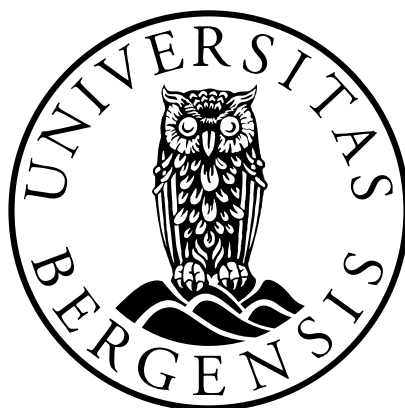


# Signed, Sealed, Delivered — but Yours?

*Debtor's assets and the scope of the bankruptcy estate under Norwegian and Chinese law*

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# 1 Introduction

## 1.1 Research question

In bankruptcy proceedings, the general rule is that only the insolvent debtor's property may be liquidated and distributed among the creditors to satisfy their claims. The Norwegian Creditors Recovery Act § 2-2 stipulates that creditors may seek satisfaction for their claims in assets (“formuesgoder”) that belong to (“tilhører”) the debtor and may be converted into money (“kan omgjøres til penger”) by means of sale, lease etc.

Similarly, the Chinese Enterprise Bankruptcy Law<sup>1</sup> article 107 (2) stipulates that “after being declared bankrupt, the debtor shall be named the bankrupt, and the debtor's assets as the bankruptcy assets”. Under article 111 (2), the bankruptcy administrator “shall (...) appraise and sell insolvent assets at the current price in due course”. The similarity with the Norwegian Creditors Recovery Act § 2-2 becomes apparent when considering the Enterprise Bankruptcy Law article 30, which stipulates that the term “debtor's assets” refers to all the assets “that belong to a debtor” when a bankruptcy application is accepted, in addition to assets “obtained by the debtor” throughout the entire bankruptcy proceeding.

These statutes suggest that the general rule has a positive and a negative facet. First, it indicates that generally, the estate may seize any property that belongs to the debtor, making the property an insolvent asset. Second, property that does not belong to said debtor may not be included in the estate.

This thesis compares the scope of the bankruptcy estate according to Norwegian and Chinese law, with a focus on which movable property the estate may seize to cover creditor claims. The topic is vast and many-faceted, the thesis covering it limited in scope, and existing comparisons of Norwegian and Chinese property and business law are few. Therefore, I do not attempt at covering aspects of ‘debtor's assets’ in such detail as some of the more specialised or lengthy works referenced. Instead, I attempt at providing a general overview as

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<sup>1</sup> In China, the word “法” (“fa”), refers both to the legal area in general and the statutes themselves. Thus, “破产法” (“pochanfa”) means bankruptcy law in general, and the statutory act it is codified in. Although the common nomenclature for statutory law in English is ‘act’, translations of and accounts on Chinese law typically use the wording ‘Law’, as will I.

grounds for a broader comparison between the two jurisdictions. My intention is to provide helpful clues for conducting secure commercial transactions across continents, give insight into the countries' legislative attitudes and show indications of undetermined legal questions that future comparative studies may investigate further.

My main research question is as follows:

*Which circumstances determine whether Chinese and Norwegian law consider movable property that of the debtor, so that it may be attached to the bankruptcy estate in the event of bankruptcy?*

As one cannot transfer a right one does not have (the so-called *nemo dat* principle),<sup>2</sup> the creditors normally cannot claim any right that the debtor himself would not have, were he not bankrupt. Thus, the rules on when ownership passes from the seller to the buyer are a natural starting point for the analysis, and the subject of chapter 3.

However, the underlying problem is this: Which movables may the estate liquidate to distribute the value among creditors? This makes ownership a mere starting point to ascertain the estate's scope, as assets that debtor owns and assets that unsecured creditors may seek satisfaction through will often diverge. Therefore, when referring to 'debtor's assets', I include both assets that debtor has ownership to and assets falling within the deviating situations detailed below.

One deviation concerns conflicting rights where the transferor retains a right to the asset in order to secure his right to the payment. The parties might have agreed that after delivery, the seller has the right to take the sold goods back and resell them if the buyer does not pay due amounts. Such 'retention of title clauses' could be viewed either as agreements on when ownership transfers or as establishing a security interest.<sup>3</sup> Irrespective of approach, the asset could be outside the estate's scope. The choice of perspective determines whether that is due to the debtor not owning the asset, or despite him doing so. Title retention clauses are the subject of chapter 4.

Moreover, a bank could enjoy preferential right to repayment from certain assets upon defaulted payment, ensuring full repayment of their secured loan through such assets before

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<sup>2</sup> See i.e. Hauge 2016, p. 93 on the principle applied to the Norwegian Creditors Recovery Act § 2-2.

<sup>3</sup> See sub-chapters 4.1.1 and 4.2.1.

any other creditor may seek dividends in their proceeds. Examination of these rules become essential to ascertaining the scope of the estate, as such 'security interests' limit the estate's access to the value of certain assets of the debtor's. Chapter 5 details security interests and their common implication: the debtor's ownership may be insufficient for the estate to access an asset. This is the first deviation from the causal relationship between the debtor's ownership and the estate's access to the asset.

Another deviation is that ownership might not be necessary. Many jurisdictions have provisions that allow the administrator of the estate to void or revoke fraudulent transactions, recovering assets to distribute their proceeds among the creditors. Such 'avoidance rules', 'revocation rules' or 'clawback rules' enable the estate to access assets that someone else already has acquired, at least insofar as the rules acknowledge the transfer as valid though reversible, and not as invalid in the first place. Because these rules are relevant to the underlying problem of what assets the creditor may seize, analysis of Chinese and Norwegian avoidance rules would be desirable. Ideally, one should also regard the possibility that a jurisdiction makes up for lenient rules on transfer of ownership by giving the estate administrator wide discretion to reverse transactions after bankruptcy is declared. However, avoidance rules are too vast a subject to compare within the scope of this thesis, and these rules remain an interesting subject for future study.

Lastly, I will mention that certain belongings that *do* fall within the sphere of debtor's property and would otherwise serve to satisfy creditor claims are still exempt from attachment to the estate even in absence of any security interest. The Norwegian Creditors Recovery Act chapter 2 gives detailed exceptions for personal belongings, stipends, public contributions, wage claims, money necessary to support the debtor and his household and more. These exceptions generally concern the debtor's 'bare necessities', and personal bankruptcies. China lacks a law on personal bankruptcy, and a comparison would be of limited use. Furthermore, these exceptions are of limited relevance to movables in commercial transactions. As this thesis investigates how one under Chinese and Norwegian rules may diminish insolvency related risks in commerce, said exceptions will not be discussed. While Hong Kong and Macau are parts of the People's Republic of China, the two administrative regions' historic colonial ties to the United Kingdom and Portugal are reflected in them being separate jurisdictions from what is usually referred to as 'Mainland China'. Macau law is influenced by Portuguese civil law, Hong Kong by English civil law.

This thesis compares the law of Norway and Mainland China, and any reference to China will refer to the mainland jurisdiction.

## 1.2 Terminology

### 1.2.1 Bankruptcy and insolvency

Different jurisdictions may apply the term ‘bankruptcy’ differently. This comparison concerns the state of debtor’s property during liquidation. Liquidation is the process of seizing the insolvent debtor’s assets, converting them into money by sale, lease or similar transactions, and distributing that money among creditors in dividends. China has also adopted a corporate rescue scheme named ‘bankruptcy reorganisation’ (“破产重整”), which will be mentioned occasionally,<sup>4</sup> although not described in general.

To verify that Norwegian and Chinese bankruptcy liquidation rules apply to the same situation, one must clarify whether they apply the same criteria for accepting bankruptcy cases. To enter bankruptcy liquidation, Norwegian law stipulates two criteria; illiquidity (the debtor is unable to pay due debts) and insufficiency (the total assets amount to less than the total debts), cf. the Norwegian Bankruptcy Act §§ 60 and 61.

The Chinese Enterprise Bankruptcy Law article 2 stipulates that if an enterprise “cannot pay due debts” (“不能偿到到期债务”) and “its assets are insufficient to pay off total debts” (“并且资产不足以清偿全都债务”) or the enterprise “is obviously lacking payment capabilities” (“明显缺乏清偿能力的”), then “its liabilities shall be liquidated (...)”.

It seems that both jurisdictions generally operate by the same two criteria for initiating liquidation; inability to clear of due debts, and total assets not exceeding total debts. That does not imply the requirements are necessarily similar in all respects. The Norwegian reservation for temporary illiquidity is one modification to the two criteria, another being the Chinese wording “obviously lacking payment capabilities” as an alternative to the insufficiency criterion.<sup>5</sup> Yet, the overall criteria are largely convergent.

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<sup>4</sup> See chapter 5.3.4.

<sup>5</sup> See the Bankruptcy Provisions (I) article 1.

## 1.2.2 Property rights, ownership and security interests

What constitutes a ‘property right’, ‘ownership’ or ‘security interest’ is a many-faceted debate relative to legal tradition. This thesis cannot apply the terms in all their complexity while maintaining the universality required for effective comparison. Still, it is necessary to define the meaning this thesis attributes to the terms, as they appear frequently.

In the following chapters, I will by ‘property right’ refer to the legal subject’s right to one or several specific assets, unlike ‘obligatory right’, which refers to the same party’s right to fulfilment of a contractual obligation that may include transfer of agreed assets. Thus, property rights are widely regarded as subject to a ‘specificity principle’ (“spesialitetsprinsippet” in Norwegian, “客体特定原则” in Chinese), meaning that acquisition of property must relate to assets specified in the grounds for acquisition. Property rights only establish over specified assets.<sup>6</sup>

In principle, property rights are enforceable against any subject, while obligatory rights may only be asserted against the party undertaking the obligation. Countries adhering to a *numerus clausus* principle prescribe a finite number of rights as property rights that can be effective against third parties, whereas other rights are obligatory and effective only between contracting parties.<sup>7</sup>

The perhaps most far-reaching property right is ‘ownership’. Whereas the Roman law notion of *dominium* emphasises the absolute nature of the owner’s right to possess, use and dispose of the owned asset and to keep others from doing so, common-law jurisdictions tend to see ownership as a ‘bundle of sticks’; a collection various rights, nothing more.<sup>8</sup> In this thesis, ‘ownership’ will not refer to either of notion exclusively. I aim at clarifying when the debtor owns something, and to what extent the estate might deviate from the ownership sphere. The nature of ownership is less relevant for the analysis’ functional motivation.

While creditors can be said to ‘own’ rights to performance, I will prefer the term ‘hold’ to avoid confusion. Yet, the meaning of the words should be deduced from the context.

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<sup>6</sup> See i.e. Lilleholt 2012, pp. 258–260, Werthwein in Bu (ed.), p. 193 for concise descriptions of the principle in Norwegian and Chinese law, respectively.

<sup>7</sup> Marthinussen 2016, pp. 37–38.

<sup>8</sup> Marthinussen 2016, p. 31, with further references to the historic account of Mattei, pp. 7–21.



Among the other rights considered proprietary, ‘security interests’ or ‘charges’<sup>9</sup> (here used synonymously) demand particular attention.

Here, ‘security interests’, ‘collateral rights’ or ‘charges’ will all refer to any right to the partial or full value of one or several assets to satisfy monetary claims secured by said assets under a legal relationship between the creditor and the owner. A ‘fixed charge’ will refer to a security interest over specified property, whereas a ‘floating charge’ covers a fluctuating amount of property.<sup>10</sup>

Categories of security interests hold different connotations.<sup>11</sup> Here, ‘pledges’ will refer to possessory security interests,<sup>12</sup> under which the holder must possess the asset securing the claim. ‘Mortgages’ will simply refer to non-possessory security interests.<sup>13</sup> ‘Liens’ can be understood simply as a creditor’s right to retain a movable until the owner pays outstanding debt.<sup>14</sup> Yet, it can be combined with a right to sell the property to satisfy the claim, as chapter 5 will demonstrate. Here, I will explain the nature of a ‘lien’ under each jurisdiction. Used elsewhere, the term should be regarded as neither including nor precluding a right to sell.

I primarily discuss transfer of property rights arising from commercial sales contracts. Hence, ‘seller’ is used synonymously to ‘transferor’, ‘buyer’ to ‘transferee’ and ‘acquirer’.

As this thesis mainly concerns tangible movables, it does not discuss intellectual property.

### 1.2.3 Perfection and legal protection

The term ‘perfection’ is commonly associated with, in the words of Bridge, “the steps that a secured creditor has to take in order to be able to oppose that security against other secured creditors, trustees in bankruptcy and company liquidators, and outright purchasers of the asset subject to security”.<sup>15</sup> In Norway, this is commonly referred to as “rettsvern” (literally: “protection of rights”), although this term also encompasses legal protection of ownership. To

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<sup>9</sup> On ‘charge’ as a general term, see McCormack, pp. 40–41.

<sup>10</sup> McCormack, pp. 47–48.

<sup>11</sup> For a historical overview: Zwolve in Kieninger (ed.), pp. 38–53.

<sup>12</sup> Ibid., pp. 47–49.

<sup>13</sup> This use of the term ‘mortgage’ could encompass either the civil-law ‘hypothec’, under which the creditor has no ownership to the asset, or the common-law ‘mortgage’, under which the creditor obtains legal title for security, cf. Ibid., pp. 49–50. On the nature of mortgages in Norway and China, see sub-chapter 5.3.1.

<sup>14</sup> Bridge, p. 170.

<sup>15</sup> Bridge in Beale et. al., pp. 709–710.

avoid confusion between the two situations, I will translate *rettsvern* as ‘legal protection’ when referring to ownership and as ‘perfection’ when discussing security interests. ‘Third-party protection’, on the other hand, accurately describes the legal effect under both circumstances, and is used in both contexts.

### 1.3 Methodology

As Zweigert & Kötz point out, “the legal system of every society faces essentially the same problems, and solves these problems through quite different means though very often with similar results”. In order to give such different means due consideration, they hold that the question of comparison “must be stated in purely functional terms”. Namely, “the problem must be stated without reference to the concepts of one’s own legal system”, and failure to do so might lead to the false conclusion that “that a foreign system has ‘nothing to report’ on a particular problem”.<sup>16</sup>

Had the comparison concerned rights to urban land, the choice of a conceptual starting point would soon pose a problem. The Norwegian case Rt-1935-981 (Bygland) has been taken to prescribe that *de facto* ownership, is the relevant factor when determining whether or not property shall be included in the estate pursuant to the Norwegian Creditors Recovery Act § 2-2. This would make it tempting to compare under what conditions an enterprise is the *de facto* ‘owner’ of the land under Norwegian and Chinese law. However, comparison of private ‘ownership’ to land would be misguided, as the Chinese Property Law article 47 provides that “the urban lands are owned by the state”. Instead, one should begin with the underlying problem; to what extent the bankruptcy estate may utilise the land’s inherent value. Even though a Chinese private enterprise cannot own the urban land itself, they can own a transferrable right to use the land. The estate could monetise this valuable, much like a Norwegian estate would make use of the debtor’s ownership.

Yet, analysing ‘debtor’s assets’ does indeed imply analysis of that concept’s contents and scope. My rationale for this conceptual starting point is that the previous sub-chapter’s functional analysis of how Norwegian and Chinese law approaches the limits of the estate

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<sup>16</sup> Zweigert & Kötz, pp. 34–35.

unveils a mutually applicable concept necessitating clarification. Nonetheless, the method is not purely functionalist in this regard.

Furthermore, functionalist method in its strictest sense depends on clarification beyond creditors' formal rights to an asset. It necessitates investigation of both enforcement rules and how far law in books reflects current practice. China is a nation of approximately 1.4 billion people, with a four-tier court hierarchy from the national to the local level. This makes an extensive investigation of such practice a tremendous task beyond what is feasible within the project's timeframe. Therefore, I will apply a hybrid approach, investigating the law as it can be understood from selected sources of law that are more or less comparable to Norwegian sources of law. This includes statutory law, its applicable equivalents and supplements such as Chinese judicial interpretations and Norwegian preparatory works, court practice from the upper end of the court hierarchy and assessments made in legal theory. In addition, I will consider possible legal solutions in light of the laws' legislative purposes, especially where legal sources are scarce or unclear.

I will mention corresponding or contrasting rules in other jurisdictions, such as England and Germany, insofar as they may explain or contrast the Chinese or Norwegian rules. This is simply for the sake of contextualisation, not authoritative reasoning for a given solution under Chinese or Norwegian law.

In short: This thesis will analyse legal concepts where they are mutually applicable, yet with a functional perspective. The methodology is functionalist in its pursuit of the effective factors for ascertaining assets within the estate's reach, yet conceptualist to the extent that a concept's mutual applicability makes its clarification relevant to understanding 'debtor's assets'. The Norwegian and Chinese approaches with regards to transfer and retention of ownership differ to the degree that I discuss them in separate sub-chapters. Chinese and Norwegian security interests largely warrant the same questions, and chapter 5 will therefore compare Chinese and Norwegian law concurrently.

## **1.4 Sources of law in China**

### **1.4.1 Translation of legal sources**

While sources of Chinese law are more available in the digital age than ever before, there is no official, universal channel for their publication. Westlaw and LexisNexis provide extensive databases. I have accessed the latter as a main source of English translations. I have upon comparison with the Chinese texts detected more than a few inaccuracies and mistakes, and found no single collection of sources that could both provide all the relevant source material and present them entirely free of inaccuracies. Therefore, I have resorted to translations from various sources, including researchers, various institutions in the business sector and Chinese government bodies to provide English translations of the law. Occasionally, I have translated statutes, terms and, especially, legal theory myself, due to no translation being available or accessible translations being inaccurate. Therefore, the English translations referenced do not necessarily correspond to the citations in this thesis.

I have full responsibility for the translations and interpretations of Chinese sources. Yet, I cannot take credit for these, as they lean heavily on works of others, found in footnotes and indexes. Some translations in the thesis are identical to the sources consulted. Others are modified from American English to British English for consistency, while some underwent substantial modification or were translated directly from Chinese. I believe the result to reflect the meaning and wording of the original Chinese texts. References to other translations are for giving credit where credit is due.

Where I omit the Chinese wording from the main text, I intend the English citation merely as means for explaining an argument, and not for detailed linguistic interpretation. Where any legal act has a widely accepted yet inaccurate name in English, I have used the common name, suggesting alternative translations in footnotes.<sup>17</sup>

### **1.4.2 Statutory law**

The different sources of law in China and Norway warrant a few remarks. China identifies itself as a Civil Law legal system, and stresses how legal authority runs from the statutes rather than judgments. The statutory hierarchy runs from the Constitution (“宪法”), via laws (“法律”), regulations (“规章”), provisions (“条例”), rules (“规则”), detailed rules (“细则”),

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<sup>17</sup> For example, the Chinese Guarantee Law should be translated ‘the Chinese Security Interest Law’, as it encompasses proprietary security in general.

measures (“办法”), decisions (“决定”), resolutions (“决议”) and orders (“命令”),<sup>18</sup> some of which are national, some local. I will exclusively consider national statutes, mostly in the form of laws (acts).

### 1.4.3 Legislative instruments of the Supreme People’s Court

Chinese law does not consider judgments to establish legal precedent, at least not as formally binding on the courts. However, the Supreme People’s Court has for decades published certain judgments through its Gazette and distributed others through more internal channels in the court hierarchy. There has been some legal debate on whether there in reality existed precedent, if not prescribed by law, than at least in practice by judges ruling in accordance with the higher courts’ opinion in previous cases on the same matter.<sup>19</sup>

Furthermore, has China in recent years established a system of so-called ‘guiding cases’. These cases are rulings from anywhere in the court hierarchy that have been labelled by the Supreme People’s Court as a model to be referred to in future cases of a similar nature, due to their solution of an intricate or significant matter. Proposal Number 13 of the second Five-Years Reform Outline for the People’s Court (2004-2008) states that guiding cases “should play the role in unifying the application of legislation by directing the lower courts’ operation, enriching and developing their jurisprudence and so on”.<sup>20</sup> Jiang argues that even though the guiding cases are not binding *per se*, and therefore cannot form a judgment’s legal grounds, “it can be cited as a reason for explaining the judgement”.<sup>21</sup> He further holds that the Supreme People’s Court’s Detailed Rules Concerning Work on Case Guidance support the view that “guiding cases were binding *de facto*, if not *de jure*”. To the extent that any of guiding cases apply to topics discussed, they are at least examples of the Supreme People’s Court confirming that the judgment is representative for current doctrine.

This is relevant also because the Supreme People’s Court’s opinion of the law, even in absence of a precedent doctrine, carries legal authority over lower courts. The Supreme People’s Court regularly issues views on points of law in four main forms. The ‘Decisions’, ‘Provisions’ and ‘Interpretations’ are abstract, general statements of law either clarifying of

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<sup>18</sup> For detailed accounts, see Jiang, p. 330.

<sup>19</sup> Liu, p. 108.

<sup>20</sup> Jiang, p. 332.

<sup>21</sup> *Ibid.*, p. 333.

unclear points of an existing statutory law, or supplementing or modifying law by regulating situations where existing statutes fall short.<sup>22</sup> They formally carry less legal authority than statutory law, yet are “analogous to legal code”, according to Fu, who argues that they aim at “providing specific, comprehensive and detailed rules supplementing substantive or procedural laws enacted by the legislature to offer judges a unified legal basis for trial”.<sup>23</sup>

The replies are interpretations given at the request from courts in the previous instance, often in connection with a current trial where the court needs instructions or approval on a matter. They relate to specific cases, bind all courts and may provide legal grounds in future cases, yet differ from precedent in not being based on the facts of the cases they provide guidance for.<sup>24</sup>

Hence, one should not take the lack of a doctrine on precedent as indication that the judiciary has a minor legislative role under Chinese law, and one must consider relevant compiled cases, guiding cases and judicial interpretations in the analysis. However, only the latter have binding force,<sup>25</sup> and deserve considerable attention.

#### **1.4.4 Judgments of the lower courts**

Judgments further down the judicial hierarchy naturally carry less normative value. In absence of Supreme People’s Court decisions on a matter of legal interpretation, I will take High Court judgments as illustrations of a problem, or indications of an interpretation being plausible. They should however be seen only as that, and not as carrying precedent.

## **1.5 Sources of law in Norway: A brief overview**

While statutory acts are the primary source of law in Norway, their format is often brief and general. Thus, precise interpretation relies heavily on preparatory works from the drafting of the statute and on case law, which carry significant authoritative precedent, although not absolute, binding force on future judgment. Norwegian jurisprudence also recognises public

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<sup>22</sup> Fu, pp. 27–28.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Jiang, p. 332 states that although the Chinese constitution vests legislative sovereignty in the National People’s Congress, scholars see the Supreme People’s Court’s lawmaking as necessary to keep up with societal changes.

practice, legal theory and policy considerations (“reelle hensyn”) as valid sources of law, but with significantly weaker authoritative value, so that they seldom prevail over a clearly formulated case law or precedent. Only a selected few Norwegian statutes and judgments are available in English. The translations in this thesis draw upon other translations referenced, but I have made adaptations where I deemed it necessary. Beyond singular terms, I have not incorporated the original Norwegian wording, and instead referred to the primary sources.

## 2 Codification efforts in history

Whereas the Norwegian Constitution article § 94 prescribed until 2014 that the parliament was to promulgate a Civil Code, the provision never resulted in a unified code, and efforts (in particular after World War II) rather produced a collection of individual acts on the relevant matters. Since the end of the Qing dynasty, China has also made repeated attempts at a unified Civil Code.<sup>26</sup> Formally beginning in 1908, students with experience from foreign jurisdictions, not to mention Japanese scholar Matsuoka Yoshimasa (松岡義正), who oversaw the book on property rights in the Draft Civil Code of the Qing Empire, which was the forerunner to current law in Taiwan, yet never entered into force due to the end of Imperial China. Codification efforts continued throughout the Republic of China period, and like the Qing Draft, subsequent drafts were heavily influenced by the German pandectist school and Japanese Civil Law, which is in turn based on German law.<sup>27</sup>

This provided German continental legal thought with an early foothold in China. Liang holds that this resulted “in a deep and far-reaching influence on modern Chinese civil law legislation and civil law theory”.<sup>28</sup> Liang argues that Japan’s (and in turn, China’s) affinity for German law over common law was due to the technological advantages of the former, as legal development in continental law is less dependent on precedent and leaves more authority to legislative propositions.<sup>29</sup> After establishment of the People’s Republic of China, codification efforts incorporated Soviet Law, which also was influenced by German law.<sup>30</sup>

Yet, after the ‘reform and opening up’-policy of Deng Xiaoping, which from 1977 onwards introduced the ‘socialist market economy’ to China, legislators found profound social changes to make implementation of a complete civil code difficult and, like Norway, resorted to promulgation of individual laws.<sup>31</sup> Some were more widely discussed than others, such as the Chinese Property Law of 2007, debated for over a decade due to the proposal’s equal recognition of private, state and collective ownership. The General Principles of Civil Law of 1986 are overarching, as are the General Provisions of Civil law promulgated in 2017. The

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<sup>26</sup> For a concise overview on which this account is based, see Liang (ed.), pp. xi–xxiii.

<sup>27</sup> *Ibid.*, p. xiii

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, p. xv.

<sup>30</sup> *Ibid.*, p. xvi.

<sup>31</sup> *Ibid.*, xvii.



latter constitutes the first book of a new Civil Code. While the General Provisions are already effective, the remaining Code is to be presented later in 2018 and promulgated in 2020.<sup>32</sup>

In the chapters below, I will identify and explain the scattered, statutory rules that govern which movable assets the estate may seize.

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<sup>32</sup> Xinhua News Agency: [http://www.xinhuanet.com/politics/2018lh/2018-03/12/c\\_129827688.htm](http://www.xinhuanet.com/politics/2018lh/2018-03/12/c_129827688.htm) (read 27 April 2018).

# 3 Transfer of property rights: When does the right transfer?

## 3.1 Delivery versus agreement

### 3.1.1 Two main approaches

When a party to a sale goes bankrupt before contractual fulfilment, the question arises: Who has the right to the sold goods? This question appears in two main variants: Whether the paying buyer may separate the goods from the insolvent seller's estate, and whether the unpaid seller may reclaim goods designated for an insolvent buyer. The answer depends on when applicable rules allow the property right to transfer.

A useful context for the Norwegian and Chinese legislative approaches to transfer of property rights is that of the two main approaches for ascertaining the time when ownership rights to movables transfer; the '*traditio* principle' (or 'delivery principle') and the '*consensus* principle'.

The *traditio* principle generally sets the transfer of property rights to the time of physical delivery. It is a rule with exceptions, and the three common surrogates to physical delivery are *traditio brevi manu*, *traditio longa manu* and *constitutum possessorium*.

*Traditio brevi manu*, or shorthand delivery, implies that a debtor already in possession of the item purchased obtains the property rights once he and the counterparty conclude the sales contract, so that the buyer does not return the item to the seller only to have it delivered back to himself.

*Traditio longa manu* applies to the situations where a third party possesses the item on behalf of the seller. If one brother buys a bicycle from the other, and the bicycle is stored in their parents' garage, the seller does not need to collect the bicycle and deliver it to his brother. Notifying the parents that the purchasing brother is the new owner of the bike is enough, and the property right transfers upon notification.

*Constitutum possessorium* is an exception by which the parties agree to have the legal possession transferred to the buyer, although the seller retains physical possession.

Germany is a jurisdiction that uses the delivery principle with variants of the aforementioned exceptions, cf. §§ 929 and 930 BGB, requiring agreement (“Einigung”) and delivery (“Übergabe”).<sup>33</sup>

England takes the other approach, and its *consensus* principle (or ‘agreement principle’) leaves more to party autonomy. The Sale of Goods Act 1979 section 17 (1) stipulates that “[w]here there is a contract for the sale of specific or ascertained goods the property in them is transferred at such time as the parties to the contract intend it to be transferred”. That intention is, according to section 17 (2), ascertained with regard to “the terms of the contract, the conduct of the parties and the circumstances of the case”. From the wording of the statute, the transfer of property is not entirely up to the parties, due to the minimum requirement that the goods are “specific” or “ascertained” (should they be generic), cf. sections 16 and 17.<sup>34</sup>

### 3.1.2 Unitary versus functional approaches to property transfer

In short, the unitary approach to property transfer refers to the view that at one point in time, the property right (or rather, the different facets of the property right) pass as a whole from one party to the other. Contrastingly, the functionalist or relativist approach implies that the acquirer may exercise owner’s rights in one respect but not another.<sup>35</sup>

Most European countries<sup>36</sup> apply a unitary approach to property transfer,<sup>37</sup> asking whether the property right is with the insolvent debtor or his predecessor or successor. Ascertaining the owner of the asset also determines whether the debtor’s estate may take the asset. Under this perspective, determining the scope of the bankruptcy estate is mostly a matter of determining who has ownership over the assets. When the main rule is that the bankruptcy estate is limited to the debtor’s assets, ascertaining the estate’s assets becomes synonymous with clarifying the main rule’s extent.

