1. Introduction

Property rights take a central place in any legal system. These rights offer the holder exclusive power over an object with effect against the whole world. Property rights are therefore different from personal rights, which generally only have effect between the parties who create them. Parties therefore, far more free to create contractual relations (rights and duties) than they are in the creation of property relations. Because of their far-reaching effect property rights are limited in number and content and their creation, transfer and extinguishment requires that a special, mandatory, procedure is followed. Property law is therefore different from contract law, characterised more by limitations than by freedom.

Property law still is very nationally (in the sense of: locally) oriented. Each legal system has its own property law, which, although it may be rooted in a particular legal tradition, still follows its own path based upon its own policy choices. This element of localism in property law systems, aggravated by a tendency to argue along doctrinal lines and develop the law in a highly technical and black letter rule-oriented way, makes the comparison of these systems complicated. At the same time, however, all (Western) property law systems seem to share a basic framework. The constituent elements of this framework can be classified in terms of general principles, policy choices, ground rules and technical rules (Van Erp 2006a, 13). This distinction in constituent elements enables a multi-level comparison and brings divergences in national property law traditions down to the level of technical differences, which can, if the political will is present to create, for instance, a European property law, be overcome. Generally, comparison is highly possible at the level of general principles, ground rules and the various policy choices which, as such, have to be made.

There are four basic general principles of property law. First of all – we only repeat what was said earlier – every property law system imposes limitations on the number and content of property rights. Parties are not free to create just any property right with any content. Instead, property rights function in a closed system that is known as the *numerus clausus* of property rights. Depending on the legal system the principle of *numerus clausus* takes the form of an absolutely closed list (in such a case the legal system applies a rule of *numerus clausus*) or of a set of general limitations.
(the respective legal system applies only a principle of numerus clausus) (Akkermans 2008, 403). Secondly, once it has been established that the right which was created is a property right, a fundamental starting point of property law is that a property right cannot exist without a specific object. This general starting point is known as the principle of specificity (Johansson 2009, 88). Thirdly, connected to the principle of specificity, another fundamental starting point is that, because of the ‘against the whole world’ effect of property rights, third parties must be able to know about the existence of such a right. This is the principle of publicity and can take the form of possession, e.g. in case of movable objects, or registration, e.g. in case of immovable objects (Cámara-Lapuente 2005, 798; Cantero 1998, 363). Together, these two principles are also known as the principle of transparency (Van Erp 2006a, 14). Finally, there is the principle of accessority. This concept is more controversial as a principle and has been classified as a technical rule before (Van Erp 2006a, 14–17). Accessority explains dependence between two elements in the law of property. Traditionally this concerns the intricate relation between a property security right and the claim the performance of which is being secured by such right. However, accessority is also used, especially in the Romanic legal tradition, to describe the relationship between the object of a property right and the property right itself.

Ground rules are also of a general nature and apply in all legal systems. These ground rules are the following. First, a holder of a right cannot transfer more than he has, known as the nemo dat rule. Second, the rule that older rights come before newer rights, the prior tempore rule. Third, the rule that limited property rights have priority over fuller rights, and, final and fourth, the rules that protect property rights.

These principles and ground rules create the basic framework that is characteristic of Western systems of property law. Taking this framework as a starting point offers a structured approach to find and analyse similarities and differences. Throughout this contribution these principles and ground rules will therefore be as a basis for comparison. What is highly intriguing to see is that systems of property law seem to share a common catalogue of property rights. Although differences exist, the core body of property rights in the various property law traditions is very similar. The explanation used for this similarity that the civil law systems share is that they are all rooted in Roman law and that certain aspects of the Roman law catalogue of rights seem to have influenced the development of the common law (Akkermans 2008, 411). Still, the differences at a technical level between the civil law and the common law traditions should not be forgotten or underestimated (Van Erp 2006b, 1043). This chapter therefore will first consider this common body of property rights. After that
some important developments in the law of property, which is not a static area of law at all, but, on the contrary a highly dynamic legal field, will be discussed before the principles and ground rules will return once more in the conclusion.

2. Property rights

Property rights are rights that have effect against the whole world. It is this characteristic that distinguishes them from personal rights, which generally only take effect between the parties that create them (Reid 1997, 225). Consequently, property law and the law of obligations are separate areas of private law, each providing their own rules on creation, enforcement and destruction (Füller 2006, 10). Furthermore, in property law party autonomy is limited, whereas it is cherished in the law of contract.

The limitations on party autonomy in the law of property are best visible when looking at the *numerus clausus* of property rights. Parties are not free to create any property right they desire. Instead, they must comply with the requirements set forth by property law and choose one of the property rights made available in the legal system (*Typenzwang*) and abide by the restrictions the law imposes on the content of these rights (*Typenfixierung*) (Wiegand 1987, 633). These limitations make it possible to provide an overview of the property rights that are usually available. In this overview, the law of France, Germany, the Netherlands and England will be taken into account. French, German, and English law represent three of the major legal traditions in Europe (Glenn 2006, 125). The law of the Netherlands, which originally followed the French tradition, but which since 1992 is more in line with the German tradition, offers interesting insights into a system that attempts to combine these traditions.

