SECURITY MEASURES DIRECTED AT MONEY PAYABLE UNDER DOCUMENTARY CREDITS — RECENT SWEDISH CASE LAW

BY

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1. INTRODUCTION

Documentary credits law is a rather unique mixture of international trade usage and practices, particularly as laid down in the rules of the International Chamber of Commerce—Uniform Customs and Practice for Documentary Credits (UCP)—on the one hand, and national law, on the other.[1] The UCP is no doubt the primary source of law for national courts in this legal field; codified national documentary credits law still remains a rare phenomenon.

While it is true that only a few states have thus far enacted laws which specifically regulate documentary credits,[2] most legal systems contain rules and principles of a general nature, such as rules and principles of commercial, procedural and jurisdictional law, which directly or indirectly have a bearing upon the development of documentary credits law. Of course, in the Anglo-American legal systems, as well as in some of the civil law systems, courts have also, in the absence of codified law, relied on case law, which, at least as far as the United Kingdom, the United States, France and West Germany are concerned, is comparatively extensive.

Until only a few years ago Swedish case law concerning documentary credits was very scanty indeed. However, in 1978 the Swedish Supreme Court broke new ground in two landmark cases.[3] These were followed by a number of cases in the lower courts in the early 1980s, and only very recently, in September 1984, a further Supreme Court decision was handed down.[4] Together these

[1] See generally, e.g., J.M. Holden, *The History of Negotiable Instruments in English Law*, London 1955; F. Wieacker, *On the History of A Supranational Legal System of Commerce, The Legal Organization of Commerce and Its Relation to the Social Conditions*, pp. 7 ff., Symposium arranged by the Faculty of Social Sciences, September 21-23, 1978, (mimeographed) University of Aarhus, Aarhus 1979; A.G. Davis, *The Law relating to Commercial Letters of Credit*, 3rd ed. London 1963; J.C.D. Zahn, *Zahlung und Zahlungssicherung im Aussenhandel*, 5th ed. Berlin-New York 1976, pp. 3 ff.; L. Gorton, *Rembursträtt*, Lund 1980, pp. 26 ff.

It is, of course, only a question of terminology whether one prefers to describe the UCP as national law, since these are incorporated into national law in one way or the other, or supra-national law, since the UCP are the common trade law of several states.

[2] Such laws have been enacted, *inter alia*, in most of the states of the United States by virtue of the Uniform Commercial Code (UCC), in Italy, Colombia, Greece, Guatemala, Honduras, Lebanon, Mexico, and partly in the DDR and Czecho-Slovakia, see further, e.g., Zahn, *op.cit.*, pp. 3 f., and Gorton, *op.cit.*, pp. 30 ff.

[3] See 1978 NJA 560 and 1978 NJA 728.

[4] The Supreme Court's decision of September 10, 1984, no. SÖ 423 (Ö 1795/82), *Skandinaviska Enskilda Banken* v. *Texall AB*, see further in section 5 below.

As regards decisions of the lower courts, see further in section 6 below.

cases constitute a significant development of Swedish documentary credits law; they shed light on numerous aspects of documentary credits and they broaden the basis for an understanding of this relatively complex legal field.

Although the above-mentioned Supreme Court cases are many-sided, they have one common denominator which is the subject of this paper: they all involve security measures (attachments, arrests, injunctions, court orders, etc.) directed at money payable under documentary credits; in fact, the origin and foundation of the cases is an application for such a measure, filed in a Swedish court by a Swedish or foreign party.

Moreover, the cases have international implications, which are a natural feature of cases in this legal field. Therefore, the present paper is a report and to some extent an analysis of these cases as they appear in their international environment.

However, since the cases to be reported contain Swedish legal elements of a jurisdictional and procedural character, some of which the reader abroad may or may not be acquainted with, the following first two sections of this paper will elaborate upon jurisdictional questions and issues pertaining to procedure in connection with security measures. Thereafter, in section 4, a case report will follow.

2. THE JURISDICTION OF SWEDISH COURTS IN PRIVATE LAW DISPUTES

2.1. *The forum rules of the Swedish Code of Procedure*

As has been mentioned, the origin and cause of the cases to be reported in what follows is an application by a Swedish or foreign party for a security measure directed at the money payable under documentary credits. The principal purpose of such a measure is the procurement of a monetary claim. When the party against whom the claim is raised is a foreigner, as is repeatedly the state in the cases to be reported, the question arises of whether the court, with which the application is filed, has power/competence to hear the case, or, in other words, whether the court has jurisdiction over the parties and the subject matter.

Like civil law systems in general, Swedish law does not draw a clear distinguishing line between personal jurisdiction (jurisdiction over the person sued—the defendant/respondent/debtor), on the one hand, and subject matter jurisdiction, on the other (as does, for instance, U.S. law).[5] The question is

[5] See generally as to this distinction in civil law systems, K. Neumeyer, *Internationales Verwaltungsrecht*, Vol. IV, *Allgemeiner Teil*, Zurich-Leipzig 1936, pp. 71 ff., 155 and 471 f. Also see, e.g., M. Haymann, *Extraterritoriale Wirkungen des EWG-Wettbewerbsrechts*, Baden 1974, pp. 224 ff., and E.

simply whether or not the court has jurisdiction to hear the case. Some legal writers[6] use the term subject matter jurisdiction ("saklig"—"sachlicher"—competency) as distinguished from local and functional jurisdiction, the two latter denoting the geographical and hierarchical distribution of cases, respectively. However, the concept of subject matter jurisdiction comprises a further element: the allocation of competency between administrative tribunals and courts of general jurisdiction.

Therefore, for the purposes of the present paper, it seems that the term "international jurisdiction" causes the least confusion[7] when designating the power of Swedish courts to hear cases involving foreign elements (e.g. either or both parties are foreigners, the case affects the rights of foreigners, the interpretation of a contract concluded abroad is at issue, etc.).

With some exceptions, particularly in the family law field,[8] the Swedish legal system contains no codified jurisdictional rules. Moreover, the number of cases involving issues regarding international jurisdiction is severely limited. In the absence of statutory rules and controlling case law, legal writers have sought guidance in the forum rules laid down in the Swedish Code of Procedure (the Code of Procedure), ch. 10.[9] The common view is that these forum rules, the foremost purpose of which is to geographically distribute judicial affairs between Swedish courts internally, are applicable to cases including questions concerning international jurisdiction *ex analogia*. At the same time, however, most writers agree that the forum rules should be applied, not mechanically, not indiscriminately, but with caution and thorough consideration of all the circumstances in the individual case.[10] Hence, there may be cases where an analogy is inappropriate: The underlying rationale of the forum rules may not always be valid with respect to cases of international jurisdiction. On the other hand, situations may arise where a Swedish court should hear a case, although the forum rules provide no directives.[11] In the latter instance, again, where no forum rule is applicable, there is the problem of finding a suitable forum when a Swedish court as such does have international jurisdiction. Since the Code of Procedure lacks a general subsidiary rule to

Nerep, *Extraterritorial Control of Competition under International Law*, Lund 1983, pp. 3 ff. and 289 ff., with further references.

[6] See, e.g., H. Eek, *Internationell privaträtt, Metod och material*, Stockholm 1962, pp. 85 f., with further references, and S. Dennemark, *Om svensk domstols behörighet i internationellt förmögenhetsrättsliga mål*, Stockholm 1961, pp. 1 ff., also with further references.

[7] See, e.g., Eek, *op.cit.*, p. 84, and Dennemark, *op.cit.*, p. 48, note 1, with further references.

[8] See further M. Bogdan, *Svensk internationell privat- och processrätt*, Lund 1980, pp. 97 f.

[9] Rättegångsbalken of July 18, 1942, *SFS* 1942:740.

[10] See, e.g., Eek, *op.cit.*, pp. 85 ff.; Dennemark, *op.cit.*, pp. 64 ff; Bogdan, *op.cit.*, pp. 98 ff.; H. Karlgren, *Internationell privat- och processrätt*, 5th ed. Lund 1974, pp. 155 f.

[11] See further, e.g., Dennemark, *op.cit*, pp. 57 f. and 63, and Bogdan, *op.cit.*, pp. 98 ff. Also see Eek, *op.cit.*, p. 112.

cover such situations, a court confronted with the problem either has to create a new forum rule or dismiss the case on jurisdictional grounds. At least in one case the court has preferred the former alternative.[12]

The Swedish forum rules are characterized as being either general or special. The general forum rules basically provide that a private dispute may be brought to the court in the district where the defendant resides (i.e. where he has his home or where he is domiciled, residence and domicile being regarded as synonymous in this context). The special forum rules normally apply when Swedish residence cannot be established, except in cases concerning real property, or when the parties have stipulated an exclusive forum clause, in which cases the special rule will govern exclusively.

Applying the forum rules of the Code of Procedure *ex analogia*, international jurisdiction would *prima facie* lie in the following cases:

1. The defendant resides in Sweden or, as regards companies, has its registered seat here (*forum domicilii*);[13]
2. the defendant has no known place of residence either within or outside Sweden but is present (stays) here either temporarily or on a more permanent basis, provided the summons is served at the place where he is staying (*forum deprehensionis*);[14]
3. the defendant is a Swedish national without a known residence either here or abroad, but is staying in a foreign country (or his whereabouts are unknown), provided the defendant has either resided or stayed here prior to the suit;[15]
4. the defendant has no known residence in Sweden, but has real or personal property situated here, provided the suit concerns a monetary obligation;[16]
5. the defendant has no known residence in Sweden, but the suit involves a dispute concerning personal property which is situated here (*forum rei sitae*);[17]
6. the defendant has no known residence in Sweden, but the suit involves a controversy concerning either a contract which has been concluded in Sweden, or a debt which has been incurred here (*forum contractus*);[18]

[12] 1958 SvJT 13.
[13] The Code of Procedure, ch. 10, sec. 1(1) and 1(3).
[14] The Code of Procedure, ch. 10, sec. 1(5)(1). The rationale of this forum rule is primarily the avoidance of negative jurisdictional conflicts, i.e. the situation where the defendant cannot be sued in any court. Of course, if the defendant has a known residence outside Sweden, Swedish international jurisdiction would be unnecessary. See Dennemark, *op.cit.*, pp. 138f., and Bogdan, *op.cit.*, p. 101.
[15] The Code of Procedure, ch. 10, sec. 1(5)(2).
[16] The Code of Procedure, ch. 10, sec. 3(1)(1).
[17] Ch. 10, sec. 3(1)(2).
[18] Ch. 10, sec. 4.