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<sup>33</sup> For detailed yet concise accounts, see i.e. Göranson, pp. 105–124 and Hauge 2016, pp. 77–79.

<sup>34</sup> Hauge 2016, p. 78.

<sup>35</sup> For a comparative overview: Lilja, pp. 13–16.

<sup>36</sup> Hauge 2016, p. 58.

<sup>37</sup> Unitary approaches may yet have relativist elements, cf. Hauge 2016, p. 60.

Under the Nordic functionalist approach, contrastingly, the perspective could be the opposite. In certain situations, ascertaining the estate's assets might as well imply clarifying the main rule's exceptions. The Nordic functionalist approach leaves the time of property transfer unanswered, asking instead whether the alleged right has been ensured protection against a third party's conflicting interest in the asset. It could be that the property right under Norwegian law is no longer with the insolvent debtor *inter partes*, but with an acquirer. However, if the acquirer of the goods fails to perform the necessary acts to ensure legal protection against a third party's creditors, he may still see the estate confiscate and liquidate his acquired goods. In that respect, one could see the Norwegian rules of legal protection of property rights against third party as an exception to, or limitation of, the main rule of limiting the bankruptcy estate to the bankrupt's own assets.

### 3.1.3 Relevant policy considerations of property law

Although various jurisdictions' compulsory requirements for recognition of property acquisition aim to balance creditor protection with commercial efficiency, the relative nature of the Nordic functionalist approach arguably provides significant argumentative leeway for when a property right enjoys protection against a third party. This leeway warrants some description of arguments that typically hold particular relevance in property law. These can be referred to as 'policy considerations' ("reelle hensyn").<sup>38</sup>

Below, I will give a brief account of such important considerations, albeit with a certain bias to their interpretation in Norwegian and, to some degree, Chinese law. The reason for the particular attention to the Norwegian concepts relates to Norwegian property law's relativism: As Hauge notes,<sup>39</sup> the fact that Norway may find the right to be perfected in one respect but not another, not only gives the concepts value as presumed intentions of the legislature. They also become factors for ascertaining the applicable rule where the law is uncertain.

Lilleholt advises caution in taking these interests as prescribing specific legal effects, and argues that the terms are merely useful to aid the understanding of the law and, "if possible",

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<sup>38</sup> Craig, p. 194.

<sup>39</sup> Hauge 2016, p. 66

identifying an underlying system.<sup>40</sup> While he argues that neither the terms nor the system explained can be used directly to deduce legal effect, Lilleholt still recognises that “one may, and should, emphasise system and consequence when assessing doubtful legal problems”, due to the need for predictability, as is Hauge’s point. Yet, the predictability argument goes both ways, and establishing rules on a case-by-case basis will make it hard for business actors to know the law.<sup>41</sup>

## Public notice

In Norwegian legal theory, Lilleholt stresses the importance of three particular interests,<sup>42</sup> some more known outside of Norway than others. Acts that enable the public, including concerned creditors, to inspect the debtor’s disposal of property to which others hold legal interests achieve the effect of *public notice* (“publisitet”<sup>43</sup> in Norwegian, “公示”<sup>44</sup> in Chinese). The extent to which an action ensures *public notice* is an important factor in assessing what acts are necessary for legal protection. Entry into a register open to inspection is a very effective means of ensuring *public notice*, and is commonly a condition for transfer of certain valuable goods, typically immovable property, motor vehicles, ships and aircrafts. The value of such goods typically requires third parties to provide credit, and exposes these creditors to considerable economic risk and interest in the debtor’s dealings.

## “Notoritet” in Norwegian law

In Norwegian law, another important consideration is the need for “notoritet”, a term that does not lend itself to simple translation. In his Norwegian-English legal dictionary, Ronald L. Craig explains the Norwegian concept of *notoritet* as “a character or form which gives the ability to establish subsequently, whether the transaction has in fact taken place, the date of

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<sup>40</sup> Lilleholt 1996, p. 69.

<sup>41</sup> Apart from Lilleholt, Marthinussen 2016 reiterates this point. In the book, largely devoted to methodological application of these interests, Marthinussen is generally more inclined to accept a consequence-oriented approach as grounds for general rules, cf. Marthinussen 2016, pp. 70 and 151, and finds that deviations from the apparent meaning of the statutory text is primarily permissible where legislators have “exaggerated or overlooked important aspects”, cf. p. 238. Truyen, pp. 348–350 argues the same point: The interests are relevant to interpretation, yet one must “strive to interpret the provisions so that conflicts due to an unclear rule are avoided”.

<sup>42</sup> Lilleholt 1996, p. 70.

<sup>43</sup> Ibid., where the term is taken to mean that “something is more or less freely available to the inspection of others”.

<sup>44</sup> See i.e. Liang & Chen, pp. 78–88, summarising the concept’s core on p. 78: “The motivation of public notice is to let people ‘know’”.

transaction and the true terms of the transaction”. Lilleholt defines it as follows: “If we say that something (...) has *notoritet*, we tend to mean that it can be tested, controlled”.

Thus, ‘notoriety’ does not hold the same connotations in legal English vernacular. The Norwegian term refers to the ability to verify the true legitimacy, nature and contents of the legal relationship, not its general recognition. *Notoritet* is not simply a matter of a transaction’s legitimacy being provable through evidence. It is a question of whether the manner of transaction in itself produces the satisfactory verifiability.

### **Apparent authority and good faith**

However, transactional security is not achieved simply by securing the seller’s creditors. By the time a transaction is found not to meet applicable criteria motivated by public notice and *notoritet*, an acquirer might already have taken possession of the goods and might either have an interest in the asset or actual ownership. The law must enable a purchaser to pay and assume that he obtains what he has purchased. Most people would presume that a seller holding registered ownership of an apartment or possession of a bicycle either owns the asset or acts in accordance with an authority that the owner has conveyed upon him. This *apparent authority* (“legitimasjon” in Norwegian, “表见代理权”<sup>45</sup> in Chinese) is an important factor in assessing whether the purchaser was in good faith. Where the seller lacked authority to dispose of the sold asset, such good faith might be grounds for the purchaser extinguishing the real owner’s rights, acquiring them by means of *bona fide* acquisition. Such acquisitions are not a main subject of this thesis, but as apparent authority is one factor to balance in choice of legislative approach, and *bona fide* acquirers appear occasionally in interpretation of bankruptcy related statutes, both terms warrant a mention here. Yet, while apparent authority is an important concern in *bona fide* acquisition, Norwegian law considers apparent authority an irrelevant circumstance with respect to a creditor’s extinctive acquisition, such as bankruptcy liquidation. Where a debtor’s valuables are a precondition for lending, the lender should take security in them.<sup>46</sup>

### **Commercial efficiency and party autonomy**

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<sup>45</sup> Peng, p. 63.

<sup>46</sup> See i.e. Lilleholt 1996, p. 74 and Lilleholt 2012, pp. 33–34.

Whereas registration and, albeit to a lesser extent, physical possession enables the public to inspect and verify the legitimacy of the sale, it puts restrictions on contractual freedom and restricts to what extent to contracting parties may agree upon a transaction they deem suitable for their needs. The purchaser might not have storage room to take delivery of new stock. The seller might be abroad and unable to register the transfer upon conclusion of the contract. And philosophically, different ideas on individual autonomy affect the freedom of an owner to dispose of the property as deemed fit.<sup>47</sup> While *traditio* permits some exceptions to the delivery rule in many jurisdictions,<sup>48</sup> one might say that *consensus* favours the contracting parties' intentions and needs by allowing them to tailor the transfer of ownership.

## 3.2 China

### 3.2.1 When does ownership transfer?

Numerous Chinese statutes provide that the main condition for transfer of ownership to movable property under Chinese law is 'delivery', suggesting that the estate of an insolvent seller may seize sold goods not yet delivered.

Under the Chinese Contract Law article 133, "ownership of a subject matter transfers upon delivery thereof, unless otherwise prescribed by law or agreed by the parties concerned".

Similarly, the Chinese Property Law states in its basic principles, article 6, that "establishment or transfer of property rights to movables shall be subject to delivery in accordance with the law", unlike property rights to immovables, which are subject to registration pursuant to the same article.

From these two statutes alone, it is evident that the main requirement for legal protection of the transaction is delivery. In other words, China has opted for the *traditio* principle as its main approach to transfer of property rights to movables.

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<sup>47</sup> Brækhus & Hærem hold the philosophy of natural law as a historical backdrop for the *consensus* approach, cf. Brækhus & Hærem, p. 500.

<sup>48</sup> Sweden is an exception, and displays a particularly rigid delivery requirement, cf. the Swedish Sale of Movable Goods Act § 1.

Subchapter 3.2.2 details which acts constitute delivery, including both actual delivery and other, more symbolic acts that are given the same legal effect as physical delivery ('delivery surrogates'). After clarifying the meaning of 'delivery', subchapter 3.2.3 discusses whether the Chinese delivery principle is mandatory, or merely a default rule that may be abandoned by agreement.

### 3.2.2 What constitutes “delivery”?

Establishing whether a delivery requirement exists is insufficient to ascertain whether some asset was delivered, as the opinions might differ on whether delivery has happened. While Sweden is exceptionally strict concerning which actions constitute delivery,<sup>49</sup> other jurisdictions might be more lenient, accepting somewhat symbolic delivery. As explained under 3.2.1, the most common ways to deliver the asset are by physical (or actual) delivery, or one of its three surrogates: *traditio brevi manu*, *traditio longa manu* or *constitutum possessorium*. Likewise, China operates with several different forms of delivery: 'actual delivery' (“实际交付”), 'simplistic delivery' (“简易交付”), 'indicative delivery' (“指示交付”) and '*constitutum possessorium*' (“占有改定”).<sup>50</sup> The paragraphs below will examine whether the Chinese forms of delivery actually correspond to the actual delivery, *traditio longa manu*, *traditio brevi manu* and *constitutum possessorium* recognised in German law.

#### Actual delivery (实际交付)<sup>51</sup>

The term “actual delivery” is not used in the statutes themselves, and the Chinese Property Law only refers to “delivery”, or “交付” (“*jiaofu*”). The Chinese word is comprised of two characters with their own distinctive meanings that when combined express the full meaning of the word. The first one, “交” (“*jiao*”), depicts two legs crossed, and literally means “to cross”.<sup>52</sup> In a wider sense, this crossing is used in various words where certain objects change hands. This could be a one-way transaction, such as in “交给” (“*jiaogei*”, “to give”). It could also be a reciprocated transaction, such as in “交换” (“*jiaohuan*”, “to exchange”), or

<sup>49</sup> PEL Acq. Own., p. 409.

<sup>50</sup> I.e. Werthwein in Bu (ed.), pp. 202–203.

<sup>51</sup> Ibid., p. 202.

<sup>52</sup> Gu, p. 298.



unspecified, as is the case with “转交” (“*zhuanjiao*”, “to transfer”). In other words, the character implies some transfer or another, physical or abstract.

The second character, “付” (“*fu*”), literally means “to give”. The left part of the character symbolises a man standing upright, whereas the right half represents a hand, symbolising the action of giving something to others.<sup>53</sup> Often used interchangeably with *jiao* in words like “付给” (“*fugei*”, “to give” or “to pay”), it gives few additional clues as to what delivery means. The word *jiaofu* certainly refers to handing over something, yet does not clarify whether this something must be physical in nature, or if handing over indirect possession suffices.

However, contextual interpretation suggests the former, as all three delivery surrogates transfer legal rights independently of the physical object, as accounted for subchapters below. One could thus presume the main rule to demand transfer of physical possession.

One finds another indication of physical delivery in the GPCL Opinions. In their article 84, the Supreme People’s Court states:

*“Where property has been delivered, but the parties concerned agree that its ownership transfers subject to conditions, property ownership transfers upon fulfilment of the additional conditions”.*

While the purpose of the provision is rather to clarify the effect of agreements withholding property rights post-delivery, not to define delivery itself, it distinguishes between ‘delivery’ and transfer of rights. This indicates that delivery refers to change in physical possession.

Another indication is the High Court case *Qingdao Yuanhongxiang Textile Co., Ltd. v. Gangrun (Liaocheng) Printing and Dyeing Co., Ltd.* One of the statements from the summary issued by the Supreme People’s Court Gazette provides some guidance as to what “delivery” means: “The so-called ‘delivery’ meant the transfer of possession or certificate of title possessed to another person”.

Furthermore, the summary refers to the Contract Law article 133, stating that “ownership of a subject matter transfers upon delivery thereof, unless otherwise prescribed by law or agreed by the parties concerned”.

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<sup>53</sup> Ibid., p. 184.

Article 135 reiterates this:

*“The seller shall towards the buyer carry out his duties of delivering the subject matter or documentation for the buyer’s collection of the subject matter, and of transferring ownership to the subject matter”.*

In conclusion, the main rule is physical delivery by handing over the object itself or documents certifying ownership, i.e. bills of lading.

Where the seller has already dispatched the asset to the buyer when the latter goes insolvent, neither have direct possession. In this situation, the Enterprise Bankruptcy Law article 39 stipulates that if the “sold subject matter is not yet received nor fully paid by the debtor, the seller may take back subject matter in transit”. However, if the administrator would rather pay and receive the asset, he has the power to request delivery subject to article 39 second sentence. The Bankruptcy Provisions (II) article 39 stipulates that the courts may support the seller’s repossession of the goods before and after delivery, yet only if the seller requested the carrier or possessor to return the goods before delivery. Therefore, the stoppage in transit rule in the Enterprise Bankruptcy Law article 39 simply refers to the period prior to delivery.

### **Simplistic delivery (“简易交付”) – is it *traditio brevi manu*?**

Under article 25 of the Chinese Property Law, where a debtor has legal possession prior to “establishment or transfer of a movable’s property rights”, the property rights “take effect upon the effectiveness of the legal act”<sup>54</sup> (“自法律行为生效时发生效力”). As no return and redelivery is required, ‘simplistic delivery’ corresponds to *traditio brevi manu*.<sup>55</sup>

### **Indicative delivery (“指示交付”) – is it *traditio longa manu*?**

The so-called ‘indicative delivery’ of article 26 prescribes that where “a third party legally possesses the movable” prior to the right’s establishment or transfer, “the person undertaking delivery obligations may instead delivery by transferring the right to request the third party to return the original object” (“负有交付义务的人可以通过转让请求第三人返还原物的权利交付”). As demonstrated in the Supreme People’s Court’s judgment in *Concordia*

<sup>54</sup> Referring to the contract, as opposed to ‘real act’, owing to the terminology of a German separation principle.

<sup>55</sup> Similarly: Werthwein in Bu (ed.), p. 202 with further references.

*Agricultural Products (Shanghai) Ltd v. Guangdong Fuhong Oil Products Ltd and Zhanjiang Branch of China Construction Bank Co., Ltd*, the provision is not entirely specific as to what transfers are sufficient. In the case, which concerned shipped soy beans from Argentina, it was deemed insufficient for the seller to transfer a delivery order (“提货单”), as it was not a certificate of title such as a bill of lading (“提单”). Where one does not transfer a title certificate, notification of the third party is necessary.<sup>56</sup> This notification being necessary, the regime quite resembles *traditio longa manu*.

### **Constitutum possessorium (“占有改定”)**

The Chinese Property Law article 27 stipulates that “where both parties agree on the seller continuing to possess the movable when transferring property rights to a movable, the property right takes effect upon said agreement”. This rule is in legal theory<sup>57</sup> and the aforementioned case between Qingdao Yuanhongxiang and Gangrun (Liaocheng) described as a rule on “占有改定”, translating to *constitutum possessorium*. Linguistic similarities aside, the Court found the rule to recognise transfer of ownership where the seller had a contractually agreed physical possession, so that the acquirer had indirect possession. The agreement in question did not specify such a right, and the buyer’s claim was rejected. As the interpretation of article 27 embodies the essence of the traditional *constitutum possessorium* exception, China’s rules on notional delivery are mirror images of the traditional exceptions to the delivery rules.

China has thus adopted a delivery scheme closely adhering to the German civil law framework, an unsurprising choice in light of the German pandectist tradition’s historic influence on China’s various civil code drafts. The fundamentals of property acquisition codified in the Chinese Property Law of 2007 continue this tradition.

### **3.2.3 Is the delivery rule mandatory?**

Article 6 in the Chinese Property Law states that “establishment or transfer of property rights to movables shall be subject to delivery in accordance with the law”, and seemingly leaves no

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<sup>56</sup> See Werthwein in Bu (ed.), p. 202 with references to the case and the bill of lading’s status as a title certificate under the Chinese Maritime Law article 71.

<sup>57</sup> Ibid, pp. 202–203.

room for parties to choose transfer of ownership upon contractual conclusion (a *consensus* model). However, the Chinese Contract Law article 133 is more ambiguous, somewhat contradicting the Chinese Property Law article 6. The wording “unless otherwise...agreed by the parties concerned” in the Contract Law seemingly leaves it to the parties’ discretion whether property rights transfer at the time of delivery or at another time.

One could see Chinese Contract Law article 133 as letting the parties’ agreement prevail where any agreement exists, rendering the *traditio* principle a default rule only applicable in absence of agreement. Interestingly, this would converge with the solution chosen in the model law Draft Common Frame of Reference (DCFR) VIII. –2:101 (1) (e), requiring that “there is an agreement as to the time ownership is to pass and the conditions of his agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery”.

One could also resolve the contradiction by holding that the Property Law is both *lex posterior* and *lex specialis*, letting the Chinese Property Law article 6 prevail. Moreover, if the delivery requirement is merely optional, the reiterations of the need for delivery seem both unnecessary and misleading. Optional transfer by agreement would also make the Property Law article 27 on *constitutum possessorium* redundant: *Constitutum possessorium* gives the effect of delivery to a separate agreement on letting the transferor retain possession of the asset, providing the parties with much of the autonomy that the *consensus* principle maintains. If another layer of autonomy were intended outside *constitutum possessorium*, one might argue that the *constitutum possessorium* rule should be omitted altogether.

Another possible interpretation could be that the parties’ agreement may not concern whether delivery is required, but rather whether physical delivery pursuant to article 23 is required, or delivery surrogates stipulated in articles 26 and 27 will suffice. One could put forth contextual arguments against this interpretation as well. Chinese Contract Law article 133 recognises other solutions than actual delivery in two cases: where the law stipulates as much, and where the parties so agree. If one interprets article 133 so that the “agree otherwise” exception only refers to agreements concerning the statutory delivery surrogates, that raises the question of what the “unless prescribed by law” exception refers to. An answer might lie in article 25 on registrable movables, as well as the registration rules for immovables (the wording “subject matter” in article 133 is, after all, wide enough to cover both movable and immovable property). Subject to article 25, acquisition of motor vehicles,

vessels and aircrafts require registration for the property right to take effect.<sup>58</sup> This is an example of the “law prescrib[ing] otherwise”, without regard to any agreement between the parties. Therefore, one might say that the parties can only agree on the delivery surrogates stipulated in law, while still complying with articles 6 and 23 by adhering to solutions prescribed by law. Meanwhile, the “otherwise prescribed by law” exception in article 133 could be said to refer to immovable and registrable movables subject to registration under article 25 etc.

While somewhat confusing, this interpretation seemingly reconciles the different wordings. Werthwein seems to presume this solution when he describes *constitutum possessorium* pursuant to article 27.

He writes that “[t]he parties have to make an explicit agreement to this effect, e.g. a lease agreement between the transferee as lessor and the transferor as lessee; the agreement on the transfer of ownership itself, e.g. a sale and purchase contract, is not sufficient. Ownership passes on to the transferee upon conclusion of both agreements”.<sup>59</sup>

This would be inconsistent with a *consensus principle*, which, after all, gives the transfer of rights effect upon conclusion of the sales contract itself. Furthermore, Werthwein refers to a case from the High People’s Court of Shandong that concerns the very essence of the question:

In *Qingdao Yuanhongxiang Textile Co., Ltd. v Gangrun (Liaocheng) Printing and Dyeing Co., Ltd*, enterprise A and B had outstanding receivables from enterprise C. The parties agreed that A would sell all its receivables to B, and that enterprise C could offset its debts with seven pieces of mechanical equipment that C owned. The agreement stipulated that ownership would transfer immediately upon conclusion of the contract, and that C would deliver the machines afterwards. However, C did not deliver the equipment on the agreed date, and plaintiff A requested the court to order defendant C to deliver the equipment and pay legal costs.

C, now bankrupt, held that the ownership was not transferred due to delivery not being made, and that the seven pieces of equipment were now insolvent assets under the bankruptcy estate. C also took company A’s declaration of claims in the bankruptcy estate as an

<sup>58</sup> See *Ibid.*, pp. 203–204 on whether registration is enough or a transfer condition besides delivery.

<sup>59</sup> *Ibid.*, p. 203.

acknowledgement of being a regular creditor, and that neither *constitutum possessorium*, indicative delivery nor simplistic delivery applied to the situation. After appealing to the High Court, A lost the case for the second time. The Court stated that the equipment was movable property, and that the method of publicity for movable property is generally possession and delivery. Delivery implied “transferring the property or certificate of title possessed to another person”. The court took the delivery requirement pursuant to article 23 as mandatory, and that the exceptions in Chinese Contract Law article 133 “covered all forms of intangible delivery as permitted by law, other than actual delivery”. As for reconciling the conflicting provisions, the high Court held that the Property Law provision, being the most recent law on the matter, only served further to clarify the exception in the Contract Law. The Court found that “the parties could only, by agreement, choose one specific form of delivery from the four statutory forms of delivery, and there were no other forms for lawful property rights in movables”.

As a model case in the Supreme People Court’s Gazette, the judgment does not have the normative value of a guiding case, yet still implies that the Supreme People’s Court considered it noteworthy for future adjudication. While not citable in a judgment, it indicates Chinese adherence to a mandatory delivery principle of the German model, where variants of *traditio brevi manu*, *traditio longa manu* and *constitutum possessorium* constitute the only acceptable exceptions to physical delivery. On the other hand, one may argue that delivery supplemented by *constitutum possessorium* in effect makes delivery unnecessary upon separate agreement, and in a factual sense renders *traditio* merely a default rule, if not in the formal sense.<sup>60</sup>

### 3.2.4 What are the consequences of contractual invalidity?

Seemingly, the Chinese publicity requirements converge with the German requirements to a large degree. Where the act of delivery (actual or notional) was performed, the third party must respect the transferee’s acquisition of ownership. Given how the acceptable forms of delivery in Germany correspond to the Chinese forms, it could be tempting to assume that

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<sup>60</sup> See i.e. Hauge 2016, p. 92, who argues that a “realistic understanding” of *constitutum possessorium* “is that the parties are given a more or less far-reaching option of agreeing exceptions from a declaratory main rule of delivery”. See also Göranson, p. 62.

transfers of non-secured movables will largely have the same outcomes in Chinese bankruptcy proceedings as in German ones.

However, the analysis above has not questioned the sales contract's validity. Under German law, property rights are subject to a separation principle and an abstraction principle. The separation principle implies that the acquirer's right to receive delivery of a certain good is different from a property right to the good itself, and that these rights arise from separate legal acts. The contractual right to demand delivery is obligatory, and is acquired by a buyer upon concluding the contract. Yet, he does not have a property right (or 'right *in rem*') to the good itself until a separate legal act (a so-called 'real agreement') is concluded, even if this second act is only implicitly agreed by the parties making and taking delivery.<sup>61</sup>

That begs the question of how these rights are interrelated. Subject to German law, you can most certainly have a right to demand delivery without a claim to ownership of the object to be delivered. This is an important distinction in a bankruptcy: If you only have an obligatory right to delivery, you might sue the estate for damages or terminate the contract and demand return of the price paid. In both cases, you will be an unsecured creditor with a claim to dividends, which might leave you short of full restitution. If you have a property right to the object, however, you would have the right to separate the asset from the estate and thereby ensuring you contractual performance as per the agreement.

A second question is what happens when you have taken delivery of the good, which would normally imply acquisition of ownership, only later to discover that the underlying contract was invalid. The seller might never have been owner in the first place, thus unable to transfer ownership (*nemo dat quod non habet*). Is the property right then dependent on the validity of the obligatory right?

In Germany, the answer is no, and that is the essence of the 'abstraction principle'. If party B performed the necessary action to ensure third-party protection (registering his acquisition of real estate or taking delivery of movables), B has the property right, whereas transferor A merely has a right to return of the asset. Since the property right is abstract from the underlying obligation, B's bankruptcy estate is able to confiscate the goods.<sup>62</sup>

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<sup>61</sup> For a concise description: PEL Acq. Own., p. 409.

<sup>62</sup> Ibid.

The alternative is ‘causal transfer’, leaving the property right reliant on the validity of the obligatory right. If B went bankrupt after acquisition on an invalid contract, B’s estate would not get a hold of the sold good, as it was never B’s asset in the first place.

According to Werthwein, China has a system of causal transfer.<sup>63</sup> It is debated whether there is even a separation principle, though this debate refers to the separation principle in the sense of there being a temporal discrepancy between contractual obligation and acquisition of the property right, which is somewhat different from the German use of the term. Werthwein sees the requirement of delivery as a requirement of a factual act, not a legal one, and concludes therefore that China has no separation principle.

Regardless of the separation principle, the functional implication of causal transfer is the same; contractual invalidity prohibits a transfer of property rights in China. This is a central point at which Chinese and German property laws diverge.

According to Chen,<sup>64</sup> the choice of causal versus abstract transfer was debated for years, before Chinese legislators decided on the former model. Yet, it is only implicit in the statutes. Article 19 in the Chinese Property Law (on registration of immovables) states that “a right holder or interested party believing an item to be incorrectly registered in the immovable register, may apply for correction of registration”, as opposed to simply having a right to return of property under unjust enrichment rules, such as in Germany. Article 25 governing *traditio brevi manu* is another indication: the property right “shall become valid as of the time when such legal act becomes effective”. On the relation between contractual validity and effectiveness of the contractual obligation, the Chinese Contract Law article 44 states that a “legally established contract becomes effective upon establishment”, whereas article 56 states that “invalid or revoked contracts are without binding force from the outset”. Furthermore, article 58 states that “after invalidating or revoking a contract, property acquired under the contract shall be returned”. Moreover, the causal relationship between validity and effective property transfer is implied in *Guiding Case no. 33, Cargill International SA v. Fujian Jinshi Vegetable Oil Producing Co., Ltd. and Others*. Fujian Jinshi owed debts to Cargill International after a settlement, and Cargill had security for the debt in Jinshi’s assets, which Jinshi transferred at low prices to affiliated companies knowing of the debt. The court

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<sup>63</sup> Werthwein in Bu (ed.), pp. 200–201, with further references.

<sup>64</sup> Chen and van Rhee (eds.), p. 6



deemed this collusion in bad faith, invalidating the contract. Although it could not order the property surrendered to Cargill, who never owned the property, the court ordered it returned to Jinshi, whereas Cargill retained security interests in it.

In short, German and Chinese law diverge on consequences of contractual invalidity. Whereas German law accepts the ownership as passed onto the insolvent debtor, leaving the asset accessible to the estate, Chinese property transfer relies on a valid underlying contract with effective obligations. Where the debtor obtains an asset under an invalid contract, he will himself have to return it under the Contract Law article 58. In an insolvency, the property is not part of “debtor’s assets”, and article 38 of the Chinese Enterprise Bankruptcy Law stipulates that where “the debtor possesses assets not his own, the owner of such assets may take back the assets through the bankruptcy administrator unless otherwise prescribed by this Law”.

## 3.3 Norway

### 3.3.1 The Creditors Recovery Act § 2-2

Under Norwegian Law, the Creditors Recovery Act § 2-2 is the starting point for determining which assets may be recovered by creditors, in or outside insolvency. The pressing question is whether an asset “belongs to the debtor” (“tilhører skyldneren”).

