MARIUS

SCANDINAVIAN INSTITUTE OF MARITIME LAW

Leiv Mikael Erdal

Legal Implications of Security Assignment

Comparing the Norwegian and English law of security assignments in the context of building finance for high-value movable property

365

Legal Implications of Security Assignment

Comparing the Norwegian and English law of security assignments in the context of building finance for high-value movable property

Leiv Mikael Erdal

Legal Implications of Security Assignment

Comparing the Norwegian and English law of security assignments in the context of building finance for high-value movable property

MarIus nr. 365

Sjørettsfondet
Scandinavian Institute of Maritime Law
University of Oslo

ISSN: 0332-7868 © Sjørettsfondet, 2008
University of Oslo
Postboks 6706 St. Olavs plass
N-0130 Oslo

Visiting address: Karl Johans gate 47

Phone: +47 22 85 97 48
Fax: +47 22 85 97 50
E-mail: sjorett-adm@jus.uio.no
Internet: www.jus.uio.no/nifs

Editor: Professor dr. juris Trine-Lise Wilhelmsen

Print: Lobo media

Preface

This thesis was submitted in satisfaction of the LLM (Maritime Law) degree offered by the Scandinavian Institute of Maritime Law in 2006-2007. The thesis has between formal submission and date of publication endured certain cosmetic and some limited substantive amendments, the latter pursuant to very helpful comments and suggestions from its examiners, dr. juris Andreas Meidell and dr. juris Berte-Elen Reinertsen Konow. Notwithstanding, the sole responsibility for the quality of amendments made lies with the author.

Shipping generally and maritime law specifically offer up ample pickings for those seeking to explore the always interesting but sometimes problematic nexus between English and Norwegian law. Norwegian by birth but English lawyer by education, an exploration of the interface between the regimes both in law and practice was for me a natural starting point. For his patient and insightful guidance from this admittedly woolly starting point through exploring the pertinent issues and all the way until submission, I am particularly indebted to my supervisor, Andreas Meidell. In sharing with me her knowledge of and experience with security assignments in an Anglo-Norwegian context, I am also particularly indebted to Marie Efpraxiadis.

In providing academic stimuli and an outstanding learning and working environment throughout the rewarding year spent there, I am thankful to the Scandinavian Institute of Maritime Law with its academic and administrative staff. Furthermore, I was in the later stages of writing fortunate in being able to draw on the resources of the law firms Wikborg Rein and Thommessen, which were kind enough to provide office space, practical support functions of every description, and numerous willing discussion partners. To both firms I owe my gratitude in this regard.

Finally, thanks are due to my fellow students at the Institute, friends and family, for academic, linguistic, moral and other support.

In the “other” category I may in particular mention the many opportunities for distraction – always welcome and absolutely essential – from a writing process for which time had to be found in the few months Norwegians (sometimes optimistically) call summer.

Oslo, 3 April 2008

Leiv Mikael Erdal

Table of Contents

1 Introduction

1.1 The Subject

This thesis will examine the device of assignments by way of security in the pre-delivery building finance of high-value movable property. Such property is typified by large commercial ships, offshore installations and similar constructions the building of which share the characteristics of being exceptionally capital-intensive, complex affairs often with substantial lengths of time passing between contract and delivery, particularly in the present market of well-filled order books worldwide.

Assignments by way of security are usual components of pre-delivery finance for these substantial building projects. Essentially, as with other forms of security, their purpose is to protect the creditor interest. Broadly, they operate similarly to a mortgage, in that the creditor gains a right, by way of a form of "transfer" (assignment) of the asset, typically contingent on an event of default under a loan facility, to look to the asset for satisfaction of the debtor's obligations. The extent to which, and the specific mechanics whereby this is achieved in various legal systems differ – so the above is by way of guidance, not definition[1]. The consequences of these differences in a context of cross-border trade can in some cases be unexpected or unwanted and in other cases as yet unknown.

[1] For comparison, see Black Law's dictionary, which for US law purposes has primarily defined assignment as such: "The act of transferring to another all or part of one's property, interest, or rights."

1.2 Method and Limitations in Scope

1.2.1 The types of security

The first and most crucial premise for the discussion is that title to the property will not pass prior to delivery, this being the default provision under most standard forms used for instance in shipbuilding[2], and that access to more traditional forms of security such as a mortgage in the vessel under construction is thereby prevented. Further, we may assume, for the purposes of this thesis, that there is no access to register encumbrances over ships under construction or building contracts, which might have been the case if it was a ship under construction in Norway, subject to the Norwegian Maritime Code 1994[3]. Finally, we may assume that the security assignment model is, in the context of the transaction, the most appropriate from a commercial point of view, precluding consideration of alternative arrangements such as financial leases or pledge constructions.

1.2.2 The objects of security

The objects of security accessible to the bank are accordingly limited to rights under the various contracts that attend the transaction. Furthermore, the scope is limited firstly to the claim for delivery of the property under the primary building contract, and secondly to claims for payment arising under refund guarantees. A refund guarantee is by and large similar in nature to the advance

---

[2] Norwegian Shipbuilding Contract 2000 Art VIII(4), Art XI ; AWES form Art 8(b), Art 6(a) ; SAJ form Art VII(1)&(5)

[3] See for detail: Falkanger, Bull, Brautaset (2004) Scandinavian Maritime Law: the Norwegian Perspective (2nd Ed.) Oslo: Universitetsforlaget , pp. 69-70, 99-101, 130-131

payment guarantees commonly found in construction generally – it ensures repayment of an instalment paid by the buyer in the event of cancellation of the primary contract[4].

As such, it should be emphasised that it is not the tangible movable property in which security is directly taken. The objects of security – the "assets" – are the 'intangible' rights that arise under the primary contract and guarantees, as these are the only rights to which a beneficiary of those rights can properly attach value prior to the transfer of ownership on delivery.

1.2.3 The party dynamics considered

Building projects of the type envisaged in this thesis are complex affairs with an almost indefinite list of potentially involved or affected parties. To illustrate the issues raised in this thesis to the best effect, we will however limit ourselves to the following relationships:

(a) Yard and buyer
(b) Buyer and bank
(c) Yard and buyer's bank
(d) The relationship between the bank and the buyer's other creditors

Relationship (a) and (b) are clearly contractual, the former by virtue of the building contract and refund guarantee, the latter by virtue of the assignment agreement and loan facility. While relationship (c) is a *prima facie* non-contractual relationship, the device of assignment will create certain proprietary effects between the two. The (a)-(c) dynamics are broadly within the ambit of

---

[4] For examples from the standard shipbuilding forms, see NSC 2000 Art III(3); cf. AWES Art 7 which does not contain an express right to a refund guarantee

sections 2 to 5 of the thesis, largely concerned with initial *inter partes* validity however (c) will also feature strongly in the discussion of notice, found in section 6. Dynamic (d) is non-contractual and falls squarely within the ambit of section 6.

Another party could be added to the above list and that is the yard's bank. They will issue the refund guarantee, but as the yard will in ordinary circumstances stand as principal debtor also in that relationship any legal consequences relating to the guarantee will in the final instance be for the yard's account.

1.2.4 The jurisdictions compared

As its title implies, the thesis is limited to Norwegian and English law. The limitation is meaningful in the particular practice of building finance to Norwegian buyers for newbuild purchases from yards abroad, typically in Asia. A choice of English law is often made in one or more of the contractual instruments – frequently in the pre-delivery security agreement, or assignment agreement, as it is also often known, additionally to the building contract itself. This comes in addition to the very frequent use of the English language in international contracts generally, and the use of a seemingly common law-inspired style of drafting in modern commerce.

English law, style and language are for better or worse facts of life for many Norwegian lawyers and English law may be regarded as a "convenient" choice for the parties to a building transaction – irrespective of any connection to England otherwise. Equally, it is a fact of life that different legal systems may have different solutions to the same problem, the consequences of which ought not to be underestimated.

In considering the respective legal regimes comparatively, the emphasis will be on functionality[5]. This approach is probably best defined in terms of what it is *not*. It is not a disinterested digest of the detailed formal and procedural requirements for assignments for security purposes in English and Norwegian law. Rather, it is a consideration of the substantive law of security assignments, with primary focus on particular issues, arising under the English and Norwegian regimes, and which may impact especially on the building finance of high-value movable property.

1.2.5 Particular problems indicative of a general condition

This thesis does not and cannot aspire to be anything more than a particular thesis dealing with particular legal problems in a defined set of relationships. Nevertheless, particular problems can be symptomatic of a more general condition, even if this is not equal to a full 'diagnosis'.

It will be seen below that English law is preoccupied with ensuring that an assignment appears as clear and full as possible – it will limit the effect of assignments which it construes as uncertain or speculative. It appears to do so out of an interest that no ambiguity should prevail over what the parties have properly agreed as between themselves, and their respective positions in the transaction dynamic. This will primarily impact on the efficacy of refund guarantees.

Norwegian law, on the other hand, appears less concerned with the certainty of an assignment and more concerned with whether

---

[5] Held by Zweigert & Kötz to be the basic methodological principle of comparative law: Zweigert, K. & Kötz, H. (1998) An Introduction to Comparative Law (3rd Ed.) Oxford: OUP , p. 34

or not the subject of the assignment is a right it views as properly transferable. It will be seen that it appears to do so out of a concern for third parties – a concern that will properly manifest itself in insolvency situations and be mostly relevant to the claim for delivery.

1.3 Objective and Structure of the Thesis

The primary objective of the thesis is to highlight legal problems pertaining to security assignments that may arise in a typical newbuild finance transaction, for instance for the purchase by a Norwegian buyer of a vessel from a foreign yard, and where an English choice of law is made. In doing so, the thesis will firstly offer a brief historical overview and general introduction to the internationally acknowledged notion of assignment (chapter 2), before considering assignability under English (chapter 3) and Norwegian law (chapter 4) with reference to particular problems in each. Next, the thesis will look to two instances in which a specific English choice of law can have unexpected consequences, firstly in relation to the guarantees assigned (chapter 5) and secondly in relation to the claim for delivery (chapter 6). Finally, the thesis will conclude with a discussion – *de lege ferenda* – of the special Norwegian prohibition of security assignments of payments in kind. While the brevity of that discussion cannot justify any pretension of reaching an objective – even if it is only secondary – it may go some way towards showing that the prohibition is ripe for removal. To this extent, it may be considered a secondary aspiration.

2 Historical Overview and General Principles

2.1 Historical Background

2.1.1 England

The common law was reluctant to permit assignment of what it refers to as 'choses in action.' A chose in action is essentially an intangible right, and has been defined as follows:

> 'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession.[6]

This includes a wide range of rights, including but not limited to shares, negotiable instruments, policies of insurance, bills of lading, copyrights and rights of action under contract or tort[7].

The justification for prohibiting their assignment at common law was two-fold. Firstly,

> the occasion of multiplying of contentions and suits, of great oppression of the people … and the subversion of the due and equal execution of justice[8]

and secondly, an apparently misconstrued understanding that all choses in action were *personal actions*[9] to enforce *personal* rights and therefore incapable of separation from that person. In substance, however, the term also developed to include *personal*

---

6 *Torkington v Magee* [1902] 2 KB 427, at 430.

7 Furmston, M. P. et al. (2007) Cheshire, Fifoot and Furmston's Law of Contract (15th ed.) Oxford: OUP , p. 643

8 *Lampet's Case* (1612) 10 Co Rep 46b at 48a, 77 ER 994 at 997

9 Smith (2007) The Law of Assignment: The Creation and Transfer of Choses in Action Oxford: OUP , p. 16

actions to enforce *proprietary* rights[10]. Hence, the reluctance to recognise assignment of choses in action at common law was in part founded on a false premise: namely that a contractual right could not be conceived of as an "impersonal" asset.

The other concern, that of 'multiplying contentions and suits' is probably still relevant: a central purpose of assignment *is* to permit an assignee reap the fruits of an action (i.e. what results from its enforcement), but it is doubtful whether this leads to a degree of subversion of justice which justifies retaining the absolute prohibition.

In any event, the English Courts of Equity did not share the common law's rigidity and developed more flexible rules[11], permitting assignment of choses in action. After the English Courts of Equity were joined with the Courts of Law[12], the two regimes were not consolidated even if the procedural aspects were greatly simplified. With the Law of Property Act 1925, a third statutory regime was added to codify and simplify some of the equitable rules of assignment[13]. Modern English law is, in spite of its various convolutions, for practical purposes left with one distinction which is relevant: namely that between the *legal* and *equitable* assignment. This is a distinction with particular consequences, as will be seen below.

2.1.2 Norway

The Norwegian legal order contains no sharp distinction between law and equity. To import English phraseology, it is only a legal assignment that is possible. As such, it is not the law/equity divide

---

10 Smith, M. (2007) The Law of Assignment, p.128

11 Smith The Law of Assignment , p. 133 et seq.

12 By way of the Judicature Acts of 1873 and 1875.

13 Smith The Law of Assignment , p.138

which has shaped the historical development of the Norwegian law of assignment. It is more appropriate to account for its development with reference to a long-standing preoccupation with the overlap between assignment and the law of security rights.

Until the Law of Mortgages of 1857 it was possible to mortgage or assign by way of security any and all contractual rights – this was, one would suppose, to the "great oppression" of the people in the manner envisaged by the English judge cited above. Surprisingly perhaps, this broad access was not borne of age-old principles: in fact the principle had been that creditor substitution had been prohibited, apparently on account of the barbaric means of enforcement a medieval creditor could bring to bear against a debtor *i.a.* "to hack off where he pleased, above or down below"[14]. Although mutilation had by 1857 given way to less drastic private remedies, the underlying sentiment for the legislative changes remained the same: namely to favour the supposedly weaker party, by limiting access to creation of contractual security and thereby strengthen the personal – unsecured – creditors' prospects[15].

The result was a total prohibition of any *mortgage* of claims which was frequently and fairly effectively circumvented by employing the security assignment as a surrogate[16]: the effect was the same, the label – i.e. *not* purporting or stated to be a mortgage – being the defining feature. The unsecured creditor was no better off. As such, the prohibition was in real terms ineffectual. In 1980, new legislation was passed in the form of the Mortgages and Pledge Act,

---

[14] Augdahl, P. (1978) Den norske obligasjonsretts almindelige del Aschehoug: Oslo, p. 309

[15] Brækhus, S. & Høgetveit Berg, B. (2005) Omsetning og kreditt II: Pant og annen realsikkerhet (3rd Ed.) Universitetsforlaget: Oslo , pp.156-158

[16] Ibid.

which in respect of the *mortgaging* of contractual claims for payment in money opened up access in §4-4 but in respect of the circumvention by way of *security assignment* served as a straightjacket, through §4-9 and in factoring through §4-10. The 1980 legislation limits the access to mortgaging to *'enkle pengekrav'* or simple claims for payment in money, whereas for security assignments the terminology is '*enkle krav'* or simple claims. We will revert to this distinction in section 4 below.

2.2 Outright Assignment: common principles

2.2.1 A transnational starting point: the PECL

The device of assignment is arguably "axiomatic" in a sophisticated modern system of circulating currency and credit[17]. The right to claim something from someone else has existed for as long as humans have traded in land and goods however a clear systemised set of rules in respect of transferring that claim as collateral for another transaction is in Norway and England of relatively recent origin (see 2.1 above). It is clear, however, that claims to performance should be considered movable items of wealth and as a matter of facilitating international trade, easily transferable[18].

