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Vacuum instruments and securing the performance interest

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Abstract: The question as to whether the buyer of immovable property should still be able to receive the ownership of the property in case the seller goes bankrupt prior to conveyance, has sparked academic debate in many jurisdictions. In the context of immovable property, many scholars feel it is justified to provide additional protective measures in favour of the buyer and hence provide buyers with some sort of proprietary interest, prior to conveyance. But exactly which circumstances justify these protective measures under current law? And what is the most desirable way to protect the buyer in terms of scope of application and effect? This article will answer these questions on the basis of a newly-developed theoretical framework.

Keywords: Vormerkung, immovable property, bankruptcy, attachment, double grant, nemo plus, fixation principle

1. Introduction

You have bought a house and transferred the purchase price, but the seller goes bankrupt prior to conveyance. Whether and to what extent will you still be able to receive the ownership of your new residence? It is a classical property law dilemma which has sparked academic debate in many jurisdictions. In Scotland, this question was embodied by a rather legalistic and technical debate following the *Sharp v Thomson* and the *Burnett's Trustee v Grainger* judgments. In South Africa, *Sarrahwitz v Martiz* provides a human-rights-based approach to this question.

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German doctrine has focused on the 'Vormerkung' (also known as advance/priority notice), whereas the Dutch solution is centered around the client account of the civil law notary. In Anglo-American jurisdictions, the Vendor Purchaser Constructive Trust immediately comes to mind.

In the context of other types of assets than immovables, the outcome based on the *prior tempore*-principle is often deemed satisfactory. This principle entails that if the establishment of the concursus creditorum/fixation of the debtors' assets takes place prior to delivery, the transferor lacks the necessary power to dispose and hence, the transfer can no longer take place.[1] However, in the context of immovable property, especially property for housing purposes, many scholars feel it is justified to provide additional protective measures in favour of the buyer. But exactly which circumstances justify these protective measures under current law? What are the implications of these measures for the legal practitioners involved in the transfer of land? And what is the most desirable way to protect the buyer in terms of scope of application and effect?

This article will answer these questions by providing a theoretical framework that enables us to compare these protective measures, by examining how these measures 'score' on different features of proprietary interests. Section 2 explores the central problem of this article and its background, and introduces said theoretical framework. Section 3 applies the conceptual framework to the South-African, German, Dutch and Anglo-American solution, and hence answers the question as to when buyers are protected and what this implies for legal practitioners. Section 4 scrutinises whether and to what extent the protection of the buyer is desirable, and uses the transaction costs as its most important criterion to determine the desirable traits of each instrument. Section 5 provides a conclusion.

2. Setting the scene

Without any further protective measures such as the ones set out in the introduction, a conflict between a buyer and (a) creditor(s), or between two buyers, is usually solved by rules that boil down to a 'first come, first served'-principle, which in turn follows from the *nemo-plus* rule. In the context of immovable property, 'coming first' must often be understood as 'registering first', since registra-

1 'The establishment of the concursus creditorum' and 'the fixation principle' are used interchangeably throughout this article. The pari passu principle, which is doctrinally speaking distinct from the abovementioned principle, is also implied in the terminology of 'the establishment of the concursus creditorum' and 'the fixation principle'. 'Delivery' and 'conveyance' are also used interchangeably.

tion is often required for the transfer itself or – in consensual transfer systems – third-party effect of the transfer. Although this system shines through its simplicity, problems arise in the context of agreements where a party only wishes to perform if the other party performs too (hereafter also referred to as 'mutual contracts'), such as a transfer of immovable property in exchange for, *e.g.*, a purchase price. Both parties to such an agreement *only* want to perform if the other party has already performed or if they know for sure that the other party will perform, which implies that neither of the parties wants to perform first. The most ideal solution to this stalemate is therefore a simultaneous exchange, meaning that – in the context of a sale/purchase – the transfer of immovable property takes place at exactly the same moment as the transfer of the purchase price.[2] This result is, however, difficult to achieve (a and b) and has an additional downside (c):

a) Suppose parties agree to transfer the asset and the purchase price simultaneously at 3 PM on December 1st. This means that parties themselves or, more realistically, a legal practitioner involved in the transfer of land, needs to check at 2.59.59 PM whether both parties still have the power to dispose of the property and the purchase price. This will inevitably give rise to transaction costs.[3] One might consider the risk that something happens in the last seconds prior to the transaction as purely theoretical, but Dutch case law proves that in these types of transactions, 'theoretical' risks *do* materialise.[4] Furthermore, given the fact that parties to a transfer pay a considerable fee to the legal practitioner involved in addition to the purchase price, the risk that the transaction fails because of something that could have been checked by the legal practitioner, is unacceptable. The last second check – and its costs – are therefore an absolute necessity.
b) Many jurisdictions have mechanisms that interfere with the power to dispose of an asset with retroactive effect, which brings about that – even though the legal practitioner determines at 2.59.59 PM that both parties still have the power to

2 Scottish Law Commission, *Discussion paper on Sharp v Thomson* (Discussion Paper no. 114, 2001) 16.

3 Although in practice, even more than one search might be required. In Dutch real estate law, the civil law notary has to conduct three searches in the relevant registries. The first two searches are conducted respectively way ahead and shortly before signing the deed of conveyance. The last search is conducted 1 day after the transfer, to see if anything prevented the transfer during the previous day (such as the retroactive effect of bankruptcy, see point b). Because multiple registries have to be checked multiple times for each individual piece of real estate, these searches are a time-consuming task for any civil law notary concerned with the transfer of real estate, even in a modern highly automated system of searches and registration. The exact amount of these costs may, of course, differ in other jurisdictions.