7. in a civil action for damages, if the tortious act occurred in Sweden (the act was committed or the harm was inflicted here), irrespective of where the defendant resides (*forum delicti*);[19]
8. the defendant is a company or other legal person without a known residence in Sweden, but with a permanent business establishment here, provided the suit concerns a controversy directly arising from the activities carried out by that establishment;[20]
9. in a suit involving a controversy regarding the title or rights to real property or claims connected to the use of such property, if the property in question is situated in Sweden;[21]
10. the parties involved in the suit have agreed upon the choice of forum (prorogation clause).[22]

While the factors enumerated above, all of which may constitute a basis for jurisdiction, should not be regarded as exhaustive,[23] they certainly are the most central. However, the purposes of the present paper are sufficiently well served if we confine the following presentation of Swedish rules of jurisdiction to those rules which may be expected to be invoked most frequently in documentary credits cases.

2.2. *Jurisdiction based on the defendant's residence in Sweden*[24]

A person resides in Sweden if he is in fact living here on a permanent basis. In determining whether or not a person is living in Sweden on a permanent basis, the court must consider all relevant circumstances, for instance, the fact that the person is registered here for census and tax purposes, the period for which he has been living in Sweden, his intentions with regard to his future residence (*animus remanendi*), the residence of his family, his citizenship, etc. However,

[19] Ch. 10, sec. 8.
[20] Ch. 10, sec. 5.
[21] Ch. 10, secs. 10 and 11.
[22] Ch. 10, sec. 16.
[23] See also, e.g., the Code of Procedure, ch. 10, sec. 1(4), under which an estate of a deceased person may be sued in the court of the district in which the dead person resided; sec. 2, under which government agencies may be sued in the court of the district in which they are seated; sec. 6, under which the defendant may be sought for obligations incurred in the district in which he is sojourning or temporarily residing, provided the defendant is present at that place at the time when the summons is delivered to him (particularly applicable to room and board expenses); sec. 7, under which an agent or trustee may be sued in the district where he carries out his activities in that capacity, provided the suit concerns the management of property (the agent may sue his principal in the same court in such matters), etc. There are, finally, forum rules relating to controversies concerning litigation expenses (sec. 13), family and inheritance matters (sec. 9) and multiparty or multiclaim litigations (sec. 14).
[24] See generally, e.g., Dennemark, *op.cit.*, pp. 69 ff.; Eek, *op.cit.*, p. 84; Bogdan, *op.cit.*, pp. 100 f. and 114 ff.; Ginsburg and Bruzelius, *Civil Procedure in Sweden*, The Hague 1965, pp. 155 ff.; Karlgren, *op.cit.*, pp. 156 ff.

according to one forum rule, the court in the district in which a person is registered for census purposes will be deemed to be his personal forum.[25] Whether the rule also is that the same court will be presumed to have international jurisdiction over a case in which that person appears as defendant, is not entirely clear. The better view seems to be that a decision with respect to international jurisdiction must rest on a consideration of all relevant factors.

Temporary visits to Sweden will generally not constitute residence, even if they last for several months—especially when the purpose of the visit is research, studies or temporary work on behalf of a company abroad—provided there is no evidence to the effect that the person in question intends to remain here.

Exceptionally, particularly in connection with private law disputes, a person may be considered to be resident in more than one state. Thus, for instance, if a person residing in France pays regular and long visits to Sweden for the purposes of conducting business here, that person may be considered to be a Swedish resident, at least as regards all matters connected to his business (and possibly also in other cases).[26]

A company or other legal or business entity is generally deemed to be residing in Sweden if it is registered here or if its board of directors (or other governing board, directorate or council), by virtue of its articles of association, is seated here. The seat of the board of directors normally also corresponds to the place in which the company is registered. The fact that a company's board of directors is actually seated in Sweden is of no material consequence, however, if it is not seated here according to its articles of association, or even if it is so seated, but is fictitiously or deceptively so.[27] On the other hand, that fact may indicate that the company has a place of business in Sweden, which, as we shall see below, is an independent jurisdictional ground.

2.3. *Jurisdiction based on a company's place of business in Sweden*[28]

If a foreign company conducts business in Sweden through a permanent business establishment situated here, such as a branch, sales or representative office, production site, workshop, or a sales agent, a Swedish court has international jurisdiction over all legal controversies arising out of the business conducted here.[29] Accordingly, in contrast to the general jurisdictional rule,

[25] See the Code of Procedure, ch. 10. sec. 1(2).
[26] See, e.g., Dennemark, *op.cit.*, p. 81.
[27] *Ibid.*, p. 87.
[28] See generally, e.g., Dennemark, *op.cit.*, pp. 196 ff.; Bogdan, *op.cit.*, p. 105.
[29] Branch offices may be established in Sweden in accordance with the Act (*SFS* 1968:555) on a

this special rule requires that there is an immediate connection between the action instituted and the business performed in Sweden.[30] However, a contractual claim directed against a foreign company having a permanent business establishment in Sweden does not have to be based on a contract actually concluded by representatives of that establishment. It is sufficient that the contract has an immediate connection with the business performed in Sweden, e.g. in the case where a sales agent or a branch office, without having the power to act on behalf of its foreign principal, solicits orders or facilitates the conclusion of contracts by carrying out activities in Sweden.[31] On the other hand, it should be noticed that the place of business rule covers contractual as well as non-contractual claims, provided these arise out of the business conducted in Sweden.

2.4. *Jurisdiction based on contracts concluded or debts incurred in Sweden*[32]

The *forum contractus* rule provides that any person, irrespective of his nationality, and provided he is not known to be residing in Sweden at the time when the summons is served upon him, may, in a controversy concerning a contract or a monetary obligation, be sued in the court in whose district the contract was entered into or the debt incurred. Thus, the rule is addressed only to non-resident defendants irrespective of nationality (whether the person in question has a fixed residence abroad at all, is immaterial); the general, *forum domicilii* rule applies to Swedish residents.[33]

While the *forum contractus* rule may, on the face of it, seem far-reaching, its scope has been considerably restricted in case law due to a narrow definition of the place of contracting.[34] Hence it has been ruled that a contract is not entered into in Sweden, at least as far as this forum rule is concerned, unless both parties were present here when the contract was finally concluded, either in person or through fully authorized agents. A foreign company's agent or representative, who is merely authorized to solicit, mediate or negotiate con-

right for a foreign individual or foreign company to conduct business in Sweden. Under sec. 2 of this Act, a branch office is considered to be subject to the jurisdiction of Swedish courts as regards the activities carried out in Sweden. See also Dennemark, *op.cit.*, p. 197.

[30] See, e.g., Bogdan, *op.cit.*, p. 105, and Dennemark, *op.cit.*, p. 197.

[31] See Dennemark, *op.cit.*, pp. 200 f., and Bogdan, *op.cit.*, p. 105. Also see the *travaux préparatoires* of the Code of Procedure, ch. 10, sec. 5, *NJA* II 1943, p. 101.

[32] See generally, e.g., Dennemark, *op.cit.*, pp. 186 ff., and Bogdan, *op.cit.*, pp. 104 f. Also see *NJA* II 1943, p. 99.

[33] See Dennemark, *op.cit.*, p. 187; Bogdan, *op.cit.*, p. 104; Ginsburg and Bruzelius, *op.cit.*, p. 163. Also see *NJA* II 1943, p. 99.

[34] See, e.g., 1923 NJA 202, 1925 NJA 330, 1940 NJA 354. Also see N. Beckman, *Svensk domstolspraxis i internationell rätt*, Stockholm 1959, p. 23.

tracts in Sweden—and thus lacks the right to enter into contracts on his principal's behalf—does not render the foreign principal amenable to Swedish courts under the rule in question (on the other hand, the place of business rule, outlined above, may under certain circumstances apply). This is so, even if the agent is empowered to make preliminary agreements subject only to his foreign principal's subsequent approval. Yet, again, the term "monetary obligation" or "debt" is broadly defined: it includes contractual as well as non-contractual liabilities.

2.5. *Jurisdiction based on property situated in Sweden*[35]

The jurisdictional/forum rule broadest in scope, and the rule most frequently utilized in connection with monetary claims, is doubtless the place of property rule. Virtually without exception, this rule also constitutes the basis for international jurisdiction over foreigners in actions for security measures directed at money payable under documentary credits. The extensive coverage of the rule has led some legal commentators to characterize it as the "umbrella" rule, thereby signifying the fact that a foreigner may subject himself to a suit in Sweden simply by leaving an umbrella behind while occasionally visiting Sweden.[36] The gist of the rule is that Swedish courts have jurisdiction over any person (an individual or a juristic entity), irrespective of his nationality, provided

1. the person is not known to be residing in Sweden,
2. the controversy brought to court concerns a monetary obligation (wherever it has incurred), and
3. the person has property in Sweden which is not entirely without value.

If these requisites are met, the suit may be commenced in the court in whose district the property is located.

The explicit *ratio legis*, as expressed in the *travaux préparatoires* of the Code of Procedure, is to provide a creditor—whether Swedish or foreign—with the opportunity to sue a debtor—whether Swedish or foreign—in the district in which the debtor's property is located and immediately seek compensation out of the property in question.[37] Hereby, the jurisdictional rule, it is believed, paves the way for a speedy and efficient execution of the court's decision, particularly when the trial has been preceded by proceedings for security measures. The broad coverage of the rule may also partly be ascribed to the

[35] See generally, e.g., Dennemark, *op.cit.*, pp. 143 ff.; Bogdan, *op.cit.*, pp. 102 ff.; Karlgren, *op.cit.*, pp. 159 f.
[36] See, e.g., Dennemark, *op.cit.*, p. 159, note 62, and Ginsburg and Bruzelius, *op.cit.*, p. 160.
[37] See *NJA* II 1943, p. 99.

fact that, as a principle, foreign judgments are not recognized and enforced in Sweden, the theory being that, if the creditor cannot procure his rights by suing the debtor abroad and seeking enforcement of the foreign judgment in Sweden, he must at least be afforded the opportunity to procure his rights by suing the debtor here.

