

IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE

Cases, Materials and Text on
**PROPERTY
LAW**

Edited by

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With the collaboration of

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Cases, Materials and Text on National,
Supranational and International
Property Law

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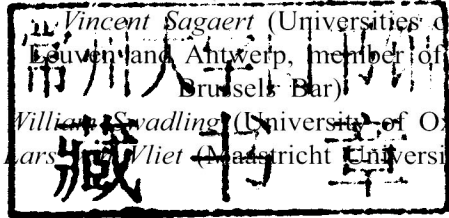
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Companion Website

The reader's attention is drawn to a companion website, with additional information about the Ius Commune Casebook series as well as original language versions of and hyperlinks to the full text versions of the excerpted materials reproduced in this casebook:

www.casebooks.eu/propertylaw/

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PREFACE

This casebook is the eighth publication in the Casebook series for the Common Law of Europe under the general editorship of Professor Walter van Gerven. We are greatly indebted to him for his continuous interest and relentless support for our team. This Casebook fits within the broader objectives of the *Ius Commune* Casebook Project, which is a joint undertaking on the part of the Universities of Leuven (KU Leuven, Belgium) and Maastricht (Maastricht University, the Netherlands). The project fosters co-operation among legal scholars from all over Europe, allowing them to join forces to undertake in-depth research in various areas of comparative and European law. One of its main aims is to enable scholars and students across Europe and beyond to study and discuss the same leading cases and materials. More information on the project is available at www.casebooks.eu.

Set-up and aims of the Casebook on Property Law

This is a casebook on property law: the first ever casebook on comparative and European property law. A major difficulty consisted in identifying appropriate cases. Sometimes this proved nearly impossible and we then had to turn to other sources, such as legislation and excerpts from scholarly writings. This ‘casebook’ – or rather this ‘sourcebook’ – unites materials from common law and civil law systems, especially from England and Wales, France, Germany and the Netherlands. Moreover, excerpts were taken from Austrian, Belgian, Scots, Irish, United States and European Union sources.

Property law systems are generally held to differ greatly from one another. This casebook respects those differences, but seeks at the same time to uncover commonalities and similarities between the legal systems. The casebook therefore prefers a functional approach, as far as possible grouping excerpts from different systems together under a single topical heading: whenever an area showed such convergence that an integrated approach proved possible, legal systems are discussed as various modes of thought leading to the same or comparable solutions to a given problem. But whenever this proved impossible or undesirable, a more classical, consecutive country-by-country approach had to be adhered to. Indeed, the European law traditions are sometimes so diverse that only a consecutive approach seemed feasible. Where this is the case, topics (problem areas) are first introduced and then followed by materials accompanied by explanatory notes from the various legal systems. At the end of the sequence, comparative notes are provided. The decision to choose the ‘consecutive’ or the ‘integrated’ approach was based on rather pragmatic arguments and depended upon the particular area of property law. However, throughout the casebook no bias is to be found towards integration or non-integration of property law in Europe. This is a casebook offering materials for further reflection, not a textbook. Of course, underlying the casebook is a particular theoretical structure, necessary to present the materials in an orderly fashion; but it is a very general and open structure that is common to the various property traditions.

The structure of the casebook itself is therefore a prime example of an integrated comparative approach, whereas, for instance, Chapter 9 on destruction provides a clear example of the consecutive approach.

The book is intended, first and foremost, for all those who study property law. Hence it is a book that can be used to teach courses on comparative and European property law, both within and beyond the European Union. At the same time it is directed towards scholars who seek to acquire a more profound knowledge of property law in another country. In addition the casebook may offer help to all those practising law and seeking information about a particular legal system or looking for a solution to a particular case. And, last but not least, this volume may prove especially useful for policy makers and legislators as it provides an overview of alternative solutions to particular problems.