The provision can be read as an expression of the *nemo dat* principle, stipulating that the insolvent debtor’s creditors cannot have any greater right than the debtor himself. If the debtor has no proprietary claim to the asset, nor will the creditors.<sup>65</sup> The exceptions are again the rules on administrator’s choices of rescinding contracts and avoiding transactions.

#### **The Bygland Case: de facto ownership vs. apparent authority**

Furthermore, the wording “belongs” is taken to refer to the *de facto* ownership, as opposed to formal or/and apparent ownership. This can be gathered from the judgment Rt-1935-981 (Bygland): A father had lost his farm in a forced sale, but repossessed it through his then underage son’s hereditary redemption right (*odelsrett*), making the latter the formal owner.

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<sup>65</sup> Hauge 2016, p. 93.

Yet, the father was the *de facto* owner of the farm. Upon the son's later bankruptcy, the creditors sued to recover their claims through the farm. However, the Supreme Court agreed on the district court's assessment that the son's creditors could not take the farm, as it was indeed owned by the debtor's father. Even though the creditors provided their loans in good faith as the deed gave the son apparent authority as owner, the Supreme Court found this an irrelevant circumstance for bankruptcy creditors.

Later legal theory cites the case as grounds for two facts of Norwegian bankruptcy law; 1) the estate is limited to *de facto* belongings of the debtor,<sup>66</sup> and 2) the bankruptcy creditors' good faith and the debtor's apparent authority are irrelevant considerations in determining the scope of the Norwegian bankruptcy estate.<sup>67</sup> In other words, good faith is no precondition for creditors extinguishing competing property rights.

### Hidden relativity

While creditor recovery under the unitary approach to property transfer is usually a matter of finding out who is the rightful owner, the functionalist approach used in the Nordic recognises that several people may hold competing property rights. Who prevails depends on the conflict, and enjoying legal protection against a subsequent purchaser does necessarily imply that one has protection against a bankruptcy estate.

Initially, the wording "belongs to" ("tilhører") suggests that solving property disputes in Norway is simply a matter of identifying the rightful owner. However, the preparatory works of the Act reject § 2-2 as providing much of a guideline:

*"[A] provision of this nature cannot draw up any specific line for the right to recovery versus a third party; here, the rules on apparent authority, third-party protection ["rettsvern"] and avoidance apply, as well as the evidence rules".<sup>68</sup>*

Generally, the third-party conflicts are categorised as variants of two main types commonly known as "legal predecessor conflicts" and "double succession conflicts".

### 3.3.2 Legal predecessor conflicts: Insolvent buyer

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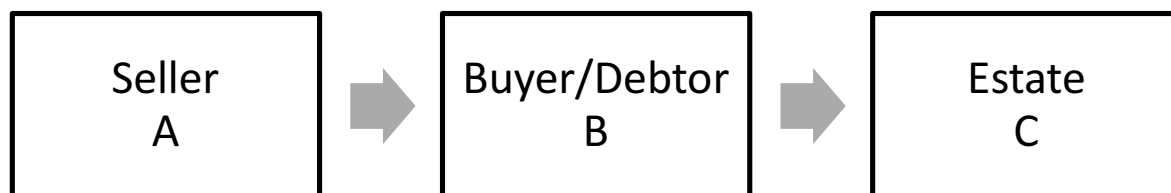
<sup>66</sup> Lilleholt 2012, p. 36.

<sup>67</sup> Marthinussen 2016, pp. 27–28.

<sup>68</sup> NOU 1972:20, p. 255.

In short, legal predecessor conflicts are conflicts wherein party C derives his right from party B, before B's legal predecessor A claims to be the rightful owner, contending C's derivative right. The guiding principle is the *nemo dat* principle; that one may only transfer rights equal to or less than one's own. The question is whether the B's predecessor or successor should prevail.

In bankruptcy situations, the situation arises where the buyer goes bankrupt, commonly referred to as the "into the estate conflict" ("inn i boet-konflikten"). The name summarises the main problem: whether or not the sold asset has already passed into the buyer's estate by becoming property of the debtor under the Creditors Recovery Act § 2-2. If the asset still belongs to predecessor A, estate C can derive no right to satisfaction from B.



Much can be said of the specific time of such transfer, as its ascertaining relies on the type of sale and individual circumstances of the case.<sup>69</sup> This account will outline the general criteria's content rather than their more specific application.

### **“Handed over”: The relation between separation, stoppage and termination**

The Creditors Recovery Act § 7-2 stipulates that where one party “lacks the funds to fulfil his part of a mutually committing contract”, the counterparty has a right to “withhold its performance” if not yet “dispatched from the place of delivery” or, after dispatch, “hinder that it is handed over to the debtor or his estate until security is provided for the performance”.

While this right to stoppage in transit presupposes that the goods have yet to reach the buyer, goods that have already been “handed over” under § 7-2 may be returned to seller by terminating the contract under § 7-7 (1), which provides such a right either when the estate

<sup>69</sup> For detailed accounts: Andenæs chapter 15 and Truyen.

does not assume or fulfil the contract according to § 7-5. However, § 7-7 (2) dictates that a party who “prior to initiation of composition or bankruptcy” has “partially or fully delivered his consideration” may only terminate with regards to delivered movables if the contract had a valid clause on a right to return. The Security Interest Act § 3-22 prescribes that if the seller has “retained ownership to the sold object until the purchase money (...) is fully paid, or a right to take the sold object back upon defaulted payment, the relationship shall be regarded as an agreement on *salgs pant* [a purchase money security interest]”.<sup>70</sup> Therefore, movables sold without a retention of title or purchase money security interest clause, can only be repossessed by seller if they were not “delivered” at the time bankruptcy was initiated, namely when the “order on initiation of bankruptcy [proceedings] was declared” pursuant to § 1-4. Although the criterion “delivered” deviates from “handed over” in § 7-2, the preparatory works to § 7-7 maintain that “[i]f it concerns delivery of movable goods, the determining [question] must be whether the fulfilment has come so far that stoppage is precluded under the rules in § 7-2”.<sup>71</sup>

In other words, goods already “handed over” to the buyer before the bankruptcy declaration may only be returned to the seller under retention of title/purchase money security interest clauses. Thus, the essential factor for the unsecured seller’s right to repossess goods sold to an insolvent buyer is whether the goods were “handed over” under § 7-2 pre-bankruptcy. Yet, as Lilleholt notes, the connection to the stoppage right does not necessarily make stoppage an accurate description for the seller’s right in bankruptcy; the question of stoppage right pre-bankruptcy is merely the means to determine the seller’s possible right to separation post-bankruptcy.<sup>72</sup> The general application of the stoppage right and harmonisation efforts imply that the law of obligations’ other rules concerning the cut-off point for stoppage rights, i.e. the Norwegian Sale of Goods Act § 61 (2), are believed largely to correspond with the Creditors Recovery Act.<sup>73</sup>

Hence, the question of whether an insolvent buyer’s estate may claim the asset, disregards the term ‘ownership’, focusing on the estate deriving its rights from the buyer, here restricted by an obligatory right to stop performance (stoppage *in transitu*) or terminate the contract. The

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<sup>70</sup> See sub-chapter 4.2.1.

<sup>71</sup> See NOU 1972:20, p. 320. Lilleholt 2012, p. 282 draws a similar equivalency argument between “delivered” in § 7-7 and “handed over” in § 7-9 on the estate’s duty to fulfil assumed contracts, while Andenæs, p. 203 and Truyen, p. 349 presume the differing criteria to be a drafting mistake.

<sup>72</sup> Lilleholt 2012, p. 282.

<sup>73</sup> Similarly: Truyen, p. 344 and Andenæs, p. 188.

*nemo dat* principle is apparent here; where the buyer must yield to the seller's repossession, so must the creditors. Notably, the Norwegian problem corresponds to the Chinese Enterprise Law article 39 stoppage, although China seemingly apply the general delivery requirement whereas Norway applies a different term altogether.

### **When are goods “handed over”?**

The wording “handed over” indicates a physical transfer of goods, and it must be rather clear that where the seller has exclusive physical possession to the goods, they are not “handed over” to the buyer. Contrariwise, where the buyer has exclusive physical possession, it is similarly obvious that they are. Here, possession provides the necessary degree of *notoritet* and public notice.

The more pressing questions relate to goods in no one's exclusive possession and goods in the possession of a third party, where the solution is less obvious. Local sales, shipment sales and sales where the buyer obtains the goods at the seller's place of business are subject to different rules. Still, the key question is generally which of the parties that can be most closely identified with the possessor or location of the goods.<sup>74</sup> To maintain public notice and *notoritet*, one should deduce this association from objective, observable facts apparent to the outsider.

**1) Local sales or shipment sales:** Where the asset is to be sent to a location or an area “to which the seller normally undertakes to bring such goods”, it is a ‘local sale’ (“plasskjøp”), and ‘delivery’ with regards to passing of risk happens “when the asset is received there”, cf. the Norwegian Sale of Goods Act § 7 (1).<sup>75</sup> If the asset “is otherwise to be sent to the buyer (shipment sale)”, delivery happens upon the asset being “handed over” to the transporter or, where the seller transports the asset himself, the buyer, cf. § 7 (2).

However, neither case necessarily implies that the goods are “handed over to the buyer” under the Creditors Recovery Act § 7-2.

From the cases Rt-1907-771 and Rt-1932-304, it is clear that goods stored in customs are still under the seller's stoppage right. The same is generally believed to be the case while the

<sup>74</sup> Truyen, p. 351. Andenæs pp. 187–193 argues along mainly the same lines.

<sup>75</sup> For an English translation of the entire act, see Skarning, pp. 73–117.

goods are in the transporter's possession or storage after arrival, unless in cases of long-term storage on the buyer's behalf.<sup>76</sup> Truyen remarks how independent transporters are usually hired or otherwise associated with the seller, whereas the buyer being the closest party to the transporter is more of an exception. Therefore, the transporter's possession will typically imply that the seller has some degree of disposal over the goods, and that they are not "handed over" to the buyer. Provisions on the seller-transporter relationship in special forms of shipment<sup>77</sup> typically provide the seller with disposal rights until surrendering goods to the buyer.<sup>78</sup> Here, the cut-off point for the stoppage right is later than contractual delivery. Andenæs maintains that the buyer even ordering the transport might be insufficient for his identification with the transporter.<sup>79</sup> However, where the transporter answers to or takes substantial orders from the buyer due to agreement or usual practice, it might imply the buyer disposing over the goods so that they must be considered as "handed over".<sup>80</sup>

Alternatively, the goods might be at a location independent from either party or their associates, yet accessible to both. In Rt-1971-549 (Dokka Bruk), the seller had delivered timber to a drop-off point along a road in the woods, where they remained until the buyer's bankruptcy. The place was neither the seller's nor the buyer's, and yet accessible to both. The Supreme Court emphasised several aspects of the legal relationship: The seller was to supervise the timber, inform the buyer of deterioration and remove snow to facilitate buyer's access. Importantly, "the individual buyer had no exclusive disposal of the location".

From this, one may deduce that both the seller's continued cooperation after drop-off, besides the buyer lacking exclusive disposal, were instrumental factors in the conclusion: The seller still had a stoppage right, and the bankruptcy estate could not seize the goods.<sup>81</sup>

This promotes public notice, since the seller's continued responsibility for the timber and the buyer's lack of exclusive disposal left the current disposal of the timber undeterminable to other interested parties. Truyen also mentions a noteworthy argument: Where the buyer does

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<sup>76</sup> Andenæs, p. 189 with reference to Truyen, pp. 369–370.

<sup>77</sup> I.e. the Postal Act § 25 and the Aviation Act § 10-12.

<sup>78</sup> Andenæs, p. 191, where he maintains that "[t]he provisions only regulate the question of the seller's right towards the transporter. Yet, they have indirect significance also to the stoppage right between seller and buyer".

<sup>79</sup> *Ibid.*, p. 189.

<sup>80</sup> For details: Truyen, pp. 364–366.

<sup>81</sup> Similarly: *Ibid.*, pp. 356–357.

not appear as owner to goods he has yet to pay for, the creditors have less reason to expect satisfaction through said goods.<sup>82</sup>

While the case was solved through the now repealed Bankruptcy Law of 1963 § 40, the preparatory works of the Creditors Recovery Act presume the solution to be the same under the Sale of Goods Act § 39,<sup>83</sup> indicating relevance to the criterion “handed over”. Truyen and Andenæs agree that exclusive disposal and apparent ownership are thus relevant factors under the Creditors Recovery Act § 7-2.<sup>84</sup>

In the other timber case, Rt-1974-879 (Statlandbruket), a seller undertook transport of the timber by sea at the buyer’s expense. When the timber lay on the beach, the buyer went bankrupt. The Supreme Court reiterated the factors of exclusive possession and the goods’ external appearance as the buyer’s. Although the buyer could retrieve the timber and the timber was commingled with timber from another supplier of the buyer, the seller’s right to withhold the timber from the estate remained. The Court remarked that the seller had obtained permission from the landowner to store the goods, raised poles marking the spot and supervised the timber to some degree.

Rt-1973-95 (Krogstad Cellulosefabrik) even recognised the seller’s right to withhold timber left on the buyer’s premises due to their longstanding custom of such timber being outside the buyer’s right to disposal until measuring. While less apparent from the outside, the court emphasised that such practice was reasonable and established. Furthermore, the majority vote found that “[w]hen the purchase money was unpaid and undue before measuring, and when the measuring in itself gives the relationship *notoritet*, I do not find it questionable with regards to third-party protection that also the creditors will have to respect the parties’ arrangements”. Yet, the arguments indicate that if such practice should be accepted, it must maintain a certain *notoritet*.

In Rt-1997-1438 (Metos), the parties established storage for the seller as a separated part of the buyer’s storage. The Court did not acknowledge the seller’s alleged stoppage right, noting that one “must under any circumstance demand clarity and *notoritet* (...), particularly regarding disposal and control – demands that are not satisfied in this case”.

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<sup>82</sup> Ibid.

<sup>83</sup> NOU 1972:20, p. 312.

<sup>84</sup> Truyen, p. 357, Andenæs, p. 190. Lilleholt 2012, p. 285 seemingly argues that one may question the case’s relevance under current law, and emphasises physical possession.

Truyen finds that some “confirming action” from the buyer, exercising the disposal, will generally be necessary for the right to be lost.<sup>85</sup> Receiving “transport documents”, such as bills of lading, is not sufficient for precluding the right, in light of explicit statements in the Sale of Goods Act § 61, which corresponds to the rule in § 7-2.<sup>86</sup>

## 2) Collection sales

The Sale of Goods Act § 6 on collection sales (“hentekjøp”), sales where the buyer collects the goods at the seller’s place of business or another location where the goods are kept “ready for collection”, stipulates that the goods are “delivered when taken over by the buyer”. If the seller is present at the time the buyer collects the goods, loss of stoppage right will occur simultaneously with delivery. Although the seller’s physical possession will here tend to correspond to his stoppage right, legal theory has taken that exceptions are conceivable.<sup>87</sup> Are the goods left in the open, they are “handed over” upon collection, as when stored by a third party.<sup>88</sup> Where the buyer is to extract them from nature, such as felling trees, they are “handed over” upon such extraction, even if they remain on the seller’s premises.<sup>89</sup>

### 3.3.3 Double successor conflicts: Insolvent seller

‘Double successor conflicts’ (“dobbelt suksessjonskonflikter”) is the general term for conflicts wherein both parties B and C derive their competing rights from party A. The guiding principle here is the *prior tempore* principle, dictating that the first in time is the best in right, and the question is whether successor B or C achieved protection of rights first. The necessary action ensuring such protection is determined with due consideration of the need for *notoritet* and public notice.

In insolvency, this conflict arises when the A sells movables to acquirer C and upon A’s subsequent bankruptcy, his estate B asserts rights to the sold goods, alleging that they belong to the debtor. It becomes a question of whether the buyer or the estate obtained legal protection first time, yet the question remains: First in time for what?<sup>90</sup> The solution of these

<sup>85</sup> Truyen, pp. 361–362, 367–370.

<sup>86</sup> Andenæs, pp. 188 and 191, and on the statute’s general relevance: Truyen, pp. 349–351.

<sup>87</sup> Andenæs, p. 192, Truyen, p. 372.

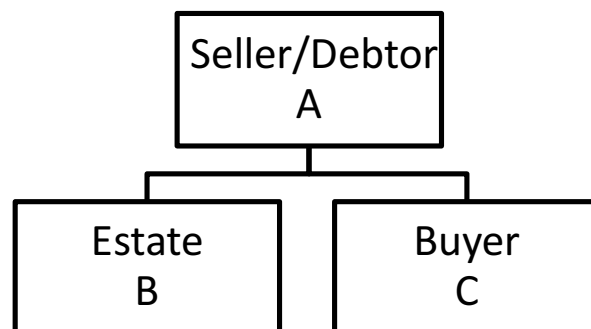
<sup>88</sup> Andenæs, p. 192, Truyen, pp. 374–375 makes a certain reservation.

<sup>89</sup> Andenæs, p. 192, Truyen, pp. 374–376.

<sup>90</sup> See also Hauge 2016, p. 93.



conflicts (called “ut av boet-konflikter”, literally “out of estate conflicts”) relies on which action the law deems sufficient for legal protection against a third party. As the estate creditors’ satisfaction right does not require any measures to obtain third-party protection (they are the third party), the question is more precisely this: Did buyer C obtain third-party protection before the bankruptcy declaration established B’s claim to creditor satisfaction under the Creditors Recovery Act § 2-2? If not, the estate may seize the asset.



### Legal grounds

As indicated under 3.3.1, the Creditors Recovery Act § 2-2 gives no indication of *when* one ought to regard something as debtor’s property, and can hardly be said to prescribe solutions for when third-party protection is acquired. Moreover, the examination below will show that applicable case law is dated and scarce.

Under such lack of clear rules, the policy considerations outlined in sub-chapter 3.1.3 become something more than legislative purposes under which the law can be interpreted; they become essential guiding principles in ascertaining what the rule is (or ought to be, as the divide between *lex lata* and *lex ferenda* tends to become less distinguishable in such circumstances).<sup>91</sup> As Lilleholt formulates, the considerations of efficient commerce, equal treatment of creditors and prevention of creditor fraud “must lie as the fundament for he who shall make an assertion on the question of the buyer’s protection against the seller’s creditors”,<sup>92</sup> and due to the question’s scarce legal framework, these considerations “are king of the hill”.<sup>93</sup>

<sup>91</sup> Ibid., p. 24 with further references.

<sup>92</sup> Lilleholt 2000, pp. 52–53.

<sup>93</sup> Ibid., p. 54.

## Relevant case law

The question of the buyer's protection of rights to movables against the seller's creditors has hardly been a subject in Supreme Court cases in the past 105 years. To this day, the interpretations of the law mostly relate to two cases from 1910 and 1912, a somewhat special case in 1990, supplemented with possible analogies from perfection rules for security interests and the policy considerations mentioned.

In Rt-1910-231 (the Cow Case), a farmer sold cattle to a butcher, who paid a tentative price. They agreed that the seller retained the cattle until milking. As milking affects the slaughter weight, the price would be adjusted accordingly upon subsequent weighing before delivery. Against a three-judge minority voting for transfer upon contractual conclusion, the majority of four deemed the transaction to "lack the characteristics of an actual property transfer". They emphasised the seller's continued possession over several months "in his interest", that the lacking transfer of disposal necessitated later delivery "for effectuating an actual transfer of ownership" and ruled in favour of the seller's estate. As Lilleholt notes, these arguments related to a current theoretical adherence to a German delivery principle, although with a restriction of *constitutum possessorium* to circumstances where the seller was not to "dispose as an owner" over the goods.<sup>94</sup>

The result was the opposite in Rt-1912-263 (the Scrap Metal Case), wherein a shipyard had agreed that scrap metal sold to a buyer was to remain in a separate pile on the shipyard's premises until the buyer's retrieval. The agreement transferred scrap metal accumulated throughout the year 1908 in its entirety. When the shipyard went bankrupt in 1909, the buyer, who had paid for 94 out of the remaining 100 tonnes, had only collected portions of the pile. A majority of five ruled in favour of the buyer's acquisition of ownership, whereas two judges referred to the Cow Case as grounds for the estate's right to satisfaction. The majority cited the parties' intention of the metal remaining in the pile at the buyer's "cost and risk", the seller's lack of right to remove or retransfer its contents and that the bill for the contents constituted "sufficient specification" in light of the nature of the goods and the legal relationship. Reference to "specification" correlates with the English *consensus* principle's minimum requirements.<sup>95</sup>

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<sup>94</sup> Lilleholt 2012, p. 288 with further references.

<sup>95</sup> See sub-chapter 3.1.1.

Rt-1909-734 converges in this respect. A seller agreed to deliver 300 dozens of timber to two lumber traders in exchange for logging rights, some established prior to delivery, others after. A deposit was paid, and the timber was marked with the acquirers' marking axe. Upon the seller's failure to deliver, the parties altered the agreement so that they were instead to own certain tree trunks with an overall value corresponding to the deposit, whereas delivery of the remainder was postponed until the next year. After finding that the parties intended for the ownership to pass immediately upon the second agreement due to them using word "transfer" ("overdra"), the Court rejected the allegation that it was an avoidable *pro forma* arrangement for securing existing debt but a modification of the price and corresponding delivery of wood. Furthermore, they found the wording "the timber transferred to us today" sufficiently distinct from the remaining wood. While the decision does not assess "the general question of conditions for transfer of ownership to movables", the arguments combined indicate the Court finding a genuine sales agreement over sufficiently individualised goods to be sufficient in the specific case.<sup>96</sup>

The third case, Rt-1990-59 (Myra Båt) concerned whether an owner of a construction project owned building materials supplied by the contractor. The standard contract governing the construction stipulated that the owner's instalments were to pay for the materials, and the majority of the Court found that "the conditions for transfer of property are here fulfilled" and that the "consideration for individualisation is fulfilled by the materials being brought to the construction site". It is notable that the case concerned a large construction contract and that the goods were on the owner's premises, differentiating the case from the aforementioned.

### **Theoretical interpretation: 'the interest doctrine'**

It might seem difficult to reconcile the rulings under one general rule. Yet, Brækhus & Hærem presented an influential effort in *Norsk Tingsrett* in 1964.<sup>97</sup> What was certain from the cases was their deduction that delivery was at least sufficient for providing the buyer third-party protection.<sup>98</sup> Yet, the cases showed that delivery might not be necessary in all

<sup>96</sup> Similarly: Hauge 2016, p. 113.

<sup>97</sup> Brækhus & Hærem, pp. 496–517.

<sup>98</sup> *Ibid.*, p. 497. Similarly: Lilleholt 2012, p. 288. Still, the transaction must be real, and not, for example, a circumvention of the pledge rule in § 3-2, see Hauge 2016, p. 95 and Lilleholt 2012, p. 289 with reference to the case Rt-2006-213 (Elcon).

cases. After examining case law, legal theoretical shifts from a *consensus* principle to a *traditio* principle and how a purported sales contracts could serve the purpose of securing a loan, circumventing the possession rule as a condition for perfecting pledges (see 5.2 and 5.5.2), Brækhus & Hærem found the purpose of possession as condition for perfection of a pledge to be a natural starting point.<sup>99</sup> In brief, they argued that sales without transfer of possession or disposal would facilitate concealed agreements on non-possessory security; a scheme Norwegian law regarded with scepticism due to the difficulty of verifying that the parties have not extended its scope or antedated the agreement to favour one creditor before the others. Equal treatment of creditors, public notice and *notoritet* are major concerns. Another argument relating to equal treatment of creditors was that where a purchase pays in advance, it resembles other credit arrangements, so that one should view the purchaser as an unsecured creditor. Brækhus & Hærem regarded this argument with some scepticism.<sup>100</sup> They found prepayment to resemble credit where the goods are undeliverable, either due to them being unfinished or the seller's continued need for the them, yet less so when the non-delivery is due to the purchasers unwillingness or inability to collect the assets. Cases where the seller undertakes transport, fell somewhere in between.<sup>101</sup>

However, they held manufacturing contracts in a special position, as the manufacturer's acquisition of materials for the individual contract is a considerable financial risk that legitimises advance payments or instalments. Furthermore, they argued that larger manufacturing contracts often are concluded by tender, and pose less of a risk of creditor fraud due to the visibility of contractual conclusion. Moreover, the financial risks and need for payment prior to delivery indicated that the policy consideration of efficient commerce outweighed the qualms of abandoning third-party protection by delivery.<sup>102</sup>

Based on their assessment *de lege ferenda*, Brækhus & Hærem concluded that the buyer has legal protection when it only relies on himself when he obtains possession, where only additional work remains on otherwise finished goods and, possibly, where only the seller's transport remains:

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<sup>99</sup> Brækhus & Hærem, p 506.

<sup>100</sup> Ibid., p. 508–509.

<sup>101</sup> Ibid., p. 509.

<sup>102</sup> Ibid., p. 510. Similarly: Hauge, pp. 167–179.

“In short, but somewhat inaccurately, this can be expressed so that the buyer is protected if the seller has the thing in his [the buyer’s] interest”.<sup>103</sup>

Brækhus & Hærem did not assert this reconciliation of case law, theory and policy considerations, later to be known ‘the interest doctrine’ (“*interesselæren*”),<sup>104</sup> as definite law. They found that “present law is so inconclusive that one must assume that the courts will be rather free [in their discretion]”, and that there “is no unconditional requirement of delivery, yet neither will the agreement always be enough”.<sup>105</sup>

The inarguable merit of the doctrine is that it reconciled seemingly contradicting case law while taking necessary reservations for certain commercial transactions.

Later theorists have, with some reservations, largely regarded delivery as a general requirement with certain modifications, such as for the seller’s retained possession in the buyer’s interest and exceptions for minor additional duties or manufacturing contracts.<sup>106</sup> In those exceptions, the goods must merely be individualised or specified to adhere to the specificity principle of property rights.<sup>107</sup> The latter exception also reconciles the doctrine with the Myra Båt Case.

This doctrine somewhat resembles the Chinese solution, albeit with the important modification that the interest assessment does not leave the reasons for the seller’s retained possession to the parties’ decision, such as *constitutum possessorium*.

### **Criticism of the doctrine**

There are clear disadvantages to the doctrine, as it is unpredictable in various respects. One might ask when only ‘additional work’ remains to an otherwise finished good, when something is only ‘in the buyer’s interest’, when a manufacturing contract is large enough to warrant exceptions from delivery requirements or when the goods under such contracts are sufficiently ‘individualised’.

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<sup>103</sup> Brækhus & Hærem, p. 513.

<sup>104</sup> I.e. Hauge 2016, p. 129 and Lilleholt 2000, p. 53.

<sup>105</sup> Brækhus & Hærem, p. 514.

<sup>106</sup> I.e. Lilleholt 2012, p. 294 and Andenæs, pp. 264–271.

<sup>107</sup> Lilleholt 2012, p. 258, Hauge, pp. 63–64 and Brækhus & Hærem, p. 513.

While the lattermost question is subject to the courts' discretion even under *consensus* jurisdictions, the other problems arise due to an uncertain doctrine under which the parties can hardly take measures to ensure protection, other than transferring possession. The unclear scope of application could potentially hamper development of new transaction methods.

Moreover, Hauge has questioned the legal grounds for deducing a delivery requirement. She asserts that if the seller has paid his consideration, a right legitimately acquired<sup>108</sup> under a sales contract perfects already upon individualisation or specification of assets. In her view, third-party protection of rights to goods that the seller retains in the buyer's interest, applies in absence of sufficiently individualising agreement.<sup>109</sup> If correct, delivery is only necessary when the contract does not concern sufficiently specific assets and the seller has an interest in their possession.

Being the most extensive analysis of the subject since the formulation of the interest doctrine, Hauge's account is far too many-faceted to cover in full. I will limit my description to certain key elements that illustrate how one cannot take the delivery requirement for granted, and will not detail the question of how her alternative approach should be specifically applied.

While Hauge acknowledges that purported sales contracts actually securing debt should be characterised as circumventions of the perfection rules for pledges, so that legal protection is not acquired before delivery, she contends such analogies where the contract serves a legitimate sales purpose, as it has another economic function<sup>110</sup> and normally will manifest its legitimacy through possession at some point. Where that has yet to happen, she argues the fact as a relevant factor in judging evidence.<sup>111</sup>

While she recognises prepayments as a possible indication of a seller's economy failing, she finds it less indicative than a security transaction, therefore deeming the analogy from pledges inappropriate.<sup>112</sup> Likewise, she advises caution in deducing a general rule from the rules in the Security Interest Act § 3-7 on third-party protection of *bona fide* acquisition of objects under a floating charge, finding them at best to be a supportive argument to otherwise

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<sup>108</sup> 'Legitimate' in the sense of *pro forma* contracts being rejected.

