Principles of European Law
Study Group on a European Civil Code

Proprietary Security in Movable Assets

(PEL Prop. Sec.)

prepared by
Ulrich Drobnig
Ole Böger

OXFORD

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with advice from the Advisory Council
and the Drafting Committee approved by the
Co-ordinating Group

OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

ISBN 978–0–19–922943–7

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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The Hamburg Working Group

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

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Foreword

The Study Group on a European Civil Code has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in moveables which are especially relevant for the functioning of the common market. It was founded in 1999 as a successor body to the Commission on European Contract Law, on whose work the Study Group has been building.

Both groups have undertaken to ascertain and formulate European standards of 'patrimonial' law for the Member States of the European Union. The Commission on European Contract has achieved this for the field of general contract law *(Lando and Beale* [eds.], Principles of European Contract Law, Parts I and II combined and revised, The Hague, 2000; *Lando/Clive/Prüm/Zimmermann* [eds.], Principles of European Contract Law Part III, The Hague, 2003). These Principles of European Contract Law (PECL) have been adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group has itself dovetailed its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations, i.e. the law of non-contractual liability arising out of damage caused to another (tort/delict), the law of unjustified enrichment, and the law of benevolent intervention in another's affairs *(negotiorum gestio);* and (iii) by developing rules for fundamental questions in the law on mobile assets – in particular transfer of ownership, security for credit, and trust.

The results of the research conducted by the Study Group on a European Civil Code seek to advance the process of Europeanisation of private law. We have undertaken this endeavour on our own personal initiative and merely present the results of a pan-European research project. It is a study in comparative law in so far as we have always taken care to identify the legal position in the Member States of the European Union and to set out the results of this research in the introductions and notes. That of course does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up "sound and fitting" principles, that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe.

The working methods of the Commission on European Contract Law and the Study Group on a European Civil Code were likewise quite similar. The Study Group, however, has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader) which undertook the basic comparative legal research, developed the drafts for discussion and assembled the extensive material required for the notes. Furthermore, to each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests

of efficiency – were formed from leading experts in the relevant field of law who are representative of the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined us after the June meeting 2004 in Warsaw.

Besides its permanent members, other participants in the Co-ordinating Group with voting rights included all the Team Leaders and – when the relevant material was up for discussion – the members of the Advisory Council concerned. The results of the deliberations during the week-long sitting of the Co-ordinating Group were incorporated into the text of the Articles and the commentaries which returned to the agenda for the next meeting of the Co-ordinating Group (or the next but one depending on the work load of the Group and the Team affected). Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible the Articles drafted in English were translated into the other languages either by members of the Team or third parties commissioned for the purpose. The number of languages into which the Articles could be translated admittedly varies considerably from volume to volume. That is in part a consequence of the fact that not all Working Teams were equipped with the same measure of financial support. We also had to resign ourselves to the absence of a perfectly uniform editorial style. Our editing guidelines provided a common basis for scholarly publication, but at the margin had to accommodate preferences of individual teams. However, this should not cause the reader any problems in comprehension.

Work on this series of Principles of European Law had begun long before the European Commission published its Communication on European Contract Law (in 2001), its Action Plan for a more coherent European contract law (in 2003), and its follow-up Communication "European Contract Law and the revision of the *acquis:* the way forward" (in 2004). These documents for their part were published before we formed the Network of Excellence, together with other European research groups and institutions, which have been collaborating in the preparation of an Academic Common Frame of Reference with the support of funds from the European Community's Sixth Research Framework Programme. This network first published an outline edition of its research results: as a first step, in 2008, an interim outline edition *(von Bar/Clive/Schulte-Nölke et al.* [eds.], Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition, Munich 2008); and, with revisions and additions, a final outline edition in 2009 *(von Bar/Clive/Schulte-Nölke et al.* [eds.], Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich 2009). A final and full edition was published later in 2009 *(von Bar/Clive,* Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition, Munich 2009). The texts laid

before the public by the Study Group on a European Civil Code are integrated in these latter texts. However, the extensive comparative law introductions and the translations of the articles of the Book or Part concerned into the other languages of the Member States are only being published in the PEL Series. Moreover, there are occasionally small discrepancies between the model rules published in this series and those of the Draft Common Frame of Reference because each publication within the PEL Series is conceived and prepared as a self-contained treatment of the field while in the consolidated composite DCFR text certain provisions could be trimmed. Repetitions could be avoided. It was also possible to respond to criticism which had been made of the model rules in the PEL Series and which had convinced us of the need to make changes.

