Revija za evropsko pravo: XVII (2015) 1.

Slavko Đorđević*

UDK:339.56 UDK:341.932/95

str. 27-41.

GOOD FAITH ACQUISITION OF USED MOTOR VEHICLES PURCHASED ABROAD – SOME OBSERVATIONS AND CRITICAL REMARKS ON SERBIAN CASE LAW

Abstract

In the past decade Serbian courts have discussed several cases in which the main legal issue was whether the Serbian citizen who bought a used motor vehicle with hidden deficiencies from a non-owner (car dealer) in a foreign country acquired the ownership of that vehicle in good faith. In all these cases the courts directly applied Serbian property law, failing to recognize the presence of a foreign element in the legal dispute, i.e. the fact that the purchase and delivery of the vehicle occurred in a foreign country. The appearance of a foreign element in the legal relationship obliges the courts to apply the rules of private international law (i.e. conflict rules) in order to determine which national law (domestic or foreign) shall be applicable to the case. These rules have been ignored by Serbian courts which consequently led to direct application of Serbian rules on good faith acquisition that were more favorable than the rules of the law of a foreign country whose application would had been ordered by Serbian conflict rules. In this paper the author deals with the problem above by analyzing and discussing the Serbian substantial law on good faith acquisition

* Assistant Professor at the Faculty of Law University of Kragujevac, slavko.djordjevic77@gmail.com.

of ownership (particularly of motor vehicles), Serbian rules of private international law as well as Serbian case law in this matter.

Keywords: acquisition of ownership in good faith; used motor vehicles; changing the situs of the vehicles; private international law; case law.

1. Introduction

Despite the fact that there are numerous licensed professional merchants (dealers) in Serbia who sell used motor vehicles, Serbian citizens (residents) very often decide to travel to countries of Western Europe (especially to Germany, Austria, France and Switzerland) in order to buy used motor vehicles from foreign dealers and traders. Such an adventure is mainly motivated by their wish to obtain a better position to select a quality used vehicle and thereby avoid paying the "extra" margins to local dealers and importers.[1] Furthermore, Serbian residents are convinced that the risk of being cheated (e.g. by buying a vehicle with reduced mileage, stolen vehicle or vehicle with illegally changed VIN number) is lower when buying a used vehicle from dealers in countries of Western Europe than from local dealers. Therefore, in order to avoid all inconveniences that could arise while purchasing a used vehicle in Serbia, Serbian residents decide to seek a suitable vehicle abroad.[2]

However, sometimes Serbian residents purchase from Western European professional dealers a used motor vehicle with hidden or less obvious deficiencies (e.g. forged registration certificate, forged VIN number or engine number, etc.) which are discovered after their return to Serbia, usually in customs proceedings or in registration proceedings before Serbian police authorities. Such deficiencies suggest that the vehicle was stolen and police authorities usually decide to seize it**.** Then a Serbian buyer initiates the civil proceedings against the Serbian police before a Serbian court and requests the return of the vehicle arguing that he has acquired the ownership of the vehicle as a *bona fide* acquirer (i.e. good faith acquirer or acquirer a *non domino*). The cases of this kind were

[1] Trend of traveling abroad in order to buy used vehicles has been the subject of many newspaper's articles. See for example *http://vesti.mojauto.rs/Aktuelne-vesti/360416/Obratite-paznju-Uvoz-automobila-iz-inostranstva*.

[2] *Ibid*.

handled before Serbian courts on several occasions in the last ten years.[3] In each of these cases Serbian courts directly applied the Serbian rules on good faith acquisition, i.e. the rules of Serbian Act on Basis of Ownership and Proprietary Relations[4] (shortly: Property Law Act - PLA), ignoring the fact that the purchase and delivery of the vehicle occurred in a foreign country. The fact that the purchase and delivery occurred abroad presents a so-called foreign element in a legal dispute which obliges the courts to apply the rules of private international law (i.e. conflict rules).[5] These rules could have referred to foreign law whose application could have produced the substantial result of a dispute that significantly differs from the result which has been produced by the application of Serbian law (e.g. according to Serbian law the buyer acquires the ownership in good faith, but according to foreign law he does not).