2.1 Primary rights: ownership

In any legal system there is one property right that forms the source from which the other property rights may be derived. This can be done on the basis of a subtraction of powers from the most extensive right or on the basis of limiting the powers contained in the most extensive right (Struycken 2007, 361). This most extensive property right has also been named primary right to emphasise its importance in respect to the other property rights, which have been named lesser rights (Akkermans 2008, 298). These lesser rights are also called limited property rights as they limit the owner in exercising his powers and the right itself is more limited than the right of ownership.

The most extensive or primary right in civil law systems is the right of ownership. This right is the paramount entitlement a person can have with regard to an object. Whether such an object may be tangible, movable
and immovable, or intangible, depends on the legal system. In French law all of these objects can be subject matter of the right of ownership, in German and Dutch law the right of ownership is restricted to tangible objects. Intangible objects, especially claims, are subjects of property law, but incapable of being owned. Instead, the term entitlement is used. In practical terms the differences between ‘owning’ a movable or immovable tangible object and being ‘entitled’ to a claim may be limited, as both rights can be transferred and used as security by creating a limited security right (Gretton 2007, 802).

The right of ownership as the paramount entitlement provides its holder the right to use, enjoy and dispose of his right. Moreover, in French doctrine the right of ownership is awarded three characteristics. First, the right is absolute, it cannot be fragmented into two types of ownership (Terré and Simler 1998, 107). This characteristic should be seen as a rejection of the *duplex dominium*, i.e. fragmented ownership, that was known under the *ancien régime*, i.e. the law that applied in France before the French Revolution. Secondly, the right of ownership is an exclusive right (Chabas 1994, 84). This indicates that only the owner is entitled to use, enjoy and dispose of the object of ownership and only he may exclude anyone from interfering with these powers. Thirdly, the right of ownership is perpetual (Chabas 1994, p. 103). The perpetuity of the right of ownership is perhaps its most important characteristic; it exists as long as the object of ownership exists. When a limited property right is created that is derived from the right of ownership the right of ownership will always exist longer than the limited property right. Would the right of ownership cease to exist, the limited property right will automatically be extinguished also. This has been named the residuary characteristic of the right of ownership (Honoré 1961, 126–128).

Finally, the right of ownership is protected with a special action known as revindication, originating from the Roman *rei vindicatio* (Watson 1968, 96). This action enables the owner to take back the control of the object of his ownership. The revindication, contrary to the actions granted in contract law, entails specific enforceability only. Furthermore, the right of ownership is protected with a special action to stop interference with the enjoyment of the right. This action, known as the *actio negatoria*, stems from Roman law and also entails specific enforceability only (Kaser and Knütel 2003, 171). The right of ownership can therefore be protected in a positive way, against unlawful possessors such as thieves, as well as in a negative way, against interferers such as trespassers.

Because of its perpetual nature and the specific enforceability of the right of ownership, English law does not recognise such a right (Swadling 2007, 280–282). English property law follows a more fragmented approach and
a distinction should be made between land law and personal property law. This distinction originates from the historical development of the common law. Real actions, i.e. those actions that were specifically enforceable, were only available in respect to land (Pollock and Maitland 1898, 570). A real action awarded *seisin*, i.e. actual power over the land. Therefore land law is also known as real property law. Tangible objects other than land, however, were not protected by real actions. Instead these objects are protected by the law of obligations, in particular through specific torts (Bridge 2002, 47).

In order to gain a better understanding of the differences between civil law and common law a brief excursion into legal history may be useful. When, in 1066, the common law began its development, William the Conqueror claimed ownership of all the land. Consequently, land in England can no longer be owned but is held from the King in what remains of a feudal structure (Holdsworth 1927, p. 3). Originally, a person would hold land from the King in tenure (from the French *tenir*) in the form of a feudal grant. This grant was strictly personal, but later developed into a transferable right called estate. The different feudal grants became standardised over time until, with the Law of Property Act 1925, the legislature confirmed this limitation of the available estates at common law (Swadling 2007, 234). The estate most comparable to civil law ownership is known as the fee simple absolute in possession (the ‘freehold’). ‘Fee’ denotes the origin of the right as a feudal grant, ‘simple’ means that the right will pass to the heirs of the holder without any conditions, ‘absolute’ indicates that the right is not subject to any condition and ‘in possession’ signals that the holder of the right is actually in control over the land (Burn and Cartwright 2006, 167–170). The fee simple is the most extensive entitlement to land in English law and can therefore be qualified as a primary right.

