# FINANCIAL COLLATERAL ARRANGEMENTS

## THE EUROPEAN COLLATERAL DIRECTIVE CONSIDERED FROM A PROPERTY AND INSOLVENCY LAW PERSPECTIVE

#### AN ACADEMIC ESSAY IN LAW

TO OBTAIN THE DEGREE OF DOCTOR
FROM RADBOUD UNIVERSITY NIJMEGEN
ON THE AUTHORITY OF THE RECTOR PROF.DR. C.W.P.M. BLOM
ACCORDING TO THE DECISION OF THE COUNCIL OF DEANS
TO BE DEFENDED IN PUBLIC ON THURSDAY 6 JULY 2006
AT 3.30 P.M. PRECISELY

BY

#### THOMAS RUDOLF MARIA PIUS KELISER

born on 20 June 1972 in Nijmegen

### SUMMARY TABLE OF CONTENTS

ABBREVIATIONS		XXIII	
I	INTRODUCTION	1	
1.	Introductory remarks	1	
2.	The European Collateral Directive	2	
3.	Presentation of questions	3	
4.	Some additional remarks	7	
II	THE MARKET	9	
1.	Introduction	9	
2.	What is financial collateral?	10	
3.	Master agreements	20	
4.	Flows of cash and securities in repos and securities lending	25	
5.	Cross-product arrangements	40	
6.	Commercial market participants	48	
7.	Central banks	53	
8.	The Collateral Directive	64	
9.	Implementation of the Collateral Directive in the Netherlands	86	
Ш	iTRANSFER OF TITLE	93	
1.	Introduction	93	
2.	Transfer of title: the market approach	100	
3.	Recharacterisation as a security interest?	112	
4.	Temporary transfer of title?	164	
<b>'</b> 5.	Conclusion	171	
IV	RIGHT OF USE	175	
1.	Introduction	175	
2.	Right of use under American law	186	
3.	Right of use under English law	199	
4.	Right of use under Dutch (and German) law	214	
.5.	Conclusion	261	

V	ENFORCEMENT ,,	275
1.	Introduction	275
2.	The liberal enforcement of a security interest and the	TM∼
	abolition of the prohibition of appropriation	279
3.	Close-out netting	290
4.	The declaration of insolvency: no retroactive effect,	
	enforceability of legal acts	313
5.	Freeze period	325
6.	Conclusion	334
VI	CONCLUSION AND RECOMMENDATIONS	339
1.	Introduction	339
2.	The consequences for property and insolvency law	340
3.	Restrictive or extensive scope of application?	352
4.	Recommended changes to the Collateral Directive and	
	the Settlement Finality Directive	361
SUN	MMARY '	365
SAN	MENVATTING	369
APP	PENDIX I TEXT OF THE SETTLEMENT FINALITY	
	DIRECTIVE	373
APP	PENDIX II TEXT OF THE COLLATERAL DIRECTIVE	383
BIB	LIOGRAPHY	397
LEG	GISLATION, GUIDELINES AND PRINCIPLES	417
LEG	GISLATIVE HISTORY OF THE COLLATERAL DIRECTIVE	421
WE	BSITES	423
~		
SUB	SJECT INDEX	425