With a view to the facilitation of international trade, we can look to an instrument which by definition is intended as non-national: the Principles of European Contract Law ('the PECL'). An assignment falling inside Article 11 is generally described as[19]:

---

17 Zweigert & Kötz Introduction to Comparative Law , p. 442

18 Ibid.

19 Lando, O. et. al. (2003) Principles of European Contract Law Part III The Hague: Kluwer Law , p. 85

i) A transfer of a right of performance, often a right to the payment of money;
ii) not involving any transfer of the assignor's obligations;
iii) with the debtor's own claims continuing to lie solely against the assignor; and
iv) not involving the release of either of the parties to the contract;
v) so that the debtor's consent is not required, subject to the underlying contract.

It appears that the five-point PECL description is apt also as a general description of the Norwegian and English regimes.

2.2.2 The distinction between rights and obligations

The PECL distinguishes assignment from a situation whereby a debtor is substituted or the contract is otherwise transferred as a whole together with its attendant obligations to a third party. These situations are appropriate for *novation* of contract which essentially establishes a new contract, requiring three-way assent. This is recognised as a fundamentally different transaction from an assignment, and is dealt with under a separate heading in Article 12 of the PECL.

The distinction between rights and obligations exists in both Norwegian and English law. In ordinary circumstances under Norwegian law, a debtor may not be released of their obligations by substituting a new debtor without the creditor's consent[20]. A near-identical statement of English law is found in the dicta of Collins MR in *Tolhurst v. Associated Portland Cement Manufacturers Ltd*[21].

In the type of transaction envisaged for this thesis – with the movable to be built at one yard only, the transfer of obligations is patently not at issue – the right of delivery to the property and the

---

[20] Hagtrøm, V. (2003) Obligasjonsrett Oslo: Universitetsforlaget, p. 841

[21] [1902] 2 KB 660

right to payment under the guarantees both flow as obligations from the yard's "side" of the transaction, and arrive as rights on the buyer's side.

2.2.3 The debtor's position

It follows from the nature of the distinction between rights and obligations that no consent is required from the debtor – herein the yard – subject to contract. Such consent is, however, frequently built into for instance shipbuilding contracts, see NSC Article XIII.

In respect of the debtor's position, Norwegian law applies no general requirement of debtor consent to the assignment – in fact it is equated to the transfer of regular rights in property and is stated to be a fairly self-evident legal rule[22]. Security assignments of contractual claims for payment in money are generally acknowledged and Norwegian courts appear willing to uphold them as a matter of law[23]. Similarly, in English law, there is no default rule of debtor's consent – the assignment nevertheless operates as an effective transfer[24]. However, where there is an express requirement for the debtor's consent or other prohibition on assignment, both Norwegian[25] and English[26] law recognise that these may not be bypassed. The debtor's position as it relates to the requirement of notice, also crucial vis-à-vis third parties, will be discussed in 6.2 below.

There is the further consideration that the debtor by the assignment should not be obliged to offer better performance than

---

22 Hagstrøm Obligasjonsrett. p.857

23 Rt.1963.893; Rt.1992.492

24 Cheshire, Fifoot and Furmston's Law of Contract (15th ed.) Oxford: OUP , p. 660

25 Hagstrøm, p.859

26 *Linden Gardens Trust Ltd. v Lenesta Sludge Disposals* [1984] 1 AC 85

he would if his obligation was never assigned. This principle is found in PECL Article 11:302 and mirrored in both England and Norway. In England it is expressed in the general principle that the debtor shall not be prejudiced[27] whereas for Norwegian law the general principle can be expressed in the Latin *nemo dat quod non habet* – no person can confer a better title than he himself has[28].

2.2.4 Requirements as to form

As between the assignor and assignee there are no particular requirements as to form laid down in Norway or England beyond those that follow from the respective ordinary law(s) of contract and obligations[29]. As between assignor/assignee and the debtor additionally to any relevant third parties, particular requirements as to form in the shape of notice requirements make themselves felt in different ways in Norway and England, discussed in 6 below.

2.3 Security Assignment: a fundamental difference

2.3.1 English law security assignments as formal transfers of ownership

A security assignment is in effect a form of mortgage. Under English law, a frequently used definition is along these broad lines:[30]

> A mortgage is a transfer of ownership of the asset (or of any lesser interest held by the transferor) by way of security upon the express

---

27 See Smith, The Law of Assignment, pp.355 et seq.

28 Hagstrøm, p. 869

29 Lando, Principles of European Contract Law , p. 97

30 Goode, R. (2003) Legal Problems of Credit and Security (3rd Ed.) London: Sweet & Maxwell , p. 35 ; Smith Law of Assignment , p. 285

> or implied condition that ownership will be re-transferred to the debtor on discharge of his obligation.

As such, the title to the asset passes. This explains the use of express "discharge" or redemption clauses in English law security assignments.

For clarity, it is important to be aware that a transfer of ownership does not require a delivery of possession. Further, it should be noted that a mortgage can also be by way of novation. A mortgage must be distinguished from a charge, by which no transfer of ownership takes place and where the security consists in the right to have the security made available by an order of a court[31]. A mortgage being a transfer of existing ownership does not as such create a new interest, where a charge on the other hand does. We need not consider charges in more detail here, but they are important to highlight as a contrast to the much 'better' security of a mortgage, at least in the eyes of the common law.

2.3.2 Norwegian law security assignments as a hybrid

To sound a terminological warning bell, the author will, with the exception of this section, use the word 'mortgage' indiscriminately when referring to the Norwegian regulation. Clarity of concept will give way to consistency of communication even if it is clear that the English law definition of mortgage is specific, and quite different from the Norwegian law definition of *panterett* which encompasses a broader range of security rights.

With a Norwegian *panterett* is meant a particular interest obtained to seek satisfaction of a claim in one or more definite asset(s). This is the author's translation of §1-1 of the Norwegian Mortgages and

---

[31] *National Provincial and Union Bank of England v Charnley* [1924] KB 431

Pledges Act 1980 ('the Mortgages Act') which implies a very different type of security right – in spite of the Act's title – than a mortgage, not involving a formal transfer of ownership and similar conceptually to an English charge. This view is supported in recent Norwegian literature[32]. Norwegian law shares with English law the absence of a requirement to deliver possession of the subject of security in the case of *underpant*, pursuant to §1-1(2), however where the security right is characterised as *håndpant* there is a *prima facie* requirement of delivery of possession pursuant to §1-1(3).

A security assignment appears presently in Norwegian law as a cross between a formal transfer of ownership and a "mere" §1-1 interest to seek satisfaction of a claim. Before the Mortgages Act the security assignment bore the hallmarks of a formal transfer even if it was implicit *inter partes* that it fulfilled a security function only[33] – to this extent it was not unlike the English mortgage conceptually. The Mortgages Act has "forced" it into its current hybrid status, whereby the notion of title to the asset seems to be downgraded and control of the asset, regardless of title, is emphasised. In the context of intangible rights, which will be the subject of the security assignment for present purposes, the control aspect is ensured by §4-6 of the Mortgages Act the operation of which means the assignee will control the asset "as if" [34] he had received title to it. The "as if" qualification underlines the hybrid nature of the security assignment under Norwegian law and should be borne in mind when comparing it to the position under English law.

---

[32] Reinertsen Konow, B-E. (2006) Løsørepant over landegrenser Bergen: Fagbokforlaget, pp.50-52

[33] Brækhus, pp.135-138

[34] Falkanger, T. in (2004) Knophs oversikt over norsk rett Oslo: Universitetsforlaget, pp.389-390

3 Particular Issues of Assignability: England

3.1 The Preoccupation with Certainty

Under English law, two issues in particular stand out. The first is that of contingency, the second is that of present as opposed to future choses in action. These issues will primarily relate to the guarantees issued under a building contract.

Firstly, an assignment by way of security of rights under a guarantee is firstly a contingent assignment of a potentially contingent claim. What is meant by the contingency of the assignment is its dependence on a trigger circumstance under the loan facility which nullifies the buyer's right of redemption. As such this type of contingency does not concern itself with any default or breach under the primary contract. This is the type of contingency which will be presently discussed. The contingency of the claim is connected with a 'trigger' under the building contract which is a matter for the characterisation of the guarantees to resolve under the choice of law made. This is an issue complicated enough to merit separate consideration in section 5 below. Secondly, an assignment of rights under a guarantee is secondly and not infrequently an assignment of a *prima facie* future right of enforcement under a present guarantee, and in some cases a purported assignment of rights to claim under guarantees to be issued in the future. Such assignments may have particular consequences under English law which will be considered below.

Both these facets seem to illustrate a particular preoccupation in the English legal order as it pertains to assignments, and that is for the rights and obligations of involved parties to be clearly established. Any assignment which is found wanting may still be given effect albeit only to a limited extent. English law appears less concerned with *what* is being assigned, provided the demands of certainty are satisfied.

3.2 Contingency

3.2.1 Law versus equity

The extent to which an assignment can be construed as contingent is important, as a contingent or non-absolute assignment will have particular consequences under English law. It is only an absolute assignment which can be effected statutorily by way of section 136 of the Law of Property Act 1925 ('the LPA'). As such, a contingent assignment can only be equitable. The significance of this is that an equitable contingent assignment, if the *chose* is legal, as in the present context, would necessitate the assignor being joined in any action the assignee might want to bring to recover under the right assigned[35]. Under a legal assignment, subject to s136 LPA, the assignee need not *prima* facie join the assignor, even if it should be acknowledged that in some cases the assignor's presence is to be desired[36].

Usually, the categorisation of the chose in action as equitable or legal is of subordinated importance as both legal and equitable assignments can today relate to both legal and equitable choses[37]. We may identify legal choses as those formerly enforceable only by an action at law whilst equitable choses were only enforceable in a court of equity – typically interests in trust funds and the like[38]. Debts and rights under a contract – contingent or not as under a

---

35 Halsbury's Vol. 6 2003, para 69 ; *Performing Right Society Ltd v London Theatre of Varieties* [1924] AC 1

36 Smith, Law of Assignment , p. 267

37 *Torkington v Magee* [1902] KB 427, at 430-431 ; *King v Victoria Insurance Co Ltd.*[1896] AC 250, at 254; *Re Pain, Gustavson v Haviland* [1919] 1 Ch 338, at 44-45; Cheshire pp.648-649

38 Halsbury's Vol 6. 2003, paras 6-7

guarantee – are legal choses[39]. As such, in the event of a contingent equitable assignment of a legal chose in action the categorisation can in fact have definite and potentially unwanted consequences whereby the assignor must be joined to the action.

3.2.2 The lack of consideration

Consideration is an idiosyncrasy peculiar to the common law, and its precise definition is a matter for considerable discussion. Nevertheless, for present purposes we may accede to the House of Lords in *Dunlop v Selfridge*[40] as inspired by Sir Pollock's definition:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

The rationale for the rule is to strike down promises deemed gratuitous, and in so doing satisfy the commercial character of the modern English law contract[41].

The risk for present purposes is that a contingent assignment is actually an incomplete assignment and therefore *nudum pactum* for want of consideration[42]. This can be traced to the principle that equity will not perfect an imperfect gift i.e. if the assignment, deemed unsupported by consideration, depends on some condition to complete the assignee's title it is but a gratuitous promise and therefore unenforceable until that condition is satisfied[43]. If an

---

39 Smith The Law of Assignment pp.40 et seq.

40 [1915] AC 847

41 Cheshire Law of Contract , p. 97

42 Ibid, p.650 et seq.

43 *Re Fry, Chase National Executors and Trustees Corpn v Fry* [1946] Ch 312

assignment is free of contingencies as a starting point, there is no requirement of consideration[44].

The issue of consideration can be significant and problematic from a conflict of laws point of view. In a multi-jurisdictional building transaction the parties would be well-advised to independently consider the issue of consideration with regard to the English law instruments and not necessarily assume that it will be deemed or implied.

3.2.3 The requirement of an absolute assignment for legal effect

It is a not uncommon misunderstanding that assignments by way of security are in English law not capable of being absolute and therefore not enforceable as legal assignments according to section 136 of the LPA. The flawed assumption is that they are somehow a "lesser" – automatically equitable – form of assignment given their temporary intent, as an interim security. The requirement for an assignment being absolute in English law is the unconditional transfer *for the time being* of the entire interest of the assignor in respect of the given chose in action and this being put entirely under the assignee's control[45]. It does not require that the assignor shall *forever* lose his interest in the chose in action; the typical situation is an express or implied provision for redemption and reassignment on satisfaction of the loan, which by its existence does not alter the absolute character of the assignment[46].

Accordingly, the requirement is one of form: the assignment – whether by way of security or not – must be drafted in "absolute"

---

44 *Re McArdle* [1951] Ch 669

45 Cheshire Law of Contract, p. 645

46 *Hughes v Pumphouse Hotel* [1902] 2 KB 190

terms in order to be construed as such and therefore avoid effect in equity only. A fairly typical example of "absolute" wording would be the following example:

> … to secure the due and punctual discharge of the Secured Liabilities, the Assignor, … assigns and agrees to assign absolutely and unconditionally … the Assigned Property

Assigned Property is in this example defined as

> … all rights and interests of the Assignor (*present and future*) to, in or in connection with a) the Contracts and b) the Guarantees.

This wording leads us on to the next pertinent topic for discussion of the English law treatment of assignability, namely the issue of whether or not both present and future choses – for present purposes exemplified by rights under the guarantees – can in law be assigned together.

3.3 Present and Future Choses

3.3.1 Distinguishing present from future choses

Simply put, in English law, a present chose in action may be assigned while a future chose in action may not. The rationale appears fairly simple: one may not dispose of something one does not yet have[47]. The line between present and future choses can be difficult to draw, so some further classification is necessary. Marcus Smith makes the following distinctions[48]: on the one hand, one can speak of presently enforceable rights – these are evidently readily assignable and require no further elaboration in the present context. On the other hand, there are rights which do not exist at

---

47 Smith Law of Assignment , p. 28

48 Ibid., pp.29 et seq.

all but may do so in the future. These may not be assigned as present choses[49], but can be subject to a promise to assign in the future subject to the doctrine in *Walsh v Lonsdale*[50], which applies the principle that equity regards that as done that which ought to be done. An assignment in respect of a future chose is thus treated as a contract to assign in the future if and when the chose comes into existence. This necessitates the important requirement – by the same line of logic as with contingent rights – that consideration is provided for the promise[51]. It follows that, without consideration, a contract purporting to assign a future chose – even if by way of promise to assign – will be ineffective in respect of the future chose.

Somewhere between the abovementioned two is Smith's third category, which also invites the most complication: these are rights presently existing but enforceable only in the future. They can also be conceived of as contractual rights which have yet to mature under a presently existing contract. Properly construed, these are assignable as present choses[52]. If not, they are future choses. Their construction turns on the *existence* of the rights; if they arise out of a present legal relationship the fact of their being *enforceable* only in the future is beside the point. They are still existing rights. The author acknowledges that this distinction can appear more notional than real, a view that to some degree is reflected by inconclusive

---

49 *Collyer v Isaacs* (1881) 19 ChD 342 ; *Annangel Glory Cia Naviera SA v M Golodetz Ltd, The Annangel Glory* [1988] 1 Lloyd's Rep 45

50 (1882) 21 ChD 9 (CA)

51 *Tailby v Official Receiver* (1988) 13 App Cas 523 (HL) ; *Brown v Tanner* (1868) 3 Ch App 597

52 *Brice v Bannister* (1878) 3 QBD 569 ; *Walker v The Bradford Old Bank Ltd.*(1884) 12 QBD 511

English authority on the matter[53]. To resolve the difficulty – at least in the abstract – a line can be drawn between the right of action itself and the 'fruits' of the action e.g. the damages recoverable at the end of the action. It is only the 'fruits' which are properly assignable as a present chose, not the cause of action itself.