In English personal property law, the feudal terminology does not apply. Instead, the most extensive right is known as title, which is short for entitlement (Bridge 2002, 28). Title in English property law is similar to ownership in civil law systems, but is not considered the same by English lawyers, because of the relativity of title. Relativity of title means that several persons can be entitled to an object at the same time and that English lawyers approach a possible conflict between two entitlements by looking at who has the stronger right. However, the outcome only answers the order of importance between the two rights in question and not in general (Bridge 2002, 29). Title is protected through the law of tort, which does not lead to specific enforceability, but rather to liability to pay damages. Because of these two reasons, English lawyers maintain that title and ownership are not the same. With regard to personal property law ‘title’ can nevertheless still be qualified as a primary right.
From a functional point of view the right of ownership as the primary right in a civil law system of property law finds its equivalents in the common law concepts of fee simple in land law and title in personal property law (Akkermans 2008, 404–407). These rights form the paramount entitlement a person can have in respect to an object.

The right of ownership or its English equivalents are normally exercised to use and enjoy an object. However, the right of ownership also represents a value that can be used to secure the performance of an obligation. This use of the right of ownership for security purposes can be achieved in two ways. First, a transfer of the right of ownership may be reserved until the performance of an obligation, usually payment of the purchase price. This type of security-ownership is known as retention of title or reservation of ownership. Retention of title or reservation of ownership is known in most legal systems, especially as Member States of the European Union are obliged under EU law to have such a security right. Secondly, the right of ownership can also be transferred under the obligation to re-transfer the right of ownership when an obligation has been performed. This type of security-ownership is known as a transfer of ownership for security purposes or *fiducia cum creditore*. This use of the right of ownership or fee simple is not allowed in all legal systems. Dutch law prohibits the transfer of ownership for security purposes; English law by operation of law transforms such a transfer of land into a property security right known as a charge. However, a transfer of title to a movable object for security purposes is allowed in the form of a mortgage.

2.2 Property rights to use

Most property law systems recognise rights to use. These rights grant the holder of the right, who is someone other than the owner, the right to use and/or enjoy the object of ownership. Generally speaking, these rights to use exist for a limited (short) duration of time with an extensive content or for a longer period of time with a more limited content (Akkermans 2008, 407–408).

Property rights to use for a limited amount of time include the right of usufruct in civil law systems. The right of usufruct is the right to use and enjoy an object for the duration of the life of the person holding the right or, when the person holding the right is a legal person, for a determined period of time, usually 30 years. The right of usufruct grants the holder the same powers to use and enjoy the object as the owner, but with the obligation to maintain the object and its value. When the objects of the right of usufruct are shares or other objects that may be invested, maintaining their value implies an investment duty for the holder of the right, the usufructuary. In exchange the usufructuary is entitled to the fruits the
Property rights: a comparative view

object produces for the duration of the existence of the right. These fruits can be apples from a tree in case of natural fruits, but also income from rent or dividend on a share in case of civil fruits. The right of ownership, when a right of usufruct is created, is deprived of or limited in its power to use and enjoy and is therefore known as bare-ownership for the duration of existence of the right (Terrê and Simler 1998, 591). English law does not recognise a right of usufruct, but the same result can be achieved through the use of trust law (Swadling 2007, 234). A trust is a legal device which enables that someone is appointed as the manager of a fund of trust assets (the ‘trustee’) for the benefit of someone else (the ‘beneficiary’). Within English law (the common law in a broad sense) two legal systems apply at the same time, which both can give rise to the creation of property rights: common law in a strict sense and equity. The trustee is frequently described as a person who holds a property right at common law, whereas the beneficiary is described as the holder of a property right in equity.

In English law the right of lease (the ‘term of years absolute’ or ‘leasehold’), which, besides the fee simple (or freehold), is the other estate known at common law under Section 1 of the Law of Property Act 1925, is a right to use and enjoy land for a limited period of time, which must be determined but which may be almost forever. The right of lease grants exclusive possession to its holder to the detriment of the holder of the fee simple. His right is, similar to bare-ownership in civil law systems, known as a remainder. The remainder can, as bare-ownership, be transferred to another person. In such a situation the remainder is known as reversion (Burn and Cartwright 2006, 510). With regard to the right of lease it can be seen how in a particular legal system a contractual right (lease) can develop into a right that is given such a strong protection that it becomes proprietary in nature. The civil law still considers lease to be a purely personal right, although generally – in particular with regard to immovables – the lessee is protected in his rights in case the owner/lessor transfers his right of ownership. The new owner then becomes lessor by force of law.

The leasehold in its turn resembles civil law property rights of emphyteusis and superficies. The right of emphyteusis is the right to use and enjoy a piece of land in the same way as the owner. The right of superficies is a property right that separates the right of ownership from a building or other construction from the ownership of the land. The holder of the property right of superficies becomes owner of the building or construction on the land on which the property right is created. The rights of emphyteusis and superficies generally exist for a limited period of time only. Usually a maximum of 99 years applies (Dupichot 2007, 5).

