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PROPERTY LAW
IN A COMPARATIVE PERSPECTIVE

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PART I GENERAL NOTIONS.

Introduction.

This overview of property law deals especially with:
1° the general notions of property law,
2° the rules on circulation (acquisition and loss) of property,
3° the concepts used for protection and limitation of property (but not the specific rules), because these matters are the most interesting from a European and comparative perspective[1].

It is supplemented by my "*Law of obligations in a comparative perspective*". According to the tradition outside the German legal family, general concepts are not studied separately in a "General part" of civil law, but in the place where such concepts play their first role. Thus, the rules on "legal acts" (*negotii*) will be found in the overview of the law of obligations.

[1] Comp. A. GAMBARO, "Perspectives on the codification of the law of property", *ERPL* 1997-4.

1. Domain of property law

1. Property law concerns the direct attribution (distribution) of things (goods, including animals). It thus confers (or recognises) "*iura in re*" (rights in things).

By analogy, the concepts of property law are used to attribute other "patrimonial values" (*i.e.* assets), such as *choses in action*, etc., to the estate of a person (see infra V). They are called incorporeal things (see also II).

Property law traditionally also includes the law of possession. Although possession is strictly speaking not a property right, the law of possession is as much concerned with the attribution of things and is very much intertwined with property law in a strict sense. The law of possession is thus included in this overview.

2. The law of obligations confers a right to performance by one or more specific persons (*i.e. iura "in personam*"), and thus never directly, but only indirectly determining the attribution of things (therefore sometimes called "*iura ad rem*"). Such rights are discussed in the law of obligations.

The law of obligations can also serve the protection of more diffuse or collective interests, such as (the right to) environmental protection. Property law can to a certain extent also serve these interests[2].

3. Intellectual property law was created by analogy to property law, but it neither concerns material things, nor choses in action (debts), but ideas, forms, design, marks, etc. (*infra* V).

4. The law of inheritance or succession is in the continental tradition system basically a very specific part of property law. It deals with the direct attribution of the things belonging to the estate of a deceased person (in French and Belgian law, there is an automatic transmission of property to heirs). In part, it also is law of obligations (esp. transfer of the obligations of the deceased; also as a source of certain obligations). It is, however, always treated as a separate branch of private law.

5. The law of companies, foundations and associations is also in the first place law of property and obligations. But it also implies rights forming a separate category (membership rights) and is also traditionally studied as a separate branch of private law. Unincorporated forms of partnership or association, however, are studied basically in property law and contract law.

[2] See i.a. W. WILHEM, *Sachenrecht*, De Gruyter Berlin 1993, No. 199 ff; A. CARETTE.

2. The objects of property rights - classes of things; types of property

Things themselves are traditionally classified into different categories, to which partly different rules apply.

2.1. Movable / immovable, tangible/intangible.

6. As an object of property law, one can distinguish basically three categories:
- immovable property, i.e. (ownership of) land and property rights in land (other than ownership) (in English law this covers "realty" and "chattels real");
- movable material things (in English law "chattels in possession, usually just named "chattels" s.s.) and property rights in movable material things. The relevant rules basically apply also to animals and sometimes to natural forces which can be appropriated (e.g. electricity) (in thius sense eg art. 713 Swiss ZGB).
- movable immaterial or incorporeal things, i.e. non-proprietary patrimonial rights (e.g. claims, intellectual property rights) seen as an asset or object of property ("choses in action") (see further V, also on the possibility to incorporate such rights into a negotiable instrument).

Some systems classify immaterial things also as movable or immovable. The latter is rare, except as to property rights on immovable material things. Movables then consist of movable material things and of incorporeal things. Similarly, Anglo-American law qualifies both chattels (*choses in possession*) and *choses in action* as "personal property" or "chattels" *s.l.* [3].

Some very specific movable things, such as ships (and sometimes airplanes), are subject to similar rules as land. Systems such as e.g. Dutch law will therefore use a single category for both (namely "goods subject to registration"). Most intellectual property rights are equally property rights subject to registration (except, in most jurisdictions, copyright). Some other movables are also subject to registration, but not to most rule son immovables (eg cars in most jurisdictions).

In some legal systems, there are further categories of movables, which under certain conditions are subjected to the rules governing land (*immeubles par destination, onroerend door bestemming)* See French and Belgian CC art. 522 and 524 ff., Spanish CC 334. For animals and other things owned by the land owner and "affected" to the operation (*exploitation*) of the land.

2.2. According to capability of private ownership.

6b. Things are further distinguished as to the possibility of property rights in them:

[3] Some interests in land are also qualified as personal property (so-called chatteles real), because their protection is merely the same as for other chattels.

2.2.1 Things capable of private ownership ("*in commercium*")

They can be owned by physical persons or by private or public legal persons or be "*res nullius*" (capable of appropriation, see *infra*). Evidently, their use and transfer can be regulated by the law.

2.2.2 Things "extra commercium",

Things are outside commerce as long as they are not capable of private ownership, of appropriation by private persons. The european coninental tradition distinguishes

1° "common things" (*res communes*), which cannot be appropriated by individual persons; by nature, they can not be disaffected from their common destiny either as long as they exist. E.g. shores, navigable rivers, harbours, some roads (E.g. art. 538 French and Belgian CC, 339 Spanish CC). Common law systems are usually more liberal in this respect.

2° "*res in uso publico*" or "*res publicae*", goods by decision of a public authority affected to a "public service" (so called "*domaine public*" of the government), including non navigable rivers, fortifications and military domain, most roads, cemeteries, etc. - see eg art. 540 French & Belgian CC, 339 and 407 Spanish CC, 822 ff. Italian CC, 664 II Swiss ZGB.
They are not governed by the normal rules on acquisition of property either. They can be disaffected and are from that moment on capable of private ownership

1° and 2° : When *res communes* or *res in uso publico* are "owned" by a public body (a state, a federation, a province or county, etc.), they form part of the "public domain" of that body (goods owned "*iure publico*"). Goods owned by a public body which are not *communes* or *in uso publico* are owned "*iure privato*" and part of the "private domain" of that body (the romans used the expression *res fisci* or *res in patrimonio publico*).

3° The human body and its organs are also in principle outside commerce. The relationship between a person and his body is not one of ownership but framed in terms of "personality rights". Organs cannot be appropriated according to the rules of property law and are governed by specific rules in the law of persons.

4° Some other things are also called "outside commerce" because their possession or use by private persons ifs forbidden or strictly regulated (eg some drugs).

5° A lot of other rights can also be called "outside commerce" because they are in principle withdrawn from patrimonial law and may not be seen as patrimonial rights. E.g.:
public offices,
- the "status" of a person as person and as to family relationship, incl the legal capacity of a person
- personality rights, and
- in French and Belgian law the "right" of a heir *in spe* to the succession of a still living

person (art. 1600 CC, see further), and rights accessory to that right.

2.3. Other distinctions.

6c. Further traditional distinctions play a more limited role, as they are relevant only for some specific rules, and will thus be mentioned when these rules are mentioned (eg. specific (ascertained) v. generic (unascertained) goods).

6d. The importance of different forms of property depending on their public of private destination will vary from time to time and country to country. Private property (owned by physical persons and private legal persons) is clearly predominant in contemporary Western societies. The end of the XXth Century has even seen massive "privatisations" of certain public services, thus subjecting these services to competition between private actors (e.g. telecommunications). Other services remain a public monopoly. In the field of cultural goods, there has rather been a tendency towards public property in order to protect goods from a purely economic logic (evidently, this can in some instances be done also by public regulation not directly affecting the ownership itself, see e.g. the EC Directive on cultural goods).

3. Main characteristics of property rights, esp. in comparison with obligatory rights.

3.1. Direct attribution of things

3.1.1 Property rights

7. A property right (*ius in re*) is the result of a direct attribution of things to a person (or estate) - *i.e.* at least in theory regardless of the activity of a specific person, although in fact the attribution is certainly influenced by the answer to the question who has, in fact, power over the thing (see *infra* possession).

One could say that this idea as such does not fit in Anglo-American common law - not in personal property, and also not in real property, where not the thing is directly attributed, but a certain "title" or "interest" in the thing (distinguishing basically legal titles or common law interests and beneficial titles or equitable interests). Certainly, the practical significance of this distinction is not very big (other differences are much more important), as one could say that continental property law equally doesn't deal with the things in themselves, but only with rights (titles) in things.

Except for the qualification of "equitable interests", such as in the Anglo-American trust law (and other institutions created by "equity"), and a number of devices in other systems (not always qualified as property rights), such as "separation of patrimonies" (these institutions will be studied *infra*), one could thus say that there is a common European notion of distinguishing property rights and obligations[4]. Only the "trust" is a figure which is sometimes pragmatically kept out of both categories; "equitable interests" (like those of the beneficiary of a trust) are usually seen as an intermediate category between property and obligatory rights. Still, they can best be understood as a specific type of property rights (see *infra* IV D) (and they are in e.g. English law; in some other systems, such as Scots law, they're not, but they are nevertheless affected by the structure of property law).

7b. In the continental tradition, things are either attributed in full ownership (to one or more persons) or in a limited property right (*ius in re aliena*) on the one hand and remaining ownership on the other hand (compare *infra* IV. A.).
Again, Anglo-American law does not make such a fundamental distinction between ownership and other property rights, at least not in real property, but makes a fundamental distinction between common law interests and equitable interests. At least in land law, this distinction is very different from the continental one. The absence of a concept of ownership in Anglo-American land law is partly caused by the feudal infrastructure of Anglo-American land law : as the "ownership" of all land belongs to the Crown or State, only "titles" or

[4] "Obligations" are a category of the European Judgements Convention and the European Convention on the law applicable to contractual obligations; property rights are a category recognised i.a. by art. 5 of the European Bankruptcy Treaty.

"interests" in land can be owned or acquired. In personal property law (chattels), the result is rather similar to continental law - if we look e.g. at the distinction between property on the one hand and equitable interests such as bailment on the other; English law even speaks of "general property" and "special property", which is very similar to "ownership" v. "limited property rights.

3.1.2 Possession.

8. The law of possession also deals with the attribution of things.

It does so - more than the law of property in a stricter sense - on the basis of a direct or indirect factual power over a thing.

The notion of possession itself developed into a more complex notion by accepting the idea that you can possess for another and that you can possess through others. This will be discussed *infra*.

If we take "possession" in the sense of the contemporary romanistic tradition, a state of "possession" corresponds to each of the property rights (at least property rights on material things), as a kind of "shadow" (comp. the Latin expression of "*imago dominii*")[5]. But if doctrinally, possession is often seen in this way, from a factual point of view, possession is often the primary phenomenon, and property secondary to it. Ownership of a thing is presumed to belong to the party who possesses it; but within certain limits, possession must bow before older (property) rights.

8b. By analogy, the concept of possession is also used for limited real rights (possession of usufruct, possession of pledge, possession of a servitude).

8c. Because the state of possession is legally protected, possession is certainly also a right, not a property right in the strict sense, but a property right in a larger sense of the word, one could say the "shadow" right of a property right.

If mere possession does not entitle you to dispose of the thing, it gives you in many cases the possibility (factual power) to dispose of it, at least in case of movables.

[5] A similar expression is used e.g. by CARBONNIER, *Droit civil, III, les biens* (1980), p. 70.

3.2. The "*erga omnes*" character of property rights and the "separatist position" of proprietors.

3.2.1 Principle.

9. As a consequence of the basic object of property law, property rights can in principle be exercised directly on the thing itself, regardless of a debtor, and thus "*erga omnes*". The proprietor therefore has a "separatist position" in case of bankruptcy and similar situations, i.e. a right to separate the thing from the assets found in the hands of the bankrupt person (*Aussonderungsrecht)*. Even where he has no right to separate in the strict sense, he will normally have a right to separate payment out of the product of the asset (*Absonderungsrecht*), although bankruptcy law may restrict this effect, too.