3.3.2 The Lack of Clear Authority

An example from practice used by Smith to illustrate what might otherwise appear to be a somewhat counter-intuitive proposition is that of insurance. The Court of Appeal in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC*[54] established that a potential future claim under an insurance contract, even if the assignment is otherwise absolute, is a future chose in action. This is because under the insurance contract considered there, there is no certainty of there ever being a casualty, whereas in a 'fruits of action' situation there will – at least *prima facie* – be a judgement, even if that judgement is against the claimant and the 'fruits' turn out to be rotten in real terms. This is the view to which Smith subscribes[55] which receives some support in the older Court of Appeal judgement in *Glegg* and also in Australian authority[56], but is contradicted in other, also Australian authority[57] and only considered in respect of insurance contracts in *Raffeisen*.

---

53 *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 (CA) as opposed to *Glegg v Bromley* [1912] 3 KB 474 (CA)

54 [2001] QB 825

55 Smith Law of Assignment , p. 31

56 *Shepherd v Federal Commr of Taxation* (1965) 113 CLR 385 (Australian High Court)

57 *Norman v Federal Commr of Taxation* (1963) 109 CLR 9 (Australian High Court)

In the absence of clear, modern English authority the position under English law for other types of contracts should be regarded as uncertain. The purpose of the restriction is sensible enough: it is not the right to control the action which ought to be assigned by way of security; it is the right to have security in the product of that action. However, as has been seen, the mechanics are a disappointment to an otherwise prudent sentiment, leaving the courts with a wide margin of discretion.

3.3.3 No assignment of 'bare' rights of litigation

The notion that it is the fruits of the action and not the control of the action which ought to be properly assignable is bolstered by the doctrines of maintenance and champerty. In spite of their somewhat puzzling titles, the doctrines are essentially considerations of public policy. They operate to strike down assignments in which there is no "genuine commercial interest" for transferring or supporting a right of action. The modern test to this effect was laid out in the House of Lords decision *Trendtex Trading Corp v Crédit Suisse*[58]. The rationale is to attack so-called "trafficking in litigation"[59]. In the context of guarantees, it seems fairly clear that their assignment has a genuine commercial intent in the context of the loan agreement, but it is nevertheless prudent to ensure that the assignment is not limited to the 'bare' right for the bank to sue under the guarantee obligation. It should purport to assign "absolutely and unconditionally" the entirety of the benefits under the guarantee.

Although unlikely to be applicable in the present scenario, the doctrines do reflect the continuing relevance of the notion that

---

58 [1982] AC 679

59 *Camdex International Ltd. v Bank of Zambia* [1998] QB 22 (CA)

assignments should not lead to "multiplying contentions and suits" (see 2.1.1) in English law and a long-standing tendency of scepticism towards giving effect to uncertain contingent, future or "speculative" choses which are not sure to bear "fruit".

3.3.4 Applying the unclear distinction to the guarantees

The rights under a guarantee contemporaneous with the assignment, although the claim for payment under it may not yet have matured, should satisfy the definition of "present legal relationship". It cannot, to the author's mind be equated to the insurance example considered above. The "casualty" and consequence of non-performance under a present guarantee is sufficiently well-defined to avoid categorisation as 'merely an unwished-for future possibility dependent upon some future casualty'[60]. Any non-performance, whether of the obligation the guarantee is intended to secure or of payment under the guarantee itself is probably unwished-for in the future, but apart from that rights under a guarantee have little in common with rights under an insurance triggered by an unforeseen casualty. If casualties were mostly foreseeable there would be little point to insurance – a guarantee on the other hand foresees a circumstance and imposes a mechanism to deal explicitly with that circumstance.

As to non-contemporaneous guarantees, such as refund guarantees to be issued for later instalments, there is more uncertainty. It is likely that these cannot be said to arise out of a "present legal relationship" even if they are strictly speaking required to be issued under for instance a shipbuilding contract, as in NSC Art III. Although the building contract itself is assigned it must be remembered that this is entered into between the buyer and yard. The benefit assigned under

---

[60] *Raffeisen v Five Star Trading*, at para. 75

a guarantee, however, would include a benefit owed to the buyer by the guarantor, who is not party to the building contract. The present legal relationship under which rights are assigned accordingly requires a present guarantee, otherwise it appears as though it will be deemed a mere promise to assign, nevertheless enforceable at equity, but with the particular requirement of consideration. For this reason, it is a prudent course of action to ensure that fresh legal assignments accompany future guarantees, as a pro-forma matter, to "convert" the promise as soon as the present contractual relationship in the form of a new guarantee arises.

3.3.5 The insolvency exception

There is an insolvency exception to the rule that future rights can in certain circumstances as laid out above be assigned. The exception is that future rights are no longer automatically assignable in insolvency. This rule is expressed in *Ex p Nicholls*[61] as preventing the mischief of, for our purposes, an insolvent, in effect assigning as against his liquidator potential profits that are no longer the insolvent's "property" by virtue of the liquidation. As such, a pre-insolvency promise to assign rights under a future guarantee would be ineffective in law and equity if the rights can only be *earned* post-insolvency. The term *earned* is difficult to pin down, however it does not entail that, for instance in the case of monies due, that the monies have become payable[62]. It does though, to the author's mind, seem to require the absence of contingency as to those monies becoming payable[63]. It remains another discretionary matter underlining the commercial predictability and advantage of the legal as opposed to the equitable assignment.

---

61 (1883) 33 ChD 782 (CA)

62 *Re Tout and Finch Ltd* [1954] 1 All ER 127

63 See discussion in Smith, Law of Assignment pp. 400 et seq.

4 Particular Issues of Assignability: Norway

4.1 A Preoccupation with the Subject of the Assignment

Norwegian law contains no problematic distinction between legal and equitable assignment and does not concern itself to the same degree with the *contingency* of the assignment. Its regulation of the *temporal* aspect is also more limited than under English law. It has been argued that the boundary between presently existing and non-existing choses in action (i.e. hypothetical, contingent or future) is inconsequential in Norwegian law[64].

There is in Norway a primary focus on the subject of the assignment – the underlying right being transferred – and how this is categorised. It is the distinction between *pengekrav* (claims for payment in money) and *naturalkrav* (claims for payment in kind) which is contentious. For present purposes, a claim under a guarantee can be conceived of as a form of *pengekrav* whereas the claim for delivery would be a *naturalkrav*.

4.2 Claims for Payment in Money

4.2.1 The positive statutory basis

With claims for payment of money there is statutory basis for the mortgaging of which found in §4-4 of the Mortgages Act. A security assignment will pursuant to §4-9 be subject to the same

---

[64] Krüger, K. (1984) Pengekrav Bergen: Universitetsforlaget, p. 26; Skoghøy, J. E. A. (2003) Panteloven: Kommentarer Oslo: Gyldendal Akademisk, pp. 394

requirements as a 'regular' mortgage[65] (see further 4.3.2). Both require sufficient so-called "individualisation"; in respect of existing claims/choses in action all that is needed is specification of the debtor whereas for claims that "will arise" there is a further requirement of express identification of the "source" of the claim

A security assignment or mortgage does not obtain a different "lesser" status merely by virtue of it being in respect of a contractual right which has not yet properly arisen[66]. Case law supports this contention[67]. Therefore, in respect of the assignment of guarantees, it therefore appears irrelevant whether or not they are presently enforceable, or whether or not they even exist when the assignment takes place.

4.2.2 Implication: broad access

It follows from the above that the access to assignment of present and future claims for payment in money is under Norwegian law subject to only very limited restrictions. The preparatory works to the Mortgages Act acknowledge this but appear to justify opening up access primarily with reference to commercial considerations[68].

4.3 Claims for Payment in Kind

4.3.1 The statutory legality principle

The "legality principle" in the Norwegian law of mortgages is statutorily founded in §1-2 of the Norwegian Mortgages Act. The principle requires a positive and statutorily founded express basis in

---

65 Skoghøy Panteloven, pp. 420 et seq.

66 Ibid., pp. 394

67 Rt.1963.893 (Supreme Court)

68 Ot. prp.nr.39 (1977-1978), pp. 64-67

order to create a mortgage in property. A claim – or "chose in action" to use English terminology – under a contract, as in the present case, will be construed as property under Norwegian law[69]. For the sake of clarity it ought to be mentioned that §1-2 is only relevant for mortgages created by contract – an execution lien for instance is subject to different regulation[70].

The current statutory basis which submits security assignments to the general law of mortgages – inclusive the legality principle – is §4-9 of the Mortgages Act. It may be the case that it is no longer meaningful to speak of a separate notion of security assignment, in that the Mortgages Act actually made it superfluous by osmosis with the law of mortgages. This argument finds support both in the preparatory works[71] and academic literature on the matter[72]. Yet, some literature continues to refer to security assignments as an "alternative" form[73] so it does appear as though there is some conceptual confusion.

4.3.2 The contentious definition of "simple claims"

The restrictions inherent in the Norwegian law of mortgages will, pursuant to the above, be identical to the restrictions imposed on assignments considered to be by way of security – or directly translated from §4-9 of the Mortgages Act: "disposals for the purpose of security". Staying with §4-9, a reference is made to *enkelt krav* – "a simple claim". It is argued and fairly broadly

---

69 Hagstrøm, Obligasjonsrett, p. 855

70 Skoghøy Panteloven , p. 63

71 Rådsegn 8, Sivillovbokutvalet, p.143 as incorporated in Ot.prp no.39 (1977-78)

72 Skoghøy, Panteloven, p. 421

73 Kjelstrup, C-B. (1994) Liten Panterett Oslo: TANO, p.54

accepted that despite its different formulation it must be construed in the same way as *enkle pengekrav* (pluralised form) – "simple claims for payment in money", the form used in §4-4[74]. To this end, it can be submitted that the internal references to other sections in the same Chapter imply that the disparity depends on oversight rather than any contrary intent. However, as will be seen below, the absence of other internal references (to §4-5 and §4-6 third para.) also means that for the purposes of security assignments, the Debentures Act 1939 will have direct application[75]. The absence of reference to §4-6, it is argued, cannot mean that the assignor may not dispose over the claim assigned – the absence is there *because* it is a security assignment that is the "default" model of mortgage for money claims, a right of disposal is implied[76]. This further underlines the hybrid nature of the modern Norwegian security assignment (see 2.3.2).

Based on academic opinion and the general view held in practice (reflected in the English choice of law for many assignment agreements) those who oppose the narrow interpretation are in a minority. That does not mean that their views ought to be disregarded. Sandvik-Krüger-Giertsen[77] have in reliance on analogy from §29 of the Debentures Act argued that claims for payment in kind can be assigned. There is some support for this contention as reflected in the commentary to the Debentures Act[78], which makes

---

74 Skoghøy, Panteloven, p. 422; Brækhus Omsetning og kreditt II, pp. 129-130

75 Ibid, Skoghøy, p. 421

76 Ibid.

77 Sandvik et. al. Norsk panterett pp. 376-379

78 Norsk Lovkommentar, § 29 Debentures Act

further reference to a 1957 Supreme Court judgement[79]. This judgement concerned a claim for payment in money and as such cannot on its own be considered decisive authority in respect of claims for payment in kind. However, in argument the judge in that case made reference to other Nordic literature which, as it turns out, does not restrict application of the analogy to merely claims for payment in money but also included claims for payment in kind[80]. The Danish literature is very clear on the point, stating it is "without a doubt"[81] on the matter, in reliance on Danish case law[82]. The use of Danish law raises interesting issues of legal method, in particular the use of foreign sources. It seems to be the case that Norwegian courts will acknowledge foreign court practice and authority (particularly Scandinavian) as relevant to solving the case at hand[83] but these must of course be weighed up against the sources applied in favour of the opposing view.

If the latter path to a legal basis for the broad interpretation of §4-4 together with §4-9 stands up to scrutiny, the outcome is that Norwegian law permits assignment by way of security for payments in kind. The theoretical implication is that the notion of the access to security assignment being no broader than to mortgage is thrown into doubt, whereas the practical implication for our purposes is that the practice of English law assignment agreements in building finance is ill-founded.

---

79 *Sirkusteltdommmen* Rt.1957.778

80 In particular, Ussing, H. (1961) Obligationsretten: Almindelig del (4 th. Ed.) Copenhagen: Juristforbundets Forlag, p. 216

81 Ibid.

82 U.1941.868

83 Rt.1984.248; Rt.1988.276; see also Nygaard, N. (1999) Rettsgrunnlag og standpunkt Bergen: Universitetsforlaget, pp.173-174 and arbitral judgement "Arica" ND.1983.309 for contract interpretation.

4.3.3 Recent legislative developments

Financial instruments such as commodity derivatives, the nature of which imply a claim for delivery of the instrument, were also bedevilled by the apparent law of mortgage-derived restrictions on security assignments[84]. This situation changed with the passing of the Financial Securities Act of 2004, which by way of its §3 created a basis for security assignment outside the framework of the law of mortgages or analogous interpretation of the Debentures Act.

The Act concerns itself with financial instruments and its scope is therefore limited both in respect of the legal persons who may avail themselves of its provisions and the type of instruments which fall into its scope. Its passing followed EC directive 2002/47, which also applies to Norway. The preparatory works to the Norwegian Act state that the purpose of the relevant Article 6(1) in the directive was to prevent the "conversion" of a security assignment to a mortgage and therefore risk invalidity or lacking legal protection if national restrictions on mortgages are not upheld[85]. Although the limitation in scope as to *persons* in §1(3) & (4) of the Financial Securities Act will not affect the typical party dynamic in building finance, the limitation in scope as to *type of instruments*[86] covered by the Act is fatal. Also, subject to §4-4(2) of the Mortgages Act, forms of financial instruments are expressly excluded. Accordingly, the types of claims considered in this thesis are

---

[84] http://www.regjeringen.no/nn/dep/jd/Kampanjer/Tolkningsuttalelser/Gjeldsforfolgningsrett/Tolkningsuttalelser-om-panteloven/-4-4-og-4-9---Pantsettelse-av-varederivater.html?id=454753. Last accessed 20 August 2007.

[85] Ot.prp. no 22 (2003-2004)

[86] A broad definition is contained in §2(1)(a) & (c) FSA ; it is clear from the preparatory works that the definition in the Securities Trade Act §1-2(2) will apply.

outside the scope of the Act, even if the assignment itself is similarly motivated by security needs.

4.3.4 Implication: No substantive change in the law

In the absence of clear authority to the contrary and in the light of the weight of academic opinion in its favour, the current state of law appears to the author unchanged: assignments by way of security of a claim for delivery under a building contract will not have legal protection under §1-2 of the Mortgages Act nor be valid *inter partes*[87]. It appears as though the analogy from the Debentures Act, does not, as a matter of legal method, stretch far enough.

However, the legislative development is indicative of a seeming intent to widen access to security in the capital markets. From this it may be implied that the rationale for the "narrow definition" is weaker now than before and that the previously maligned approach to security assignments exemplified the Sandvik-Krüger-Giertsen text has new relevance. The widening of access has drawn some weighty criticism that this is a worrying development with serious negative implications on insolvency – essentially, that the balance has been tipped to excess in the banks' favour[88]. These matters will be considered in more detail below in 7.2.