Our observations and critical discussion of the foregoing judicial practice begin with short presentation and analysis of Serbian substantial provisions and case law on good faith acquisition of ownership of motor vehicles (2), continue with discussing private international law issues of acquiring the vehicles abroad (3) and end with critical analysis of Serbian judicial practice, especially the decision of District Court of Novi Sad[6] where the described problem came to the fore (4).

2. Serbian rules and case law on good faith acquisition of motor vehicles

In Serbian law, similarly to other legal systems worldwide, the *nemo dat quod non habet* rule ("no-one can give what he does not have") protects the true owner of goods and serves as a safeguard of the right of ownership. Specifically this means that a seller cannot transfer ownership of goods to a buyer, if he does not own

[3] Presuda Okružnog suda u Novom Sadu (Judgment of District Court of Novi Sad), Gz. 4548/05 07.12.2006, *Pravo, teorija i praksa,* 3-4/2007, p. 64-65; Presuda Okružnog suda u Čačku (Judgment of District Court of Cacak), Gz. 46/04 18.01.2006, *Izbor sudske prakse,* 6/2006, p. 45; Presuda Okružnog suda u Čačku (Judgment of District Court of Cacak), Gz. 1696/07 28.11.2007, *Izbor sudske prakse,* 3/2007, p. 49; Presuda Okružnog suda u Užicu (Judgment of District Court of Uzice), Gz. 1649/06 10.11.2007, *Izbor sudske prakse,* 12/2007, p. 51.

[4] Act on Basis of Ownership and Proprietary Relations [Zakon o osnovama svojinskopravnih odnosa], *Official Gazette of SFRY,* No. 6/80 and 36/90, *Official Gazette of FR Yugoslavia,* No. 29/96 and *Official Gazette of the Republic of Serbia,* No. 115/2005.

[5] The conflict rules are mandatory rules in Serbian legal system. See T. Varadi, B. Bordaš, G. Knežević, V. Pavić, *Međunarodno privatno pravo*, Beograd, 2007, p. 101-102.

[6] Presuda Okružnog suda u Novom Sadu (Judgment of District Court of Novi Sad), Gz. 4548/05 07.12.2006, *Pravo, teorija i praksa,* 3-4/2007, p. 64-65.

them or is not entitled to sell them. However, Serbian law provides a general exception to *nemo dat* rule, well-known in civil law systems, to the benefit of the purchaser (acquirer) who was acting in good faith.

It should be stressed out that the good faith acquisition of ownership (i.e. the transfer of ownership by a non-owner) is possible only in tangible movables (goods).[7] The exceptions are movables, such as airplanes and ships, whose acquisition is impossible without entering in public register which has a constitutional effect. Although the motor vehicles must be registered, they do not fall into this category of movables, because entering in the Serbian register of vehicles and issuance of registration certificate have an administrative character and, therefore, can be acquired in good faith as well.[8]

The rules on good faith acquisition of ownership are contained in Article 31 of Serbian PLA. According to the first paragraph of this article, a person acting in good faith shall acquire the ownership of a tangible movable, provided he acquired it for value by concluding the valid contract transferring the ownership: (a) from a non-owner who was acting in the ordinary course of business (merchant), or (b) from a non-owner, entrusted with the movable by an owner, or (c) on a public sale. The acquisition from a merchant or on a public sale is possible even if the original owner has involuntarily lost possession of movables.[9] Article 31 (2) PLA stipulates that the previous (original) owner may request the return of the movable by reimbursing the possessor for the market price, only if the movable has a special meaning for him. This request is limited to a period of one year from the day of acquiring the ownership.

As can be seen, Serbian legislator has not defined the notion of "good faith acquirer". Serbian authors[10] draw its meaning from Article 72(2) PLA that contains a general definition of bona fide possessor according to which "*possession of the thing shall be deemed in good faith, if the possessor does not know or may not know that the thing in his possession is not his*". On the basis of this provision, legal doctrine defines "acquirer in good faith" in the following manner: the acquirer acted in good faith if he neither knew nor could reasonably be

[7] Article 31(1) of Act on Basis of Ownership and Proprietary Relations (Property Law Act).

[8] N. Planojević, *Sticanje svojine od nevlasnika*, Kragujevac, 2008, p. 160.

[9] See O. Stanković, M. Orlić, *Stvarno pravo*, Beograd, 1996, p. 80.