Besides these property rights for a limited period of time, there are also property rights to use for a very long duration of time. In civil law systems
this is the right of servitude, in English law the right of easement. Although only civil law systems share a basis in Roman law the House of Lords in its landmark decision *Re Ellenborough Park* has applied very similar criteria as in the civil law for the existence of servitudes (Swadling 2007, 252). A right of servitude or easement grants a specific right to its holder that must be tolerated by the owner of another piece of land. These rights can be a right of view or a right of way over the land of someone else. In order to create such a right it must be held by two parties, one who benefits, one who is burdened. These two parties must either hold a primary right or a property right to use on the land. A right of servitude can only be created in respect to land. Instead of the holders themselves, it should be one of the pieces of land that benefits and one of the pieces of land that is burdened by the existence of the right of servitude. The pieces of land must therefore, generally, be in vicinity to each other (Borkowski 1997, 170).

Alternatively, servitudes exist that are not real servitudes, i.e. dependent on two pieces of land, but which are personal. A personal servitude is a right that burdens a piece of land, but, different from a right of real servitude, benefits any specified person. The requirement of two pieces of land therefore does not apply to this category of servitudes. These personal servitudes are not recognised by all legal systems. In German law they are known as *beschränkte persönliche Dienstbarkeit* and in English law as restrictive covenants (Schwab and Prütting 2003, 431; Burn and Cartwright 2006, 668).

In English law there is also a property right that entitles a person to take something from the land of someone else. These rights are known as profits à prendre, and include a right to access the land of someone else in order to exercise the profit. The profit generally exists for a longer duration of time (Swadling 2007, 255). Similarly to profits, German law recognises real burdens in the form of a *Reallast*: a right that entitles its holder to a periodic payment in the form of a duty for the holder of the burden to pay. Performance of a *Reallast* will, because of this positive duty that the right imposes, not lead to specific enforceability. Instead it leads to liability (Amann 1993, 222).

Finally, legal systems also award a right to use and enjoy an apartment. Apartments create specific problems to property lawyers because of the technical rules concerning accession. In civil law systems, when a building is placed on a piece of land the ownership of the land comprises the ownership of the building, unless a right of *superficies* is created. However, an apartment is only a small part of the building for which a right of *superficies* cannot be used. Moreover, apartment buildings require a special management regime, different from a single building used by only one owner. Apartment rights are therefore needed to solve this problem.
These rights exist in the exclusive use of a certain space in the building, the co-entitlement to the common parts, and a membership of a compulsory association of apartment-owners. This is either created through a special type of co-ownership as is done in French law, a separate property right as is done in Dutch law and modification of the law dealing with ownership or fee simple in case of apartments, as is done in German and English law (Van der Merwe, De Waal and Carey Miller 2002).

2.3 Property rights as security

Besides property rights that entitle to the use and enjoyment of an object, property rights are also used to strengthen the performance of an obligation in the form of a security right. A property security right entitles its holder to, if not already, take possession, sell the object and compensate the claim on the debtor of the obligation with the proceeds of the sale. As a general prohibition most legal systems prohibit the holder of the property security right to keep the object for himself after non-performance by the debtor. An agreement to such extent is known as a *pactum commissoria* and already stems from Roman law. It is only allowed in France and under the application of European Union legislation in case of financial collateral arrangements between banks and other financial institutions (Van Vliet 2005, 190; Johansson 2009, 21–22).

Because property rights are used to secure the performance of an obligation, their existence is usually dependent on the existence of that obligation. This dependence is known as accessority and results in destruction of the property right if the obligation underlying the right extinguishes, for instance through payment of a claim. However, not all legal systems impose accessority in all cases. Property security rights can be divided in rights with respect to immovable objects (land or buildings) and in rights with respect to movable objects and claims.

In civil law systems the property security right that is used to secure the performance of a, usually monetary, obligation is a right of pledge or a right of mortgage (hypothec). A right of pledge can exist with and without the transfer of possession. In the first case, the right of pledge is known as a possessory pledge and implies that the holder of the right will be, for the duration of the underlying obligation, in possession of the object. The disadvantage of a possessory pledge is that the owner can no longer use his object. This can in particular be problematic if the object is needed to trade in order to earn income to perform the monetary obligation underlying the property security right. A non-possessory pledge is therefore a solution for this (Legeais 2006, 359). It is the same right as a possessory right of pledge, but without the requirement of a transfer of possession. Therefore, the owner of the object remains in possession, but with the risk
that in realisation of the right of pledge in case of non-performance of the underlying obligation, the holder of the right of pledge takes possession and the object is sold in order to compensate the claim of the holder of the right of pledge.

The possessory pledge originates in Roman law, it is therefore recognised in all civil law systems, but is also known in English law, where it is a specific type of bailment, a way of holding rights on behalf of another (Kaser 1971, 458; Swadling 2007, 269). The non-possessory pledge is recognised in particular as an alternative to the transfer of ownership for security purposes. It is therefore recognised in Dutch law, but also, since 2006, in French law. In English law, non-possessory security rights also exist in the form of charges. Any object may be charged to secure the performance of an obligation. This can be a fixed charge, in which case it is immediately clear what objects fall under the charge. However, a charge may also be floating in which case it hovers over objects that can be substituted until realisation of the charge, in which case the floating charge becomes fixed (Goode 2004, 587).