---

87 RG.1997.1269

88 Brækhus (2005) Omsetning og kreditt II (3 rd. Ed), pp.258-260

5 The Guarantees: Characterisation

5.1 The Relevance of Characterisation

What characterisation concerns itself with is the degree to which liability under a guarantee hinges on liability in another legal relationship – in our case the building contract. This in turn would have a bearing on the assignment, which, under English law, may fail to a greater or lesser extent if it is contingent or in respect of a future chose.

The crux of characterisation relates to the guarantee being construed as "free-standing". The notion of a "free-standing" guarantee is, apparently, a fairly novel concept, brought into international usage in the wake of the credit challenges encountered after the oil crisis in 1973[89]. Some have gone so far as to argue that the free-standing guarantee is derived exclusively from international usage[90].

The "transnational" approach is bolstered by international efforts to harmonise the law and practice of such guarantees and similar instruments such as letters of credit[91]. As such, it may not be unreasonable to expect that the characterisation of a guarantee as a demand guarantee or not would lead to the same result irrespective of whether Norwegian or English law was applied. This view will now be examined.

---

89 Vinje, E. H. (1999) Tolking av garantier i forretningsforhold Oslo: Universitetsforlaget, pp. 172-173

90 Goode, R. et al. (2007) Transnational Commercial Law: Text, Cases and Materials Oxford: OUP , p. 372

91 E.g. ICC Unform Rules for Demand Guarantees 1992 UN Convention of Independent Guarantees and Stand-By Letters of Credit 1995, International Standby Practices 1998, UCP 500/600 (1993/2007)

5.2 Construction of a Guarantee

5.2.1 Common ground

In both Norway[92] and England[93], it appears as though the nature of a guarantee is a matter of construction of the instrument creating it. If nothing else follows from their construction, guarantees will be so-called ordinary guarantees (or more correctly for English law: contracts of suretyship). In broad terms, these have the common effect in both regimes of making the liability of the guarantor contingent on the principal debtor's default. If principal debtor's default in an underlying contractual relationship need not be proved objectively, then we are *prima facie* dealing with a "free-standing" demand guarantee and not an ordinary guarantee.

Norwegian law operates with a further distinction, which relates to the point in time when the obligations under the guarantee mature. In the one case ('*simpel kausjon*'), the obligation will not mature before there is proof of the principal debtor's insolvency, so it only protects the creditor against insolvency risk; in the other case ('*selvskyldnerkausjon*'), the obligation is triggered by the debtor's default in the underlying contractual relationship, which will protect the creditor against default risk additionally to insolvency risk[94].

The situation is not mirrored in England as a matter of background law although it is of course open to the parties to agree a mechanism akin to the Norwegian *simpel kausjon*, if they so wish[95]. For the purposes of the present discussion we may however

---

92 Smith, C. (1981) Garantirett III Oslo: Universitetsforlaget, pp. 235 et seq.

93 Goode Legal Problems in Credit and Security, pp. 297 et seq.

94 Smith Garantirett III, pp. 230-232

95 Goode Legal Problems , p. 298

proceed on the basis that it is the 'default' trigger which is relevant in characterising a guarantee as on-demand or not.

5.2.2 The importance of language

Both Norwegian and English law attribute some weight to the language employed by the guarantee. It is argued that "signal" phrases such as "payable on (first) demand" should for commercial reasons of predictability and certainty be interpreted uniformly as indicating a demand guarantee[96]. This is also reflected in the international harmonisation efforts cited above[97].

This may be a surprising outcome under Norwegian law which does not appear to have the same tradition for literal interpretation as the English courts and may reflect the trend towards internationalisation, especially in commercial matters. Recent Norwegian Court of Appeal authority has suggested that any challenge of the literal interpretation of a demand guarantee between commercial parties on the basis of the loyalty principle or §36 of the Contracts Act (simply put: a Norwegian statutory basis for revising unfair contracts) must take account of the guarantor's cognisant acceptance of an added risk[98] by way of accepting the demand guarantee. It has also been argued that a stricter mode of interpretation will be employed in international transactions as opposed to one with Norwegian parties[99].

It is perhaps to be expected that English judges will concern themselves to a greater degree with literal interpretation – even the

---

96 In Norway: Vinje Tolking av garantier , pp.176-177; In England: *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146.

97 See especially definition in Art 2(a) of URDG

98 RG.2005.96

99 Vinje , p. 177

absence of a comma has been considered in some detail in the context of demand guarantees[100] . Nevertheless, the same judgement made the point that the instrument needed to be considered in its factual context with regard to its commercial purpose, with particular reference to the lack of standard practice where refund guarantees are concerned[101]. Commercial "purport" and "obvious intent"[102] as well as "plain purpose"[103] are important factors. Further, outside a strict banking context, presumptions may be applied against demand guarantees where the language is not sufficiently clear[104]. On the other hand, in a banking context, the presumption appears to be the opposite and contradictory language will result in the commercial purpose of a demand guarantee being upheld[105]. The lesson appears to be this: in the absence of clear language or clear intent the status of a refund guarantee may be uncertain – a mere label or "signal word" may not be conclusive on its own. This is the case in England[106] and apparently so also in Norway[107].

---

100 *Gold Coast Limited v Caja de Ahorros del Mediterraneo and others* [2001] 1 All ER (Comm) 142 (CA), at 150.

101 Ibid, at 147

102 *Hyundai Shipbuilding & Heavy Industries Co. Ltd. v Pournaras / Bouboulina* [1978] 2 Lloyd's Rep 502 (CA)

103 *Mercers v New Hampshire* [1992] 2 Lloyd's Rep 365

104 *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] All ER (Comm) 289; here the issuer was the state of Mongolia.

105 *Esal Commodities Ltd v Oriental Credit Ltd.*[1985] 2 Lloyd's Rep 546

106 *Gold Coast*, at 149

107 Vinje Tolking av garantier i forretningsforhold, p. 176

5.3 Claiming Under the Guarantee

5.3.1 English law

English law will, according to Lord Denning in *Edwards Owen Engineering Ltd v Barclays Bank*[108], only in the very limited circumstance of clear fraud of which the bank has notice set aside a properly construed demand guarantee. As such, a demand guarantee is equated to a letter of credit. It is argued that such guarantees are entered into with eyes wide open and "there is no real hardship on [a] bank in imposing this strict liability", given access to hedging devices such as cross-indemnities and the like[109]. There is authority from lower courts[110] and some academic argument[111] challenging the stringency of the rule, but in the absence of higher authority the English legal position cannot be said have changed.

The consequence is that a claim – provided it is not fraudulent – under an English law guarantee construed as on-demand is entirely independent of the relevant obligation under the building contract. Effectively, this leaves the principal debtor under the guarantee at the beneficiary's (or his assignee's) mercy given the notoriously difficult business of establishing a fraud: "these are risks which the merchants take"[112]. As such, assignment of a demand guarantee is

---

108 [1978] 1 All ER 976

109 *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep. 146

110 *Potton Homes Ltd. v Coleman Contractors* [1981] 28 Build. L.R. 19, per Eveleigh LJ

111 Debattista, C. "Performance Bonds and Letters of Credit: a Cracked Mirror Image" (1996) in Festskrift til Jan Ramberg Stockholm: Juristförlaget, pp. 101 et seq.

112 *R D Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd.* [1977] 2 All ER 862, per Kerr J.

very solid security indeed for the assignee bank, perhaps excessively so and therefore open to abuse. This consequence ought to be borne in mind when choosing English law for one or more of the instruments, a choice which may be made for very different reasons than moving a substantial degree of contract risk to the principal debtor yard.

5.3.2 Norwegian law

It appears as though the Norwegian position departs from the uncompromising position under English law. As a starting point, Vinje argues that a letter of credit cannot be equated to a demand guarantee[113]. Crucially, he states that the purpose of a letter of credit is a regular element of contractual discharge, whereby payment under the letter is the norm; with a demand guarantee the purpose is as security for irregular (purported) discharge, where payment under the guarantee is the "unwanted" exception. There is also the difference that under a letter of credit the obligation to pay out hinges on documentary compliance, whereas a demand guarantee, simply put, hinges only on a claim being made.

Once demand guarantees are extricated from the stringencies of letters of credit it is a short leap of logic to a position under which demand guarantees can be challenged alongside other forms of guarantee. The rationale is that it would be unreasonable for the guarantee creditor to be permitted payment on the basis of an unsubstantiated claim. The line Vinje draws is at a "clearly unfounded" claim. He further argues that not only may the general provision for interference in "unfair" contracts in Norwegian law (§36 Contracts Act) be applied, but also that – generally speaking –

[113] Vinje, p. 178

demand guarantees should be approached with a view to restrictive interpretation[114].

Vinje's views find some support in public statements and unreported cases cited in his work additionally to a recent Norwegian case which while adopting the "clearly unfounded" threshold found in favour of the demand guarantee being given effect[115] on the particular facts of that case.

5.3.3 No true trans-national harmonisation in respect of unjustified claims

It seems therefore a futile project to speak of internationalisation in respect of the characterisation of a guarantee, or at least a harmonised approach to resisting demand guarantees. Adopting words from the UN Convention on Independent Guarantees and Standby Letters of Credit Article 19, it appears as though the standard adopted there is of a guarantee which is manifestly and clearly groundless. Nevertheless, other transnational sources describe the relevant standard as being a national matter, with fraud adopted as the "minimum"[116].

5.4 Consequences for Security Assignments

5.4.1 Differing standards for findings of an unjustified claim

It is not difficult to imagine a situation, in the present context, where the differing standards may make themselves felt. For

---

[114] Ibid. pp 180 et seq.

[115] RG.2005.96

[116] Goode, R. (1992) Guide to the ICC Uniform Rules for Demand Guarantees Paris: ICC Publishing, p. 23

instance, it can be imagined that a building contract is terminated and the buyer claims for refund of paid-in instalments under an on-demand guarantee and that the yard disputes the termination on grounds of permissible delay, arguing it is "clearly unjustified". In such a case, English law, pursuant to the above discussion, may yet give effect to the guarantee if "clearly unjustified" in the particular case does not equal fraud. Pursuant to this, deciding to assign a right which may have this consequence is therefore not far removed from assigning a right to "cash in hand" by way of demand guarantee.

On the other hand, the less stringent Norwegian attitude must be borne in mind, even if express choices of English law have been made. It should not be assumed that a Norwegian court will set aside central tenets of contract interpretation purely to give effect to an opportune choice of law (see, in general 6.7.3): the emphasis on considering the guarantee's place in the context of the transaction supports this contention.

5.4.2 English law consequences: contingency and future choses

It follows from the strict interpretation of a demand guarantee that it bears few of the hallmarks of contingency. Contingency might for English law purposes reduce the efficacy of the assignment by reducing it to an equitable assignment (see 3.2). A Norwegian law demand guarantee assessed according to the English law of assignment is probably not far enough removed from an English guarantee to justify a different categorisation. As for an ordinary guarantee, it is by definition contingent, but it will be remembered that even contingent claims may be assigned provided they are not a bare right of litigation, but assignments of the "fruits" of an action.

Both for ordinary and demand guarantees the situation as to present and future choses is the same: a future refund guarantee is no less a future guarantee by virtue of it being on-demand. The effect in equity only (see 3.3) that this would entail is generally, to the author's understanding, considered unsatisfactory in Norwegian practice, so the general rule is to have a separate assignment for every separate (refund) guarantee. This may seem an inconvenient and unnecessary precaution seen with Norwegian eyes, but it seems a "necessary" evil when an English choice of law is made. It is a good illustration of how an otherwise "convenient" choice of law for one reason can be an inconvenient choice for other reasons.

6 The Claim for Delivery: Consequences on Insolvency

6.1 The Relevance of Insolvency

In the foregoing we have considered questions relating to the initial validity and legal status of the assignment of the contract and guarantees as between the parties to the building transaction. What we will now consider concerns the effects of a security assignment in insolvency situations. This does not mean that we will leave *inter partes* matters behind altogether – as will be seen below, an integral part of the analysis for conflict of laws purposes concerns itself also with the *inter partes* position.

The point of departure will be the typical practice in Norwegian building finance of movable property abroad, as the author has understood it, of an English law assignment of the claims under the building contract and the guarantees. However as a starting point and for the sake of completeness, the English rules for perfection of a security assignment will be considered alongside the Norwegian rules before moving on to a specific discussion of potential issues arising in Norwegian insolvency situations – especially that of conflict of laws.

It ought to be appreciated that it is the danger of insolvency and pursuant liquidation that a security assignment in the final instance is intended to hedge against. If one could be sure that there was no risk of insolvency an important incentive to obtaining real security would be voided – there would, in simplified terms, only be a concern that the assignment was valid *inter partes*. This is of course impossible so the ability of a security assignment to achieve a protected status in insolvency situations is essential.

6.2 Protecting the Security Assignment: perfection by notice

6.2.1 England

The English law notice requirements differentiate between legal and equitable assignments. A legal assignment – that is to say one carried out in the auspices of the LPA 1925 – requires express notice in writing pursuant to s136(1) LPA. The assignment will take effect from the date of notice, which is deemed to be the date of receipt[117] by the debtor.

An equitable assignment, on the other hand, does not require notice to the debtor in order to be effective as against the assignee[118] or persons who stand in the assignor's stead e.g. a trustee in bankruptcy or a judgement creditor[119]. However, as between the assignee and the debtor, in order to make the assignee's title effective against him and third parties not standing in the assignor's stead, notice to the debtor is required, even for equitable assignments. This follows from the judgement in *Dearle v Hall*[120], which varies, for equitable assignments, the general rule that the date of creation determines priority[121].

The *Dearle v Hall* rule is this: priority is determined by the order in which notices are received in respect of competing assignments.

---

117 *Holwell Securities Ltd. v. Hughes* [1973] 2 All ER 476

118 *Gorringe v Irwell India Rubber Works* (1886) 34 ChD 128

119 Cheshire Law of Contract , p. 653

120 [1828] 3 Russ 1 at 23

121 Also expressed as the *nemo dat quod non habet* ("no person can confer a better title than he himself has") and *qui prior est tempore potior est jure* ("earlier in time, stronger in law") principles, for legal estates and interests and equitable estates and interests, respectively; see generally for priorities, Smith, pp. 415 et seq.

The rule has a major qualification, although not expressly stated in the judgement, but implied nevertheless[122]: that an assignee with actual or constructive knowledge of a previous assignment may not claim priority over the previous assignment by giving notice first. There is some suggestion in case law that the qualification should reach further: that the debtor's knowledge – even informal[123] – of the assignment will prevent a second assignee from taking advantage of the rule, although this would not therefore mean that the "order" of accidental knowledge determines notice[124].

Subject to its qualifications, *Dearle v Hall* has a wide scope, clearly applying to equitable assignments of both equitable and legal choses, but also going so far as to apply to situations where one or more of the competing assignments is a legal assignment. In *E Pfeiffer Weinkellerei-Weinereinkauf GmbH & Co v Arbuthnot Factors*[125], a second assignee under a legal assignment took priority over an earlier "higher order" equitable assignment purely because of the notice issued *per* s136 of the LPA. This judgement exemplifies the potentially unexpected consequences of *Dearle v Hall* and serves as ample proof of the importance of ensuring that assignments made under English law are legal, if at all possible, and that proper notice is always given. *Dearle v Hall* will punish an assignee for transgressions no worse than forgetfulness or misapprehension – this has made it subject to some criticism[126].

