PROPERTY AND TRUST LAW IN THE NETHERLANDS

ARTHUR SALOMONS MATTHIAS HAENTJENS



Property and Trust Law in the Netherlands

Arthur Salomons Matthias Haentjens

This book was originally published as a monograph in the International Encyclopaedia of Laws/Property and Trust Law.

Founding Editor: Roger Blanpain General Editor: Frank Hendrickx Volume Editors: Alain Verbeke & Vincent Sagaert



Published by:

Kluwer Law International B.V.

PO Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Website: www.wolterskluwerlr.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.

7201 McKinney Circle

Frederick, MD 21704

United States of America

Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Quadrant

Rockwood House

Haywards Heath

West Sussex

RH16 3DH

United Kingdom

Email: international-customerservice@wolterskluwer.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper

ISBN 97890-411-8754-3

e-Book: ISBN 97890-411-8777-2 web-PDF: ISBN 97890-411-8807-6

This title is available on www.kluwerlawonline.com

© 2017, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wolterskluwerlr.com

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

The Authors



Arthur Salomons has been Professor of Private law at the Law Faculty of the University of Amsterdam since 1997 and Director of College of Law since 2014. He acted as chairman of the Civil Law Department between 2002 and 2013. He is deputy judge at the Court of Appeals of Amsterdam and member of the Editorial Board of the European Property Law Journal. His research focuses on Dutch and European Property and Security Law. He is married and has three children.



Matthias Haentjens is full professor (chair) of financial law and director of the Hazelhoff Centre for Financial Law at Leiden University.

Prior to joining Leiden University in 2012, Prof. Haentjens was an attorney with De Brauw Blackstone Westbroek. In this capacity, he handled cases both as an international transaction lawyer and as a (Supreme Court) litigator.

Prof. Haentjens studied Greek and Latin at the University of Amsterdam (BA *cum laude*), and obtained his Master degree in 2001. He became a teacher of classics, but subsequently obtained a Master degree in Law (*cum laude*) in 2003, also at the University

The Authors

of Amsterdam. He obtained his PhD at the University of Amsterdam in 2007 and was a visiting scholar at Université de Paris II (Panthéon-Assas), Harvard Law School and New York University School of Law. He is currently visiting professor at Ghent University.

He teaches and publishes nationally and internationally on European banking law, insolvency law and on private international law. He is a deputy judge in the District Court of Amsterdam, a certified expert to the European Commission (EC) and a (short-term) consultant to the World Bank.

List of Abbreviations

BW Civil Code (Burgerlijk Wetboek)

Rv Code of Civil Procedure (Burgerlijke

rechtsvordering)

Fw Bankruptcy Act (Faillissementswet)

THE	Addiois	-
List	of Abbreviations	13
Gen	eral Introduction	15
Duto	ch Property Law: Introduction	15
§1.	Definition	15
§2.	Sedes Materiae	15
§3.	HISTORICAL BACKGROUND	16
§4.	Property	17
§5.	Categorization	18
	 I. Assets II. Corporeal Assets III. Incorporeal Assets IV. Absolute Interests V. Dependent Interests v. Ancillary Rights VI. Complete Interests v. Limited Interests VII. Absolute Interests in Corporeal Assets v. Absolute Interests in Assets VIII. Relative Interests IX. Other Distinctions 	18 19 20 21 23 24 25 26
§6.	Ownership/Possession/Detention	27
Part	I. Immovable and Movable Property – Ownership	29
Chap	pter 1. Ownership	29
§1.	Introduction; the Object of Ownership	29
82	THE RIGHTS OF THE OWNER	30

	I. II. III.	The Right to Use the Object The Right to Revindicate the Object The Right to Dispose of the Object	30 30 31
§3.	RES	trictions on Ownership	31
	I. II. III.	Restrictions Regarding the Use of the Object Restrictions Regarding Revindication Restrictions Regarding the Right to Dispose of the Object	32 34 35
§4.	PRO	TECTION OF OWNERSHIP	36
	I. II. III. IV.	Revindication A. Revindication by a Non-owner B. Revindication from the Possessor Declaratory Judgment Tort (Injunction, Damages) Unjustified Enrichment	36 36 37 38 38 39
Chap	ter 2.	Co-ownership, Community and Apartment Rights	41
§1.	SEC	es Materiae	41
§2.	Cor	mmunities; Classification	42
§3.	Cor	MMUNITY; THE RIGHT TO DISPOSE	42
§4.	APA	ARTMENT RIGHTS	44
Chap	ter 3.	Fiduciary Ownership	47
Part 1	II. Im	movable and Movable Property – Rights to Use	49
Chap	ter 1.	Usufruct	50
§1.	Сн	ARACTERISTICS, OBJECT AND CREATION OF USUFRUCT	50
§2.	FRU	JITS	51
§3.	От	HER RIGHTS OF THE USUFRUCTUARY	52
§4.	Ов	LIGATIONS OF THE USUFRUCTUARY	54
§5.	Ты	rmination of Usufruct	55
§6.	Тн	E RIGHT OF USE AND THE RIGHT OF HABITATION	56