The following is a more detailed account of the place of property rule.

The first requisite, as stated above, is that the defendant/debtor must not, at the time when the summons is served, be known to be residing—by Swedish legal standards—in Sweden. Whether he is a Swedish or foreign national (or, indeed, without nationality), or whether he is a resident of any other country, is of no relevance. The residence or nationality of the plaintiff/creditor is likewise immaterial.

Secondly, only actions concerning monetary disputes are covered. Excluded are, for instance, ownership claims and claims regarding proprietory rights, patent and trademark suits and claims connected to inheritance or wills.[38] However, certain other family law claims, such as allowance or alimony claims, as well as non-contractual monetary claims (e.g. tort claims), fall within the scope of the rule. The fact that the foundation for the claim (contract concluded, damages inflicted, debt incurred, etc.) arose abroad is irrelevant. On the other hand, it is not required that the monetary obligation, having arisen, has matured when the action is commenced.

Thirdly, there are the questions of what types of property may constitute a jurisdictional ground in this context, and the minimum value stipulated. Property of all types satisfy the requisite hereunder, whether personal or real, tangible or intangible, bank accounts or cash money, property pledged, mortgaged or placed as security, property hired out or leased, irrespective of whether the property is in the debtor's or any other person's possession (provided it is not wholly owned by that person). Negotiable instruments are covered, as are monetary claims—irrespective of whether they have matured—against any person residing in Sweden, including the plaintiff/creditor, who has instituted the suit.

Property only incidentally or temporarily on Swedish ground, for instance, property being transported through Sweden, or, in cases of ships and airplanes, expected to arrive at a Swedish port, also generally falls within the

[38] As regards ownership claims and claims concerning proprietory rights, the *forum rei sitae* rule will generally apply. As to this rule, see *infra* under this section. With respect to patents, see the Patent Act (*SFS* 1967:837), ch. 10, sec. 71, and the Act (1978:152) on the jurisdiction of Swedish courts in certain cases in the patent law field. Also see, with regard to trademarks, the Trademark Act (*SFS* 1960:644), sec. 31. Inheritance claims, etc., are governed by the Act (*SFS* 1937:81) on international legal relations regarding estates of deceased persons.

ambit of the rule, while goods transported by airplanes over Swedish territory most probably would not.

However, property of a more private nature, which a foreigner brings along while paying a temporary visit to Sweden, is generally regarded as falling outside the jurisdictional sphere.[39] Yet, should the visitor consciously or by a mere accident leave property, such as an umbrella or a bicycle, behind, the property, if it has some value, suffices to provide a basis for international jurisdiction. Purely personal and private belongings, such as letters, clothes, business documents, etc., fall outside the jurisdictional realm, unless they have a market value as such (e.g. letters written by famous persons). Most writers further agree that property which for various reasons must not be subject to enforcement activities, such as personal belongings, certain work tools which are indispensable in the defendant's work, household machines, certain necessary furniture (covered by the so-called debtor's beneficium), registered trademarks, etc., cannot form a basis for international jurisdiction.[40]

The *forum rei sitae* rule is applicable in the limited situation where the suit as such directly concerns the property on which jurisdiction is based and that property is located in Sweden, i.e. the suit involves a dispute with regard to the ownership of the property in question or other rights connected hereto.

An obvious prerequisite—except, of course, in cases where the *forum rei sitae* rule applies—is that the defendant/debtor is the true owner of the property on which jurisdiction is based. In the event that the defendant/debtor should deny ownership, the burden of proof with respect hereto lies with the plaintiff/creditor. The question of ownership may, on the other hand, be determined in accordance with Swedish or, occasionally, foreign law, depending upon the applicable choice of law rule.[41] As regards the question of international jurisdiction, full proof of the defendant's/debtor's ownership is generally required. During pre-trial stages, however, for instance, when a security measure is applied for, it would seemingly suffice that the fact of ownership is made probable.[42]

The question of what minimum value is required in order for the property to

[39] See, e.g., Dennemark, *op.cit.*, pp. 161 f. Also see the Supreme Court case 1981 NJA 386, in which money to be used for coverage of travel expenses, necessary hand luggage and certain measuring instruments, brought along by a person on a temporary visit to Sweden, were considered insufficient to constitute a basis for jurisdiction on the ground that the property in question was for personal use during the visit.

[40] See, e.g., Dennemark, *op.cit.*, pp. 153 ff. and 163 f.; Karlgren, *op.cit.*, p. 159; Bogdan, *op.cit.*, p. 104. With regard to trademarks, see the Trademark Act (*SFS* 1960: 644), sec. 34(3).

[41] See, for instance, the cases to be noted in section 5 *infra*, one of which is a Supreme Court case, decided on October 1, 1984 (no. SÖ 481; Ö 854/83), and another a case decided by the Gothenburg ("Västra Sveriges") Court of Appeal on April 19, 1983 (SÖ 23; Ö 1272/82). Also see 1970 NJA 487 and 1958 SvJT 56.

[42] See further *infra* under section 3.

constitute a basis for jurisdiction may be divided into two parts: first, there is the question of what value the property must have as such (the absolute value) and, secondly, the question of what value the property must have as compared to the plaintiff's/creditor's monetary claim (the relative value).

The prevailing view is that property of any value may constitute a basis for international jurisdiction, so long as the value is not merely fictitious.[43] Thus, monetary claims that are obviously worthless do not constitute property on which jurisdiction may be based.

Furthermore, for jurisdictional purposes any discrepancy between the property on which jurisdiction is founded, and the plaintiff's/creditor's monetary claim is entirely irrelevant, i.e. the requirement of relative value coincides with that of absolute value; only the value of the property as such is relevant.[44]

Hence, for instance, property that has been mortgaged or pledged up to its full value may still constitute a basis for international jurisdiction. Moreover, a creditor may sue a foreigner for a million dollar claim and secure jurisdiction on the ground of property worth a few dollars. In this way the plaintiff/creditor is afforded the opportunity to obtain a judgment from a Swedish court without being able to enforce the judgment in Sweden, assuming the defendant/debtor has no other property in Sweden. Although, at first sight, this view may seem to run counter to the *ratio legis* of the place of property rule, it is generally accepted and is, to a certain extent, also supported by express statutory wording. The rationale for this standpoint seems to be that the plaintiff/creditor, although unable to enforce the judgment in Sweden, may find use for the judgment for other purposes, for instance, for enforcement abroad (which, however, is less likely in view of the general difficulties in this respect), settlement negotiations, set-offs, etc. The defendant/debtor may also find it advisable voluntarily to adhere to the judgment in order to safeguard his reputation and good business relations.[45]

A final requisite is that the property must be situated in Sweden at the time when the summons is served upon the defendant/debtor. The question whether the property is so located is to be determined in accordance with *lex fori*. Negotiable instruments are located in Sweden if they can be found here, whereas non-negotiable instruments and other monetary claims are considered to be where the debtor resides. Pledged property is deemed to be situated where such property can be found.[46]

[43] See, e.g., Dennemark, *op.cit.*, pp. 160 and 164 f., and Bogdan, *op.cit.*, p. 103. Also see Karlgren, *op.cit.*, p. 159.

[44] See particularly Dennemark, *op.cit.*, pp. 152 ff.

[45] See *ibid.*, p. 154.

[46] See the Code of Procedure, ch. 10, sec. 3(2).

Finally, as documentary credits involve monetary claims on which international jurisdiction may be based, a few additional remarks will be devoted specifically to this problem area.

As has been mentioned above, the law does not require that the monetary claim has actually matured. Even claims which are otherwise conditional upon the occurrence of an event or a specific action taken by the creditor or a third person, may suffice for jurisdictional purposes, as may also claims on future deliveries. There is, furthermore, no requirement to the effect that the claim subject to trial, i.e. the claim for which the suit was commenced, in any way corresponds to the monetary claim on which jurisdiction is sought to be procured. And the fact that the plaintiff/creditor himself is the debtor as regards that monetary claim is, as a general rule, without material significance. However, it is required that at least a part of the claim, no matter how infinitesimal, is undisputed.

Accordingly, in the case, for instance, where a Swedish purchaser of goods terminates his contract with a foreign seller and thereafter claims damages for the seller's breach of contract, he cannot—for jurisdictional purposes—dispute his liability to pay for the goods entirely if the basis for jurisdiction in the suit against the seller is to be the seller's claim on payment for the goods delivered. But then again, the Swedish purchaser, in the situation referred to, may be in debt to the foreign seller for prior deliveries which may or may not be connected to the delivery in dispute. Such debts may, of course, also form a basis for jurisdiction in the dispute at issue. Moreover, a Swedish court may seemingly hear the case even when the Swedish purchaser has deliberately delayed or withheld the payment for the prior deliveries in order to obtain jurisdiction, although a Supreme Court case from 1962,[47] *prima facie*, indicates a contrary standpoint: An undue or improper omission to pay a matured debt for jurisdictional purposes, the Court indicates *obiter dictum*, may fall short of the jurisdictional requirements. The fact that a purchaser/debtor withholds or postpones payment cannot, of course, be characterized as undue or improper as such. The Court's *obiter dictum* seems exclusively to refer to the situation where the sole purpose of the delay is the procurement of jurisdiction.

In line with this theory is the principle that the debt on which jurisdiction is sought to be based, must not have been created solely for the purposes of jurisdiction. Of course, this circumstance—as well as the fact that a payment has been withheld solely for jurisdictional purposes—is a matter of proof, the burden of which should lie with the party alleging the circumstance; in its essence, the allegation is really that the purchaser/debtor manipulates *fraudem legis*.

