THE CONFLICT BETWEEN THE LEGAL INTERESTS OF THE ORIGINAL OWNER AND THE GOOD FAITH ACQUIRER OF MOVABLES – A COMPARATIVE OVERVIEW OF THE SOLUTIONS

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Abstract:

The present article compares the legal rules on the good faith acquisition of movables in various national legislations of both Member states and countries outside the EU, in order to analyze the differences of the three major types of legal approach towards this means of original acquisition of ownership over movables. It is underlined that the existing diversity in the regulation can cause serious difficulties when multiple jurisdictions are concerned. One of the solutions to this issue is the unification of these rules at the EU level. The provisions of Book VIII, art.3:101 of the Draft Common Frame of Reference provide a solid foundation for this unification and may help to solve cross-border cases in a more efficient and just manner.

Keywords: *'nemo plus iuris' principle, good faith acquisition, original owner, bona fide acquirer, transfer of movables, comparative legal research, Draft Common Frame of Reference.*

Introduction:

Due to its great importance for the security of transactions, there is hardly a major legal system that doesn't contain any rules on the good faith acquisition of movables as well as the protection of the rights of the deprived original owner. The legislations of the particular Member states, as well as other countries outside the European Union are not coherent and they differ in the solution of the arisen legal conflict, taking a different approach to the Roman principle '*nemo plus iuris ad alium transferre potest quam ipse habet*'. Either the deprived owner or the bona fide acquirer (or sometimes even both sides) must bear the risk of losing their rights. The interests of commercial transactions and the liberalization of the market normally favor the bona fide acquirer, while even the basic notion of justice is offended by the idea that the owner of a movable could be deprived of it, sometimes even against his will, simply because someone has disposed with it. Of course, if the acquirer knows or under the specific circumstances of the case should have known that he is dealing with a non-owner or a person not being entitled to transfer the movable, every major legal system unambiguously protects the deprived owner, thus preventing the loss of his rights *in rem*. Much more complicated to solve are those situations where the acquirer is in good faith and the transferor, who has disposed of the movable, is holding it with the consent of its owner.

It is possible to divide the major contemporary national legislations into three

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broad groups as far as protection of the good faith acquirer is concerned. It will be inaccurate to say that every particular country has an absolutely identical set of rules with the other countries, included in the same group. What is important to stress out is that those legislations share a common legal principle that has defined their legal approach on resolving the conflict between the rights of the dispossessed owner and of the bona fide acquirer. Two extreme and one balanced legal approach can be distinguished. Using the comparative method of legal research the present article aims at studying these three main types of legal approach in cases where the law has to take side in the conflict of legal interests of the deprived owner, on one hand, and a good faith acquirer, on the other.

I. The Original Owner Rule

At the first extreme the original owner's legal interests are being meticulously protected irrespective of the means in which he was deprived of his property. The owner is granted the right to claim back his property, wherever he finds it, even if it has passed in the hands of a good faith acquirer.

The roots of the *original owner rule* can be traced back to Roman private law. In the early period (about 450 BC) private law was codified by Lex Duodecim Decorum (The Twelve Tables) and original acquisition of ownership was recognized by acquisitive prescription only – the so called *usucapio*. This principle intended to protect the owner of the movable from being deprived of his property, on one hand, and the party in possession who could acquire the movable after a certain period of time. A means for the owner of the movable was provided to claim back his property if the prescriptive period had not run.

By the Classical period of Roman law, extending from 1 AD to the end of the third century AD the rules on acquisitive prescription evolved immensely. The major principle, applicable both to immovables and movables, was formulated by Ulpianus – "*One cannot acquire ownership from a person who is not himself the owner*"[1]. Together with another tenet, formulated by Paulus "*What belongs us cannot be transferred to another without our consent*"[2], they formed a concept of the consistent protection of the original owner.

During this period, the basic action available to an owner out of possession to recover his property, both movable and immovable was the *rei vindicatio*, or revandicatory action. Initially the period for this action was limited to one year. The possessor could repel the claim if proving the fact that his possession had lasted longer than one year, without having to prove anything else. This circumstance was seriously obstructing the interests of the original owner.

That's why at the end of the Republican era the prerequisites for the usucapio were set to five elements: *res habilis* (a movable or immovable thing that is not *extra commercium*), *possessio*, *iustus titulus* (a just title, capable of transferring ownership by nature), *bona fides* (good faith) and *tempus* (an elapsed period of time).

Furthermore, at the time of Justinian and his Corpus Iuris Civilis, enacted in the middle of the 6th century, the prescriptive period was increased to three years. If the prerequisites were not met (for example, if the *iustus titulus* was not present because of the circumstance that the goods were lost or stolen, or the possessor was lacking good

[1] "Nemo plus iuris ad alium transferre potest quam ipse habet"- D.50, 17, 54.
[2] "Id, quod nostrum est, sine facto nostro ad alium transferri non potest – D. 50, 17, 11.

faith) the period of possession necessary to acquire the thing was set to thirty years. In addition, the Justinian legislation strengthened the *rei vindicatio* so that the owner could pursue his property during the whole prescriptive period.