Chap	ter 2. Easements	58
§1.	Definition	58
§2.	Content	58
§3.	Alternatives to an Easement	61
§4.	CREATION OF EASEMENT BY ESTABLISHMENT	61
§5.	Creation of Easement by Prescription	62
§6.	Modification or Termination of Easements by the Court	64
§7.	Other Causes of Extinguishment of Easements	6.
Chap	ter 3. Leasehold	6
§1.	Definition	6
§2.	CONTENT AND TERM OF THE LEASEHOLD	6
§3.	RIGHTS OF THE LEASEHOLDER	68
	I. Enjoyment and FruitsII. Transfer and EncumbranceIII. LeaseIV. LitigationV. Reimbursement	68 70 71 71
§4.	Duties of the Leaseholder	72
	I. Ground RentII. Charges and Repairs	72 72
§5.	Creation and Transfer	73
§6.	Extinguishment of Leasehold	73
§7.	Modification of Leasehold	74
Chap	ter 4. Superficies	76
§1.	Definition and Function of Superficies	76
§2.	DEPENDENT AND INDEPENDENT RIGHT OF SUPERFICIES	70

§3.	RIGHTS AND DUTIES OF THE SUPERFICIARY	77
§4.	CREATION AND TRANSFER	78
§5.	Term and Extinguishment	79
Part I	II. Acquisition	81
Chapt	ter 1. Accession, Confusion and Specification	81
§1.	TERMINOLOGY: COMPONENT PART AND PRINCIPAL MOVABLE	81
§2.	Accession of Movables	82
§3.	Confusion	83
§4.	Specification	84
§5.	Accession of Movables by Land	86
Chap	ter 2. Prescription	88
§1.	REQUIREMENTS FOR ACQUISITIVE PRESCRIPTION	88
§2.	'Thief Becomes Owner': Liberative Prescription with Acquisitive Effect	91
Chap	ter 3. Transfer	94
§1.	Unititular Concept of the Transfer of Ownership	94
§2.	Transferability	94
§3.	REQUIREMENTS FOR TRANSFER	95
	I. Valid TitleII. Right to DisposeIII. Delivery	95 96 97
§4.	No Requirement of Payment	98
§5.Ti	ERMINATION OR ANNULMENT OF THE CONTRACT UNDERLYING THE TRANSFER	99
	L Void or Annulled Titles	99

	Π .	Obligations That Do Not Constitute Valid Titles for	1.0.1
	III.	Transfer Termination of a Contract	101 102
§6.	Тнв	Delivery Requirement	102
	I. II. III.	Movables A. Movables Within the Control of the Transferor 1. Actual Delivery 2. Fictitious Delivery B. Movables Not Within the Control of the Transferor C. Movable Registered Objects Registered Property Claims	103 103 103 104 108 109 110
§7.	REA	AL AGREEMENT	110
§8.	Rig	HT OF RECOVERY OF UNPAID SELLER	112
§9.	Dot	JBLE SELLING	113
§10.	SEL	ling in a Chain; Combined Title	114
§11.	Acc	QUISITION THROUGH ANOTHER: INDIRECT REPRESENTATION	116
§12.	Insc	DLVENCY OF TRANSFEROR	117
	I. II. III. IV.	Bankruptcy Between Sale and Delivery Bankruptcy After Transfer under Suspensive Condition Position of the Transferee in Case of Invalidity of Sale Insolvency of the Transferee	117 118 119
§13.	TRA	INSFER OF MOVABLES AND PASSING OF RISK	121
Chapt	ter 4.	Good Faith Acquisition a Non Domino	124
§1.	Mo	VABLES	124
		Requirements Field of Application Acquisition for Value Possession or Physical Control by Transferor Required? Acquisition of Physical Control by Transferee Required? Specific Requirements Regarding Transferor? Good Faith Effect of Protection	124 125 125 126 126 127 128 129

	IX. Acquisition of a Movable Encumbered with a Limited Right	130	
§2.	REGISTERED PROPERTY AND CLAIMS	130	
§3.	GENERAL PROVISION ON THIRD-PARTY PROTECTION	132	
§4.	REGULARIZATION OF INVALID TRANSFER OF MOVABLE	132	
Chapt	er 5. Reservation of Title	134	
§1.	Character and Establishment	134	
§2.	OWNERSHIP OR SECURITY RIGHT?	134	
§3.	FOR WHICH CLAIMS?	135	
§4.	THE TRANSFEROR'S AND ACQUIRER'S RIGHT TO DISPOSE	135	
§5.	Extended Reservation of Title	136	
§6.	Extinction of Title Reservation	137	
Chapt	ter 6. Acquisition by Successor	138	
§1.	Acquisition by General and by Particular Title	138	
§2.	Succession by General Title	139	
§3.	LEGACY	140	
Chap	ter 7. Finding, Occupation, Fruits, Treasure	141	
§1.	FINDING	141	
§2.	Occupation	143	
§3.	Separation	144	
§4.	Treasures	144	
Part I	V. Security Rights	147	
Chap	ter 1. Introduction	147	
Chanter 2 The Dutch System of Priority Panking			