- The right to separate payment implies that in case of bankruptcy or other form of recourse on the assets of the debtor, the product of this asset is attributed to the creditors with such a right, independently form the ranking of creditors in bankruptcy in general. They thus do not have to contribute in the general costs of the liquidation or adminisitration of the estate, and bear only the specific costs of realisation of that asset

- Property interests usually grant the proprietor in addition a right to separate, i.e. right to execute the asset individually (subject to the formalities prescribed by law). This right to individual execution is in principle maintained even where the asset is subject to some collective administration (in favour of the creditors in general). The asset is then in principle administered by the insolvency administrator, etc., but the separatist creditor may nevertheless claim the assets and execute them individually. In many jurisdictions, this right is limited or abolished in case of bankruptcy and/or some other forms of collective administration.

3.2.2 Position of third parties.

9b. Third parties :
- have to undergo the revindication by the proprietor;
- have to undergo *actiones negatoriae* of the proprietor, i.e. actions in denial of rights or titles of the defendant on the claimant's property or possessions, or to stop acts by the defendant which constitute a violation of the claimant's property right; and
- are under certain conditions liable for any damage consisting of or caused by a violation of a property right (quite largely admitted in all continental systems, *i.e.* unless there is a ground for justification or a ground for disculpation) (see Part III and tort law).

Persons in possession of the thing, however, do not have to tolerate all this in all circumstances, and enjoy some (sometimes even a very strong) protection even against the owner. The property right, as a direct right to the thing itself, is thus limited by the rights arising out of possession and also by other limitations, described in Part III.

3.2.3 Position of the party in possession.

10. The position of a party on possession of a thing is in principle the same as that of its owner (proprietor), except in relation to the (real) owner.

3.2.4 Comparison with obligatory rights

3.2.4.1. Principle

11. Where the debtor of an obligatory right is not able to perform, and the right has to be realised by recourse the assets of the debtor, the relativity of creditors rights becomes apparent. As the claim in itself does not grant a right in one or more specific assets, it will only be realised through recourse on the assets of the debtor.

As the date of a claim (priority in time) does not grant any priority to its creditor – the equal ranking of claims -, all creditors have in principle the same possibilities to take recourse on the assets of their debtor, unless they have some property interest or other priority recognised by law.

The historically primary form of such a recourse is the "seizure" of one or more assets of the debtor by the creditor, in the forms prescribed by law. In the course of history, the law has developed also forms of collective realisation, by or in the interest of all creditors of the debtor. These forms were first of all developed in commercial law, in the form of bankruptcy, and later on also outside commercial law, by extending bankruptcy to non-tradesman or by developing separate forms of collective action for non-tradesman.

A collective realisation of claims implies:
- that some or all creditors realise their claim at the same time on the same assets; the current expression for such a situation is "*concursus creditorum*" (concurrency of creditors) on these assets;
- that these creditors – given the contemporaneity of their realisation – only acquire a collective right in these assets, whioch we may a call a collective right of pledge ("*gage collectif*" in art. 8 Belgian Hyp.W. = C.C.). The share of each creditor in this collective right is fixed *in abstracto* at that moment. Creditors can thus no longer compete to obtain a greater share. Their claims are called "concurrent claims", i.e. claims whose realisation "concurs" or is "contemporaneous.
- that because of the contemporaneity of their realisation – of their acquisition of a right of pledge – the rights of these creditors have equal ranking, unless one of them has acquired some property right in one or more of these assets on beforehand, or a priority is granted by law (for other reasons than priority in time).
In case of equal ranking, the product is distributed proportionally.

Legal systems differ as to the question whether a seizure on the initiative of an individual creditor must be treated as a collective measure or not. In some legal systems (e.g. Germany), seizure in principle grants the individual creditor an individual right of pledge, in others it automatically leads to a *concursus* with all other creditors who come up (or are found) within a specified period of time (e.g. Belgium); others have some intermediate position.

Other situations may also lead to a collective administration and therefore a concursus creditorum, such as e.g. the liquidation of a company or other legal person, some forms of administration of the estate of a deceased person, judicial administration of enterprises, etc.

Conclusion:
Where the debtor is unable to perform, the creditors right can thus only be exercised as a right to a relative (proportionate) share in the whole patrimony (assets) of the debtor; the creditor is thus concurring with all other creditors of the same debtor. Some of them will be "preferred" to others (privileges or preferences), but even these preferred creditors can only exercise their right on the assets belonging to the debtor (the estate of the debtor), or - under certain conditions - at least apparently belonging to the debtor (see *infra* Part II, III).

3.2.4.2. Nuances

12. The distinction between property rights and claims (creditors rights) may not be overestimated: as long as the creditor can exercise his right in another way than by seizing (attaching) and selling off the assets of this debtor, he is not concurring with all other debtors (although there could be a conflict between two creditors having claims which are incompatible if they are exercised specifically) (see *infra*).

Obligatory rights can thus also be exercised in principle "*erga omnes*" as a right to that specific performance (not as a right to a specific thing, as things are not their direct object) and are protected as such. Other persons must thus also tolerate in principle the priority of the first creditor of that specific performance and are under certain conditions liable for violations of this specific right (quite largely in Belgian, Dutch and French law; traditionally not so largely in English and German law; see further *infra* V).

The important thing is thus to see the difference in object between both rights. The weaker character of obligatory rights is only relevant where specific performance is not possible anymore (be it because of impossibility of the specific performance or as a consequence of a general insolvability of the debtor).

3.2.5 *Erga omnes* character and relativity of transfer.

13. The "*erga omnes*" character does not exclude, at least not in French, Italian and Belgian law, the "relativity" of property rights in the sense that property situations can differ according to the relationship at stake. Transfer of property can thus take place at different moments in different relationships (respects). Between the parties, the normal rules of property law play only a limited role in French, Italian and Belgian law - their relationship is to a high degree "obligatorised". In Nordic countries, the relativity is even more pronounced. Other continental systems know this phenomenon only exceptionally[6]. If we look more closely, there is, however, some functional equivalence between “relative property” in these

[6] See however Dutch NBW 3:90, 2; BGB 135-136, 883 ff.; Swiss ZGB art. 9, 900, 931, 937. In German literature, G. DULCKEIT, *Die Verdinglichung obligatorischer Rechte*, Tübingen 1951, esp. p. 43, 51 ff., also concludes that the contract of sale procures already a “relative” ownership.

systems and certain "anticipatory" property rights in other systems, like the German "*Anwartschaftsrecht*" (see *infra* IV. A.), with some functions of the division between legal title and equitable ownership of - in Anglo-American law (e.g. in case of sale of real property), i.e. land), or even with the protection of the oldest creditor in case of conflicting obligatory rights with the same object (see *infra* V B 2).

NB. There also is a certain relativity of possession. The mere *possessio civilis* e.g. - without factual power - (see infra) can not always be relied upon against third parties.

3.3. Priority principle and *droit de suite* - protection of acquirers in good faith – real subrogation.

14. The former characteristic of property rights implies further:
- the "priority principle": *nemo plus iura transferre potest quem ipse habet*; thus older rights get priority;
- a certain *ius persequendi* ("*droit de suite*"), right to follow the thing irrespective of the person in whose hands it is. There is no such right where the asset was transferred by a person having the authority to do so (authority to dispose, see blow). This right is further limited by the rules on protection of acquirers in good faith. This protection is very large for acquirers of movable things[7], and rather limited for acquirers of immovables and *choses in action* (see *infra*).

If one looks more closely to the protection of obligatory rights, such a "*droit de suite*" (right to follow) is not completely absent there either (namely due to some forms of the *actio Pauliana* and other forms of direct protection of older obligatory rights, sometimes qualified as "specific redress" of a tort against the older creditor). But it never has the same intensity.

Further, the intensity of application of the above mentioned principles is quite different for different categories of goods, especially for immovables (land) on the one hand and for movable things on the other hand. This is even more so in Anglo-American law. "Personal property" rights in Anglo-American law come in some respects closer to the obligatory rights than to property rights in the continental sense. The above mentioned principles play a limited role in personal property; persons who are no longer in possession often have only an equitable right in these things (see *infra* for these terms), apart from remedies in tort (e.g. tort of conversion); however, the beneficiary of an equitable interest can "trace" the object of its interest sometimes further than the legal owner in continental systems (concepts of "tracing" and "constructive trust"). In land law, the principle is much more absolute.

14b. It is also characteristic for property rights that they can be maintained through real subrogation. Legal systems differ as to the extent to which this takes place.

(257) Een ander kenmerk van zakelijke rechten is dat ze, wanneer het recht op het oorspronkelijk voorwerp ervan voor de eigenaar verloren gaat, onder bepaalde voorwaarden gehandhaafd worden door middel van zakelijke subrogatie. Door middel van de zakelijke subrogatie wordt het recht verdergezet op andere goederen, die de plaats van de eerste innemen. In ons recht is zakelijke subrogatie subsidiair aan het volgrecht en gebeurlijke andere rechtsfiguren. Ze komt verderop nader ter sprake[8].

[7] This explains why property in them is called merely "personal" property in English law (in contrast to the "real" character of legal interests in land).
[8] Zie uitvoerig V. SAGAERT, *Zakelijke subrogatie*, pr. Leuven 2002.

(258) Obligatore rechten die betrekking hebben op goederen daarentegen, kunnen niet gehandhaafd worden door middel van zakelijke subrogatie. Wel bestaan er soms andere remedies voor de schuldeiser, zoals het naastingsrecht (typisch voorbeeld : bij miskenning van een voorkooprecht), de zijdelingse vordering en de *actio Pauliana*.

3.4. Absence of power to dispose and other mechanisms for protection of older (third party) rights - Protection against absence of authority

3.4.1 Concept

15. The reverse side of the priority principle and the *droit de suite* is the fact that all others (*erga omnes*) are in principle bound by a property right. Some of the consequences were already indicated *supra* (necessity to tolerate revindication, bound to stop violations; liability for violations).

In property law, this also takes the specific form of "absence of authority to dispose" (of the assets) of all other persons (*beschikkingsonbevoegdheid*; in French usually called "*défaut de qualité (requise pour disposer)*"). "Dispose" is used here in the technical sense of transferring or vesting property rights. This absence of the right to dispose is the specific consequence of older property rights or rights with a similar "real" effect (such as attachment or seizure, bankruptcy or collective debt liquidation, liquidation of a company, etc.). It marks the difference between such rights and other rights with partly similar consequences as just mentioned (rights of family, of legitimate heirs, partners, etc.).

In case of obligatory rights, again very similar rules apply in some specific circumstances (cases of "exceeding authority", *bevoegdheidsoverschrijding*). But the more general protection of creditors is of a different nature and offered by the doctrines of inducement of breach (of contract), *fraus creditorum* and similar tort rules, which offer a more limited protection than a *droit de suite* (*infra* V. B).

As the priority principle is balanced by the protection of acquirers in good faith, the requirement of authority to dispose for acquiring property is replaced under certain conditions by other requirements.

The concept of "authority to dispose" will be studied more in detail infra in relation to transfer of property. It will be clarified in how far such authority can be granted to a third party without granting him the title to the goods. It is a typical characteristic of the Anglo-American trust and some continental devices that ownership is split up in such a way that the power to dispose lies in principle with one party (trustee), although the other party (beneficiary) is the one entitled to the goods or their value. Other systems have more problems with the notion that the authority lies with another party than the owner; they will therefore consider the trustee as a full owner, still recognising, however, some type of property right of the beneficiaries over the assets thus held by the trustee in a fiduciary manner. See further infra IV D.

