1 Introduction

In this report we will present, given the space available, a brief overview of Dutch law in regard to real and personal security. First we will discuss the law of real security, followed by a discussion of the law of personal security. We will focus on questions as to which practical and/or theoretical uncertainties exist. Although a major part of the books on patrimonial law of the Dutch Civil Code entered into force 10 years ago, already case law is developing in areas where the codified rules proved to be unclear or imprecise and where legal practice needed solutions which were not laid down in the Civil Code. A general provision which immediately gave rise to considerable uncertainty in legal practice is the rule in art. 3:84(3) C.C.: the so-called ‘fiducia ban’, a ban on *fiducia cum credito*: ‘A juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the patrimony of the acquirer, after transfer, does not constitute valid title for transfer of that property’. Transfer of ownership for security purposes is, therefore, not allowed. The Dutch legislator already accepted that this provision should not be applied in the case of foreign trusts which have to be recognised under the Hague ‘Trust Convention’ and in the case of so-called ‘repo-transactions’ between large financial institutions. Furthermore, the fiducia ban will not be adopted in the new Netherlands Antilles and Aruba Civil
Code, which is based on the new Dutch Civil Code. Case law in regard to the fiduciary ban will be discussed in more detail in the part on pledge.

2  **Pledge and mortgage** (‘pledge’ and ‘mortgage’)

2.1  **General provisions**

The provisions on pledges and mortgages (Title 9 of Book 3 C.C.) are structured in the following way: Section 1 contains general provisions on pledge and mortgage, Sections 2 and 3 contain the provisions on pledge and Section 4 the provisions on mortgage. It should also be noticed that the rules of the previous titles of Book 3 might also apply to pledges and mortgages, especially Title 1 (general provisions), Title 2 (juridical acts) and Title 4 (acquisition and loss of property). Title 4 is specifically made applicable *mutatis mutandis* to the creation, transfer and abandonment of a limited real right on such property, unless otherwise provided by law. This means that as to the creation of pledge and mortgage art. 3:84(1) and (2) applies. Necessary are (a) a legal act of creation, (b) pursuant to a valid legal ground, and (c) by a person who has the power to dispose of the property. The legal act of creation is a so-called real agreement (*goederenrechtelijke overeenkomst*) in which the pledgor or mortgagee declares to give a right of pledge or mortgage to the pledgee or mortgagee, and in which the pledgee or mortgagee declares to accept this interest. The application of the rules as laid down in Title 4 also means that the conditions as to delivery apply *mutatis mutandis*: for the creation of a mortgage the following requirements have to be fulfilled: a notarial deed drawn up between the parties in which a mortgage is granted to the creditor, followed by its entry in the public land register. In the case of pledges special rules apply which will be discussed below.

Generally speaking, the following stages are distinguished in the creation of a right of pledge or mortgage: the promise between the future pledgor/mortgageor and pledgee/mortgagee to create such a right (the legal ground), the agreement by which...
the pledgor/mortgagor grants a right of mortgage to the pledgee/mortgagee (the real agreement) and the fulfilment of certain additional formalities. The real agreement is the legal act which creates the security interest, yet the interest comes into being only after the additional formalities have been fulfilled. These formalities vary according to the type of security interest to be created (possessory pledge, non-possessory pledge or mortgage) and the security object (in regard to pledges a distinction should be made between movables and claims). Before the fulfilment of the additional formalities the real agreement is valid, yet has no effect even between the parties. The effect of the real agreement is postponed until all formalities have been fulfilled. In the case of a mortgage, e.g., the agreement has to be laid down in a notarial deed, which must then be registered in the public land register.