FWT			6	-	- 4		
10	hi	0	Ot	Cor	n t	an	10
11 64	L/ J		UI	VUI	LR E		F13

§1.	Bas	Basic Principles			
§2.	Тн	The General Ranking Order			
Chap	ter 3.	Absolute Security Rights	151		
§1.	Int	RODUCTION	151		
§2.	Con	mmon Features	151		
	V.	General Characteristics The Secured Claim The Party Providing Security The Asset Subject to Pledge or Hypothec Creation Creditor's Rights	151 152 152 152 153 153		
§3.	PLE	DGE	154		
	I. III. IV.	Introduction The Asset Subject to a Pledge Creation Pledge of Debt Claims A. Introduction B. Creation C. Asset D. Recent Developments in Case Law 1. Future Debt Claims: Dix q.q./ING 2. Rights of the Pledgee During Bankruptcy: Mulder q.q./Credit Lyonnais 3. Rights of the Pledgee Before or Outside Bankruptcy: Rabobank/Knol q.q. 4. Rule of Conduct of the Liquidator: ING/Verdonk q.q. 5. Rules of Conduct of the Liquidator II: Hamm q.q./ABN AMRO Bank	154 155 155 156 156 157 157 158 158 158		
§4.	Нуг	POTHEC	160		
	IV.	Introduction Creation Third-Party Protection Letting Clause Termination of Hypothec	160 161 161 162		
Chap	ter 4.	Privileges	163		

§1.	Introduction					
§2.	PRIVILEGES ON SPECIFIC ASSETS					
§3.	Privileges on All Assets					
Chapt	er 5.	Other Forms of Actual Priority/Title Finance	167			
§1.	INTE	ODUCTION	167			
§2.	RES	ervation of Title (Eigendomsvoorbehoud)	167			
§3.		ancial Collateral Arrangement anciëlezekerheidsovereenkomst)	167			
§4.	Rigi	HT OF RECOVERY (RECLAMERECHT)	168			
§5.	RIGHT OF RETENTION (RETENTIERECHT)					
§6.	Claim for Compensation by the Lessee/Tenant (Schadevergoedingsvordering van de Huurder/Pachter)					
§7.	CLAIM FOR COMPENSATION FOR THE LOSS OF A LIMITED RIGHT OF USE (SCHADEVERGOEDINGSVORDERING VAN DEGENE DIE EEN BEPERKT GEBRUIKSRECHT VERLOOR)					
§8.		MS OF SECURING ONE'S CLAIM CONTRACTUALLY/CONTRACTUAL DRITY	170			
	I. II.	Introduction Suretyship/Guarantee (Borgtocht) Lintaged Survey Lightility of a Third Poetty (Heafdeliike	170 171			
		Joint and Several Liability of a Third Party (Hoofdelijke Aansprakelijkheid) Bank Guarantee (Bankgarantie)				
	V. VI.	Documentary Credit/Letter of Credit (Documentair Krediet/documentair Accreditief) Set-Off (Verrekening)	172 172			
Chap	ter 6.	Fiduciary Ban (Fiduciaverbod)	174			
Selec	ted B	ibliography	175			
Index	Index 1					

Property and Trust Law in the Netherlands

Arthur Salomons Matthias Haentjens

This book was originally published as a monograph in the International Encyclopaedia of Laws/Property and Trust Law.

Founding Editor: Roger Blanpain General Editor: Frank Hendrickx Volume Editors: Alain Verbeke & Vincent Sagaert



The Authors



Arthur Salomons has been Professor of Private law at the Law Faculty of the University of Amsterdam since 1997 and Director of College of Law since 2014. He acted as chairman of the Civil Law Department between 2002 and 2013. He is deputy judge at the Court of Appeals of Amsterdam and member of the Editorial Board of the European Property Law Journal. His research focuses on Dutch and European Property and Security Law. He is married and has three children.



Matthias Haentjens is full professor (chair) of financial law and director of the Hazelhoff Centre for Financial Law at Leiden University.

Prior to joining Leiden University in 2012, Prof. Haentjens was an attorney with De Brauw Blackstone Westbroek. In this capacity, he handled cases both as an international transaction lawyer and as a (Supreme Court) litigator.

Prof. Haentjens studied Greek and Latin at the University of Amsterdam (BA *cum laude*), and obtained his Master degree in 2001. He became a teacher of classics, but subsequently obtained a Master degree in Law (*cum laude*) in 2003, also at the University