APPLICATION OF FOREIGN RULES ON NON-POSSESSORY SECURITY INTERESTS IN SWEDISH PRIVATE INTERNATIONAL LAW

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I. Introduction

This paper deals with the recognition in Swedish private international law of non-possessory security interests created abroad. A non-possessory security interest is one where the creditor does not keep the charged movable in his possession. The chattel remains in (or is transferred to) the possession of the debtor (in the following sometimes denoted as “the possessor”) who is allowed to use it. Typical examples of non-possessory security interest are conditional sale with reservation of title by the seller, security transfer of ownership and non-possessory chattel mortgage. In order to avoid repetition of the term “non-possessory security interest”, the term “security interest” will be used in the same meaning, unless otherwise indicated.

Security interests in real property will not be considered, although they too may conceivably involve conflicts problems.1 Because of the special regime applicable under international conventions, registered ships and aircraft will also be left out of consideration.

The paper is focused on the effects of security interests in relation to third parties, although security interests have important legal effects also in regard to the relationship between the possessor and the creditor of the secured claim. The question whether a security interest created abroad is to be recognized in Sweden will usually arise only after the charged chattel has been moved into this country. Concerning the relationship between the possessor and the creditor of the secured claim, this may occur when, for instance, the creditor invokes the security interest in order to take the chattel from the possessor who has not fulfilled his obligations under the contract. The effects of a security interest in relation to third parties may come under scrutiny when the possessor goes bankrupt or when execution is sought in the chattel by his other creditors; if the security interest is recognized, it will lead to the exclusion of the chattel from the bankruptcy estate or it will give the creditor of the secured claim certain priorities before other creditors when it comes to obtaining payment from the value of the chattel.

Swedish case law regarding recognition of security interests created abroad is very meagre, almost non-existent. Furthermore, there are practically no statutory rules

1. E.g. if the charged immovable is “transferred” from one country to another as a result of a change in national borders or if an accessory part of an immovable, for example an elevator, is temporarily sent to another country for reparation.
concerning the matter. To a large extent, it is therefore necessary to rely on the opinions of legal writers. The legal systems of the Scandinavian countries are closely related to each other and it is thus possible, to a certain extent, also to refer to solutions that have been adopted or suggested in the other Scandinavian states.

The understanding of the conceivable conflicts problems that may arise in Sweden in connection with security interests created abroad requires a short presentation of the rules of Swedish municipal law concerning security interests. After this presentation in Part II of this paper, the difference between the security interests' effects inter partes and their effects in relation to third parties will be examined in Part III. If a security interest is to be recognized, two conditions must be fulfilled. First, the security interest must have been validly created (Part IV). Secondly, it must not have subsequently ceased to exist (Part V). Finally, Part VI deals with the content of security interests created abroad.

II. Non-possessory security interests in Swedish law

In Swedish law, the principal non-possessory security interests in chattels are reservations of title in conditional sales and security transfers of ownership. Non-possessory chattel mortgage is inadmissible, since Swedish law requires transfer of the possession of the chattel (traditio) for the validity of the pledge in relation to third parties.

Reservation of title in conditional sales is by far the most important and the most frequent security interest, both in domestic transactions and in foreign trade. It is particularly employed when the buyer is to pay the purchase price by instalments. The relationship between the seller and the buyer is governed by a special statute of 1915 (Act no. 219), which states explicitly that it also applies to contracts denoted as hire or rent, provided that the intention of the parties is that the person receiving the chattel will become its owner. The 1915 Act regulates both the right of the seller to take back the chattel if the buyer does not fulfill his obligations under the contract and the economic relations between the parties in such situations. The validity of the reservation of title in relation to third parties is not governed by the Act, but it has been subjected to several conditions by case law.

In the first place, the reservation of title ("ägareförbehåll") must be made before or at the latest simultaneously with the transfer of the chattel into the possession of the buyer. Another requirement is that the purchaser must not be allowed by the seller to re-sell or to consume the chattel. It is also required that the seller must be the creditor: the reservation of title ceases to be operative in relation to third parties if the buyer pays for the chattel with money he borrows from a bank and the seller reserves the title and transfers it to the bank as security. Finally, the secured claim and the charged chattel must be clearly specified. On the other hand, Swedish law requires no registration or publication of title reservations.

2. In the following, any reference to the law of a country refers to its municipal law only, not to its conflicts rules.
4. Sec. 1, subsec. 2.