[47] 1962 NJA 354.

Yet it is no doubt too intricate a task to prove, for instance, that a Swedish purchaser/debtor has ordered (and received) goods, for which payment has been withheld by the purchaser in order to procure jurisdiction over the foreign seller in a suit concerning the purchaser's monetary claims against the seller for earlier breaches of contracts.[48]

There is, however, at least one situation in which the *fraudem legis* theory may have a practical significance, namely the following:

A foreigner is sued in a Swedish court. The foreigner appears but pleads that the case be dismissed on the ground that the court lacks a jurisdictional basis to try the case. The court agrees. While dismissing the case, the court awards the foreign party compensation for litigation costs, which is to be paid by the suing party (under Swedish law, the losing party normally has to bear the costs of the winning party). The crucial question now arising is, did the court—by ordering the Swedish purchaser to compensate the foreign party for litigation costs—simultaneously afford the purchaser a jurisdictional basis, i.e. the debt relating to the litigation costs, on which the purchaser could sue (now successfully) the foreign party anew?

The common Swedish view seems to be that, in this particular situation, the debt for litigation costs would not constitute a jurisdictional ground.[49] This should not, however, exclude the conclusion that, in other situations, debts for litigation costs may meet the jurisdictional standard, for instance, where such have incurred as a result of a full trial in a Swedish court, whether against the party subsequently suing the foreigner or any other party.

2.6. *Forum non conveniens*

As stated above, jurisdictional issues are generally solved by means of an application *ex analogia* of the forum rules of the Code of Procedure, in which connection all the circumstances of the specific case are carefully considered. Since the forum rules have been designed primarily to effectuate a geographical distribution of judicial business and jurisdictional spheres between Swedish courts internally, an analogy may not always be in order. An analogy may also be inappropriate on grounds of *forum non conveniens*. Whether a Swedish court has the power to dismiss a case on such a ground is not entirely clear. The circumstance that the forum rules are not directly applicable to issues of international jurisdiction may in itself point towards a discretionary power in

[48] Compare, for instance, the facts of the Supreme Court case reported *infra* under section 4 (the third case—*Skandinaviska Enskilda Banken* v. *Texall AB*).

[49] See Dennemark, *op.cit.*, pp. 168 f., and Bogdan, *op.cit.*, p. 104. Also see the Supreme Court case 1966 NJA 450.

this respect. Although there seems to be no case law in point, the commentators generally agree[50] that the courts have the power to dismiss a case on grounds of *forum non conveniens* where there is no other nexus between the case and Sweden than the bare fact, for instance, that the parties have concluded the contract in dispute at an intermediate landing at a Swedish airport, or that one of the parties in suit has left behind property of minor value in Sweden while travelling here. This is so even if that bare fact is formally sufficient to constitute a jurisdictional ground. In the cases referred to, the submission is, Sweden and Swedish courts have no interest in administrating justice. This is particularly true when it can be assumed that the suit has been instituted in a Swedish court for the purpose of persecuting an economically weak counterparty in a case where the bulk of the written and oral evidence can be found abroad, where both parties are foreigners, where foreign law is applicable and where the judgment would have to be enforced abroad (owing to the fact that the defendant owns no valuable property situated in Sweden).

Still, situations may occur where the plaintiff/creditor is capable of establishing that the forum more intimately linked to the case is inconvenient for him on the ground, for instance, that the political or legal environment in the state in question is such that his prospects of a just and fair trial or enforcement would be considerably undermined if he were not allowed entrance into a Swedish court. The doctrine of *forum non conveniens* would obviously be inapplicable in such cases.[51]

2.7. *Conclusion*

It is clear from the foregoing summary of Swedish jurisdictional law that Swedish courts have broad jurisdictional powers in private controversies. In the eyes of the foreigner, some jurisdictional rules, as interpreted by commentators and in case law, may seem less amicable: A monetary claim against any person in Sweden, or a bank account for a minor sum, personal articles left behind in a hotel room, may, at least theoretically—but probably also in practice—constitute a basis for jurisdiction over the owner of the property in question in a suit involving millions of dollars. It must be observed, however, that any person, irrespective of his nationality, domicile or residence, may avail himself of these jurisdictional rules, although the doctrine of *forum non conveniens* certainly sets an outer limit insofar as foreign plaintiffs may be directed to commence action in a more convenient forum. (The doctrine can

[50] See, e.g., Dennemark, *op.cit.*, pp. 67 f., 173 ff. and 190; Eek, *op.cit.*, pp. 88 ff.; Karlgren, *op.cit.*, p. 158; Bogdan, *op.cit.*, p. 102.

[51] Cf. Dennemark, *op.cit.*, p. 176.

hardly be invoked as a defence against a Swedish party.) Secondly, and probably more important, since, as a general rule, foreign judgments are only exceptionally recognized and enforced in Sweden, at least the jurisdictional rules provide an opportunity to obtain a Swedish judgment, which may subsequently result in enforcement in Sweden (or elsewhere).

3. PROCEEDINGS FOR SECURITY MEASURES

The Code of Procedure, ch. 15, contains provisions regarding attachment, arrest and injunction proceedings in connection with private law disputes.[52] On the ground of these provisions, a plaintiff/creditor is provided the opportunity to secure provisionally a claim against the defendant/debtor, prior to adjudication of the same, by subjecting the defendant or his property in Sweden to an attachment, arrest or injunction. Sec. 1 of ch. 5, which covers attachments and arrests, reads as follows:

> Should anyone show probable ground for having a monetary claim, which is or may be assumed to become subject to ordinary legal trial, or any other similar legal proceedings [e.g. arbitration], and it can be reasonably apprehended that the counterparty will evade payment of his debt by absconding, removing assets or otherwise, the court may issue an attachment [or arrest] order, which covers so much of the counterparty's property as may be assumed to cover the monetary claim at a seizure.

The principal prerequisites for an attachment (or arrest) order under Swedish law thus are (1) that the plaintiff/creditor presents an unsecured claim which satisfies the court as to the essential facts of the case, and—if ultimately substantiated—would entitle the plaintiff/creditor to a judgment or an arbitral award in his favour, and (2) that it can be reasonably apprehended that the debtor will seek to evade payment of the debt at issue by absconding, removing assets or otherwise. With respect to the latter requisite, the case law indicates that a showing to the effect that it is not improbable that the debtor will seek to evade payment is sufficient. Moreover, it is not necessary to demonstrate bad faith on the part of the defendant/debtor.[53] Foreign companies will therefore

[52] These provisions are by no means exclusive. In the market law area, and in the field of industrial and intellectual property, for instance, a wide variety of security measures are provided for. See, e.g., the Swedish Competition Act (*SFS* 1982:729), secs. 3 and 10, and the Marketing Practices Act (*SFS* 1975:1418), secs. 2-5.

[53] The law does not require that an intention to evade payment is shown, but merely that the course of action which the debtor is about to take, such as the conducting of detrimental business (at a loss), the overstraining of resources, the realization of assets and removal of such from Swedish territory, may result in an evasion of payment or inability to pay. However, proof of the fact that the debtor is insolvent does not as such meet the standard in question. See, e.g., P.O. Ekelöf, *Rättegång*, vol. III, 3rd ed. Stockholm 1970, p. 13. Also see G. Walin, T. Gregow, P. Löfmarck, *Utsökningsbalken och promulgationslag m.m., En kommentar*, Lund 1982, p. 660, with further references.

generally be amenable to attachment orders, provided they have property of some kind in Sweden. On the other hand, Swedish courts seem reluctant to grant a provisional relief when such is sought against Swedish business entities or individuals. With respect to these persons, the presumption seems to be that they will not seek to evade payment by carrying out the above-stated measures.

Sec. 2 of ch. 15 is exclusively geared to controversies concerning proprietary rights. The section provides:

> Should anyone show probable ground for having preferential title to certain property, which is or may be assumed to become subject to legal trial, or any other similar legal proceedings, and it can be reasonably apprehended that the counterparty either removes or substantially deteriorates the property, or otherwise disposes of the property to the detriment of the applicant, the court may issue an attachment order with respect to the property in question.

The broadest provision of ch. 15 is, no doubt, sec. 3. The section places at the court's disposal a security instrument which encompasses a wide variety of situations. The remedy is an injunction subject to a penalty of a fine. The injunction may comprise a prohibition directed against the removal, alienation, dispersion, sale, transfer, etc., of certain property. The injunction may also comprise an order to carry out a specific action. As we shall see below, injunctions and orders, as well as attachment orders, may be issued on an *interim* and *ex parte* basis.

Sec. 3 provides as follows:

> Should anyone, in cases other than those referred to in secs. 1 and 2, show probable ground for having a claim against another person, which is or may be assumed to become subject to ordinary legal trial, or any other similar legal proceedings, and it can be reasonably apprehended that the counterparty, by carrying out certain activities or by taking or omitting to take certain action, will prevent or impede the exercise of the applicant's right, or substantially reduce the value of that right, the court may grant an appropriate relief designed to procure the applicant's right.
>
> The relief referred to in the first paragraph may comprise a prohibition, subject to penalty of a fine, against carrying out certain activities or taking certain action, or other injunction or order, subject to penalty of a fine, under which the applicant's claim shall be considered, or an appointment of a trustee, or an issuance of an order or directive otherwise designed to forestall interference with the applicant's right.

What distinguishes attachments and arrests, on the one hand, from injunctions and orders, on the other, is primarily the fact that security measures of the former type, as a general rule, involve the element of enforcement by seizure (carried out by the enforcement authorities—the local execution officials), whereas injunctions and orders are court decisions directed at—and served upon—certain persons. As regards attachment of monetary claims, however,

such may be enforced either by seizure of the money, in which case the money is transferred to the execution official's bank account, or by a prohibition, issued by the execution official and directed at the person holding the money, to dispose of the money.

Since it is vital that an injunction (or order) is directed against a named person, an attachment of a monetary claim is often preferred to an injunction in situations when the whereabouts of that person are unknown or when it may be assumed that he will not comply with the injunction. Of course, in the context of documentary credits, where the injunctions are regularly directed against bank or other credit institutions, such situations will seldom arise.