3.4.2 Different from other techniques

16. This type of protection, namely maintaining older property rights against alienation by a person without authority (and its reverse side: the protection of acquirers in good faith against absence of such authority and thus against older property rights), should not be

mixed up with other techniques of protection of parties, which are sometimes quite similar, but still obey to different rules. The main techniques are:
a) different grounds for attacking the validity (legal ground) or effectivity of an enrichment;
b) protection - in an obligatory relationship - of legitimate expectations based on appearance;
c) making obligations "qualitative" (or *propter rem*), i.e. bind it to the quality of owner of a certain thing and thus make it pass with ownership of that thing upon its acquirer.

3.4.2.1. Grounds for attacking the validity (legal ground) or effectivity of an enrichment.

16b. A proprietary disposition can mainly be attacked on the following grounds :

1° Protection of the other contracting party by "relative nullity" or avoidability (e.g. defects of consent); rights of termination and similar rights.

2° Protection of public order and public policy by nullities.

3° Rights to terminate or revoke the transaction leading to a trasnfer of property.

4° Protection of the "family" (spouse and children) against dispositions by one spouse threatening the stability of the family (protection of the family home and other important assets), giving rise to voidability of the disposition[9].

5° Protection of "legitimate" heirs by the possibility of reduction of gifts and bequests (most continental systems).

6° Protection of co-proprietors bound together by family or marriage ties, association or partnership, etc.? against immixtion of third parties in case of liquidation of the community or co-ownership (by statutory rights of pre-emption).

7° Protection of other private or public interests by statutory rights of pre-emption (tenants, neighbours, family members, etc.).

8° Protection of normal creditors against acts of *fraus creditorum (actio Pauliana),* etc.

In so far as the system of transfer is causal, these grounds may have a "real" effect (see *infra*).

3.4.2.2. Protection - in an obligatory relationship - of legitimate expectations based on appearance:

16c. Examples of such rules :

1° Expectations created by a debtor or apparent debtor : the *expectans* may be protected by

[9] Thus Art. 215, 224 Belgian CC; BGB § 1369, etc. see generally D. HEINRICH & D. SCHWAB (eds.), *Der Schutz der Familienwohnung in europäischen Rechtsordnungen*, Gieseking Bielefeld 1995.

imposing him an obligation. Most applications do not create obligations as such, but make an obligation "abstract" to a certain degree, i.e. all or certain defences cannot be invoked in relation to the creditor (esp. in multiparty-relationships).

2° Expectations created by a creditor or apparent creditor (protection of a *debitor cessus* in case of assignment of the claim upon him or other mechanisms for change of creditor; apparent authority to receive performance, etc.).

3.4.2.3. Qualitative obligations.

17. A specific supplementary protection is given to creditors of debts, which are qualified as "qualitative" by operation of law. One can distinguish perfect qualitative obligations (the old debtor is discharged) and imperfect ones (the old debtor/owner remains bound with the new one). *Examples* :
- obligations “inherent” in the property of a certain thing, or more correctly incumbing on the owner “*qualitate qua*”, are passing with ownership (as from that moment) (rarely accepted).
- in case of lease, the obligation of the landlord towards the tenant passes under certain conditions automatically to the new landlord (as from a certain moment of time)(statutory rules, eg art. 259 Swiss ZGB);
- obligations between the owner of a thing and the person entitled to a limited property right (easement, superficies, etc.) to the thing are usually qualitative;
- obligations between co-owners of apartment buildings are usually qualitative (eg Art. 577-10 Belgain CC);
- obligations between joint owners of a fund or patrimony (mass, *Gesamthand*) are usually qualitative.

Specific rules are necessary to determine which obligations are considered to be “past” or “old” ones, for which the old owner alone is liable, and which ones are “new” ones, for which the owner is liable alone or together with the old one.

In some countries, obligations relating to immovable property can be made qualitative by contract and registration (e.g. Dutch NBW art. 6:252). In Belgian law, this is only possible in the context of apartment buildings and similar forms of co-ownership.

Normally, obligations are not qualitative, but personal to the debtor.

Qualitative obligations play a minor role in those systems which recognise “personal servitudes” as a type of property right, such as the German BGB (*persönliche Dienstbarkeiten*, BGB § 1090) and evidently in systems where the rights of a tenant are qualified as property rights (see *infra*).

Such qualitative obligations do raise specific questions not elaborated her, such as:
- under which conditions an owner is bound by qualitative obligations created by a third party without right to dispose (an apparent owner, or a party with a limited property rights

such as usufruct);
- under which conditions an acquirer is protected against such obligations he's unaware of. Often, some form of “publicity” is required in order to bind the acquirer.

3.5. Transferability and seizability

18. Property rights are also in principle transferable and seizable. Accessory rights - such as most security rights - are not transferable in themselves (but follow the main right to which they are accessory).

The specific situation of to creditors' rights (claims) will be discussed under No. 48.

3.5.1 Transferability (not strictly linked to a person).

3.5.1.1. Principle

19. For material things, this is a general principle[10], and restrictions are not easily admitted. But creditors rights and intellectual property are equally transferable in principle.

3.5.1.2. Exceptions.

19b. The most important exceptions concern:

1° things "*extra commercium*" (see supra).

2° in some legal systems[11], future hereditary rights : as long as the succession is not open, i.e. the *de cujus* is not dead, the "right" of a heir *in spe* to the succession of a still living person, is also "*extra commercium*" and thus not transferable in eg French and Belgian law.

3° property rights *intuitu personae* for the protection of the debtor[12]; in some legal systems, limited property rights may receive this characteristic if stipulated when they were created[13];

4° right to wage and other income. Transfer of such choses in action is restricted for the protection of the creditor. It usually limited to the part exceeding a certain amount (protection of income)[14]. Income has a "family destination" leading to a number of specific rules on transfer and attachment of such claims.

5° "moral" copyrights (*droit moral de l'auteur*) during the life of the author[15];

6° the share of a co-owner in certain types of community of property, such as a marital community, some partnerships, etc.

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[10] Explicit in e.g. art. 3:83 I NBW and BGB § 137.

[11] E.g. art. 1130 II French and Belgian CC.

[12] This is rare. Examples are rare the so-called right of habitation in art. 631 CC and 3:226 NBW.

[13] E.g. art. 5:91 and 5:104 NBW for the Dutch law on *emphyteusis* and *superficies*; not in the case of usufruct (See art. 3:223 NBW).

[14] E.g. art. 1409 ff Belgian Judiciary Code; art. 7:633 Dutch NBW.

[15] Art. 1 § 2 Belgian Copyright Act 1994.

"Accessory" things or rights cannot be transferred separately as long as they are accessory; they follow the main thing (see infra *accessio*).

In some other cases, transfer is possible, but cannot be relied upon against certain third parties, esp. specific creditors (including e.g. public authorities - the case of soil pollution legislation such as the Flemish Soil pollution Act of 1995).

In still other cases, not the transfer is invalid, but the goods may not be exported etc. (protection of goods of national artistic or other interest - see also EC-Directive 93/7 of 15 March 1993); this is rather an internal limitation of the right of ownership of these goods.

3.5.1.3. Effect of conventional restrictions to transfer.

19c. Insofar as there is a *numerus clausus* (see *infra*), transferability cannot be abolished or restricted by the parties, apart from the cases established by law[16]. Certainly, parties can in principle engage in obligations not to transfer, but such limitations are purely obligational and not limiting the property right itself.

NB. Validity under the law of obligations.
Apart from these, the agreement or clause may be void under the law of obligations, too : all legal systems do restrict, in the public interest, the possibility of such agreements and clauses.

In French and Belgian law, a statutory rule is only found in specific cases (e.g. shares in companies[17]), but is applied as a general rule in case law: restrictions on transfer must be limited in time and be justified by a legitimate interest.

There are also some more specific rules for certain types of restrictions; thus, Art. 896 CC (*code Napoléon*) prohibits all inalienability clauses in gratuitous transfers if they are combined with an obligation to transfer the goods to a specific third party (beneficiary) (so-called *fideicommissum*); apart from some exceptional cases, it is generally forbidden to stipulate that the donee must keep the goods and transfer them to a third party (whether at a fixed moment of time or at his death). See art. 896 CC. A *fideicommis* is not forbidden as far as the donee has no obligation to conserve the things and may thus dispose of them (at least onerously) (*fideicommis de residuo* or *fideicommis de eo quod supererit*).
For a different but analogous example, see Art. 4:931 Dutch BW.

The same basic rules normally apply to clauses restricting the transfer of choses in action, esp. claims or shares in companies. A number of more specific rules can be found for certain types of claims or shares. There is a tendency in contemporary law to become stricter on such clauses (see eg art. 354a German HGB; art. 6:83 Dutch BW; art. 442-6-II French Code de commerce).

[16] Comp. BGB § 137, NBW 3:83, 1.
[17] Art. 500 Belgian Company Code (ex-art. 41).

3.5.2 Seizability by the creditors of the proprietor.

20. Here again, there are exceptions, such as 1° things "*extra commercium*", 2° things of a very personal character and 3 ° right to wage and other income below certain amounts. But apart from such exceptions, all assets can in principle be seized by the creditors[18]. An engagement not to alienate goods is normally not binding on one's creditors.

The normal rules of property do apply to property of the state and other public bodies, unless it concerns "*res in uso publico*", things affected to public use (so-called *domaine public*, as distinguished from the *domaine privé* of the state or crown). This exception is stronger in some countries (esp. France, also Belgium) than others.

3.6. Abstraction principle or causal principle.

20b. Systems of property law can also be characterised as abstract or causal, depending on whether (the validity of) a transfer of property depends on an underlying obligation or not. As this is a matter of transfer of property, these principles will be explained *infra*.

[18] See e.g. art. 7 and 8 Belgian Hyp. Act; 3:276 NBW.

4. Traditional conditions for property rights.

21. (The effects of) a "real" right (property right) is (are) only recognised under certain conditions. At least, they form the "classical" property law, as it developed in the XVIIIth and XIXth Century (abolition of feudalism) (similar reforms, but not as far-reaching, have taken place in England partly earlier, partly in the first decades of the XXth Century, esp. 1925).

NOTE. Certain things are not at all or only to a very limited extent governed by property law. They have been mentioned *supra* n° 5.

4.1. The principles of unity, specialty and determination as to the object of a property right.

4.1.1 The principles in theory (esp. elaborated by v. Savigny, compare *infra* the explanation of the *numerus clausus* principle).

4.1.1.1. The speciality principle

22. The speciality principle means that property rights only relate to specified things *ut singuli*; and not to a group of things as such.

In case of a group or mass of things, they deal with each thing separately, unless the group forms a factual unity (considered as one thing) or a legally recognised mass (*boedel*, patrimony). Clearly, it is not always evident what constitues a single thing. This does not depend merely on physical factors. Thus, certain groups of things in a physical sense may constitute a single thing legally because of its unity in legal commerce: the so-called *universitates facti* (*universalité de fait*), such as – under circumstances – the stocks (raw materials) of a firm, or an investment portfolio (of securities). They form a single thing as long as this *universitas facti* is not split up in several ones. This shows that the principle is applied with some flexibility; its principal meaning is not that only physically separate things are the object of property rights, but that this depends on objective elements (physical or economic (use)), and it is not up to the parties to decide this question[19]. Comp. the nuances relating to immovables *infra* 2a), and to movables, *infra* 2 b).

When a group of things is a) sufficiently separated and b) recognised as an *universitas facti*, this avoids the legal effect of "confusion" (*confusio* c.q. *commixtio*) of these goods with other goods of the same kind.