As a conclusion, Roman law established and developed an approach that meticulously protected the dispossessed owner. This approach has been enacted by a series of national legislations.

English common law takes as a starting point the *nemo plus iuris* principle. As a consequence if someone has disposed of a property not belonging to him, in the conflict between the original owner and a third acquirer the former has the stronger position. This is expressed in art. 21 (1) of the English Sale of Goods Act of 1979 (SGA)[3].

The major difference between English and civil law in respect of good faith acquisition is that the first one lacks a gerenal exception to the *nemo plus iuris* rule to benefit the good faith acquirer. Rather, the SGA of 1979 provides several statutory exceptions to this principle.

The emergence of these exceptions is to an extent influenced by a statement by Lord Denning:

"In the development of our law two principles have striven for mastery. The first is for the protection of property: nobody can give a better title than he himself possesses. The second one is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title."[4]

The first exception concerns *apparent authority* (also known as the doctrine of estoppel), which is actually provided in the second part of art. 21 (1) SGA'1979 "… unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell". This doctrine means that if the owner has assured the buyer that the seller has an actual right to transfer the title of the goods, the buyer can acquire the title despite the fact the seller was not the owner[5].

The second statutory exception to the *nemo plus iuris* principle is referred to as *sale under voidable title* (art. 23 of the SGA) - "When the seller of goods has a voidable title to them, but this title has not been voided at the time of the sale, the buyer acquires a good title, provided he buys them in good faith and without notice of the seller's defect of title". It offers protection to the buyer of a movable if he purchased it in good faith and did not know that his seller has a defect of title (cases of fraud, duress, misrepresentation etc).

The SGA contained the market overt rule as well, but the provision was abolished in 1995[6].

Other statutory exceptions can be found in the Factors Act of 1889, concerning

[3] Art. 21 (1) SGA : "Subject to this Act where goods are sold by a person who is not their owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

[4] See *Bishopsgate Motor Finance Corporation Ltd. v Transport Brakes Ltd* [1949] 1 KB 332 at 336-337.

[5] The estoppel is actually a rule of evidence preventing a person from denying the truth of a statement he has made previously or the existence of facts in which he has lead another to believe. See Laszlo Pók, op. cit., 7.

[6] The market overt rule was codified in art. 22 (1) SGA'1979 : Where goods are sold oin market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect of title on the part of the seller".

cases of mercantile agency[7] and seller in possession after sale[8].

The provisions of the English Sale of Goods Act have influenced a number of common law national legislations, like Scotland and Northern Ireland (as part of the United Kingdom), Cyprus[9], India[10], Canada[11] etc.

Among the countries whose national legislations belong to the Continental legal system Portugal is the only country whose Civil Code has fully adopted the *nemo plus iuris* principle. Portuguese civil law does not recognize good faith acquisition. There are no rules comparable to the "possession is equal to a title" principle, embodied in the French law, or even to the provisions of §929-932 BGB allowing the good faith purchase despite the enhanced protection of the original owner.

This circumstance results in the legal construction that a sales contract, by which the seller is neither the owner, nor legally entitled to dispose of the goods, is considered void, as art. 892 of the Portuguese Civil Code explicitly provides. If, however, such a contract is concluded and the purchaser acting in good faith, paid a consideration, the Portuguese legislator provides a restitution claim for the price because of unjustified enrichment of the transferor (art. 894 of the Portuguese Civil Code). The dispossessed owner can always claim back his movable, no matter how much time has elapsed.

II. The Bona Fide Acquirer Rule

At the second extreme, an acquirer who gained possession over a movable through a valid title, becomes the rightful owner, even if the movable has originally been lost or stolen from its original owner. The former owner loses his rights over the movable, but can always claim compensation for unjustified enrichment against the transferor of the goods. The policy of a comprehensive protection of the good faith transferee, known as the bona fide acquirer rule, has been adopted by the new Italian Civil Code of 1942. Pursuant to art.1153 of the Italian Civil Code, as far as movables are concerned, the possession is equal to a title. This principle is based on the need to increase certainty in the circulation of movables, since it is nearly impossible for a person to undertake a thorough investigation if every transferor of the goods was in fact their owner. Another argument in support of adopting this principle is the speed with which transactions occur, not allowing the transferee to keep a complete record of the transfers. It is being stressed out that the possession of a movable creates a legitimizing appearance of ownership, so that every person exercising power over a movable has a right to dispose with it, as far as other people unaware who the actual owner is are concerned. Pursuant to art. 1153 et seq. Italian Civil Code, the former owner cannot bring a rei vindicatio action against the good faith acquirer under any circumstances, not even if the goods were lost or have been stolen from him. Thus, the

[7] Art. 2 of the Factors Act provides: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale … made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same."