Proceedings for procurement of security measures may be commenced in connection with a pending suit or prior to the introduction of a suit. If the latter alternative is chosen, sec. 7 of the same chapter prescribes that the plaintiff/creditor must sue the debtor (in an ordinary court), or commence arbitral proceedings, within one month from the date on which the security measure was decided upon.[54] The suit brought must further be aimed at resolving the dispute between the parties concerned. Should the plaintiff fail in this respect, the provisional remedy granted shall immediately be revoked.

Proceedings for a security measure shall be initiated in the court in which the suit is pending, or, if commenced prior to the suit, in the court having jurisdiction to hear the case under ch. 10 of the Code of Procedure, as outlined above. Accordingly, with respect to an attachment order issued under secs. 1 or 2 of ch. 15, and where the debtor is a foreigner without another nexus to Sweden, the court in the district where the debtor's property can be found has jurisdiction. As regards injunctions and orders under sec. 3, the locus of the property is likewise determinative in the absence of a permanent business establishment and residence. In the alternative, the *forum contractus* rule may apply. As a general rule, a security measure directed at certain property presupposes the existence of that property on Swedish territory, at least at the time when the measure is enforced.[55]

As stated above in connection with the jurisdictional rules, the plaintiff has the full burden of proof with respect to the fact that the defendant/debtor is the owner of the property on which jurisdiction is sought to be based. Whether or not this rule of evidence also applies to pretrial proceedings, such as where a

[54] In this context it is vital to distinguish between interim and final decisions on security measures. The one-month time limit here prescribed does not relate to interim decisions, but runs only from the date of the final decision.

[55] See, e.g., Å. Hassler, *Utsökningsrätt*, 2nd ed. Stockholm 1960, p. 35, K. Olivecrona, *Utsökning*, 9th ed. Lund 1978, p. 23, and H. Nial, *Internationell förmögenhetsrätt*, Stockholm 1953, pp. 107 ff. and 125 ff. Also see M. Bogdan, "Om svensk exekutionsbehörighet", *SvJT* 1981, pp. 401 ff., at pp. 412 ff., where the matter is discussed in detail.

security measure is applied for prior to the commencement of a suit, is not clear. The wording of sec. 5 of ch. 15 seems to indicate that the rule of evidence applies co-extensively. However, the better view, which also falls within the framework of sec. 5, is that the plaintiff merely has to make the debtor's ownership probable. Thus, in order to escape a security measure, the debtor would have to prove that he is not the owner.[56]

The court to which the plaintiff submits his petition for a security measure must, as a general rule, allow the counterparty the opportunity of defence. In cases of urgency (time is of the essence), however, the court may decide upon an immediate interim measure *ex parte*. Such a decision, which rests exclusively on the material presented by the plaintiff, shall be valid until the court decides otherwise, for instance, subsequent to communication with the defendant.

Court decisions regarding security measures are immediately appealable. Moreover, a decision by an execution official to enforce a security measure may also be appealed. While, as a general rule, the addressees of that right are restricted to the litigating parties, the right to appeal a decision to enforce a security measure is granted all persons directly affected by the decision, if the ruling is against him. Thus, in documentary credits cases, banks at which attachment orders or injunctions are directed, have the right to appeal the execution official's enforcement decision.[57]

When filing the petition, it is incumbent upon the plaintiff to provide security in favour of the defendant/debtor designed to cover the damages that may arise as a result of a wrongful security measure. The security—often supplied in the form of a guarantee—must be executed in general terms, i.e. as a security for possible losses. In the event that the counterparty does not approve of the security issued by the plaintiff, the court has discretion to determine whether or not the security is satisfactory.[58]

Under the Swedish Code of Execution, the enforcement of security measures rests with the local execution official. Having obtained a court decision regarding a security measure, the plaintiff must file an application for enforcement of the same decision with the local execution official, stating the ground for enforcement (the court decision, which shall be attached to the application)

[56] This position is in accord with the legal history of the sections here at issue and also corresponds to the general principles underlying the Code of Procedure and the Swedish Code of Execution ("utsökningsbalken"), *SFS* 1981: 774-775.

See, however, a case decided by the Svea Court of Appeal on July 8, 1983 (SÖ 34/83; Ö 1794/83 —*Alfa-Laval AB* v. *Saudi Arabian Agriculture and Dairy Company*), in which a petition for an attachment was denied on the ground that the plaintiff had—in view of the defendant's denial—failed to prove that the defendant was the owner of the property at which the attachment was sought to be directed (and on which jurisdiction was sought to be based).

[57] See the Code of Execution, ch. 18, sec. 2. Also see Walin *et al.*, *op.cit.*, pp. 586 f.

[58] See the Code of Procedure, ch. 15, sec. 6.

and—in cases of attachment—defining the property subject to the measure. In urgent cases, the enforcement may be decided upon and carried out immediately. As we have seen, the decision to enforce is appealable by any person affected.

In conclusion, the following security measures may be utilized in connection with documentary credits.

1. An attachment of the money payable under a documentary letter of credit (or bank guarantee), which measure is directed against the issuing bank, in which case the execution official either attaches the money in question or issues an injunction directed against the issuing bank, under which injunction the bank is prohibited from paying under the letter of credit.
2. An injunction directed against the issuing bank, prohibiting the bank from paying under the letter of credit, which injunction is enforced by the execution official by means of service upon the bank of the court decision.

4. ATTACHMENT OF MONEY PAYABLE UNDER A DOCUMENTARY COLLECTION ARRANGEMENT

The case law report will commence here with a Supreme Court case from 1970.[59] The case eloquently illustrates the operation of the jurisdictional and procedural rules summarized above and will therefore, in spite of its early date, provide a practical introduction to the case report to follow.

In this case a Swedish company sued a Swiss company for damages. The plaintiff simultaneously petitioned for an interim attachment order respecting the defendant's property in Sweden sufficient to cover the amount in dispute. The background was as follows.

Under two contracts the plaintiff had ordered yarn from the defendant. The goods had been paid for and delivered. On the ground that the goods were defective, the plaintiff had complained to the defendant and claimed damages amounting approximately to SEK 17,000. Under a third agreement between the parties, the plaintiff had allegedly suffered further losses amounting to SEK 30,000. However, the plaintiff had been unsuccessful in receiving compensation from the defendant, and at the time of the suit the claim (in total approx. SEK 47,000) was still unsettled.

The third agreement set forth that payment was to be effected by means of documentary collection via a Swedish bank. The plaintiff had accepted a draft which was due and payable in the bank only a few days after the filing of the suit.

[59] 1970 NJA 487. Cf. 1958 SvJT 56 and 1958 SvJT 449.

The court of first instance based its jurisdiction over the defendant on the ground that the defendant had a monetary claim against the plaintiff under the third contract, i.e. the money payable under the draft, and consequently issued an interim attachment order. The order was directed against the Swedish bank and comprised a prohibition against the bank disposing of the sum in dispute. The interim order was subsequently replaced by a final order. The court of appeal affirmed.

On appeal to the Supreme Court the defendant argued that the monetary claim under the documentary collection arrangement was due to a Swiss bank, which had prepaid the sum at issue to the defendant and guaranteed payment to the defendant's supplier. Furthermore, the defendant had pledged the shipping documents under the letter of credit to the Swiss bank as security for the prepayment, pursuant to which the Swiss bank had transmitted the documents to the Swedish bank accompanied with an instruction to deliver the documents against acceptance of the draft, as had been agreed. The accepted draft had thereafter been retained by the Swedish bank for collection on the day of maturity and for an ensuing account to the Swiss bank. Since the Swiss bank had prepaid the defendant and, as it turned out, the defendant's supplier under the guarantee, the defendant concluded, the entire economic burden had been borne by the Swiss bank.

In two letters produced as evidence by the defendant, the Swiss bank confirmed that the payment under the documentary collection arrangement formed a part of the assets, which the defendant, in accordance with the bank's general rules and conditions for the type of transactions in question, had pledged to the bank. Under the law and prevailing banking practice (in Switzerland, it is presumed), the bank is considered to be the owner of the money in dispute until it has received full payment from the defendant.

In a 3-2 decision the Supreme Court held that under Swedish law, and for jurisdictional purposes, the defendant is the true holder of the monetary claim against the plaintiff. Consequently, jurisdiction over the defendant was rightly procured. The circumstance that the payment under the documentary collection arrangement had been pledged to the bank as a security for prepayment and money paid under a guarantee, does not exclude the conclusion, the Court reasoned, that the monetary claim was due to the defendant, even if the bank could directly appropriate the payment of the debt on the basis of the pledge.[60]

[60] The very same circumstance led the two dissenting judges to conclude that the Swiss bank, and not the defendant, was the true holder of the monetary claim at issue. See further, *infra*, the discussion under section 6.

5. SECURITY MEASURES DIRECTED AT MONEY PAYABLE UNDER DOCUMENTARY LETTERS OF CREDIT

Three rather recent Supreme Court cases have contributed a great deal to the development and understanding of documentary credits law, not only as such, but also in the context of jurisdictional law and security measures. All the cases involve attachment orders directed at money payable under documentary letters of credit. Moreover, they all involve foreign beneficiaries. Jurisdiction has throughout been based on the beneficiary's claim against a Swedish debtor under the letter of credit.

The first case to be reported is a Supreme Court case from 1978, the facts of which were as follows:[61]

Tekniska Verken i Linköping AB ("Tekniska"), a Swedish company, had agreed to purchase oil from a foreign company, Lakeview Trading Co. S/A ("Lakeview"). Pursuant to the agreement, Tekniska had applied for, and a Swedish bank had issued (on August 15, 1975), an irrevocable and internationally transferable documentary letter of credit in favour of Lakeview. The letter of credit was confirmed (on August 19, 1975) by a London bank. The UCP were to apply.

