zemljiški knjigi / Land Registry Act
ZZZDR  Zakon o zakonski zvezi in družinskih razmerjih / Marriage and Family Relations Act