[10] N. Planojević, *op. cit.*, p. 265; T. Delibašić, Posebni uslovi sticanja svojine od nevlasnika, *Sudska praksa,* 3/1996, p. 76.

expected to know that the transferor was not the owner of the movable nor had the authority to transfer the ownership of the movable at the time of the delivery.[11] If the acquirer, due to his own gross negligence, was not aware that the transferor was not entitled to dispose of the movable, it should be considered that he did not act in good faith.[12] Consequently, it is presumed that he acted in good faith, until it is proven otherwise.

In the case of purchasing the used vehicle from a non-owner, it is necessary to take into account some specific circumstances in order to determine whether the acquirer acted in good faith. Serbian literature[13] and judicial practice[14] have clearly pointed out that following circumstances have to be taken into consideration:

(i) The time and place of the purchase of the vehicle as well the price of the vehicle. If the time and place were unusual, e.g. in an empty parking lot at midnight, it could be reasonably doubted that the transferor was entitled to sell the vehicle and the acquirer acted in good faith. The same conclusion can be drawn if the purchase price was significantly below the value of the vehicle.[15]

(ii) Checking the registration certificate. The acquirer must take the registration certificate of the vehicle from the transferor and check whether it contains the

---

[11] *Ibid*.

[12] Gross negligence as degree of culpability is not mentioned in PLA. It is required by Serbian literature and judicial practice (N. Planojević, *op. cit*., p. 273-276).

[13] *Ibid*., p. 277-279; T. Delibašić, Odluke parničnih sudova kojima se vraća vlasniku privremeno oduzeto vozilo – falsifikati dokumentacije i značaj ovih odluka za odluke koje slede u kaznenom postupku (kritički osvrt na sudsku praksu), *Sudska praksa*, 11-12/1994, p. 59.

[14] See Presuda Vrhovnog suda Srbije (Judgment of Supreme Court of Serbia), Prev. 470/03 11.11.2004; Presuda Okružnog suda u Beogradu (Judgment of District Court of Belgrade), Gz. 9424/99; Vrhovni sud Srbije, Rev. 1550/98; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 4581/98; Vrhovni sud Srbije, Rev. 688/98; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 4634/96; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 2584/91; Presuda Okružnog suda u Čačku (Judgment of District Court of Cacak), Gz. 46/04 18.1.2006; Presuda Okružnog suda u Užicu (Judgment of District Court of Uzice), Gz. 1649/06 10.7.2007; Presuda Opštinskog suda u Čačku (Judgment of Municipal Court of Cacak), P. 275/07 7.6.2007; Presuda Okružng suda u Čačku (Judgment of District Court of Cacak), Gz. 1696/07 28.11.2007. (all available: *http://www.poslovnibiro.rs/files/File/SUDKSA_PRAKSA/3.1.2.%20STVARNO%20PRAVO.pdf*, last visited 3 July 2014).

[15] Compare N. Planojević, *op. cit*., p. 278-279.

transferor's name. If this is not the case and if the transferor is not entitled by the original owner to sell the vehicle, it should be considered that the acquirer was not acting in good faith. Sometimes, the registration certificate is counterfeit. Well-made certificate forgeries are visually identical to the original, sometimes to the smallest details, so that the acquirer is not able, despite his best efforts, to recognize the difference. Therefore, a well-made counterfeit certificate cannot alter his position of acquirer in good faith. However, when forged vehicle certificates are of poorer quality, it may be assumed that the acquirer can spot the difference by simple observation. If he fails to do that, he acts with gross negligence and cannot acquire the vehicle in good faith. The same should apply when the acquirer fails to notice the visible modifications of characters and typing errors in the registration certificate.[16]

(iii) The acquirer must also check whether the engine and VIN numbers correspond to the numbers from the registration certificate.[17] If he fails to do this, it should be considered that he acts with gross negligence.