The emerging field of comparative property law

As already stated, property law is an area of law with respect to which it is traditionally held that there are many and deeply rooted differences between legal systems which are difficult to overcome. This firm conviction not only concerns the traditional divide between common law and civil law, but also persists with respect to systems within the civil law family. In this respect, property law is rather different from other areas of law such as contract and tort, or constitutional law, where similarities were discovered earlier and comparative research has really gained ground. In comparison to those fields, comparative property law still finds itself in an emerging state and remains rather small, precisely because of said – often real, but, as it will appear, in many cases also unduly perceived – differences.

Nonetheless the number of academics devoting their time to the comparative study of property law is increasing. Although they must take fundamental differences into account, there is indeed an increasing consensus that property law systems do share many similarities. These similarities, we would submit, do not exist at a technical level, ie at the level of the actual rules that serve to solve disputes, but are rather to be found in the realm of common thought-patterns and approaches. When property law is analysed at such a level, underlying values and policy questions prove to be the same. The question ‘who should be allowed to create new types of property rights?’ could serve as a prime example, since its answer – enshrined in the principle of *numerus clausus* – is present in all legal systems: generally speaking no legal system permits parties to freely create new types of property rights and therefore the list of property rights is limited in all property law systems.

The genesis of the Casebook

It is the above-sketched type of analysis that made it possible to embark on this project in the area of property law, especially in the framework of the casebook series which offers a natural habitat for such an endeavour. With the above-described mind-set, a team of nine authors from different EU Member States set to work. From England, representing the common law tradition, William Swadling (Brasenose

College, University of Oxford) and Alexandra Braun (formerly St John's College, now Lady Margaret Hall, University of Oxford) took part. From Belgium, representing the Romanistic civil law tradition, Vincent Sagaert (Universities of Leuven and Antwerp and member of the Brussels bar) as well as Caroline Lebon (University of Leuven and member of the Brussels bar) joined in. From Austria, representing the Germanic civil law tradition, Monika Hinteregger (University of Graz) reinforced the team. And finally, from the Netherlands, representing a civil law tradition straddling the Romanistic and the Germanic traditions, Sjef van Erp (Maastricht University, Deputy-Justice Court of Appeals and Adviser for European law to the Netherlands Royal Society of Notaries), Bram Akkermans (Maastricht University), Lars van Vliet (Maastricht University) and Michael Milo (University of Utrecht) were involved.

This team conceived the casebook around six essential questions:

1. What is property law? – addressed in Chapters 1 and 2, which respectively set the scene and discuss the degree of protection enjoyed by property rights; and eventually revisited in the final Chapter 10 on harmonisation efforts in the area of property law.
2. What are property rights? – unravelled in Chapters 3–5, respectively dealing with property rights that can be held in respect of immovables and movables, property rights that can be held in respect of claims, and property security rights.
3. How can these rights be held? – described in Chapter 6 on management devices and the holding of property rights.
4. How can these rights be created? – dealt with in Chapter 7 on creation.
5. How can these rights be transferred? – analysed in Chapter 8 on transfer.
6. How can these rights be destroyed? – discussed in Chapter 9 on destruction.

This will not come as a surprise: writing a casebook is teamwork. It is in essence a collaborative effort.

This casebook is the fruit of regular author meetings. During these meetings the casebook took shape: its structure was set, authors suggested materials from their jurisdictions and fields of expertise, contextualised their suggestions and explained their importance to their fellow team members, materials were pondered before selection, draft chapters were presented, debated and refined. However, different authors stem from different backgrounds; different personal styles and inclinations remain as well. The latter is of course reflected in the eventual text of the chapters for which they took final responsibility. Therefore we thought it appropriate to make plain who contributed to which chapter at the outset of each chapter.

Throughout the process, we were able to draw on the invaluable experience and insights of our advisory committee which consisted of Madeleine Cantin-Cumyn (McGill University), Marius de Waal (University of Stellenbosch), Susan French (UCLA Law School), Kenneth Reid (University of Edinburgh) and Reinhard Zimmermann (Max Planck Institute for Comparative and International Private Law). We are very grateful for their continuous involvement and support.