The right of pledge and the right of mortgage are both limited real rights, intended to provide recourse against the property subjected to such right and with preference over other creditors, for the payment of a sum of money. If such a right is established upon registered property it is a called a right of mortgage, if established upon other property it is called a right of pledge. Registered property is e.g. land, but it can also be a sea-vessel, an inland-vessel or aircraft, although it should be remembered that in the cases of registered ships or registered aircraft special rules apply. The rights of pledge and mortgage entail a right of pledge upon all claims for compensation, including claims resulting from its depreciation, which take the place of the burdened property. Such a legal right of pledge has priority over other rights of pledge established on the claim. The rights of pledge and mortgage confer upon the holder of such right the power to sell the encumbered property. In the case of a right of mortgage this has to be done in public before a notary having authority to do so. It is possible, according to art. 3:231, to establish a right of pledge or mortgage for a future claim. The claim must be sufficiently determinable. In the case of a mortgage the notarial deed in which the mortgage is laid down ought to mention the maximum amount of the claim for which recourse may be taken on

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12. A description of these three stages as to the creation of a mortgage can be found in Gerver, Het recht van hypotheek, pp. 21 ff.

13. See artt. 3:10, 8:193 ff., 8:783 ff. and 8:1302 ff. C.C.

14. In the case of registered aircraft Dutch law accepts two types of limited real rights which are unknown outside this area: art. 8:1308 creates a real right of acquisition and art. 8:1309 creates a real right of lease. The first mentioned limited real right establishes a real right in favour of the buyer to become owner of the aircraft after, e.g., full payment of the purchase price. The real right as laid down by art. 8:1309 allows the lessee under a lease contract of at least 6 months to register the lease contract with effect against third parties. Cf. for a further analysis of these articles, also in the light of the draft UNIDROIT convention on security interests in mobile equipment: B.P. Honnebier, Het eenvormige zekerhedenregime van UNIDROIT waarborgt de Nederlandse rechten van de houder van een luchtvaartuig, WPNR 6449 (2001).

15. Art. 3:229 C.C.

16. For pledge see art. 3:248, for mortgage see art. 3:268 C.C.

17. In the case of a right of mortgage, exceptionally a private sale is allowed, provided the President of the District Court gives permission to do so.
the mortgaged property. Establishing a right of pledge or mortgage for a future debt should be distinguished from creating such a right on future claims (e.g. accounts receivable in the future). Whereas a right of pledge can be created on future property, a right of mortgage cannot. It is further allowed to create a right of pledge or mortgage for the benefit of a third party: in that case the pledgor or mortgagor is not the debtor of the underlying loan (so-called third party pledge or third party mortgage).

Any clause allowing appropriation of the pledged or mortgaged property by the pledgee or mortgagee (lex commissoria) is null. An agreement to that effect can be made only after the debtor’s default. Thus, in principle, exercising the pledge or mortgage involves a forced sale. The pledge or mortgage may also be exercised by the pledgee or mortgagee in the debtor’s insolvency. The pledgee and mortgagee take a high rank: they may, in principle, take away (separate) the burdened property and sell it in execution.

The rights of pledge and mortgage are rights depending upon the existence of an underlying loan. As a result the right of pledge or mortgage ceases to exist when the creditor’s claim against the debtor falls away, e.g. as a result of payment. Similarly, if the claim is being transferred the new creditor acquires the rights which are attached to the claim, such as the rights of pledge and mortgage. They are therefore called accessorial rights. These two principles also apply in the case of suretyship.

2.2 Pledge

The 1992 Civil Code abolished *fiducia cum creditor*. Security ownership had been recognised by the Dutch Supreme Court in 1929 because a mortgage on movables was needed (i.e. a non-possessori security right). Besides a silent assignment of a personal claim by way of security was recognised (i.e. without

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18. Art. 3:260(1) C.C.
19. Cf. artt. 3:236(2) and 3:97(1) C.C.
20. Art. 3:231(1) C.C.
21. See art. 3:235 C.C.
22. Art. 57 Fw.
23. Cf. artt. 3:7 and 6:142 C.C.
24. See also art. 7:851(1) C.C. These principles have led to various problems in situations where a large group of (changing) creditors exists. In such cases sometimes a security trustee is appointed, who will, e.g., be the mortgagor for the benefit of the creditors. As a result the mortgagor and the creditor are not identical persons. We should distinguish this from a third party mortgage in which the mortgagor and the debtor are not identical persons. See for an elaborate discussion of the various questions which can arise: S.C.J.J. Kortmann/M.H.E. Rongen/H.L.E. Verhagen, Zekerheidsrechten op naam van een ‘trustee’ (I), WPNR 6459 and (II), WPNR 6460 (2001).
notification to the debtor of the claim). The 1838 Civil Code required the pledgor to
give actual power over the object to the pledgee or a third person holding it for the
pledgee. A pledge on a claim had to be notified to its debtor.