Besides acting in good faith, the acquirer must conclude the valid sale contract and obtain the possession of the movable from the transferor (*modus acquirendi*[18]). In respect to the acquisition of motor vehicles it is often questioned whether the registration certificate of the vehicle has to be handed over to the acquirer too? Obviously, the handing over of the registration certificate cannot in itself represent the special requirement for acquiring the ownership, but it may have an influence on the determination whether the acquirer acted in good faith.[19]

Out of the three situations set out in Art. 31 (1) PLA, which specify the acquisition of the ownership of the movable in good faith, the great attention in Serbian literature and judicial practice (especially in respect to the acquisition of used motor vehicles) is paid to the situation in which the movable has been acquired from a non-owner acting in the ordinary course of business (i.e. a merchant registered for selling movables of same or similar kind). Purchasing the movable from a merchant, the *bona fide* acquirer can become the owner of the

[16] This view was adopted in German judicial practice (see e.g. KG, MDR 2003, 1350; LG München, ZfS 2006, S. 93). It can be also applicable in Serbian property law. See also N. Planojević, *op. cit.*, p. 279.

[17] N. Planojević, *op. cit.*, p. 279.

[18] Article 34 of Act on Basis of Ownership and Proprietary Relations (Property Law Act).

[19] Similar N. Planojević, *op. cit.*, p. 159.

movable notwithstanding whether the original owner of the movable lost it, had it stolen or otherwise taken from him against his will.[20]

Serbian courts handled numerous cases in which a licensed dealer (i.e. a person or a company selling the vehicles in the ordinary course of business) was involved in an acquisition of ownership of the vehicles. In the past, especially during the nineties, this way of good faith acquisition was often the subject of manipulation and abuse, because it allows the transfer of ownership of stolen or lost vehicles. It happened very often that a person sold a used vehicle with legal deficiencies (e.g. stolen vehicle or vehicle with forged VIN number and/or forged registration certificate) to another person, who was aware of these defects, for a price which was significantly below the value of the vehicle, and thereafter both of them visited a professional dealer with whom a seller concluded a commission agreement and a buyer (acquirer) the sale contract which was actually fictive.[21] The motive for this arrangement was to provide the application of more favorable rules to secure the acquisition of ownership of a stolen vehicle.[22] In many cases of this kind, Serbian courts have succeeded to reveal these attempts of fraud and ruled that the buyer acted in bad faith and the sale contract between the dealer and the buyer was invalid.[23] However, the courts clearly stated that, if the price of the vehicle have been regular (i.e. market price) and the buyer could not have been aware of buying the deficient vehicle from real licensed dealer, he would have acquired the ownership of vehicle in good faith.[24]

---

[20] It was seen as a triumph of the interest of trade and legal certainty (O. Stanković, M. Orlić, *op. cit*., p. 80).

[21] See Okružni sud u Beogradu (Judgment of District Court of Belgrade), Gz. 9424/99; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 1550/98; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 4581/98; Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 688/98; Vrhovni sud Srbije, Rev. 4634/96; Presuda Okružnog suda u Užicu (Judgment of District Court of Uzice), Gz. 1649/06 10.7.2007 (*http://www.poslovnibiro.rs/files/File/SUDKSA_PRAKSA/3.1.2.%20STVARNO%20PRAVO.pdf*, last visited 3 July 2014).

[22] See very profound discussion on this matter by N. Planojević, *op. cit*., pp. 415-418.

[23] See footnote 19.

[24] See Vrhovni sud Srbije (Revision of Supreme Court of Serbia), Rev. 4634/96.

3. Purchasing vehicles abroad – application of private international law rules

Comparing Serbian rules on good faith acquisition of movables with the rules of some other legal systems in Europe, such as Germany or Croatia, it can be concluded that the Serbian rules are, to a certain extent, more favorable for *bona fide* acquirer, especially when acquiring the ownership of a movable of which the owner had involuntarily lost possession. § 935 of German BGB[25] and Art. 118 (4) of Croatian law on ownership and other proprietary rights[26] explicitly prescribe that good faith acquisition of ownership does not occur if the owner lost a movable or if it was stolen or otherwise taken from him against his will. The divergences between legal systems become of great importance in cases with a foreign element where the rules of private international law have to determine which national law shall govern the case. For a *bona fide* acquirer importing a used motor vehicle to Serbia, which he has bought from a professional (licensed) car dealer in a foreign country under circumstances that could indicate that the original owner had involuntarily lost possession of that vehicle, it is important whether the Serbian law or the law of that foreign State governs the good faith acquisition of ownership of such a vehicle.