4 Hoge Raad (HR), 30 januari 1981, *Nederlandse Jurisprudentie (NJ)* 1982, 56.

dispose – in hindsight, one of the parties lost the power to dispose prior to the transfer. In the case of bankruptcy, Dutch law provides that bankrupt debtors lose their power to dispose from the day that the court has established bankruptcy – including that day itself.[5] Only on December 2nd will the buyer/legal practitioner know for sure whether the transfer took place or not, which means that the buyer can only safely transfer the money to the seller on December 2 and not earlier. However, given the fact that in 99 % of the cases the transfer of the land is successful on December 1, the exchange also lacks simultaneousness if the purchase price is transferred on December 2. The same problem may occur with the payment: also buyers can go bankrupt during the day on which they transfer the purchase price. Obviously, this principle makes it downright impossible to achieve a truly simultaneous exchange.[6] Legal practitioners have often developed their own methods to mimic the result of a simultaneous exchange. Examples include the Scots 'letter of obligation' and the Dutch 'Baarns Beslag-brief'. These workarounds increase the fee of the legal practitioner involved with the transfer and hence also add to the transaction costs.

c) Let us disregard these practical obstacles for a second and focus on the intended outcome of a simultaneous exchange. This intended outcome of a simultaneous exchange is *that either both parties perform, or both of them do not*. However, the consequences of this principle are harsh. Consider a typical sale of immovable property. The buyer has often viewed several properties prior to making an offer. On today's market, at least in the Netherlands, the first offer a buyer makes often does not suffice. After the negotiations, once an offer is accepted, the parties – or a legal practitioner – draft(s) a sale purchase agreement that is signed by both parties. In the weeks/months prior to the transfer, the buyer will prepare the move of residence in more depth, by *e.g.* making an appointment with a moving company, planning renovations of the property, or buying furniture. However, if on the day of the transfer, the seller loses the power to dispose of the asset a few minutes prior to the transfer of the property, the transfer will not take place. This means that all the preparations of the buyer will have been in vain.

For these reasons, legal systems have adopted mechanisms that allow a transfer to take place *despite* the seller going bankrupt between sale and (intended)

5 Dutch Bankruptcy Act (*faillissementswet*), s 23.

6 In Dutch literature, it is sometimes submitted that the sale and transfer of immovable property takes place by the principle of a simultaneous transfer. I argue, however, that there is no simultaneous exchange in the context of a 'standard' real estate transaction, see TJ Bos, 'Als tweede komen maar als eerste malen' [2020] *NTBR* 39.

transfer. The most exemplary and well-known mechanism is perhaps the priority/advance notice, also known as *Vormerkung*, which entails registering the sale-purchase agreement of immovable property in the public land records. From that moment on, the buyer of the property is protected in a proprietary sense: even though the buyer has not yet acquired the property, their claim for the transfer of the property *will* be satisfied, even when the seller goes bankrupt in the meantime. The priority notice therefore provides an elegant solution to all of the issues mentioned above. Let us say that in the mentioned example, the sale purchase agreement of the land is registered in the public land records on November 20. From that moment on, the buyer can pay the purchase price to the seller without running the risk of performing whilst the seller does not perform, because buyers know for sure that they will acquire the property, which eliminates the need for a simultaneous exchange.[7] Hence, it is also not required to check whether the seller still has the power to dispose on December 1st at 2.59.59 PM exactly: once it has been established that the priority notice has been registered successfully, which can be checked anywhere from November 21 until November 30, a loss of power to dispose over the asset does not affect the transfer. This solves problems a and b. Furthermore, because the seller's bankruptcy is no longer an obstacle to the transfer of the property, the buyer is protected in an additional sense compared to a simultaneous exchange. Instead of keeping the purchase price in the event of bankruptcy of the seller, the buyer actually acquires the property itself. Preparations will therefore not have been in vain, which solves problem c.

However, utilising this method comes at a cost. From November 20 until December 1, the transferor/seller cannot dispose of the property to someone else than the buyer. The creditors of the seller can no longer successfully take recourse against the sold property. Neither can the creditors of the buyer, although the creditors of the buyer can take recourse against the purchase price, until the transfer takes place. This all changes after the transfer of the property and the purchase price: after the transfer, the seller is entitled to the purchase price, which can be attached by the sellers' creditors. The property itself then belongs to the buyer and can be attached by the buyers' creditors. However, during the period between registration of the sale purchase agreement and the transfer of the property – from November 20 until December 1 – one may classify the status of the property as that of property placed in a 'legal vacuum'. Even though the property does not yet belong to the buyer, the seller – and the sellers' creditors – cannot

7 Scottish Law Commission, *Discussion paper on land registration; miscellaneous issues* (Discussion paper no. 130, 2007) 93.

'touch' the property, because the vacuum conserves the property for transfer to the buyer later on. For this reason, this article refers to the priority notice and similar instruments as 'vacuum instruments' from now on. The existence of this legal vacuum, however, is considered somewhat undesirable. One should, in general, be able to freely dispose of assets in a commercial context, and creditors need collateral to seek recourse against, in case debtors do not fulfill their obligations.[8] The million-dollar question, therefore, is: which circumstances justify the usage of such a vacuum to secure the performance interest?

It is helpful to break this question down into sub-questions. By answering these sub-questions, it is possible to compare all the instruments mentioned in the first paragraph of section 1, even though these instruments are rooted in completely different property law regimes. The sub-questions relate to the properties of the proprietary interest that the buyer may have, after concluding the purchase of an asset, but prior to delivery. The sub-questions are as follows:

1) Type of asset: to which types of assets does the instrument apply? The German priority notice (*Vormerkung*), for instance, only applies to one type of asset, namely immovable property, but can also be applied to secure the obligation to vest/transfer/cancel a limited real right (every *dingliche Rechtsänderung*). However, nowadays, other types of assets – such as claims, company shares and intellectual property rights – also play a crucial role in commerce. For these reasons, from now on, this paper will also utilise the more general term 'grantee' instead of 'buyer', which includes, e.g., parties that wish to obtain a limited real right, as opposed to the 'grantor', who grants something to the grantee. If an instrument also applies to the obligation to transfer money, the 'grantee' can even refer to the seller.
2) Type of application: does the instrument apply automatically (like the vendor purchaser constructive trust), or do parties have to explicitly choose for the instrument to apply (like the Dutch priority notice)? Closely related to this question, is the issue of registration: is an additional act of registration required for the instrument to apply or not?
3) Duration of the instrument: is the duration of the vacuum limited? Priority notices, for instance, are usually limited in this respect: durations vary from 4 weeks till 6 months.
4) Effect: does the instrument protect the grantee against other grantees, against creditors/a bankruptcy trustee, or both? Priority notices usually offer protection against both, but as subsections 3.1 and 3.3 will illustrate, this is by no means self-evident in the context of vacuum instruments.

8 BCJ van Velthoven and PW van Wijck, *Recht en Efficiëntie* (5th edn, Kluwer 2013) 111.

Section 3 will provide descriptive answers to these sub-questions. It must be noted that the term 'vacuum instruments' is not predefined. Hence, section 3 will also help to develop and clarify my definition of a vacuum instrument, by illustrating which traits are characteristic of vacuum instruments and which are not. Section 3 does not intend to create a comprehensive overview of all the applicable instruments in the jurisdictions mentioned in the first paragraph of section 1, but purports to highlight the differences among these instruments, which proves that there is hardly any consensus as to when a vacuum should be applied and that, hence, there is some room to play with in this regard.