<sup>109</sup> Hauge 2016, pp. 193–195.

<sup>110</sup> *Ibid.*, p. 99.

<sup>111</sup> *Ibid.*, p. 98.

<sup>112</sup> *Ibid.*, pp. 99–100.

solid legal grounds.<sup>113</sup> Moreover, she rejects applying the rule in the Creditors Recovery Act § 7-13 on only “fulfilled” gift promises enjoying protection, unless the sales price is low enough that the sale has a significant gift element.<sup>114</sup>

Moreover, the preparatory works for the Promissory Note Act<sup>115</sup> rejected a delivery requirement for legal protection of rights to negotiable promissory notes because requiring delivery would not “be in the best accordance with the tenets that we otherwise apply to transfer of movables”. Hauge notes that although they carry limited normative value as a representation of the legislature’s current opinion on the matter, the preparatory works nuance the view of the delivery requirement as verified truth in the past century, and she holds it as an overlooked fact that the consensus on protection upon delivery spread only after the interest doctrine.<sup>116</sup>

As to case law, she finds the timber case in Rt-1909-734 as recognition of third-party protection upon contract over specified assets, and that one might see the requirement of delivery in the Cow Case as a default rule due to the cattle’s weight being too unspecific under the agreement.<sup>117</sup> Hilde sees the case as restricting the degree of autonomy under a *consensus* principle,<sup>118</sup> an interpretation resonating with the Scrap Metal Case, which explicitly referred to “sufficient specification” of the goods. Moreover, the judges mostly concurred with the city court’s reasons for their judgment, which stated a need for commercial autonomy to conclude transactions fitting the circumstances, finding that separation of a clearly defined quantum into a pile the seller was unauthorised to dispose of, hardly warranted further measures for obtaining legal protection.<sup>119</sup>

As to the Myra Båt Case, Hauge makes the reservation that it differs from the general question here, yet deducts that “it is of general relevance that the Supreme Court by the decision recognises a contractual clause for transfer of ownership with effect to third-party protection”.<sup>120</sup>

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<sup>113</sup> Ibid., p. 107.

<sup>114</sup> Ibid., p. 109.

<sup>115</sup> NUT 1935:1, p. 45.

<sup>116</sup> Hauge 2016, p. 110–111.

<sup>117</sup> Ibid., p. 161.

<sup>118</sup> Ibid., p. 118.

<sup>119</sup> Rt-1912-263 on p. 266.

<sup>120</sup> Hauge 2016, p. 123.

Yet, as she notes,<sup>121</sup> the broad consensus on delivery at least serving as the main rule might in itself carry some authority as legal grounds for future cases, especially when considering the doctrine's longevity in light of its subsequent practical application and the need for predictability. To what extent Hauge will be proven right in future legal development, is therefore hard to say. Nonetheless, she concludes that at present, one can hardly deduce a delivery principle from the sources of law.

### **Current and future prospects for the delivery principle**

While the *consensus* principle's merits of enabling flexible commercial transactions are rather clear, any future deviations from the delivery principle will nonetheless rely on the extent at which the legislature or judicature find a *consensus* principle with a minimum requirement of ascertaining the goods to provide a sufficient degree of *notoritet* and public notice. Below, I will examine to what extent the alleged deficiencies of the *consensus* model remain an issue today. At the very least, these deliberations can be considered arguments *de lege ferenda*, yet as the legal grounds are scarce and ambiguous, they can arguably also be seen as arguments *de lege lata*.<sup>122</sup>

One objection could be asserted against the basic fundament for the doctrine or the delivery requirements in general: On the need for transfer of possession as a safeguard for *notoritet*, Brækhus & Hærem state that delivery “does not provide any fully adequate protection against later antedating”, as delivery only proves the possessor of having “some right or another”, and not its contents. Furthermore, they note: “Neither does one know for certain when the delivery has taken place”. When they still find delivery as the most appropriate measure against creditor fraud, it is because “there usually is no better way to ensure *notoritet* (...)”,<sup>123</sup> and at present, Norway lacks a movable goods register sorted by asset and not by person (a “realregister”, as opposed to a “personalregister”).

Much has happened to transaction methods since 1964. While electronic manipulation of digital contracts sent by e-mail is certainly possible, the development of i.e. blockchain technology allows for data verification even in absence of a central supervisory institution. While not a current alternative, it is conceivable that such technologies can serve as platforms

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<sup>121</sup> Ibid., pp. 130–132

<sup>122</sup> See note 84.

<sup>123</sup> Brækhus & Hærem, p. 496–497.



for concluding contracts, making payments or registering acquisitions without the inconvenience and cost of public notary functions. At present, the blockchain technology is being explored by the land registry authority (Lantmäteriet) in Sweden,<sup>124</sup> a jurisdiction where registration and delivery are the only acceptable third-party protection acts to date, pursuant to the Swedish Sale of Movables Act § 1.<sup>125</sup>

Although such future prospects are hardly strong arguments for *notoritet* in absence of delivery today, certain current technologies are. As Hauge notes, the risk of a *pro forma* sales agreement is less obvious in today's context of digital payment than in 1964.<sup>126</sup>

The legal grounds for the delivery-based doctrine are scarce and inconclusive, even in the eyes of its inventors. Within the accordingly wide argumentative margin, Brækhus & Hærem based their doctrine upon concrete assessment of risk and need for verifiability, as one should today.

It is therefore highly relevant how modern transaction methods maintain a higher degree of verifiability than those of 1964 and, arguably, what transfer of possession can add. While one can often manipulate electronic information, Brækhus & Hærem were entirely clear on similar risks of manipulation and antedating being inherent to a delivery rule.

Unless future legislation allows for simplified registration measures, the technological arguments relate primarily to *notoritet*. One might therefore argue that protection upon transfer in possession provides more public notice a contractual agreement over specific assets. Yet, one might contend the extent of insight a creditor has in the debtor's possessions in the course of business, at least in minor transactions. Therefore, one might question whether the additional publicity from possession requirements is substantial enough to outweigh the consideration for efficient commerce. Moreover, a requirement of ascertaining goods could be interpreted strictly enough that if the creditors were to look into their debtor's possessions, they would be able to discover goods designated for a third party. As such, lack

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<sup>124</sup> See the websites of Lantmäteriet: <https://www.lantmateriet.se/sv/Nyheter-pa-Lantmateriet/lantmateriet-har-tittat-pa-blockkedjetekniken/> (read 18 April 2018) and its project report: <https://www.lantmateriet.se/contentassets/6874bc3048ab42d6955e0f5dd9a84dcf/blockkedjan-framtidens-huskop.pdf> (read 18 April 2018).

<sup>125</sup> The Swedish Sale of Movable Goods Act § 1.

<sup>126</sup> Hauge 2016, p. 41.

of public notice is less of an argument against protection upon ascertaining than an argument against protection upon lenient ascertaining.

One can hardly regard the current, exceptional ascertaining requirement in Norway as very strict. In describing the exceptions to their interest doctrine, Brækhus & Hærem detail the remaining condition of specifying the asset or individualising it by separation where it is generic: they hold that exact measuring can hardly be a requirement in light of the Scrap Metal Case and the timber case in Rt-1909-734. Instead, they deem separation of an “approximate amount” sufficient,<sup>127</sup> and doubt whether the buyer must be notified of the separation.<sup>128</sup> Yet, they maintain, one should require “rather strict requirements for the evidence of the individualisation having taken place prior to the bankruptcy”.<sup>129</sup> There is consensus on the individualisation requirement being relevant to circumstance in the sense that it must appear “normal” in light of the usual way of separating such assets.<sup>130</sup> It is somewhat uncertain whether the separation must be binding on the seller in the sense of irreversibility.<sup>131</sup>

## Conclusions

It is difficult to make conclusive statements about the current conditions for protecting acquisition of movables against the seller’s creditors. One can hardly disregard the widespread belief that delivery is generally required unless the seller only retains possession for the sake of the buyer, the goods are mostly ready for delivery or prepayments have been made under large-scale manufacturing contracts. Yet, these deductions are made from case law that are also reconcilable with protection at the conclusion of a contract where the purchased goods are sufficiently specified, as Hauge holds. While the interest doctrine of Brækhus & Hærem is certainly not undisputed, it seems that one can hardly rely on anything but delivery being sufficient, except under the widely accepted exceptions.<sup>132</sup>

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<sup>127</sup> Brækhus & Hærem, p. 515

<sup>128</sup> Ibid., p. 516.

<sup>129</sup> Ibid., p. 517.

<sup>130</sup> Ibid., Lilleholt 2012, p. 259 and Hauge 2016, p. 159.

<sup>131</sup> Brækhus & Hærem, p. 516 find that it must be “loyal to the sellers creditors in general and other buyers”, yet not undoable. Lilleholt, p. 259 holds that it does not need to be binding. Andenæs, p. 270 holds that it “possibly” does.

<sup>132</sup> Andenæs, p. 264 notes that even these exceptions might be questionable grounds in court proceedings.

Comparing the traditional Norwegian approach with China, the traditional view is similar in its main rule of delivery. The permitted exceptions, however, are more restrictive: Whereas *constitutum possessorium* allows parties to agree that the seller retains possession in either party's interest, traditional Norwegian doctrine only allows retention in the seller's interest where large-scale manufacturing necessitates advance payment.

One might argue that the respective flaws of both a strict *traditio* principle and a lenient *consensus* principle pose less of a challenge than the unpredictability owing to the lack of clarity and the interest doctrine's discretionally determined scope. Then again, the ascertaining requirement of a *consensus* principle warrants uncertainties in its own right.<sup>133</sup>

If the legislature were to re-examine the legal framework, the flaws of the *consensus* principle are arguably less pronounced in the digital age than in 1964, and it is conceivable that lawmakers may consider this. If technologies such as the blockchain or ordinary electronic payments through financial institutions can provide adequate authentication when applied in the transaction itself, *notoritet* could be achieved without additional third-party protection requirements, instead making third-party protection a question of evidence. However, digital improvement of the registration framework could potentially make a statutory rule of registering acquisition of movables more attractive as an alternative for high-value acquisitions. That system has long been in place for motor vehicles, ships and aircrafts. While Sweden's general registration alternative for movables is rarely used,<sup>134</sup> their exploration of the blockchain technology at least suggests a curiosity towards applying recent financial technology to the framework of property registration.

To what extent Hauge's analysis forebodes a paradigm shift, remains to be seen. Judging by the frequency at which such conflicts have proceeded to the Supreme Court, the uncertainties seldom result in major litigation, and it seems less than likely for case law to clarify the matter in the near future. For now, the cautious acquirer of movable property would be wise in taking delivery at first opportunity.

### 3.3.4 What are the consequences of contractual invalidity?

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<sup>133</sup> Hauge 2016, p. 196

<sup>134</sup> In 2014, only 98 acquisitions were registered, cf. Mattson & Matz, p. 335.

As with China, acquisition under an invalid contract will often result in the original owner having a restitution claim to the individual asset. Marthinussen holds that the principle of causality “lies clearly enough as a basic structure also in our Norwegian property law”.<sup>135</sup> see Marthinussen 2010, p. 36 with further references. He further nuances the degree of causality on p. 38. However, Færstad & Lilja<sup>136</sup> maintain that under the functional property transfer model in Norway, it makes little sense to speak of a causality principle between the obligatory rights and the property rights, as Norway does not designate certain rights as proprietary. Although Norwegian law often presupposes valid agreement as grounds for transfer of property, the causal relationship is a result rather than an argument from which one may deduce the result. In principle, the question of whether invalidity renders property transfer ineffective should not be assessed generally, but with regards to the nature of the conflicting rights and their holders.<sup>137</sup> Here, I will only outline to what extent validity in general can be asserted against the estate. A question not detailed here is whether the individual invalidity rule gives rights to the asset itself or to monetary compensation.<sup>138</sup>

Where the buyer is insolvent, one must determine whether the seller may assert the agreement’s invalidity as grounds that the buyer’s estate may not seize the goods. It is generally accepted that where a seller could assert the claim against the debtor himself, he may also assert it against the debtor’s creditors.<sup>139</sup> Some invalidity causes only take effect if the other party was in bad faith, and if so, the estate will only have to yield where the debtor was in bad faith.

Where the seller is insolvent, the question is whether the estate may assert contractual invalidity against the buyer. Hauge holds it as generally accepted that the estate “has the same opportunity to assert a cause of invalidity as the insolvent debtor would have himself”.<sup>140</sup>

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<sup>135</sup> Marthinussen 2010, p. 36, with nuances on p. 38.

<sup>136</sup> Færstad & Lilja, pp. 217–218

<sup>137</sup> For a possibly differing opinion, see Aagaard, who finds that one should assess the consequence of invalidity independently for different invalidity causes, yet does not consider the type of the goods or parties as relevant criteria. Instead, she finds these aspects primarily relevant for execution where a claim to restitution has been acknowledged.

<sup>138</sup> See Aagaard, chapter 10 regarding these questions.

<sup>139</sup> Andenæs, p. 166.

<sup>140</sup> Hauge 2009, p. 328, with further reference to Andenæs, p. 166. Similarly: Lilleholt, p. 316.

While the term ‘causal transfer’ is seldom used explicitly,<sup>141</sup> Norwegian law, notwithstanding law on *bona fide* acquisition, often presupposes a causal link between contractual validity and effective transfer of property.

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<sup>141</sup> Marthinussen 2010, Ørjasæter and Aagaard are notable exceptions.

## 4 Retention of title clauses: Who is the owner?

### 4.1 China

#### 4.1.1 Retention of title or mortgage right?

When “the debtor possesses assets not his own” at the time the People’s court accepts the bankruptcy application, “the owner of such assets may take back the assets through the bankruptcy administrator unless otherwise prescribed by this Law” under the Enterprise Bankruptcy Law article 38. Since the rightful owner “may take back” the property, this statute clearly addresses the situation where the goods are already in the buyer’s possession. If the insolvent debtor has leased the property, he is not the owner<sup>142</sup> and the administrator shall return the property to the lessor. However, it is common in sale of goods to agree upon so-called ‘retention of title’ clauses that allegedly keep ownership on the seller’s hands until the buyer has fully paid the agreed price. If so, the seller could, in principle, be entitled to the asset’s full value upon default.

Whereas Norwegian law deems title retention clauses as establishing mere security interests over unpaid goods,<sup>143</sup> Chinese legislation seems to imply actual title retention by leaving legal ownership with the seller until the clause’s conditions for ownership transfer are met.

Namely, the Chinese Contract Law article 134 dictates how “concerned parties may in [a/the]<sup>144</sup> purchase and sale contract agree that if the buyer fails to pay the price or other obligations, the ownership to the subject matter remains in the seller”.

The wording “the ownership (...) remains” leaves little ambiguity: The seller would undoubtedly have a proprietary claim to sold assets where the buyer defaulted due to insolvency and his bankruptcy estate attempted to seize such assets.

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<sup>142</sup> Notwithstanding agreements on financial leasing. This thesis will not cover such agreements.

<sup>143</sup> See sub-chapter 4.2.1.

<sup>144</sup> Mandarin Chinese does not use definite particles before nouns, a noteworthy fact for reasons detailed under sub-chapter 4.1.2.

The Bankruptcy Provisions (II) article 2 supports this impression.<sup>145</sup> The provision states that “the following assets shall not be identified as debtor’s assets”, before listing several specific types of assets, among them “assets that the debtor has not yet obtained ownership to under a title retention transaction”. Seeing as article 3 further stipulates that the people’s courts “shall identify specific assets upon which the debtor has legally established a security interest as debtor’s assets”, Chinese legislation draws a clear line between title retention clauses and security interest agreements. Under a Chinese title retention clause, the property right does indeed remain with the seller.

However, this only remains the case when the title retention clause is legally established and the seller has not lost the right to demand return of the asset. Below, I will examine whether there are conditions for title retention clauses enjoying legal validity and third-party protection, and under what circumstances the seller might lose his right to repossess the sold asset upon the buyer’s default.

#### **4.1.2 Establishment and perfection**

Whether there are conditions for title retention clauses’ enforceability is a question with at least two facets. First, one might imagine that title retention clauses may only be agreed in writing to be effective between the parties. Second, the law might require a certain action of perfection for the clause to have legal protection against interests of third parties.

The title retention statutes are silent on whether the clause must be concluded in writing. Naturally, written form significantly aids efforts to prove that the clause’s legitimacy. The topic at hand, however, is not evidence rules, but whether written form is a formal requirement even when the contents of the clause are provable through other means. It is hard to deduct any such requirement from the law, though there appears to be a requirement for the title retention being part of the original sales contract:

The Contract Law article 134 stipulates that “concerned parties may in [a/the] purchase and sale contract agree that if the buyer fails to pay the price or other obligations, the ownership to the subject matter remains in the seller”. The wording “in [a/the] purchase and sale contract” (“在买卖合同中”) hints at a legislative intent for the clause to be part of the

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<sup>145</sup> The translation at LexisNexis China is flawed. More accurate: Bufford, pp. 38–54.

underlying agreement, especially given the definition of a sales contract in article 130: “a contract wherein the seller transfers ownership of the subject matter to the buyer, and the buyer pays the price”. A title retention agreement makes little sense without a sales agreement, and it would be illogical to conclude a title retention agreement after the seller transferred ownership under the original agreement. By then, the ownership would no longer be the seller’s to retain.

However, if the contract was concluded but the object undelivered, the seller would still have ownership under the Contract article 133 and the Property Law articles 6 and 23. In such cases, the question supplementary title retention agreements could arise. Recognition of such schemes would not resonate well with the wording “in [a/the] sales contract” of the Contract Law article 134. Furthermore, the seller would already be contractually obliged to perform under the original contract, and if the buyer signed the supplementary title retention clause, in reality he would forfeit existing rights to the subject matter.

Article 34 of the Bankruptcy Provisions (II) also seems to support the claim that a sales contract must contain the retention clause if there is to be one. It is slightly more ambiguous, as it deems the contract incompletely performed where the two parties to a sales contract have “agreed in [a/the] contract” upon title retention. As the Chinese language does not employ definite articles before nouns, it is unclear whether the statute refers to a contract or the sales contract. In light of the Contract Law article 134 reiterating the term ‘sales contract’ in both instances, the logical conclusion seems to be that one cannot add supplementary conditions for transferring of ownership after agreeing on the transfer itself. The law is however unclear concerning this.

The statutes are also silent as to whether there are other perfection requirements for title retention clauses. Wang, who led the work on one influential draft of the Property Law, seemingly takes this to imply that there are no perfection requirements. In his inquiry into uncertainties of Chinese title retention,<sup>146</sup> he notes lacking clarification of several important questions in the Bankruptcy Provisions (II) and the Sales Contract Interpretation. These include the detailed scope of title retention clauses, the mechanisms of the buyer’s right to performance, detailed conditions and procedures for the seller to exercise the repossession right, and the problem in question: any procedure for registration of retained ownership.

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<sup>146</sup> Wang 2014.



Wang states that “China has not stipulated provisions on this, and as this remains a rather controversial question, the Sales Contract Interpretation avoids the question”, before listing the drafters’ supposed reasons for why registration procedures are unnecessary for the *inter partes* effect, including promoting transactions, reducing their costs and protecting lawful interests of the concerned parties. Wang himself, holds that title retention clauses remain a sort of security interest without a method for ensuring public notice, and that registration procedures should be established for all relevant parties to be protected; the seller, the buyer and third parties.

At present, title retention clauses seemingly do not require neither written agreement, though there seems to be an expectation of the clause being part of the underlying sales agreement, nor any other perfection acts. This is in stark contrast to the security interests that fall within the scope of the Chinese Guarantee Law.<sup>147</sup> This does not imply that a title retention clause gives the seller an unconditional right to return of the goods upon the buyer’s default, as the clauses are subject to certain limitations.

### 4.1.3 Termination

While the Bankruptcy Provisions mentioned in subchapter 4.1.1 clearly leave ownership to assets under a valid title retention clause with the seller, they do not necessarily allow the seller to reclaim sold assets until the buyer has performed his obligations in full.

It is noteworthy that retention of ownership only applies to movable property, according to article 34 of the Sales Contract Interpretation. This makes sense, as immovable property is subject to registration. Had title retention clauses been acknowledged for immovable property, they could undermine the registry’s reliability.

Under the Sales Contract Interpretation article 36, two events terminate the owner’s right to repossession: 1) the buyer’s payment of 75 percent or more of the purchase money and 2) *bona fide* acquisition by third parties.

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<sup>147</sup> See chapter 5.

## 75 percent payment

Where the buyer has “paid 75 percent or more of the subject matter’s total price”, article 36 of the Sales Contract Interpretation stipulates that the courts shall not sustain the seller’s claim to take back the asset.

According to this provision, the remedy of taking the unpaid goods back through the estate administrator under the Enterprise Bankruptcy Law article 38 only applies to situations in which 74 percent or less of the total price is paid.

One might object that such a rule is unnecessary for a balanced restitution, since the Enterprise Bankruptcy Law article 17 would entitle the buyer, and thereby the estate, to a refund of the purchase price in any case. However, one may argue that contractual performance is commercially favourable, rather than resorting to termination and restitution. Where mutual performance is nearing completion, there is all the less reason to terminate, and perhaps one should not see the rule primarily as a remedy for ensuring contractual balance, but as a vehicle for contractual fulfilment.

However, bankruptcy administrators often have discretionary powers to terminate or continue contracts not yet fully performed, as Chinese administrators do under the Chinese Bankruptcy Law article 18. Whether this authority applies to contracts with title retention clauses is resolved by article 34 of the Bankruptcy Provisions (II). Article 34 stipulates that where ownership under a title retention sale has yet to transfer when one party goes bankrupt, the courts shall deem the contract incompletely performed, and the administrator “has the right to decide whether to cancel or continue performance of the contract under article 18 of the Enterprise Bankruptcy Law”.

This raises the question of whether the 75 percent limit binds the administrator. While the Sales Contract Interpretation from 2012 left this question unanswered, the later Bankruptcy Provisions (II) addressed it in detail:

Under article 35, the administrator of a bankrupt seller may continue the original contract and reclaim the sold goods if the buyer defaults on payment, transfers or improperly disposes of the assets. However, third paragraph clearly states that the exceptions for both *bona fide* acquisition and for 75 percent payment apply to the administrator’s repossession right. While the discretion to terminate contracts gives the administrator rights that the debtor would not

have, these limits to repossession are clear reiterations of the main rule of the estate being limited to the debtor's own rights, resorting to payment or compensation where the asset cannot be returned. Under article 36, the administrator may also terminate the contract and repossess the property through the courts. Yet, in doing so, the buyer's claim to his purchase money could become a priority claim (a 'common benefit debt' paid before unsecured creditors' dividends), unless the buyer breached the contract.

Where the buyer is bankrupt, article 37 authorises the administrator to continue the contract, making performance due from acceptance of the bankruptcy petition. Still, the administrator's transfer, default or improper disposal would evoke the seller's right to repossession, again limited by the exceptions for *bona fide* acquisition and 75 percent payment. As under article 36, non-returnable assets result in the seller having a priority claim.

The administrator may also terminate the contract under article 38, entitling the seller to return of property, and to offset any loss to the asset's value against the purchase price before returning the remaining price to the buyer's estate. Should the loss exceed the purchase price, the courts will render the remaining loss a priority claim at the seller's request.

In sum, the interpretations of the Supreme People's Court seemingly favour contractual fulfilment where the buyer has neared complete payment or established a third-party interest in the asset by means of sale or other unauthorised disposal. Where the administrator may cancel the contract and return assets, the provisions aim at full restitution of claims arising from the termination through priority rules. Although detailed in nature, the provisions still leave several matters unattended. Wang holds that future interpretations should address whether defaulted payment must consist of several instalments or persist for a certain amount of time to warrant repossession.<sup>148</sup> He holds that a defaulting buyer should be entitled to a reminder and a redemption period. For now, the seller's right to repossession seems hindered only by a *bona fide* third party and the 75 percent threshold.

#### **4.1.4 Are extended retention of title clauses possible?**

The German retention of title clauses come in three main varieties, ranging from the simple retention of title clause, to two categories of extended retentions of title that must be agreed

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<sup>148</sup> Wang 2014.

specifically, giving the seller a better right than a simple retention clause would. Chinese property law's Germanic origins could suggest similar extensions in China, and the paragraphs below will discuss whether such extensions exist.

### **Retention against other claims: *Erweiterte Eigentumsvorbehalt***

One category is the so-called *erweiterte Eigentumsvorbehalt*, under which the secured asset not only secures its purchase price, but also any other claim the seller may have against the buyer (*Kontokurrentvorbehalt*),<sup>149</sup> or even claims against legal persons that the buyer is associated with (i.e. sister companies), although they are not parties to the contract (*Konzernvorbehalt*).<sup>150</sup>

In Chinese law, one may debate whether the law is actually silent regarding similar constructs. The Contract Law article 134 lets the parties agree that ownership remains with the seller “if the buyer fails to pay the price or perform other obligations”. As the law only refers to the buyer's performance, it seems unlikely that the parties may agree that ownership transfer depends on a third party's performance.

Still, one could imagine that the buyer's obligations under the contract included both paying the purchase price, providing and fulfilling a guarantee for outstanding debt of a sister company under chapter 2 of the Guarantee Law and thereby circumventing the limitation through the “other obligations” alternative in the Contract Law article 134. This is unclear under applicable law, yet as the statutes seemingly stipulate retention and passing of title as effects to the contracting parties' conduct, it seems unlikely for the law to permit the German *Konzernvorbehalt*.

As to extension of the security to other claims between the contracting parties through a *Kontokurrentvorbehalt*, the wording “paying the price or other obligations” leaves more to uncertainty. One might argue from the context of stipulating the retention of title “in a sales contract” that “other obligations” refers to obligations under the same contract. Yet, the mere presence of an alternative condition for title retention besides failing to “pay the price” could suggest that Chinese title retention clauses are not merely intended as security for purchase

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<sup>149</sup> Konow, p. 123 with further references.

<sup>150</sup> Ibid. Both variants are controversial, and according to Kieninger (ed.) pp. 418–419, *Konzernvorbehalt* clauses have since 1999 been void under § 455 BGB section 2 (now § 449 BGB).

money. However still, there is a difference between extending the security beyond the purchase price and extending it beyond obligations arising from the contract containing the retention clause.

Furthermore, guarantees, mortgages and pledges are of a strictly accessory nature under Chinese law (see chapter 5), and subject to a specificity principle requiring contracts to state the amount of money secured, apart from contracts on ‘ceiling mortgages’ or ‘ceiling pledges’ (which I will collectively refer to as ‘ceiling charges’). If rules on Chinese retention of title clauses are interpreted so liberally that they may also secure other claims between the contracting and/or third parties, they could easily circumvent the limitations on establishing security interests imposed by the Guarantee Law articles 15, 39 and 65, and the Property Law articles 185 and 210.

Perhaps the strongest argument against extending title retention to other claims is the principle of accessoriness, clearly stated for mortgages in the Property Law article 192. Article 192 not only stipulates that the mortgage right “may not be independently transferred” and therefore is inseparably connected to a specified, underlying claim, but also that it cannot be “used as security for another claim”.<sup>151</sup> The purpose of title retention clauses is shared with mortgages, pledges etc., namely securing a transaction. Therefore, the retention of title rules should not be interpreted so that they undermine the bearing principles of Chinese security interest law, although title retention clauses are not “security interests” (“担保”) according to the legal definition in the Guarantee Law article 2 (2).

Moreover, the abovementioned rule on 75 percent payment of the purchase price precluding the seller’s right to repossession should imply that 75 percent payment, let alone 100 percent, would have the courts dismiss repossession on the grounds of other, unpaid claims.