4.1.1.2. The unity principle :

22b. This principle means that "parts" of things are subject to the property status of the thing

[19] Comp. Art. 3:4 Dutch BW ("A component part of a thing is anything which according to common opinion, forms part of that thing"); comp. Art. 642 II Swiss ZGB (referring to local usage as a criterion).

as a whole, or, in other words, that property rights deal only with things as a whole, not with parts of things[20]. The rules on accession (*accessio*) and *specificatio* are applications of this principle.

4.1.1.3. The principle of determination or certainty of subject-matter :

22c. This principle means that property rights only relate to determined things, not to an unspecified item in a larger mass of generic things[21]. Property rights cannot be "alternative" in the sense in which the object of an obligation can be alternative.

The rules on *confusio* and *commixtio* are applications of the principles of specialty and determination.

22d. These principles do not play a role in the law of obligations, but are common to continental property law (even if some systems attach more importance to them than others).

4.1.2 Types of property rights making an exception.

23. In contrast to this classical principle, continental property law exceptionally recognises property rights relating to a whole patrimony or a specific part of the patrimony, a "*patrimoine d'affectation*" (comparable to a trust fund). Continental legal systems adhere to the theory of the patrimony (every person has one and only one patrimony); some systems, however, accept more readily exceptions to this in the form of separate funds (*universitates iuris*).

For such purposes, it is normally necessary to form a legal person (company, association etc.) or at least a legally recognised (be it not as a legal person) "community" such as a marital community, a partnership or an association. In the first case, the assets are "property" of the legal person and the "equity" of the shareholders is NOT seen as a property right but basically as a creditors right. In the second place, the "share" of the co-owners can be seen as a very specific form of property. A similar type of co-property is also found in the case of a common securities depository (CSD). This type of co-ownership (*Gesamthand, propriété en main commune*, joint ownership) – which is analysed a bit more further - comes close to equity in the specific Anglo-american sense.

Some continental jurisdictions also accept trust-like funds under certain (more restrictive) conditions (some forms of *Treuhand*). See *infra*.

Another form of property-like right, which may relate to the whole property or a more specific part of it is the "collective right of pledge" of the creditors. It is not a right of pledge

[20] See eg art. 642 I Swiss ZGB.

[21] Formulated otherwise: obligations can be "alternative", property rights not. The alternative obligation is indeed an exception to the principle of determination, exception accepted in the law of obligations. The fact that obligations can be generic, on the other hand, is not even an exception to the principle: the performance of a "generic" obligation is always "specific".

in the technical sense, as it does not grant priority, but precisely guarantees the equality among creditors. It is found each time when property is seized, or assets are frozen in order to be liquidated.

Anglo-American law, on the contrary, generally accepts the possibility to form separate funds, especially in the form of a trust, where the interest of the beneficiary (equitable owner) relates to the fund as a whole and not to the single things forming part of the trust fund. Comp. also the "floating" charge which can be taken over the assets of a legal person.

Mixed legal systems, such as Scots and South African law, equally recognise trusts, although they understand them differently (namely as a separate patrimony, not so much in the form of dual ownership).

4.1.3 These principles put in perspective.

24. These principles must, however, be put in perspective. We analyse them in their application to the basic categories of things in most systems of property law, *i.e.* movables, immovables, obligatory rights (choses in action) and intellectual property.

4.1.3.1. Immovables

25. As to immovables, their unity and specification is also rather conventional, but in another sense: their specification is only a specification in the books (land register, *Grundbuch, cadaster*) or by symbols (walls, fences etc.)[22], rarely a specification by "the nature of things" (except small islands maybe).

This can be seen in the way the law is dealing with apartments buildings: in some countries the single apartments are considered to be the main thing, and the common parts are seen as accessories (dualistic system, such as in Belgium, Germany etc.), In other countries the individual apartments are not seen as single things, and apartment owners are co-owners of the whole building (monistic system, *e.g.* the Netherlands). Both systems are legally perfectly possible, which shows that "the nature of things" does not impose a specific system.

One could even say that the requirement of speciality, etc., is thus in most cases nothing more than the requirement of publicity, namely that the land is specified as a certain piece of land (lot or parcel) in the land register, etc.

As long as it happens publicly (*i.e.* can be found in the land register), the contents of the real rights can within certain limits also be modified by the parties (although it is always necessary that the right can be qualified as one of the recognised real rights). So the property division deed for apartments buildings can determine the rights and duties of the apartment owner with a certain "real" effect (in Belgium similar to easements; in other countries other

[22] Legal systems will also have rules to deal with the situation where the specification in the books and "in the field" differ, eg Art. 668 Swiss ZGB (the land register is presumed to be correct).

qualifications are used), ownership can in many countries be used for security or other fiduciary purposes, etc.

4.1.3.2. Movable things

26. As to movable things, it was already mentioned that specialty is not seen merely physically, but also economically : it is determined by objective criteria such as usage.

Specialty could also be seen as a specific kind of publicity, as both derive from possession (or in some cases registration). Thus, legal systems, including some continental jurisdictions, have developed e.g. certain forms of a "floating charge" *e.g.* pledge of a "*fonds de commerce*" (firm) or farm, privilege of the landlord on the household or farm furniture (art. 20, 1° Belgian Statute on Privileges and Hypothecs), etc. (the English floating charge is much broader and attaches to all the assets of the company)

Apart from these exceptions to the rules, these rules do NOT exclude that a separated mass or "pool" of unspecified, generic goods can be as such the object of property and transfer (see eg Art. 1586 French & Belgian CC). Equally, an undivided share in such a mass can be the object of property and transfer of property. The acquirer then immediately becomes co-owner of the whole mass. - co-property of, generic goods. The pool of goods is specified, and each party has a quantitative share in the pool. An important example in most jurisdictions are the CSD's (Central Securities Depositories) or clearing systems for securities[23].

These possibilities are, however, limited by the publicity principle (possession for movables) and thus much more limited than in the Anglo-American common law (*e.g.* tracing goes much further in common law). Thus, such a separated pool is NOT accepted for money (other than account money) - the *confusio nummorum* always applies.

4.1.3.3. Choses in action

27. As to choses in action (creditors' rights), the unity and specification is merely conventional, *i.e.* determined as between creditor and debtor. It is the relationship between debtor and creditor which "specifies" the right as a thing (chose in action) and determines its transferability and its divisibility (see *infra* V B 1).

4.1.3.4. Intellectual property rights

28. As these rights are basically territorial monopoly rights created by statute, it is also this statute which determines their transferability and divisibility, differing from right to right. *E.g.* trademarks can not be created or transferred separately for a part of the Benelux countries only (art. 11 Benelux Trademarks Act); a license, however, can be limited to part

[23] The notion of some form of co-ownership at least applies in those jurisdictions where the investors are co-owners of the (pool of) securities (as in Belgian law) or have equitable interests in the (pool of) securities. It does not apply in jurisdictions where the rights of the investors are not proprietary but merely obligatory.

of the Benelux.

4.2. The principle of publicity.

29. Real rights are normally only recognised insofar as they are "public" (knowable to anybody). A specific publicity is organised for immovables (land & interest in land). For movables, possession functions as publicity. For creditors' rights, the communication to or knowledge of the debtor often plays a publicity role. For most intellectual property rights, publicity (registration) is even constitutive (with an exception for copyright in most jurisdictions).

This principle suffers numerous exceptions, esp. developed since the beginning of the XXth Century (security rights on movables esp.).

4.3. The condition to belong to a type of property right recognised by law: the "*numerus clausus*" principle.

4.3.1 Historical background

30. Because of the far-reaching protection given to property rights in comparison with obligatory rights, at least in their time, XVIIIth-early XIXth C. doctrine and legislation tried to limit the number of property rights and especially exclude the creation, by contract, of other property rights than those generally recognised. The XVIIIth Century (French) Physiocrats in France promoted the circulation of goods (against the "dead hand" of accumulated property, esp. of land). F.C. v. Savigny (early XIXth Century Germany) saw the *numerus clausus* also as a limitation of the domain of property law in favour of the domain of the law of obligations[24]. One of the reasons for the *numerus clausus* principle is the reduction of transaction costs: parties acquiring assets do not have to examine the precise power of the alienator: it follows from the type of property rights he has. The principle has been introduced to make property rights - and thus the authority to dispose of an alienator - foreseeable for third parties.

4.3.2 Application of the *numerus clausus* in "continental" legal systems (apart from trustlike institutions)

4.3.2.1. Meaning.

30a. According to this principle, ownership cannot be split arbitrarily into powers of various kinds. Most continental systems have this principle (except Danish and Norwegian law, and to a certain degree Spanish land law; South African law has equally never formally accepted the principle).

The *numerus clausus* thus installs a "closed system" of property rights. Evidently, the legislator (the law) can recognise new types of property rights, but they can not be established by the parties. Thus, any recognised property right is in principle foreseeable. Other rights have only an obligatory effect[25].

30b. The *numerus clausus* principle does not exclude that authority to dispose can be granted to a non-owner. It is not always necessary to grant "title" to another person in order to grant him this authority. We find this eg also in cases of undisclosed agency (see *infra*).

On the other hand, the *numerus clausus* does imply :
- that the authority of an owner to dispose of its goods cannot be limited by contract. Any contractual limitation (other than in the forms recognised by property law) has no effect under property law;
- that transferability of goods cannot be restricted by contract (other than in the cases

[24] See W. WIEGAND, *AcP* 1990.
[25] See eg Art. 1306 Portuguese CC.

recognised by property law). Where such a restriction is validly contracted, it has in principle only an obligatory effect (between the parties), although indirectly it may have property effects.

4.3.2.2. Nuances for categories of things.

31. As other basic principles of property law, the *numerus clausus* principle applies basically to movable things and is less absolute in the field of immovables and creditors' rights.

The application to Creditors' rights will be discussed *infra* V.

One of the basic reasons for the *numerus clausus*, namely the previsibility of property rights for third parties, is much less present in case of immovables, as soon as there is a good registration system for them. This explains that the *numerus clausus* principle is not applied to immovables in some systems, (e.g. Spain, South Africa[26]), or indirectly weakened by the recognition of registered qualitative obligations (e.g. Netherlands).

Still, even in case of immovables, the question remains simply whether it is advisable to accept that immovable property can be charged and split up in an infinite number of ways. This was precisely the reason why so many limited rights were abolished by the French revolution and why they have been gradually restricted in English law (esp. since the reform of 1925).

In most continental systems, there still is a *numerus clausus* for immovable rights, but the parties have some autonomy as to the precise contents of a recognised property right. They can determine eg the period of time for which it is granted (within minimum and maximum limits which may be determined by law). in the tradition of the *ius commune*, it is said that the parties may not modify the *essentialia negotii* and the *naturalia negotii,* but that they may modify the *accidentalia negotii*.

4.3.2.3. The list of property rights in continental systems

The continental tradition normally recognises the following types of property (and only these).

1° Ownership (eigendom, propriété, Eigentum).

31b. Ownership being the most extensive of property rights (but not absolute in the sense of unlimited, see *infra*) (comparable in English law is the fee simple). It traditionally includes the *ius utendi, ius fruendi, ius abutendi*.

All others are "limited" real rights compared to ownership. One also speaks of the "elasticity" of ownership: it is the right which remains despite limitations by other property

[26] See section 3 (1), esp. (r) of the (South African) Deeds Registries Act.

rights - its content thus is not always the same, but depends on whether there are other property rights on the same thing (ownership may be "full ownership" or "naked ownership" (*Obereigentum* in ABGB § 357)).

31c. In some legal systems, property can also be split up on the basis of a condition: one party being an owner under resolutive condition, the other one owner under suspensive condition[27]. French-Belgian, Dutch and German law do not recognise this (and English law only for equitable interests; other common law jurisdictions, however, such as American law, have maintained this possibility also for legal interests).

