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## NEW BELGIAN PROPERTY LAW

*Abstract: The purpose of this paper is to present newly enacted Book III on property of the Belgian Civil Code. However, the author does not make a review of the entire Book III, but makes a selection of the most interesting features of this new piece of legislation in the field of property law.*

**Key words:** Belgian Civil Code, Book III, Property law.

### 1. INTRODUCTION

By the Act of 4 February 2020, the Belgian legislator has introduced a Book 3 of the new Belgian Civil Code, which was published in the *Official Gazette* of 14 March 2020.<sup>1</sup> The Law came into force on 1 September 2021, and is applicable to property rights created after this date.<sup>2</sup> The provisions pertaining to land registration shall come into force as of date determined by the King, but no later than 1 July 2022.<sup>3</sup>

Before the adoption of the new Book 3 on property, the Belgian property law was fragmented. It was regulated by special statutes and more frequently by case law, because the existing rules dating back to 1804 became obsolete.<sup>4</sup> In 2016, professors Vincent Sagaert and Pascale Lecocq were charged with the task of making new comprehensive codification of

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1 Wet houdende boek 3 “Goederen” van het Burgerlijk Wetboek (1)/ Loi portant le livre 3 «Les biens» du Code civil (1), ([http://www.ejustice.just.fgov.be/mopdf/2020/03/17\\_1.pdf#Page7](http://www.ejustice.just.fgov.be/mopdf/2020/03/17_1.pdf#Page7), 18. 3. 2022). The text of the Book 3 was translated into English by Vincent Sagaert, one of the drafters of the Book 3, Ghijlsbrecht Degeest, Marie-Laure Degroote, Bram Maeschaelck, and Benjamin Verheyne, and this translation was published in 2021 in *European Property Law Journal*, Vol. 10, No. 1, pp. 108–175, and I will rely on this translation for the purposes of this paper.

2 Sagaert, V., 2021a, Preface, *European Property Law Journal*, Vol. 10, No. 1, p. 2.

3 Verheyne, B., 2021, Land Registration in the New Belgian Property Law, *European Property Law Journal*, Vol. 10, No. 1, p. 27.

4 Sagaert, V., 2021a, p. 1.

property law.<sup>5</sup> The drafters decided to set aside the existing provisions, and started their work from square one with the exception of the provisions regarding the condominium law.<sup>6</sup> After several years of hard work, public consultations which resulted in more than “200 pages of observations, criticism, proposals, etc.” the final draft was made and unanimously adopted by the Parliament.<sup>7</sup>

The Book 3 has 188 articles, and is divided into 8 titles where Title 1 is dedicated to the general rules common to the whole of property law, Title 2 contains the classification of goods, and other 6 titles regulate particular property rights. The articles are enumerated so that they begin with the number of the book of the Code followed by a dot and a number of a particular article. So, the first article is 3.1 meaning article 1 of the Book 3 of the Code. Such enumeration is seen for instance in the Civil Code of the Netherlands.

The intention here is not to give complete review of all 188 articles of this new piece of legislation, but to highlight some parts which seem particularly interesting and/or innovative from a practical and/or theoretical point of view.

## 2. THE GENERAL PART

The General part of the new Book 3 of the Belgian Civil Code contains principles common to the whole of property law, as well as general rules on property rights, general provisions on objects of property rights, and on loss and acquisition of property rights, on land registration, on publicity of property rights, and on estate.<sup>8</sup> This section of the paper does not pertain to the whole general part but highlights several general principles.

Quite unusually for a property law regulation the first principle promulgated is party autonomy. Namely, the Article 3.1 states that parties may derogate from the norms in the Book 3 unless these are definitions or the norms which expressly suggest otherwise.<sup>9</sup> The provisions which preclude parties to deviate from them are exceptions, and these are the rules prescribing the time limits of property rights, and the rules on compulsory

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5 Sagaert, V., 2021b, The Background and General Principles of the New Belgian Property Law, *European Property Law Journal*, Vol. 10, No. 1, p. 5.

6 *Ibid.*

7 *Ibid.*

8 Sagaert V. *et al.*, 2021, Act of 4 February 2020 containing Book 3 “Property” of the Civil Code, *Belgian Official Gazette* 17 March 2020, Arts. 3.1–3.37.