[8] Art. 8 of the Factors Act provides that if the owner of a good sells it two times the second buyer can acquire the title if he acts with good faith and has no knowledge about the first sale.

[9] Cyprus's Sale of Goods Act of 1994 and its articles 27-30 mirror the provisions on good faith acquisition of English Sale of Goods Act of 1979.

[10] See art.26-30 of India's Sale of Goods Act.

[11] See § 22-24 of Canada's Sale of Goods Act.

Italian Civil Code of 1942 has eliminated the distinction between involuntary and voluntary loss of ownership and enhanced the protection of the bona fide transferee in either cases. Furthermore, there are no additional requirements concerning the title except its validity, which means that both onerous and gratuitous acquisition will lead to extinguishing the original owner's right and the good faith acquirer shall become the new owner.

Throughout the Member states, there is no other legal system implementing the *bona fide acquirer rule* to such an extreme extent. The other national legislations are being somewhat influenced either by the balanced approach or by the *original owner rule* that consistently protects the right of the dispossessed owner. Particularly interesting is the policy towards good faith acquisition adopted in the Czech and Slovakian legislation. Both countries have very similar civil and commerce codes and thus share the same principles. Their civil codes do not provide any rules on good faith acquisition. Is it not possible to acquire ownership from a transferor who lacks the right to dispose regarding the transferred property. The absence of a right of disposition of the property always results in an absolute nullity of such a contract[12]. It is clear that Czech and Slovak civil law have adopted the *nemo plus iuris* principle. Surprisingly, on the other hand, the Czech and Slovak Commercial Codes have codified a set of very liberal rules on good faith acquisition, applicable to merchants only (see § 446 of the Slovak Commercial Code and § 446 of the Czech Commercial code). The main purpose was to promote the security of commercial transactions. § 409 of the Slovak Commercial code explicitly provides an exception of the *nemo plus iuris* principle if the good faith acquisition is based on a business relationship. Since there is no rule excluding lost or stolen goods, scholars[13] believe that they can be acquired in an original manner from the good faith transferee.

Another example of a national legislation that adopted the bona fide acquirer rule, but sustained some influence from the balanced approach is Austria.

Art. 367 of the Austrian Civil Code provides that it is possible to acquire ownership over movables from a non-owner in three particular situations: at a public auction; if it is purchased from a person in the course of the latter's commercial activity of selling goods of this kind; and if the owner has voluntarily entrusted the movable into the seller's possession. Moreover, the acquisition must be for value and the acquirer must have obtained possession over the movables in good faith.The rules on good faith acquisition in the Austrian civil code do not provide an exception on lost or stolen goods. This circumstance has lead scholars to assume that it is possible for the good faith transferee of these goods to gain ownership over them in an original manner[14]. This effect can occur only if the other prerequisites of the good faith acquisition are present. Despite these limitations, the Austrian Civil Code provides an enhanced protection of the legal interest of the good faith transferee, allowing him to acquire ownership even over lost or stolen goods. Scholars tend to categorize Austrian law as one of the most protective

[12] Ivan Petkov, National Report on the Transfer of Movables in Slovakia, in vol. 6 of *National Report on the Transfer of Movables in Europe* (Munich: Sellier European Law Publishers, 2011), 421.

[13] Ivan Petkov, op.cit., p. 421

[14] Helmut Koziol and Rudolf Welser, *Bürgerliches Recht*, Band 1 (Wien: Manzsche Verlags-und Universitätsbuchhandlung, 2006), 335.

jurisdictions towards good faith purchasers[15].

The liberal Austrian provisions that can be ranked as the second most favorable to the bona fide acquirer (after the Italian ones), have been fully adopted by the art. 64 et seq. of the Slovenian Ownership Code as well.

III. The Balanced Approach

1. The Consensual System

Just like the bona fide acquirer rule, the balanced approach recognizes good faith acquisition as a separate, original manner of acquiring ownership over a movable from a person acting in good faith.

The basic rule that has become the founding stone in a number of national legislations when it comes to good faith acquisition is that "with reference to movables, possession is considered equivalent to title"[16], meaning that possession and ownership of movables go hand in hand. The first national legislation to adopt this principle with the intention to protect good faith acquirers and the interests of commerce, was the French Civil Code of 1804 and its article 2279 (a recent reform changed the numeration to art. 2276). The drafters of the Code placed this provision in a section called "On some special prescriptions". Thus, good faith acquisition was looked upon as a special, instantaneous acquisitive prescription rule. This explanation is rejected by Marcel Planiol[17], however, being in contradiction in terms since "acquisition by prescription presupposes a certain period of time has actually elapsed". A more recent theory explains the legal nature of the provision on good faith acquisition as an irreputtable presumption of ownership in favor of the possessor[18]. The prevailing view, supported by the case law of the French Cassation Court is that the good faith acquisition is a separate, independent method to acquire ownership over a movable in an original manner. The main effect of the principle "as far as movables are concerned, possession is equivalent to title" is that it overrides the rules in the law of obligations regarding abuse of trust by a transferor holding a limited title or even nullity of a contract. The result therefore is that the good faith acquirer a non domino neither receives the ownership right on a derivative basis, nor takes title by instantaneous prescription, but acquires a clear title by statutory provisions[19].