3. The descriptive approach: vacuum instruments in different jurisdictions

This section covers the various instruments mentioned in section 1. Each subsection covers one instrument from one jurisdiction, although an instrument is sometimes juxtaposed with a different one. Each subsection starts with a) an introduction of the instrument, then b) provides the answers to the subquestions, and finally c) makes some concluding remarks. This section concludes by summarizing the findings in subsection 3.4, in the form of a chart.

3.1 South Africa: Sarrahwitz v Martiz

3.1.1 Introduction

This sub-section deals with the solution adopted by South African constitutional property law. In 1981, the Alienation of Land Act was enacted.[9] The presumption of this Act was that vulnerable individuals would normally not be able to pay the full purchase price for land at once. Therefore, the Alienation of Land Act aims to strengthen the position of the purchaser who pays the purchase price in installments. One of the provisions that strengthens the position of the purchaser is Section 22 of the Alienation of Land Act. This provision dictates that a purchaser is entitled to receive the title to the immovable property if the transferor has gone bankrupt prior to delivery, on the condition that the purchaser has purchased the land in terms of a 'contract' and that the purchaser has made arrangements for the

9 Alienation of Land Act 1981.

payment of all costs in connection with the transfer of land and several other costs. A 'contract' in terms of the Alienation of Land Act is an agreement pertaining to the sale of land in more than two installments over a period exceeding one year.

A few years ago, the scope of this protection was widened by the Constitutional Court in *Sarrahwitz v Maritz N.O. and Another*. In this case, Ms Sarrahwitz, an unemployed woman, bought a house from Mr. Posthumus and paid the purchase price in full, by borrowing this amount from her former employer. However, as the years progressed, no transfer of the immovable property took place. On 14 April 2006, the estate of Mr Posthumus went bankrupt and Mr Maritz was appointed as the trustee. At common law, both the immovable and the purchase price formed part of the insolvent estate. After several unsuccessful attempts, Ms Sarrahwitz made an application to the Constitutional Court. The Constitutional Court held that the distinction between purchasers that paid the purchase price in installments and ones who immediately paid the full price was not in accordance with Sections 9 (equality) and 26 (right to housing) of the Constitution. The Court therefore applied the remedy of severance and read in, at the end of the definition of a 'contract' in section 1 of the Alienation of Land Act, the words "including residential property paid for in full within one year of the contract, by a vulnerable purchaser". The Court further defined a 'vulnerable purchaser' as "a purchaser who runs the risk of being rendered homeless by a seller's insolvency". Therefore, under these circumstances, the transferee may acquire the ownership of the immovable property, despite the fixation of assets of the insolvent estate.

3.1.2 Sub-questions

The instrument applies only to the *transfer* of *immovable property* (question 1). The instrument applies automatically (question 2): as long as the purchaser qualifies as 'vulnerable' and the purchase price is paid at once in full, the purchaser is protected without any additional form of registration being required. Although the court does not explicitly limit the duration of the instrument, the judgment *does* provide some sort of limitation by stating that the order only applies to "a seller's insolvent estate that has not been finalised" (under 78, point 5). However, as long as the purchaser pays the purchase price at once within one year after concluding the contract, the proprietary interest that the judgment bestows upon the purchaser is, in principle, unlimited in time (question 3). Finally, the purchaser is merely protected against the bankruptcy of the seller, and – unlike a priority notice – not against an attachment or a second grant by the seller (question 4).

3.1.3 Concluding remarks

The most important feature of this judgment for the rest of this paper, is that the judgment illustrates that policy arguments such as preventing homelessness can outweigh the interest of the creditors in bankruptcy (embodied by the establishment of the concursus creditorum) and hence provide an exception to the 'first come'-rule, despite the fact that these are core principles of property/insolvency law.[10] In the context of bankruptcy, the idea of the concursus creditorum and its first-come rule seem so impenetrable that there is hardly any point in challenging it. Instead of deciding in favour of the creditors or the buyer on the basis of the merits of their respective claims, the fixation principle seems to completely block out the possibility of discussing its merits. This all or nothing approach is hard to justify, especially given that the question whether an interest is proprietary or not, often depends on timing. To illustrate this, consider the English cases of *Re Goldcorp Exchange Ltd* and *Re London Wine Company (Shippers) Ltd,* in which the buyers were erroneously under the impression that ownership had already passed to them, with disastrous consequences when faced with the bankruptcy of the seller. For this reason, Worthington has compared the process of winding up a bankrupt estate as a game of musical chairs, because the relative positions of the parties at the time the music stops (the fixation principle kicks in) is crucial to their happiness.[11] Worthington, therefore, pleads for a different approach that shifts the focus from doctrinal arguments to policy arguments. *Sarrahwitz* illustrates that policy arguments may in fact provide a deviation from the fixation principle. The judgment also proves that policy arguments may justify the existence of vacuum instruments, even though parties themselves have not explicitly chosen for such an instrument. This makes sense: from a policy perspective, the position of ms Sarrahwitz or mr Martiz is irrelevant. It is homelessness as a problem for society as a whole which must be tackled with a constitutional remedy.[12]

10 One might expect a lack of publicity to become a practical issue in this context, but as section 3.2.2 will illustrate, this is not necessarily the case.

11 S. Worthington, 'Proprietary Remedies and Insolvency Policy: The Need for a New Approach' in: John Lowry and Loukas Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths 2006) 196.

12 *See also*A Heyns and B.O. Mmusinyane, 'Should the Alienation of Land Act 68 of 1981 be amended to Address Homelessness? Sarrahwitz v Maritz 2015 8 BCLR 925 (CC)' [2017] *PER/PELJ* 20.

3.2 Germany and the Netherlands: different functions of the priority notice

3.2.1 Introduction

For Germany, my analysis will focus on the priority notice. The priority notice is, by origin, a German creation (*Vormerkung*), which was adopted by many other jurisdictions in the past decades. The Netherlands, for instance, adopted the priority notice in 2003. In order to illustrate the different functions of the priority notice, the German priority notice – or, more precisely, the way it is utilised in current legal practice – is juxtaposed with the Dutch priority notice.