Therefore, if the purchase and delivery of the vehicle have taken place abroad, the foreign element appears in the case and Serbian court inevitably has to apply the rules of private international law (conflict rules) in order to determine which national law is to be applied to the case.[27] Once the applicable national law (foreign or domestic) is determined, it shall govern all conditions for acquiring the ownership of a used vehicle in good faith.

The principle source of private international law in Serbia is the Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States of 1982[28]

---

[25] Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das durch Artikel 1 des Gesetzes vom 22. Juli 2014 (BGBl. I S. 1218) geändert worden ist.

[26] Croatian law on ownership and other proprietary rights, *Narodne novine* (Official Gazette), No. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12.

[27] The conflict rules are mandatory rules in Serbian legal system. See T. Varadi *et al.*, *op. cit.*, p. 101-102.

[28] Act Concerning the Resolution of Conflicts of Laws with Provisions of Other States [Zakon o rešavanju sukoba zakona sa propisima drugih zemalja], *Official Gazette SFRY* No. 43/1982. English translation of this Act can be found in D. Babić, C. Jessel-Holst, *Međunarodno privatno*

(Private International Law Act - PIL Act). Art. 18 (1) of the PIL Act contains the basic conflict rule for acquisition, content and loss of rights in rem: "*Relationships relating to ownership and other property rights shall be governed by the law of the place where the property is situated.*" (so-called *lex situs* rule). There are two common exceptions to *lex situs* rule, which are contained in Art. 18 (2) and (3) of the PIL Act: (1) in respect of movables (goods) in transit, the governing law shall be the law of the place of destination and (2) in respect to means of transportation (airplanes and ships) the law of the state of which those means have the nationality.

Unfortunately, Serbian PIL Act has not solved the problem of changing the *situs* of tangible movables (i.e. so-called *conflit mobile* problem) which appears in the cases where a used vehicle has been purchased abroad and moved to Serbia. The solution of this problem is left to the Serbian scholars and judicial practice. It is up to them to determine the moment of time at which the *situs* of a movable is relevant. Serbian authors have discussed the matter several times, while the courts missed several opportunities to finally take the stand on this issue.

The change of the *situs* of a movable (its relocation from one to another country) opens the question of changing the applicable law, i.e. creates a dilemma whether the right *in rem* shall be governed by previous or actual *lex situs*? In principle, this question may be raised in two situations which should be discussed.

In the first situation, a movable in which the right *in rem* was validly acquired in one country (former *situs*) is removed into another country (new/actual *situs*) in which a person who is entitled to such right *in rem* invokes and exercises that right. Is the law of previous or actual *situs* applicable to the content and effects of such right in rem? The problem becomes more difficult if actual (current) *situs* does not know the right *in rem* in question. According to the widely accepted opinion in literature,[29] the law of actual *situs* shall be applicable to the content

---

pravo – zbirka unutarnjih, europskih i međunarodnih propisa, Zagreb: Narodne novine, 2011, p. 4 etc.

[29] See for example U. Drobnig, Recognition and Adaptation of Foreign Security Rights, *Divergences of Property Law, an Obstacle to the Internal Market* (eds. U. Drobnig, H. J. Snijders, E. Zippro), München, 2006, p. 105 etc.; M. V. Polak, Recognition, Enforcement and Transformation of Foreign Proprietary Rights – a handful of observation and suggestions, *Divergences of Property Law, an Obstacle to the Internal Market?* (eds. U. Drobnig, H. J. Snijders, E. Zippro), München, 2006, p. 117 etc.; B. von Hoffmann, K. Thorn, *Internationales Privatrecht*, 9. Aufl., München, 2007, S. 523; J. Kropholler, *Internationales Privatrecht*, 4. Aufl., Tübingen, 2001, S. 526; Morris (authors

and effects of such right *in rem*.[30] If the right *in rem* acquired under the law of previous *situs* is unknown to the law of actual *situs* (i.e. it does not fit in its *numerus clausus* of rights *in rem*), it may be recognized and effective in the actual *situs*, provided the law of actual *situs* knows the right *in rem* which is in substance and effects the closest equivalent to the right *in rem* acquired in previous *situs*. This means that it shall be transformed into the closest equivalent right *in rem* of the actual *lex situs*.[31]

In the second situation, a movable is removed from one to another country before all legal facts that are required for the acquisition or cessation of the right *in rem* have occurred. The question is: does the previous or actual *lex situs* govern the acquisition or cessation of right *in rem*? Serbian literature[32] supports the widely[33] accepted rule that the acquisition or cessation of right *in rem* shall be governed by the law of the state in which a movable is situated at the time when the last required legal fact on which the acquisition or cessation is based has occurred (i.e. the law of actual *situs*). Thereby, where some legal facts required for acquisition or cessation of right *in rem* took place in one country, it shall be deemed that they also occurred in another country in which the last legal fact required for acquisition or cessation of such right *in rem* has occurred.