In order to fully comprehend the good faith acquisition in French law one must keep in mind that according to art. 711 of the French Civil Code, ownership is acquired and transmitted by succession, by gift (both inter vivos and mortis causa) and by the mere effect of a obligation.This provision brings us to the conclusion that the French transfer system is consensual, which can be derived from a closer look on article 1138 as well : *An obligation of delivering a thing is complete by the sole consent of the*

[15] Ernst Karner, Gutgläubiger Mobiliarerwerb, (Wien : Springer, 2006), 18.

[16] "*En fait des meubles, la possession vaut titre*". This principle was formulated in the first half of the XVIII century by the famous French civil law scientist Francois Bourjon in his work Le commun droit de la France et la Coutume de Paris reduits en principles. (Paris, 1770) p. 1094., see Arthur Salomons, "The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the European Draft Common Frame of Reference. A Tale of Two Gatekeepers." *European Review of Private Law* vol. 3 (2013): 843.

[17] M.Planiol, Traite elementaire de Droit Civil. Droit les biens, translated by Tihomir Naslednikov (Sofia, 1928, Staykov Printing Office), 214.

[18] P. Michael Hebert, "Sale of Another's Movables", *Louisiana Law Review*, vol. 29 (1969): 335.

[19] Colin, A., Capitant, H., Traite elementaire de Droit Civil, Tome 1, Livre II – Droit les biens, translated by Galab Galabov, (Sofia, 1926, Royal Court Printing Office), 326.

contracting parties. It makes the creditor an owner.

Thus, the provision of art. 2276 (1) serves a double function. In the first place, it provides a rule of proof – possession establishes a legal presumption that whoever is exercising the factual power over a movable is deemed to be its owner, unless proven otherwise. In the second place, it contains a material rule – the act of possessing a movable renders its possessor as the owner in case the movable is being transferred to him by someone not entitled to dispose with it.

The French Civil Code does not specify further requirements that the possessor has to meet before he is entitled to invoke the *possession vaut titre* rule. That's why case law helped the institute to evolve. Nowadays, it is unambiguous that the transferee of a movable that was transferred to him by a non-owner can acquire ownership if he received actual ("real") possession and he doesn't know or should not have known that his transferor lacks ownership over the movable. Transition of ownership is not caused by the effect of an obligation, but instead, by mere possession. This possession creates a new title on behalf of the good faith transferee, independent and not deriving from the original title.There is no requirement for the transaction to be onerous – any valid legal act capable of transferring rights over movables is sufficient[20].

The major difference between the balanced approach and the bona fide acquirer rule can be found in the attitude towards lost or stolen goods. Unlike the quite liberal approach in Italy that allows the good faith transferee to acquire ownership even over lost or stolen goods, the provisions of the French Civil Code exclude them from the material protection of the good faith acquisition. The reason for this exception can be found in the circumstance that loss and theft lead to involuntary loss of possession. If the property was lost or got stolen, the original owner can reclaim it back from whoever holds it, even from the good faith transferee. Because of its somewhat radical nature, the French legislator has limited the time-span for such a claim to be made to three years – not from the date of the bona fide acquisition, but from the moment the movable got lost or was stolen (see art. 2276 (2) French Civil Code).

The good faith transferee of a lost or stolen movable is not left completely empty-handed. Pursuant to art. 2277 French Civil Code, *when the present possessor of a thing lost or stolen has bought it at a fair or market, or at a public sale, or from a merchant selling similar things, the original owner may have it returned to him only by reimbursing the possessor for the price which it has cost him.*

This remarkable provision of medieval origin is called the "market overt" rule. It serves a primary function – to create a counter-exception in favor of the transferee who acquired in good faith lost or stolen movables under normal, unsuspicious circumstances[21]. On the other hand, it protects him against a possible insolvency and/or untraceability of his transferor. If the dispossessed owner reclaims back his goods, the good faith buyer can spare the difficulties of trying to find the seller and refund the purchase price. The French Civil Code has adopted a much more fast and practical solution that strikes the best possible compromise in the conflict of legal interests between the original owner and the

[20] Eleanor Kashin Ritaine, National Report on the Transfer of Movables in France, in National Report on the Transfer of Movables in Europe, (Munich: Sellier. European Law Publishers, 2011), 119-128.

[21] Arthur Salomons, "Good Faith acquisition of movables", in *Towards an European Civil Code, 4th revised and expanded edition*, ed. M. Hesselink et al. (Wolters Kluver Law International, 2011), 1065-1082.

bona fide acquirer – the owner is obliged to reimburse him with the price paid for the lost or stolen goods. Until he has received this payment, the possessor is entitled even to exercise a retention right over the movables.