3.2.2 Sub-questions

The first difference is the scope of application of both notices. In the Netherlands, the priority notice can only be used to anticipate the *transfer* of registered property (immovable property, ships and aircraft) *itself* (s. 7:3 Dutch Civil code). It is not possible to anticipate the creation of a security interest (hypothec). Whether and to what extent the creation, transfer and waiver of other limited rights can be anticipated upon, is unclear.[13] The German priority notice, on the other hand, can be used to anticipate any real/proprietary change in rights in immovable property (*Dingliche Rechtsänderung*) (§ 883 BGB) (question 1). This wider scope of application boasts a huge benefit: since the buyer of land often requires external financing to cough up the purchase price, creating a security interest – and being able to anticipate it – is just as vital to the transaction as the transfer of the asset itself. Both instruments also differ in terms of duration: the Dutch Vormerkung lasts six months, whereas its German counterpart is, in principle, not limited in time (question 3).[14] In terms of effect, both instruments are the same: they both provide the

13 B Wessels, *Koop: algemeen* (Kluwer 1997), para 71; JWA Hockx, *Koop en levering van vastgoed* (Sdu 2003) 36.

14 In order to prevent public land records from getting cluttered, the Bayerisches OBerstes Landesgericht has ruled that a Vormerkung cannot be utilised to secure an obligation when "*lediglich eine bloße mehr oder weniger aussichtsreiche tatsächliche Möglichkeit besteht*" (the obligation is a mere possibility). Instead, the Vormerkung requires that "*bereits der Rechtsboden durch ein verbindliches Angebot oder Abkommen so weit vorbereitet sein, daß die Entstehung des Anspruchs nur noch vom Willen des demnächst Berechtigten abhängt*" (there should be a binding offer or agreement, under which the acquisition of property merely depends on the will of the grantee). Bayerisches Oberstes Landesgericht (BayOBLG), 21 April 1977, *Neue Juristische Wochenschrift (NJW)* 1977, 1781.

grantee a proprietary interest that can be invoked against other grantees and creditors/a bankruptcy trustee (question 4).

The biggest difference between the two instruments in this regard is the frequency with which the priority notice is used. This closely relates to the second question (type of application). In the Netherlands, the priority notice is not used very often. Instead, the performance interest of the buyer is protected by the client account of the civil law notary. The client account is a bank account held by the civil law notary that does not form part of the recoverable property of the notary itself. The money in the account still belongs to the parties involved. In the context of a transfer of real estate, the buyer will transfer the money to the client account. As soon as the civil law notary has established that the buyer has actually become the owner of the immovable property, the notary releases the money to the seller. If the buyer fails to acquire ownership – for instance, because the seller went bankrupt in the meantime – the notary releases the money to the buyer instead.[15]

In Germany, on the other hand, the priority notice is used very often. It even forms part of the template of sale-purchase agreements of land that can be downloaded by legal practitioners.[16] What must be noted is that in Germany, the contract by which land is transferred must be recorded by a civil law notary anyway (§ 311b BGB), regardless of whether or not parties use a priority notice. In the Netherlands, the only requirement of the contract is that it is 'in writing', which means that the additional fee of the notary comes into play only when parties choose for a priority notice. This brings about that the 'extra' cost of registering the sale purchase agreement is substantially higher in the Netherlands. The German Vormerkung does not apply completely automatically like the Vendor Purchaser Constructive Trust (see next subsection), but because it is in practice used in almost all real estate transactions, the German Vormerkung closely resembles

15 For a more detailed overview of how the intermediary functions, see TJ Bos, 'The Effect of a Seller's Insolvency on the Transfer of Immovable Property' in CS Rupp, RI Garza and B Akkermans (eds), *Property Law Perspectives VI* (Maastricht Law Series 7) (Eleven 2019). This very closely resembles a simultaneous exchange, but in practice, the client account of the civil law notary functions as a vacuum instrument in favour of the seller. From day of the transfer onwards (so also the hours ahead of the transfer), buyers – and their creditors – can no longer 'touch' the money transferred to the bank account of the notary, even though the purchase price still belongs to the (recoverable property of the) buyer. See also TJ Bos, 'Als tweede komen maar als eerste malen' [2020] *NTBR* 39, 289. See also A. Steneker, 'Kwaliteitsrekening en afgescheiden vermogen' (PhD thesis Nijmegen) (Kluwer 2005).

16 It is also worth noticing that in German commercial practice, the template for an agreement regarding the sale of company shares uses a transfer under a condition subsequent as an alternative with very similar proprietary effects.

automatic application. Because the priority notice protects the performance interest of both parties,[17] there is no need for a client account. This is reflected in German practice: the client account of the German civil law notary is hardly ever used in standard real-estate transactions, and the purchase price is transferred directly from the buyer to the seller. So why then does Dutch law have a priority notice in the first place? The difference between Germany and the Netherlands in this regard, perfectly illustrates the different functions that a vacuum instrument might have. Section 2 has listed three problems of a simultaneous transfer that can be overcome by vacuum instruments. For the sake of clarity, the problems are summarized here once more. Problem a is the necessity to check at the last possible second if the transferor still has the power to dispose, problem b is the possibility of an event that occurs with retroactive effect and problem c is the possibility that the preparations of the transferee have been in vain if the exchange does not occur. In Germany, the function of the priority notice is to solve all three problems.[18] By contrast, in the Netherlands, the client account of the notary overcomes almost all difficulties relating to problem a and b by creating what is, *de facto*, a vacuum instrument in favour of the seller (see footnote 16). The priority notice provides an additional form of protection for the buyer by providing a remedy for problem c. It must be noted that the Dutch Vormerkung *does* have the potential to overcome problems a and b, just like its German counterpart.

3.2.3 Concluding remarks

In order to secure the performance interest of both parties, it has become the customary practice in both countries to use respectively the client account of the civil law notary or the priority notice, even though there is no rule that makes either mandatory. Also more practical interests, such as the interest of civil law notaries to secure the performance interest of both parties in a cost-effective way, can justify 'imposing' vacuum instruments on parties to the transfer. In fact, this result can also be considered as an interest of society as a whole, because it will result in lower transaction costs (section 4 elaborates on this).

17 The performance interest of the seller is protected because the seller will only instruct the notary to effect the transfer as soon as the purchaser has transferred the purchase price.