In order to leave no room for misunderstanding, it is important to stress that these Principles have been prepared by impartial and independent-minded scholars whose sole interest has been a devotion to the subject-matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimation for promoting harmonisation of the law. Our legitimation is confined to curiosity and an interest in Europe. In other words, the volumes in this series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the current law and introduce possible models for its further development; no less, but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a *Study* Group. The question whether a European Civil Code is or is not desirable is a political one to which each member can only express an individual view.

Osnabrück, September 2014 *Christian von Bar*

Our sponsors and donors

The project of the Study Group on a European Civil Code represents a research endeavour in legal science of extraordinary magnitude. Without the generous financial support of many organisations and individuals its realisation would not have been possible.

Our thanks go first of all to the *Deutsche Forschungsgemeinschaft (DFG),* which has supplied the lion's share of the financing for the first phase of this project, including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Coordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO).* Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO),* the *Onassis-Foundation,* the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung, Norges forskningsråd* (the Research Council of Norway) and the *Fundação Calouste Gulbenkian.* From the middle of 2005 funds were made available to us under the mantle of the 'CoPECL' Network of Excellence established under the European Union's Sixth Framework Programme for Research and Technological Development.

The work of the Austrian working team was financed by the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung* (FWF) and the European Commission's Sixth Framework Program for Research and technological Development.

In addition we have consistently been able to fall back on funds made available to the respective organisers of the eighteen week long sittings of the Coordinating Group by the relevant university or other sources within the country concerned. It is therefore with the deepest gratitude that I must also mention the *Consiglio nazionale forense* (Rome) and the *Istituto di diritto privato* of the *Università di Roma La Sapienza,* which co-financed the meeting in Rome (June 2000), which followed our inaugural meeting in Utrecht (December 1999). The session in Salzburg (December 2000) was supported by the Austrian *Bundesministerium für Bildung, Wissenschaft und Kultur,* the *Universität Salzburg* and the *Institut für Rechtspolitik* of the *Universität Salzburg.* The discussions in Stockholm (June 2001) were assisted by the *Department of Law, Stockholm University,* the *Supreme Court Justice Edward Cassel's Foundation* and *Stiftelsen Juridisk Fakultetslitteratur (SJF).* The meeting in Oxford (December 2001) had the support of *Shearman & Sterling,* the *Hulme Trust, Berwin Leighton Paisner* and the *Oxford University Press (OUP).* The session in Valencia (June 2002) was made possible by the *Asociación Nacional de Registradores de la Propiedad, Mercantil y Bienes Muebles,* the *Universitat de València,* the *Ministerio Español de Ciencia y Tecnología,* the *Facultad de Derecho* of the *Universitat de València,* the *Departamento de Derecho Internacional, Departamento de Derecho Civil* and the *Departamento de Derecho Mercantil "Manuel Broseta Pont"* of the *Universitat de València,* the law firm *Cuatrecasas,* the *Generalitat Valenciana,* the *Corts Valencianes,* the *Diputación Provincial de Valencia,* the *Ayuntamiento de Valencia,* the *Colegio de Abogados de Valencia* and *Aran-*