One of the main reasons for abolition was that security ownership gives the
creditor more than needed: ownership rather than a limited real right. Gradually,
during many decades following the recognition of security ownership in 1929, the
Supreme Court reduced the security owner's rights to the rights of a pledgee. It held
that the owner is under a duty to sell the security object in execution and satisfy
himself from the proceeds of sale. Any surplus money had to be given to the debtor.
It was thus accepted that security ownership was different from normal ownership.
Another important but closely related drawback of security ownership was lack of
legal certainty: the concept had developed in practice and was not to be found in
legislation. As a result it took many decades to get any certainty about the rights and
duties of the security owner.

_Fiducia cum credito_ was replaced with a ‘silent’ pledge on movables (art.
3:237 CC) or claims (art. 3:239 CC). The pledgor remains in actual power of the
moveables, or, in the case of a claim, the pledge will not be notified to the debtor of
the claim. A silent pledge on moveables or claims requires a private deed registered
with the tax department or, alternatively, a notarial deed. These formalities prevent
antedating but do not aim at making the security interests public. The register at the
tax department is not a public register. The old types of ‘overt’ pledge on moveables
and claims (art. 3:236 CC) are maintained. In certain cases the pledgee may turn the
silent type into an overt type.

In the meantime the Dutch Supreme Court turned back the abolition of security
ownership to a large extent by acknowledging sale and lease back by way of
security. 27

The causal system for the transfer of things also applies to the creation of
limited real rights. As a result the pledge needs a valid legal ground (e.g. a contract
requiring the debtor to create a pledge). In principle the pledge, like the mortgage, is
a dependent or accessorial right (_afhankelijk_ or _accessoir recht_). This means that the
right of pledge depends on the claim secured by it. Consequently the pledge falls
away if the claim falls away (e.g. payment or compensation) and the pledge will
follow the secured claim when the claim is assigned to a new creditor. However,
exceptions have been made for example to create a pledge to secure credits on
current accounts, often called bank-pledge or current account pledge. This is made
possible by art. 3:231 providing that a pledge may be created as security for a future
claim.

In principle exercising the pledge involves a forced sale. The pledge may also
be exercised by the pledgee in the debtor's insolvency (art. 57 Fw). The pledgee
takes a high rank: he may in principle take away (separate) the pledge object from
the insolvency proceedings and sell it in execution. For this reason the pledgee, like
the mortgagee, is called a _separatist._

27. HR 19 May 1995, NJ 1996/119. _Fiducia cum amico_ is recognised to some extent, yet
ownership cannot be split into legal ownership and beneficial interests as in the English common
law.
A pledge may be created in advance on so-called future objects: movables which do not yet exist or have not yet entered the pledgor's patrimonium, or claims which do not yet exist. The legal act of creation (a real agreement different from any underlying contract; *goederenrechtelijke overeenkomst*) will be made under a suspensive condition. If all other requirements have been met the pledge will automatically be created the moment the object comes into being or enters the pledgor's patrimonium. The creation in advance of a pledge on claims is restricted to claims arising from an existing legal relationship, for example periodical lease payments.