In conclusion, retention of title schemes such as *Konzernvorbehalt* and *Kontokurrentvorbehalt* would have little support in the statutes and be thoroughly inconsistent with basic principles of Chinese security interest law, and therefore inadvisable

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<sup>151</sup> The LexisNexis translation “used as a guarantee for other obligee’s rights” is inaccurate in two respects. First, generic Chinese term “担保” in article 192 should be translated as “security interest”, while “guarantee” is “保证” in the Guarantee Law (an act which, as its Chinese name is “担保法”, should rather be called the Security Law or Collateral Law). I have still used Guarantee Law in line with official translations. References to the Security (Interest) Law or Collateral Law in cited literature refers to the same act. Second, “[O]bligee’s right”, in the Chinese version “债权”, refers to any creditor right, and translates to “claim”. Thus, the statute refers to any other right, not merely the right of another creditor.

as security against a buyer's insolvency. Where the seller is insolvent, one cannot take for granted that a buyer would have to return movables bought with an alleged extended retention of title clause, if the seller's claims arising from the purchase itself were fulfilled.

### **Retention of assets for sale or improvement: *Verlängerte Eigentumsvorbehalt***

The other category of extended title retention clauses safeguards the seller's retained ownership in situations where he might otherwise have lost ownership under a simple retention clause. One variant, the *Vorausabtrennungsklausel*, lets the original, secured seller acquire his buyer's rights as a seller against a third-party buyer in a subsequent sale.<sup>152</sup> Alternatively, the original seller could by means of a *weitergeleitete Eigentumsvorbehalt* impose on his buyer to include a title retention clause in the subsequent sales contract with the third-party buyer in such a manner that the original seller could enforce his right towards the second buyer.<sup>153</sup> Chinese statutory law does not explicitly recognise such schemes, and whereas the German rules on these title retentions have been developed in the judiciary branch, there seems to be no mention of the matter in Chinese judicial interpretations or guiding cases.

For such clauses to be necessary, the law must dictate that a seller loses his ownership upon subsequent sale between the original buyer and a third party, or upon the asset being processed, commingled or combined with another asset. Sales are regulated by the Property Law articles 106 and 108 on *bona fide* purchase, and the Sales Contract Interpretation article 36 (2) explicitly dictates that a subsequent *bona fide* purchaser prevails over the original seller in a title retention sale.

The question remains as to the processing or commingling with other assets. The Chinese statutes are remarkably silent on this point, though there is widespread consensus that property rights in such assets are lost. The reason is this: Although Chinese law does not provide specific conditions for when property rights are lost in these circumstances, it does presume that they are. The Guarantee Law Interpretation article 62 stipulates that a mortgage is valid and effective over payable compensation "where processing, commingling or processing causes ownership to pass to a third party". Furthermore, the mortgage is under

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<sup>152</sup> Konow, p. 122.

<sup>153</sup> Ibid.

article 62 effective over any attached, processed or commingled assets acquired by the mortgagor by such means, and over the mortgagor's share in the resulting asset where the above circumstances renders him a co-owner. Consequently, the article presumes that an asset's processing, commingling or attachment to another asset may result in the mortgagor's ownership being acquired from, lost to or shared with a third party. How to decide between these three results remains uncodified.

While the statute refers to compensation arising from a lost mortgage right, the institute of property acquisition based on processing, commingling or combination, is general. This institute is known, and hereinafter referred to, as *tianfu* (“添附”, approximately translating to “addition and attachment”). The specifics of *tianfu* are not inferable from applicable law, and until further clarification from China's legislature, I may only refer to opinions in legal theory, which distinguishes between the three categories combination, commingling and processing.<sup>154</sup>

As for combination, Cheng maintains that where movables are combined to become an important part of an immovable, the movable loses its nature of economic independence and the ownership to it is lost, whereas ownership to the immovable expands to include the movable.<sup>155</sup> He further holds that combination of two movables creates a “compound property” (“合成物”). If one of the assets composing this compound property can be considered the ‘main property’ (“主物”), in light of the assets' value, usefulness, nature and common trade practices, then the owner of the main property quashes any other person's ownership to the remaining assets and becomes the owner of the compound property in its entirety. As an example, Cheng argues that if A owns a chair and paints that chair with B's paint, A becomes the owner of that paint in doing so.

In cases of commingling or mixture, the assets are mixed to become practically inseparable. According to Cheng, the task is again to determine the main ingredient and holds that the coffee will be the main asset, and the creamer the addition,<sup>156</sup> whereas Liang & Chen trade creamer for sugar.<sup>157</sup> On the effect of commingling, Liang holds that the respective owners are in principle co-owners by proportion of their assets' respective values at the time they

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<sup>154</sup> Wang (ed.), p. 224.

<sup>155</sup> Wang et. al., p. 412.

<sup>156</sup> Ibid., p. 413.

<sup>157</sup> Liang & Chen, p. 206.

were mixed, yet that an eventual owner of a ‘main property’ should prevail. He also finds that the losing owner may have his loss compensated under unjust enrichment rules, and finally that a mortgagee retains security over any due compensation from the prevailing acquirer to the losing mortgagor, mortgagor’s original *and* acquired property, or the mortgagor’s share in co-owned property.

As to processed goods, legal opinion seems also to regard the question as one of determining the main “part” between the physical components and the work done to them. In Cheng’s words, the Chinese law uses “a broad processing concept” (“广义的加工概念”), and does not merely include work resulting in a new product, but also work which “does not produce a new property, but carries more value than that of the materials”.<sup>158</sup>

Thus, it is rather clear that an owner forfeiting possession of property, such as the seller in a title retention sale, incurs a risk of losing the property under Chinese law if the asset loses its economic identity. However, the particulars of the regulations are vague, as paper law merely mentions possible outcomes, and not the way to them.

The conclusion should still be that there is an area which extended title retention clauses similar to *verlängerte Eigentumsvorbehalt* could function within. Then, the question arises: Would such clauses be recognised in courts?

The first statute of the People’s Republic of China to deal with consequences of *tianfu*, article 86 in the GPCL Opinions, states that where a non-owner “adds appurtenance to another person’s property that he uses”, and the owner agrees to the addition and “has agreed on how to deal with the appurtenance”, they are to be followed. If there are none and negotiations fails to bring about a solution, the owner may request dismantling if possible, or a return after conversion to money if dismantling is impossible, all while holding the non-owner liable for any loss. Yet, it is noteworthy that “non-owner of property” in the Chinese text is formulated as “非产权人”. As “产权” means ‘right to an asset’ in the broad sense, whereas ‘right *in rem*’ is “物权” as in the “物权法” or ‘Property Law’, the statute could be interpreted as merely recognising agreed contractual obligations arising from adding appurtenance.<sup>159</sup>

Acknowledging clauses on proprietary aspects will often impose contractual effect on a third

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<sup>158</sup> Wang et. al., p. 413.

<sup>159</sup> Ibid., p. 412, wherein Cheng seems to conclude on the provision’s obligatory nature.



party, at least where a third party is adding appurtenance. Still, Cheng holds that one “in the spirit of article 86” could recognise clauses on ownership to the asset post-process, and that one in the absence of a clause could give ownership to the person providing the most value to the new product, be it the owner of the materials or the person processing them.<sup>160</sup>

In conclusion, it seems uncertain whether current Chinese law recognises *erweiterte Eigentumsvorbehalt*. Recognition of clauses stipulating that the buyer does not quash the seller’s ownership through adding appurtenance himself is perhaps less controversial than recognition of clauses affecting third parties, yet somewhat unclear. As the draft for the remainder of the future Civil Code is expected in the latter half of 2018, one may hope for clarification in the near future.

## 4.2 Norway

### 4.2.1 Retention of title or mortgage right?

The Norwegian Security Interest Act §3-14 stipulates that “In sales of movable property, [one] may agree upon a security interest in the [property] sold (“salgspant”)”.

Like Chinese retention of title clauses, Norwegian *salgspant* is limited to the sale of movables, which is natural, considering the importance given to the reliability of immovable property registration. Here, the common roots in German continental law result in a shared trust in land registers (in Germany referred to as *der öffentliche Glaube des Grundbuchs*). Neither does the general rule in Norwegian Security Interest Act §3-15 extend to registrable movables, such as ships, motorvehicles and aircrafts, governed by special rules.

Whereas the Chinese Contract Law refers to actual retention of ownership similar to German *Eigentumsvorbehalt*, the Norwegian Security Interest Act § 3-14 refers to retention of a right more similar to a Chinese mortgage, retaining only a security interest while passing ownership on to the purchaser. This is apparent from the wording “security interest” (“panterett”) which under Norwegian law does not imply any ownership for the holder. The parenthesised term “*salgspant*” literally translates to “security interest for sales”, not unlike the “purchase money security interest” known in US law. The UCC article 9-103 on the

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<sup>160</sup> Ibid.

purchase money security interest is in fact an accurate equivalent, due to its purpose. The Norwegian Security Interest Act provides that *salgspant* in the sold good can be agreed on “to secure...a) the seller’s claim to the purchase money including interests and costs, or...b) loans that a third-party lender provides the buyer with to fully or partially pay claims under item a), and that the lender pays directly to the seller”.

The provision is considerably narrower than the “price or other obligation” alternative of the Chinese Contract Law article 134, seemingly ruling out any extension of the Norwegian *salgspant* to other claims than the purchase money by means of the aforementioned *Kontokurrentvorbehalt* or *Konzernvorbehalt*. In the preparatory works to the Security Interest Act, the legislative committee details the history of non-possessory security in movables, from general recognition via gradual restriction, and to a proposed law “nearly implying a revival of the old generic security interests”.<sup>161</sup> However, the committee gives a close-ended list of security interests in movables: 1) pledges, 2) (non-possessory) security in movables subject to registration, 3) floating charges for an enterprise’s stock and movable equipment used in the course of business, and finally 4) *salgspant*, which according to the committee “corresponds to current law’s retention of title for security purposes”. The existing terminology was due to the historic prohibition against non-possessory security in individual movables, resulting in a construction based on ownership.<sup>162</sup> The renaming to *salgspant* was intended to reflect how the interest was indeed a security interest, and its usage was accepted because it only secured the purchase money and therefore did not separate more values from other creditors than the debtor was provided through the asset.<sup>163</sup> The committee found that “this framework is restricted to securing purchase credit, and can thus only be used in relation to purchase of the secured asset”, and furthermore that the rules “replace the now practised regime of retaining ownership (...) until full payment (retention of title)”.<sup>164</sup> The solution clearly rejects the German option of extending the secured claim to other claims.

It is conceivable that contextual interpretation of the Chinese Contract Law article 134 could lead to a similarly narrow scope, cf. the wording “in a sales contract”, but the Norwegian equivalent is unambiguous: *salgspant* is one party’s charge over its own performance to secure the counterparty’s corresponding counter performance, and that alone.

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<sup>161</sup> Innst. O. nr. 19, p. 10.

<sup>162</sup> Skoghøy 2014, p. 98.

<sup>163</sup> Ibid.

<sup>164</sup> Innst. O. nr. 19, p. 10.

Norwegian law goes so far as recharacterising alleged title retention clauses as security interest agreements. The Norwegian Security Interest Act § 3-22 stipulates that where the seller or third-party lender has “retained ownership to the sold goods until full payment of the purchase money or the loan, or a right to take it back upon default, the relationship shall be regarded as an agreement on *salgspant*”.

This provision corresponds with US law, namely the Uniform Commercial Code article 2-401 (1) second sentence: “Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest”.<sup>165</sup>

Ownership passing to the debtor appears to be a significant difference from articles 2 and 3 of the Bankruptcy Provisions (II), that formally label property with security interests as debtor’s assets, and property that the debtor has yet to obtain ownership to under a title retention clause as the seller’s assets. Taken literally, retention of title clauses would seem to withhold assets from the buyer’s bankruptcy proceedings in China altogether, whereas the Norwegian equivalent scheme would find the goods as debtor’s assets, albeit with a security interest. However, as Bufford points out, both the Chinese bankruptcy administrator’s right to rescind or execute sales contracts with title retention clauses and the hindrance of the 75 percent payment rule in reality leave such assets under bankruptcy administration. These facts diminish the goods’ difference from secured assets of the debtor, and so the *de facto* difference is not as absolute as it would appear. Still, the Norwegian regime only allows for securing the value of the purchase money, attributing any surplus to the estate. Repossession under title retention agreements in China does not impose a duty to attribute values exceeding the purchase money to the estate, unlike Chinese pledges, mortgages and liens (see chapter 5).

In this regard, the nature of the Chinese title retention clause is closer to that of German continental law, whereas Norwegian *salgspant* owes more to its US relative; the purchase money security interest.

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<sup>165</sup> See also McCormack, p. 72.

## 4.2.2 Establishment and perfection

### Form

Whereas the Chinese statutes on title retention do not contain any clear provisions on the form of the title retention clause, the Norwegian Security Interest Act § 3-17 sets a somewhat higher threshold for a *salgspant* agreement. The provision's second paragraph, titled "*Rettsvern*" (here meaning 'perfection'), provides that "[i]n other purchases than consumer purchases, *salgspant* must at the latest be agreed upon when the sold good is surrendered to the buyer", exempting such agreements from the strict requirement of written contract for consumer sales, cf. first paragraph. Still, if an agreement on *salgspant* between professional "is not written, it must be confirmed in writing by one of the parties without undue delay after the delivery", thereby imposing some degree of written form to ensure *notoritet*. As implied by the term "*rettsvern*", the form requirement is not a condition for validity, but perfection.<sup>166</sup>

### Specification

Furthermore, perfection of a Norwegian *salgspant* is also subject to a specification requirement, as § 3-17 (4) prescribes that the agreement "must specifically mention the things that the security interest shall include and the purchase price or purchase loan that it shall secure". In Chinese property law, the general specificity principle is read in the definition of 'property rights' ("物权") in the Property Law article 2 (3). The current statutes on Chinese retention of title does not explicitly prescribe an application of the specificity principle. Naturally, due to the clause being part of a sales agreement, a degree of specificity is implicit, but the mandatory written confirmation and express duty to specify the monetary scope of the Norwegian *salgspant* are much more similar to what Chinese jurists label as 'classic' security interests; mortgages and pledges. This is unsurprising, as Norwegian *salgspant* is indeed one such 'classic' security interest.

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<sup>166</sup> Skoghøy 2014, p. 134.

## Intention

Another difference from title retention is how Norwegian law limits the material scope of *salgspant*. Even where any specification requirement is fulfilled in a contract that is written or confirmed in writing, *salgspant* agreements securing sale of goods intended for the buyer to resell prior to paying the original seller, are rendered ineffective even between the parties.<sup>167</sup> Whether the second buyer acquires the property with a security interest or without it, is governed by § 3-15, prohibiting *salgspant* in “a thing that the buyer has the right to resell before it is paid”.

The wording makes it clear that *salgspant* cannot be validly established upon assets that the buyer has an explicit, agreed right to resell prior to payment. However, Rt-1992-438 (GMAC) casts the provision’s net even wider. In short, the automobile sales company Auto Service A/S had purchased cars from General Motors Norge A/S, the latter having *salgspant* in the cars to secure the payment. The agreement between the parties, which also included General Motors’ financing company (GMAC), provided that the ownership of General Motors should be retained until the cars were paid, explicitly prohibiting legal disposal such as sale, pledging, mortgaging, etc. Still, with some reluctance on GMAC’s part, Auto Service started to conduct irregular sales, sometimes accepting late payment from the resale, before GMAC received payment for the original sale. When Auto Service later went bankrupt, GMAC demanded return of the vehicles, which according to the estate belonged under a bank’s floating charge.

In interpreting the wording of the provision, the Supreme Court referred to the preparatory works’ statements: The original draft provision was formulated as prohibiting *salgspant* in “things bought with the intention of resale, if the seller had to consider this a likelihood”.

According to the later proposition to the legislature, the final, proposed provision differed from the original proposition in limiting the resale rule to “instances where finished goods are sold to retailers of such goods with the intent of resale. Simple assembly for the buyer to perform, or similarly simple operations, are in this regard insufficient to regard as processing”.<sup>168</sup>

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<sup>167</sup> Skoghøy 2014, p. 104 with reference to Ot.prp. nr. 39, p. 122.

<sup>168</sup> Innst. O. nr. 19, p. 18.

The Court found that the committee sought to modify the rules in two ways, one regarding the now codified processing, accession and commingling situations, the other by limiting the resale rule:

*“It also included cases where the buyer had no resale right versus the seller, but the seller had to assume the buyer to resell. The committee wanted to omit the latter cases. What remained was for salgspant to be forbidden in the typical resale cases (...)”*.<sup>169</sup>

In this case, however, GMAC purported that unlike an earlier case in which the resale rule had its origin, Rt-1963-109 (the Scooter Case), it was agreed that no resale right existed prior to paying GMAC for the individual vehicle. GMAC further held that the proposed law placed *salgspant* in things to be processed or incorporated before sale in higher priority than floating charges over stock. Since these goods were clearly intended for sale, a mere intention of resale could not invalidate the security interest.

Addressing this, the Court found that the resale rule did not apply only in absence of express agreement on no resale right, referring to the committee’s intention as understood in the quote above:

*“When [the statutory text] says that salgspant cannot be agreed in things that the buyer has the right to resell before it is paid, it is meant to express that salgspant cannot be agreed in things that the buyer shall have the right to receive for sale before it is paid”*.

Furthermore, the Court found that although the law did recognise valid *salgspant* in things to be processed or incorporated before sale, it did not imply recognition in other cases. Under dissent (3-2), the Supreme Court upheld the High Court’s judgment, finding that GMAC’s *salgspant* was never established in the first place, thus recognising the floating charge holder’s right to the cars as maintained by the estate.

In legal theory, the judgment is understood to widen the scope of the *salgspant* prohibition beyond what the wording in the Security Interest Act § 3-15 suggests. Skoghøy maintains that the critical question is not “whether the seller has the right to resell the goods before they

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<sup>169</sup> Rt-1992-438, p. 443.

are paid, but [rather] whether the goods are *intended for resale*". He further holds as a precondition for invalidation that the seller "is or ought to be aware of this [intention]".<sup>170</sup>

This also indicates that Norwegian rejection of the German *erweiterte Eigentumsvorbehalt*, the extended title retention scheme in which the parties agree that the right remains in the asset irrespective of any subsequent resale or processing.

Extending the right throughout resales makes little sense, as any intention of resale would render the *salgspant* non-existent from the outset. One could imagine a prohibition combined with a clause retaining title.

Since one cannot establish *salgspant* in assets for resale, it makes little sense to agree that the interest would remain after the resale, as the *salgspant* never existed in the first place. One could imagine a contract prohibiting resale while simultaneously retaining ownership. However, the Norwegian Security Interest Act § 3-2 states that movables not subject to registration must be delivered in order to perfect any security interest in it, except where otherwise provided by law, cf. § 3-1.

The Security Interest Act only exempts floating charges and *salgspant* as limited, statutory exceptions to the general prohibition. Extending the security interest to remain after a resale without statutory grounds would run contrary to basic rules of Norwegian security interest law. Hence, the *salgspant* would only remain if 1) the second purchaser was not in good faith pursuant to the Bona Fide Acquisition Act § 1 or 2) the secured object was a motor vehicle, ship or aircraft subject to registration, and the *salgspant* was registered, cf. § 4.

As for processing and commingling, §§ 3-19 and 3-20 provide statutory rules for determining whether the right is lost or not, irrespective of agreements between the parties. These rules will be detailed below, but it is clear that Norwegian *salgspant* leaves no room for any such contractual extension as in German law on title retention.

### 4.2.3 Termination

Unlike Chinese law, which is somewhat vague on the proprietary consequences of processing, combination or commingling of assets under title retention or security interests, the

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<sup>170</sup> Skoghøy 2014, p. 104.

Norwegian Security Interest Law gives rather clear provisions concerning these occurrences. The following occurrences do not lead to the *salgspant* never having been effective as an intention of resale could, but instead quashes an otherwise valid security interest.

### **Fulfilment of the claim**

As with Chinese mortgages (see chapter 5), the security interest ceases to exist upon payment of the purchase money. This is implied by § 3-15 stipulating *salgspant* as security for the price alone. Where there is no outstanding purchase money, there is nothing to secure and there is no room for extending *salgspant* to other claims. Yet, is there a similar threshold for enforcement as the Chinese rule of rejecting repossession rights after 75 percent payment?

The Norwegian Enforcement Act chapters 8 and 9 allow for satisfaction of claims secured by *salgspant* either by forced sale or by, as a creditor would under a Chinese title retention sale, repossessing the asset. Before a 2010 revision, the Norwegian Enforcement Act § 9-1 on such repossession referred to conditions in the now repealed Norwegian Credit Purchase Act § 15. The provision prohibited repossessing *salgspant* security unless “a) at least 1/10 of the credit purchase price or at least two instalments or the remaining debt has not been paid one month after it was due” or “b) the purchaser exposes the security to considerable risk”. After a 2010 revision, the Enforcement Act § 9-1 instead refers to the Financial Contract Act §52 and its conditions for debt maturing prior to the agreed term which, among others, include situations in the Security Interest Act § 1-9 that would mature the secured debt. They generally concern “material breach” of the credit agreement, insolvency, abuse of possession and other circumstances infringing upon the value of the security. What constitutes a material breach is a question under the law of obligations, but it is worth noting that current Norwegian law seemingly does not impose a specific minimum percentage of outstanding debt for repossession to be possible.

### **Combination and commingling**

In contrast, loss of security interest due to reworking or combining the asset with another may leave the creditor with next to nothing if such loss happens prior to payment. As for combination and commingling (“*sammenføyning*” refers to both, as it means physical attachment of several things), the Security Interest Act § 3-19 provides that the *salgspant* is



lost when the asset is combined with “immovable property another main object” in “such a manner that separation would lead to disproportional expenses or unreasonable loss of value”.

What Skoghøy calls “a natural economic unit”, i.e. where one part is useless in lack of the other, is insufficient.<sup>171</sup> The reference to “another main object” resembles the theoretical approach to *tianfu* under Chinese law, where the assessment of which object is the “main object” decides which party acquires another’s right. Where co-ownership (or similar coexistence of rights) is not an alternative, this approach is unsurprising. But whereas Chinese legal theory seems to hold shared interests as an alternative, Norwegian *salgspant* will either remain or be quashed. According to Skoghøy,<sup>172</sup> something is a main object where it would be regarded as such under the Incidental Ownership Act § 3, with reference to the preparatory works presuming the acts to be “in principal compliance” with one another.<sup>173</sup> He formulates the point as whether the alleged main object “can be identified in the new object and constitute the most significant element of it”. This corresponds with Cheng and Liang’s theories on identifying the main object (“主物”) in compound (“合成物”) property under Chinese law. The security interest is quashed where the expense is “disproportional” or the loss “unreasonable”, two thresholds open to interpretation, demanding clarification beyond what the statute provides.

In Rt-1991-909 (the Brown Order), the Appeals Selection Committee of the Supreme Court found that “costs that would be incurred also if the *salgspant* was invoked before the combination, shall not be regarded”. The Appeals Selection Committee agreed with the High Court that “it is primarily physical damage and loss falls in under the term ‘loss of value’, not that the separate values of the main object and the part together are worth less than the value of them united”. The High Court had found that the question of unreasonable loss had to relate to the costs of disassembling and removing secured parts incorporated into the main object in question (here: excavators), as well as the costs of incorporating new parts. While unable under procedural rules to scrutinise the concrete assessment of whether the threshold “unreasonable” was passed, the Appeals Selection Committee did not find the interpretation

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<sup>171</sup> Skoghøy 2014, p. 108 with further references to Rt-1991-909 (the Brown Order).

<sup>172</sup> Skoghøy 2014, p. 108.

<sup>173</sup> Rådsegn 8, pp. 118 and 156 stated that the situation could resemble that of the Incidental Ownership Act, but proposed a different solution not resulting in law.

incorrect and thus accepted that i.e. costs of transporting the goods to the holder of the *salgspant* and delivery costs for new parts had to be disregarded.<sup>174</sup>

The terms “expenses” and “loss” can overlap, and the fact that they must be “disproportional” or “unreasonable” does, from a linguistic interpretation suggest that the amounts must be reasonable or proportionate compared to something else. It is therefore believed that the amounts must be compared to the value of the object, and Skoghøy finds that costs of 100 000 kroner will not be sufficient for loss of *salgspant* if the secured asset holds a value of 5 million kroner. Yet, in a commentary to the act, he suggests that the threshold is also relative to whether the secured creditor knew of the incorporation, as does Konow.<sup>175</sup> The same consensus applies to the opinion that both losses and expenses must be regarded in a final, overall assessment of whether the detrimental effects are to result in loss of *salgspant*, also where the security interest concerns several assets.<sup>176</sup>

### **Processing or improvement**

Another instance when Norwegian law might quash security is after the debtor has processed or added to the asset. Under the Security Interest Act § 3-20, *salgspant* is lost where there “by processing or addition has taken place a not insignificant change in the sold good’s nature or value after being handed over to the buyer”. The wording implies that both reworking and simply improving can lead to this change in nature, and that change of nature and value are alternative causes for loss. This interpretation complies with the intentions apparent in the preparatory works,<sup>177</sup> where the committee found reason to tighten the rule following two widely cited cases mentioned below. Whereas the judgments had upheld change of nature and value as cumulative conditions, the committee found that “one on this point should tighten the conditions for the *salgspant* to remain: ‘not insignificant change in the sold good’s value’ and ‘not insignificant change in the sold goods nature’ should be alternative causes of loss”.

That would have reversed the verdict in Rt-1996-857 (the Piglet Case), where the prolonged feeding of piglets had increased their value, though not their nature. In the older Rt-1955-209 (Vågå Bruk), the processing of timber had altered its nature and its value, and the relation

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<sup>174</sup> Skoghøy 2014, p. 109 makes the same deduction.

<sup>175</sup> Skoghøy 2016, p. 384. Similarly: Konow, p. 99.

<sup>176</sup> Skoghøy 2014, p. 109–110.

<sup>177</sup> Innst. O. nr. 19, pp. 19–20.

between the two conditions was no determining factor. But giving “an exact rule about how big the change must be” was in the committee’s opinion “hardly appropriate”, and therefore left to the courts’ discretion. One should however note that the wording “not insignificant” indicates a middle ground between “insignificant” and “significant”, and that the threshold might not be insurmountably high. The wording “by processing or addition” also, as Konow points out,<sup>178</sup> requires a causal link between the change and the work on the asset so that “inflation or market related circumstances” does not terminate the right. There are also examples of this causal requirement in court practice, such as Rt-1990-128 (the Smolt Order) where the High Court found that otherwise improved smolt was still under *salgspant* as the value had not increased due to a lower market price. The Supreme Court’s Appeals Selection Committee, contrastingly, found this to be incorrect, as “the crucial point is, in the committee’s opinion, whether the additions have increased the value not insignificantly compared to its value without these additions”. Furthermore, it could not be a determining factor that the price was not higher “due to the market crashing in the meantime”.

Both positive or negative changes in value may result in loss. The preparatory works use the example of steel cutting for fitting onto a ship’s hull as an example, finding that although the processing of the steel would decrease its value rather than increase it, “one changes the nature of the steel as an object of sale by cutting it”. In the legislators’ opinion, this ought to lead in loss of the security interest.<sup>179</sup>

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<sup>178</sup> Konow, p. 99.

<sup>179</sup> Innst. O. nr. 19, p. 20

# 5 Security interests: When are debtor's assets not part of the estate?

## 5.1 Backdrop and outline

The question of whether the insolvent party has ownership to an asset is only a starting point for answering whether an asset is part of the estate. Under Chinese law, this is evident when one sees the Bankruptcy Provisions (II) article 3 in connection with the Chinese Enterprise Bankruptcy Law article 109. Under the Provisions' article 3, the courts "shall identify specific assets upon which the debtor has legally established a security interest as debtor's assets", while the Law article 109 prescribes how "right holders enjoying security interests to debtor's specific property enjoy a right to preferential payment from such specific property". According to the Bankruptcy Provisions (II) article 6, bankruptcy costs and mutual benefit claims may only be satisfied through any "remaining part" ("剩余部分") of secured property after the security is realised or terminated. The Norwegian Security Interest Act § 1-1 stipulates that "a security interest" ("panterett") is a "separate right to seek satisfaction for a claim (the secured claim) in one or more specific assets (the security)". Both jurisdictions' laws imply that although the asset is owned by the insolvent debtor, its proceeds cannot satisfy unsecured creditors' claims before paying off secured claims to creditors with existing security interests in that particular asset.

Thus, security interest rules are as significant to ascertaining the estate's scope as the rules on transfer of ownership. This chapter investigates circumstances under which the estate must recognise a security interest that allegedly withholds some value of the debtor's property from the estate.