In respect to immovables, civil law systems recognise a right of hypothec. A right of hypothec is a non-possessory security right that entitles its holder to the value of the immovable or land. The right of hypothec, like the right of pledge, dates back to Roman law, and is traditionally accessory to the claim the performance of which it seeks to secure (Kaser 1971, 462). However, exceptions exist in relaxation of accessority to enable the use of the right of hypothec to secure a future claim and to enable the re-use of the right of hypothec. Securing a future claim is necessary to allow credit facilities. Re-using the right of hypothec achieves what is known in France as a rechargeable hypothec modelled to the rechargeable mortgage in German law and the so-called ‘euro-mortgage’ proposed by a European Union working group. The rechargeable hypothec was introduced in France in 2006 together with the reversed hypothec. A reversed hypothec is a right of hypothec for a claim that increases instead of decreases in value and is used, primarily, as supplementary income to pension benefits (Grimaldi 2005, 33).

German law also recognises a strictly non-accessory property security right on immovable objects in the form of a right of Grundschuld. The Grundschuld is a right that entitles its holder to take possession and sell the object. The right is not dependent on any claim and is usually created by the owner himself, before the right is transferred for security purposes to a creditor in the same way as ownership can be transferred for security purposes. The result is a security-Grundschuld right (Baur, Baur and Stürner 1999, 505).

In English law the right of mortgage was originally a transfer of the fee
simple for security purposes. However, because such a security transfer was considered to give the creditor too much power, the Law of Property Act 1925 changed this type of transfer into a legal charge by operation of law. As a result a mortgage on land is a charge, i.e. a non-possessory property security right and no longer a transfer of the fee simple for security purposes. Mortgages of movable objects remain allowed (Burn and Cartwright 2006, 724).

2.4 Other property rights

The above catalogue of property rights allows a classification along the traditional lines of property law. However, due to societal changes property law systems are moving away from a classical system of property law (Van Erp 2009). This movement away from the classical system of property law also brings the rise of new property rights and the acceptance of new objects of property law, such as emission rights and ‘virtual’ property (domain names, but also a protected position in Internet computer games or in virtual worlds such as ‘Second Life’).

The most important example of these new property rights are those that entitle its holder to the acquisition of a property right. Different from classical property rights that are derived from an existing more extensive property right, these acquisition rights look towards a right that must still be acquired. Acquisition rights do not limit, e.g., the right of ownership in its content, but force the transfer of such right. German law is most famous for these rights in the recognition of Anwartschaftsrechte (Strauch 1984, 288). These acquisition rights emerge when a personal right arises to which the German Civil Code provides additional protection. The best example of this is the position of the acquirer in a situation of reservation of ownership. The right of ownership in such a situation remains with the owner and the other party will only have a personal right to expect the acquisition of the right of ownership. The expectation right is protected in the German Civil Code in such a way that the only requisite for the transfer of ownership is the fulfilment of the condition under which it was created. The expectation right is therefore awarded proprietary status through the case law of the German Federal Supreme Court (BGH). Other examples of acquisition rights are estate contracts in English law, that give rise to a property right, because English law allows specific enforceability of contracts relating to land (Swadling 2007, 259). The same applies to options to purchase that are recognised in English law, because of the same reason, but also in German law under the heading of the dingliche Vorkaufsrecht (Staudinger and Wolfsteiner al 2002, 769).

A second type of property right that does not fit very well in the classical distinctions is the suretyship in France. A suretyship is a contract by which
one party declares himself liable for the debt of another party (Aynès and Crocq 2003, 15). In a regular suretyship agreement, which is classified as a personal security right, as there are no property rights involved, the surety is liable with his full set of assets (whole estate or patrimony). However, when the surety creates a limited property right, a right of pledge or hypothec, on his own asset that serves as security for the payment of a debt of someone else this is known as a cautionnement réelle or real suretyship (Aynès & Crocq 2003, 43). The legal nature of a real suretyship has been much debated in France, and several decisions of the French Cour de Cassation have made the classification of the right even more difficult (Grimaldi 2005, 454). Eventually the French Cour de Cassation classified the real suretyship as a distinct property security right.

The classification by the French Supreme Court is remarkable, because in other legal systems existing property security rights may also be used to secure payment of the debt of another. However, until 2006, this was not possible under French law and therefore the need to classify this distinct property right arose. Since 2006 the right of pledge and hypothec may also be used for this purpose, but the classification of the French Cour de Cassation remains (Legeais 2006, 57–61).

3. Developments

Comparing property law systems becomes more and more important. The traditional assumption that property law systems diverge and cannot be harmonised is proven false by comparative legal analysis (Van Erp 2006b, 1043). Moreover, through comparative analysis common developments that bring property law systems closer to each other can be discovered (Van Erp 2009). Some of these developments will be dealt with here.