According to the principle of specificity which applies to any transfer, creation or abandonment of a real right (i.e. ownership or a limited real right) a pledge should always relate to a specified object (the security object). The Supreme Court held that in the case of pledges on large amounts of claims the principle of specificity is applied leniently in that the pledge does not require a full list of all claims (the security objects) to be registered. A shortened list suffices as long as it enables a determination of the exact security objects, e.g. references to detailed computer lists which are not themselves registered.\(^{28}\)

In recent case law the Supreme Court extended the pledge on a claim in a surprising way. Due to the principle of specificity the pledge will end when the security object, the claim, falls away as a result of payment of the claim. According to art. 3:246(5) CC the pledgee who demands payment of the claim himself (this is possible in the case of an overt pledge) will not lose his right of pledge: because of real subrogation it will subsist on the money as the new security object. However, as Dutch law recognises real subrogation only in specific cases explicitly mentioned in the code, the pledge cannot subsist where the payment is received by the pledgor or his receiver in insolvency (this happens in the case of a silent pledge). Nonetheless the Supreme Court moderated this inevitable consequence by giving this silent pledgee a high rank in insolvency despite the loss of his pledge.\(^{29}\)

### 2.3 Mortgage

The general principles on pledges and mortgages imply that as to the creation of mortgages the causal system of establishment applies and that as a matter of principle - no right of mortgage can exist if there is no underlying loan. Furthermore, Dutch law does not allow an owner=s mortgage, as is e.g. possible under German and Swiss law: the very moment the mortgagor becomes owner of the burdened object the mortgage falls away as a result of confusion of the right of ownership and the right of mortgage.\(^{30}\) Unlike e.g. German and Swiss law, Dutch law also does not allow the creation of a document in which the mortgage is laid down and which may be transferred as a document of title. The owner of property which was burdened with a right of mortgage can ask the creditor of the loan for a notarial declaration that the right of mortgage no longer exists.\(^{31}\) This declaration can be registered in the

\(^{30}\) See art. 3:81(2)(e) C.C.
\(^{31}\) Art. 3:274 C.C.
public land register as evidence of the extinction of the right of mortgage.

When the debtor is in default the mortgagee can take several measures. If expressly agreed in the deed of mortgage and with the authorisation of the President of the District Court, the mortgagee may take over the management of the property. The mortgagee may also take control of the mortgaged property, provided this is expressly stipulated and required in view of the execution.

The Civil Code contains an elaborate provision on the right of the mortgagee and the buyer at an execution sale to annul certain lease contracts relating to the mortgaged property. This can be done only if the - notarial and registered - deed of mortgage explicitly stipulates that the mortgagor should be limited in his power to give the encumbered property in lease, although even then notable exceptions exist. This provision can be understood only against the background of the rule that lessees cannot be evicted if, after the lease, the leased property is being transferred or burdened with a limited real right, such as a mortgage. In the case of a mortgage certain lessees are even protected if the lease dates from after the right of mortgage was established, even if an express stipulation was made that the mortgagor is not allowed to lease the burdened property. The protection of the lessees means that, e.g., the new owner is considered to be the new lessor.

The proceeds of the sale in execution must be paid to the notary. The notary is allowed to pay the creditors if there is no doubt how to divide the proceeds. If there is any doubt the notary will have to pay the net proceeds to a custodian. The interested parties may request a judicial ranking: the court will then decide how the proceeds should be divided. As a result of the delivery pursuant to a forced sale and the payment of the purchase price by the buyer at the auction, all mortgages encumbering the property, all registered seizes and all limited real rights which cannot be invoked against the mortgagee are extinguished. The buyer can ask the President of the District Court for a declaration that the sale took place as required by law and that the purchase price has been paid to the notary. This declaration can be entered in the public land register and it authorises the registrar to cancel the entries regarding mortgages and seizes.

3 Retention of ownership (‘eigendomsvoorbehoud’)34

Dutch law regards the retention of ownership clause as a condition incorporated into

32. The relevant article (3:264 C.C.) takes about a whole page in print. We refer to the text as translated by Haanappel and Mackaay for further details. As to agricultural leases (‘pacht’) see also art. 34 Pachtver.

33. The principle that a sale will not break a lease (‘koop breekt geen huur’) is laid down in art. 7A:1612 CC (the provision of the old C.C. which still applies) and the articles 7:226 en 7:227 new C.C., which will enter into force in the near future. The new articles 7:226 and 7:227 have led to considerable academic debate. See e.g. M.M. van Asbreuk-van Os, De regel ‘koop breekt geen huur’ in wetsvoorstel 26089 vertoont (verborgen) gebreken, WPNR 6386 (2000); R. Westrik, Koop breekt geen huur en het huurbeding, Koninklijke Vermande, The Hague 2001), pp. 179 ff.