zadi Publishing Company. The subsequent meeting in Oporto (December 2002) was substantially assisted by the *Universidade Católica Portuguesa – Centro Regional do Porto.* For the week long session in Helsinki (June 2003) we were able to rely on funds from *Suomen Kultuurirahasto* (Finnish Cultural Foundation), the *Niilo Helanderin Säätiö* (Niilo Helander Foundation), the *Suomalainen Lakimeisyhdistys* (Finnish Lawyers Association), the *Ministry of Justice* and the *Ministry for Foreign Affairs,* the *Nordea Bank, Roschier Holmberg* Attorneys Ltd., *Hannes Snellman* Attorneys Ltd., the *Department of Private Law* and the *Institute of International Commercial Law (KATTI) of Helsinki University.* The session in Leuven (December 2003) was supported by *Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid,* and the *FWO* Vlaanderen Fonds voor Wetenschappelijk Onderzoek (Flanders Scientific Research Fund). The meeting of the Group in Warsaw (June 2004) was substantially assisted by the *Fundacja Fundusz Wspolpracy* (The Cooperation Fund) and the *Faculty of Law and Administration of Warsaw University.* The meeting in Milan (December 2004) was supported by the *Università Bocconi* and its *Istituto di diritto comparato,* by the Milan *Camera di Commercio,* by the *Associazione Civilisti Italiani* and by the *Comune di Milano.* The meeting in Berlin (June 2005) was made possible by *PricewaterhouseCoopers Deutschland AG,* Frankfurt/Berlin; *Sievert AG & Co.,* Osnabrück, and by *Verband deutscher Hypothekenbanken e.V., Berlin.* The meeting in Tartu (December 2005) was supported by the *University of Tartu,* its *Faculty of Law,* its *Institute of Law* and its *Institute of Private Law,* by the *Estonian Supreme Court,* the *Ministry of Justice,* the *Tartu City Government, Iuridicum Foundation,* the Law Offices *Concordia, Lepik & Luhaäär, Luiga Mody Hääl Borenius, Ots & Co, Aivar Pilv, Aare Raig, Raidla & Partners, Sorainen, Tark & Co, Teder Glikman & Partners, Paul Varul, Alvin Rödl & Partner* and *Lextal Law Firm.* The meeting in Oslo (June 2006) was made possible by the *kongelige Justis- og Politidepartement* (The Royal Ministry of Justice), by *Sigvald Bergesen d. y.,* by *hustru Nankis Almennyttige stiftelse, Storebrand* and the law firms *Wiersholm and BA-HR.* The meeting in Lucerne (December 2006) was sponsored by *Schulthess Publishing Company,* by *Schweizerischer Nationalfonds* and by the *Universität Luzern,* the meeting in Budapest (June 2007) by *Eötvös Loránd Tudományegyetem* (Eötvös Loránd University), by *Magyar Tudományos Akadémia* (the Hungarian Academy of Sciences), by *MOL* Magyar Olaj- és Gázipari Nyrt (the Hungarian Oil & Gas Company) and by *Szalma & Partnerei Ügyvédi Iroda* (Szalma & Partners Attorneys at Law), and the meeting in Prague (December 2007) by *Česká advokátní komora* (the Czech Bar Association), *White & Case* Prague, *Squire, Sanders & Dempsey,* Prague, *Ladislav Krym,* Attorney at Law, Prague, *Jan Brož,* Attorney at Law, Prague and the *Representation of the European Commission in Prague.* Our final meeting in Athens (June 2008) had the support of the *Stavros Niarchos Foundation,* the *National and Kapodistrian University of Athens,* the *Union of Greek Civil Law Jurists* and the *Municipality of Athens.* We thank all of these organisations and institutions for the funds which they made available to us and for the extraordinary warmth of hospitality with which our hosts received us.

Osnabrück, September 2014 *Christian von Bar*

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Preface to this volume

As has often been said, credit is the lifeblood of commerce. The availability of security, whether as personal security or proprietary security, can greatly facilitate the provision of credit, be it by strengthening the creditor's trust in repayment of its advances in general or by allowing for specific benefits for the debtor in the form of lower interest rates. An efficient legal framework for security is therefore very much in the interest of every modern credit-based economy.

These basic principles are now near universally accepted and have, as a matter of course, also been acknowledged in the work of the Study Group on a European Civil Code. The Study Group has prepared both rules on personal security and on proprietary security and both sets of rules have also been included in the Draft Common Frame of Reference as prepared for the European Commission (Book IV.G is entitled "Personal Security"; Book IX covers the topic of the present volume "Proprietary Security in Movable Assets").

While the Study Group's work on personal security has already been published in 2007 (Study Group on a European Civil Code, Principles of European Law on Personal Security: *UlrichDrobnig*, ed., Munich 2007), the authors can now complete the tasks assumed by the Study Group in this field of law by presenting also the collection of rules, comments and national notes on the topic of proprietary security. As will be shown throughout this volume, the field of law of proprietary security is characterized by strong divergences between different legal traditions: It is a primary mission of this book both to attempt to create bridges between these traditions and to further a common understanding of general policy issues in this field of law as well as to promote modernization and the gradual acceptance of modern solutions that are best suited to fulfil the needs of current market practices.