Note. Relationship between ownership and limited property rights:

31d. Ownership is the "mother right" - when a limited right ends, the rights and powers it included return to the owner. If the goods are charged with a limited right, the content of ownership can be defined negatively: it is everything which remains with the owner except the actual limited rights. As this differs from case to case, we speak about the elasticity of ownership.

Note. Property rights and possession :

31e. The distinction between property rights (ownership) and possession - already mentioned supra - is of a very different nature (*nihil commune habet proprietas cum possessione*).

2° Limited rights of enjoyment.

32. These are basically (apart from some specific rights in specific jurisdictions):

aa) The rights of
- usufruct (*vruchtgebruik, usufruit, Nießbrauch*),
- *superficies (superficie, Erbbaurecht, opstal)*[28],
- *emphyteusis* (long leasehold, *erfpacht, Erbpacht* or *Erbzins*),
- *antichresis* (*Nutzungspfandrecht*)

bb) real servitudes or easements (*erfdienstbaarheden, Grunddienstbarkeiten*),

cc) sometimes personal servitudes[29]; in French-Belgian law not recognised, apart from the right of personal inhabitance and the right of personal usage (art. 625-636 CC/BW))

dd) in some systems *charges foncières* or *Reallaste*[30].

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[27] See art. 1307 Portuguese CC.
[28] In Art. 675 and 779 Swiss CC classified as a special kind of servitude.
[29] E.g. BGB § 1090 and Swiis ZGB 781, *beschränkte persönliche Dientsbarkeit*
[30] BGB § 1105 ff.; Swiss ZGB art. 782-792.

ee) Leases or some types of leases are qualified as property rights in some countries, *e.g.* Sweden and Finland. In most other countries (*e.g.* Belgium, France, Netherlands, Germany, Italy, Switzerland, Austria, etc.), this is not the case, but lease contracts give rise to "qualitative" rights and obligations (and may have to be entered in the land register for that purpose).

ff) A property effect is also given :
- to the (otherwise obligatory) mutual rights of co-proprietors as to the "common parts" of apartment buildings (the regulation concerning the obligations and duties of co-owners is treated as a kind of servitude in Belgian law (since 1994), as a separate type of property right in Dutch law, etc. etc.).
- in some systems, to the mutual rights of other categories of co-owners.

Note. Property rights on property rights :

32b. Some of these limited property rights can also relate to other rights, in such a way that the "ownership" of a right (property right or creditors' right) is split up in "ownership" of the right on the one hand and a "limited right" on that right on the other hand.

3° Security rights.

33. These are basically the following:

aa) for immovables : mortgage (*hypothèque*: in Scotland *standard security"*)[31], sometimes in different forms (German law knows the *Hypothek*, *Grundschuld* and *Rentenschuld*)[32]; in French and Belgian law also the "immovable privileges"

bb) for movables (incl. creditors' rights) : pledge (*pand, gage, Pfand*) or charge (in English terminology, pledge is traditionally used for a possessory security right (*Faustpfand*, *vuistpand*), and charge for non-possessory security rights (often subject to registration)) . Some rights which are in fact rights of pledge or at least very similar are, in some countries, "privileges" (*voorrechten*) (not all privileges, however, are equivalent to pledge).

Apart from "fixed" charges, a number of legal systems also recognise "floating charges" (eg English & Scottish law on assets of companies; to a certain extent the Belgian law on receivables and stocks of commercial firms, etc. - comp. supra no. 26).

cc) Some real effect is normally also given to all kinds of seizure, attachment, bankruptcy and collective debt liquidation, etc.- they are similar to a "collective pledge"; in some other systems, seizure gives rise to a real individual right of pledge (e.g. Germany, France as far as

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31 In the English mortgage, the mortgagee is legal owner, but the mortgagor has an equitable interest, including the right to redeem (by paying the debt) - also called the "equity of redemption". Comp. the German *Anwartschaftsrecht* infra.

32 See also Swiss ZGB 793 ff.

claims are attached, etc.). The rules are rather different as to the moment of time at which such a measure has property effects in relation to third parties (immediately, after registration, etc.).

33a. In all countries, there are or have been tendencies to circumvent the restrictions on such security rights by using ownership itself as a security right; this is the so-called security ownership (*zekerheidseigendom, propriété-sûreté, Sicherungseigentum*), a specific form of "fiduciary ownership" (Latin term: *fiducia cum creditore*). It is mainly found in the field of moveables.

For this type of ownership, there are basically two problems:

1° the *fiducia* is usually chosen in order to avoid the rules on publicity of security rights (*e.g.* dispossession in case of pledge). It is questionable whether the transfer of ownership can be opposed against third parties if the publicity requirements are not fulfilled. Some countries have accepted it (*e.g.* Germany), others have created a general (Netherlands) or some specific forms of pledge without dispossession (France, Belgium, Spain). The always pragmatic Swiss ZGB has decided that there is no transfer of ownership without dispossession if it was intended to circumvene the publicity rules for pledge or to prejudice third parties (art. 717).

Reservation of title, another form of fiduciary ownership, is nearly everywhere accepted without publicity, although sometimes under restrictive conditions.

Apart from retention of title (see below), Belgian law does not recognise “security ownership”, only pledge or full ownership (apart from certain phenomena in the field of co-ownership).

Fiduciary ownership is not a 100 % ownership, as legal systems tend to recognise the position of the other party (often called economic owner) as a property right (such as the German “*Anwartschaftsrecht*” - see *infra* 2°) and to reduce the powers of the “owner” in case of bankruptcy of the other party (no right of separation, see e.g. the new German Insolvency Act), in such a way that it is in fact not more than a right of pledge. The same is true for Retention of title under Belgian law it is called ownership, but basically entitles the seller only to the rights of a pledgee.

2° Fiduciary ownership (including reservation of title) may also be chosen in order to avoid restrictive rules provided by the law, esp. concerning the realisation of the security right, for the protection of the debtor/securitygiver. Such rules are found in the law on pledge and mortgage, esp. the following :
- rules of procedure protecting the debtor;
- substantive rules against unjust enrichment of the creditor : the security interest does not grant more rights than a security for the payment of the secured debts; the security-giver thus always has a right to redeem by paying the secured debts. Where the creditor is executing, he has a duty to account to the debtor. It may be that due to legal formalism, some forms of

security ownership escape from these rules (eg leasing cases).
The question is then whether the creditor avoids the application of these rules by choosing fiduciary ownership as a security. Case law tends either to requalify the ownership as a security interest[33] or to apply at least some of these rules to fiduciary transfer, too (*e.g.* right of the debtor or his trustee in bankruptcy to get the goods back by paying the debt). German law has done this *i.a.* by constructing the right of the buyer under reservation of title as an *Anwartschaftsrecht*. Fiduciary ownership becomes thus more and more limited to a right of pledge; it is thus not amazing that the Dutch NBW has (since 1992) simply converted nearly all fiduciary property in a pledge without dispossession. Belgian law does, as a rule, not recognise a fiduciary transfer for security reasons; where it is recognised (reservation of title), at least some of the rules on pledges do apply.

33b. A related discussion concerns the accessory character of security rights. Security rights are normally accessory to one or more secured claims. In most systems, this also applies to reservation of title. An exception is the German *Grundschuld*[34].

Security rights apart from security ownership are further characterised by the fact that the same right can be granted successively in a subsidiary rank (in first rank, second rank, etc.). This is not the case for ownership

4° Anticipatory rights or anticipatory protection (*Erwerbsrechte*).

33c. These and other developments have led to additional rights with a real effect, esp. in the form of anticipatory rights of the buyer.

* Especially the *Anwartschaftsrecht* (kind of property under condition subsequent, e.g. of the buyer under reservation of title), as a protection of the party who has left fiduciary ownership in the hands of the creditor. This right differs considerably from the normal "equitable interest" (also called “economic” ownership), discussed *infra* in relation to trusts, but is comparable to the "equity of redemption" in anglo-american security rights (eg of a mortgagor against the mortgagee). The *Anwartschaftsrecht* is very similar to the ownership charged with a right of pledge and has precisely the same function. Similar results can also be based on a so-called right of retention in those cases where the expecting party is in possession (e.g. to protect the buyer under reservation of title against the creditors of the seller when the seller goes bankrupt).

** A similar device in several jurisdictions protecting the buyer against the seller who has not yet transferred title, this time for immovables, is the prenotation or preliminary registration or *Vormerkung*. It has especially been developed in systems where publicity is a constitutive element for transfer of ownership, such as in German, Austrian and Swiss land

33 See for English law Lionel SMITH, "Relief against forfeiture", 60 *Cambridge LJ* 2001, 178 ff.

34 The Austrian hypothec is not necessarily accessory either, see ABGB § 469. As in Germany, the owner can determine that the hypothec is not accessory; this gives him the possibility to grant a hypothec in first rank to a new creditor once the debt for which it was originally granted is paid.

law[35]. Further, it was introduced to a certain extent in Italian law. It secures a claim (or future claim) to acquire a property right[36]. This claim must be established in a certain way (usually a written contract or a prima facie recognition by a judge in summary proceedings)[37].

The position of the party who has registered is sometimes explicitly qualified as a conditional property right (*bedingtes Eigentumsrecht* in ABGB § 438).

In the French-Italian-Belgian system, partly the same results (as the *Vormerkung*) are reached by quite different means, namely by accepting that the property passes already between the parties, although it does not yet pas *vis-à-vis* third parties. Even if parties postpone the moment at which property passes, this protection of the buyer will apply.

In Anglo-American law, partly the same result is reached by recognising an equitable interest for the buyer (of land) as soon as the contract is concluded.

The *Vormerkung* can also be used as a mechanism to give a property effect to a right of pre-emption (*Vorkaufsrecht)*[38] or even an option to buy (eg Swiss ZGB Art. 683) or re-acquire (*terugkoop, réméré*). Most legal systems do recognise in a number of situations rights of preference in acquiring certain goods and/or recognise conventional rights of preference. Such rights can take different forms: it may be a right of pre-emption (which implies an obligation for the seller to give preference to the entitled party) or merely a right of take-over of an already concluded sale. The effect of such rights varies:
- it may be purely obligatory (such as contractual rights of preference under Belgian law),
- or have some property effect,
-- either directly (the right is under certain conditions recognised as an anticipatory property right making the owner of the goods without authority to give preference to another buyer, e.g. in Swiss[39] or German law; if the right is not statutory but merely contractual, prenotation (*Vormerkung*) is necessary)[40];
-- or indirectly (only in causal systems, namely by take-over of the rights of the first buyer by the entitled party, e.g. in Belgian law (only for statutory rights of preference)).
NB. Examples of statutory rights of preference are given infra.

The period of validity of such a provisional registration may also vary enormously.

5° Some future interests in the form of beneficiary rights.

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35 BGB § 883-884; ABGB § 438-439; Swiss ZGB art. 681-683 and 961.

36 More precisely, it portects a party against later acquieres, not against older property rights - see eg Art. 959 II Swiss ZGB.

37 See eg Art. 961 Swiss ZGB; see also Art. 960 I as to the registration of a judicial defense to alienate.

38 For this protection of pre-emption rights, see BGB § 1098 II and Swiss ZGB 681.

39 With a maximum validity of 10 yeras.

40 In Portuguese law, a promise to transfer (or constitute rights) or a contractual right of preference (pre-emption right) can acquire "real effects" (property law effects) by such a registration (see art. 413 ad 421 Portuguese CC).

34. Exceptionally, continental law will recognise (with a real effect) some beneficiary rights of third persons indirectly favoured, esp. in the institution of the *fideicommis* etc.
This possibility is very limited in French and Belgian law; but widely possible in German law in the form of a *Nacherbschaft*).
Although the right of the beneficiary of a fideicommis (the Nacherbe) is usually considered to be no property right *senso strictu*, it has analogous characteristics. Its registration will eg protect the beneficiary against younger property rights[41]. In Swiss law, it is qualified as an "*Anwartschaft*".