In connection with these rules the following question can be raised: How to treat the situation in which all legal facts required for the acquisition of right *in rem* in a movable under the law of actual *situs* have occurred in previous *situs* under whose law they could not produce legal effects? In our view we cannot speak of valid acquisition of right *in rem* in such a situation. Namely, where all the facts that could eventually lead to the acquisition of right *in rem* occurred when a

---

D. McClean, K. Beevers), *The Conflict of Laws,* 6. ed., London, 2005, p. 409. It is followed by Serbian authors M. Dika, G. Knežević, S. Stojanović, *Komentar zakona o međunarodnom privatnom i procesnom pravu*, Beograd, 1991, p. 69; A. Jakšić, *Međunarodno privatno pravo*, Beograd, 2008, p. 489-490.

[30] The same opinion is widespread in Serbian literature. See M. Dika, G. Knežević, S. Stojanović, *op. cit*., p. 69; A. Jakšić, *op. cit*., p. 489-490; S. Đorđević, Transpozicija stranih stvarnih prava na pokretnim stvarima prema Nacrtu Zakona o međunarodnom privatnom pravu, *Anali Pravnog fakulteta u Beogradu,* 1/2013, p. 151.

[31] See S. Đorđević, *op. cit*., p. 152 etc.

[32] M. Dika, G. Knežević, S. Stojanović, *op. cit*., p. 68; A. Jakšić, *op. cit*., p. 488, T. Varadi *et al*., *op. cit*., p. 362.

[33] See e.g. J. Kropholler, *op. cit*., S. 527; G. Kegel, K. Schurig, *Internationales Privatrecht*, 8. Aufl., München, 2000, S. 668; J. H. C. Morris, *op. cit*., p. 409.

movable was situated in previous *situs* whose law does not recognize their effects, the right *in rem* cannot be acquired by simple relocation of such a movable to a new *situs* whose law gives a legal effect to those facts.[34] The retroactive application of rules of actual *situs* must not be allowed in this situation. Therefore, the law of previous *situs* shall be applied to the case, which means the right *in rem* shall not be acquired. As will be seen in the following section, Serbian courts dealt with these situations in cases involving good faith acquisition of ownership of used vehicles purchased abroad, but they unfortunately came to completely different results.

4. Critical analysis and observation of Serbian judicial practice – the decision of the District Court of Novi Sad

Several court cases on good faith acquisition of used vehicles purchased abroad have been published in Serbian law journals.[35] The common characteristic of all these cases is that Serbian courts did not take into account the fact that the purchase and the delivery of a used vehicle occurred abroad. The consequence of ignoring this undisputable fact was non-application of rules of private international law (conflict rules). In this section we analyze the case which was finally decided by District Court of Novi Sad[36] in 2006.

At the beginning of 2003 a Serbian citizen from the small town of Sremski Karlovci decided to buy a used mini-van. He contacted his nephew in Munich (Germany) in order to find the suitable vehicle in Germany. Using the Google Search Engine the nephew found a licensed dealer in the German city of Rosenheim who was selling the used "Ford Fiesta Courier" registered in Switzerland. In March 2003 the Serbian citizen traveled to Rosenheim and concluded the sale contract with the professional dealer who handed the vehicle over to him together with the Swiss registration certificate. He drove the vehicle

[34] In similar manner T. Varadi *et al*., *op. cit*., p. 362.

[35] Presuda Okružnog suda u Novom Sadu (Judgment of District Court of Novi Sad), Gz. 4548/05 07.12.2006, *Pravo, teorija i praksa,* 3-4/2007, p. 64-65; Presuda Okružnog suda u Čačku (Judgment of District Court of Cacak), Gz. 46/04 18.01.2006 (2006), *Izbor sudske prakse,* 6/2006, p. 45; Presuda Okružnog suda u Čačku (Judgment of District Court of Cacak), Gz. 1696/07 28.11.2007, *Izbor sudske prakse,* 3/2007, p. 49; Presuda Okružnog suda u Užicu (Judgment of District Court of Uzice), Gz. 1649/06 10.11.2007, *Izbor sudske prakse*, 12/2007, p. 51.