Work on the topic covered by this volume started in 2006, after the volume on "Personal Security" had been finalised. The members of the Study Group on a European Civil Code's Hamburg Working Group on Personal and Proprietary Security under the direction of the senior author, Professor *Ulrich Drobnig*, were: *Christopher Bisping*, LL.M. (2000–2003), *Luca Bizarri* (2004), Dr. *Ole Böger*, LL.M. (2003–2008), *Cristiana Cicoria* (2003–2004), Dr. *Francesca Fiorentini* (2004–2008), *Alessio Greco* (2004), *Judith Hauck*, LL.M. (2001–2009), *Menelaos Karpathakis* (1999–2003), *Caroline Lebon* (2000–2002), *Birte Lorenzen* (1999–2000), Dr. *Alumudena de la Mata Muñoz* (1999–2003), *Teresa Pereira* (2003), *Frank Seidel* (2000–2002), Dr. *Malene Stein Poulsen*, LL.M. (2000–2009), *Yves Thiery* (2002). The Working Group had the benefit of discussions with and advice from an Advisory Group consisting of Professor *Hugh Beale* (Warwick), Professor *Michael G. Bridge* (London), Professor *Angel Carrasco Perera* (Toledo), Professor *Pierre Crocq* (Paris), Justitierådet Professor *Torgny Håstad* (Stockholm), Professor *Matthias Storme* (Leuven), Professor *Luboš Tichý* (Prague), Professor *Anna Veneziano* (Rome) and Professor *Fryderyk Zoll* (Cracow).

The authors are obliged to several persons who have given information, especially upon legal issues in countries with difficult languages: Dr. *Gregor Dugar* (University of Ljubljana); Mrs. *Gergana Kozarova* (Sofia/Hamburg); Dr. *Norbert Csizmazia* (Budapest/Cam-

bridge); Professor *Luboš Tichý* (Charles University Prague); and Professor *Pestana de Vasconcelos* (University of Porto). Further support has been provided by the staff of the Max Planck Institute for Comparative and International Private Law in Hamburg, especially by Ms. *Karen Kück*, who has provided crucial assistance especially in the preparation of the Annexes. All errors, obviously, remain the two authors' own, especially with regard to the preparation of the National Notes: The Notes to Chapters 1, 2, 5 and 6 as well as Chapter 3 Sections 1 and 2 have been prepared by Professor *Drobnig*, the Notes to Chapter 3 Section 3 and to Chapter 4 have been prepared by Dr. *Böger*.

In late 2009, the black-letter text of the Principles and the Comments on proprietary security had been completed and Principles and Comments were subsequently published in the Full edition of the Draft Common Frame of Reference *(Von Bar and Clive*, Vol. VI, pp. 5389–5667). The elaboration of the extensive body of National Notes took much time since the former collaborators of the Hamburg Working Group were no longer available for this work. The collection of the national references and the systematic presentation of the National Notes fell essentially to the two editors of this volume and had to be completed in addition to other pressing commitments. The delay in the publication of this volume, however, presented the opportunity to take into account, amongst others, several recent codifications of civil law in the Central and Eastern European countries (Czech Republic 2012; Hungary 2013; Romania 2009/11) as well as important developments specifically with regard to the law of proprietary security in movables in other jurisdictions (see, for instance, the thorough revision of the relevant French law, especially the introduction of a new Book 4 of the French Civil Code devoted to security rights, the United Kingdom Companies Act 2006 (Amendment of Part 25) Regulations 2013, and, most recently, the introduction of a new regime for proprietary security in movables in Belgian law in Civil Code, Book III, new title XVII, as revised by Law of 11 July 2013).

While National Notes have been prepared for Chapters 1 to 6, it was decided against the inclusion of Notes to Chapter 7 which deals with enforcement: Under national law, the issues covered by this Chapter are mainly dealt with under the procedural law of the Member States, whose legal systems usually are primarily focused on judicial enforcement. The Draft Common Frame of Reference as a whole, however, concentrates on issues of substantive law.

Finally, in the process of the preparation of this volume, a few minor glitches in the black letter text of Book IX as published in the Full edition of the Draft Common Frame of Reference were noticed by the editors: These are indicated by footnotes to the text of Book IX in this volume, suggesting an alternative wording preferred by the editors.

Hamburg and Berlin, October 2014

Ulrich Drobnig
Ole Böger

Short table of contents

Section 3: **Registration**

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