This balanced approach, resulting in a compromise in the conflict of legal interests between the dispossessed owner and the bona fide acquirer was adopted by the revoked Italian Civil Code of 1865 (art. 707). One of the most significant merits of art.707 Italian Civil Code'1865 was expanding the protection of good faith acquisition institute over bearer instrument and money as well. The old Italian Civil Code had a great impact on a huge number of national legislations that belong to the Romanistic legal family, including the Bulgarian one.

In Bulgaria, the first rule on good faith acquisition was enacted in 1904 in the revoked Law on Property, Ownership and Servitudes. This act implemented the provisions on ownership and other real rights from the revoked Italian Civil Code and closely followed both the consensual system of transferring ownership and the balanced approach in terms of good faith acquisition. Its article 323, identical to art. 707 of the old Italian Civil Code, contained the rule "With reference to movables and bearer instruments, possession is considered equivalent to a title". The possibility for the original owner to reclaim his lost or stolen movables for a period of three years, as well as the market overt rule in favor of the good faith acquirer who bought lost or stolen goods at a fair, market or at a public sale, were present as well (art. 324 and 325 of the Bulgarian Law on Property, Ownership and Servitudes).

After the deep socio-economic changes in the Bulgarian society after World War II, in 1951 a new Ownership Act came into force and remains until today the primary source of rules on ownership and other real rights. The policy on good faith acquisition sustained only minor changes. Pursuant to art. 78 (1) of the Bulgarian Ownership Act, the good faith purchaser of movables or bearer instruments, who acquired them on a valid onerous title is their new owner if he didn't know that the transferor did not own them. If the goods were lost or stolen, art. 78, (2), first sentence provides the familiar three year period for an ownership claim to be made by the dispossessed owner.

The first change concerns the requirement for value of the legal act that transfers ownership. If it is gratuitous, the interests of the dispossessed owner will prevail, because it is not justified to protect the person who has enriched himself, without sacrificing a counter-performance. As mentioned above, modern Bulgarian civil law has continuously adopted the balanced approach and a general policy of enhanced protection of the bona fide acquirer has never been customary.

The second change is tightly connected with the socio-economic changes in Bulgaria. After 1950, commercial law was abolished and private enterprises were nationalized. They were all transformed into State-owned socialistic enterprises who were the only major participant in Bulgaria's economic life until 1989. That circumstance made the counter-exception concerning lost or stolen movables bought at a fair, market or at a public sale pointless and incompatible with the socialistic state regime, since it presumed the presence of private commercial relationships. This rule was substituted with another provision that suited the new regime better, yet expressed the same ideas. Pursuant to art. 78, (2) second sentence, if a person bought lost or stolen goods from a State or cooperative enterprise, he acquires ownership in an original manner and the former owner cannot claim the goods back under any

circumstance. No possibility for reimbursement of the price was provided as well. The legislator's aim was to affirm the dominant position of State and cooperative enterprises as the substitute of all previous private companies and partnerships and to increase citizens' trust in the new legal subjects who were designed to achieve the primary economic goals of the ruling party. Still, it must be pointed out that the good faith transferee enjoyed such a favorable position only if he acquired the lost or stolen movable from a State or cooperative enterprise. If the goods were transferred by anyone else, the original owner's interests prevailed and a claim could be successively carried out even without having to reimburse the good faith acquirer with the price paid.

After the transition to free market economy in the late 80's and in the beginning of the 90's, the State and cooperative enterprises are no longer the only and the biggest participant in the economic life of Bulgaria. The majority of them were reorganized in the process of privatization and nowadays they have a negligible role. This circumstance significantly reduces the applicability of the provision of art. 78, (2), second sentence and causes a debate on enacting a new rule on the protection of the good faith transferee who acquired lost or stolen goods from a transferor acting in the ordinary course of business.

Apart from Bulgaria, the consensual system of transferring ownership as well as the balanced approach on good faith acquisition was adopted with some changes by many other national legislations within the European Union, as well as other, Non-member States. The Belgian Civil Code has adopted an identical set of rules and stands the closest to its primary source – the French Civil Code. The provisions of art. 2279 and 2280 of the Belgian civil Code follow art. 2276 of the French Civil Code to the letter. Out of the EU, art. 1161 and 1162 of the Ethiopian Civil Code have fully adopted the French approach on good faith acquisition as well. The only difference is that the rules on good faith acquisition in the Ethiopian Civil Code are not placed next to the provisions about prescription, but among the other separate methods of acquiring ownership by original manner.