[36] Presuda Okružnog suda u Novom Sadu (Judgment of District Court of Novi Sad), Gz. 4548/05 07.12.2006, *Pravo, teorija i praksa,* 3-4/2007, p. 64-65.

back to Serbia, paid customs fees and initiated the registration proceeding before the local police authorities in Sremski Karlovci. Along with the application for registration he submitted the Swiss registration certificate and all the other documents he got from the German dealer. After checking in the Interpol Stolen Motor Vehicle Database and finding out that the vehicle was not reported as stolen, police authorities allowed the registration of the vehicle, which was completed in April 2003. However, a few weeks later the police authorities determined by forensic methods that the Swiss registration certificate was counterfeit and decided to annul the registration and seize the vehicle. Soon after the vehicle was seized, the police forensic experts also found out that the VIN number was not original.

The Serbian citizen brought proceeding against the state (i.e. Serbian police authorities) before the Municipal court of Novi Sad seeking return of the vehicle with an argument that he acquired the ownership of the vehicle in good faith. The municipal court of Novi Sad directly applied the provisions of Art. 31 of PLA to the case and decided that the Serbian resident as good faith acquirer became the owner of the vehicle at the time of the delivery. The defendant (police) lodged the appeal with the District Court of Novi Sad who rejected it and affirmed the judgment of the municipal court.[37]

As can be seen, Serbian courts (the Municipal Court and District Court of Novi Sad) did not take into account the facts that the acquirer concluded the sale contract and took over the vehicle in Germany. These facts were undisputable and as such represented the foreign elements in the relationship between the acquirer and the transferor which necessarily activate the application of conflict rule in Art 18 PIL Act. Serbian courts were obliged to apply *lex situs* rule in order to determine which national law is applicable to the acquisition of ownership of the vehicle. Considering that the vehicle was removed from Germany to Serbia (i.e. its *situs* was changed), the courts had to recognize the problem of *conflit mobile* and solve it by applying the rules described in the previous section. So, they should have started with locally and worldwide recognized rule that the governing law for the acquisition of ownership is the law of the state in which the movable is situated at the time when the last required legal fact on which the acquisition is based has occurred. After that they should have determined that all legal facts of the case that could be relevant for acquisition of ownership of the

[37] *Ibid*.

vehicle (i.e. sale contract and delivery) had occurred when the vehicle was situated in Germany, which doubtlessly leads to the conclusion that German law was applicable to the case. Therefore, Serbian courts were wrong to directly apply the Serbian rules on good faith acquisition.

Could the application of the German law have produced a different substantive result, i.e. that the Serbian resident is not the owner of the vehicle? The answer might be affirmative. According to the German law (§ 932, § 935 BGB), the transferee who acted in good faith becomes the owner even if the movable does not belong to the transferor, provided that the movable has been voluntarily entrusted to the transferor by the owner or his intermediary.[38] § 935 (1) BGB explicitly prescribes that good faith acquisition of ownership does not occur if the owner lost the movable or had it stolen or otherwise taken from him against his will. In the presented case, the counterfeit registration certificate of the vehicle and the fake VIN number were the indications that led the police authorities to reasonably suspect that the vehicle was stolen. As Serbian courts directly applied the Serbian law, i.e. Art 31 of PLA, they did not find it necessary to insist on determining the facts which would support the police's assertion that the vehicle was stolen or otherwise involuntarily taken from the original owner. The reason for that was obvious: according to Art 31 (1) PLA, if *bona fide* acquirer purchases the movable from a merchant acting in ordinary course of business, he becomes the owner even if the movable was stolen from the original owner. However, if the courts had applied the conflict rule of Art 18 PIL Act, then the German law would have been applicable to this case and all the circumstances which could indicate that the vehicle was stolen would have been examined. If it had been proven that the vehicle was stolen or otherwise involuntarily taken from the owner, the Serbian resident could not have acquired the ownership of the vehicle, although he acted in good faith.

