



Universiteit
Leiden
The Netherlands

Beginsel en begrip van verdeling

Sikkema, T.H.

Citation

Sikkema, T. H. (2018, November 22). *Beginsel en begrip van verdeling*. *Meijers-reeks*. Retrieved from <https://hdl.handle.net/1887/67088>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/67088>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/67088> holds various files of this Leiden University dissertation.

Author: Sikkema, T.H.

Title: Beginsel en begrip van verdeling

Issue Date: 2018-11-22

Summary

PRINCIPLE AND CONCEPT OF APPORTIONMENT

According to art. 3:166(1) of the Dutch Civil Code (DCC) a community of property is present when one or more assets (property rights) belong to two or more co-proprietors jointly. A community will cease to exist when this criterion is no longer met. Termination of a community can take place in various ways. One of these ways to terminate refers to termination via apportionment. With effect from 1 January 1992, the legislature provided for the legal arrangement of apportionment in the law. The legal concept of apportionment has since been regulated in art. 3:182 DCC:

‘An apportionment is every juridical act in which all co-proprietors, either in person or through a representative, participate and which has the effect that one or more assets of a community of property are assigned to and subsequently acquired by [at least, THS] one of the co-proprietors to the exclusion of all others. An act is not an apportionment if it intends to perform for account of the community of property an obligation indebted to one or more co-proprietors, that does not result from a juridical act as meant in the previous sentence.’

Knowing whether or not a legal act should be classified as apportionment is of significant importance for civil as well as for tax law. In this study the focus is on the legal act of apportionment as defined by civil law. In addition, the study exclusively involves apportionment by mutual agreement in accordance with the aforementioned art. 3:182 DCC.

The correct application of the legal concept of apportionment requires a full understanding of its content and scope. A systematic and thorough reflection on the content and scope of apportionment is not yet available in current legal literature with the exception of a few (old) high quality monographs in the field of community of property. A systematic explanation of apportionment is lacking, in particular if there are three or more co-proprietors jointly entitled to the community. The overall aim of this study is therefore to provide an evaluation of the legislative frameworks concerning apportionment as a juridical act according to Dutch civil law, by examining in particular the content and scope of apportionment based on art. 3:182 DCC.

In Chapter 2 the legal concept of apportionment is introduced. The content and scope of apportionment can only be described comprehensively when

the type of community to which the apportionment relates is taken into account. For this reason, relevant historical and contemporary models of co-ownership are both addressed. In addition, a reflection is presented on the way those models can be terminated by virtue of apportionment. The discussion of this theme preludes the consideration of community and apportionment according to the current Dutch Civil Code.

In Chapter 3 the developmental history of the legal concept of apportionment is described on the basis of various legal sources.

In Chapter 4 an analysis is presented of the two sentences on the concept of apportionment in art. 3:182 DCC. Both sentences act as each other's antagonists; what is considered to be apportionment on the basis of the first sentence can be excluded from this qualification by the second sentence. In general, it can be concluded that a clear understanding of the concept of apportionment is complicated by the use of inadequate legal methodology and the ambiguous way in which apportionment is discussed within its developmental history. As a result, no unanimity exists in opinion in the current doctrine with regard to the content and scope of apportionment. Given Meijers' and the Ministers' (latest) opinion on apportionment, the guiding principle within this study is that apportionment constitutes the 'causa' for delivery and that delivery must be distinguished from apportionment.

In Chapter 5 the 'criterion for apportionment' is established. This reflects the essence of the effect of acquisition by virtue of apportionment. The essence of the effect of acquisition by virtue of apportionment can be represented as the occurrence of a reduced degree of joint ownership. This should occur as a result of the reduction of the number of co-proprietors entitled to at least one of the community's assets pursuant to an act to that effect between co-proprietors, to which all co-proprietors contribute.

In Chapter 6 acquisition by virtue of apportionment is analyzed with regard to its legal effect. For the interpretation of this legal effect, the first sentence of the legal concept of apportionment is of importance. This sentence states that it is required that one or more co-proprietors acquire one or more assets of a community of property by virtue of a legal act, while excluding other co-proprietors. The content and scope of this concept of acquisition as it applies to apportionment is examined. Two different types of acquisition should be taken into account for the realization of legal apportionment. The first type of 'acquisition' refers to the acquisition of assets of a community of property whereas the second type of 'acquisition' concerns the acquisition of non-community assets (equalization by cash not held communally due to a non-proportionate apportionment in a factual – and therefore not yet in a legal – sense).

With regard to the first-mentioned type of acquisition, the content and scope can only partly be considered from legislation. It can therefore be assumed that the scope of the concept of acquisition on the one hand is determined by the scope of the term 'acquired' as referred to in the first sentence of art. 3:182 DCC and on the other hand by the criterion – not laid down by law – of the extent to which a co-proprietor can dispose of (his share of) the community property. The legal concept of acquisition functions only in the event that the term 'acquired' is understood to also include the acquisition of the part to which a co-proprietor is already entitled to before apportionment and delivery. In addition, the scope of acquisition is determined by both the part to which a co-proprietor is already entitled to before apportionment and delivery (as a minimum) and the full entitlement to the asset as a whole (as a maximum).

The latter type of acquisition refers to the criterion developed in jurisprudence that legal apportionment can only occur if agreement exists on the financial consequences (equalization by cash not held communally) due to a non-proportionate apportionment in a factual sense. This type of acquisition is not stipulated in the legal concept of apportionment as currently regulated in art. 3:182 DCC.

In Chapter 7 the subjective elements regarding the realization of apportionment are dealt with. It is concluded that co-proprietors in apportionment must cooperate as is defined by their capacity of being co-proprietors. This participation of 'co-proprietors as co-proprietors' can be deduced from the assumptions underlying the legal relationship between the co-proprietors derived by the joint entitlement to the assets of the community of property.

In Chapter 8 a definition is provided of both the object of the legal act of apportionment as intended in art. 3:182 DCC and the object of delivery as intended in art. 3:186 DCC. The opinion that the object of the legal act of apportionment applies to the entire common assets should be regarded legally correct provided the framework for acquisition by (one or more) acquiring co-proprietors is determined by the criteria set out in Chapter 6. On the strength of this legislation as well as on the accompanying commentary, it can be assumed that the object of delivery to effect apportionment concerns the apportioned asset as a whole.

The two sentences that deal with the concept of apportionment of art. 3:182 DCC are reflected upon in Chapter 9. The purpose here is to provide recommendations for an alternative wording of the legal concept of apportionment according to its typical characteristics. It is concluded that an improved description of the content and scope of apportionment is possible when the 'criterion for apportionment' as analyzed in Chapter 5 becomes the guiding principle for the description of the required legal effect of acquisition by virtue

of apportionment. If, in addition to this, the principle is adopted that a legal act of apportionment requires the cooperation of all co-proprietors in their capacity as co-proprietors, remaining acts in which not all co-proprietors cooperate as such can be excluded from the scope of the concept of apportionment. Finally, the concept of apportionment could be expanded to include the criterion of agreement on the financial consequences resulting from a non-proportionate apportionment in a factual sense.