34. See Reehuis et al., Goederenrecht, ch. 15; Mijnssen/Van Velten, Zakenrecht, Zekerheden, ch. 7.
the legal act of transfer. Unless the parties agreed otherwise the law will assume that
they opted for a suspensive condition postponing the transfer of ownership until the
condition of payment has been met (art. 3:92 lid 1 CC). However, the parties may
opt for a resolutive condition: here ownership, which initially passed, will revert
upon fulfillment of the condition. Although the reversion has no retroactive effect, it
does in principle work against third parties.

Special provisions apply to hire-purchase which is regarded as a binding
contract of sale in which the purchase price should be paid in instalments. The
passing of ownership is postponed until full payment of the purchase price (art.
7A:1576h-x CC). Inmovable property, registered ships and registered aircraft are
excluded from the hire-purchase provisions, yet a special statute enables hire-
purchase of immovable property.36

Until 1992 retention of ownership could be used to secure any present or future
claim against the buyer. The new Civil Code of 1992 curtailed the field of
application drastically to claims which are directly related to the goods sold. As the
1992 Civil Code abolished security ownership (fiducia cum credito) it had to cut
down retention of ownership as well, because these means of security have in
common that ownership is used to secure a claim. Apart form the purchase price of
the goods sold the retention clause may secure the payment of other similar goods
delivered to the buyer previously or similar goods to be delivered in future. This will
reduce the risk that ownership will be lost because of mixing (commixtio or
confusio). Secondly, retention of ownership may secure the payment of additional
work (e.g. installation). The third category of claims which may be secured are
claims arising in the case of non-performance of the contract (art. 3:92(2) CC). To
the extent that a retention of ownership clause exceeds these limited categories of
claims it is void (partial voidness of the clause).

The retention of ownership is strictly confined to the original object delivered
to the buyer. Real subrogation is not acknowledged. As a result the security interest
will not extend to a new object produced from the goods delivered (specificatio), nor
will it extend to (a claim for) the purchase price received by the buyer in the case of
resale by him. The rules on original acquisition constitute ius cogens because it
serves the interest of clearness which is most important in property law. If the seller
wants to extend his security interest to a new product or to the a claim against a sub-
purchaser, he should require the buyer to create in advance a right of pledge on the
new object or claim. However, this security right will take rank after any other right
of pledge created in advance at an earlier date.

Unlike genuine security rights such as pledge and mortgage the so-called quasi-
security right of retention of ownership is not a dependent or accessorial (afhankelijk
or accessoir) right. Consequently, assignment of the seller's claim against the buyer
to a third party does not transfer the seller's right of ownership to the third party: a
separate act of transfer is needed.

The seller with retention of ownership takes a firm position in the buyer's

35. Art. 7A:1576(4) BW.
on hire-purchase of immovable property, is under consideration in Parliament (Document no.
24212).
insolvency. The object sold does not form part of the buyer’s insolvent estate available for execution. Unlike a pledgee or mortgagee he does not need the status of separatist, because the seller’s goods are not part of the buyer’s patrimonium.

4  **Right to reclaim (‘recht van reclame’)**

The seller of a movable object delivered to the buyer has under certain conditions a right to reclaim the object even though ownership has already passed to the buyer. The right does not apply to objects for the transfer of which registration is needed. As a first condition there should be a breach of contract entitling the seller to terminate the contract. The reason is that the right to reclaim is a special form of termination. While normal termination will create a mere obligation for the buyer to retransfer ownership of the object, exercising the right to reclaim will automatically revert ownership to the seller without any legal act of retransfer being needed. Secondly, the object sold should still exist in its original state (art. 7:41 CC). Thirdly, the right will lapse after both of the following terms have expired: six weeks after the claim for the purchase price has become due, and sixty days after physical delivery of the object. It can also be used in the buyer’s insolvency (art. 7:40 CC).