Applying the Serbian rules on good faith acquisition of ownership without previous application of conflict rule that would rather refer to the German law, the Serbian courts enabled the Serbian resident to acquire the ownership of the vehicle by simple relocation of the vehicle from Germany to Serbia. Direct application of the Serbian law in this case can be described as "retroactive

[38] About German law on good faith acquisition of ownership see H. Prütting, *Sachenrecht*, 34. Aufl., München, 2010, S. 180ff.

application" and giving effects to the facts that occurred in previous *situs* (i.e. Germany) as "convalidation". It really should not have happened.

5. Conclusion

The Serbian property law prescribes that *bona fide* acquirer may become the owner of a used vehicle, if he concluded a valid contract transferring the ownership with (a) the non-owner who sells the motor vehicle in the ordinary course of business or (b) the non-owner to whom the vehicle has been entrusted by the owner or (c) on the public sale. Attention should be paid to the situation in which a used vehicle is acquired from a non-owner (merchant) who is registered (licensed) for selling vehicles, because the transfer of ownership to the *bona fide* acquirer in this situation is possible even if the original owner has involuntarily lost possession of the vehicle or it has been stolen from him. In comparison to the rules of some other legal systems in Europe which expressly prescribe that good faith acquisition of stolen or lost movables is forbidden, one can say that the rule of Serbian law is more favorable for *bona fide* acquirer. This advantage of Serbian law may be applied only in the cases that are completely connected to Serbia or where the application of Serbian law is ordered by conflict rule. Therefore, if the case is related to more than one legal system, Serbian courts are obliged to apply the rules of private international law that have yet to determine the applicable national law (Serbian or foreign) whose substantive rules shall finally be applied to all the requirements for good faith acquisition. In the case discussed and criticized in this paper, the Serbian courts failed to apply the conflict rule of Art 18 PIL Act and directly applied the rules of the Serbian law on good faith acquisition which were more favorable than the rules of German law whose application to the case should have been imposed by Serbian private international law (Art. 18 PIL Act). This practice is wrong and must be changed.

Slavko Đorđević*,

Sticanje svojine od nevlasnika na polovnim motornim vozilima pribavljenim u inostranstvu – nekoliko napomena i kritički osvrt na domaću sudsku praksu

Rezime

U poslednjih desetak godina srpski sudovi su u više navrata rešavali sporove o sticanju svojine od nevlasnika na polovnom motornom vozilu koje je pribavljeno u inostranstvu. U svim ovim slučajevima oni nisu uzimali u obzir činjenicu da su se kupovina i predaja vozila u državinu dogodili u inostranstvu, tako da su direktno primenjivali domaće pravo, tj. čl. 31 Zakona o osnovama svojinskopravnih odnosa (ZOSO), bez prethodnog konsultovanja kolizione norme iz čl. 18 ZRSZ koja je trebalo da pruži odgovor na pitanje koje je pravo merodavno – domaće ili strano. Direktna primena domaćeg prava redovno je favorizovala savesnog sticaoca, s obzirom da su domaća pravila o sticanju svojine od nevlasnika za njega bila povoljnija od pravila stranog prava na koja bi, eventualno, uputila koliziona norma. Stavljajući ovaj problem u središte svojih istraživanja, autor najpre analizira domaća materijalnopravna pravila o sticanju svojine od nevlasnika na pokretnim stvarima, posebno na motornim vozilima (čl. 31 ZOSO). Zatim pažnju posvećuje kolizionom pravilu *lex rei sitae* iz čl. 18 ZRSZ i problemima mobilnih sukoba zakona, uspostavljajući pravila za njihovo rešavanje koje treba primeniti kod sticanja svojine od nevlasnika na motornim vozilima pribavljenim u inostranstvu. Najzad, autor analizira i kritikuje odluku Okružnog suda u Novom Sadu (Presuda Okružnog suda u Novom Sadu, Gž. 4548/05 od 7.12.2006) kojom je rešen spor o sticanju svojine od nevlasnika na motornom vozilu koje je kupljeno i preuzeto u državinu u SR Nemačkoj.

Ključne reči: sticanje svojine od nevlasnika; polovna motorna vozila; lex rei sitae; mobilni sukob zakona; sudska praksa

* Docent na Pravnom fakultetu Univerziteta u Kragujevcu