Modern national legislations have adopted the consensual transfer system as well, but have provided some additional requirements or other prerequisites as far as good faith acquisition is concerned. The most typical one is that the acquisition must be onerous. Only when the good faith transferee has given or promised a counter-performance his legal interest is worthy of protection. A number of national legislations broaden the scope of the "good faith" requirement as well. In contrast to the French Civil Code where case law defined good faith as the lack of knowledge that the transferor is not the owner of the movable[22], modern civil codes tend to perceive the good faith requirement as a lack of knowledge that the transferor is not entitled to dispose of the goods. The transferee may know that he is dealing with a non-owner and this circumstance will not vitiate the acquisition a non domino. The main reason for this concept is protecting the dynamic commercial relationships in cases when the transferor established factual power over the movable on a lease, pledge or rent contract, but the acquirer believes that his transferor holds the goods on a consignation contract, for example and is entitled to transfer them.

[22] Cass. 1re civ., 23 mars 1965: Bull. civ. I, n° 206: « *En matière d'application de l'article 2279 du Code civil, la bonne foi … s'entend de la croyance pleine et entière où s'est trouvé le possesseur au moment de son acquisition des droits de son auteur, à la propriété des biens qu'il lui a transmis; le doute sur ce point est exclusif de la bonne foi.* »

A number of national legislations combine the classical French approach and a modern, reformed policy on the good faith acquisition. Such rules can be found in art. 933 of the Swiss Civil Code[23], art. 464 of the Spanish Civil Code[24] art. 4.96 of the Lithuanian Civil Code[25], art. 95, (1) of the Estonian Property and Ownership Act[26], art. 5:39 of the New Hungarian Civil Code (in force since 2014)[27], art. 3:86 of the Dutch Civil Code[28], the Swedish Good Faith Acquisition of Personal Property Act and § 1 of the Norwegian Good Faith Acquisition Act. Outside the EU, the balanced approach on good faith acquisition has been implemented in art. 1197, 1204 and 1268 of the Brazilian Civil code[29], § 34 of the Sale Law of Israel, art. 798 and 799 of the Mexican Civil Code, art. 194 of the Japanese Civil Code, art. 1713 and 1714 of the Civil Code of Quebec and art.1157 of the Iraqi Civil Code[30].

2. The Abstract (Traditio) Transfer System

Among those national legislations included in the balanced approach group, the rules on good faith acquisition enacted in § 932 of the German Civil Code (Bürgerliches Gesetzbuch) deserve special attention. The starting point of the German transfer system is that a legal consequence can either follow

[23] Article 933 of the Swiss Civil Code states that "If someone has acquired ownership or other real rights over a movable in good faith is worthy of protection in case his transferor was not entrusted with the movable as well". Article 934 (1) provides a 5-year period of time for the original owner to claim back his stolen or lost goods after he reimburses the good faith acquirer with the price the latter paid for the movables. For additional information see Arnold F. Rusch, Gutgläubiger Fahrniserwerb als Anwendungsfall der Rechtsscheinlehre, in:

Jusletter 28. January 2008, p. 12-13; Tuor/Dreyer/Schmid, Das Schweizerische Zivilgesetzbuch (Zürich: Schulthess Polygraphischer Verlag, 1996), 618-619.

[24] "As far as movables are concerned, possession is equivalent to title". For additional information see José Manuel de Torres Perea, "Acquisition from a non domino in Spanish civil law" (paper presented at the International Scientific Congress on Spanish-Philippine Private Law, University of Malaga, April 16-17, 2015).

[25] "If a person in good faith acquires property for value and without notice that the transfer doesn't have authority to dispose, the legitimate owner may bring an action for rei vindicatio of the goods against the good faith transferee, provided that the owner lost the goods or was dispossessed without consent or that the goods were stolen." Apart from this exception, the good faith acquirer can always rely on a title to ownership. Art. 4:96 of the Lithuanian Civil code provides that lost or stolen goods can be vindicated within three years from the moment of dispossession.

[26] "A person who has acquired a good by transfer in good faith is the owner of the good from the moment of gaining possession over the thing even if the transferor was not entitled to transfer ownership." The Estonian civil law doesn't explicitly provide a requirement "for value" of the acquisition. However, if the acquisition was gratuitous, the acquirer must re-transfer the thing to the entitled person even if the disposition was otherwise valid. This provision is derived from the rule of art. § 1040 Law of Obligations Act: "An acquirer in good faith who is no longer enriched in the extent of the (gratuitous) 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". For more detailed information about the Estonian national legislation in terms of the good faith acquisition see : Priit Kama, Evaluation of the Constitutionality of Good-Faith Acquisition, *Juridica International*, XIX (2012), accessed May 08, 2015, doi:10.12697/1406-1082.

[27] Section 5:39 (1) provides that "A bona fide acquirer acquires ownership of a good, which has been sold in the course of the transferor's commercial activity, even if the merchant was not the owner of the goods". Section 5:39, (2) and (3) create the exception concerning lost and stolen goods and the counter-exception, when these goods are obtained at public auctions. See Laszlo Pók, An old topic in a modern world, *European Review of Law and Economics*, vol. 2 (2012), 7.