18 HF Krauß, in *Beck'sches Notar-Handbuch* (7th ed, 2019), paras. 93–98 (*Leistung Zug um Zug*).

3.3 VPCT: vacuum without publicity?

3.3.1 Introduction

So far, my analysis has focused on immovable property. However, as mentioned in the introduction, nowadays, other types of assets are just as important in the context of commercial transactions. Examples are company shares, intellectual property rights, permits, claims and contracts.[19] The problem with these types of assets, however, is that there is no register that keeps track of their legal status. For this reason, a priority notice cannot exist in the context of these types of assets. This section will demonstrate, however, that it is possible to protect the performance interest of the buyer without awarding the buyer a registered and hence publicly visible right. For this purpose, this section analyses Anglo-American law, more specifically the Vendor Purchaser Constructive Trust (hereafter: VPCT).[20]

3.3.2 sub-questions

The basis of the VPCT-doctrine was laid down in *Lysaght v Edwards*, where it was held "that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser (...)".[21] In the interest of readability, this section will not explore the theoretical background and properties of this doctrine.[22] The core of its functionality is that, as soon as there is a) a valid sale/purchase agreement, b) a proper consideration and c) an asset that qualifies as 'unique', the purchaser of an asset acquires an equitable interest in the asset.[23] 'Unique' means that the asset cannot be easily acquired on the current market. This equitable interest has a proprietary nature and can therefore be enforced against third parties. The most

19 W Loof, 'Securing Debot in a World Without Collateral' in B Akkermans and A Berlee (eds), *Sjef-Sache* (Maastricht Law Series 18) (Eleven International Publishing 2021) 319.

20 The VPCT is not by any means an easy doctrine to understand. Anglo-American academics have often submitted that this doctrine is confusing (DWM Waters, *The Constructive Trust: The Case for a New Approach in English Law* (Athlone 1964) 74–87 and should even be abolished (W Swadling, 'The Vendor-Purchaser Constructive Trust' in S Degeling & J Edelman (eds), *Equity in Commercial Law* (Lawbook co. 2005) 488. My analysis of this doctrine is, therefore, somewhat simplified in the interest of readability. For a more detailed overview, see PG Turner, *Equitable Rights Arising from Specifically Enforceable Contracts* (diss. Cambridge) 2010.

21 *Lysaght v Edwards* (1876) 2 Ch.D. 499 MR at 506.

22 See footnote 21.

23 PG Turner, 'Understanding the Vendor Purchaser Constructive Trust' [2012] *LQR* 590.

notable difference between this vacuum instrument and the previously analysed ones, is that this instrument applies to every type of asset, except for movable property (question 1). The doctrine does not apply in the context of movable property, because the transfer of movables is exclusively regulated by the Sale of Goods Act.[24] Furthermore, the doctrine applies, in principle, automatically (question 2). In the context of immovable property, however, the Land Registration Act of 2002 requires registration of the equitable interest in public land records in order to achieve third-party effect.[25] In the context of other types of 'unique' assets (e.g., shares and intellectual property rights), the doctrine applies as explained, without requiring registration. This raises the question as to how the purpose of the publicity requirement – being able to quickly assess whether or not someone has the power to dispose of an asset, in order to conduct transactions efficiently – are met.

The lack of publicity with other types of assets than immovable property is overcome by the bona fide purchaser for value doctrine. If buyer A (the first buyer) has acquired an equitable interest in the property and, before delivery took place, a second buyer (B) buys the same asset, A cannot invoke A's equitable interest against B, on the condition that B is a bona fide purchaser and furthermore provides valuable consideration.[26] One may notice, however, that the *bona fide* purchaser doctrine cannot be invoked by creditors or bankruptcy trustee's. The VPCT therefore brings about a similar result as the South African *Sarrahwitz*-judgment: the (first) buyer acquires a proprietary interest that can be invoked against creditors, but most often not against purchasers (question 4). The doctrine is, in principle, not limited in its duration (question 3). The 'uniqueness' criterion deserves closer attention, because it sheds light on a different type of policy goal that can be achieved with vacuum instruments.

3.3.3 'Unique'

On first sight, the criterion that an asset must be 'unique', may sound arbitrary. It has been submitted, for example, that – in terms of consequences for the buyer, if the seller goes bankrupt prior to delivery – the difference between shares in a public company (which are not considered 'unique') and private shares (which

24 Sale of Goods Act 1979.

25 Land Registration Act 2002, s. 28 et seq.

26 For what qualifies as 'bona fide' in the context of company shares, *see Macmillan Inc v Bishopsgate Investment Trust plc* (no. 3) [1995] 1 *WLR* 1014.

are 'unique') cannot be justified.[27] However, it is submitted that it does in fact have a rational justification. As mentioned above, the VPCT provides purchasers a proprietary form of protection, mainly against creditors of the seller. It is in this particular context – a conflict between a purchaser and creditors – where the rationale of the 'uniqueness'-criterion shines.

Assets are worth more to a buyer than to a creditor, because purchasers will in general cough up market value, whereas creditors are in general merely able to generate the forced sale-value out of an asset as collateral for their claim.[28,29] As a matter of fact, it quite often occurs that the value that the buyer places on an asset is higher than its market value.[30] The market value of an asset often exceeds the value in a forced sale, but this statement is more accurate if – and to the extent that – an asset is 'unique'. This can be easily explained. If a generic asset (e.g. oil) is sold by creditors as collateral for their claim, everyone in the world interested in buying oil is a potential buyer, meaning that it would be unlikely that the price of that oil (forced sale value) is *much* lower compared to an 'open-market' transaction. However, if a specific asset (such as immovable property) is sold, the statement that everyone in the world is interested in buying that immovable property is false. The specific properties of that particular piece of real estate (such as its location, its vicinity, size and esthetics) bring about that, if immovable property in Groningen (an area in the Netherlands) is sold, not even everyone who lives in Groningen would be interested in buying that piece of property, let alone everyone in the world.[31] The more unique an asset is, the more it will be worth *extra* to a buyer that has already chosen that specific property for its unique traits.

It is important to notice that also creditors benefit from a vacuum instrument in this context: after the buyer has paid the purchase price, the creditors can take recourse against a market value price, whereas the *prior tempore* outcome (see section 2) outcome would be that the creditors have to make do with dividing the

27 W Swadling, 'The Vendor-Purchaser Constructive Trust' in S Degeling & J Edelman (eds), *Equity in Commercial Law* (Lawbook co. 2005) 467.

28 See, in the context of immovable property in the Netherlands: I Visser, *De executoriale verkoop van onroerende zaken door de hypotheekhouder* (PhD thesis Groningen) (Boom Juridisch 2013) 40 et seq.