It is unsurprising that pledges are recognised security interests in China and Norway,<sup>180</sup> as both the German *Pfandrecht* and the common-law 'pledge' largely concern the same right. Most jurisdictions have a variant of pledges, and their regulations are largely similar;<sup>181</sup> enforceability generally relies on possession. Mortgages, however, are more revealing to differing considerations, raising the question of which mechanisms safeguard verifiability

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<sup>180</sup> Cf. the Norwegian Security Interest Act § 3-2 and the Chinese Property Law article 208.

<sup>181</sup> Konow, pp. 55–60.

and public notice in lieu of possession, and is a more practical security where the debtor and the creditor are located in different countries.

Liens are practical where large-scale machinery is subject to maintenance, and while this thesis covers liens over non-registrable movables, the subject itself has a close connection to the maritime sector, an industry with a strong Sino-Norwegian connection. As Norway and China diverge on the implications of a lien, it is of interest to the comparison.

This chapter will therefore only detail mortgages and liens, omitting contractually agreed possessory security interests (pledges). For a general overview over security applicable to movables, the properties they may relate to and their perfection, please refer to Appendix A.

Yet, a comprehensive account of all aspects concerning mortgages and liens can hardly be given adequately in this chapter. Therefore, it will merely concern certain essentials: The requirements for mortgages' protection against the estate, the extent at which their scope may fluctuate from the time of establishment until bankruptcy, whether priority rules affect the estate's rights, and lastly; when the mortgage terminates. Before this, I will briefly examine the implications of a lien, albeit without detailing the liens' lifespan, as the focus is instead on how the security differs between China and Norway in terms of its legal nature.

## 5.2 The nature of liens

The term 'lien' holds different connotations in different jurisdictions. In the UK, the term 'lien'<sup>182</sup> merely refers to a non-consensual, possessory right to retain the debtor's assets to provoke payment (a retention right).<sup>183</sup> In the US, 'lien' is a generic term for collateral in general. 'Non-consensual liens', such as carrier's liens<sup>184</sup> or mechanic's liens applied by some states, are closer equivalents to the British concept, albeit with an implied right to forced sale.

The Chinese Property Law article 230 gives the possessor a right to withhold possession of the debtor's goods, a 'lien' (“留置权”). If one of the parties is not a business, article 231 requires the possession to arise from the “same legal relationship” (“同一法律关系”) as the

<sup>182</sup> At least the 'common-law lien', as opposed to the 'equitable lien', cf. McCormack, pp. 44–45.

<sup>183</sup> See i.e. Bridge, p. 170: “a passive right to retain a chattel (...) conferred by law”, and Gullifer in Beale et. al., p. 75.

<sup>184</sup> See UCC §§ 7-307 and 7-308.

debt. Yet, in business between enterprises, the creditor may also utilise possession arising from an unrelated relationship to the debtor. However, the Chinese lien is not a mere retention right, as article 230 gives the creditor a right to “seek preferential payment” (“有权就该动产优先受偿”) from the movable, and entitles him to its fruits (“孳息”). Under article 236, the possessing creditors may monetise the property in agreement with the debtor, or seek preferential payments through a sale or auction. This sales right differs from the mere retention right of i.e. England, and more resembles a pledge in effect. The difference from a pledge is that the possession was not obtained for security with the debtor’s consent. The sales right is restricted under article 236. If there is no clear agreement on a specific redemption period, the debtor may repay within two months, unless the goods are “difficult to keep” (“不易保管”).

In Norway, various statutes stipulate a retention right (“retensjonsrett” or “tilbakeholdsrett”), such as the Maritime Act § 54, the Carriage of Goods by Road Act § 20 (3) and Artisan Services Act § 46, giving the creditor in possession of a defaulting debtor’s goods the right to withhold the goods. However, these are codified examples of a general, non-statutory retention right.<sup>185</sup> Skoghøy maintains three basic requirements, namely that the claim secured “must be due”, that the retaining party “must have possession of the goods” and lastly that there is some degree of “connectivity between the claim and the possession”.<sup>186</sup> So far, the Chinese liens differ only concerning the third requirement, as they do not require the same legal connectivity between claim and possession in professional transactions.

However, the effects of a lien are somewhat different, as a Norwegian lien does not automatically imply a right to sell the property, and merely lets the creditor retain it, such as in England. Yet, there are far-reaching exceptions. One is an artisan’s right to sell unretrieved goods under the Right to Sale of Unretrieved Goods Act §§1 to 5. If relevant court proceedings are decided, the Act gives a sales right when the claim is at least three months due, the work is finished, and the creditor has encouraged the debtor to pay and release the lien and informed him of the alternative being forced sale. The procedure somewhat resembles the redemption period under the Chinese Property Law article 236, which requires the creditor to negotiate fulfilment terms or wait two months.

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<sup>185</sup> I.e. Rt-2006-1348 (Østlandske Autoberging) and Skoghøy 2014, p. 281.

<sup>186</sup> Skoghøy 2014, p. 284.

Other exceptions to the lack of sales right under Norwegian law are, according to Skoghøy, sales due to some degree of emergency, i.e. where the goods are perishable or decrease in value<sup>187</sup> or continued retention is costly or “especially burdening”.<sup>188</sup>

In addition, the Enforcement Act § 7-16 allows the retaining creditor to obtain distraint over the property to realise the claim, such as in Rt-1923-113 (Kubben). The latter case, concerning a maritime lien, acknowledged that such distraint would take priority over competing security interests and enabled realisation. Skoghøy takes the case as representative of a general rule; upon obtaining distraint in the retained asset, the distraint assumes the lien’s priority and the lienee may sell the asset, effectively combining the retention right with a sales right.<sup>189</sup>

Considering these exceptions, Norwegian liens will often offer the creditor a similar position as under Chinese law. Yet, China has a default rule resembling the US non-consensual liens, whereas Norway share with England the notion of mere retention as the default right, notwithstanding deviations in special statutes or certain areas of law.

## 5.3 Mortgages

### 5.3.1 General overview

#### Mortgages

Here, ‘mortgages’ refer to contractually established non-possessory charges over property; the secured creditor may satisfy his claim through certain property of the debtor, with the asset still in the debtor’s possession.

Some jurisdictions may take mortgages to imply transfer of ownership to the mortgagee.<sup>190</sup>

The Norwegian Security Interest Act § 1-1 defines the term (in Norwegian called “underpant”) as “a security interest where the disposal is not taken from the owner”, it is clear that the debtor holds both possession and legal ownership. The same applies to China,

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<sup>187</sup> Rt-1907-359 (Hver 8de Dag)

<sup>188</sup> Rt-1896-321

<sup>189</sup> Skoghøy 2014, p. 299.

<sup>190</sup> I.e. the English ‘legal mortgage’, cf. Gullifer in Beale et. al., pp. 83–84. In this chapter, a ‘mortgage’ refers to what British law would name a ‘charge’.

where the Property Law article 186 forbids agreements from prescribing that “ownership of the mortgaged property shall be attributed to the creditor when the debtor fails to pay his due debts” if such agreement is made before the debt is due. Thus, Norwegian mortgages (“underpant”) and Chinese mortgages (“抵押”) refer to the same concept. Neither mortgage equivalent implies a *lex commissoria* rule of claiming ownership upon default, and corresponds more to a civil law *hypothec*, English ‘charge’ or mortgage of US states taking a ‘lien theory’ approach to mortgages.

While mortgages are often created over rights to land and other immovable property, the Chinese Property Law article 180 also accepts mortgages over movables, such as “manufacturing facilities, raw materials, semi-manufactured goods and finished products”, “vessels and aircrafts under construction”, “means of communication and transportation” and “other property not prohibited from mortgaging”. Article 184 codifies such prohibitions, listing land ownership due to being state property, land rights owned by the collectives where they are not exempt by law, and properties with unclear or disputed ownership or right to use, confiscated, seized and supervised property.

Perhaps more significant is the provision’s prohibition of mortgaging schools, kindergartens, hospitals and other “facilities” (“设施”) of institutions or social groups for public benefit. The Chinese wording for “facilities”, “设施”, encompasses movables and immovables alike, and any financing of such property must be secured by other means, such as financial leasing or, perhaps, retention of title. The effect of title retention financing would resemble that of mortgages: The creditors’ satisfaction through such movables would have detrimental effects to the public interest. The statutes on title retention clauses only reject clauses over immovables, and contain no explicit prohibition on certain movables. Moreover, the Guarantee Law Interpretation article 53 stipulates that where such welfare undertakings mortgage assets “other than” (“...以外的财产”) the ones referred to in the statutes to obtain credit, the court “may consider the mortgage valid” (“人民法院可以认定抵押有效”). Still, the law does not indicate where to draw the line.

On the other hand, the purpose of title retention and mortgages is largely the same, as are the potential consequences to the public. While a similar prohibition of title retention to public welfare facilities could be consistent with article 184, the question appears somewhat unclear



at present. I will not detail further whether title retention is possible for public welfare facilities, and the Draft Civil Code might provide some clarification in late 2018.

Compared with China, Norway takes a more restricted approach to non-possessory security interests. The Norwegian scepticism to far-reaching non-possessory security interests for private persons is apparent in several respects. First, there is the prohibition in § 1-4 (1) against security interests encompassing “all that someone owns or will own”, a rule dating back to the Security Interest Act of 1857.<sup>191</sup> The various preparatory works detail the reasons for such limitations, and tend to emphasise the importance of available assets for involuntary creditors such as tort creditors and tax authorities, as their opportunities to secure claims are fewer.<sup>192</sup>

While Norway historically banned non-possessory security in movables, necessitating a title retention scheme, current law is more lenient in allowing non-possessory security in the form of *salgspant* in singular movables.<sup>193</sup> Still, as the Chinese Property Law article 180 further provides that movables permitted for mortgaging “may be mortgaged together”, Norwegian *salgspant* remains more rigid in both scope and purpose, and does not correspond to the Chinese mortgage. As for mortgaging goods collectively, Norwegian law only recognises such schemes under a floating charge. As non-possessory security without title retention is unavailable for movables in Germany,<sup>194</sup> both Norway and China diverge from the countries’ Germanic influences, although Norwegian law does so to a lesser degree.

## Floating charges

While normal mortgages refer to security over specific objects, floating charges (“varelagerpant”, “driftstilbehørspant” or more generally, “virksomhetspant” or “tingsinnbegrepspann” in Norwegian, “浮动抵押” in Chinese) refer to certain legal subjects mortgaging classes of assets without specifying individual assets or their overall amount, an English common-law invention<sup>195</sup> adopted by China in the Property Law of 2007. The Chinese Property Law article 181 stipulates that “an operator of an enterprise, individually

<sup>191</sup> Cf. Rådsegn 8, p. 29.

<sup>192</sup> For a concise summary: Ot.prp. nr. 26, p. 161.

<sup>193</sup> See i.e. Konow, p. 61, also noting exceptional singular mortgaging of certain goods in the Norwegian Security Interest Act § 3-8.

<sup>194</sup> Retention of title or transfer of title for security (“Sicherungsübereignung”) are the only alternatives, cf. Konow, p. 61 and pp. 120–133.

<sup>195</sup> Kieninger (ed.), p. 477. For a brief account of its invention, see Gullifer in Beale et. al., pp. 108–109.

owned business or agricultural manufacturing business” may mortgage “manufacturing facilities, raw materials, semi-manufacture goods and finished product currently owned or to be owned in the future”. Similarly, the Norwegian Security Interest Act § 3-4 allows only for “businesses enterprises” to create non-possessory security interests on “operating accessories” (“driftstilbehør”) that are “used in or designated for their business operations”. Such accessories includes movables such as “machines, implements, tools, furnishings and other equipment”, in addition to certain immaterial rights and exploitation rights, cf. §3-4 (2). This “operating accessory mortgage” (“driftstilbehørspant”) is subject to somewhat different rules from the alternative “stock mortgage” (“varelagerpant”) for “stocks of goods used in the business” under § 3-11, which relates to “raw materials, unfinished and finished goods and merchandise”, “fuels and other consumables” as well as “packaging for the products of the enterprise”. In addition, there are several specific equivalents for motor vehicles and construction machinery (§ 3-8), agriculture (§ 3-9) and fisheries (§3-11) that will not be detailed further.

These goods share the feature of being necessary to business operation, thus making it inconvenient if possible to pledge them while continuing operations. This is also an important reason for the floating charges’ invention and adoption.<sup>196</sup> Norwegian preparatory works emphasise how such goods through economic development have come to constitute ever-larger parts of an enterprise’s total assets, thus necessitating raising significant capital: “The need for credit can in such cases be large, and securing such credit may come with serious problems”.<sup>197</sup> Similar factors were key elements behind China’s expansion of mortgages in the Chinese Property Law, which introduced the floating charge. Williams & Lu hold that state owned enterprises “had much easier access to banks and financial markets than non-state, non-listed firms”, and that small and medium sized enterprises’ most valuable assets were often unsuited for pledging, resulting in such enterprises often resorting to the unofficial debt market.<sup>198</sup> Hence, making assets of small and medium sized enterprises (‘SME’s’) available as security became a priority that “would hopefully allow SME’s greater access to the formal banking sector and thereby bolster economic growth and development”.<sup>199</sup>

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<sup>196</sup> Gullifer in Beale (ed.), p. 108.

<sup>197</sup> Rådsegn 8, p. 30.

<sup>198</sup> Williams & Lu, p. 26–28.

<sup>199</sup> Ibid., p. 28.

However, these reasons apply primarily to commerce, and it is therefore unsurprising that floating charges are available exclusively to business enterprises under both Norwegian and Chinese law.

While Norwegian law divides general floating charges into two categories,<sup>200</sup> operating accessories and stock, their statutory contents are rather similar to the scope of the Chinese floating charge, securing both production equipment and products at any point in the production process. Operating accessories and stock alike must be mortgaged “in their entirety” under §§ 3-4 (5) and § 3-11 (3) respectively, yet with the reservations that one may mortgage separate parts of stock that appear as independent units, and that businesses with separately managed departments may mortgage one department’s goods alone.<sup>201</sup>

The implication of Norwegian floating charges’ division mainly concerns the debtor’s right to disposal: Under § 3-7, one may only replace or transfer operating accessories “in accordance with proper operation”, and may not “considerably reduce” the mortgagee’s security. Stock goods “may be freely transferred” within the debtor’s “normal business operations”. The Norwegian floating charges cover the relevant equipment pool of the enterprise or department, or the stock in trade or relevant part of such stock, “in its entirety, as it is at any time”. Where the enterprise sells property under the floating charge in accordance with normal or proper operation pursuant to the conditions above<sup>202</sup> and the buyer obtains perfection (see sub-chapter 3.3.3), the floating charge no longer includes said property.

The Chinese statutes do not draw a similar line, although breaches of either criterion under Norwegian law could potentially fulfil the conditions for ‘crystallisation’ of the Chinese floating charge pursuant to the Chinese Property Law article 196. This ‘crystallisation’ (“结晶” in Chinese)<sup>203</sup> denotes the event turning the unspecific floating charge to a fixed charge over specific assets.<sup>204</sup> Article 196 stipulates crystallisation upon 1) expiration of payment terms, 2) the mortgagor being “declared bankrupt or dissolved” (“被宣告破产或者被撤销”), 3) contractually agreed circumstances for realisation of the mortgage or 4) “any other

<sup>200</sup> Certain charges specific for fisheries and agriculture also exist.

<sup>201</sup> The arbitration case RG-1987-140 details the conditions’ application.

<sup>202</sup> These conditions are different from one another, yet both relative to the nature of the business, and are not detailed here. For an overview: Skoghøy 2014, pp. 225–229.

<sup>203</sup> Cheng in Wang et. al., p. 476.

<sup>204</sup> Ibid. On similar implications in English law: Gullifer in Beale et. al., pp. 112–113.

circumstance seriously impacting the realisation of the claim” (“严重影响债权实现的其他情形”). Improper transfer of the property could presumably concern the lattermost criterion.

The general rule of the estate’s satisfaction right in the Norwegian Creditors Recovery Act § 2-2 refers to debtor’s property at the time bankruptcy was declared, cf. § 1-4 (3). Thus, the floating charge affixes to relevant property not yet transferred prior to bankruptcy declaration.

However, the Chinese Enterprise Bankruptcy Law chapter 8 prescribes a corporate rescue scheme called “bankruptcy reorganisation” (“破产重整”), under which the bankruptcy administrator, or the insolvent debtor under the administrator’s supervision, continues business operations while enforcement is stayed against the debtor. The scheme resembles the reorganisation of the US Bankruptcy Code Chapter 11, in particular where the court allows the debtor to operate the reorganising business (‘debtor-in-possession’),<sup>205</sup> and the English scheme where the administrator operates it.<sup>206</sup>

This raises the question of whether Chinese floating charges may automatically crystallise prior to bankruptcy declaration, so that the creditor has fixed charges to all equipment or stock during reorganisation.

It is clear that article 196 (2) on crystallisation upon bankruptcy declaration or dissolution does not apply to reorganisation, as the Chinese Enterprise Bankruptcy Law article 78 stipulates that the court may terminate reorganisation and declare the debtor bankrupt, implying that bankruptcy declaration is a later event. The parties might agree upon insolvency or near-insolvency as a crystallisation event under the Chinese Property Law article 196 (3), but it can hardly be deduced as a default rule, as that would make transfer of equipment or stock subject to the creditor’s consent under article 191, which could impair the reorganisation’s goal of regaining solvency. Furthermore, the Chinese Enterprise Bankruptcy Law article 75 prescribes that “exercise” (“行使”) of security over “specific assets” (“特定财产”) is “suspended” (“暂停行使”) during reorganisation, indicating an intention of debtor’s assets being available for business. One could restrict these assets and obtain post-insolvency financing by providing new security under the Chinese Enterprise Bankruptcy Law article 75

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<sup>205</sup> Ren, p. 179.

<sup>206</sup> Zhang in Parry, Xu & Zhang (eds.), pp. 214–215.

(2), which allows the administrator to provide security for new debt, but as insolvent enterprises tend to have total debt exceeding the value of available assets, obtaining adequate financing would be difficult. The reasonable conclusion therefore seems to be that floating charges continue to fluctuate unless the circumstances “significantly impact” the prospect of realisation under the Chinese Property Law article 196 (4). That would also correspond with the automatic stay in the Enterprise Bankruptcy Law, which allows the court to lift a stay on security interests “where it is possible that the security property may suffer damage or obvious decrease in value” (“担保物权有损坏或者价值明显减少的可能”).

### 5.3.2 Establishment and perfection

Establishment and perfection of a security interest are two different concepts. Establishment refers to creating an effective right protected between the contracting parties. Perfection is the act of giving this right protection against third parties. When this sub-chapter addresses these events concurrently, it is due to how Norwegian and Chinese approaches differ in protection of security interests:

As this analysis will show, the parties have wide discretion and few restrictions on how to establish a valid mortgage in Norway. More restrictive are the conditions for third-party protection, as security is generally unenforceable against the estate without an additional action of perfection aimed at providing the legal relationship with a degree of *notoritet* and public notice. China sets out stricter requirements for the security interest to exist, but once it is established, additional perfection requirements relate only to protection against *bona fide* acquisition, whereas even unperfected security is effective against the estate.

Where the requirements are not met, the secured creditor loses to the estate under either jurisdiction, yet for different reasons: In China, the creditor has no security interest at all. In the Norwegian relativist approach, the creditor has a security interest in the property against the debtor himself, yet no enforceable right against the estate as a third party.

#### Legal grounds

A first problem is on what legal grounds a mortgage contract may be established. One may see this as a question of whether there are limitations on the contract’s contents.

The Norwegian Security Interest Act § 1-2 (2) prescribes that “security interests established by contracts” can only be “validly established” pursuant to the Act or “other statutory provision”. This rule, often referred to as ‘the legality principle of security interest law’, dictates contractual invalidity where the contract establishes a security interest over an asset that is not permitted as an object to security interests by statute, or the relevant contractual requirements for such security are not adhered to. The Chinese Property Law articles 170 and 180 take another approach, permitting security interests in general “unless otherwise provided by law” and normal mortgages for certain properties as well as “other property not prohibited from being mortgaged”. That does not mean that all security interests are applicable where no specific prohibition exists. Floating charges are under article 181 reserved for certain movables. Yet, the Norwegian function of the principle of legality as requiring explicit mention in statutes for an object to be valid security, does not correspond to the Chinese legislation.

The Norwegian wording “validly established” implies that breach of the legality principle not only renders the security interest unenforceable against third parties, but ineffective between the contracting parties.<sup>207</sup> This is similar to the effect of mortgage agreements on objects prohibited from mortgaging under the Chinese Property Law article 184. The Guarantee Law Interpretation 53 states that property of public welfare institutions other than that intended for public welfare “may be considered valid”, and presumes the alternative to be invalidity.

### **Form requirements**

In China, any pledge or mortgage contract must be concluded in “written form” (“书面形式”) or “written agreement” (“书面协议”), cf. the Chinese Property Law articles 185 and 210, cf. articles 202 and 222. Article 172 dictates that the “establishment” of the charge presupposes that the contract is “concluded in accordance with this law and other laws”, implying that where form requirements are not adhered to, no valid right exists. One may see this as a safeguard for the specificity principle, which is as present in security interests as in property rights generally. Only when the scope of agreement is clear, does the legal relationship lend itself to adequate scrutiny, either from an estate investigating the relationship’s legitimacy or from creditors examining the unoccupied margin between the

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<sup>207</sup> Similarly: Skoghøy 2014, p. 32.

asset's value and the scope of existing security to evaluate the risk of taking second-priority security in the asset.<sup>208</sup>

For the mortgage contract to comply with the law, it should also “general” (“一般”) specify categories and amounts of the secured claims, payment terms, the monetary scope of security as well as property's quantity, quality, location, ownership or use right attributions. However, the wording “general” indicates that the specification requirement is relative. One modification is how a floating charge contract cannot specify the amounts of secured property or the specific assets covered. Another is how the Chinese Property Law article 203 allows for a debtor or a third party to establish ceiling mortgages (“最高额抵押权” literally: “maximum amount mortgage”) or ceiling pledges (“最高额质押权”, literally: “maximum amount pledge”), allowing the parties to secure consecutively arising debt within a specified maximum amount. Here, specification of the monetary scope of security applies only to the stated maximum. Unless a payment term is agreed, the law applies a default rule of the creditor's entitlement to request confirmation two years after establishment, cf. article 206 (2). Furthermore, article 185's predecessor in the Guarantee Law article 39 stipulated that the contract “shall” specify the aforementioned variables, yet held that omissions “may be amended” (“可以补正”). Furthermore, the Guarantee Law article 56 allows for supplementing “the main types of credits secured or the mortgaged property” from obligations of the underlying contract, yet deems the mortgage “not to have been established” (“不成立”) where that is impossible.<sup>209</sup> This demonstrates that although the specification requirement is a relative one, it is a condition for validity.

Norway, contrastingly, does not generally prescribe form requirements for contractual security in movable property. Thus, in the relationship *inter partes*, freedom of form remains. Enforceability is rather a question of perfection. The only remaining non-possessory security interests in movables are floating charges. Under the Security Interest Act §§ 3-6 and 3-12, these are subject to registration, presupposing submission of written forms to the registry. Nonetheless, floating charges remain effective between the parties without registration, and

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<sup>208</sup> The Chinese Property Law article 199 contains priority rules between concurrent mortgagees to the same asset, presupposing the legality of multiple mortgages over one object.

<sup>209</sup> The Measures for Movable Property Mortgage Registration articles 6 and 12 stipulate application procedures for amending registered mortgages, including ceiling mortgages.

finding written form to be a condition for a security interest's existence over movables would therefore be inaccurate.

## Specification

As to specification, the Norwegian Security Interest Act § 1-1 defines a security interest as a right to satisfaction in “one or several specific assets”. Moreover, § 1-4 prescribes that a security interest “only obtains perfection when a specific amount or a maximum amount has been specified for the secured claim, unless otherwise provided by this Act”, with an exception for additional claims such as costs and interests under § 1-5.

Together, these statutes demonstrate the two aspects of the Norwegian specificity principle in security interests: Specification of the security object and specification of the monetary scope of security. Skoghøy notes that the reason for the specificity principle is twofold. One purpose is to avoid creditor fraud by providing *notoritet*, the other is to facilitate security interests on secondary priority.<sup>210</sup> The latter is addressed in the preparatory works for a legal revision: “He who lends on secondary priority ought to know what principal claim he will have to yield for”.<sup>211</sup>

However, only the specification of claims is generally a condition for perfection. Yet, as Skoghøy notes, the fact that only the scope of security aspect is expressed article in § 1-4 “does not mean that the first aspect of the specificity principle is abandoned”. The reason is rather that floating charges specify the objects themselves, without letting the parties agree otherwise.<sup>212</sup>

As under Chinese law, specification of the security object is not a strict requirement for Norwegian floating charges under § 3-4 and § 3-11. Before realisation, the security interest relates to the classes of property, not individually specified property or amounts. The specificity principle takes on another form: Even though the floating charge covers the relevant pool of assets “in its entirety”, the options of limiting the floating charge to a specific

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<sup>210</sup> Skoghøy 2014, p. 135.

<sup>211</sup> Ot.prp. nr.65, p. 335. Similarly: Ot.prp. nr. 39, p. 21.

<sup>212</sup> Skoghøy 2014, p. 132.



part of storage or the assets of one department imply that one must instead specify the relevant asset pool (storage part or department).<sup>213</sup>

Another possible difference relates to the Norwegian principle's effect. The wording "only obtains perfection" ("rettsvern") refers to third-party protection, not validity, and suggests that lack of specification of claims does not preclude contractual validity between the contracting parties. Moreover, the preparatory works arising from revision of the Security Interest Act state that "§ 1-4 first paragraph is a perfection rule. It poses a requirement of specifying the secured claim as a condition for perfection".<sup>214</sup> In the proposition for the Security Interest Act, the preparatory works state that the "the condition of specifying the secured object (...) is in the draft a validity requirement", whereas "the condition of specifying a maximum amount (...) only relates to perfection".<sup>215</sup> The asset specification rule referred, the current Act's § 1-3, prohibits the debtor from placing all current and future property as collateral. Skoghøy holds that even validity of security contracts relating to singular assets must rely on specification, by extension of § 1-3.<sup>216</sup> However, he himself admits that there can hardly be form requirements for such specification, unless the law provides otherwise. This is mainly a pledge related concern, as the only non-possessory contractual security interest to individualised movables is *salgspant*, where the sales contract specifies the property.

The Norwegian Security Interest Act § 1-2 (4) states that when a security interest "obtains perfection under this act", it "does not preclude acquisition of rights pursuant to [the Bona Fide Acquisition Act] unless otherwise provided by law". The implicit meaning is that perfection of rights under the Act refers to protection against the owner's creditors. Expressed differently, the creditors constitute the third party against which protection is acquired. As the creditors in a bankruptcy estate are considered third parties, as previously discussed under sub-chapter 3.3,<sup>217</sup> perfection is a precondition for asserting the security interest in

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<sup>213</sup> See Skoghøy 2014, pp. 70–73, Rt-1995-1181 (the Norblast Case) and the arbitration case RG-1987-140 for details on how separate such entities must be.

<sup>214</sup> Ot.prp. nr. 65, p. 335.

<sup>215</sup> Ot.prp. nr. 39, p. 22.

<sup>216</sup> Skoghøy 2014, p. 133.

<sup>217</sup> A practical example of the third-party status is the case HR-2017-1297-A (Bergen Bunkers): An agreement on choice of law on perfection was overruled because "[p]arty autonomy should not affect the validity and perfection in the form of binding choice of law", as that would undermine the estate's interests.

bankruptcy liquidation.<sup>218</sup> In such cases, a valid security that does not satisfy specification requirements is hardly worth more than were it invalid, as *inter partes* effect does not extend to the estate. Due to its limited implications to bankruptcy proceedings, I will not detail the question of specification as a condition for validity further.

### **Perfection requirements beyond the contract**

The discussion above warrants the question of what requirements exist beyond an adequate contract for a mortgagee to enjoy protection against the estate. As mentioned in chapter 4, several acts may perfect a contractually acquired property right, if any action beyond concluding the contract is at all required. For security interests, the way to ensure legal protection will depend upon the nature of the right. These acts aim at providing some degree of public notice (“公示”, or ‘publicity’, “publisitet”) and, according to Norwegian legal theory, *notoritet*.