On October 20, 1975, a third party, Cadmus Shipping Co. Ltd. ("Cadmus"), filed a petition for an interim attachment order to be directed at Lakeview's property, specifically the monetary claim which Lakeview had against Tekniska (amounting to approx. USD 293,000). It was believed that the money was deposited with the issuing bank. In this way Cadmus endeavoured to secure a freight claim, which the company allegedly had against Lakeview.

On the following day the interim order was issued, whereupon the local execution official enforced the order by prohibiting both Tekniska and the issuing bank from paying under the letter of credit in favour of Lakeview. On March 11, 1976, the attachment order became final. In connection herewith, Cadmus initiated a civil action against Lakeview on grounds of the aforementioned claim. Cadmus subsequently obtained a default judgment, which was enforced by means of seizure of the money in dispute, i.e. approx. USD 293,000, and held by Tekniska and the issuing bank.

The enforcement decision was appealed by Tekniska and the issuing bank, unsuccessfully, however, in the court of first instance. On appeal to the Göta Court of Appeal, Tekniska and the issuing bank argued, *inter alia*, that Lakeview had no claim against Tekniska or the issuing bank which could be made subject to a seizure. Prior to the attachment of the money, they maintained,

[61] 1978 NJA 560.

Lakeview had transferred its claim against the confirming bank to a Dutch company. That transfer had been effected—all in accordance with art. 46 of the UCP—by means of a new irrevocable letter of credit in favour of the Dutch company, which was issued by the confirming bank. The amount due under the new letter of credit had also been paid by the confirming bank. The balance between the sum due to Lakeview (owed by the confirming bank) and the sum paid to the Dutch company, approx. USD 19,000, had finally been paid to Lakeview at the beginning of November, 1975. Any claim that Lakeview still might have under the letter of credit, it had against the confirming bank. Under the letter of credit Tekniska and the issuing bank had no direct contractual relation to Lakeview. As far as its dealings with Lakeview were concerned, the confirming bank was entirely independent *vis à vis* Tekniska and the issuing bank in all matters pertaining to the letter of credit. At the most, the issuing bank was a guarantor of the money owed by the confirming bank to Lakeview, in which case the rights of the issuing bank fully corresponded to those of the confirming bank; in other words, since the confirming bank's debt to Lakeview had been settled, the issuing bank owed Lakeview nothing.

Finally, Tekniska was under no circumstances liable to pay under the letter of credit, unless the beneficiary, or any of its successors, had directed its claim against the confirming and issuing banks and had failed to recover.

The Court of Appeal reversed, basically on the ground that, as argued by the appellants, Lakeview had no claim against Tekniska or the issuing bank, unless the confirming bank had failed to discharge its liabilities under the letter of credit; in view of the evidence, however, this was not the situation in the case at hand.

The Court of Appeal's decision was affirmed by a unanimous Supreme Court, essentially on the same grounds.

The Court held that sales agreements under which payment is to be effected by means of a documentary letter of credit *in dubio* debar the beneficiary from claiming payment directly from the purchaser, unless he has failed to recover from the banks under the letter of credit. Consequently, Lakeview could not recover from Tekniska, without having first failed to recover from the confirming and issuing banks; nor could therefore Cadmus.

As regards Lakeview's (and Cadmus's) right to direct its claim against the issuing bank, the Court reasoned as follows.

While it is true that according to art. 3 of the UCP the confirming and issuing banks are independently liable *vis à vis* the beneficiary, the latter is under a duty to first direct his claim against the confirming bank, at least when the letter of credit so provides or when, in view of the specific circumstances in the case, it may be assumed that such a procedure was implicitly agreed upon by the parties. Since the evidence showed that the letter of credit was payable

with the confirming bank, Lakeview, consequently, was obliged to claim payment first from that bank. Should the confirming bank fail to meet its obligations, Lakeview would have a secondary right to recover from the issuing bank. However, there was no evidence to the effect that the confirming bank had so failed.

In the second case—also a Supreme Court case from 1978—the Swedish plaintiff had formed a general agreement with the Rumanian defendant.[62] Under this agreement, the plaintiff had undertaken to purchase and resell in Sweden tractors delivered by the defendant, on a long term basis. The specifics of the parties' rights and liabilities were to be set forth in consecutive yearly contracts.

Subsequently, and as a result of the general agreement, the parties had entered into a contract in 1977. However, on the plaintiff's side, the contract had been signed by a wholly owned subsidiary, which, as a *successor de facto et de jure*, had assumed the plaintiff's rights and duties under the general agreement. The 1977 contract provided, *inter alia*, that payment was to be effected by means of a set of irrevocable letters of credit. Accordingly, on behalf of the plaintiff's successor, a Swedish bank issued such credits in favour of the defendant, a Rumanian bank functioning as an advising bank. The 1974 UCP were to apply.

In 1978 the defendant terminated both the general agreement and the 1977 contract. The plaintiff (and the successor) contested the termination and claimed damages (approximately amounting to SEK 6,570,000) for breach of contract; it was the intention of the plaintiff to initiate arbitral proceedings in Paris under the ICC rules, as had been stipulated in the general agreement.

In order to procure at least part of that claim, the plaintiff applied for, and obtained, an interim—and later a final—injunction, under which the issuing bank was prohibited from performing under the letters of credit.

A unanimous Supreme Court revoked the injunction on the following grounds.

While it was true that the 1977 contract stipulated a deferred payment credit, which is not directly covered by the UCP,[63] the parties had agreed that the 1974 UCP were to apply. Under the UCP, the advising bank is under no duty to pay to the beneficiary, even if the money in question has been transmitted through the bank. Consequently, the defendant beneficiary had a claim against the issuing bank directly, which claim, in principle, may be made subject to security measures.

However, it follows from the UCP (General Provisions and Definitions c))

[62] 1978 NJA 728.

[63] According to the latest revision of the UCP, deferred payment credits are now covered.

that a documentary letter of credit is a transaction separate from the underlying contract. For the purposes of this principle, the plaintiff and its successor were to be regarded as one unit under the 1977 contract: although legally separate entities, they had acted in concert and appeared as one party externally, particularly in the proceedings at hand. The claim on which the interim injunction was based originated from the contractual relation existing between the plaintiff and its successor, on the one hand, and the defendant, on the other. The plaintiff, being considered a party to the underlying contract, the Court concluded, cannot avail itself of security measures aimed at interfering with the issuing bank's payment under the letter of credit, unless the claim on which such a measure rests is separate from the underlying contract. In the case at hand, the plaintiff was unable to present such a separate claim.

The third case, from late 1984, involved the following rather complex facts.[64]

A Swedish company, Texall AB ("Texall"), had for a three-year period purchased garments from a Hong Kong company, Polyseiko Garment Factory ("Polyseiko"). Due to, *inter alia*, extensive delays in delivery on the part of Polyseiko, Texall had allegedly made losses amounting to approx. HKD 340,000, for which Texall raised a claim against Polyseiko. However, Texall was confronted by difficulties in getting the claim settled.

In the spring of 1982, the claim still being unsettled, Texall ordered a new set of garments from Polyseiko. An agreement was reached, under which the payment (in the sum of approx. HKD 450,000) was to be effected by means of an irrevocable and non-transferable letter of credit. In accordance with the letter of credit clause, a Swedish bank, at Texall's instructions, issued a letter of credit in favour of Polyseiko. The letter of credit was advised by a Hong Kong bank.[65] Under the credit, Polyseiko was further to present a draft payable at 45 days sight, drawn on the issuing bank and stating any bank in Hong Kong as payee. The letter of credit was to be valid until October 18, 1982. The 1974 UCP were to apply.

The goods delivered by Polyseiko arrived at Stockholm on or before October 18, 1982, and were, at Texall's request, released by the issuing bank on that date. Hence, on October 18, Texall had yielded its right to raise objections under the letter of credit with respect to, *inter alia*, the condition of the goods.

On October 19, 1982, Texall applied for an interim (and final) attachment

[64] Decision by the Supreme Court delivered on September 10, 1984 (no. SÖ 423; Ö 1795/82); *Skandinaviska Enskilda Banken* v. *Texall AB*.

[65] The letter of credit was issued by a telegram to the advising bank stating, *inter alia*, that "please notify beneficiaries by telephone and by letter through your Tsuen Wan Branch *without adding your confirmation*".

order directed at Polyseiko's property in Sweden to cover Texall's aforementioned claim against Polyseiko (HKD 340,000).[66]

On the very same day the court of first instance issued an attachment order in accordance with Texall's application. Jurisdiction was based on Polyseiko's property situated in Sweden, i.e. the money payable under the letter of credit. The court order was immediately enforced, at least provisionally, by the local executing official, whereby the issuing bank was prohibited from paying under the letter of credit. Subsequently, on October 29, the money in question was made subject to an attachment.

The issuing bank appealed the enforcement decision to the Svea (Stockholm) Court of Appeal and argued,[67] *inter alia*: Since the goods under the letter of credit were released by the issuing bank at Texall's request, the bank could not refuse to accept—on whatever ground—the shipping documents forwarded by the advising bank. Therefore, the issuing bank's sole obligation under the letter of credit was to accept the sight draft drawn on the bank. The bank received the shipping documents and the draft on October 18, only a few hours after the release of the goods. The draft was accepted on the same day by the bank. Consequently, on October 19 (or thereafter) Polyseiko had no claim against the bank or Texall which could be made subject to attachment. Furthermore, by naming the advising bank as payee on the draft, Polyseiko had waived its right to payment under the letter of credit.

Texall, on the other hand, argued that the issuing bank's acceptance, in order to be complete, had to be followed by a delivery of the accepted draft by the bank to the holder of the draft. Since the issuing bank had not delivered the accepted draft on October 19, the money under the letter of credit was amenable to attachment.

In a somewhat confusing and scantily worded decision the Court of Appeal affirmed the decision to enforce attachment order, apparently on the ground that, under Swedish law, the issuing bank's acceptance was incomplete: in order to be complete, the accepted draft must be delivered to the holder.

The issuing bank appealed to the Supreme Court. The advising bank intervened. Leave to appeal was granted.