9 *Ibid.*, Art. 3.1.

co-ownership.<sup>10</sup> This wide freedom of the parties to shape their relationships regarding property rights is limited by the *numerus clausus* principle in Article 3.3. This article stipulates that only the legislator may create property rights, and further enumerates them giving a closed list thereof.<sup>11</sup> The definitions of property rights contain core elements which the parties cannot change.<sup>12</sup> In this way the parties are given wide but framed space within which they can freely manipulate with pre-determined tools: particular property rights.<sup>13</sup>

Another important principle is the principle that property rights follow their objects and entitle their holders to enforce their rights against any subsequent acquirer of the object.<sup>14</sup> It is refreshing to see this principle expressly spelled out as a general rule in a positive law instrument because, the author of these lines too holds that, this characteristic of property rights called *opposabilité*, *Entgegensetzbarkaeit*, *suprotstavljivost* etc. is a trait that delineates property rights from other rights which as their object may have goods and other subjective rights.<sup>15</sup>

A very interesting rule is that when a holder of property use right who acquired it for a consideration which constitutes a personal liability transfers this use right to another person remains jointly and severally liable with the transferee for the consideration due after the transfer.<sup>16</sup> For instance if A constituted a real use right in favor of B in exchange for B's obligation to construct a building, B cannot discharge himself from this duty completely by transferring his use right to C, because A could not estimate C's liquidity and solvency in the moment he granted the right to B.<sup>17</sup>

### 3. OBJECTS OF PROPERTY RIGHTS

There is a question of what it is that one can have a property right on? The general category used is objects. The objects are corporeal if they are perceptible with senses and instantaneously measured, while the incorporeal objects are the residual category.<sup>18</sup> Another important category is a

10 Sagaert, V., 2021b, p. 13.

11 Sagaert V. *et al.*, 2021, Art. 3.3.

12 Sagaert, V., 2021b, pp. 12–13.

13 *Ibid.* p. 14.

14 Sagaert V. *et al.*, 2021, Art. 3.1, §2.

15 Vodinelić V. V., 2020, *Gradansko pravo*, Beograd, Pravni fakultet Univerziteta Union, JP Službeni glasnik, pp. 210–211.

16 Sagaert V. *et al.*, 2021, Art. 3.6, §2.

17 Sagaert, V., 2021b, p. 17.

18 Sagaert V. *et al.*, 2021, Art. 3.40.

good which denotes any object, therefore both corporeal and incorporeal, which is liable to appropriation including property rights.<sup>19</sup> It is the goods so defined that are the objects of property rights.<sup>20</sup> In this way the drafters intended to translate “the increasing importance of incorporeals and new technologies into the new statute.”<sup>21</sup> Whether the category of incorporeal goods will be good enough to facilitate the development of property law regarding digital objects remains to be seen. There are strong theoretical arguments that digital goods constitute a separate kind of object and that they are not incorporeal in the same way as rights are.<sup>22</sup> However, the definitions offered in the statute seem flexible enough to make such a development possible.

#### 4. THE CATALOGUE OF PROPERTY RIGHTS

The property rights are listed as ownership, co-ownership, property use rights, and property security rights.<sup>23</sup> Property use rights are: easements, the right of usufruct, the right of emphyteusis, and the right of superficies.<sup>24</sup> Property security rights are: specific statutory priority rights, pledge, mortgage, and the lien.<sup>25</sup> There are three matters that attract attention especially from the perspective of Serbian property law.

First, in line with what has been said in the previous section the right of ownership is not limited to corporeal goods.<sup>26</sup> Indeed the Article 3.50 which enumerates the powers of the owner uses the term object of the right remaining thus neutral as to corporeality of the object of the right of ownership.

Second, unlike in Serbian law which recognizes both common ownership (*zajednička svojina*), and co-ownership (*susvojina*), the former denoting the situation in which two or more persons have undetermined shares in a right of ownership over an object, and the latter pertaining to situation in which the shares in the right of ownership are determined, the Belgian legislator provides for a right of co-ownership only.<sup>27</sup>

19 *Ibid.* Art. 3.41.

20 *Ibid.* Art. 3.7.