However, the legal effect of such acts may vary. Chinese property law has a dualist approach of two different doctrines. The “validity upon publicity doctrine” (“公示生效主义”) takes the action of publicity as a requirement for a property right to be valid. The “validity upon publicity” doctrine is not only the general rule for property rights pursuant to the Chinese Property Law article 9, but also appears in mortgage rights to immovables, stipulating that the right is “established” upon registration. This is not a mere question of third-party protection; without registration, there is no valid security interest at all.<sup>219</sup>

Contrastingly, the “opposability upon publicity doctrine” (“公示对抗主义”) recognises the right to property as effective prior to the action of publicity, yet requires the action of publicity as a measure for protection against *bona fide* third parties.<sup>220</sup> Rights to registrable movables, such as ownership to vehicles, vessels and aircrafts under article 24, as well as mortgages over any movable under article 188, are all subject to the “opposability upon publicity doctrine”. Security interests attach to them already at the time of contractual effect, rendering registration voluntary. However, if such voluntary registration of the mortgage has

<sup>218</sup> I.e. Andenæs, p. 244, who makes the same deduction and states more generally: “The acquisition must have legal protection [“rettsvern”] to be assertable against the transferor’s creditors”.

<sup>219</sup> The Chinese Property Law article 188. The same applies to pledges, as delivery establishes the pledge, cf. article 212. Delivery as an establishment condition also explains why the specification requirement for Chinese pledges includes the time of delivery, cf. article 210 (5).

<sup>220</sup> See also Werthwein in Bu (ed.), pp. 204–205, noting the doctrine’s roots in Japanese law.

not happened, the mortgagee may not oppose any “*bona fide* third party” (“善意第三人”), cf. article 188. The same applies to floating charges under article 181. That certainly leaves the creditor at risk of losing the asset to a *bona fide* acquirer, as regulated in articles 106 and 108 of the Law, but the more pressing question regarding insolvency is whether the secured creditor would also lose to the unsecured creditors in the bankruptcy estate.

One could regard the unsecured creditors in a bankruptcy estate as third parties in the sense of not being parties to the contract. Furthermore, their interests are often of a tertiary nature, converging with neither the debtor’s nor the secured creditors’. Bobrow et. al. hold that “[a]lthough not expressly stated in either the Bankruptcy Law or the Property Law, the Chinese Bankruptcy Administrator would likely be recognised as a *bona fide* third party for the purpose of avoiding unperfected security interests”. As I read their account, Bobrow et. al. do not refer to the avoidance rules as such, but to the implied authority of an administrator to confiscate property under an unperfected security interest. There are weighty arguments for their interpretation: The right to separation entailed by a security interest is a useful means of withholding assets from the estate, and harbours a risk of creditor fraud. A lack of registration requirements for non-possessory security enables antedating of mortgage agreements. Nevertheless, the interpretation is not entirely convincing, as it gives rise to several problems:

Primarily, it undermines the Chinese dichotomy of validity vs. opposability upon publicity, as a valid but unregistered mortgage would be as unenforceable as an invalid one. The purpose of a mortgage is to seek preferential payment to mortgaged property in case of default, so if the unsecured creditors constituted a third party under article 188, any unregistered mortgage would be ineffective in a bankruptcy. The obligatory right to payment exists without regard to the existence of a security interest, and the advantage of securing the obligation is the recourse to preferential payment. As ‘preferential’ payment presumes that there exist competing interests that the secured creditor is preferred to, it would make little sense to regard the mortgage as valid if any unsecured creditor could prevail over the security interest. Due to the explicit statement that the mortgage of a movable is valid without registration, which is the essence of the “opposability upon publicity doctrine”, identifying the estate with the insolvent party to the contract would better serve the purpose of a mortgage.

Second, the statutes on opposability upon publicity, namely article 129 for contractual management of land, article 158 for easements and articles 188 and 180 for movables, all use the term “*bona fide* third party”. As Werthwein notes, this indicates that the law “only refers to such a third party whose good faith is legally relevant”.<sup>221</sup> Estate creditors, contrastingly, do not need to be in good faith concerning other interests in the asset.

Third, the *bona fide* acquisition rule protects the party that has achieved a property right after relying on the transferor’s apparent authority to dispose of a given property. The unsecured creditors in the estate do not hold property rights, but obligatory rights. In a legal system with a *numerus clausus* principle, one might discuss if one can then speak of conflicting interests in the property itself, which is the situation that the statutes appear to address. Cheng holds that “...the so-called ‘third party’ as in ‘*bona fide* third party’ should be limited to people enjoying a *property right* to the property in question, and does not include general creditors. When it comes to creditors’ rights and unregistered mortgage rights, there cannot be a conflict, as the rights are not of the same nature”.<sup>222</sup> In Cheng’s view, the possible third parties with property rights include acquirers of ownership, unregistered mortgagees, and others enjoying “some other right of a proprietary nature” to the movable, such as lessees etc.<sup>223</sup> While Werthwein disagrees with Cheng on the lessee, there is some consensus on the conflicting right having to be proprietary, thus excluding unsecured bankruptcy creditors.<sup>224</sup>

Recent legislation points even further in this direction. In late 2016, the Supreme People’s Court issued the Property Law Interpretation. It explicitly states in article 6 that for unregistered property rights to motor vehicles, vessels and aircrafts under article 24, the *bona fide* third party shall not include the transferor’s creditors (“转让人的债权人”). This excludes unsecured creditors’ rights from prevailing in the movables most closely associated with registration, as even ownership acquisition to such movables follow the “opposability upon publicity doctrine”, unlike the more lenient rules for other movables discussed under sub-chapter 3.2.1. Strictly speaking, the Supreme People’s Court only opined on “*bona fide* third party” in transfer of ownership to these particular movables. Still, this indicates how the

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<sup>221</sup> Werthwein in Bu (ed.), p. 205. He does not specifically refer to bankruptcy estates, but discusses whether a lessee is a “third party”. The point remains the same: reference to good faith suggests *bona fide* acquisition.

<sup>222</sup> Cheng in Wang et. al., p. 458.

<sup>223</sup> Ibid.

<sup>224</sup> See also Liang & Chen, p. 50, specifically mentioning the mortgagee’s implied right to separation to the insolvent debtor’s mortgaged asset.

Court interprets the “opposability upon publicity doctrine” as establishing property rights effective against creditors already upon contractual conclusion. This is a sound argument for protection against unsecured estate creditors even when the mortgage of a movable is unregistered.

Moreover, article 199 takes proportion as the basis of priority between concurrent, unregistered mortgages, presupposing the effectivity of mortgages in absence of registration. If unregistered secured creditors are to share the property, it makes little sense to rank any unsecured creditor above them.

In conclusion, the voluntary registration seems to aim at protection against *bona fide* acquisition, and it appears likely that the mortgage agreement alone should be sufficient to protect the mortgaged movable against the unsecured creditors in the estate. Yet, as the law is unclear on this matter, and the risk of *bona fide* acquisition remains, registration is certainly the safest course of action for the cautious creditor.

In Norway, the perfection rules are clear-cut and notably strict: A *salgs pant*, as explained under sub-chapter 4.2.2, has perfection if the agreement was concluded at the time of delivery or prior to that time pursuant to § 3-17. Floating charges over operating equipment or stock are perfected upon registration pursuant to §§ 3-6 and 3-12. Unlike in China, lack of perfection not only exposes the creditor to the risk of *bona fide* purchasers, but to extinctive acquisition of the estate, which does not require the creditors of the estate to be in good faith.

While this may suggest a more lenient approach in China, the formal conditions for contractual establishment are stricter. The qualitative requirements for a contract maintain some degree of scrutiny, though mostly concerning what Norwegian lawyers would call *notoritet*, and even so with a risk of contracting parties colluding to alter the contract. Public notice is far more prominent with regards to immovables, where lack of registration implies the same unenforceability as under Norwegian law, and even *inter partes* validity is generally only obtainable through registration.

### 5.3.3 Priority

Priority rules refer to the order of existing security interests. As the mere existence of a Chinese mortgage precludes the estate from seizing the mortgaged property, they are seldom

important to whether a Chinese estate may confiscate the property.<sup>225</sup> As to ceiling mortgages and ceiling pledges, article 205 provides that one may not use one's priority to increase the secured debt at the expense of other creditors with security in the same asset without their consent. Moreover, the determination of debt rule in article 206 (see sub-chapter 5.3.4) hinders the debtor from increasing the debt during bankruptcy proceedings at the expense of the unsecured creditors of the estate. By implication, the parties must be free to increase the debt at the expense of unsecured creditors as long as the determination circumstances have yet to occur.

Also in Norway, priority rules concern mainly the internal distribution between secured creditors, as the estate may generally seize values under unperfected security. The priority between security interests over the same asset is prescribed in § 1-13, which applies the first-in-time principle so that "the right first attached ranks first, unless otherwise agreed or provided by the rules on perfection". The term "attached" ("påheftet") refers to the time of establishment, not perfection. As the exceptions refer to protection against the unsecured creditors, it normally does not determine priority between security interests.<sup>226</sup> In other words, where both the claim and the security interest securing it exist, the right takes priority over subsequently established rights, regardless of perfection.

However, as perfection is a condition for estate creditors having to respect the security interest, as well as the explicit reservation for perfection rules in § 1-13, any secured creditor having a first priority right to satisfaction is of little concern to the estate unless that priority is perfected. Skoghøy summarises the implication concisely: "One may thus say that an unperfected security interest protects against reluctance to pay, yet not against insolvency".<sup>227</sup>

Yet, under certain circumstances, the order of priority may be of consequence to the estate's right to satisfaction. These conflicts are too manifold and relative to circumstance to detail in this account, but generally arise where the estate may assume the position of the first-ranking creditor, but the lower-ranking creditors have protection against the estate. The reason is the general rule that outranked creditors may, unless otherwise agreed, assume higher priority

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<sup>225</sup> Similarly: Liang & Chen, p. 284: "(...) mortgagees may all seek preferential payments from the sale proceeds of the same asset before the general creditors, irrespective of priority order".

<sup>226</sup> Skoghøy 2014, p. 197.

<sup>227</sup> Ibid., p. 175.

when the higher priority security interest or claim is fulfilled or terminated.<sup>228</sup> Still, this rule does not apply where the senior creditor secures new claims under the original security,<sup>229</sup> where the estate redeems a senior claim under the Creditors Recovery Act § 8-16, or where the estate voids a senior security interest.<sup>230</sup> Another exception to the promotion rule is where the debtor retained a right to establish another security interest on senior priority. If that right is unused upon bankruptcy, it “belongs to the debtor” and the estate may assume that right.<sup>231</sup>

### 5.3.4 Fluctuation

#### Increase of the secured claim

Despite the specificity principle, the scope of a mortgage may fluctuate from establishment to realisation, in this case bankruptcy liquidation.

As implied by the ceiling mortgages of Chinese law and the formulation “specific amount or maximum amount” in the Norwegian Security Interest Act § 1-4, the specification of the secured amount does not necessarily reflect the current debt owed to the creditor.

Naturally, repayment may reduce the debt secured by the collateral. As the purpose of a security interest is to satisfy the debt secured, it could be natural to assume the scope of security to decrease along the scope of debt, yet that is not necessarily the case.

Chinese security interests are generally accessory to the underlying claim. This is implied by the statements in the Chinese Property Law article 172 that a security interest contract “shall be subordinate to the principal contract” and that an invalid claim renders attached security invalid, and in the stipulation in article 177 (1) that a security interest “terminates” (“消灭”) upon “the principal claim terminating”. Yet, article 203 on ceiling charges permits the parties to agree only upon a maximum amount within which the secured debt may fluctuate until the

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<sup>228</sup> See Skoghøy 2014, p. 202 and casuistic provisions in the Housing Cooperatives Act § 6-9 and the Aviation Act § 3-29.

<sup>229</sup> Skoghøy 2014, p. 203.

<sup>230</sup> NOU 1972:20, p. 295, Falkanger & Falkanger, p. 815 and Skoghøy 2014, p. 205. Less certain: so-called ‘triangular priority conflicts’ (“trekantede prioritetskonflikter”), i.e. where the senior creditor has a lien by attachment (lacking protection against the estate, cf. the Civil Procedure Act § 33-7), and the second-ranking contractual secured creditor has perfected his right against the estate. Such triangular conflicts’ solutions are disputed and relative to the cause of conflict. For detailed accounts: Skoghøy 2014, pp. 217–220, Steinkjer, pp. 160–175 and Berg, pp. 28–41.

<sup>231</sup> Skoghøy 2014, p. 205.

occurrence of certain circumstances prescribed under article 206. These circumstances confirm the debt secured, and happens upon expiration of an agreed term of credit or a default period of two years from establishment, when it is clear that new credit is “unlikely to arise” (“不可能发生”), when the security is “confiscated or seized” (“被查封, 押扣”), when the debtor or creditor “is declared bankrupt or dissolved” (“被宣告破产或者被撤销”), or upon other circumstances prescribed in law.

Before then, the debts may fluctuate within the set maximum and the parties may alter this maximum, any agreed terms and the included claims with the consent of other creditors with security in the same assets or insofar as it does not adversely affect them, cf. article 205. This presupposes two deviations from the specificity principle:

First, the scope of security remains at the maximum even as outstanding debt decreases. Second, one may incur new debt within the margin between current debt and the property value where the latter exceeds the former. Naturally, the property may only satisfy total secured debt under the ceiling mortgage at the time of realisation, as article 198 prescribes that “any excess proceeds from cashing, auction or sale of mortgaged property beyond amount of claims, shall be attributed to the mortgagor, while any shortfall shall be settled by the debtor”.

Under article 203, “claims existing prior to establishment of the ceiling mortgage may, with consent from the parties concerned, be incorporated into the scope of claims under the ceiling mortgage”. The term “incorporated” (“转入”) in connection with “prior to the establishment” (“设立前”) seemingly holds the agreement on a ceiling charge as an establishment of a separate right, suggesting both that the ceiling mortgage can hardly assume the priority of a previous, registered secured claim incorporated into it and that security for fluctuating debt must be established as just that. This also seems more coherent with the general accessoriness principle, as it would hardly be a representative principle if deviation were the default rule. Another implication is that only ceiling charges can be established independently of the claim existence.

Contrarily, Norwegian mortgages allow for relending under the original security by default. In practice, relending may happen under a mortgage for a maximum amount without declaration of debt (“skadesløsbrev”) or for debt diverging from the specified amount (“gjorte



panteobligasjoner”). Marthinussen takes this practice as a clear example of the mortgage being somewhat independent of the original underlying claim, and cites the case Rt-1994-775 (Yousuf), in which the Supreme Court found that the priority of such mortgages is determined by time of perfection.<sup>232</sup> This, he argues, indicates how “the Norwegian security interest is independent with regards to establishment”, meaning that the mortgage right can exist and obtain perfection prior to the claim, a practice with longstanding recognition of the courts (i.e. Rt-1909-117 (Løvlie) and Rt-1910-177 (Halvorsen)).<sup>233</sup> Another implication is that the parties may agree to secure increasing or new claims within the agreed maximum or exceeding scope. Like Marthinussen, Lilleholt sees this as Norwegian security interests being abstract “in the sense that the security interest can secure shifting and varying claims”.<sup>234</sup> The effect is rather similar to Chinese ceiling charges, yet the right is general, and exists by default.

However, such relending schemes are restricted in both jurisdictions. The Chinese Property Law article 205 limits alterations to the specified maximum, so that they may only take place before final confirmation of the debt under the mortgage or pledge, and without adverse effects to other creditors with security in the same asset, unless such creditors consent to the alteration. As alterations are under such restrictions, it appears questionable to assume that one may establish a ceiling collateral in assets to which other secured creditors have an interest, so long as the value of the asset does not exceed the total sum of secured debts or other creditors have consented to the ceiling collateral arrangement.

A similar concern for competing mortgagees is evident in the Norwegian Yousuf Case: Although bank A had a mortgage on first priority in the asset, bank B had established a mortgage ranking second only to the originally secured amounts. Subsequently, bank A and the debtor agreed to increase the secured amount from 125 000 NOK to 300 000 NOK. The Supreme Court found that it would be a “breach of the principle of loyalty that must be between competing right holders, if [the debtor] were to do this at the expenses of the priority assigned to the subsequent mortgagee”. Although the relending right existed prior to the second mortgage, the court considered bank A’s subsequent increase disloyal, finding bank A to have known of debtor’s agreement with B for B only to rank behind the original amount.

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<sup>232</sup> Marthinussen 2010, p. 281.

<sup>233</sup> For a detailed account: Marthinussen 2010, chapter 14.

<sup>234</sup> Lilleholt, p. 78.

The Chinese reorganisation institute raise a similar question for ceiling charges as for floating charges; is the debt confirmed already upon initiation of reorganisation proceedings?

Seeing as declaration of bankruptcy is the statutory limit for fluctuation, it again seems that the scope of the charge, this time concerning the secured claim, fluctuates until bankruptcy or contractually agreed circumstances. While it would be unfair to other creditors for the mortgagee to relend post-bankruptcy, the reorganisation system requires refinancing measures, and utilising existing ceiling mortgages is a convenient and fair manner of obtaining funds that does not unnecessarily infringe upon competing interests, as the creditor had protection up until the maximum amount at the outset.

### **Commingling of security**

Another way a security interest may fluctuate is commingling of security with other assets. This may lead to one owner's extinctive acquisition of another's property. Where the debtor loses ownership, it is no longer a matter between the secured creditor and the estate, and thus irrelevant to this account. However, the debtor could also claim to acquire such property, raising the question of who obtains its value.

For example, party A mortgages machinery to creditor B. After increasing the value of the machine by giving it a coat of paint, A discovers that the paint in fact was property of C. When A goes bankrupt, C maintains a claim to the added value. A's estate maintains that B acquired the paint from C by combination, and belongs to the estate since B's security interest only extends as far as the value of the uncoated machinery. B argues that the value of the machinery has decreased after concluding the mortgage contract so that the secured claim now exceeds the value of the machine in uncoated state, and equals its value in coated state. He therefore purports that he can exercise his mortgage over the entire machinery, as far as his secured claim extends.

In China, the mechanics of *tianfu* (see sub-chapter 4.1.4) are essential to the solution. The Guarantee Law Interpretation article 62 only provides that the mortgage remains valid over 1) compensation payable due to third-party acquisition, and over 2) the mortgagor's ownership or 3) co-ownership where he is the acquirer. The pressing question is when the result should be one alternative and not another. The solution remains as unclear for mortgages as for retention of title, and the general description under sub-chapter 4.1.5 applies here. However,

under the theoretical approach of finding the ‘main object’,<sup>235</sup> the paint would presumably be part of the machine to which B has a mortgage right, and its value subject to the mortgage. Were the paint mortgaged, the security presumably terminated, although statutory law is unclear on this point.

In Norway, the Norwegian Incidental Ownership Act § 3 prescribes that the owner of any eventual “main object” becomes the owner, similar to Chinese legal theory. In other cases, § 2 prescribes co-ownership according to their original assets’ respective values. However, these rules only apply insofar as the property cannot be separated “without too large a damage and cost”, a standard which must weigh the expense of separation against the value of the asset.<sup>236</sup> If the main object is subject to a floating charge, the charge applies to the relevant asset pool in its “entirety”, extending as far as the debtor’s rights to the assets. Therefore, B would also acquire the paint in Norway, unless it was subject to a *salgspant*, which prevails over a floating charge under the Security Interest Act § 3-4 (3), cf. § 3-11 (5). Yet, as the paint would be virtually inseparable, the latter situation is impractical. In other words, where the debtor obtains ownership through these rules, the security may remain also over the addition.

### 5.3.5 Termination

Several circumstances may terminate a security interest, removing the hindrance for the estate seizing the security. While loss of property, either by commingling, processing or *bona fide* purchase is certainly a relevant cause for termination, these circumstances also imply that the asset becomes non-existent or outside the debtor’s ownership sphere, thus unavailable to the estate. Therefore, I will not detail the rules on loss of property, but only note that where the asset is lost, both Chinese and Norwegian security interests are often substitutive, so that the security may remain over the debtor’s insurance or proceeds obtained in connection with the loss.<sup>237</sup> Below, I will discuss causes for termination that may result in the estate’s seizure of values.

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<sup>235</sup> See sub-chapter 4.1.4.

<sup>236</sup> See sub-chapter 4.2.3 concerning *salgspant*.

<sup>237</sup> The Norwegian Insurance Contract Act §§ 7-1 (3) and 7-5 entitle secured creditors to insurance of registrable movables and movables under floating charges by default, and secured creditors in other situations upon agreement. For details concerning rights to insurance and sales proceeds: Skoghøy 2014, p. 257. The Chinese Property Law article 174 entitles secured creditors to insurance, proceeds or compensation obtained from the loss, whereas article 191 entitles a mortgagee to proceeds of unauthorised sale of the asset.

Termination upon realising the security interest, cf. the Chinese Property Law article 177 (2) and the Norwegian Enforcement Act § 8-17 (2) for forced sale and § 9-10 (1) for repossession is self-explanatory: after satisfying the claim through the security, the right has served its purpose and ceases to exist.

Another is expiration of the claim, which leads to simultaneous termination of a Chinese mortgage under the Chinese Property Law article 202, but probably applies as a general rule pursuant to article 177 (1) on termination of the claim.<sup>238</sup> Contrariwise, the Norwegian Limitation of Action Act § 27 (3) prescribes that collateral does not expire with the claim, unless in two cases: One is *salgspant*, which expires concurrently with the claim under §27 (2) and independently one year after the claim or last instalment was due and five years after delivery under the Norwegian Security Interest Act § 3-21 (1). The other is mortgages for unspecified debt that is not for “intended credit”,<sup>239</sup> but for contingent debt arising from events outside the parties’ control, i.e. tort claims, cf. the Norwegian Limitation of Action Act § 27 (1) b). This is another instance of Norwegian security being independent from the claim, although *salgspant* remains strictly accessory.

The Chinese accessory principle further implies that payment terminates the security interest, cf. the Property Law article 177 and the Guarantee Law articles 52, 74 and 88 (2). However, ceiling mortgages and pledges allow for relending, so partial fulfilment does not quash these security interests, as implied by the wording “for debt to be incurred”.

Again, Norwegian security interests differ, and while Skoghøy generally maintains that a collateral right terminates “if the claim it is to secure, is settled”,<sup>240</sup> there are modifications to this statement. One is the Financial Contract Act § 70 (1), which prescribes that a third-party guarantor’s settlement of debt allows the settlor to assume the secured creditor position, which Skoghøy holds as evidence of the collateral terminating only when there is no recourse right against the debtor.<sup>241</sup> One could say that “the claim it is to secure” is now another. In

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<sup>238</sup> Similarly: Liang & Chen, pp. 320 and 345 and probably Cheng in Wang et. al., p. 450, although his account seems unclear on whether a two-year extension in the Guarantee Law Interpretation 12 now abolished for mortgages still applies to liens and pledges. In my opinion, the development towards strict accessoriness suggests that it does not.

<sup>239</sup> In the words of Skoghøy 2014, p. 256.

<sup>240</sup> Ibid., p. 253.

<sup>241</sup> Ibid., p. 254.

this situation, the Chinese Property Law article 176 prescribes that the creditor shall instead realise the claim, rendering the guarantee a secondary remedy.

Relending under original security presupposes the security has continued existence at least after partial payment. Marthinussen finds that even full repayment should not terminate the collateral right, unless the underlying relationship displays a clear intention of such termination,<sup>242</sup> with reference to Rt-1895-721, where party A settled the debt of party B without recourse while acquiring the mortgage bond, which was reused with the Supreme Court's later approval. Marthinussen also cites the Financial Contract Act § 6,<sup>243</sup> on the creditor's duty to delete or release the security for settled claims "unless otherwise agreed in connection with the settlement". Thus, Norwegian security interests do not necessarily terminate upon payment; contractual interpretation is necessary.

Norwegian rules on contract law terminate the security where the creditor waives the security.<sup>244</sup> Where the creditor waives the claim, it is again a matter of contractual interpretation whether the waiver applies to security also.<sup>245</sup> The Chinese Property Law articles 177 (3) and 194, explicitly cites the creditor waiving security as a cause for termination of a mortgage, and the accessoriness implied in article 177 (1) on termination of claims must apply similarly where the claim is waived.

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<sup>242</sup> Marthinussen 2010, pp. 340–343.

<sup>243</sup> Ibid., p. 343.

<sup>244</sup> Skoghøy 2014, p. 254.

<sup>245</sup> Ibid.

## 6 Comparative summary

The above chapters have compared the determining legal factors for ascertaining the scope of Norwegian and Chinese bankruptcy estates. The two jurisdictions' shared roots in German continental law could make it reasonable to assume that their laws on property transfer and secured transactions would roughly correspond to that of the German BGB, yet the comparison shows otherwise.

Between Norway and China, China seems to be the most mindful of German requirements for transfer of ownership, differing only on consequences on contractual invalidity, whereas Norwegian conditions for transfer of property are highly dependent on circumstance. Instead of finding 'the owner', Norwegian lawyers assess the individual right's degree of third-party protection.

The principles for determining whether an insolvent buyer's estate may seize assets are not too different; both China and Norway apply a right to halt and repossess goods in transit. However, when deciding whether this right is lost, China refers to generally applicable rules on delivery by possession or limited surrogates, whereas the Norwegian stoppage right's criterion "handed over" is somewhat relative to the type of sale.

Where the seller is insolvent, delivery is required in China, albeit with the traditional three exceptions to the delivery principle allowing for indirect possession. Norwegian law is somewhat unclear on whether it adheres by Germanic law. While Brækhus & Hærem's interest doctrine does not correspond to *constitutum possessorium*, the general belief in a delivery requirement is closely associated with the German roots that inspired Chinese law. Yet, the Norwegian dogma has at times favoured the agreement principle, and Hauge has recently argued that relevant legal sources can very well prescribe such an approach. In any case, the consensus she opposes is at least a testament to German law's currency as inspiration for Norwegian property law, a common denominator with the Chinese legislative outlook.

In both jurisdictions, retention of title or *salgspant* rules supplement the transfer of property rules, and as neither Chinese retention of title nor Norwegian *salgspant* require acts of perfection beyond the agreement, they are both forms of security largely hidden to other

creditors. They also share a common purpose of, at least primarily, securing the purchase money.

Yet in other respects, the Norwegian purchase money security interest *salgspant* is not a true equivalent to neither Chinese nor German retention of title, as it is in essence a non-possessory security interest that does not retain ownership. It seems highly improbable that the difference between *salgspant* clauses and title retention clauses can be anything more than nominal under Norwegian law: It was the legislature's explicit intention to replace title retention with *salgspant*. The resulting recharacterisation rule imposes the same statutory restrictions regardless of what the parties named the clause, be it *salgspant* or title retention. Since these restrictions limit the secured claim to the purchase money, nullify *salgspant* in assets for resale and give mandatory rules on whether processing or commingling results in loss of rights, extended title retention clauses cannot be recognised. As to the effect of the *salgspant*, the buyer would be as unauthorised to sell or pledge the property under § 3-16 as would a non-owner, and the seller can realise the interest by either forced sale or repossession. In short: permissible acts under *salgspant* are achievable under Chinese title retention. What is only be achievable under extended title retention in Germany, is forbidden under Norwegian law. Effectively, title retention as something more than *salgspant* ought therefore to be impossible under the Norwegian Security Interest Act. However, it seems probable that similar restrictions apply in China.

Causes for termination of *salgspant*, largely converge with the theoretical approaches to the Chinese *tianfu* rules, although the latter appear more uncertain due to scarcer legal grounds, and a natural point for future codification. Norwegian law has several statutes on the matter, but the use of general standards leaves a fair bit of discretion to the judicature, making applicable case law all the more relevant.

In terms of legal nature, *salgspant* is rather Norway's closest equivalent to Chinese mortgages over singular movables, as Norwegian law is otherwise restrictive with non-possessory security interests in movable property. In terms of formation, specification and effect, the two countries' legislative approaches to security interests quite resemble one another. *Salgspant* resembles the US purchase money security interest, and the rules in the Uniform Commercial Code generally appear a significant inspiration for Chinese and

Norwegian securitisation, although China partially adheres to German legal thought, namely *Eigentumsvorbehalt*, on the point of securing purchase money.

Yet, whereas both countries have drawn upon common law for their security interests, Chinese recognition of non-possessory security in singular movables to secure obligations beyond purchase money leaves Norwegian law somewhat closer to the Germanic scepticism to non-possessory security. Moreover, the Chinese lien's implied sales right has more in common with the American liens (as a general, proprietary security) than the mere retention right implied by possessory liens in Norway and England.