The institution of an *exécuteur testamentaire* may partly serve the same function.

In contrast to this, there are a large number of "future interests" in common law jurisdictions. This concept, however, covers as well "nude ownership" (comp. e.g. a "vested remainder") as interests basically unknown in continental jurisdictions such as a "contingent remainder". The German "*Anwartschaftsrecht*" and "*Vormerkung*" (*supra*) (including the prenotated right of pre-emption) and similar devices could also be seen as future interests protected under property law.

Apart from these beneficiary rights, some other trust-like devices maybe recognised (in Belgium e.g. nominee accounts). They result in some form of split ownership, to a certain extent comparable to the dual ownership in Anglo-American trust law (legal/equitable title). See *infra*.

6° Administration rights (management rights)

34a. Some continental legal systems have developed divisions of ownership whereby one person has the right to administer the goods in the form of a limited property right, whereas the other party is considered the owner (in whose interest the assets must be administered), e.g. the Dutch "*bewind*".

Specific forms of *bewind* have been developed in inheritance law.

French & Belgian inheritance law have the institution of the "*saisine*" which is difficult to qualify (see art. 1004 e.a. CC). It is not ownership (although the heirs with *saisine* will usually be the owner of most of the assets under *saisine*) but a limited property right which gives the right to administer and enjoy the assets, even those devolved to other parties, until they have claimed delivery in due form. The right of *saisine* belongs jointly to the "legitimate heirs", who are seen as continuing the person of the deceased.

7° Other rights with some "real" effect.

[41] See eg Art. 960 I 3 Swiss ZGB.

35. Next to these, a certain "real" effect is given to some inalienabilities imposed by law and some types of limitations of the authority to dispose over goods[42]. Equally, acts of opposition by interested third parties can under certain conditions be registered in order to give them effect against younger rights[43].
But in principle, such limitations to the authority of the owner are merely obligatory and have no external effect (except under certain conditions in case of limitations of the property of creditors' rights - see V B). Compare the opposite position of Anglo-American trust law: the limitations to the authority of a trustee normally have this external ("real") effect (thus giving rise to "tracing" of the illicitly alienated goods).

Apart from the recognised property rights (and the constitution of a legal person such as a foundation), the "destination" of a thing has no property effect[44]. This is not contradicted by the fact that the destination of an asset will in some cases lead to the application of specific rules with property effects, such as statutory privileges for certain creditors, statutory restrictions on transfer or alienation of certain assets (wages or income e.g., because of its family destination), immunity from seizure of certain goods[45], etc.

Other rights thus have, as a rule, no real effect. E.g. contractual inalienabilities (this is different in French law, at least under certain conditions), options, exclusivity rights etc.; also the rights of a tenant. Some of these rights have some third party effects; this can take different forms. Under Belgian law, these effects are different from real effects. In some jurisdictions, some of these limitations are seen as some type of property rights (e.g. pre-emption rights with "real" effect - *dingliche Vorkaufsrechte* -, see *supra*).

Again, the most important question is whether it is in the general interest to give "real" effect to such types of limitations.

Legal systems may be stricter by not only denying real effect, but equally prohibiting (under the law of obligations) or restricting contractual clauses restricting the transferability of assets (comp. already supra no. 19).

4.3.3 Legal property rights in Anglo-American law.

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42 E.g. ABGB § 364 c, limited to *published *intra-family arrangements.

43 See eg in German law the registration of an opposition (*Widerspruch*), in Swiss law the registration of an opposition recognised by a judge (usually as a provisional measure when an action for avoidance or revocation of an earlier transfer is started) - see art. 960 I 1 ZGB. Comp. the "marginal registration" of an action for avoidance or revocation under Belgian law. In "causal systems" these measures do normally not tend to acquire property rights, but to secure the protection of an existing - "reviving" - property right in case of invalidity or termination of a transfer. In abstract systems, it rather grants a property law effect to an otherwise merely personal claim.

44 See e.g. Cass. (Belg.) 15-10-1999, RW 2000-2001, 479: the fact that an association was legally obliged to use a subsidy or grant in a specific way (for payment of specific services or goods), does not create a priority for the creditor who has rendered them.

45 Under the French *Loi* du 12-7-1909, this could be established conventionally by constituting a "*bien de famille*".

38. Anglo-American land law seems totally different from this, but some comparability remains.

As to immovables, a fee simple is comparable to ownership, different other "estates" in land are comparable to the limited rights of enjoyment (e.g. an "estate for life" is comparable to usufruct, a leasehold is comparable to *emphyteusis*), and the possibility to create new types of estates is also very limited in English law. Since the different reforms of land law, esp. since 1925, English law basically recognises only a limited number of legal interest in land (the "fee simple absolute" and the "fee for a term of years absolute", easements, "mortgage legal", perpetual rent and rent for a term of years absolute), all the others being merely "equitable interests"[46]. Except for equitable interests, English land law is nowadays thus even much stricter than continental law.

As to movables, Anglo-American law equally has a *numerus clausus* of legal titles (basically only ownership, including forms of co-ownership).

4.3.4 Equitable rights in Anglo-American law and in continental law; functional equivalents to trusts.

4.3.4.1. Difficulties for trusts in continental jurisdictions - the joint property (*Gesamthand, propriété en main commune*) as a trust-like institution :

39. The above mentioned principles can also explain why the continental law developed no trust (or only recently and to a limited extent). In case of a trust, ownership is divided in a way, which is very different from the ways known in the continental tradition, although not necessarily incompatible with it: the legal "owner" has the power to administer and dispose of the things themselves, but the person who "trusts" has an "equitable" right (with external effect) to their value, which should also be seen as a kind of property. The division of property into "legal" and "beneficiary" ownership is not impossible in continental property law systems (could be created by the legislator), but it is not easy to fit it in.

What is difficult to achieve in continental law, is the constitution of a separate fund or estate, such that the interest of the beneficiary (the equitable interest in Anglo-American law) remains a "real" or property interest even if the goods themselves are disposed of and replaced by other goods, namely by attaching the interest to the substituted goods (a kind of general "real subrogation"). Such funds are considered exceptions to the basic principle of the "unity of the patrimony", *i.e.* the rule that a person has one and not more than one patrimony (rule which can be set aside by setting up a uni-personal company).

Certainly, the legislator can create the possibility of such a fund.

* He has done so in the form of a specific form of co-ownership (the *Gesamthand* or joint

[46] American law and other Anglo-American jurisdictions still recognise other common law interests, such as e.g. life estates.

property), which is found in the marital community, partnerships, unincorporated associations, and some other cases. It has some characteristics of the Anglo-American trust. In principle, none of the joint owners can individually dispose of single things or his share in single things, but only of his share as a whole or a certain part of it. This “collective" or "abstract" character of such co-property is disputed in Belgian and French law (see the discussion further, where we discuss accrual of shares in joint ownership).

* He also has done so to where he has instituted the *fideicommissum* or the *Nacherbschaft*. But there is no general possibility for private parties to create such estates or patrimonies (apart from legal persons).

Apart form these exceptional cases of property forming a separate estate or patrimony, real subrogation is known only to a limited extent (compared to the general rule of subrogation in trusts and in such separate patrimonies).
In its limited form, it is recognised especially in a context where, on the basis of a recognised property right, the value of certain goods is affected to a certain purpose or person rather than the goods themselves. This is esp. the case with security rights, coming the closest to the common law “equitable interest” as they are attached to the value of things rather than to the things themselves. Rules on security rights (pledge and mortgage) often provide, that when the object of these rights disappears, is destroyed or otherwise in value diminished, the security right can be exercised (in the same way or by analogy) on the value of the goods accruing to the debtor due to the same facts. Under Belgian law, more generally, whenever a material thing is replaced by a creditor’s right (claim), the property rights concerning the thing are converted into similar rights as to the replacing creditor’s right. See *infra* n° (83) for examples.

Another reason, at least in Belgian and French law, is that limited real rights are always limited in time (namely 99 years) and an eternal division of ownership is not permitted (or rather: not binding).

4.3.4.2. Functional equivalents or alternatives to trusts - general

40. Evidently, many of the functions of trusts can be fulfilled by creating legal persons (companies, incorporated partnerships, foundations, etc.). The fact that these are heavily regulated and subject to publicity is, however, seen as a disadvantage for certain purposes.

As long as there is no intervention by the legislator to create a new division of ownership, fiduciary relationships also suffer from the fact that it is difficult to give both parties a “real” protection. In a certain sense, a trust can be defined as a fiduciary relationship whereby the creditor of the fiduciary obligation is protected by property law. Without such a protection, a fiduciary relationship is not trust-like.

If we look at the most important functions of trusts, they have the following functional equivalents.

Trusts for purposes, where the trustee has a discretionary power, can be created in the form of a foundation (sometimes also by way of association), i.e. a legal person. In other constructions, the trustee will be a 100 % owner and the destination or purpose of the assets has no property effect (see *supra*).

On the other hand, a trust or other fiduciary construction is unnecessary for a number of cases which could only be solved by trusts in Anglo-American law, but are solved more easily in continental law, e.g. because the notion of privity of contract is less strict (stipulation in favour of third parties is thus generally admitted).

Fiduciary transfers are also used as a credit security device (*fiducia cum creditore*). This question has been dealt with *supra*.

The main function of the trust finally is asset management - see the following No.

Finally, many situations of division between a legal ownership and an equitable interest are in fact not very different from comparable situations, qualified differently under continental law. E.g. "bailment" gives rise to a kind of legal ownership on the side of the bailee and an equitable interest on the side of the bailor; in continental law, the possession of the bailee is often protected by possessory protection, too, and he has in fact the possibility to procure (legal) ownership to third parties in good faith.

4.3.4.3. Asset management.

41. The main fiduciary relationship is indeed where assets are administrated by one party for the benefit of another. The Anglo-American trust law grants both parties a property right (title) (dual ownership). Other systems have tried to balance the interests in different ways.

Some systems have granted the beneficiary a protection under property law without recognising it as such, e.g. Scots law, Quebec CC. The trust assets form a separate patrimony, which is formally belonging to the trustee, but not subject to the same rules as his "private" patrimony.

42. In most continental systems, however, the position of the beneficiaries remains very weak - in case of fiduciary transfer to the administrator (*fiducia cum amico*), they rarely enjoy a protection under property law. Where the trustee is owner, Belgian law has not developed an "equitable protection" with external effects in favour of the beneficiary. Fiduciary relationships are therefore not very widespread (other devices are used more frequently, e.g. companies or corporations). In case of fiduciary transfer of ownership esp., the transferor enjoys no "real" protection at all. This is esp. problematic in case of bankruptcy of the trustee.

In some continental countries, case law has developed a limited form of such protection, usually limited to certain types of situations. *E.g.* Germany (protection of the *Treugeber* who has entrusted assets to a fiduciary), and in a quite different way Switzerland (protection of

the beneficiary in case of assets acquired by the fiduciary). Outside situations of insolvency of the trustee, some protection is offered on the basis of tort law (compare *infra* n°).

43. However, some continental jurisdictions have also developed trust-like devices vesting or maintaining the title to the assets in the beneficiary and granting the trustee powers to administer the goods and dispose of them in his own name. This is generally possible on the basis of mediate (indirect) representation (undisclosed agency), but will not always have trust-like effects.

44. According to the continental tradition, an agent can act in the name of his principal or in his own name. The first is called immediate (direct) representation, the second mediate (indirect) representation. In the first case, the agent himself is not bound (as a rule), in the second case normally only the agent (and not his principal) is bound. Most legal systems accept, however, that property passes directly from the principal to the third party and *vice-versa* even in case of indirect representation:
- e.g. Belgium, Netherlands (NBW 3:110), Italy, except for immovables (art. 1706 II it. CC), etc.
- not Germany, except in case of 1° *Geheißerwerb* (*Geschäft für den, den es angeht* - i.e. when the identity of the acquirer is irrelevant for the alienator, such as immediately paid consumer goods in daily life) and 2° assignment of future claims (creditors' rights) arising out of an already existing relationship.