Sincere thanks are also due to all those who assisted the authors in the making and revising of translations of excerpts taken from non-English sources. Utmost efforts have been taken in the making and revising of translations for this casebook.

PREFACE

As far as terminology is concerned, all involved endeavoured to achieve as much consistency as possible. However, in view of the number of persons involved and the complexity of the subject matter, some inconsistencies seem unavoidable and may have escaped the eye of the editors. In addition to translations by the authors themselves, many translations were prepared by students who either followed the courses on European and/or comparative property law that we teach within the European Law School programme at Maastricht University or who were employed as student assistants at the same university. Dozens contributed, but special words of thanks are due to Almaz Teffara, Anna Berlee, Lee-An Geerman, Laura Guteirrez Gomez, Tessel Kuijten, Eveline Ramaekers, Bonnie Witvliet, Willem Loof and, above all, Hanna Schebesta. They translated substantial parts of the French, Dutch and German materials in this book. We are also indebted to Manuela Weissenbacher (wissenschaftlicher Mitarbeiterin of Professor Monika Hinteregger at the University of Graz) for translating large German excerpts. Last but not least, we extend sincere thanks to editors, Philipp Kiiver and Nicole Kornet, of ‘The Maastricht Collection: Selected National, European and International Provisions from Public and Private Law’, who allowed us to reproduce many of their excellent translations of French and German civil code provisions, as well as to professional translator, Filip Ameloot, for organising the swift translation of the excerpts that still remained to be taken care of at the end of the editing process. The translation process could not have been organised without the help of our former student assistant, Ton Rosenboom, who uploaded all original source materials to our intranet system, and student assistants, Sophie von Wedel, and, again, Hanna Schebesta, who kept the necessary overview of the translation process. Sincere thanks are also due to Christina Lienen for setting up the accompanying website.

The technical editing was expertly taken care of by former student assistant, Eveline Ramaekers, when she started working as a PhD researcher at Maastricht University. Mention should also be made of the support which, throughout the project, was readily offered by the Maastricht European Institute for Transnational Legal Studies (METRO), and especially by Yleen Simonis and Chantal Kuypers. At the proofreading stage we relied on the eyes of Beatrix van Erp-Jacobs, professor of legal history at Tilburg University. And, this casebook would never have been in front of you without the efforts of Hart Publishing: sincere thanks are due to its managing director, Richard Hart and managing editor, Mel Hamill.

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www.casebooks.eu/property

A digital companion to this casebook is to be found on the website of the casebook

series: www.casebooks.eu/property. Every excerpt in this casebook has a threefold number. For example, the number '1.2 (NL)' identifies the second excerpt of the first chapter and informs you that the excerpt relates to Dutch law. On the website the same numbers are to be found. They will lead you to a page where either a link to the original source can be found or where the original language version of the excerpt has been reproduced. Whenever possible the website will lead you to or offer the full text from which an excerpt has been taken, thereby enabling those who master its original language to study the case in its entirety. In addition the website allows readers to leave comments on the structure of a chapter or on the selection or translation of a particular excerpt. Moreover, it enables registered readers to submit materials from their own legal system, thereby complementing the materials in the casebook. We do invite our readers to consult the website and to make use of its interactive features. The editors undertake to actively follow the property law section of the casebook website. They hope to establish an online community of comparative property lawyers as cooperation and teamwork are pivotal to enhancing fundamental and comparative legal analyses in this area of the law.

In conclusion . . .

We have immensely enjoyed working on this casebook and hope that the enthusiasm of the entire casebook team is reflected in its text. Suggestions and questions on (the making of) the casebook are most welcomed. The editors can be reached at s.vanerp@maastrichtuniversity.nl and b.akkermans@maastrichtuniversity.nl.

Sjef van Erp and Bram Akkermans
Maastricht and Brussels, April 2012

COUNTRY CODES

AT	Austria
BE	Belgium
DE	Germany
E&W	England and Wales
EU	European Union
FR	France
INT	International
NL	The Netherlands
SC	Scotland
US	United States of America

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