Norway and China's shared reluctance towards the most generic security interests has led to some modification of the floating charge through limiting its scope through specification, and where other jurisdictions may allow all current and future assets to serve as security, China and Norway reserve such schemes for certain movable property. Still, its introduction is in itself an appropriation of common law. The Chinese appropriation extends also to the bankruptcy reorganisation scheme.

A common metaphor for China's reconciliation of market economy and socialism is that of pragmatic reformer Deng Xiaoping, architect of the 'reform and opening up policy':

*"It does not matter whether it is a black cat or a white cat; if it catches mice, it is a good cat".*

This pragmatism also applies to both jurisdictions' legislative outlook: In the larger picture, both Norway and China display an eclectic and utilitarian approach to limiting a bankruptcy estate. This utilitarian attitude results in hybrid property laws less concerned with adherence to concepts of their Germanic civil law roots than accommodating increasing needs for credit in two markets that have rapidly developed within half a century. Yet, both jurisdictions seem reluctant to give the market full autonomy at the expense of public or third-party interests. This is reflected in Norway's prohibition against all-encompassing security interests, in part motivated by concern for tax authorities and other involuntary creditors. It is also apparent in the strict requirements for obtaining legal protection against third parties in property acquisition, safeguarding the need for verifying the transaction's legitimacy and contents. China prohibits mortgaging public welfare facilities and attributes land ownership to the collectives and the State.



Both countries address credit needs through wide arrays of security interest and title retention schemes. Opposing interests of unsecured or involuntary creditors and the public are protected through scepticism towards legal protection from contractual conclusion alone and restricting the scope of the most unspecific security interests; the floating charges. Many have pointed out Chinese legislative pragmatism in the area of civil and commercial law. Chen points out a trend that Chinese legislators “are becoming more open-minded by borrowing from the legislative experiences of both civil law and common-law countries, and also from those of mixed jurisdictions”.<sup>246</sup>

This comparison has demonstrated how Norway and China are often similar in this respect, and indicated some uncertainties that are interesting subjects of comparison when China presents its Draft Civil Code in the latter half of 2018.

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<sup>246</sup> Chen & van Rhee (eds.), p. 101.

# Legal sources and bibliography

## Chinese statutory acts and regulations

Abbreviation or short title	Full title (Eng./Cn.)	Date of promulgation	English translations
<b>Chinese Contract Law</b>	The Contract Law of the People's Republic of China / 中华人民共和国合同法	15 March 1999	<p>Freely available at the websites of the National People's Congress:  <a href="http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm">http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm</a>            (read 26 May 2018)</p> <p>Available at LexisNexis China:  <a href="https://hk.lexisn.com/law/content_cnen.php?lawid=3888&amp;eng=1">https://hk.lexisn.com/law/content_cnen.php?lawid=3888&amp;eng=1</a> (read 26 May 2018)</p>
<b>Chinese Civil Procedure Law</b>	The Civil Procedure Law of the People's Republic of China / 中华人民共和国民事诉讼法	27 June 2017	<p>Freely available at the websites of the National People's Congress:  <a href="http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm">http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm</a>            (read 26 May 2018)</p> <p>Available at LexisNexis China:  <a href="https://hk.lexisn.com/law/content_cnen.php?lawid=3090980&amp;eng=1">https://hk.lexisn.com/law/content_cnen.php?lawid=3090980&amp;eng=1</a> (read 26 May 2018)</p>
<b>Chinese Enterprise Bankruptcy Law</b>	The Enterprise Bankruptcy Law of the People's Republic of China / 中华人民共和国企业破产法	1 June 2007	<p>Freely available at the websites of the National People's Congress:  <a href="http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm">http://www.npc.gov.cn/englishnpc/Law/2008-01/02/content_1388019.htm</a>            (read 26 May 2018)</p> <p>Available at LexisNexis China:  <a href="https://hk.lexisn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=21998">https://hk.lexisn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=21998</a></p>

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<b>Chinese Guarantee Law / Chinese Security Law</b>	The Guarantee Law of the People's Republic of China (alt: The Security Law of the People's Republic of China) / 中华人民共和国担保法	30 June 1995	Freely available at the websites of the National People's Congress: <a href="http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383719.htm">http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383719.htm</a> (read 26 May 2018)  Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?lawid=2972&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?lawid=2972&amp;eng=1</a> (read 26 May 2018)
<b>Chinese Maritime Law</b>	The Maritime Law of the People's Republic of China / 中华人民共和国海商法	7 November 1992	Freely available at the websites of the Ministry of Commerce: <a href="http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050726.html">http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050726.html</a> (read 26 May 2018)  Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?eng=0&amp;provider_id=1&amp;isEnglish=N&amp;origin_id=4599">https://hk.lexiscn.com/law/content_cnen.php?eng=0&amp;provider_id=1&amp;isEnglish=N&amp;origin_id=4599</a> (read 26 May 2018)
<b>Chinese Property Law</b>	The Property Law of the People's Republic of China / 中华人民共和国物权法	1 October 2007	Freely available at the websites of the National People's Congress: <a href="http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm">http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm</a>  Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?lawid=222964&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?lawid=222964&amp;eng=1</a> (read 26 May 2018)
<b>General Provisions</b>	The General Provisions of the Civil Law of the People's Republic of China / 中华人民共和国民法总则	15 March 2017	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?lawid=3038971&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?lawid=3038971&amp;eng=1</a> (read 26 May 2018)

<b>GPCL</b>	The General Principles of Civil Law of the People's Republic of China / 中华人民共和国民法通则	12 April 1986	Freely available at the websites of the National People's Congress: <a href="http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm">http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm</a>  Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=3066112&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=3066112&amp;eng=1</a> (read 26 May 2018)
<b>Registration Measures</b>	Measures for Registration of Movable Property Mortgages / 动产抵押登记办法	5 July 2016 (Revision)	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=N&amp;origin_id=2861232&amp;eng=0">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=N&amp;origin_id=2861232&amp;eng=0</a> (read 26 May 2018)

## Chinese judicial interpretations

<b>Abbreviation or short title</b>	<b>Full title (Eng./Cn.)</b>	<b>Date of issue</b>	<b>English translations</b>
<b>Property Law Interpretation (I)</b>	Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Property Law of the People's Republic of China (I) / 最高人民法院关于适用《中华人民共和国物权法》若干问题的解释(一)	22 February 2016	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=2766103&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=2766103&amp;eng=1</a> (read 26 May 2018)
<b>Bankruptcy Provisions (I)</b>	Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (I) / 最高人民法院关于适用《中华人民共和国企业破产法》若干问题的解释(一)	9 September 2011	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1377053&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1377053&amp;eng=1</a> (read 26 May 2018)

<b>Bankruptcy Provisions (II)</b>	Provisions of the Supreme People's Court on Certain Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (II) / 最高人民法院关于适用《中华人民共和国企业破产法》若干问题的规定(二)	29 July 2013	Translation by Bufford available at HeinOnline: <a href="http://heinonline.org/HOL/P?h=hein.journals/ambank91&amp;i=47">http://heinonline.org/HOL/P?h=hein.journals/ambank91&amp;i=47</a> (read 26 May 2018)
<b>GPCL Opinions</b>	Opinions of the Supreme People's Court on Certain Issues Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China (Trial Implementation) / 最高人民法院关于贯彻执行《中华人民共和国民法通则》若干问题的意见(试行)	2 April 1988	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?lawid=283557&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?lawid=283557&amp;eng=1</a> (read 26 May 2018)
<b>Guarantee Law Interpretation</b>	Judicial Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the Guarantee Law of the People's Republic of China / 最高人民法院关于适用《中华人民共和国担保法》若干问题的解释	8 December 2000	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1490724&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1490724&amp;eng=1</a> (read 26 May 2018)
<b>Sales Contract Interpretation</b>	Interpretation of the Supreme People's Courts on Issues Concerning the Application of Law for the Trial of Cases involving Disputes over Purchase and Sale Contracts / 最高人民法院关于审理买卖合同纠纷案件适用法律问题的解释	10 May 2012	Available at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1490724&amp;eng=1">https://hk.lexiscn.com/law/content_cnen.php?provider_id=1&amp;isEnglish=Y&amp;origin_id=1490724&amp;eng=1</a> (read 26 May 2018)

## Chinese case law

Title	Source
<b>Cargill International SA v. Fujian Jinshi Vegetable Oil Producing Co., Ltd. and Others</b>	<p>《瑞士嘉吉国际公司诉福建金石制油有限公司等确认合同无效纠纷案》 (Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Limited et al., A Dispute over Contracts Affirmed to be Invalid), China Guiding Cases Project, English Guiding Case (EGC33), Mar. 24, 2015 Edition, available at <a href="https://cgc.law.stanford.edu/guiding-cases/guiding-case-33">https://cgc.law.stanford.edu/guiding-cases/guiding-case-33</a> (read 26 May 2018)</p>
<b>Concordia Agricultural Products (Shanghai) Ltd v. Guangdong Fuhong Oil Products Ltd and Zhanjiang Branch of China Construction Bank Co., Ltd</b>	<p>《肯考帝亚农产品贸易(上海)有限公司与广东富虹油品有限公司第三人中国建设银行股份有限公司湛江市分行所有权确认纠纷案. Judgment available in Chinese at LexisNexis China: <a href="https://hk.lexiscn.com/law/content_case_analysis.php?case_id=482011">https://hk.lexiscn.com/law/content_case_analysis.php?case_id=482011</a> (read 26 May 2018)</p>
<b>Qingdao Yuanhongxiang Textile Co., Ltd. v. Gangrun (Liaocheng) Printing and Dyeing Co., Ltd</b>	<p>《青岛源宏祥纺织有限公司诉港润聊城印染有限公司取回权确认纠纷案》. Chinese summary available from the website of the Supreme People Court's Gazette: <a href="http://gongbao.court.gov.cn/Details/3cd383841a8014afb01979f91ddb35.html">http://gongbao.court.gov.cn/Details/3cd383841a8014afb01979f91ddb35.html</a> (read 22 May 2018).</p> <p>The English translation used is available at the website of Shanghai Nuo Di Law Firm: <a href="http://www.shnuodi.com/_case.asp?iid=301">http://www.shnuodi.com/_case.asp?iid=301</a> (read 22 May 2018).</p> <p>It is notable that this translation is identical to the initial paragraphs of the translation from Peking University's subscription-only database, and could possibly be the same translation: <a href="http://en.pkulaw.cn/display.aspx?cgid=1970324837807974&amp;lib=case">http://en.pkulaw.cn/display.aspx?cgid=1970324837807974&amp;lib=case</a> (read 22 May 2018)</p>

## Norwegian Constitution

Abbreviation or short title	Full name (Eng. /Nor.)	Date of enactment	English translations
<b>Constitution</b>	Constitution of the Kingdom of Norway / <a href="#">Kongeriket Norges Grunnlov</a>	17 May 1814	Available at Lovdata: <a href="https://lovdata.no/NLE/lov/1814-05-17">https://lovdata.no/NLE/lov/1814-05-17</a> (read 29 May 2018)  The old § 94 is available at the website of the Storting: <a href="https://www.stortinget.no/en/Grunnlovsjubileet/In-English/The-Constitution---Complete-text/">https://www.stortinget.no/en/Grunnlovsjubileet/In-English/The-Constitution---Complete-text/</a> (read 29 May 2018)

## Norwegian statutory acts

Abbreviation or short title	Full name (Eng. /Nor.)	Date of enactment	English translations
<b>Aviation Act</b>	Act concerning aviation / <a href="#">Lov om luftfart</a>	11 June 1993	Available at <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19930611-101-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19930611-101-eng.pdf</a> (read 26 May 2018)
<b>Bankruptcy Act</b>	Act concerning debt negotiation and bankruptcy / <a href="#">Lov om gjeldsforhandling og konkurs</a>	8 June 1984	Available at the website of the Bankruptcy Council: <a href="http://www.konkursradet.no/getfile.php/3243290.2255.wtffrfeyvv/Konkursloven+oversatt+til+engelsk.pdf">http://www.konkursradet.no/getfile.php/3243290.2255.wtffrfeyvv/Konkursloven+oversatt+til+engelsk.pdf</a> (read 26 May 2018)
<b>Bona Fide Acquisition Act</b>	Act concerning bona fide acquisition of movables / <a href="#">Lov om godtroerverv av løsøre</a>	2 June 1978	Unavailable
<b>Carriage of Goods by Road Act</b>	Act concerning contracts regarding carriage of goods by road / <a href="#">Lov om vegfraktavtaler</a>	20 December 1974	Unavailable

<b>Civil Procedure Act / Dispute Act</b>	Act concerning mediation and procedure in civil disputes / <a href="#">Lov om mekling og rettergang i sivile saker</a>	17 June 2005	Available at Lovdata: <a href="https://lovdata.no/dokument/NLE/lov/2005-06-17-90">https://lovdata.no/dokument/NLE/lov/2005-06-17-90</a> (read 26 May 2018)
<b>Credit Purchase Act / Sale of Goods on Credit Act</b>	Act concerning sale of goods on credit / <a href="#">Lov om kredittkj�p</a> (Abolished)	21 June 1985	Available at the website of the University of Oslo: <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19850621-082-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19850621-082-eng.pdf</a> (read 26 May 2018)
<b>Creditors Recovery Act</b>	Act concerning creditors' right to recovery / <a href="#">Lov om fordringshaveres dekningsrett</a>	8 June 1984	Translation of chapters 2, 5 and 9 available at the website of the University of Oslo: <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19840608-059-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19840608-059-eng.pdf</a> (read 26 May 2018)
<b>Enforcement Act</b>	Act concerning enforcement / <a href="#">Lov om tvangsfullbyrdelse</a>	26 June 1992	Unavailable
<b>Financial Contract Act</b>	Act concerning financial contracts and financial work / <a href="#">Lov om finansavtaler og finansoppdrag</a>	25 June 1999	Available at the website of the University of Oslo: <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990625-046-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19990625-046-eng.pdf</a> (read 26 May 2018)
<b>Housing Cooperatives Act</b>	Act concerning housing cooperatives / <a href="#">Lov om burettslag</a>	6 June 2003	Available at the website of the University of Oslo: <a href="https://www.regjeringen.no/en/dokumenter/the-housing-cooperatives-act/id439595/">https://www.regjeringen.no/en/dokumenter/the-housing-cooperatives-act/id439595/</a> (read 26 May 2018)
<b>Incidental Ownership Act</b>	Act concerning incidental ownership / <a href="#">Lov om hendelege eigedomsh�ve</a>	10 April 1969	Unavailable
<b>Insurance Contract Act</b>	Act concerning insurance contracts / <a href="#">Lov om forsikringsavtaler</a>	16 June 1989	Available at the website of the University of Oslo: <a href="http://www.cefor.no/Documents/Industry%20Policy/Consultations%202008-2009/InsuranceContractsAct_09-06-19_.pdf">http://www.cefor.no/Documents/Industry%20Policy/Consultations%202008-2009/InsuranceContractsAct_09-06-19_.pdf</a> (read 26 May 2018)



<b>Limitation of Action Act</b>	Act concerning the limitation period for claims / <a href="#">Lov om foreldelse av fordringer</a>	18 May 1979	Available at the website of the University of Oslo: <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19790518-018-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19790518-018-eng.pdf</a> (read 26 May 2018)
<b>Maritime Act</b>	Act concerning shipping / <a href="#">Lov om sjøfarten</a>	24 June 1994	Available at the websites of the Norwegian Maritime Authority: <a href="https://www.sdir.no/contentassets/3bbe45af5f294abe852675c7a9795cf7/the-norwegian-maritime-code-no.-39-of-24-june-1994-excerpts.pdf?t=1526298676934">https://www.sdir.no/contentassets/3bbe45af5f294abe852675c7a9795cf7/the-norwegian-maritime-code-no.-39-of-24-june-1994-excerpts.pdf?t=1526298676934</a> (read 26 May 2018)
<b>Sale of Goods Act</b>	Act concerning purchases / <a href="#">Lov om kjøp</a>	13 May 1988	Available in Skarning, pp. 73–117.
<b>Security Interest Act</b>	Act concerning security interests / <a href="#">Lov om pant</a>	8 February 1980	Available at the website of the University of Oslo: <a href="http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19800208-002-eng.pdf">http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19800208-002-eng.pdf</a> (read 26 May 2018)

## Norwegian case law

Reference number	Colloquial title	Reference number	Colloquial title
Rt-1895-721		Rt-1910-231	The Cow Case
Rt-1896-321		Rt-1912-263	The Scrap Metal Case
Rt-1907-359	Hver 8de Dag	Rt-1923-113	Kubben
Rt-1907-771		Rt-1932-304	
Rt-1909-117	Løvlie	Rt-1935-981	Bygland
Rt-1909-734		Rt-1955-209	Vågå Bruk
Rt-1910-177	Halvorsen	Rt-1963-109	The Scooter Case

Rt-1971-549	Dokka Bruk	Rt-1994-775	Yousuf
Rt-1973-95	Krogstad Cellulosefabrik	Rt-1995-1181	Norblast
Rt-1974-879	Statlandbruket	Rt-1996-857	Piglet
RG-1987-140		Rt-1997-1438	Metos
Rt-1990-59	Myra Båt	Rt-2006-213	Elcon
Rt-1990-128	The Smolt Order	Rt-2006-1348	Østlandske Autoberging
Rt-1991-909	The Brown Order	HR-2017-1297-A	Bergen Bunkers
Rt-1992-438	GMAC		

## Norwegian preparatory works

### Abbreviation Full title (Eng./Nor.) or short title

NUT 1935:1	Official Norwegian Report 1935:1 Draft Promissory Note Act / NUT 1935:1 Utkast til Lov om Gjeldsbrev
Rådsegn 8	Official Norwegian Report 1970: Recommendation 8 On security interests / NUT 1970: Rådsegn 8 Om pant
NOU 1972:20	Official Norwegian Report 1972:20 Debt negotiation and bankruptcy / NOU 1972:20 Gjeldsforhandling og konkurs

Ot.prp. nr. 39 Proposition to the *Odelsting* no. 39 (1977–78) on the Security Interest Act / Ot.prp. nr. 39 (1977–78) om panteloven

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Innst. O. nr. 19 Recommendation to the *Odelsting* no. 19 (1979–80) Recommendation from the Justice Committee concerning Security interest Act and changes to Act 7 June 1935 no. 2 on registration and to certain other acts / Innst. O. nr. 19 (1979–80) Innstilling fra justiskomiteén om pantelov og om endringer i lov av 7. juni 1935 nr. 2 om tinglysning og i en del andre lover

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Ot.prp. nr. 65 Proposition to the *Odelsting* no. 65 (1990–91) on the Act concerning enforcement and provisional security / Ot.prp. nr. 65 (1990–91) om lov om tvangsfullbyrding og midlertidig sikring (tvangsfullbyrdingsloven)

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Ot.prp. nr. 26 Proposition to the *Odelsting* no. 26 (1998–99) on the Act concerning alterations to bankruptcy and security interest law / Ot.prp. nr. 26 (1998–99) om lov om endringer i konkurs- og pantelovgivningen

## Other legal sources

Abbreviation or short title	Full name (Eng. /Other)	Date of enactment	English translations
<b>Swedish Sale of Movable Goods Act</b>	Law (1845:50 p. 1) on trade of movables that the buyer lets remain in the seller's care / <a href="#">Lag 1845:50 s. 1) om handel med lösören som köparen låter i säljarens vård kvarbliva</a>	20 November 1845	Unavailable
<b>UK Sale of Goods Act 1979</b>	<a href="#">Sale of Goods Act 1979</a>	6 December 1979	Freely available from the National Archives (UK) on behalf of the Government at Legislation.gov.uk: <a href="https://www.legislation.gov.uk/ukpga/1979/54">https://www.legislation.gov.uk/ukpga/1979/54</a>
<b>BGB / German Civil Code</b>	Civil Code / <a href="#">Bürgerliches Gesetzbuch</a>	18 August 1896	Freely available from the German Ministry of Justice and Consumer Protection at Gesetze-im-internet.de: <a href="https://www.gesetze-im-internet.de/englisch_bgb/">https://www.gesetze-im-internet.de/englisch_bgb/</a>
<b>UCC / Uniform Commercial Code</b>	<a href="#">Uniform Commercial Code</a>	Depends on the state. First published in 1952.	Freely available at the websites of Cornell Law School: <a href="https://www.law.cornell.edu/ucc">https://www.law.cornell.edu/ucc</a>
<b>United States Bankruptcy Code</b>	<a href="#">The Code of Laws of the United States of America Title 11 – Bankruptcy</a>	11 June 1978	Freely available at the websites of Cornell Law School: <a href="https://www.law.cornell.edu/uscode/text/11">https://www.law.cornell.edu/uscode/text/11</a>

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- Liu** Liu, Nanping: “‘Legal Precedents’ with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court”, *Journal of Chinese Law* 5.1 (1991), pp. 107–140.
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## Appendix: Overview over security interests

Note: The table below displays general, contractual security interests that are applicable to movables in general, in addition to liens, which are not created directly by contract, yet (in China) resemble pledges in effect.

Security interest (Grey cell: possession required)	Subject		Objects		
	Debtor	Creditor	Permitted	Establishment and perfection	Prohibited
<b>Chinese lien (sales right by default)</b>	Any “debtor” (CPL art. 230)	Any “creditor” that has legal possession of an asset of the “debtor” (CPL art. 230)	General: Movables to which the creditor has legal possession under the same legal relationship  Between two enterprises: Movables to which the creditor has legal possession under any legal relationship (CPL arts. 230 and 231)	Established by operation of law when the debtor fails to pay due debt (CPL art. 230)	Movables the lien of which is prohibited by law or by the parties’ agreement (CPL art. 232)
<b>Norwegian lien (no sales right by default)</b>	Any debtor	Any creditor	Movables, unless otherwise prescribed by law, according to Skoghøy, pp. 282–283. Sandvik, Krüger & Giertsen, p. 414 hold it as uncertain whether immovables can be covered. Skoghøy holds that such coverage must be prescribed in statutes	Established by operation of law when the debtor fails to pay due debt in a legal relationship connected to the possession, according to Sandvik, Krüger & Giertsen, pp. 414–417. Yet, they and Skoghøy all find that the courts must exercise discretion and reject liens that are unfairly coercive, cf. op.cit., p. 416–417 and Skoghøy, pp. 291–293	The rule is unclear, yet it seems that immovables should at least be prescribed statutorily to be covered by a lien
<b>Chinese pledge</b>	Any “debtor” or “third party” (CPL art. 208).	Any “creditor” (CPL art. 208)	Movables (CPL art. 208)	Established and perfected upon delivery (CPL art. 212)	Movables of which pledging is prohibited by law or administrative regulation (CPL art. 209)
			The following rights: 1. Draft, cheques, cashier’s cheques 2. Bonds, deposit receipts 3. Warehouse receipts, bills of lading 4. Transferable fund units and equity 5. Property rights in transferable exclusive trademark rights, patent rights, copyrights, etc. 6. Accounts receivable 7. Other property rights*(CPL art. 223)	Established upon delivery of title certificate, or upon registration if there is no title certificate (CPL art. 224)	Property rights for which pledging is not stipulated by law or administrative regulation (CPL art. 223 by neg. implication)

<b>Norwegian pledge</b>	Any debtor	Any creditor	Non-registrable movables or accessories to registrable movables (Norwegian Security Interest Act § 3-2 (1))	Established by agreement, perfected upon delivery (Norwegian Security Interest Act § 3-2 (2))	Property not mentioned under Norwegian Security Interest Act § 3-2 (§ 1-2 (2))
<b>Chinese mortgage</b>	Any “debtor” or “third party”. Requires civil capacity and right of disposal to the object (CPL arts. 179 and 180)	Any “creditor” (CPL arts. 179 and 180)	Buildings, objects attached to the land (CPL art. 180 (1))	Established and perfected upon mandatory registration (CPL art. 187)	1. Land ownership 2. Cultivated land, residential sites, hilly land set aside for private use, etc. for which the use right is owned by the collective, apart from exceptions prescribed by law 3. Public welfare facilities 4. Property with unclear or disputed ownership 5. Confiscated, seized or supervised property 6. Other property of which mortgaging is prohibited by law or administrative regulation (CPL art. 184)
			Construction land use rights (CPL art. 180 (2))		
			Contractual land operating rights of land such as barren land, etc. acquired through invitation to tender, auction, public consultation, etc. (CPL art. 180 (3))		
			Buildings under construction (CPL art. 180 (5))	Established upon effective contract. Perfected against bona fide third party upon voluntary registration (CPL art. 188)	
			Manufacturing facilities, raw materials, semi-manufactured goods, finished products (CPL art. 180 (4))		
			Vessels and aircrafts under construction (CPL art. 180 (5))		
			Means of communication and transportation (CPL art. 180 (6))		
			Other properties not prohibited from being mortgaged by any law or administrative regulation (CPL art. 180 (7))		
<b>Chinese floating charge</b>	Any “enterprise”, “individually owned business” or “agricultural manufacturing business” (CPL art. 181)	Any “creditor” (CPL art. 181)	Manufacturing facilities, raw materials, semi-manufactured goods, finished products currently owned or to be owned in the future (CPL art. 181)		
<b>Norwegian mortgage</b>	Any debtor	Any creditor	Rights to immovable property (Norwegian Security Interest Act § 2-1)	Established by agreement, perfected upon registration (Norwegian Security Interest Act § 2-5)	Property not mentioned in the Norwegian Security Interest Act § 2-1 (§ 1-2 (2))

<b>Norwegian mortgage (cont.)</b>			Registrable movable property and accessories to such property (Norwegian Security Interest Act § 3-3 (1))	Established by agreement, perfected upon registration (Norwegian Security Interest Act § 3-3 (1))	Property not mentioned in the Norwegian Security Interest Act § 3-3 (1) (§ 1-2 (2))
	Business enterprises (Norwegian Security Interest Act § 3-8)	Any creditor	Motor vehicles, movable construction machinery and railway vehicles used in or intended for business operations (Norwegian Security Interest Act §3-8 (1)).	Established by agreement, perfected upon registration (Norwegian Security Interest Act § 3-8 (2))	Property not mentioned in the Norwegian Security Interest Act § 3-8.
<b>Norwegian salgspant</b>	Any buyer of movables (Norwegian Security Interest Act § 3-14)	Seller or third-party providing credit for purchase money (Norwegian Security Interest Act § 3-14)	Sold movable property (Norwegian Security Interest Act § 3-14) or sold accessories to registrable movables (§ 3-15) or accessories to immovables (§ 3-18).	Professional sales: Established by agreement confirmed in writing by a party, perfected by delivery after such confirmation (Norwegian Security Interest Act § 3-17 (2))	1. Immovables (Norwegian Security Interest Act § 3-14) and registrable movables (§ 3-15).  Motor vehicles are not prohibited from salgspant as they are not registered in an asset register ("realregister") but a personal register, cf. § 1-1 (4). Yet, the <i>salgspant</i> must be registered in this personal register for perfection.  2. Movables for resale prior to payment (§ 3-15 (2))
				Consumer sales: Established and perfected through written agreement and subsequent delivery (Norwegian Security Interest Act § 3-17 (1))	
<b>Norwegian floating charge for operating accessories</b>	Business enterprises (Norwegian Security Interest Act §§ 3-4)	Any creditor	Operating accessories used in or designated for debtor's business operations, including: 1. Machines, implements, tools, furnishings and other equipment, certain intellectual property rights and exploration rights (Norwegian Security Interest Act § 3-4 (1)) 2. Motor vehicles, movable construction machinery and railway vehicles (§3-8) 3. Movables for agricultural use (§3-9) 4. Movables used for business utilising fishing vessels (§3-10)	Established by agreement, perfected upon registration (Norwegian Security Interest Act §§ 3-6, 3-8 (2), 3-9 (3) and 3-10(2))	Property not mentioned in the Norwegian Security Interest Act §§ 3-4, 3-8, 3-9 and 3-10
<b>Norwegian floating charge for stock</b>	Business enterprises (Norwegian Security Interest Act §§ 3-11 (1))	Any creditor	Stock in trade, including raw materials, unfinished and finished goods, fuel and other goods consumed in the course of business and packaging for the enterprise's products (Norwegian Security Interest Act § 3-11 (1))	Established by agreement, perfected upon registration (Norwegian Security Interest Act § 3-12 (1))	Property not mentioned in the Norwegian Security Interest Act § 3-11