On appeal, the issuing bank contested the lower court's theory that an acceptance of a draft can only be completed by delivery of the draft: The draft had been retained by the issuing bank for the benefit of the advising bank in

[66] Texall also applied for an injunction comprising a prohibition against the issuing bank to pay under the letter of credit at issue. The court first issued an injunction to that effect but annulled it a week later.

[67] As has been mentioned under section 3 *supra*, a right to appeal the execution official's enforcement decision is granted any person directly affected by the decision, provided the decision is a ruling against him. See the Code of Execution, ch. 18, sec. 2.

full accordance with international banking practice. It is common international practice that banks have this double function of, on the one hand, accepting the draft and, on the other hand, retaining the accepted draft on behalf of the payee, i.e. the advising bank. These two functions are strictly separate and banks are organized accordingly.[68]

The issuing bank's second line of argument, which was particularly supported by the advising bank, was that the right to payment under the letter of credit had been assigned by Polyseiko to the advising bank. It was a condition of the letter of credit that credit was to be available with any bank in Hong Kong by negotiation of the beneficiary's draft at 45 days sight drawn on the issuing bank. This condition gave Polyseiko the opportunity to collect payment in advance by discounting the draft in any Hong Kong bank. Polyseiko had taken this opportunity by naming the advising bank as payee on the draft and by endorsing and delivering the same draft to the advising bank. In so doing, Polyseiko had assigned its right to payment under the letter of credit. Thereafter, on October 15, the advising bank advised the issuing bank that "we have negotiated the undermentioned draft/s the relevant documents under which have been disposed of as follows". At the same time, the advising bank transmitted the draft together with the shipping documents to the issuing bank. Hereby, the issuing bank had been properly advised as to the assignment of the right to payment not later than on October 18.

In an affidavit, submitted by the advising bank, the details of the assignment were outlined as follows.

Polyseiko opened an account with the advising bank on January 19, 1981. On January 27, 1981, Polyseiko executed a general letter of hypothecation in favour of the advising bank.[69] By an overdraft agreement dated April 1, 1981, Polyseiko agreed, *inter alia*, that the advising bank had the right to retain any securities or personal property of Polyseiko, held by the bank on deposit or otherwise, and the right to sell the same at any time and retain from the proceeds derived therefrom the total amount remaining unpaid under the overdraft agreement. By a trust receipt for packing credits dated April 26, 1982, Polyseiko applied (and received) a packing loan for the purpose of acquiring the goods to be delivered to Texall under the letter of credit in

[68] The issuing bank's arguments in this respect were given full support by the Swedish Bankers Association, which submitted a legal opinion to the Court.

[69] Clause 1 of said general letter provided as follows.

"As the undersigned may have occasion from time to time to negotiate with you or hand you for collection bills of exchange and/or invoices or other documents representing or relating to goods the undersigned agree that you shall hold the same and all goods thereby represented or to which the documents relate as a continuing security for all sums in which the undersigned may from time to time be actually or contingently indebted or liable to you on any account."

dispute. On October 13 the same year Polyseiko delivered to the advising bank the draft at issue in favour of the advising bank and drawn under the letter of credit on the issuing bank together with the other documents required for negotiation under the letter of credit, subject to the terms and conditions set forth in a specific form delivered with the draft and documents. This form stipulated, *inter alia*, that "in consideration of an advance or advances or other financial accommodation given or to be given or renewed to or at the request of the undersigned by [the advising bank] the undersigned does hereby sell, assign and transfer to [the advising bank] all right, title and interest in and to the above described draft and/or documents and/or merchandise covered hereby and/or proceeds of sale thereof".

The Supreme Court's decision, which was delivered on September 10, 1984, implied, as a practical matter, an affirmation of the decisions of the lower courts. In *obiter dicta* the Court stated its view on the issues presented.[70]

The relatively concise opinion of the majority of the Court (three judges—against two) deserves to be quoted *in extenso:*

> The applicable principles underlying the bills of exchange law may be presumed to imply that a drawer of a bill is, in principle and *vis à vis* the drawee, entitled to revoke the drawee's assignment to pay the payee or his legal successor, until the draft has been accepted, and this is so also in the case where the drawee has been informed of the debt agreement which has resulted in the issuance of the bill to the payee. The investigation of international practice concerning letter of credit arrangements, which has been brought to the court's attention in the case, does not, in the light of what has been stated above, sufficiently support the view according to which the delivery of the draft by the payee [the advising bank], together with the enclosed message and the documents under the letter of credit, is to be understood as a notice of the fact that the monetary claim against the [issuing bank] under the letter of credit has been definitely assigned. Hence, the assignment of the claim to the [advising bank] which may have been effected prior to the delivery of the draft to [the issuing bank], cannot be maintained against Polyseiko's attachment creditors.
>
> As far as the alleged draft engagement is concerned, it appears from the finding of facts that representatives of [the issuing bank] on October 18, 1983, effected an

[70] Since the Court reached the conclusion that the case was moot it did not pass judgment:

In early 1983 Texall had obtained a default judgment against Polyseiko, which judgment was subsequently enforced by means of seizure of the money under the letter of credit at issue in the instant case. The decision to enforce by seizure was appealed by the issuing bank on the grounds stated in the attachment case, i.e. the case at hand. The attachment case and the seizure case thus ran parallel. However, the Court found that the attachment case had been consummated by the seizure case.

For the purpose of determining the issue relating to compensation for litigation costs, the Court stated its position as to the issues involved in the attachment case. These issues were thus preliminary questions in determining the question of awarding compensation for litigation costs. In this context, see especially 1979 NJA 769, which Supreme Court case is controlling with respect to this particular problem.

> acceptance of the delivered draft and that the bank, via telex on October 20, advised [the advising bank] as payee hereof. [The issuing bank] has stated that—in accordance with international banking practice in letter of credit arrangements of the type at issue—it retained the draft on behalf of [the advising bank] and at the instruction of that bank.
>
> Section 29 of the Swedish Bills of Exchange Act may be assumed to imply that an obligation for the drawee under the bills of exhange law arises either by means of delivery of the draft or, if the draft is not delivered, by means of a written notice by the drawee to the holder of the draft or any party to the draft: the liability in the latter case is effective only in relation to those who have received such a notice. Telegrams, telexes and similar messages should be considered the equivalents of a written notice. The utilization of the aforementioned forms of notification procedures should give sufficient room for a simple and flexible handling of bills within the framework of the banks' dealings with international letter credits arrangements.
>
> In accordance with the above stated, a valid obligation for [the issuing bank] ensuing from a bill in relation to [the advising bank] as a party/creditor to the bill [draft] could have arisen at the earliest when the [issuing bank] notified [the advising bank] about the acceptance on October 20. At that time, however, [the issuing bank] had already been given notice of the local execution official's decision of October 19. Therefore, the [issuing bank] has not been entitled to invoke the alleged obligation ensuing from the bill against Polyseiko's creditors in the attachment case.

The essence of the majority opinion thus seems to be that Polyseiko had a claim on the issuing bank (and therefore also property in Sweden), which could be made subject to attachment, until the moment when it had lost control over that claim, or, to be specific, until the issuing bank had effected what is under Swedish law considered to be a complete acceptance of the draft[71] (by first accepting it and then delivering it or notifying—in writing—the advising bank of the acceptance), since, under Swedish law, until that moment the drawer of the bill (Polyseiko) was entitled to revoke the drawer's assignment to pay to the payee (the advising bank) or his legal successor. Moreover, the alleged assignment of the monetary claim under the letter of credit was not valid against Polyseiko's creditors, since, under Swedish law, such validity presupposes that either the assignee or the assignor gives notice to the debtor about the assignment;[72] the fact that the advising bank delivered the draft together with the message that the draft had been negotiated was considered insufficient in this respect.

The two dissenting judges (Mr. Justices Bengtsson and Mannerfelt) delivered separate opinions based on somewhat diverging grounds but leading to the same end result.

[71] See, e.g., G. Eberstein, *Den svenska växelrätten*, Stockholm 1934, pp. 119 f.
[72] The Promissory Notes Act, sec. 31.

Mr. Justice Bengtsson found that on October 18 the issuing bank had been advised by the advising bank that the latter had negotiated the draft and the documents. The wording of this message showed that the advising bank acted on its own behalf as creditor. By virtue hereof, the issuing bank had been notified of the fact that the advising bank had the right to claim payment under the letter of credit. Pursuant to the acceptance of the draft on October 18 (without determining whether or not that was a complete acceptance) the bank had in accordance with international banking practice retained the accepted draft on behalf of the advising bank. In the described situation, Mr. Justice Bengtsson concluded—irrespective of whether a liability ensuing from the bill had incurred for the issuing bank—Polyseiko cannot, as against the advising bank, be considered to be entitled to revoke its payment order to the issuing bank and order other performance under the letter of credit. On October 19, therefore, Polyseiko had no claim on the issuing bank which could be made subject to an attachment.

Mr. Justice Mannerfelt's conclusion to the same effect rested on a broader analysis. In concord with Mr. Justice Bengtsson he found that the issuing bank had on October 18 been notified by the advising bank of the fact that the latter had negotiated the draft, and that the form of the notice was such that it showed that the advising bank acted on its own behalf as creditor. In accordance with international banking practice, the issuing bank, having accepted the draft, retained it on the advising bank's account. While it is true that, under Swedish law, an acceptance of a draft, in order to be complete, must be effected either through delivery of the accepted draft or by means of written notification to the payee of the fact that it has been accepted, it is vital for the efficiency of the documentary credit system that national law does not impede the functioning of international banking practice. Consequently, the question is whether under Swedish law, for the purposes of the present case, the fact that the issuing bank retained the draft exclusively on behalf of the advising bank may be considered as equivalent to such a delivery or notification. Taking into consideration the concurrent interests of Polyseiko's creditors, on the one hand, and of the advising bank, on the other, in the money at issue, Mr. Justice Mannerfelt indicated, the problem of accepting that view is the following:

A bank would be entrusted with a double function, in which it can act both on its own behalf and on behalf of its contracting parties. Theoretically, situations may arise in which a bank in order to protect one of its contracting parties from attachment creditors, temporarily accepts a draft, which it thereafter retains, and subsequently—if necessary—strikes out the acceptance when such protection is no longer required. Thus, theoretically the objects of the principle which requires delivery or notification—*inter alia*, to protect creditors

from manipulative transactions aimed at depriving them of property from which to secure their claims[73]—may be frustrated.