---

122 Smith Law of Assignment , p. 443

123 *Lloyd v Banks* (1868) LR 3 Ch App 488

124 *Arden v Arden* (1885) 29 ChD 702

125 [1988] 1 WLR 150 (QBD) as applied, *per* Smith, in *Compaq Computer Ltd v Abercorn Ltd* [1991] BCC 484

126 See: Smith Law of Assignment, p. 442

6.2.2 Norway

In Norwegian law the notice requirement is for present purposes found in §4-9 of the Mortgages Act in operation with §29 of the Debentures Act. The result is as follows: the security constituted by that assignment is only valid as against other creditors when the debtor has received notice of assignment from the assignee or assignor. The requirement is identical to that stipulated by §4-5 Mortgages Act in respect of the mortgage of a simple claim for payment in money. However, Norwegian law too contains particular priority rules, which, perhaps surprisingly, are quite similar to *Dearle v Hall*.

Norwegian law operates with the concepts of *bona fides acquisition* (*godtroerverv*) and creditor protection (*kreditorvern*). The latter has no requirement of *bona fides*, it is sufficient if its other rules are satisfied[127]. The default rule, as in English law, is *nemo dat*, resulting in the older right having priority over a new right[128]. However, for simple claims for payment in money, whether the assignment is outright or by way of security, the abovementioned rule in §29 Debentures Act will apply[129], which conceptually is near-identical to the notice rule in *Dearle v Hall*.

As for simple claims for payments in kind, we are for the purposes of priority under Norwegian law in a quandary. A claim for payment in kind can on present authority probably not be mortgaged or assigned for security by operation of §1-2 of the Mortgages Act. If the assignment is outright – by *avtaleerverv* – the

---

[127] Lilleholt, K. (1994) Godtruerverv og kreditorvern Oslo: Universitetsforlaget, p. 167

[128] Lilleholt, K. Godtruerverv og kreditorvern, p. 18

[129] Ibid., pp. 219-

situation is unchanged and §29 protection by notice will apply[130]. We are left with the problematic implication that even if notice is given, the notice, and the priority that is determined pursuant to it, may be invalid if it is in respect of the assignment by way of security for the claim on delivery under the building contract. In other words, without an assignable right there cannot be priority, without priority it is as if the right was never assigned. The assignment would not be protected against other creditors who may thereby be able to establish a priority right regardless of the "first in time"-principle.

6.3 Norwegian Insolvency: preliminary matters

6.3.1 The general and specific grounds for asserting creditor demands

Creditor demands can arise in *i.a.* separate debt recovery proceedings and in liquidation of an insolvent company's estate under §2-1(1) Creditor Recovery Act. The general ground for creditor demand is contained in §2-2 of the Creditor Recovery Act 1984. In simple terms, it provides that any property belonging to the debtor at the time of the demand is 'available' to a creditor, provided it is a proprietary right capable of being expressed in money. This must not be equated to *pengekrav* in Norwegian law – the limitation merely excludes rights such as those which only have sentimental value[131]. The relevant specific ground for asserting a creditor demand is that found in §1-1 of the Mortgages Act. This exempts proprietary rights properly protected by mortgage from a demand on the general ground. In other words, §1-1 relates to

---

[130] Ibid. pp

[131] Norsk Lovkommentar: § 2-2 Creditor Recovery Act

creditors secured by mortgage and crucially for our purposes – security assignments.

Linking §1-1 of the Mortgages Act §2-2 Creditor Recovery Act to the priority rules, a creditor claiming against the debtor's estate must, pursuant to *nemo dat* default rule, heed older claims in the estate. This is however only in the case where the 'new' creditor is unable to extinguish an older right by way of the older right being perfected. As was seen above, it may not be the case that the security assignment of the building contract can be perfected on a strict application of Norwegian law.

6.3.2 Overview of potential consequences for 'failed' creditors

On insolvency, the liquidator may have options open to it which do not correspond with the interests of creditors – this underlines the importance of ensuring the properly protected security is achieved, and the major consequences a 'failed' security might have.

Firstly, a liquidator has, subject to Chapter 7 of the Creditor Recovery Act, a right of election to step-in to existing contracts – for our purposes the building contract. Secondly, a liquidator may exercise rights of Roman law-derived *actio Pauliana* which is reflected in Norwegian law in §5-9 of the Creditor Recovery Act and supplements the other "objective" rules as to voidable transactions in Chapter 5 of the Act[132]. The Norwegian *actio Pauliana* represents the outer boundaries for setting aside transactions made leading up to the insolvency, drawing the line at ten years prior to the insolvency but with a high threshold for transactions being found voidable, including a requirement of subjective knowledge on the part of the other contracting party of

[132] Andenæs, M. H. (1994) Konkurs Oslo, p. 237

circumstances that would deem the transaction unconscionable. It ought to be noted that, if satisfied, the *actio Pauliana* would set aside for instance an assignment *prima facie* validly made and protected against third parties, and as such it would have no sensible application to an assignment found invalid *inter partes* or against third parties as a preliminary contractual or proprietary matter. Finally, the creditor ranking in Chapter 9 of the Creditor Recovery Act reflects in the final instance the poor position in which a 'failed' (formerly secured) creditor may find himself – in the pool of un-prioritised dividend claims falling behind the preferential claims.

Such potential "local" consequences ought to be borne in mind when discussing the private international law implications, for insolvency purposes, of a particular choice of law – considered next.

6.4 Conflicts of Laws on Cross-Border Insolvency

6.4.1 Applying conflicts of laws rules on insolvency

Cross-border insolvencies give rise to a host of challenges – amongst these are accounting properly for potential conflicts of laws. In the present case it is appropriate to speak of a cross-border insolvency, in that we have envisaged a Norwegian subject, some of whose assets are either notionally or actually located abroad. A contractual right to delivery is of course an asset also in the context of insolvencies. As will become clear from the below, to categorise that asset and determine its "location" for conflicts of laws purposes causes particular difficulty from a Norwegian perspective.

As a starting point, we can identify three separate sets of laws which would be relevant in a cross-border insolvency involving security assignments. These are the law of the insolvency (*lex*

concursus), the law of the contract (*lex contractus*), and the law of the asset[133]. It is the law of the asset which we are primarily concerned with here. While it may be tempting to term the law of the asset the *lex rei sitae* – i.e. the law of the place where that asset is situated – this implies a specific choice of law rule being given application to that asset which may in the context of assets understood as "intangible" contractual rights not be entirely correct. This will be considered in more detail below.

The *lex concursus* additionally to laying out the procedural law of the insolvency, will also define *i.a.* the extent to which current contracts are affected by the liquidation, the invocation of the *actio Pauliana* and similar provisions considered above[134]. In the presently assumed case of liquidation proceedings ordered by a Norwegian court the *lex concursus* will be Norwegian.

The *lex contractus* will determine matters such as the validity, content, breach and termination of the contract. With the numerous instruments involved in the type of transaction imagined here, several jurisdictions may be involved, but seeing as our topic is the law of assignment, it is the assignment agreement between assignor (buyer) and assignee (bank) which is relevant in determining *lex contractus*. For present purposes, the *lex contractus* is English law given the assumed (and typical) express choice made in the assignment agreement.

The proper law of the asset will also affect the status of these assets in a liquidation situation vis-à-vis creditors. Importantly, the question of whether a claim is secured as against other creditors

---

[133] Van Houtte, H. (2002) Law of International Trade London: Sweet & Maxwell, p. 380

[134] Ibid., p. 379

can be answered by the law governing the claim[135] – or proprietary right, which is the terminology used herein. In our case, it is the proper law of the asset which is most problematic, as it concerns itself both with the relationship between the assignor/assignee and contract debtor on the one hand and third parties on the other.

6.4.2 Opposite ends of the spectrum: the *lex rei sitae* and party autonomy

Lex rei sitae is the term typically used to describe the traditional rule generally applied to real property and tangible movables, namely that the law of the jurisdiction in which the property is located will apply to that property. In Norway, it is held to be an undisputed rule for real property[136], and is also accepted as a rule for tangible movables, albeit only with some qualification and further clarification, given the inherent ability of movables to cross borders[137]. This rule, in common with variations on the same theme abroad, will be relevant in Norwegian priority conflicts pertaining to tangible property, but cannot be considered conclusive in cases involving rights of security created in intangible property[138].

With intangible rights arising under contract the point of departure is party autonomy under Norwegian private international law[139]. This is also the position under the Purchase of Goods Choice of Law Act 1964, however the scope of the Act – laid out in

---

135 Ibid, p. 380

136 Gjelsvik, N. (1936) Millomfolkeleg privatrett (2nd Ed.) Oslo: Nikolai Olsen, p. 178; Lundgaard, H. P. (2000) Gaarders innføring i internasjonal privatrett Oslo: Universitetsforlaget, p. 283

137 Ibid, Lundgaard pp. 285 et seq.

138 Reinertsen Konow, Løsørepant over landegrenser, pp. 401-491

139 Lundgaard, pp. 231 et seq.

§1 and §2 – is limited to purchase of goods matters and excludes objects such as ships. Nevertheless, it is a helpful indication of the general approach of the law. In the absence of choice, the Norwegian rule is the "individualising method", also known as the Irma Mignon formula[140]. While this has some similarities to the "closest connection" as tempered by "characteristic performance" rules adopted in Art 4 of the Rome Convention 1980, the individualising method will look to a wider range of circumstances in determining the appropriate law and is as such a "purer" (and some would argue more unpredictable) "closest connection" rule.

Valid questions can be asked as to whether party autonomy is the correct choice of law rule to apply to third party conflicts – typically priority collisions – involving intangible proprietary rights. The basic argument is persuasive: it is stretching party autonomy too far to apply it indiscriminately to the rights of third parties on liquidation, who would have had no influence on a choice of law which inevitably affects their legitimate proprietary rights in the assignor's assets. Such considerations carry significant weight in the Norwegian analysis of the relevant private international law rules, as will be seen below.

The argument against party autonomy is founded on a notion of separating the property from the contract: that a "true" law of the asset determined by the law of the actual or notional location of that asset supersedes a contract purporting to place it artificially in a party-defined jurisdiction. This *situs* rule is fairly straightforward when dealing with the property in isolation – it will of course be obvious where for instance a ship or a rig is being built. However, when the property is 'polluted' by contract, and the asset in which security is taken is not strictly speaking the piece of property itself

[140] Rt.1923. II.58

but contractual rights to the eventual delivery of that property or to claim under the guarantees, we need further clarification.

6.5 The Contract/Property Divide: *inter partes* validity

6.5.1 Validity of the contract at the outset

Within the *inter partes* dynamic, validity of the contract at the outset is a natural starting point. There seems to be little cause to depart from the party autonomy rule generally applied to contract law matters on this count. Even if the assignment has both contractual and proprietary effect, *inter partes* validity at the outset only concerns itself with whether or not the assignment satisfies the requisite conditions for existence between the signatories thereto, namely the assignor and assignee.

The Norwegian legal treatment of initial validity from a conflict of laws perspective has not developed in a uniform manner conducive to clear conclusions. The court in *Nittedalssaken*[141], for instance, suggested that the strict *lex situs* rule should be applied insofar as it is a proprietary right that is created or transferred – however the case only concerned real property, was not unanimous and has been criticised in recent literature for haphazard treatment of the choice of law issue[142]. A more correct approach, it has been argued, in the context of tangible property, would be to apply the conflict of law rules applicable to contracts to matters which are concerned with the existence and validity of the contract *per se*, even if what is created is a proprietary right in tangible property[143].

---

[141] Rt.1924.1181 (*Nittedalssaken*)

[142] Konow Løsørepant, p. 342

[143] Konow, p. 345

This is to the author's mind a sensible approach, and even more so for intangible rights, with the consequence – in the present scenario – that even if the right to delivery is "located" elsewhere, say at a yard in Asia, this does not mean that party autonomy in respect of contract law matters is precluded by mandatory application of a *situs* rule. The *lex contractus* of the assignment agreement being the result of a proper choice of English law therefore suggests that the assignment agreement cannot be set aside as initially invalid or non-existent. This solution gives effect to the parties' wishes as reflected in the choice of law clause, and is accordingly to be desired as a matter of commercial certainty. So far therefore, no line is drawn between property and contract.

6.5.2 Validity of the security right in the internal transaction dynamic

A second important issue is what security can be agreed validly between the parties. As such, this is a matter of the extent to which the security right can be upheld *inter partes* on default and must be distinguished from questions of initial validity or existence of the contract. The *inter partes* dynamic will in this context necessarily include not only the assignor and assignee, but also the contract debtor (*debitor cessus*), in this case typically a yard, but to whom only the assignor, and not the assignee, have a *prima facie* contractual connection. Also on this count it may be argued with support in literature concerned with intangible rights (albeit primarily concerned with claims for payment in money under charter parties)[144] that party autonomy should be permitted application to matters concerned with the validity of the security

[144] Brækhus (1978) "Sikkerhet i certepartier og certepartifrakter" in Fra kredittretten og andre rettsområder, Oslo, p. 53

right in intangible property, insofar as third parties are left out of the equation.

In the realm of tangible movable property the line is drawn close to *lex situs* in Norwegian court practice, at least in respect of retention of title situations[145], but not without qualification. Konow has suggested a more flexible approach than the strict *lex situs* of the jurisdiction in which the property was located at the time the security was created. This implies a cautious acceptance of the *lex causae*, understood as the laws of the cause of action. The implication is that party autonomy may prevail to the extent the parties to the contract of assignment have in fact pointed to a *lex causae*[146]. To some degree, this runs contrary to the traditional view in Norwegian private international law in respect of security rights[147], but is in Konow's comparative analysis in line with current international trends. Perhaps even more so than for tangible property, there is cause to import party autonomy when determining what rights of security can properly be given effect *inter partes*, where those rights need not yet be linked to physical property.

In conclusion, therefore, there does not appear to be much cause to separate the property from the contract. In general terms, and presupposing that national requirements as to notice to the contract debtor are satisfied (discussed above) it may be submitted that party autonomy (and failing that, the individualising method) is an apt starting point in respect of matters concerned with validity and the extent to which the security right may be enforced *inter partes* according to the terms of the contract. This general view is

---

145 RG.1958.646

146 Konow, p. 396

147 Gjelsvik, p. 209

also considered appropriate in other Norwegian literature dealing with the choice of law implications with mortgages of simple claims for payment in money[148], additionally to finding support in Konow's analysis by analogy. It must however be admitted that the legal foundation on which this proposition rests becomes treacherous as the lines between *inter partes* and third party validity are increasingly blurred.

6.6 The Contract/Property Divide: validity as against third parties

6.6.1 Party autonomy re-assessed in the context of tangible property

We are now operating outside of the *inter partes* dynamic and it is to be expected that party autonomy will necessarily have less of a role to play. Any analogy to tangible property here is in all likelihood weaker than for the *inter partes* discussion above. It has been argued that any analogy from tangible property is futile, given the difficulty (and some would argue, impossibility) of determining a *situs* for a contractual right[149]. To the contrary, in the author's view, where the contractual right relates to the eventual delivery of a tangible property, the *situs* of which can easily be determined, it would be wrong to discard outright the solutions reached in respect of tangible property. To do so would mean drawing a line between tangible and intangible property, with claims for payment of money classed with claims for payment in kind on the intangible side of that equation. Classing one with the other in this manner is in the

---

[148] Johnson, I. (1990) "Interlegale rettsvernsregler ved sikkerhetsstillelse av enkle pengekrav" TfR 1990, p. 436

[149] Brækhus (1978) pp. 52-58

Norwegian mortgages law framework largely rejected, as has been seen above. A claim for delivery of a piece of property is a unique class of asset, the value of which is dependent on an actual physical manifestation of eventual delivery. A claim for money, on the other hand, is an asset where the physical manifestation of eventual delivery is to a much greater degree notional. On this basis, the author submits it is appropriate to adduce some – if not conclusive – interpretive weight to the solutions reached for tangible property.