29 Although in the Netherlands, it is possible to request a private foreclosure sale (*onderhandse verkoop)*, rather than a public one (s. 3:269 BW). This may in general increase the forced-sale value.

30 Eisenberg, 'Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law' [2005] 93 *CLR* 4, 991.

31 The research listed in footnote 29 reaches the same conclusion (that market value easily trumps execution value), but mainly focuses on different reasons (the circumstance that buyers in foreclosure sales mainly belong to a relatively small group of slumlords that probably conspire in order to keep prices low).

forced sale value amongst themselves. We are starting to explore an additional, yet till now hidden potential of vacuum instruments: they can be used to maximize value of assets, which is naturally also a policy goal of private law. Vacuum instruments that provide a grantee protection against a different grantee cannot be justified on the basis of this benefit, however, they still boast the benefit of providing a solution for problems a and b (see section 2) and hence lower transaction costs.

3.3.4 Concluding remarks

This section does not purport to give a final answer to the question as to whether the argument of reducing transaction costs outweighs the interest of maximizing value. Instead, this subsection merely intends to point out the different shapes and sizes of vacuum instruments, and the variety of policy arguments underlying the desirability of these instruments. In order to underline the differences amongst instruments once more, subsection 3.4 provides a chart that summarises the findings of this section.

3.4 Chart

Instrument	Type of asset/grant	Type of appl.	Duration	Third party effect
Sarrahwitz	Imm. prop./transfer	Automatic	Unlimited	Creditors
Dutch Vk	Imm. prop./transfer, some limited rights	Manual	6 months	Grantees & creditors equally
German Vk	Imm. prop./transfer and limited rights	Manual, but standard practice	Unlimited	Grantees & creditors equally
VPCT	All types of assets/all types of grants (with some exceptions)	Automatic	Unlimited	Grantees & creditors, but much stronger against creditors

4. Normative approach

4.1 The need for more vacuum

The main purpose of the last section is to illustrate the differences amongst vacuum-instruments themselves and the different policy goals that they can accommodate. The purpose of the current section is to argue that the balance of interests struck by current private law is suboptimal, and that vacuum instruments deserve a stronger effect and/or a bigger scope of application. Most modern jurisdictions have a system of priority notices, that allows parties to conduct a risk-free transfer of immovable property aided by a vacuum instrument. However, despite this, many issues regarding the performance interest of the buyer still occur in these jurisdictions, such as the following:

a) parties to a transfer have to explicitly choose for a priority notice, which – unless it is more or less included in the customary practice and fee of a standard real estate transaction,[32] such as in Germany – they often fail to do. An illustration of how this brings about difficulties is provided by a Dutch lower court judgement.[33] An apartment building had been sold without using a priority notice, but prior to delivery/conveyance, the building had been attached by a creditor of the seller. The purchase price was more than sufficient to satisfy the claim of the creditor, but the creditor refused to cancel the attachment. This meant that the buyer could not acquire the building without the attachment of the creditor. The court, however, ruled that the attachment would be ineffective so that the transaction could take place. The argument that the court used was that it would be in the interest of everyone involved to carry on with the transfer. To carry on with the transfer is, of course, beneficial for buyers, because it means that they can actually acquire the immovable property and that their preparations have not been in vain. Contrary to what one might expect, this state of affairs is also beneficial for creditors. Because the purchase price exceeds the claim of the creditor, the interests of the creditor are sufficiently looked after. When the transaction has concluded, the creditor can take recourse against a sum of money (the purchase price) which can be easily divided amongst the creditor and the seller in accordance with the creditor's claim. Furthermore, the collateral for the creditor is higher, because the market value (purchase price) in general exceeds the forced sale value. To secure the interest of the creditor, the court ordered that

32 See subsection 3.2.2.

33 Rechtbank Noord Nederland (RBNN), 14 June 2018, ECLI:NL:RBNNE:2018:2240.

the notary had to wait for one week before releasing the purchase price to the seller, so that the creditor has ample time to attach the purchase price while the purchase price is still held by the notary. In short, the court mimics the effect of a priority notice.[34] In giving this order, the court gives a nice illustration of the argument developed in subsection 3.3.3, namely that a vacuum instrument that confers a grantee an interest that can be invoked against creditors, maximises the value of assets. This is beneficial to everyone involved, on the condition that also (the) creditor(s) profit(s) from this maximisation of value, which can be assured by ordering the notary to wait for one week with releasing the purchase price to the seller. This reasoning, however, does not only apply to the specific circumstances of this case. Instead, it applies to almost every conflict between a grantee and a creditor: the value that a grantee/buyer places on an asset almost always exceeds the value that a creditor is able to generate in a forced-sale situation.

b) Securing the performance interest of the buyer *without* a vacuum instrument is an arduous task for legal practice. This is illustrated in subsection 2. The mere *risk* that a grantor loses the power to dispose of an asset between the contract of sale and delivery will inevitably give rise to transaction costs, because the legal practitioner has to check at the last second before the intended transfer whether both parties still have the power to dispose. These costs can be easily avoided by a more frequent use of vacuum instruments.

c) Traditionally, immovable property is considered the most important type of property. For this reason, the legal status of immovable property is registered in public land records, which justifies the existence of a priority notice in this context: the publicity of the notice justifies its third party effects. However, nowadays, other types of assets can be just as crucial as immovable property. Consider, for example, shares in a company that owns immovable property: from an economic point of view, ownership of those shares is just as important as the immovable property itself. Also, consider intellectual property rights: buyers of those rights may redesign their factory to incorporate these rights in their production process way ahead of the actual transfer, which underlines the importance of performance for those purchasers. The mere fact that there is no public register that keeps track of the legal status of these objects, does, however, not necessarily bring about that the performance in-

34 If parties opt for a Vormerkung under Dutch law, s. 507b (1) of the Dutch Code of Civil Procedure states that a posterior attachment of a creditor on the immovable property is converted into an attachment on the part of the purchase price that the notary holds for the seller after the transaction. Also this consequence was mimicked by the court.

terest of the buyer cannot be secured at the expense of creditors, as is illustrated by the VPCT.

The next subsection will elaborate on how to adopt vacuum instruments, without interfering with the interest of publicity/creditors too much, by discussing the development of Scottish legal doctrine in response to the *Sharp v Thomson* judgment.