However, the now described situation totally lacks a foundation in reality. Moreover, the Swedish Promissory Notes Act, sec. 22, affords a statutory basis for the principle that banks may, at least in cases such as the one at hand, have the aforementioned double function.[74]

Therefore, Mr. Justice Mannerfelt concluded, for the purposes of the particular case, the acceptance of the draft must be considered as complete also when the draft had been retained by the issuing bank, and, consequently, Polyseiko had no claim which could be made subject to attachment.

6. CONCLUSION

The pivotal point of the foregoing exposé of the operation of the Swedish jurisdictional law and security measures in connection with documentary credit arrangements is the situation where a creditor—whether Swedish or foreign—seeks to secure a claim against a debtor—Swedish or foreign—in a Swedish court by initiating security measures directed at money payable to the debtor under a letter of credit.

In resolving the documentary credit issues which arise in such a context, the courts in the cases reported have generally resorted to the UCP—insofar as the rules therein give guidance—at least when the parties to the letter of credit have agreed upon the applicability of the UCP. Thus, when the parties so have agreed, the UCP will control, which in itself is not very surprising. The following is a summary of principles enunciated and held as controlling in the cases reported, the bulk of which principles may be regarded as fundamental in this legal area.

1. If the parties to a deferred payment credit arrangement have agreed that the UCP shall govern the arrangement, a Swedish court will apply the UCP, although the UCP rules themselves do not expressly apply to such arrangements. The conclusion that may be drawn from this is that the parties' choice of the UCP as governing law will also be decisive as regards other documentary credit arrangements, which are not directly covered by the UCP's definition of a letter of credit.

2. Security measures or claims cannot be directed at money payable under a

[73] See, e.g., Bo Helander, *Kreditsäkerhet i lös egendom*, Lund 1984, pp. 359 ff., with further references at p. 359, note 228.

[74] "Lag om skuldebrev", *SFS* 1936:81. Sec. 22 of the Act provides that when a bank sells a negotiable instrument, the sale shall be valid as against the bank's creditors, although the instrument has been retained by the bank for deposition.

letter of credit if the measure or claim originates from the agreement which stipulates payment by means of that letter of credit; the letter of credit transaction is separate from the underlying agreement (see the UCP, General Provisions and Definitions c)). In other words, a creditor cannot secure a claim arising out of the underlying contract by applying for security measures directed at the money payable under a letter of credit which originates from the very same agreement. This is documentary credits law, not jurisdictional law. The evident *e contrario* conclusion is that the money payable under the letter of credit is amenable to security measures for claims *not* arising out of the underlying agreement, irrespective of whether the claimant is a party to that agreement or if he is a person otherwise contractually or non-contractually related to the beneficiary.

3. A beneficiary under a letter of credit does not have a claim for payment against the buyer under the underlying sales agreement, unless he has first sought to recover from the confirming and issuing banks involved in the letter of credit transaction but has failed to do so. Until that moment, since the buyer's monetary obligation against the beneficiary has not arisen, a security measure cannot be directed at the money in question. Moreover, there is no claim on which jurisdiction may be based.

Likewise, although the confirming and issuing banks are independently liable *vis à vis* the beneficiary, the beneficiary has no claim against the issuing bank on which jurisdiction may be based or at which security measures may be directed, unless he first fails to recover from the confirming bank. An advising bank, however, does not have an obligation to pay under a letter of credit (unless, of course, the parties have so expressly agreed). Therefore, the beneficiary is under no duty to first seek to recover from that bank. In this situation, the beneficiary's claim is against the issuing bank directly.

The basic principles stated above are internationally well-established. In applying them, the Swedish courts promote the development of international trade law and banking practice.

However, there is a problem area which tends to create a clash between national law, on the one hand, and the UCP, international trade law and international banking practice, on the other. The problem, which is plainly demonstrated in the reported cases, may be summarized in the following two questions: 1) Which country's law shall be applicable when deciding whether an assignment of monetary claims is valid as such and against the assignor's creditors, particularly those who institute a suit in Sweden against the assignor and petition for a security measure directed at the assigned claim? 2) If Swedish law is to apply, to what extent should established international trade law and banking practice be considered?

By way of conclusion, these two questions will be briefly discussed.

1. With regard to the first question, the prevailing view among legal commentators[75] is that, under Swedish private international law, the law of the state in which the debtor resides shall apply. Hence, in the situation at issue in the present paper, where a Swedish or foreign party seeks to procure payment out of money payable under a letter of credit, Swedish law will, as a general rule, apply. This is also confirmed by the 1970 and 1984 Supreme Court cases reported above: In the former case the validity of a transfer of money payable (and the pledge of shipping documents) under a documentary collection arrangement was tried under Swedish law, as was the assignment of money payable under the letter of credit (by endorsement, delivery, etc., of the draft) in the latter case. Swedish law was considered determinative with respect to the validity of the transfer or assignment as such *inter partes*, as well as the validity *vis à vis* third persons, particularly the creditors of the transferor or assignor. The applicability of foreign law was not reflected upon (at least not openly). Exceptionally, however, and in particular where all the parties involved in the case are foreigners, a Swedish court may find foreign law applicable, as being the law most intimately linked to the transaction in question.[76]

The effect of the choice of law rule alluded to—in the situation at issue in the present paper—is that Swedish courts will normally apply *lex fori* and only exceptionally foreign law. While the plaintiff/creditor is hereby protected, the assignee can never be sure that an assignment (or other transaction), which is fully valid under the law of the country where either the assignment occurred or the assignor or assignee resides, is valid also against the assignor's creditors, unless he complies with the law of the country in which the debtor resides. Whether this is a wise choice of law rule, whether it furthers international trade and security in international transactions, is not subject to discussion here. Suffice it to say that it does not seem too inconvenient for the assignee to

[75] See Karlgren, *op.cit.* (*supra* note 10), p. 87; Nial, *op.cit.* (*supra* note 55), p. 71; Bogdan, *op.cit.* (*supra* note 8), p. 236; A. Philip, *Dansk international privat- og procesret*, 3rd ed. Copenhagen 1976, pp. 404 f: Beckman, *op.cit.* (*supra* note 34), p. 59, and O. Lando, *Kontraktstatuttet*, Copenhagen 1962, pp. 387 f. See, however, Lars Hjerner, "Om trust receipt och trust i svensk internationell privaträtt", *Nordisk Tidsskrift for International Ret* 1952, p. 223.

[76] See, e.g., the Gothenburg ("Västra") Court of Appeals's decision of April 19, 1983 (no. SÖ 23/83; Ö 1272/82—*Armada Transport and Refining Co.* v. *Oasis Oil and Refining Corporation*). In this case, which involved foreign parties (plus a foreign intervenor), the debtor was a Swedish resident. In disregard of this fact, the court applied Swiss law on the ground, *inter alia*, that the parties were foreign, the transfer agreement at issue was concluded by Swiss parties and the agreement prescribed that Swiss law was to apply. The case has not yet been decided by the Supreme Court, but since leave to appeal has been granted, such a decision is expected to be made within the near future. Cf. as regards security transactions concerning movables, 1978 NJA 593 (in which the Supreme Court indicated that foreign law may be applicable to such transactions) and a decision of the Supreme Court of October 1, 1984 (SÖ 481/84; Ö 854/83—*Tapani Tiainen* v. *Riksskatteverket*), in which case West German law was applied.

inquire into the particulars of the law of the debtor's residence, at least when the assignee is an international bank.

2. The second question is much more delicate. If Swedish law is to apply—in situations at issue in the present paper—when determining the validity of the assignment (transfer) of a monetary claim, to what extent should international trade and banking practice be considered?

In the 1984 Supreme Court case reported above (the third case), the majority of the Court attached little or no significance to the arguments put forward by the banks, based on international banking practice. It seems that the majority felt reluctant to let international practice interfere with the applicability of Swedish law. Under Swedish law, the majority held, it is incumbent upon either the assignor or the assignee of a non-negotiable monetary claim to give the debtor notice of the assignment in order for the assignment to be valid against the assignor's creditors, and, under Swedish law, an acceptance of a draft is incomplete until the accepted draft has been delivered to the payee or at least until the payee has been notified in writing of the fact that the draft has been accepted.[77]

These two rules were applied to their fullest possible extent. The fact that the draft had been delivered together with the message that the draft had been negotiated, was considered insufficient for the purposes of the former rule, as was the fact that the accepted draft had been retained—in accordance with international banking practice—for the benefit of the payee, for the purposes of the latter.

The minority, on the other hand, took a different standpoint. As suggested by Mr. Justice Mannerfelt, "For the efficiency of the letter of credit system, it is desirable that in internal law such rules as hinder the applicability of international banking practice are not found to apply. National right *in rem* rules ("sakrätt") may involve a danger of complication in this respect".[78] Therefore, it seems, the Swedish rules were adjusted somewhat—without being stretched beyond reason—to match the international standard.

A nationalist approach may indeed endanger the smooth functioning of the letter of credit system. Yet even an extreme nationalist should recognize that, at least on grounds of reciprocity, the minority view is to be preferred.[79] Of course, were the Swedish rule to be unequivocal, based on, for instance, clear statutory directives, there would hardly be room for such discretionary power. In the case referred to, however, this was not the situation.

[77] See the Swedish Promissory Notes Act, sec. 31. As regards negotiable instruments, endorsement and delivery or delivery alone is sufficient to protect the assignee against the assignor's creditors, the Promissory Notes Act, sec. 22.

[78] *Supra* note 64, dissenting opinion, at p. 2. Also see Gorton, *op.cit.* (*supra* note 1), pp. 173 f.

[79] See, e.g., the Supreme Court case decided on October 1, 1984, referred to *supra* note 76, in which case the Court attached great importance to this aspect (at p. 4).