[28] "Although an alienator lacks the right to dispose of the property, a transfer pursuant to articles 90, 91 or 93 of a movable thing, unregistered property, or a right payable to bearer or order is valid, if the transfer is not by gratuitous title and if the acquirer is in good faith."

[29] See Eduardo Filho, Good Faith in the Brazilian Civil code : Ten Years Later, *Teisé*, 88 (2013), 211-221.

[30] Dan Stigall, A closer look on Iraqi Property and Tort Law, *Louisiana Law Review*, 68 (2008), 780.

directly from a statutory provision or from a party's legal act. In contrast to the French Civil Code, German private law does not grant translatory effect to the contractual agreement, but has developed its own method, known as the "Trennungs- und Abstraktionsprinzip". The transfer of title must find its basis in a real agreement distinct from the obligation created prior by the parties. The basis of the transfer therefore is held to be the agreement on the transfer of title, this real agreement being an agreement in rem. Furthermore, pursuant to § 929 BGB the real agreement must be made public by the abstract act of *traditio*, that is the transfer of possession and both contracting parties must have agreed upon the passing of ownership. As far as these requirements are fulfilled, all powers embraced in the right of ownership pass to the transferee. In other words, ownership doesn't pass until the transferor has actually delivered the movable to the transferee. The transfer of title is a consequence of the real agreement, not of the underlying agreement creating just a mere obligation to transfer[31].

Apart from this major difference, with regard to the acquisition a non domino, German private law resembles the French provisions, yet imposes a much more consistent legal protection of the original owner in comparison to art. 2277 of the French Civil Code.

The basic rule is given in § 932 (1) BGB: *The transferee becomes the owner occurring under paragraph 929 even if the movable doesn't belong to the transferor, unless he did not act in good faith at the time at which he would acquire ownership under these provisions.* The transferee is worthy of protection only if he acts in good faith at the moment of delivery. Section 932, (2) BGB sets out that "*the purchaser is not in good faith if he is aware or due to gross negligence is unaware that the movable doesn't belong to the seller*".

Paragraph 932 BGB does not provide a requirement for value and this might create the false impression that both onerous and gratuitous transfers can lead to a good faith acquisition. However, § 816 BGB provides that the person who acquires a movable without a counter-performance, may be under a duty to return it to the owner under the rules of unjustified enrichment. This means that good faith acquisition under the rules of the German Civil Code can occur only if it is for value.

Despite being positioned in the balanced approach group, German private law is somewhat influenced by the *original owner rule* and this can easily be seen when it comes to the scope of protection of the dispossessed owner. Similarly to French law, §935 BGB starts off by manifesting that the movable must have been voluntarily entrusted to the transferor, thus excluding lost or stolen goods, but continues by referring explicitly to goods of which the owner had otherwise involuntarily lost possession. This provision extends the number of occasions when the dispossessed owner can reclaim back his movable and since there is no requirement for him to reimburse the price the good faith acquirer had paid[32], we can conclude that the rules on good faith acquisition in the German Civil Code, despite sharing common principles with the French provisions, stand much closer to the *original owner* rule than most of the other national legislations from the *balanced approach* group.

The German approach has influenced a number of national legislations, for example the Greek Civil Code. Its provisions on the abstract method of transfer

[31] Manfred Wolf, *Sachenrecht* (München: Verlag C.H.Beck, 2006), 198-200.

[32] W. Brehm/C. Berger, *Sachenrecht* (Tübingen: Mohr Siebeck, 2000), 412; H. J. Wieling, *Sachenrecht* I, (Berlin: Springer, 2001), 385-395.

of movables, as well as on good faith acquisition (art.1034-1038 Greek Civil Code) follow in general § 929-932 of the German Civil Code. However, the Greek legislator has adopted the "French" market overt rule on lost or stolen goods, bought at a public auction, or at a fair or on the market, providing a better protection of the legal interests of the bona fide acquirer in comparison to the German Civil Code[33].

Other national legislations that adopted the German Civil Code, can be pointed out as well – the provisions of art. 22 of the Law on Property and other real rights of Kosovo[34] and art.187 et seq. of the Georgian Civil Code[35].

IV. The need for coherence and the Draft Common Frame of Reference as a role model

As this short comparative overview has shown, there is a considerable diversity on the rules of good faith acquisition. The majority of national legislations strive to find a balance between the interests of both the original owner and the good faith transferee, especially when it comes to lost or stolen goods. Yet, within Europe Italian and Portuguese law represent the two contemporary extremes and throughout the national legislations there are differences beyond trifle. This circumstance is able to cause serious difficulties in legal enforcement if multiple jurisdictions are concerned, not to mention the unfair treatment of either parties if the applicable law is less susceptible and provides a considerably lower level of legal protection towards one of them in comparison to their national legislation, for example.