5  **Right of retention (‘retentierecht’)**

The right of retention is a special form of the right to suspend performance (the right of suspension) in that it entitles its holder to retain a thing belonging to the counterparty or a third party until his claim is satisfied. It thus temporarily impedes the action of revindication.

In order to retain the object the creditor should be entitled to suspend his duty to render the thing back to the debtor. The right of suspension may be given by the general provisions in art. 6:52-57 CC, the exceptio non adimpleti contractus of art. 6:262 CC, or by other, special, provisions. Thus, in principle there should be a sufficient coherence between the creditor’s (retentor’s) claim and his duty of returning the object. The right of retention works not only against the debtor but also against his creditors (art. 6:53/57), even in insolvency (art. 60 Fw).

Under strict conditions a right of retention can be exercised also to withhold immovable property. If, for example, a building contractor remains unpaid he is entitled to refuse access to the building. The conditions are laid down in HR 23 June 1995, NJ 1996/216 (Deen/Van der Drift) and HR 6 February 1998, NJ 1999/303.

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39. If the thing belongs to the creditor the standard right of suspension suffices.

(Winters/Kantoor van de Toekomst). It is required that the contractor have exclusive power over the building. This power may subsist even if the contractor has left the building site, e.g. by fencing off the site. The right of retention subsists until the debtor of the contractor’s claim or the owner of the site regains control of the building.

To answer the question whether the right of retention works against third parties with a real right on the object we should distinguish between movable and immovable property and the question whether the real right is older or younger than the right of retention.

A right of retention on movables or immovables works against the holder of a prior interest over the object provided either that the holder of the prior interest allowed the debtor to enter into the contract in which the non-performance takes place or that the creditor/retentor assumed in good faith that the debtor was so entitled (art. 3:291(2) CC). The right of retention of movables also works against interests subsequently created (art. 3:291(1) CC). As a right of retention over immovable property is not always recognizable to third parties (it cannot be registered onto the land register) the right does not work against every holder of a younger interest. It does so only if the retentor exercises his power over the object in a way which is recognizable to third parties (e.g. name plate on the fence). However, even if the power is not recognizable to outsiders, the right of retention works against a third party who knows of the right of retention. See the judgments in Deen/Van der Drift and Winters/Kantoor van de Toekomst.

6 Set-off (‘verrekening’) \(^{41}\)

The debtor of a claim who has a counter-claim against his creditor may set off his debt against his claim by unilateral declaration in any form (art. 6:127(1) CC). Where the parties have agreed set-off beforehand, e.g. in a relationship of current account, claims are automatically set off (art. 6:140 CC). Set-off requires that the claim and counter-claim are between the same parties and that both claims are similar in content. Moreover, to be able to set off a debtor should already be entitled to perform his obligation and should be able to force the other party to perform his counter-obligation (art. 6:127(2) CC). He cannot enforce payment from his counter-party if the latter has a right to suspend performance, if the payment is not yet due, or if the counter-obligation is a natural obligation (obligatio naturalis). Set-off will cause the obligations to fall away to their common amount. Although the result is to some extent similar to payment it should not be considered as such.

Assignment of the claim does not deprive the debtor of this claim of his right to set off, provided that both this claim and the debtor’s counter-claim arose from the same legal relationship, or that the debtor’s counter-claim arose to him and became due before the assignment (art. 6:130(1) CC).

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Once the possibility of set-off has emerged, it cannot lapse as a result of extinctive prescription. Set-off remains possible although the counter-claim has turned into a mere natural obligation due to prescription (art. 6:131(1) CC).

The requirements of set-off are more lenient in the creditor's insolvency. It is not required that the debtor be entitled to pay and to enforce payment from the counter-party. It suffices that both claims have arisen before insolvency or that they arise from a legal relationship with the creditor which predates the creditor's insolvency (art. 53 Fw).