3.1 The increasing importance of European and global economic and legal integration

Property law has traditionally escaped the influence of harmonising measures from a European level. There has, in other words, been almost no European legislation dealing with the core of property law. Exceptions to this include directives on the protection of cultural goods and on financial collateral arrangements. However, there is more European legislation that, although it does not affect the core of property law, touches upon aspects of property law. Examples are the Directive combating late payments that forced Member States to recognise a reservation of ownership or retention of title, the Insolvency Regulation that does the same, but also European legislation dealing with soil protection and the trade in emission rights. It can, therefore, be said that a growing body of European Union property law exists (Sagaert 2007, 301; Akkermans 2008, 486).
Property law is also covered by the current revision of the European Union consumer *acquis*, the existing European Union law in the area of consumer transactions and, more specifically, consumer protection. Under an 2001 Action Plan from the European Commission a large group of academics has been researching the core of European private law in order to draft a Common Frame of Reference (Von Bar et al 2009). Certain areas of property law have also been included in the review, although in these areas not much European property law in a strict sense can be found (Von Bar and Drobnig 2002, 442). These are areas of property law that have a direct impact on contract law. They include transfer of ownership of movable objects, property security rights on movable objects and trusts (Von Bar et al 2009, 24). The Draft Common Frame of Reference (DCFR) is therefore a possible source for future European Union property law.

Finally, property law is now increasingly dealt with on a global level. Examples are the 2001 Cape Town Convention on international interests in mobile equipment (aircraft, railway rolling stock, space objects), the 2008 draft Convention on substantive rules regarding intermediated securities (both the work of Unidroit, an international organisation for unification of the law <www.unidroit.org>) and the 2007 Legislative guide on secured transactions (under the responsibility of Uncitral, a United Nations organisation for unification of the law <www.uncitral.org>).

3.2 Changes in objects of property law

A general problem that all property law systems are facing is the rise of new objects in property law (Reich 1964, 733; Libchaber 2004, 239). Property law systems are generally old systems of law that have hardly changed over time. The catalogue of property rights that deals with objects is mostly quite old. However, since the French Revolution and, especially, since the Industrial Revolution the importance of land as an object of property law has decreased and the importance of movable objects and, most recently, immaterial objects has increased (Libchaber 2004, 239). These immaterial, or intangible, objects are, for example, ideas and other intellectual property rights and, especially, claims. Claims are rights to the performance of an obligation usually derived from a contract. Although these claims are personal in nature – they only apply between the parties – they represent a value that can be an object of property law. Claims are used in modern finance to serve as subject matter for property security rights. This development from material to immaterial objects has been named dematerialisation (Libchaber 2004, 329; Johansson 2009, 2).

The problem with dematerialisation is that the old rules of property law do not always apply adequately to these new objects of property law. For example, money is now, in the last few decades, held in bank accounts
rather than in a collection of coins and paper notes. A bank account is, in terms of property law, classified as a claim on a bank for the payment of money in coins and bank notes. When money is transferred from one bank account to another, the rules of property law apply. However, the transfer rules of property law generally require a transfer of possession, i.e. factual control, over the object from the transferor to the transferee. However, modern banking practice makes a transfer of money on a bank account into an administrative act where one account is credited and the other is indebted, without any transfer of possession of any object. In terms of property law, in any case, the claim of the transferor is certainly not transferred to the transferee (Heermann 2003, 167; Delebecque and Germain 2004, nr. 2303–2312). The rules of property law therefore barely apply here anymore. Comparable remarks can be made about intermediated securities. Shares, stocks and bonds, are no longer kept physically by, e.g., a bank, but have been reduced to book entries (Johansson 2009, 14). Transfer of shares is therefore a process of crediting one account and debiting another.

3.3 Party autonomy in property law (numerus clausus)
One of the distinguishing features between contract law and the law of property is the limited role of party autonomy in the law of property. In classical contract law, the freedom of contract, as the supreme expression of party autonomy, is seen as the most valuable starting point (Atiyah 1979; Gordley 1991). In property law, the starting point is completely the opposite: limitation on party autonomy in order to safeguard legal certainty (Van Erp 2006a, 5–6). According to the numerus clausus principle of property rights only those property rights can be created that are set forth by, at least in principle, legislation and only the content as laid down in legislation can be given to property rights created by the parties. However, that is not to say that parties may not make clever use of party autonomy to achieve certain effects in the law of property.

First of all, parties may use the law of property in combination with the law of contract to enforce the performance of a contractual obligation. Although originally the law of property only allows the use of property security rights for this, also other property rights are being used for this purpose. It is especially in German law that this use has been invented (Baur, Baur and Stürner 1999, 370–371). The best example is the use of a right of real servitude. A right of servitude may only contain a negative duty. It is therefore almost impossible to enforce a positive duty with property effects. Nonetheless, when a servitude is negatively formulated, such as a prohibition to have a petrol station on a piece of land, and that right of servitude is combined with a contract that limits the holder of that
right to enforce it, the practical effect can be the imposition of a positive duty. This can be done by formulating the contract in such a way that the right of servitude will only be exercised when the holder of the servient land, on which an actual petrol station exists, stops buying a specific brand of petrol from the holder of the dominant land, i.e. in this case the petrol company. In the latter situation, the petrol company can demand removal of the petrol station. The final outcome in practice is a positive duty for the owner of the petrol station to buy his petrol from that specific petrol company, secured by a right of servitude. These servitudes are therefore known as security servitudes (Füller 2006, 505–506).