In respect of tangible property, the position in Norwegian private international law appears settled. Where the matter deals with perfection of a form of security, the rule appears to be *lex rei sitae*. In two cases[150] concerning retention of title – one of which made an express distinction between *inter partes* validity and validity as against third parties[151] – this was held to be the case. As for other forms of security, such as that constituted by security assignment, this is not considered directly although it is suggested in literature that any rights of security which fall into Norwegian system of property (realty and personalty) law, including mortgages thereof (*panterett)* will be caught by the rule[152]. Given the – perhaps controversial – categorisation of a security assignment as equal to a mortgage for the purposes of Norwegian law, the implication is that as against third parties, *lex rei sitae* will be applied in preference to party autonomy.

It appears as though contract and property (insofar as the property is tangible) may finally have parted company. Before this admission is made, however, we ought to extend the analysis beyond the framework of tangible property. In doing so, we will

---

150 RG.1958.646; RG.1963.528

151 RG.1958.646

152 Konow, p. 463; Lundgaard, p. 283 et seq.

below firstly look to the treatment of simple claims for payment of money for choice of law purposes under Norwegian law. Secondly, we may by way of analogy look to the Rome Convention 1980. Thirdly, we will consider English case law and literature, also analogously, with a view to the Rome Convention, to which England is subject. Finally, we will comment briefly on the scope afforded to the new 2004 financial securities legislation, and its relevance to conflict of laws questions.

6.6.2 The private international law treatment of claims for payment in money

We have in the above reached some preliminary conclusions as to the appropriate conflict of laws rule to apply *inter partes*. We have also considered the position – where tangible property is concerned – for third party conflicts in respect of security rights created by contract. While the analogy to tangible property is of some interpretive weight it is nevertheless the case that without support from the realm of intangible rights the conclusions reached would be of limited value for the types of contractual rights relevant to this thesis.

Unfortunately, as is the case elsewhere in Norwegian private international law, there is a dearth of Norwegian sources on which to draw. In respect of claims for payment of money, however, Ida Espolin Johnson has argued in a candidate paper from 1990 that it is "clear" that party autonomy can have no application to matters of legal protection in respect of third parties. The rationale is that the parties should not be able to freely choose a law with less stringent requirements than the otherwise applicable law to the detriment of third parties[153]. It is not entirely clear to which

[153] Johnson, p.442

requirements Johnson refers, but the implications of the general sentiment are nevertheless valid for present purposes: that it is not appropriate to uphold the English choice of law in the assignment agreement as against third parties in insolvency matters, insofar as making that choice would apply less stringent requirements as to the validity of the security right.

Johnson discusses several connecting factors which may indicate the appropriate choice of law. This must not be misunderstood as an application of the Irma-Mignon "individualising method" – she expressly underlines that this model is not appropriate given its unpredictability. On the contrary, the analysis leads to a specific preference for a single rule: namely that of the domicile of the assignor[154].

In reaching this conclusion, and in comparison to other alternatives, she places decisive weight on the following considerations. Firstly, she argues that letting party autonomy prevail either in the assignment agreement or the underlying building contract (i.e. by way of applying either the "proper" law of the assignment, or the law of the underlying right, respectively) would prejudice the rights of third parties and, failing valid exercise of party autonomy, the individualising method would remove all pretence of predictability. Secondly, she considers *lex rei sitae* inappropriate given the difficulty of establishing a *situs* for a contractual right (even if the analysis is limited to claims for payment in money). Thirdly, the law of the assignee's domicile is discarded – again mainly out of concern for third parties – as a Norwegian third party creditor to the assignor would not be in a position to establish whether or not a valid security right has been created if a foreign assignee could within their national regime protect their security in the assignor's

[154] Ibid., p. 448

property. Finally, while Johnson has some sympathy for the law of the underlying contract debtor (*debitor cessus;* here: the yard) in certain circumstances[155], she argues that the centre of gravity in the transaction dynamic lies with the assignor, in that it is over his assets (his claim to the payment) security is taken and for which legal protection is sought by the assignee. As such, it is in her view appropriate to apply the laws of the assignor's domicile to questions concerned with whether or not legal protection has validly been obtained as against third parties.

In support of this conclusion, additionally to Nordic literature, she refers to Brækhus' views[156] on the matter, and an older Norwegian Supreme Court Judgement – *Rt.1933.897*. The case concerned a German assignor assigning by way of security its right against a Norwegian contract debtor to a German assignee. The subject of the assignment was a right of claim pursuant to a verbal promise which Norwegian law at the time did not regard as assignable. The case is negative authority for the proposition that in such a case it is not appropriate to look to the laws of the domicile of the contract debtor. It is less certain whether or not it can be deemed positive authority by itself for the laws of the domicile of the assignor being applied in similar cases[157], but in light of the support for the judgement in the literature, it may be submitted with some force that there is now a presumption of the assignor's domicile being given application in security assignment situations

---

[155] Not least because support for this rule is found in the preparatory works to the Mortgages Act: Ot.prp.nr.39 (1977-78)

[156] Brækhus (1978). Pp. 53-55

[157] Ibid, p. 56-57: Brækhus argues that although the result appears to have been achieved by way of the individualising method, it is the conclusion and not the method that from a conflict of laws perspective should be looked to as authoritative.

vis-à-vis third parties, at least where monetary debts are concerned. For the purposes of this thesis and to the extent claims assigned are monetary in nature, the assignor's domicile would be the preferred conflict rule for the guarantees considered above. The position is less clear with the claim for delivery under the building contract; this is not a claim for payment in money *per se*, even if it may still be construed as a contractual debt. We may here refer in particular to the discussion in 4.3.2 above concerned with the definition of "simple claim" under the Mortgages Act. Pursuant to this, while acknowledging that caution ought to be exercised in categorising payments in kind with payments in money, it may nevertheless be admitted that in the absence of clear and specifically relevant authority for claims for payment in kind, sources concerned with the similarly intangible right to claim a monetary debt must be given interpretive weight.

The private international law treatment of claims for payment in money in Norwegian legal discourse would seem to prefer a proprietary analysis. Thus, the contract/property divide established for tangible property, appears valid also for intangible rights insofar as they relate to claims for payment in money.

6.6.3 Rome Convention Article 12

The Rome Convention specifically deals with choice of law in respect of assignments. Although it does not apply to Norway directly it is appropriate to consider its effect given the Norwegian private international law lacuna as to the assignment by way of security of intangible property. This approach is supported in Norwegian literature which goes as far suggesting that the Rome Convention can in some circumstances apply by analogy[158] which

[158] Lundgaard, pp. 97-98

in turns finds support in a memorandum issued by the Ministry of Justice, in respect of suggested reforms to the Rome Convention[159].

Art 12(1) deals with the choice of law appropriate for *inter partes* matters, making internal reference to the Convention, with the effect that Article 3 (party autonomy) and Article 4 ("closest connection" in the absence of a choice, as modified by "characteristic performance") will apply. Article 12(2) deals with matters which in one sense fall outside the primary – "contractual obligations" – ambit of the Convention, namely issues of "assignability" and the (usually) *prima facie* non-contractual relationship between assignee and contract debtor (*debitor cessus*). Article 12(2) makes no reference to the Convention, but to the "law governing the right to which the assignment relates".

The provision in Art (12)(2) is exceptionally broad and may be variously interpreted. On an ordinary understanding of the phrase it appears to make reference to the law of the underlying right being assigned. The inference is thus that if that underlying right is contractual, the Convention will apply in a Convention state as it will be the "law governing the right". If it is not contractual, the Convention will not apply. This line of reasoning is supported in recent English law literature on the matter, which also suggests that the Rome Convention dispenses with the contract/property division, embracing 'all' aspects of the assignment[160]. This line of argument is best considered with reference to the case law which inspired the literature, as supplemented by other English law discourse. Even if the Rome Convention may to a certain degree be considered persuasive for Norwegian law, English legal interpretation

---

[159] "Høring – Grønnbok om mulige endringer i Roma-konvensjonen 19. juni 1980 om lovvalg på kontraktsrettens område" 15.08.2003

[160] Smith, Law of Assignment p. 603

of the Rome Convention must from a methodological perspective be applied with caution in Norwegian law. Nevertheless, it is apt as an example of how the solutions under the Rome Convention might be applied in a legal system the influence of which, particularly in maritime and finance law, is extensive.

6.6.4 The English law perspective

The above-cited case of *Raffeisen*[161] is recent Court of Appeal authority for the English law perspective of the so-called contract/property divide. The question was if a legal assignment of insurances made subject to an English choice of law but formally invalid under French law permitted a bank as assignee to receive the proceeds of the insurances. The cargo owners asserted that the dispute was over intangible property in the right to sue the insurers, and accordingly subject to *lex situs* which was France. The bank asserted that it was a contractual dispute and subject to Art 12(2) of the Rome Convention, governing the insurance contract, which was also subject to an English choice of law.

It was held that an enforcement of a right of action under contract was – unsurprisingly – contractual. The leading judgement, delivered by Mance LJ, attacked the cargo owner's characterisation of the matter as essentially proprietary which would have meant *lex situs* being applied:

> To my mind, the "control" or coercive power over a debt which may be exercised by the courts of a debtors' residence is not a persuasive reason either for treating debt as property in the present context or for looking to the law of the place of the debtor's residence to determine the effect of an assignment as between the assignee and the debtor

[161] [2001] QB 825

Mance LJ goes on to suggest that a proprietary analysis may be more appropriate when dealing with physical assets, but that an analogy to intangible rights is not necessarily appropriate. This reflection is significant in the context of this thesis of an intangible right to delivery of, in the final instance, tangible property. Mance LJ concluded as to the wording of Art 12(2) that there does not appear to be any intent of distinguishing between the contractual and proprietary aspects of assignment. Further, he argues that the Convention views the matters required to be taken for the assignment to take effect between assignee and debtor (notice, etc.) as involving simply contractual issues determined by the proper law governing the obligation assigned, not involving the separate law of the "property" – the *lex sitae* – of those rights.

The view adopted finds academic support[162] in literature prior to and after the judgement, underlining its persuasiveness. Writing prior to the Convention, but inviting its future ratification, Cheshire & North dispense with various conflict rules as to the assignor's domicile, the *lex situs* and law of the place of execution[163]. The conclusion reached is that in respect of the essential validity and effect of the assignment, it is the proper law of the assignment which should be applied.

For questions dependent on the nature of the right assigned, on the other hand, the most appropriate solution is the "proper law of the transaction that created the debt"[164]. For present purposes, the "debt" of contractual delivery is created by the shipbuilding

---

[162] North, P. M. & Fawcett, J. J. (1987) Cheshire and North's Private International Law London: Butterworths, pp. 803-822 ; Smith, Law of Assignment p. 608

[163] Ibid, pp. 803-807

[164] Ibid, pp. 808-16

contract, so it must be the proper law of the shipbuilding contract which as a matter of English conflict rules is conclusive. Also for determining priorities between competing claimants under separate assignments, the proper law of the transaction creating the debt is held to be the correct rule, even if the text stops short of saying outright that priority as between creditors on liquidation is thereby caught by the rule[165].

By way of comparison, the position seemingly now espoused under Norwegian law – to let the law of the assignor's domicile prevail – is rejected in Cheshire & North. It is argued that this would lead to unpredictable and potentially absurd results, with the assignee's interests in transaction underlined in this respect[166]. It is not for this thesis to conclude as to which of the Norwegian or English literature on the treatment of the assignor's domicile is the more convincing. A firm conclusion that may be drawn, however, is that the law of the assignment is not supported in either, negating the value of the English choice of law typically made in the assignment agreement. As for the express choice of law made in the shipbuilding contract and to the extent this will be construed as the "proper law of the transaction creating the debt", an English court is more likely to endorse such a choice than a Norwegian court. .

6.6.5 Reconciling the Convention and English interpretation with the problem

There thus appears to be support in the Rome Convention, as interpreted in English case law and literature, that the contract/property divide for choice of law purposes in respect of intangible rights is more imagined than real.

---

[165] Ibid, pp. 812-813

[166] Ibid. pp. 803-804

The problem of validity as against third parties is however not fully resolved. This does not fall into the express scope of the Convention – the line for non-contractual application is drawn at "assignee and debtor", and its scope of application is pursuant to Article 1 (Scope) limited to contractual obligations. Interestingly, matters of assignability are within the scope of Article 12 and it could be argued that such matters extend by implication also to third parties. However the Green Paper of 2003[167] regarding potential reform of the Convention seems to have excluded this possibility – by operating with a premise that it at present does not have application to third parties but requesting submissions as to whether it should have such application, with a view to future reform.

In the English authority and literature cited, although generally supportive of the Convention as laying out clearer choice of law rules, there is also some reluctance to extend application to third parties, at least in relation to liquidation. This in spite of the statement – similarly to the Rome Convention's use of the term "assignability" – that "matters dependant on the nature of the right assigned"[168] could be deemed to include third party matters. In matters concerning tangible property, there is fairly clear English authority to the effect that *lex situs* will be applied[169]. Within the intangible rights framework, as mentioned, it has been seen that that law of the transaction creating the debt is preferred as a conflict rule, the overlap between contract and property thus being more readily accepted than under Norwegian law. Again, however,

---

[167] http://europa.eu.int/eur-lex/da/com/gpr/2002/com2002_0654da01.pdf

[168] Cheshire & North Private International Law, p. 815

[169] *Cammell v Sewell* (1860) 5 H &N 728; *Winkworth v Christie* [1980] 1 All ER 1121

on the basis of the sources considered herein, it ought to be underlined that there is no clear authority for this preference being applied in every circumstance on insolvency with forum in England.

6.6.6 Recent Norwegian legislative developments: choice of law implications

Norwegian private international law is not founded on statute by implementation of the Rome Convention, although it is acknowledged that the solutions under the Rome Convention will be relevant also to Norwegian law (see 6.6.3). There are three isolated statutory bases for choice of law, namely the Purchase of Goods Choice of Law Act 1964, the Insurance Choice of Law Act 1992, and recently the choice of law provision in the Financial Securities Act 2004. It is the last provision which is particularly interesting from the point of view of the thesis.

It has been established that the 2004 Act cannot directly apply to the rights arising in the present context (see 4.3.3). It may nevertheless be useful to consider how the choice of law issue was dealt with, given its application to the type of dematerialised security rights, such as in commodity derivatives, the assignment of which was previously – like claims for payment in kind – prohibited by the legality principle in the Mortgages Act.

The preparatory works to the Act acknowledge the need for a clear choice of law rule in the matters covered by the Act and recommend a statutory codification[170]. The suggestion was carried over to the Act's §9, with the choice of law rule being "the law of the jurisdiction where the relevant account is kept", essentially where the dispositions which establish the security right are carried

[170] 13.4, Ot.prp.nr.22 (2003-2004)

out – in other words a modified form of a *situs* rule[171]. The choice of law rule itself is probably less interesting for present purposes than the scope afforded to it: the choice of law rule encompasses both *inter partes* and third party matters, inclusive of estate in liquidation of the obligor (for the security).