4.2 Balancing interests

4.2.1 Scotland: a tale of two judgments

The central issue of this paper – protecting the performance interest of grantees – has received an extraordinary amount of attention in Scotland. The debate was sparked by *Sharp v Thomson*, in which the buyers of immovable property had not yet completed delivery before a floating charge, that covered all of the 'property and undertaking' of the seller (s. 462(1) of the Companies Act 1985), crystallised.[35] It was held by the House of Lords that the buyers were triumphant in this conflict. It was, however, unclear exactly why they were triumphant. There were two explanations: explanation A entailed that the buyers had acquired some sort of proprietary interest in the immovable property prior to completion of the delivery. This reasoning seems hard to unite with a *traditio* transfer system such as Scots law, but can be explained by the tendency of the House of Lords to take common law doctrines, such as the VPCT, into consideration, even when deciding on Scots law. Explanation B centered on a narrow interpretation of 'property and undertaking': this would include only what the company uses in its day-to-day business dealings, and not literally 'all its property' in a legal sense. The main arguments against explanation A were the lack of clarity in regard to exactly when buyers receive their proprietary interest, and the lack of publicity of the buyers' interest. However, if explanation A were correct, it would entail that buyers of immovable property were also protected from, *e.g.*, insolvency of the seller, if they fail to complete delivery prior to the sellers' bankruptcy. Several years later, exactly these facts (interest of buyer conflicts with insolvency of the seller) occurred (*Bur-*

35 *Sharp v Thomson* [1997] SC(HL) 66. For a more extensive overview of the facts and the process of conveyancing in Scotland, see K. Reid, 'Equity Triumphant: Sharp v Thomson' [1997] 1 *ELR* 4 464 et seq. Just like with the VPCT, this section does not elaborate on the more technical legal details in the interest of readability.

nett's Trustee v Grainger).[36] The House of Lords held that the buyers were in this instance not protected, from which it followed that explanation B of the *Sharp v Thomson* judgment had been the correct one. In several reports following these judgments, Scottish academics submitted that because of *Sharp's* narrow interpretation, there was a lack of transactional security for grantees involved in a transfer of land, and that "there is now a clear need to improve the position of grantees who act in good faith and with reasonable diligence".[37]

The considerations of the Scottish law commission are especially relevant for this paper, because they provide a clear insight into the central problem of this paper – the problems that a *traditio* transfer system gives rise to in the context of mutual contracts and the performance interest of both parties – from the perspective of academics that, just like the author of this paper, have a civil law oriented background whilst being familiarised with the common law solution to this problem (the VPCT). This section will therefore use the general structure of the first report as a backbone for discussing the question as to whether, and if so to what extent, vacuum instruments deserve a stronger effect and/or a bigger scope of application.

4.2.2 Protecting the performance interest: a tale of two approaches

The core of the two possible approaches has been outlined in the initial discussion paper following *Sharp*.[38] According to the researchers, the two approaches are: a) "to provide for the registration of a contingent interest in the land to the effect of establishing a priority against all subsequent rights" (also known as the priority notice or Vormerkung) and b) "to continue with a single act of registration but to confer priority against diligence and insolvency for a period *before* registration".[39] These two approaches can be conceptualised as follows: approach A strengthens the interest of the grantee when this interest competes with creditors *and* other grantees, whereas option B does not strengthen the interest of the gran-

36 *Burnett's Trustee v Grainger*[2004] UK(HL) 8.

37 In these reports it has been submitted that, even if *Sharp*'s broad ratio would have prevailed, the objective of transactional security would still not have been achieved. See Scottish Law Commission, *Discussion paper on Sharp v Thomson* (Discussion Paper no. 114, 2001) 14.

38 Scottish Law Commission, *Discussion paper on Sharp v Thomson* (Discussion Paper no. 114, 2001) 22.

39 Other suggestions made by the researchers, such as decreasing the time gap between insolvency and registration thereof, are too specifically oriented towards the properties of Scots conveyancing law, and are therefore not elaborated upon in this paper. One may note that approaches A and B correspond with explanations A and B from the previous paragraph.

tee, but *weakens* the position of *just* creditors when the interest of creditors conflicts with the interest of the grantee.[40] Option B therefore does not operate in the conflict between two grantees, and seems to assume that the 'normal' rules of property law suffice in this context. As mentioned in the introduction of section 4, many countries have adopted a priority notice (option A). Why does the Scots law commission even consider an alternative?

4.2.3 Benefits of approach B

The first reason that the commission mentions, is that a double act of registration "would involve more trouble and expense than would seem justified by the risk sought to be guarded against". At first sight, this argument seems convincing. After all, 99 % of the transactions take place as planned, without an actual double grant by or insolvency of the grantor. If priority notices became standard practice, the commission rightfully notes that "almost all would turn out to have been unnecessary". However, as mentioned above, the *mere possibility* of a double grant/insolvency problem gives rise to transaction costs. Because Germany (also a civil law jurisdiction) uses the priority notice to prevent exactly these transaction costs from occurring, the idea of a priority notice could, in general, still provide a viable solution to reduce transaction costs, even though the commission is of the opinion that this is probably not the case for Scotland.

A second, more convincing argument against the priority notice – and, therefore, in favour of approach B – is that the priority notice not only operates in a conflict between a grantee and creditors, but also in a conflict of grantees against other grantees. Operation in this context, however, cannot be justified on the basis of the argument developed in section 3.3.3, namely that an asset is worth more to a grantee than to a creditor. There is no indication that the grantee that registers a priority notice (first), is able to generate more value than a grantee that registers a priority notice later (or does not use a priority notice at all). This is exactly what makes alternative B attractive: it is a vacuum instrument that only operates when its operation can easily be justified by the difference between market value and forced sale value. In this regard, the commission notes that protection against double grants is offered by other instruments, such as the 'rule

40 Of course, one implies the other: also approach B strengthens the interest of grantees when their claim conflicts that of creditors (and vice versa). However, treating both approaches as separate ones makes them in my opinion easier to conceptualise.

against offside goals'.[41] This rule entails that the title of an acquirer can be set aside by reduction, if the acquirer knew about an earlier grant in favour of someone else. The commission then poses the question whether "the relatively low incidence of risk justifies the complexities of a system of [priority] notices, or that the few acquirers who turn out to be unlucky should be left to try their fortunes in the courts". No answer is provided, although the phrasing of the question implies that priority notices are considered too complicated by the commission. Another benefit of method B is that method A requires a register which keeps track of the legal status of an asset: method B can therefore also be applied in the context of different types of assets, such as movable property.