In my opinion, the existing diversity of rules could be overcome on the way of a unification of the provisions on good faith acquisition through a mandatory act, enacted at EU level. For this purpose the rules of the Draft Common Frame of Reference (DCFR) may serve as a role model. The Draft Common Frame of Reference is prepared by the Study Group on a European Civil Code that consists of legal scholars from several jurisdictions in the EU. It is a soft law codification[36] which can serve as a common denominator in the approximation of laws within the Member States[37].

Because of its great importance for promoting security of transactions and commerce, the Study Group has provided a set of rules regarding good faith acquisition of movables in Book VIII, art. 3:101 of the DCFR[38].

[33] See art. 1039 Greek Civil Code : "If the lost or stolen things are ... things, sold at a public auction, or at a fair or on the market, the buyer does acquire ownership of them if he is acting in good faith". See P.Agallopoulou, *Basic Concepts of Greek Civil Law* (Athens, 2005), 394.

[34] Haxhi Gashi, Acquisition and Loss of Ownership under the Law on Property and Other Real Rights (LPORR): The influence of the BGB in Kosovo Law, *Hanse Law Review*, 9 (2013), 41-61.

[35] Eugenia Kursynsky-Singer and Tamar Zarandia, Rezeption des deutschen Sachenrechts in Georgien, *Max Planck Private Law Research Paper*, 14 (2010), 108-137.

[36] See Christian von Bar, Eric Clive and Hans Schulte-Nölke, *Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law* (Munich: Sellier European Law Publishers), 2009, 431-432.

[37] http://www.sgecc.net/pages/en/introduction/100.aims.html (accessed on 09.05.2015)

[38] The Study Group agreed upon the need of drafting rules on good faith acquisition. This would balance the interest not only of the concrete parties at an individual level, but also of all participants in the commercial relationships intending to acquire goods. The scholars state that it would be too burdensome, costly and insecure if every particular acquirer was forced to undertake a detailed investigation of his transferors' rights. Not having a good faith acquisition rule would ruin legal certainty and increase investigation costs immensely. See Eric Clive,

The provision of art. 3:101, (1) DCFR sets out that when a movable is acquired for value from an unauthorized transferor, the transfer is valid, provided all other transfer requirements are met and the transferee neither knew nor could reasonably be expected to know that the transferor was not entitled to transfer. The article contains a rule on burden of proof as well: "The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee".

Art.3:101, (2) DCFR provides that good faith acquisition does not take place with regard to stolen goods, unless the transferee acquired them from a transferor acting in the ordinary course of business.

As one can see, the Study Group has tried to strike a compromise between the provisions on good faith acquisition in the majority of national legislations. The requirement for value, the strict standard on good faith and the exclusion of lost or stolen goods from its scope of application are aimed at granting a better protection of the dispossessed original owner, whereas the market overt rule and the wider content of good faith (especially compared to the provisions of the French Civil Code) put the transferee in a favorable position.

The choice of the Study Group to place the burden of proof on the good faith transferee has been regarded as "highly unusual" and criticized for causing a detrimental effect to commercial transactions, as well as urging costly and time-consuming lawsuits that the rules on good faith acquisition are evocated to prevent[39]. Perhaps the reason for this criticism is that in the majority of national legislations a presumption of good faith is provided in favor of the transferee. The only two countries in the EU whose rules on good faith acquisition provide a requirement for the transferee to prove that he did not know or couldn't have known that he was dealing with a non owner or a person, not entitled to transfer ownership, are Sweden and the Netherlands.

On the other hand, one can find solid arguments in support of this policy. Placing the burden of proof on the transferee can be regarded as a form of balancing the interests. The good faith acquisition leads to depriving the original owner of his rights *in rem* and should be seen as an exceptional opportunity for the transferee to acquire ownership.

Another justification for this decision can be found in the general principles of the law of evidence. The transferee, as one of the contracting parties, is much closer to the act of acquisition than the original owner and it would be much easier for him to provide evidence of his good faith. The original owner will have immense difficulties to investigate the circumstances of the transfer that might have occurred on a different place or after a considerable period of time has elapsed. Moreover, there is a general principle that a person who wants to benefit from a specific provision has to provide facts and evidence that support his statement.

Conclusion:

The comparative overview of the major national legislations made above reveals that the existing diversity of the solution to the conflict between the legal interests of the original owner of a movable and its good faith acquirer can cause serious difficulties when multiple jurisdictions are

Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition, vol. 5 (Munich: Sellier European Law Publishers), 2010, p. 4827.

[39] Arthur Salomons, *The Purpose and Coherence of the Rules on Good Faith Acquisition and Acquisitive Prescription in the DCFR: A Tale of Two Gatekeepers*, European Review of Private Law, 3 (2013), 854.

concerned. The importance of this issue is even bigger under the conditions of the EU-Internal market and its primary feature - the free movement of goods. In spite of being a mere soft law codification, the DCFR can provide a solid basis for legal harmonization among national jurisdictions. Adopting a set of harmonized rules may help to solve cross-border cases on good faith acquisition in a more efficient, consistent and equitable manner.

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