21 Sagaert, V., 2021b, p. 6.

22 More on this see Paška, P., 2017, *Virtual Property. Towards a General Theory*, doctoral dissertation, European University Institute.

23 Sagaert V. *et al.*, 2021, Art. 3.3.

24 *Ibid.*

25 *Ibid.*

26 Baeyens, S., 2021, Ownership in the New Belgian Property Law, *European Property Law Journal*, Vol. 10, No. 1, p. 57.

27 Sagaert V. *et al.*, 2021, Art. 3.68.

Third, the right of superficies is the right which grants its holder the ownership of a volume of another's land so the holder may have plantations or constructions on that volume of the land whether it lies below, on or above the surface of another's parcel.<sup>28</sup> What is interesting from the perspective of Serbian property law is that there was an attempt to introduce such a right in Serbia. The Draft Law on Ownership and Other Property Rights published in 2007 provided by virtue of Article 347 the right to have a building on another's land, to add a construction to an existing building or to build a new construction on another's land.<sup>29</sup> However, this draft has never been adopted. Several years later a pre-draft of the Civil Code was published, and in Book 3 on property in Article 1925 the building right was once again envisaged.<sup>30</sup> This time its content got one step closer to what was the idea of Belgian legislator regarding volumes of land, because it prescribed that the building right meant owning a construction under or above the surface of another's land.<sup>31</sup> For reasons unknown to the author, work on the final Draft of the Civil Code seized, and the opportunity to modernize Serbian property law was missed.

## 5. VOLUMES OF IMMOVABLES

Volumes of immovables, or volumes of land were mentioned in previous section, and this is something that deserves more attention. In an attempt to optimize the use of land the statute allows land owners to grant use rights of separate volumes of their parcels.<sup>32</sup> This means that an owner may grant one property right, or may set one purpose for a volume of land underneath the surface of his parcel, the other right or purpose for a certain volume on and above the surface, and third right or purpose for the volume above this one.<sup>33</sup> The intention is not only to provide owners with the possibility to exploit the value of their land to the fullest extent, but also to prevent excessive use of space for buildings.<sup>34</sup> The logic is that the exploitation of one parcel of land by several persons for different purposes

28 *Ibid.* 3.177.

29 The text of this Draft Law was published in Serbian and German in 2007 in: *Ka novom stvarnom pravu Srbije/Auf dem Wege zu einem neuen Sachenrecht Serbiens*, Belgrade, Ministry of Justice of the Republic of Serbia, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ).

30 The pre-draft was published in *Serbian Bar Association Review for Legal Theory and Practice "Branic"*, 3/2018 and 4/2018.

31 *Branic*, 4/2018, p. 94.

32 Sagaert, V., 2021b, p. 24.

33 *Ibid.*

34 *Ibid.*

will reduce the number of parcels needed, and will give a chance to those who own more than one piece of land to leave some of those unbuilt or destined for other purposes.

It remains to be seen if this possibility will lead to a more optimal use of space, but the idea of enabling land owners to dispose of not only the surface of their land but of volumes under and above that surface, or to put these to different uses is novel and interesting.

## 6. CONCLUSION

The new Book 3 of the Belgian Civil Code aims to bring the Belgian property law in line with the 21<sup>st</sup> century. The drafters wanted to acknowledge the increasing significance of incorporeal objects so they provided for flexible definitions of objects and of ownership which may leave enough room for practice to adapt the letter of the code to the whims of rapid technological developments. They have provided for the significant amount of freedom to the parties to regulate their relations in an area of law which is traditionally perceived as rigid and static, dominated by cogent, not default rules. They have changed the way in which the land as a resource can be seen in hope to optimise its use. And these are just some distinguished features. What will be the result in practice; will the rules live up to the wishes of their drafters, remains of course to be seen. In any case it will be interesting to follow these developments in the future.

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## NOVO STVARNO PRAVO BELGIJE

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### APSTRAKT

Svrha ovog priloga je da se predstavi nova Knjiga treća Građanskog zakonika Belgije. Ipak, autor ne ide u iscrpnu analizu cele knjige, već akcentat stavlja na najinteresantnije delove ovog novog propisa u oblasti stvarnog prava.

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