4.2.4 Downside of approach B

However, the biggest downside of *only* providing protection against creditors/bankruptcy (approach B) is that, because it does not operate in the grantee vs grantee context, a double grant may give rise to the situation where one party performs and the other does not. An example to illustrate this argument: S sells immovable property to P, and intends to transfer/register on December 1 at 3 PM. Assume that *none* of the approaches applies. In order to ensure that either both parties perform or both of them do not – a simultaneous exchange – the legal practitioner has to check whether S still has the power to dispose of the property on December 1 at 2.59.59 PM. If we add approach B, the effect would be that even if bankruptcy took place before December 1 at 3 PM, the registration of the transfer would be backdated to an earlier date, to November 24 for example. This means that the insolvency would no longer affect the transfer. *If* insolvency would be the *only* reason why owners lost the power to dispose, the legal practitioner would no longer need to perform several checks – one of which at 2.59.59 PM exactly – and can instead perform only one check when it suits the practitioner best, at some point between November 24 and December 1, which would reduce transaction costs. This is the desirable result from a vacuum instrument (see section 2). Furthermore, because P knows for sure that he will acquire the property from November 24 onwards, P may opt to pay the purchase price directly to the seller, like in German real estate practice. However, sellers may also lose their power to dispose because of a double grant. This chance may be considered theoretical, but as mentioned, 'theoretical' risks *do* sometimes materialise, and

41 Scottish Law Commission, *Discussion paper on land registration; miscellaneous issues* (Discussion paper no. 130, 2007) 96.

hence, private law needs a solution for this issue. If this occurs – S registers a second grant in favour of X, at 2.50 PM – the legal practitioner needs to check whether S still has the power to dispose in favour of P at some point in the 10 minutes before 3 PM. If the legal practitioner fails to do so, P may pay the purchase price to S, only to discover that X has become the owner of the property and that the seller has left the country with both the purchase price from X and P in their pocket. As mentioned, P may invoke the 'rule against offside goals' or a doctrine to a similar effect against X, but even if P invokes this rule successfully, X is the one that has neither the purchase price nor the property. It is needless to say that X's claim for breach of contract against S cannot be satisfied if S is untraceable, or has gone bankrupt in the meantime. Because of this particular risk that is not covered with approach B, the benefits of vacuum instruments cannot be fully seized: a last minute check for power to dispose is still necessary.[42] However, the small risk of a double grant – and the dangers it poses to the performance interest – can also be remedied by an insurance-oriented remedy, similar to Anglo-American conveyancing practice.

4.2.5 The golden mean

An intermediary solution might be the following. It is submitted that, for the reasons listed above, approach A – giving the purchaser a proprietary interest from the moment of sale onwards, made public by a priority notice – is the most desirable one in the context of assets that have a register to keep track of their legal status anyway, such as immovable property. In order to reduce transaction costs further, I argue that the current form of the priority notice could be simplified. Many jurisdictions provide an extensive set of rules of what must and must not be registered, in order for a priority notice to be effective.[43] However, in order to fulfill its function, the Scots law commission is of the opinion that the scheme for

42 One could also argue that the tasks of a legal practitioner involved with the transfer of land (such as a civil law notary) do not include securing the performance interest of both parties in the particular context of a double grant. An argument to support this is that an attachment or insolvency is something that actually happens involuntarily to one of the parties and is beyond their control, whereas a double grant implies that one of the parties fully intends to breach the contract. However, it is submitted that the situation in which a fraudulent seller might successfully usurp two purchase prices and that the unlucky buyer loses both the purchase price and the bought asset, is outright unfair. Therefore, I argue that the legal practitioner involved with the transfer of land *should* prevent this risk from occurring.

43 Scottish Law Commission, *Discussion paper on land registration; miscellaneous issues* (Discussion paper no. 130, 2007) 90.

priority notices could be simplified considerably without impairing its overall effectiveness. I would like to take this argument one step further and argue that it suffices to merely register the fact that a contractual obligation to transfer the asset itself, or that there is an obligation to vest/transfer/cancel a limited real right in relation to the property. Current schemes are probably often complicated because the priority notice does confer some sort of proprietary interest and is therefore – in terms of requirements for eligibility – treated like a real right. However, the German term for the origin of this doctrine – 'Vormerkung' – roughly translates to 'ear tag' or 'caveat'. It should merely be considered as a signal to the parties or, in practice, the legal practitioner involved with the transfer, that there is something going on, and that further investigation/inquiry is necessary before proceeding with the transfer itself. The arguments in favour of the priority notice also apply to other assets of which the legal status is tracked by a register such as company shares, but it is not self-evident that all of these registers have a similar quality as the public land records. Hence, they are in legal doctrine deemed less trustworthy as an indication for proprietary interests.

For other types of assets – assets with low quality registers or assets that lack such a register at all – approach B would be the most suitable. As mentioned above, approach A is in general preferable, but approach A cannot be applied if there is no register keeping track of legal status. The benefits of approach B are still seized: the performance interest of buyers is protected at the cost of creditors, which is justified because of the difference between market value and forced-sale value. Buyers are not protected against double grants, but 'default' private law provides a degree of protection by instruments such as 'the rule against offside goals' or the bona fide purchaser doctrine. If this protection is considered insufficient, an insurance system can be set up to compensate the unlucky few that encounter a fraudulent and/or bankrupt seller. On one hand, one could argue that the risk that one party performs whilst the other does not, is impermissible, and that a simultaneous transfer is more desirable. On the other hand, assets that lack a register are in general of less value, which means that some incidents could be considered acceptable if transaction costs in general are lowered by adopting approach B.

5. Conclusion

Many jurisdictions have had their fair share of debate regarding the question as to when and how to protect the performance interest of the grantee, mainly in the context of immovable property. In many cases, the answer current private law provides is unsatisfactory, and to some extent remedied by legal practitioners.

Private law *does* provide tools to secure the performance interest in an elegant way, such as the priority notice. The answer as to whether and to what extent these tools can be applied, however, seems to be based on property law tradition and doctrinal discussion, rather than a debate focused on policy arguments such as maximizing the value of assets and lowering transaction costs. This article argues that these tools – 'vacuum instruments' – have the potential to accommodate these policy goals in a considerably more desirable way than is currently the case in many modern jurisdictions, and illustrates this point by comparing currently existing vacuum instruments in vastly different jurisdictions on the basis of a newly-developed theoretical framework.

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