As such, the Act goes further than the Rome Convention and the English law authorities, when concerned with the security rights in the types of intangible property that fall within its scope. It expressly provides for the bridging of the contract/property divide – applying the same rule both to the *inter partes* and third party dynamics – for choice of law purposes. Although with reservations for the Act's limited scope, this is not an insignificant development in the Norwegian private international law concerning intangible rights, and it will be interesting to observe whether the change reflects a new attitude to conflicts of law problems involving third party conflicts.

6.7 Different Rules in Different Relationships

6.7.1 Inter partes

Inter partes it may be concluded that under Norwegian law party autonomy prevails in matters concerned with the initial validity of the contract and the extent to which security rights created thereby may be upheld in the internal party dynamic. A choice of English law for the assignment agreement should according to the above analysis be upheld, with the consequence that insofar as the *inter partes* dynamic is concerned, Norwegian restrictions on what

[171] Ibid. The formulation used in Norwegian is this: "lokaliseringen av det interne registeret hvor rettighetene i verdipapiret fremkommer på sikkerhetsstillernivå".

security rights may be agreed cannot be brought to bear on the transaction.

6.7.2 Third parties

As against third parties, it cannot be concluded with any certainty that party autonomy will under Norwegian law be upheld pursuant to a notion of the so-called contract/property divide being bridged. There may be persuasive arguments to support party autonomy in respect of intangible rights, the best of which is probably the need for commercial certainty in that a conceptually challenging placement of a right – much like a debt owed – is thereby made superfluous. Where tangible property is "connected" to the intangible right in the manner seen with the claim for delivery, these arguments may be weaker. With the guarantees, given their different character, there may be more cause to apply party autonomy.

It is nevertheless doubtful, though, whether the concern for commercial certainty is superior to the need for third party protection as a matter of Norwegian private international law. Here we may recall Gjelsvik's view that "a right in security in the function of proprietary right does not arise, unless the law of the place where that proprietary right exists, permits it"[172] and further "the legal protection for the right in security, as with the other proprietary rights, is resolved by the law of the place where that proprietary right exists"[173]. Whereas applying *lex rei sitae* in the traditional sense has in the modern analysis been discarded in favour of a rule of assignor's domicile, it is nevertheless the case that linking an intangible right to either of the parties' domicile has

[172] Gjelsvik, p. 209

[173] Gjelsvik, p. 211

overtones of a *situs* rule. In essence, to say that the centre of gravity for third party conflict purposes lies with the assignor at his domicile, is none too different from pointing to that domicile and saying "this is where the proprietary right exists". As such, one could argue that the basic position today remains that espoused by Gjelsvik, namely "the place where the proprietary right exists", with the more modern authorities building on that foundation by providing us with an analytical framework which permits us to point to a "place", even where intangible rights are concerned. By way of aside, it may be noted that in the 2001 UNCITRAL convention on assignment of receivables in international trade, the conflict of laws solution corresponds to that espoused in the Norwegian literature – namely the law of the state in which the assignor is located.

The above leads to the following conclusion for third party rights in insolvency situations: an English choice of law in a contract purporting to assign by way of security the building contract and the guarantees will on the current state of Norwegian private international law (and as interpreted in Norwegian insolvency proceedings) be disregarded in favour of the law of the assignor's domicile. While it is not for this thesis to assess in detail the merits of the particular conflict of laws rule which necessarily leads to this conclusion, it must be admitted that the state of the law – in the absence of a clear authority and taking into account the discord in the international discourse – is uncertain. A clear, harmonised rule, perhaps in the vein of the UNCITRAL convention and ideally incorporated in statute (as with the 2004 Act), is called for.

6.7.3 Does choice of law even matter?

Having established the presumption of the law of the assignor's domicile being applicable in the context of security rights vis-à-vis

third parties we should ask if, fundamentally, the conflict rule under Norwegian law may not matter.

It is an adage of private international law that certain national rules are sufficiently important to be applied regardless of the choice of law – whether that be by way of the abovementioned presumed rule in Norwegian law, or a lesser or greater extent of party autonomy, which to some degree seems permissible under English law by application of the "proper law of the transaction creating the debt". Such rules are known as overriding mandatory rules or the more severe and limited *ordre public* public policy rules, dealt with in the Rome Convention under Articles 7(2) and 16[174], respectively. It is the overriding mandatory variety that is the most relevant for the present context. Konow goes some way towards suggesting that, in order for any security right to gain protection as against Norwegian third parties, it must be a valid security right under Norwegian law and that this has overriding mandatory effect[175]. This validity goes beyond the *inter partes* dynamic, which in a Norwegian court's eyes may reflect no more than a deliberate circumvention of the stringencies of the Norwegian regulation as to security rights. It also goes beyond the specific context of tangible property: there is no reason to afford a third party less protection merely because the subject of the security is intangible. The subject of the security must as a starting point by capable of being secured by way of assignment. The author would agree with this assertion. On current Norwegian authority, a right to a claim for delivery is afforded no such capacity by virtue of the legality principle in §1-2, in which lies a presumption of an overriding mandatory nature.

---

[174] Also reflected in the Purchase of Goods Choice of Law Act section 6.

[175] Ibid., 330-332 & p. 471

In conclusion, therefore, a purported choice of English law – to the extent that it will affect third party proprietary rights – may fail in two respects. First is the application of the presumed conflict rule, the selection of which is a matter largely for the discretion of the *lex concursus* on insolvency. Second is the risk of the choice of law – for instance in the event that English law should be designated or another conflict rule employed – being overruled as a matter of contravention of a Norwegian overriding mandatory rule. The likelihood of either outcome will of course depend on the circumstances of the specific case, but in a matter otherwise closely connected to Norway, and especially Norwegian unsecured creditors, the author would presume that the likelihood is great, particularly in respect of the exclusive conflict rule being applied.

7 Discussion and Conclusion

7.1 The Subject Recapitulated

The thesis has in the above given an account of some important implications of the law of security assignments, as applied to Norway and England. The point of departure was the fairly common finance model for newbuild construction, the purpose of which is to assign the benefit of the guarantees (typically for refund) and the building contract by way of security to the buyer's bank. Typical practice in such finance models is – from a Norwegian perspective – selecting English law to govern the assignment agreement, regardless of the choices of law made in the other contracts.

The rationale for the practice is clear enough. As established above, there is a strong presumption that a security assignment cannot assign the benefit of delivery of the property, this being a claim for a payment in kind prohibited by implication of the Norwegian mortgages regulation. Clearly, the prohibition does not favour the banking interest which has – not unexpectedly – sought to circumvent the prohibition with English law in hand. English law does not mirror the Norwegian prohibition but it does import other issues – notably the distinctions between absolute and contingent assignments and present and future choses. These issues will have the most impact where the guarantees are concerned and by this token we can see that an English choice of law to overcome one obstacle may engender unforeseen and potentially undesired consequences in other respects, if the choice of law for each particular document is not carefully considered.

As such, a "forced" English choice of law is not ideal from a point of view of commercial certainty. We ought therefore to assess the rationale for the Norwegian prohibition in some detail to

establish whether or not there are convincing reasons to maintain it in a context of an internationalising commercial law.

7.2 The Norwegian Prohibition Evaluated

7.2.1 The lesser of two evils

To some degree, the discourse on the Norwegian prohibition is concerned with which of two divisions is the most problematic: on the hand, between legitimate assignment and non-legitimate security assignment, and; on the other hand, between a security assignment and a mortgage for claims for payments in kind.

Sandvik-Krüger-Giertsen, in their text, suggest that the more problematic of the two is the former distinction. The justification is that if §4-9 of the Mortgages Act provides for perfection of security assignments by way of §29 of the Debentures Act, which in turn permits outright assignment of claims for payment in kind (see 4.3.2), it would be strange to preclude assignment merely for the "crime" of fulfilling security purposes.

Brækhus, the prime proponent for the other view, suggests that drawing a line between security assignments and mortgages is more problematic when speaking of claims for payment in kind. He submits that the Mortgages Act, by expressly considering security assignments within its scope, instituted a fundamental change in the law. The change, to his mind, entailed bringing security assignments into line with mortgages, so that circumvention of the apparent public policy rule of unsecured creditor protection was not achieved by attaching the label of security assignment to what in effect was a mortgage[176].

[176] Brækhus, pp. 160-162

Brækhus' argument appears, as a matter of legal method, the more convincing (see 4.3.4), drawing strength directly from the new Mortgages Act. The alternative would necessitate reliance on analogy supported by a court judgement which while applying policy considerations of its own, simultaneously drew on foreign law to bolster its conclusions[177]. To the author, this appears as a weaker basis, but he would be reluctant to say so definitively. The question is ripe for further debate.

7.2.2 The law and the practice

It is bordering on platitude to say that law – and often good law – can follow from the practice. This is nevertheless worth emphasising in the context of regulation of security rights. In large part, the Mortgages Act 1980 was borne out of the fact of life that modern commerce would inevitably develop new forms of finance to which the law must adapt or react – this is well-reflected in the preparatory works to the Act[178]. In court practice, particular customs of the trade have been held to inform a rule of law – the prime example of this is *Smågrisdommen*[179] in which it was held that even as a matter of third party protection on liquidation, particular contractual practices could be given application. Literature has described this view as reflecting a concern with ensuring that credit can be freely created and secured, a concern to which weight ought to be attributed as a matter of legal method[180]. The judgement is also interesting for the court's reference to foreign law in reaching its conclusion.

---

177 Rt.1957.778

178 Rådsegn 8 as cited in Ot.prp.nr.22 (1977-78) , at p.66

179 Rt.1966.857

180 Nygaard, pp. 253 & 261

This is certainly relevant today in the present context. International commerce – arguably with the banking interest at its helm – has in spite of a broadly held acknowledgement of a local Norwegian prohibition, devised a model to, purportedly, avoid its application. An English security assignment is only one of several models. Another method is a form of finance lease, whereby the financier, crudely put, buys the ship on terms that it will bareboat charter it to the "actual" ship-owner (the buyer in our scenario). Other examples, worthy of separate investigation, depend on constructions utilising pledges in favour of the financier.

These devices all point in the same direction and that is to the increasing need for flexibility in obtaining security. One size rarely fits all. This is certainly so in the case of building finance for high-value objects such as ships and oil rigs. Depending on the relative bargaining strengths and creditworthiness of buyers, yards and banks different models may be called for. It seems to the author an unnecessary fetter on flexibility – at least *inter partes* – that the legal stringency, and worse yet, uncertainty, of the Norwegian prohibition should "force" a particular choice of supposedly safe foreign law. It should be clear from the above that English law is not always a safe harbour for reasons of its own, and difficult assessments as to conflicts of laws throw the matter into further doubt.

The types of transactions considered in this thesis are highly commercialised. They must be deemed to be entered into with wide eyes wide open; restrictions on party autonomy implied by background law are unwelcome guests in commercial relations.

7.2.3 The interest of third parties

While there are few persuasive arguments to maintain the prohibition on *inter partes* grounds, the interest of third parties is not infrequently held up as a public policy concern. As described

above it most likely possesses the status of being an overriding mandatory rule for the purposes of Norwegian private international law. The basic rationale is that creditors – especially of the "involuntary" variety – to whom prioritised security is not available, will have no recourse against an estate in liquidation emptied of its assets.

This does on its face appear to be a valid concern. It is supported by weighty academic opinion[181] and reflected in the efforts of the Falkanger Commission in the early 1990s which expressed the general view that access to secured credit should be limited, relative to the arguably broad access under the Mortgages Act[182]. To this should be added that the suggestions of the Falkanger Commission were broadly opposed on grounds that this would hamper the supply of credit which in turn would be likely to raise its cost[183]. The views of the Falkanger Commission went largely unheeded[184], and as if to add insult to injury, the new Financial Securities Act came into force in 2004, further opening up access in the manner described above.

It is difficult to disagree with the notion that unsecured – particularly "involuntary" – creditors should have their dues. It may seem unfair that for instance tortious rights, unsecured rights under contract, or rights accruing to employees or the public at large (by proxy of tax) should not be satisfied – at least in part – by recourse to the assets in an insolvent estate. To some degree, this concern is alleviated by alternative mechanisms and special priority arrangements. With employee accruals and certain liabilities, third

---

181 See in particular Brækhus (2005), pp. 240-255

182 Ot.prp.nr.26 (1998-1999)

183 Ibid.

184 Brækhus, p. 259

parties may have recourse to the state[185] or insurance. Employee accruals are further protected with first class priority through the Creditor Security Act §9-3 and some taxes under §9-4. Questions may of course be asked as to whether these hedges are substantial enough, or if they cover a sufficiently broad range of creditors, but that is a separate discussion.

A more important question, though, is if the emphasis on drawing the right line in the sand between secured and unsecured credit is ill-founded in the present context. It is difficult to reconcile the particular, fairly "localised" discourse of the pros and cons of broad access to security in Norway with the modern practice of international building finance for high-value movable property. It seems artificial to separate, for security purposes, the object itself from the claim for its delivery as it is in the final instance the object to which the value of the security in the claim will attach. Again we are encountering the difficult and often puzzling separation of contract from property which causes such uncertainty for choice of law purposes.

Brækhus, otherwise sceptical of wide-ranging access to security, acknowledges that arbitrary limitations are uncalled-for when high-value objects such as ships and rigs are to stand as security[186]. This suggests that arguments levelled in favour of the prohibition do not specifically target security in such property, but are more concerned with the objection in principle to the haphazard disposal of all debts and rights under any and all contracts – an objection which appears well-founded. There is however a self-evident need for, and a generally acknowledged access to, obtaining protected security in

---

[185] The Norwegian State guarantees, to some extent, for employee accruals: Act 61/1973

[186] Brækhus, p. 256

tangible movable property on completion. It would in truth be a strange state of affairs if the legal order refused to afford security in such property certain legal protection as against third parties. The consequence would be prohibitively expensive credit or no credit at all with obvious detrimental consequences. Nevertheless, this is precisely what the uncertain position in respect of intangible rights under Norwegian law engenders in the context of pre-delivery building finance of movables under construction abroad: namely, that no firm protection as against third parties is available for security created at the pre-delivery stage.

By separating the contract from the proprietary right it is meant to secure, a new problematic division results: between protected security post-delivery and unprotected security pre-delivery.

7.2.4 The Need for Clarity

Fundamentally, the Norwegian prohibition, both in law and effect, lacks clarity. This shortcoming has resulted in a practice of circumvention, the merits of which are unclear and to the author's mind dubious, particularly in the light of conflicts of laws issues. It is informed by a particular understanding of a rule of law, which, in all likelihood, does not intend to target the types of transaction in which the security assignment model and circumvention is typically used, namely, the building finance for high-value property such as commercial ships and oil rigs, built abroad and in the current market not infrequently at Asian yards. To some degree, a square peg is being forced into a round hole.

Formal limitations bypassed in practice to dubious effect are clearly not ideal solutions in the eyes of the law, nor the practice. To paraphrase Knoph and Villars-Dahl[187]: clear words always being

[187] "Utkast til lov om gjeldsbrev (1935)" as cited in Rådsegn 8

more dignified than evasive manoeuvres, the legal order is best served by acceding thereto. This cannot mean that the legal order must suffer and make law of any creative construction the practice sees fit to invent, but where a prohibition informed by a rule of public policy may strike at random, undermining commercially sound and necessary credit arrangements by forcing a potentially awkward choice of law, it seems to the author that action is needed.

