THE APPLICATION BY DANISH COURTS OF FOREIGN RULES ON NON-POSSESSORY SECURITY INTERESTS*

By Ole Lando, professor, LLd.,
Copenhagen School of Economics
and Business Administration

INTRODUCTION

1. Terminology and subject matter

By a non-possessory security interest is here meant an interest which, in situations where the debtor and not the secured party has the goods in his possession, gives the secured party a priority in the goods over the creditors of the debtor and others who claim to have acquired an interest in the goods.

This paper deals with the conflict-of-law rules respecting rights to movable property which has been taken from one country to another. A typical situation is that where a security interest is created according to the law of country A while the goods are still in that country. Later the goods are taken to Denmark. Will the Danish courts then recognize the foreign non-possessory security interest of country A?

Under the instructions of the General Reporter no distinctions are to be made according to whether the security interest is called title (ownership), reservation of property, chattel mortgage, leasing, or something else. By the laws of many, if not most, countries the seller who has reserved title under a conditional sales contract is termed owner, and so in German law is the holder of a right under a “Sicherungsübereignung” (security transfer of ownership). These interests are all rightly termed non-possessory security interests. Therefore, there is no reason to exclude the rights of other “owners” who have not acquired possession, such as, under several legal systems, a purchaser of specific or ascertained goods. This “owner” has a position different from that of the other owners mentioned only in so far as eventually he will become the possessor and “real owner” of the goods with greater certainty than the “owners” under a conditional sale or a security transfer of ownership agreement; but this greater probability, it is submitted, is not a tenable fundamentum divisionis, see section 4, infra.

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* Report to the Xth International Congress of Comparative Law, Budapest 1978, held by the International Academy of Comparative Law. The title of the subject reads "The recognition of non-possessory security interests in private international law", see on this infra sec. 2. General Reporter is professor dr. Ulrich Drobnig, Hamburg.

1. References


2. *Philip* rightly seeks to discard the distinction between mortgage and conditional sale, see 404, but see *Ørgaard*, 336 and 337.
2. The subject matter to be discussed

The subject matter as set out by the International Academy of Comparative Law is the recognition by the courts of security interests created abroad. However, in a rational treatment of the subject one should also treat the application by the courts of foreign rules which do not grant a person a non-possessory interest that he would acquire under the substantive rules of the forum country.

Example. Specific goods are sold in Germany free delivered to a Swedish buyer. While they are on their way to Sweden an attempt to attach them is made in Denmark by a creditor of the German seller. Under Danish law a purchaser of specific goods acquires a non-possessory interest, called title or property, as soon as the contract is made. Under German and Swedish law property in such goods passes when the buyer lawfully obtains possession of them. If in this case the Danish court applies German or Swedish law to the question which party has priority in the goods, the buyer or the creditor, the court will find for the creditor, and it will not recognize any foreign security interest but will instead apply foreign rules on the “non-existence” of such an interest, see also section 25 infra.

The subject covers many issues which cannot be treated here. This report is restricted in the main to those issues which according to the Law Reports have been dealt with by the Danish courts.

3. Plan

In part I a short account will be given of Danish non-possessory security interests; part II will be devoted to the reported Danish cases on the subject, and in part III, Critique, the position of the present writer will be presented.

I. DANISH NON-POSSESSORY SECURITY INTERESTS

A. Passing of property

4. In Danish law the interests of the purchaser of specific goods take priority over the interests of the creditors of the seller as soon as the contract is made. As for unascertained goods, the purchaser achieves priority when they are appropriated to the contract (individualized to the buyer). The seller, in general, loses his priority over the creditors of the buyer when the goods have come into the possession of the buyer. Until then the seller can reclaim the goods.

In Danish legal terminology these phenomena are expressed in terms of “ownership” or “title” (ejendomsret). “Title”, it is said, passes at different stages of the transaction according to whether the interests of the purchaser or the interests of the seller are considered. In fact, one may express the same phenomena by saying that the buyer achieves a security interest in specific goods when the contract is made, and in unascertained goods when the goods are appropriated to the contract, and that the seller retains a lien or security interest in the goods until they have come into the pos-