However, a current account relationship between a bank and his client does not always suffice. The bank will no longer be able to set-off incoming payments on the current account against his counter-claim against the client in the period in which the client's insolvency can be foreseen or in the period after the declaration of insolvency. Despite these strict rules set-off in this 'forbidden' period is possible if the incoming money is a payment of a client's claim which was pledged to the bank (HR 17 February 1995, NJ 1996/471).

The lenient art. 53 Fw on set-off in insolvency is restricted also by art. 54 Fw. In sub 1 it provides that someone who before the declaration of insolvency took over from a third party a debt due to or a claim against the insolvent party is not entitled to set-off if at the moment of taking over he was not in good faith. Sub 2 adds that debts or claims taken over after the declaration of insolvency cannot be set off.

7 Suretyship ('Borgtocht')

Suretyship under Dutch law is seen as a special contract, creating a specific type of passive solidary obligation: the surety has to perform an obligation to which a third person, the principal obligor, is or will be bound to the obligee. The provisions regarding solidary obligations apply, unless otherwise provided in the Title on suretyship.

Suretyship has a subsidiary nature: the surety is not obliged to perform until such time as the principal obligor has failed in the performance of his obligation (art. 7:855(1)).

As to suretyship, again, the Civil Code adheres to its general approach that provisions common to certain legal relationships precede more specific rules. This means that, as already mentioned, the provisions on solidary obligations also apply to suretyship and that, as suretyship is a contract, the rules in Book 3 on legal acts

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42. HR 10 January 1975, NJ 1976/249.
44. See artt. 6:6 ff., concerning plurality of debtors and solidary obligations.
45. Art. 7:850(1) and (3). See artt. 7:865 ff. regarding the consequences of suretyship as between the principal obligor and the surety, and as between sureties and non-obligors liable for obligations among themselves.
apply, as well as the rules in Book 6 on obligations in general and on contracts. The specific rules on suretyship are laid down in Title 14 of Book 7. First general provisions are given, followed by special (mandatory) provisions in case the surety is a non-professional and, finally, provisions on recourse.

We already mentioned above that suretyship cannot exist without an underlying obligation and that transfer of the claim which is secured with suretyship entails that the new creditor will be entitled to claim under the contract of suretyship. Furthermore in the case of a pledge or mortgage the Civil Code accepts that such a right may be created to secure future claims provided the future obligations are sufficiently determinable. This rule also applies to suretyship. A surety agreement does not have to be made in writing, except if the surety is a non-professional.

The contract of suretyship does not create a relationship which is abstract from the underlying contract. The defences which the principal obligor has against the obligee may also be used by the surety, if they relate to the existence, content or time of performance of the obligation of the principal obligor. This provision, however, is not of a mandatory nature, except where the surety is a non-professional.

8 Final remarks

Generally speaking, the new Dutch Civil Code follows established civil law principles in regard to real and personal security law. As such the code seems to function well in legal practice. There is, however, one area where this is not the case: the ban on fiducia cum credito. The Civil Code explicitly adheres to the principle that ownership is a unitary concept and that it cannot be transferred for security purposes. However, the Supreme Court acknowledged sale and lease back by way of security as a valid transaction. Also, the Dutch legislator has already limited the impact of the fiducia ban in special statutes.

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46. Art. 7:857 defines a non-professional as a natural person acting neither in the conduct of a profession or business, nor for the benefit of the normal exploitation of the business of a company limited by shares or a private company with limited liability, of which he is director and in which, alone or with his co-directors, he holds a majority of the shares. On the mandatory nature - meaning that no derogation is allowed to the detriment of the surety - of certain provisions on suretyship see art. 7:862.

Case law decided under the old Civil Code shows that a professional obligee was under a duty founded in good faith to give clear information to the non-professional surety about the legal consequences of a surety agreement. See, e.g., HR 1 June 1990, NJ 1991, 759. Under the new Civil Code the same rule applies.

47. Art. 7:851(2). However, as to the non-professional surety special provisions apply: art. 7:861 C.C.

48. Art. 7:859 C.C.

49. Cf. artt. 7:852 and 7:862 C.C.