Where title remains in the beneficiary as principal (and not in the administrator), the beneficiary is protected under property law. However, the position of the trustee may be too weak (his right being a purely contractual one), and other characteristics of trusts (real subrogation etc.) will equally not be present in principle. Only some of the effects of trusts are created in this way:
1° Undisclosed agency does not in itself create a separate patrimony (to this effect, the agency has to be combined with e.g. a partnership) but only goods or assets "*ut singuli*";
2° Such agency cannot deprive the principal of the power to dispose himself of the goods (although this would constitute probably a breach of his agency contract); and
3° The power of such an agent falls away if the principal becomes insolvent etc. (not "bankruptcy-proof")
The agent may have a right of retention on the assets he administers.

45. Some specific types of undisclosed agency, however, come a lot closer to the trust, namely (in Belgian law):
- specific forms of common property, where a separate patrimony is recognised : silent partnerships ("*stille maatschap*"). A specific variety of such a silent partnership is the common investments fund : the investors are joint owners of the fund, but have no power to administer the assets.
- nominee accounts ("*kwaliteitsrekeningen*") : a bank account held by a nominee, i.e. a person holding the account "*qualitate qua*" (in its own name for the account of an undisclosed principal); although in principle only the account holder may act in relation to the account, the claim (balance) does not form part of his assets, but "belongs" to whom it is

due by the nominee. E.g. lawyers, notaries, investment managers, etc.

Comp. Also the "*bewind*", *supra*.

4.4. The condition of "existence" of the object of a property right.

45b. Property rights can only be vested in things which are in existence. Equally, no transfer can be effective as long as the goods do not exist.

But a right which will give rise to other rights or to accession of other things in the future may be a separate right (chose in action), which can in itself be the object of property and in principle be transferred.

4.5. No property right without proprietor (actual beneficiary).

45c. Equally, in continental legal systems, things can only be attributed in ownership or limited property to persons who are in existence, whether as natural persons or as legal persons (companies, associations, foundations).

The principle is especially relevant in cases of transfer *mortis causa* : rights can only be granted by last will to persons in existence at the time of the death of the testator. There are some limited exceptions, eg foundations can often be constituted by the last will itself (provided they are registered within a certain period of time). Some forms of *fideicommis* (*Nacherbschaft*) can be instituted in favour of descendants which are yet unborn (eg art. 1048-1050 French and Belgian CC).

In Anglo-American law, trusts for purposes can be created without creating a separate legal person and without actual beneficiary. In such cases, there must be an "enforcer", a party who is entitled to force the trustee to respect its fiduciary obligations.

5. Application of property rules (and possession) by analogy.

5.1. Application to ideas etc.

46. This happens in the law of "intellectual property". Copyright, patents, trademarks etc. are considered as assets created and attributed by law. They are usually created as transferable, seizable, chargeable with certain real rights (namely pledge, usufruct and license). Except for copyright, they are subject to publicity (in American law, copyright is also subject to publicity). As to application of the speciality principle etc., see *supra* No. 36.

The notion of possession is often used metaphorically to such objects, too.

5.2. Application to choses in action, esp. creditors' rights.

47. The basic concepts of property law are also applied by analogy to choses in action[47].

They, too, are considered as "goods" (assets), which can be transferred, seized, charged with limited real rights, etc. (for some exceptions, see *supra*).

Although on the "passive" side (debt), they are purely "relative" rights and not property rights (performance can only be claimed from the debtor, not from anyone), on the "active" side, they have property aspects (e.g. transferability, publicity, etc).

Once more, this application must be put into perspective. Therefore, three levels can be distinguished as to the application of property law to creditors' rights. As to the protection of claims as a form of property, see Part III. on remedies.

5.2.1 First level: the right as an object of property law.

5.2.1.1. Starting point: subject to the rules on possession and basic principles of private law.

1° Object of property rights.

48. As to their transfer, seizure (attachment), limitation by charges or real rights, etc., creditors' rights are treated as a type of property. The asset is thus attributed like a thing to an owner - namely the creditor - or more owners, an owner and an usufructuary, an owner

[47] See historically R. ZIMMERMANN, *The law of obligations*, 58 v. Mainly German doctrine has difficulties in considering claims as an object of property law (and tends to deal with the problem only in the law of obligations), although it cannot be denied that similar rules apply in German law.

and a pledgee, - where this distinction exists - a legal owner and an equitable owner (beneficiary), etc.

2° Object of (quasi-)possession.

48b. As to the application of the notion of possession to creditors' rights, it is not accepted by all jurisdictions. Strictly speaking, possession only relates to material things (including limited real rights on such things), but the notion is often (in some countries more than in others - not in Germany e.g.) applied metaphorically to choses in action. Several Civil Codes do use the term possession[48]. Other systems refuse to speak about possession, but do sometimes use "quasi-possession".

The party in possession (or quasi-possession) is the party for whom the debtor reserves performance, and who thus has - indirectly, via the mind of the debtor - "power" over the performance. Possession of claims is by nature indirect possession (depending on the debtor), as performance lies "in the hands of" the debtor. The possessor is therefore the party who appears as creditor to the debtor. Thus, the knowledge of the debtor is the basic criterion for possession of a claim. Such knowledge will mostly be based on notice given to the debtor. The knowledge of the debtor plays a very similar role for claims as possession in the strict sense does for movable material things (see *e.g. infra* the analogy to the *traditio by communication to the detentor* in Belgian and Dutch law). "Possession" of the claim may also depend from "possession" of material elements from which ownership of the claim is normally deduced (so that the debtor is discharged when paying to the person in possession, *i.e.* the apparent creditor).

Where creditors rights and similar rights (shares) are incorporated on a negotiable instrument, the right is through this document an object of possession basically in the same way as a movable thing. Jurisdictions have different rules as to the extent to which this is possible, esp. for shares in companies. Some countries restrict or exclude the possibility of (incorporation of shares into) bearer documents[49]. Shares and other securities can also be "dematerialised" by incorporating them in a book entry in the books of a clearing institution; they retain most of the characteristics of bearer securities (negotiable instruments)[50].

3° Application of the classical principles of property law.

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48 E.g. the French and Belgian Civil Code, *i.a.* in art. 1240; ABGB § 311, etc.

49 E.g. France, Italy, etc. In American and Belgian law, bearer shares do incorporate legal title in the shares; as far as such shares are mentioned in the shareholders register, it is in blanco. In English law, there are only registered shares, but they can be registered in the name of a trustee as legal owner, who can issue (certificates granting) equitable rights

50 In those systems recognising the ownership of the investor, the clearing institution or CSD is only a kind of "bailee" (*detentor*) for the investors, known to the issuer as bailee for third parties (and thus not registered with the company as an owner). Where the clearing institution or CSD is the legal owner of the securities; it will grant equitable rights or mere obligatory rights to the investor.

48c. Creditors' rights are basically governed by similar rules as other assets: the priority principle applies (as to property rights in the claim), the *numerus clausus* (as to possible property rights in the claim) (see, however, *infra*), publicity - in this case the knowledge of the *debitor cessus* - plays a similar role in most jurisdictions (as to transfer of the claim, i.e. assignment, or constitution of limited property rights in it) (see *infra*), the principles of unity and specialty apply in principle, etc.

5.2.1.2. Influence of the specific nature of such assets

1° Principle

There is, however, a major difference. The determination of the good itself, its contents ad its limits, and the publicity of its property ("real") situation, do not follow from the nature of things, nor from the land register, but from the relationship between debtor and creditor. Such goods are thus intrinsically determined and limited by the extent and modalities of the right as determined between the parties. It is this internal relationship which specifies the claim. If parties create, by contract, a right, which is inalienable or not attachable (seizable), this can basically be opposed to third parties ("external effect" of internal determinations). Parties can also divide a right into several new ones (by way of subrogation due to partial payment e.g.), etc. The principle of unity and speciality is thus very relative (it does not play for modifications agreed between creditor and debtor).

Whereas the system of property law is closed, even in its application to creditors' rights (*numerus clausus* principle), this applies only to charges or limitations of property of such goods without the consent of the debtor (and creditor). Without the consent of the debtor, it is only possible to charge the claim with pledge or usufruct or another legally recognised property right (NB. it can also be attached, i.e. seized). But the creditor can by agreement with the debtor transform a creditors' right as they like it (open system of obligations) - at least, this is possible as long as the creditor has the authority to dispose of this asset[51] -. The unity and specialty of creditors' rights are equally the unity and specialty they have according to the internal relationship and are thus essentially "relative". Thus, they can by mutual agreement make the claim non-transferable, they can merge several claims into an indivisible single claim or inversely make a claim divisible into several claims, they can make a claim "indisponible" e.g. by accepting a *delegatio solvendi* by its debtor or by delegating the debtor to pay to one's own creditor[52], etc.

It must be added that modifications agreed between the debtor and creditor, which are not apparent to third parties, can often not be invoked against third parties in good faith (principle of protection of legitimate confidence or theory of appearance). The principle will often take specific forms, such as the various rules on "abstraction" of claims, esp. those incorporated in negotiable instruments or "dematerialised" into a book entry on an account.

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[51] He will lose this authority e.g. when the claim is seized (attached) or falls into bankruptcy (see *infra*).

[52] In Art. 7:107 (2) PECL this "*indisponibilité*" is formulated in this way that "the creditor may not enforce the original obligation to pay unless the order or promise" (of the delegated debtor) "is not honoured"

Parties (*i.e.* debtor and creditor) can indeed go a step further than the general principle and "abstract" the obligation up to a certain degree from their mutual relationship. The obligation thus becomes an "abstract obligation", *i.e.* the exceptions which stem from the relationship between the debtor and the creditor can not be opposed against third parties, such as the new creditor to whom the right may have been assigned (transferred).

This is, however, not due to the application of property law, but to similar, but not identical (technically different) rules in the law of obligations. They are not an application of the protection of acquirers in good faith against the priority principle (*nemo plus iura tansferre potest quam ipse habet*), but an application of the protection of confidence or legitimate expectations in the law of obligations (theory of appearance or confidence, e.g. in art. 3:35 and 3:36 Dutch NBW; see also for a specific application to no-assignment clauses Swiss OR art. 164 II and BGB § 405[53]).

2° Specific application : transferability of creditors rights and restrictions thereof.

49. Let us have a closer look at the rules on transferability of creditors' rights. On the one hand, creditors' rights are assets which are in principle transferable[54]; on the other hand, one can only transfer rights which exist and as they exist. If they only exist as non-transferable, this must affect the possibility of transfer. As a creditors' right is shaped by the relationship between debtor and creditor, it is in principle (for the exception in case of incorporation in negotiable instruments, see below) the internal relationship which determines whether they are transferable or not, or transferable only under certain conditions (e.g. restrictions on the transfer of shares in a company). Therefore, restrictions on transfer which form part of the agreement or relationship between debtor and creditor have effect *erga omnes*. Such effect will follow from a specific clause (no-assignment clause) [55] – evidently on the condition that such an agreement or clause is valid under the law of obligations – or from the nature of the performance[56].
Agreements to which the debtor itself is not a party, do not have such effect.