A second example of how parties by making autonomous choices can use property law to attain results which may not have been envisaged by the drafters of, e.g., civil codes can be found when looking at the ‘stacking’ of property rights. The use of stacking is controversial (Struycken 2007, 368–378). An example of this is a municipality that does not want to transfer ownership of the land it is selling to, e.g., a developer, because it wants to control land use also in its capacity as private law owner. Instead of transferring the right of ownership, the municipality will use a long lease or right of emphyteusis, that will grant the holder of the right control over the land, but not the primary property law entitlement. However, in order to obtain finance it might be necessary for the holder of the right of emphyteusis to have ownership of the buildings that are to be constructed on the land. To attain this purpose a right of superficies can be created on the right of emphyteusis. Further, when the building that is constructed is an apartment building the right of ownership that is created by the right of superficies on the right of emphyteusis will be separated into rights of apartment, which can each, in their turn, be subject to a right of hypothec to finance the acquisition of the apartment right on the right of superficies on the right of emphyteusis on the right of ownership of the municipality.

3.4 Flexibilisation of the specificity principle
The principle of specificity prescribes that each object of property law must be identifiable. In the classical model of property law an unidentified object leads to the impossibility to hold a property right on such an object. This fundamental starting point of a legal system originates from a time where land was the most valuable and important object of property law. However, with the changes in objects of property law and the movement towards the recognition of immaterial objects, in particular claims, as subject matter of property law, the principle of specificity has come under pressure (Van Erp 2006a, 14–16).

First of all, claims are a-typical objects of property law. They are fundamentally different from tangible objects, as they exist for a short duration...
of time only and cannot as easily as physical objects, i.e. by handing over factual control, be transferred to another person. Nevertheless, claims are the primary source of business finance today. The principle of specificity determines that for each object of property law a separate property right must exist. When a trader has several thousands of claims he wishes to provide as security for the payment of a loan, according to the specificity principle each claim would need to be identified as well as to be described individually ex ante in order to create a valid right of pledge. A steady pressure from legal practice has led to a relaxation of the principle of specificity in respect to security rights on claims. It is generally considered sufficient that the claims can be described ex post, in other words at the moment of enforcement of the security right. It is now in several legal systems possible to transfer claims, especially for security purposes, by making use of a list, in which these claims are described in generic terms. In French law this is known as a cession Daily after the name of the law that introduced this possibility (Crocq 1995, 27; Legeais 2006, 377). In the Netherlands a further flexibilisation occurred through the recognition of valid rights of pledge on claims that have been ‘specified’ by a general reference to the administration of the debtor/security provider.

Another development that affects the specificity principle is related to how the transfer of large quantities of bulk objects, such as grain, takes place. In these situations it can be difficult to identify the object and it is unclear what exactly belongs to a certain bulk. To solve this problem it is made possible to transfer a quantity of goods by identifying the bulk, rather than the individual parts the bulk comprises (Van Vliet 2000, 93).

As a consequence – next to what can be seen with regard to the principle of numerus clausus – also the principle of specificity is no longer applied rigorously. A strict identification in case of security rights on multiple and shifting claims is not necessary and in case of a transfer of quantities of the same material that cannot be easily separated from each other (transfer of goods ex bulk) a meticulous identification of the goods is also not required. Instead, one single transaction suffices to create or transfer rights in respect to these objects.

3.5 Flexibilisation of the publicity principle

The principle of publicity, which demands that a property right is visible to third parties, fulfills a very important function in the law of property: it offers justification for the third party effect. Therefore in the classical model of property law all property rights are subject to publicity. When movable objects are involved, publicity is achieved by factual control. The owner of an object is also the person in factual control. When, for some
reason, the factual control has been handed over to someone else, this is a sign of changed property relations; either a transfer of ownership or the creation of, for instance, a right of pledge. In respect to immovables there is land registration. In the classical model the creation, existence and termination of property rights in respect to land are to be registered so that third parties may inform themselves before acquiring a property right in a piece of land.

However, especially in the area of property security rights developments have taken place that have resulted in a less strict application of the publicity principle and the development of alternative techniques, other than transfer of factual control and registration, to inform third parties. This development was caused, among others, by the rise of a transfer of ownership of movables and claims for security purposes, whereby factual control remains with the debtor, rather than with the creditor/security-owner. To the outside world the debtor, although no longer owner, still seems owner. This is known as reputed ownership and requires protection by third parties in good faith, wishing to acquire property rights in these movables or claims. It may also require new techniques to inform third parties, such as a duty to provide information by the transferor of a property right to the transferee. The same applies to the creation of non-possessory property security rights such as the non-possessory pledge and charges. Also there, the impression remains that the owner of the object is in full, i.e. unburdened or unlimited, control and the other party will need to be informed otherwise.