In the current economic climate, the prohibition is presently of limited practical effect. Liquidations of ship-owners and the like are few and far between and more or less shrewd financing models are freely employed. All the prohibition achieves at present is uncertainty as to its consequences. The fact that we cannot see the consequences of the prohibition at present does of course not mean that it is disqualified from clarification: in fact it is especially in a case of unknown consequences that clarification is called for. Knee-jerk after-the-event reactions are infrequently ideal solutions in law. Clarification is best achieved by statutory intervention, which need not take the form of lifting the prohibition, but should take the form of a precise limitation in scope.

There seems to be no convincing reason as to why commercially necessary international building finance involving high-value movable property should be covered by the prohibition. This is particularly so where the domestic law – in Norwegian shipbuilding for instance, by way of registration of the building contract – would permit the equivalent domestic transaction to proceed without the potential security woes implied by the prohibition. In the present context, where overseas construction is largely a commercially inevitable fact of life *inter partes*, it ought to make no difference as against third parties that the movable property is being built abroad.

7.3 Conclusion

To the extent possible within the scope of the thesis and its stringencies of form, the author has sought, from a comparative perspective, with England and Norway as reference points, to illustrate certain legal implications of a specific but common model of international building finance for a particular type of property. In doing so, however, the author hopes to have shed some light on more general concerns related to the often complicated legal dynamics of international trade and the need for law to reflect and adapt to modern commercial realities.

For better or worse, an increasing common law 'bias' is manifesting itself in international trade. Commercial actors should not take the consequences of this lightly, and should appreciate the full breadth of consequences of what may appear as the "safe route" by way of the common law. Equally, it is necessary to understand that even a supposedly safe route may lead to an uncertain destination if matters of public policy are at stake. Finally, and perhaps most importantly, there is a duty incumbent on the legislator to see to its public policies being applied in a targeted, meaningful way. A badly calibrated public policy lacks both direction and meaning and cannot benefit either commerce or community.

References

Statute

English

Law of Property Act 1925

Judicature Acts 1873 and 1875

Norwegian

Debentures Act 1939

Mortgages Act 1857

Act 61/1973 ('State guarantee for employee accruals')

Mortgages and Pledge Act 1980

Creditor Recovery Act 1984

Norwegian Maritime Code 1994

Financial Securities Act 2004

Other

EC Directive 2002/47

Rome Convention of 1980

Case Law

English

Lampet's Case (1612) 10 Co Rep 46b

Dearle v Hall [1828] 3 Russ 1 at 23

Brown v Tanner (1868) 3 Ch App 597

Brice v Bannister (1878) 3 QBD 569

Collyer v Isaacs (1881) 19 ChD 342

Walsh v Lonsdale (1882) 21 ChD 9

Ex p Nicholls (1883) 33 ChD 782

Walker v The Bradford Old Bank Ltd.(1884) 12 QBD 511

Gorringe v Irwell India Rubber Works (1886) 34 ChD 128

Tailby v Official Receiver (1888) 13 App Cas 523

King v Victoria Insurance Co Ltd.[1896] AC 250

Hughes v Pumphouse Hotel [1902] 2 KB 190

Torkington v Magee [1902] 2 KB 427

Tolhurst v. Associated Portland Cement Manufacturers Ltd. [1902] 2 KB 660

Glegg v Bromley [1912] 3 KB 474

Dunlop v Selfridge [1915] AC 847

Performing Right Society Ltd v London Theatre of Varieties [1924] AC 1

National Provincial and Union Bank of England v Charnley [1924] KB 431

Re Fry, Chase National Executors and Trustees Corpn v Fry [1946] Ch 312

Re McArdle [1951] Ch 669

Re Tout and Finch Ltd [1954] 1 All ER 127

Holwell Securities Ltd. v. Hughes [1973] 2 All ER 476

R D Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd. [1977] 2 All ER 862

Hyundai Shipbuilding Co. Ltd. v Pournaras / Bouboulina [1978] 2 Lloyd's Rep 502

Edwards Owen Engineering Ltd v Barclays Bank [1978] 1 All ER 976

Potton Homes Ltd. v Coleman Contractors [1981] 28 Build. L.R. 19

Trendtex Trading Corp v Crédit Suisse [1982] AC 679

Linden Gardens Trust Ltd. v Lenesta Sludge Disposals [1984] 1 AC 85

Esal Commodities Ltd v Oriental Credit Ltd.[1985] 2 Lloyd's Rep 546

Siporex Trade SA v Banque Indosuez [1986] 2 Lloyd's Rep 146

E Pfeiffer Weinkellerei-Weinereinkauf GmbH & Co v Arbuthnot Factors [1988] 1 WLR 150

Annangel Glory Cia Naviera SA v M Golodetz Ltd, Annangel Glory [1988] 1 Lloyd's Rep 45

Compaq Computer Ltd v Abercorn Ltd [1991] BCC 484

Mercers v New Hampshire [1992] 2 Lloyd's Rep 365

Camdex International Ltd. v Bank of Zambia [1998] QB 22

Gold Coast Limited v Caja de Ahorros del Mediterraneo [2001] 1 All ER (Comm) 142

Raiffeisen Zentralbank Østerreich AG v Five Star Trading LLC [2001] QB 825

Marubeni Hong Kong v Government of Mongolia [2005] All ER (Comm) 289

Norwegian

Rt.1923.II.58

Rt.1924.1181

Rt.1933.897

Rt.1957.778

Rt.1963.893

Rt.1966.857

Rt.1984.248

Rt.1987.35

Rt.1987.984

Rt.1988.276

Rt.1992.492

RG.1958.646

RG.1963.528

RG.1997.1269

RG.2005.96

ND.1983.309

Other

Norman v Federal Commr of Taxation (1963) 109 CLR 9 (Australian High Court)

Shepherd v Federal Commr of Taxation (1965) 113 CLR 385 (Australian High Court)

U.1941.868 (Danish Østre Landsret)

Commentary

Halsbury's Vol. 6 2003

Norsk Lovkommentar: Debentures Act

Norsk Lovkommentar: Creditor Recovery Act

Norsk Lovkommentar: Mortgages and Pledge Act

Norsk Lokommentar: Financial Securities Act

Preparatory Works

Rådsegn 8, Sivillovbokutvalet

Ot. prp.nr.39 (1977-1978)

Ot.prp.nr.26 (1998-1999)

Ot.prp. no 22 (2003-2004)

NOU 16: 1993

Literature

Augdahl, P. (1978) Den norske obligasjonsretts almindelige del Aschehoug: Oslo

(1990) Black's Law Dictionary (6 th Ed.) West Publishing: St. Paul

Andenæs, M. H. (1994) Konkurs Oslo

Brækhus (1978) Fra kredittretten og andre rettsområder Sjørettsfondet: Oslo

Brækhus, S. & Høgetveit Berg, B. (2005) Omsetning og kreditt II: Pant og annen realsikkerhet (3rd Ed.) Universitetsforlaget: Oslo

Cordero Moss, G. (2003) Stensilserie No. 162: Lectures on International Commercial Law Oslo

Debattista, C. "Performance Bonds and Letters of Credit: a Cracked Mirror Image" (1996) in Festskrift til Jan Ramberg Stockholm: Juristförlaget

Falkanger, Bull, Brautaset (2004) Scandinavian Maritime Law: The Norwegian Perspective (2nd Ed.) Oslo: Universitetsforlaget

Falkanger, T. in (2004) Knophs oversikt over norsk rett Oslo: Universitetsforlaget

Furmston, M. P. et al. (2007) Cheshire, Fifoot and Furmston's Law of Contract (15th ed.) Oxford: OUP

Gjelsvik, N. (1936) Millomfolkeleg privatrett (2nd Ed.) Oslo: Nikolai Olsen

Goode, R. (1992) Guide to the ICC Uniform Rules for Demand Guarantees Paris: ICC Publishing

Goode, R. (2003) Legal Problems of Credit and Security (3 rd Ed.) London: Sweet & Maxwell

Goode, R. et al. (2007) Transnational Commercial Law: Text, Cases and Materials Oxford: OUP

Hagtrøm, V. (2003) Obligasjonsrett Oslo: Universitetsforlaget

van Houtte, H. (2002) Law of International Trade London: Sweet & Maxwell

Johnson, I. (1990) "Interlegale rettsvernsregler ved sikkerhetsstillelse av enkle pengekrav" TfR 1990

Kjelstrup, C-B. (1994) Liten Panterett Oslo: TANO

Krüger, K. (1984) Pengekrav Bergen: Universitetsforlaget

Lando, O. et. al. (2003) Principles of European Contract Law Part III The Hague: Kluwer Law

Lilleholt, K. (1994) Godtruerverv og kreditorvern Oslo: Universitetsforlaget

Lundgaard, H. P. (2000) Gaarders innføring i internasjonal privatrett Oslo: Universitetsforlaget

North, P. M. & Fawcett, J. J. (1987) Cheshire and North's Private International Law London: Butterworths

Nygaard, N. (1999) Rettsgrunnlag og standpunkt Bergen: Universitetsforlaget

Reinertsen Konow, B-E. (2006) Løsørepant over landegrenser Bergen: Fagbokforlaget

Sandvik, T. et al. (1982) Norsk panterett Oslo: Universitetsforlaget

Skoghøy, J. E. A. (2003) Panteloven: Kommentarer Oslo: Gyldendal Akademisk

Smith, C. (1981) Garantirett III Oslo: Universitetsforlaget

Smith, M. (2007) The Law of Assignment: The Creation and Transfer of Choses in Action Oxford: OUP

Ussing, H. (1961) Obligationsretten: Almindelig del (4 th. Ed.) Copenhagen: Juristforbundets Forlag

Vinje, E. H. (1999) Tolking av garantier i forretningsforhold Oslo: Universitetsforlaget

Zweigert, K. & Kötz, H. (1998) An Introduction to Comparative Law (3rd Ed.) Oxford: OUP

Documents

Norwegian Shipbuilding Contract 2000

Assocation of West European Shipbuilders

SAJ Form

Transnational Sources

Principles of European Contract Law

ICC Unform Rules for Demand Guarantees 1992

UN Convention on the Assignment of Receivables in International Trade 2001

UN Convention of Independent Guarantees and Stand-By Letters of Credit 1995

International Standby Practices 1998

UCP 500/600 (1993/2007)

Internet and Other Sources

http://www.regjeringen.no/nn/dep/jd/Kampanjer/Tolkningsuttalelser/Gjeldsforfolgningsrett/Tolkningsuttalelser-om-panteloven/-4-4-og-4-9---Pantsettelse-av-varederivater.html?id=454753 (Commodity derivates)

http://europa.eu.int/eur-lex/da/com/gpr/2002/com2002_0654da01.pdf (Commission Green Paper 2003)

"Høring – Grønnbok om mulige endringer i Roma-konvensjonen 19 juni 1980 om lovvalg på kontraktsrettens område" 15.08.2003

Earlier editions of MarIus

The prices listed are for subscribers. For other buyers the price is doubled. Full booklist in no. 360, 370, etc. and at http://www.jus.uio.no/nifs/

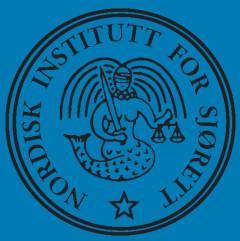
358	KEISERUD, Jørgen	Transport og kortsiktig salg av gass i Nederland - nettoperatørens tilrettelegging. 2007. 156 s. Kr. 80,-
359	EGGEN, Tine	«No gain no loss» – prinsippet i petroleumsvirksomhetens samarbeidsavtaler. 2007. 184 s. Kr. 100,-
360	SIMPLY	Yearbook 2007, 2007. 463 s. Kr. 210,-.
361	SØRENSEN, Christopher Haugli	Konstruktivt totalforlis. Kondemnasjonsvilkår og totaltapsoppgjør etter Norsk Sjøforsikringsplan og spesialvilkår. 2008. 186 s. Kr. 90,-.
362	ØSTLIE, Christian B.	Finansielle covenants i låneavtaler. 2008. 160 s. Kr. 80,-.
363	LERVÅG, Jon Vegard	Miljørettsleg handlingsrom innanfor konsesjonssystemet for norsk petroleumsverksemd. Tilhøvet mellom utvinningsløyvet, godkjenninga av PUD og forureiningskonsesjonen. 2008. 161 s. Kr. 80,-.
364	WARD, Ezekiel	Collaboration in Liner Shipping under Article 81 Ec. Agreements between liner shipping undertakings following the repeal of Regulation 4056/86. 2008. 105 s. Kr. 70,-.
365	ERDAL, Leiv Mikael	Legal Implications of Security Assignment. Comparing the Norwegian and English law of security assignments in the context of building finance for high-value movable property. 2008. 92 s. Kr. ?

Books published by Sjørettsfondet from 1990

Syversen, Jan: **Skatt på petroleumsutvinning**. 762 s. l99l. Kr. 50.-	ISBN 82-90260-33-4
Askheim, Bale, Gombrii, Herrem, Kolstad, Lund, Sanfelt, Scheel og Thoresen: **Skipsfart og samarbeid.** Maritime joint ventures i rettslig belysning. 1119 s. l99l. Kr. 50.-.	ISBN 82-90260-34-2
Brækhus, Sjur og Alex Rein: **Håndbok i kaskoforsikring** På grunnlag av Norsk Sjøforsikringsplan av 1964. 663 s. 1993. Kr. 100.-.	ISBN 82-90260-37-7
Hans Peter Michelet: **Last og ansvar.** Funksjons- og risiko- fordeling ved transport av gods under tidscerteparti. (Hefte) 180 s. 1993. Kr. 50.-.	ISBN 82-90260-36-9
Røsæg, Erik: **Organisational Maritime Law.** 121 s. 1993. Kr. 100.-.	(Utsolgt)
Nygaard, Dagfinn: **Andres bruk av utvinningsinnretninger.** 365 s. 1997. Kr. 100.-.	ISBN 82-90260-40-7
Bull, Hans Jacob: **Hefte i sjøforsikringsrett.** 60 s. 2. utg. 1997. Kr. 60.-.	(Utsolgt)
Michelet, Hans Peter: **Håndbok i tidsbefraktning.** 600 s. 1997. Kr. 100.-	ISBN 82-90260-31-8
Arnesen, Finn, Hans Jacob Bull, Henrik Bull, Tore Bråthen, Thor Falkanger, Hans Petter Graver: **Næringsreguleringsrett** 187 s. 1998. Kr. 150.-.	ISBN 82-90260-42-3
Brautaset, Are, Eirik Høiby, Rune O. Pedersen og Christian Fredrik Michelet: **Norsk Gassavsetning - Rettslige hovedelementer** 611 s. 1998. Kr. 100.-.	ISBN 82-90260-43-1
Falkanger, Thor og Hans Jacob Bull: **Innføring i sjørett. 6. utg.** 573 s. 2004. Kr. 300.-	ISBN 82-90260-46-6
Karset, Martin, Torkjel Kleppo Grøndalen, Amund Lunne: **Den nye reguleringen av oppstrøms gassrørledningsnett**. 344 s. 2005. Kr. 500,-	ISBN 89-90260-47-4

SCANDINAVIAN INSTITUTE OF MARITIME LAW forms part of the University of Oslo. It is also a part of the co-operation between Denmark, Finland, Iceland, Norway and Sweden through the Nordic Council of Ministers. The core research areas are maritime law and petroleum/energy law.

In MARIUS, articles from these core areas are published in the Nordic languages or English. It is issued at irregular intervals.



Lobo Media AS - 44674