Although they are in principle transferable[57], it is thus normally possible to create such rights

53 Draft art. 12:301 PECL provides that that "An assignment which is prohibited by or is otherwise not in conformity with the contract under which the assigned claims arise is not effective against the debtor unless (b) the assignee neither knew nor ought to have known of the non-conformity". Art. 577 II Portuguese CC provides that the no-assignment clause can only be invoked against the assignee if he knew it at the time of assignment.
54 As to the principle, see BGB § 398, NBW 3:83 I, etc.
55 See explicitly BGB § 399; NBW 3:83, 2; Swiss OR 164 I.
56 Comp. Art. 12.302 Draft PECL : "An assignment to which the debtor has not consented is ineffective against him so far as it relates to a performance which the debtor, by reason of the nature of the performance or the relationship of the debtor and the assignor, could not reasonably be required to render to anyone except the assignor".
57 Comp. Draft PECL Art. 12.102. Claims Generally Assignable : "Except as provided by Articles 12.301 and 12.302, a party to a contract may assign his claims under it". Even partially, if the right is divisible. - comp. Draft PECL Art. 12.103. Partial Assignment: "Claims which are divisible may be assigned in part, but the assignor is liable to the debtor for any increased costs which the debtor thereby incurs".

as "not transferable", but strictly personal to the creditor (*intuitu personae*), or to submit the transfer to certain conditions (e.g. restrictions on the transfer of shares in a company). In most legal systems, there are certain limits as to the validity of agreements limiting the transferability of receivables and similar creditors' rights, and even more as to the validity of agreements limiting the transferability of shares in public companies.

However, these rules do fully apply only to creditors' rights not incorporated in negotiable instruments (nominative rights). If, however, a creditors' right is incorporated in such a document (to order or bearer) or "dematerialised" into a book entry, abstraction is necessarily made from all restrictions which are not apparent from the instrument itself. Clauses restricting transfer, but not mentioned on the instrument, will thus in principle not have the just mentioned third-party effect.

Applications:
Shares in companies: the external effect of internal limitations on their transferability etc. is fundamentally different depending on whether they have been incorporated in negotiable instruments (anonymous shares) or not.

Derogating rules.
Further, the above mentioned principle has been modified in some legal systems to the extent that, despite a valid agreement excluding transfer of a claim, the creditor can nevertheless transfer certain categories of claims in that sense, that the "property" right is transferred, although the debtor remains entitled to pay the original creditor. In the German HGB § 354A (introduced in 1994) such rule applies to commercial claims and claims against public authorities. The rule is inspired by Anglo-American conceptions allowing to split up the ownership of a claim into "legal title" and "equitable interest". To be coherent with the above mentioned principle, one should analyse it in this way, that a clause excluding such a split is void (whereas a clause excluding a full transfer is in principle valid)[58]; it is an imperative rule which limits the effect of a no-assignment clause to those effects whereby the debtor has a legitimate interest.

Draft Art. 12:301 PECL goes, however, further, by providing that "an assignment which is prohibited by or is otherwise not in conformity with the contract under which the assigned claims arise is not effective against the debtor unless (c) the assignment is made under a contract for the assignment of future claims to money", thus even modifying the relationship with the debtor[59]. The rule is quite strange, as the transfer is still considered a breach of contract for which the creditor is liable towards the debtor.

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[58] Compare the rules relating to shares in companies and partnerships in the former art. 1861 *Code Napoléon* = Art. 38 Belgian Company Code.

[59] This is inspired by Art. 6 (1) of the 1988 UNIDROIT Convention on International Factoring, providing that in case of assignment of monetary claims arising out of an international sales contract, "The assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment". The application of this Convention as a whole may, however, "be excluded (b) by the parties to the contract of sale of goods, as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion" (Art. 3).

5.2.1.3. Protection as property.

The ownership of a claim will be protected by some of the remedies for protection of property. The ownership itself of a claim will rarely be infringed, apart from cases where a third party will assign or collect it (without authorisation and pretending to be the creditor). The owner of the may resort to "direct remedies" (see infra Part III) in the form of an *actio negatoria* (injunction against a third party pretending to be entitled to the claim) or *declaratoria*, and to indirect remedies such as compensation based on tort or unjust enrichment (in case he has lost the claim due to a valid payment by the debtor to a false creditor or acquisition by an acquirer in good faith).

Even German law, which stresses the "relative" character of claims (see *infra*), will protect the creditor against (competing) third parties when the "title" itself (the fact of being entitled to the right) is attacked. As German authors put it, the absolute aspect of creditors' rights concerns the (attacks on) "entitledness" to the object of the right, not (attacks on) that object itself[60]. German law will thus recognise *i.a.* a restitutionary action of the creditor against third parties having collected "his" debt.

5.2.2 Second level: the right as a right to a certain performance.

50. As to the (specific) performance of the debt (obligation), the question arises whether the specific performance is also exclusively attributed to a certain person or not. The question arises specifically when a promisor promises to different parties the same performance (if it can only be rendered once) or other incompatible performances.

5.2.2.1. Protection under tort law (indirect protection)

51. The protection of the first creditor against competing creditors who come later has been developed more in *e.g.* French and Belgian law - theory of inducement of breach of contract (*derde-medeplichtigheid, tierce-complicité*)- than *e.g.* German law. If obligatory rights are the result of specific efforts, others can still compete on the market with their own efforts, but must refrain to profit from the efforts of others if, doing so, these others would be deprived substantially from the fruits of their efforts. Where a creditors' right is in this way violated, the creditor has an action in tort against the third party. Not every devaluation of the right is sanctioned, only the case where the creditors is deprived of the specific fruits of his efforts.

In German law, creditors' rights are traditionally seen as "relative rights" without "external effects". Therefore, apart from the case where thte "title" itself is attacked (see supra), the younger creditor is only bound by the rights of the older one, in that sense that he may not act fraudulently (in fraud of the right of the first one), which is illicit because "*contra bonos mores*" (immoral) (BGB § 826). A stronger protection is given only in case the relative right forms part of the "firm" (*entreprise - eingerichteter Gewerbebetrieb*) (this falls under BGB §

60 WILHELM, *Sachenrecht* , nr. 59.

823, 1) and some more specific torts (e.g. BGB § 824)[61].

5.2.2.2. Direct protection ?

52. In French and Belgian law, as long as specific performance is possible (when such is no longer the case, we arrive at the third level), they have an external effect which renders them nearly as "absolute" as property rights, *i.e.* which binds third parties to respect it. The "relativity" of such rights does mainly concern the recourse on the debtor's assets (secondary right when the primary one, *i.e.* specific performance, is impossible - see the third level), not so much the attribution and protection of the primary right.

Examples

1° A landlord promises the same house successively to two tenants (*in spe*). Except where the second promisee moves first into the house in good faith, the first gets priority. He can ask for an injunction against the landlord and the second tenant.

2° A promise to sell a house or option given to 2 different parties

3° In distribution contracts : an exclusivity for a certain territory promised to two different distributors.

4° An exclusivity for a certain business promised to 2 different suppliers (e.g. breweries)

This rule could be understood as the application of an *actio negatoria* in the field of (property of creditors' rights (on the *actio negatoria*, see Part III).

52b. A direct protection is given in some specific situations. An example is the "*Vormerkung*" protecting a buyer and thus the right of the buyer to obtain conveyance of the land (German, Austrian and Swiss law, see also Italy). Under the French-Belgian-Italian-Portuguese system, a *Vormerkung* would not fulfil this function and even be superfluous for it, because conveyance (transfer) of property in land can in principle take place by mere agreement; once the seller agreed to transfer of property, the buyer is no longer a mere creditor. However, the *Vormerkung* could be useful a) in case parties have agreed that property does not pass immediately to the buyer and b) as a simplified formality to ensure that third parties can not be in good faith about one's right. The latter function is found e.g. in Italian law permitting a *Vormerkung* on the basis of non-authenticated contract (whereas the final registration of transfer can only take place on the basis of a formal notarised deed).

5.2.2.3. Conclusion

53. "Personal" (creditors') rights are thus protected up to a certain degree, although less than property rights. They are also valid *erga omnes*, the difference is rather that they're not yet considered violated merely because others are concurring (competing) in relation to the same debtor (and on his assets) (such concurrence or competition is even a basic idea of the law of obligations), but only where another party tries to appropriate himself the fruits of the efforts of the older creditor (e.g. earlier sole distributor having invested a lot to create goodwill for a certain product).

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61 See for this discussion i.a. WILHELM, *Sachenrecht*, n° 61; D. MEDICUS, *Schuldrecht II* (1995) n° 812, 818 ff. (restrictive).

The specific forms of such protection are partially discussed in Part III. Special remedies are e.g. the *actio Pauliana*, or injunctions like the '*action en cessation'*. Important is further the protection by tort law.

5.2.3 Third level: the right as giving rise to recourse on the patrimony of the debtor.

54. If specific performance is no longer possible, no longer "within the means" of the debtor, then the different creditors are "concurring" on the patrimony (assets) of their common debtor in order to get payment of damages. In case the creditor is unable to pay all his debts, the date of the creditors' right plays no role anymore, and they will get paid according to
a) the legal order of privileges, and
b) - within the same category - in proportion to the amount of the debt ("*paritas creditorum*").
This applies *e.g.* (but not only) in case of organised insolvency (bankruptcy, collective debt liquidation), liquidation of a company, etc.

The right of a creditor is in these circumstances very "relative" in the sense of related to the patrimony of the debtor : it is limited to a proportionate share of the product of the assets of the debtor. Creditors have to undergo all fluctuations of the patrimony of their debtor as long as their rights are not "realised" by seizure or creating a *concursus*.

There is a limited protection of general creditors against the effect of such fluctuations. First of all, a creditor may have an action in tort against third parties, if they have committed a tort in causing this insolvency. More specifically, creditors are protected by the possibility of conservatory measures (comp. *Mareva* injunctions) "freezing" the assets of the debtor , by exercising indirectly rights the debtor omits to exercise (*action oblique*, indirect action, e.g. art. 1166 CC), and by the *actio Pauliana* against acts in fraud of their rights as creditors.

Creditors can protect themselves also specifically by taking securities recognised by the law (on the goods of their debtor). In some jurisdictions, seizure (being a unilateral initiative) creates such a security *c.q.* priority (e.g. German law), in others not (e.g. Belgium, France). In some of the latter systems, however, there are more cases of security rights *c.q.* priorities implied by law (e.g. privilege of the seller in Belgium).

On the other hand, creditors can also protect themselves against others who would try to obtain unjustifiedly a larger share of the assets by seizing (and thus freezing) assets (seizure, including bankruptcy and similar proceedings), or by attacking fraudulent transactions of their debtor (*actio Pauliana*, etc.)

5.3. Application to other "interests"

55. Most other immaterial assets do not enjoy the same protection as creditors' rights. They're not patrimonial subjective rights in the strict sense. *E.g.* goodwill, (commercial) reputation, competitive position, etc. Some, however, tend to become specific subjective rights and be protected as such, *e.g.* the commercial name. Where this is not the case, something more is required before the infringement of such an interest constitutes a tort. See Part III.

5.4. Application to personality rights and to the human body.

56. There is a tendency, if not in modern law, at least in modern ideology, although not always recognised publicly, to see the human body and its parts also in terms of "property". Traditional law has always considered the human body and its parts outside the domain of patrimonial law (esp. property law) and subject to different logic from a purely economic one. The ideology of absolute self-determination, however, reduces the human body often to an object of property and contracts like any other thing.

Excluding the human body from property law does not exclude that certain "violations" of the body are permitted (e.g. medical treatment), with consent or for reasons of public interest determined by law (e.g. transplantation of organs). But they are always limited and do not amount to a "transfer" of the right to another (such as in slavery).

The right to the human body is thus to be seen as a (non-patrimonial) personality right and not as a property right.

57. Personality rights are normally "*extra commercium*": they cannot be the object of property rights in the strict sense of the word. This does not exclude that the person can agree as to limited infringements of his personality rights (*e.g.* consenting in the use of one's name or image for publicity reasons).