In respect to property security rights in respect to land, registration already offers a solution for non-possessory security rights, such as the rights of hypothec and mortgage. However, the flexibilisation of the law on hypothecs, for instance the recognition of a rechargeable hypothec, also leads to a different approach whereby a right of hypothec may still be in the register although it is completely repaid, waiting for another creditor on whose behalf the right may be recharged (Grimaldi 2005, 33–36).

3.6 Less importance of the accessority principle in the law on security rights

Another important development concerns the principle of accessority. Accessority means that a link exists between a property security right and the underlying (secured) claim. A repayment of the claim will lead to a loss of the security right. This principle protects the debtor from undesired use of the security right by the creditor. Recent developments in Germany with non-accessory property security rights have shown how dangerous the lack of accessority can be (Clemens 2007, 737). There, non-accessory property security rights on land, rights of Grundschuld, had fallen into the
hands of companies that were not bound by the corresponding underlying contractual relationship due to a lack of accessority. As a result the rights of *Grundschuld* were sometimes realised in a situation where the debtor had paid off his debt. Legislation to remedy this is now being considered, now that it became clear that contractualisation of property law also has its negative side effects.

Interestingly enough, this non-accessory property security right has, for many years, been envisaged by the European Commission as a model for a Euro-mortgage, a pan-European property security right in respect to land (Stöcker 1992). Whether, after these developments the emphasis on the need for a non-accessory security right remains, is to be seen. In the meantime, the principle of accessority remains strong in most legal systems.

Many legal systems nevertheless relax the principle of accessority to make it possible that a property security right can be created in order to secure the performance of a future claim. This is particularly useful when credit is given, which can fluctuate. In such a situation a credit facility may be opened which, at the moment of its creation, is not used instantly. In other words, at the moment of creation, the claim which the security right seeks to secure does not yet exist, but will come into existence once money is actually borrowed. The principle of accessority does, as a matter of principle, forbid the immediate creation of a property security right under these circumstances, but the principle is more and more relaxed in the interest of commerce to allow the creation of a valid security right at the moment of the opening of the credit facility. Examples are the legal systems of the Netherlands and, since 2006, of France.

### 3.7 Growing acceptance of general and fluid security rights

A final development in the law of property concerns the acceptance of general security rights. In the classical model of property law there is only room for a single set of property rights per object. However, there is a growing need in legal practice to be able to use one and the same property right on a set of objects (a changing ‘fund’ of assets), rather than having to use one property right per object. The principle of specificity does not allow this. Moreover, creditors are treated equally, the *paritas creditorum*, unless the law explicitly gives a creditor priority. This priority is limited to a specific asset or group of assets of the debtor’s patrimony. An example of priority is a creditor secured by a security property right. The limitation of the priority is, again, an expression of the specificity principle, which in this case protects ordinary, i.e. unsecured, creditors against creditors who may be over-secured. Recognising a general security right would violate the specificity principle, as this would hardly leave any other objects for the other creditors in, e.g., an insolvency procedure.
Nonetheless, general security rights do exist. The best example is the English floating charge, a property security right on land, movable objects and claims (also known as ‘chattels’ and ‘chooses in action’ in English property law terminology), that only becomes a fixed charge when it ‘crystallises’ upon default by the debtor. Once the charge becomes a fixed charge, the chargee is entitled to take possession and sell objects to compensate his claim with the proceeds of sale (Goode 2004, 676). In French law a similar situation is achieved, but with a different technique. The principle of specificity does not allow the creation of a single property right in respect to multiple objects. However, it is possible to combine certain objects into one group which, as a group, can be subject of a single property security right. The group is known as a *fonds de commerce* or fund of commercial assets and can be the object of a special right of pledge (Malaurie and Aynès 2005, 33–35). German law recognises an *Unternehmen*, or undertaking, that can, under conditions be the object of a single right of pledge (Hattenhauer 1989, 101).

4. Conclusion
The various property law traditions, particularly civil law and common law, share leading principles and ground rules. These principles and ground rules create a basic framework, within which further policy choices have to be made, such as how far third parties in good faith should be protected in the interest of commerce. The major differences between the property law traditions are not so much the result of divergence regarding the basic framework, but regarding the technical rules which have been formulated over centuries. In other words: the existing divergence is primarily the result of historical development. On the continent of Europe a major historical moment was the French Revolution, whereas all property law traditions underwent the changes caused by the Industrial Revolution. Developments continue as a result of regional and global economic and legal integration. This even affects the application of the leading principles, which nevertheless, in spite of these changes, show a remarkable resilience.

Property law is therefore slowly developing into a system fit for the twenty-first century, although much work needs to be done to ensure coherence both at national level as well as in the European and international legal order. The analysis of property rights in terms of principles, policy choices, ground rules and technical rules have proven to be a model that can be worked with.

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