# THE SUPREME COURT OF NORWAY

On 28 June 2017, the Supreme Court gave judgment in

**HR-2017-1297-A, (case no. 2017/445), civil case, appeal against judgment and case no. 2017/474, appeal against order**

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| ING Bank N.V. | (Counsel Henning Harborg<br><br>Counsel Peder Alvik Sanengen<br>– qualifying test case) |
| v. | |
| The Bankruptcy estate of<br>Bergen Bunkers AS | (Counsel Kristoffer Larsen Rognvik<br>– qualifying test case)<br>Assisting counsel Egil Horstad) |

O P I N I O N :

(1) Acting justice **Kaasen:** The case concerns the dismissal of an action from a Norwegian bankruptcy estate against a foreign secured party due to lack of jurisdiction, and the choice of law if the case is not dismissed.

(2) Bergen Bunkers AS (hereinafter Bergen Bunkers) engaged in the purchase and sale of bunkers (ship fuel) and in bunker brokerage. The company was wholly owned by O.W. Bunker Norway AS, and both companies were part of a large group. The Danish company O.W. Bunker & Trading A/S was the parent company of the group and had subsidiaries in a number of countries.

(3) ING Bank N.V. (hereinafter ING) is a Dutch bank acting as agent and lender under a loan agreement where a number of lenders granted the O.W. Bunker group a loan of

USD 700 000 000. The loan agreement was entered into on 19 December 2013 under the condition that the Danish parent company and a total of sixteen other group companies granted security for the loan. ING would also be granted a security interest in the group companies' trade receivables.

(4) Bergen Bunkers was not a direct borrower under the loan agreement, but the loan amount was "streamed" downwards in the group so that Bergen Bunkers could also benefit from the loan. In return, Bergen Bunker acted as guarantor and issuer of security under the loan agreement. The guarantee is described in the loan agreement itself, while the creation of security is described in the "English Omnibus Security Agreement" ("the security agreement") of the same date.

(5) The security agreement was entered into between ING and group companies from a total of thirteen jurisdictions. The security agreement is governed by English law.

(6) In accordance with the security agreement, Bergen Bunkers granted a security interest in its accounts receivable under the company's delivery contracts in effect as of 19 December 2012 with specific buyers of bunkers. A security interest was also granted in accounts receivable under future delivery contracts. It was implicit in the security agreement that the delivery contracts were governed by English law, which was also the case.

(7) Under the security agreement, Bergen Bunkers was required to "give notice of the Security created by this Deed to each debtor" under the delivery contracts. Such a notice was to be given within certain deadlines to both existing and future customers (debtors) in accordance with the "Form of Notice of Assignment", which is included as an appendix to the security agreement. Included is also a standard "Form of Acknowledgment of Debtor" where the debtor was to confirm its will to follow the payment instructions in the notice from Bergen Bunkers. It is stated that Bergen Bunkers gave notice to its customers as agreed. No granting of security was registered.

(8) Following the collapse of the O.W. Bunker group in November 2014, bankruptcy proceedings in Bergen Bunkers AS (hereinafter the estate) were opened by Bergen District Court's order of 18 November 2014.

(9) ING registered a claim against the estate, last updated to USD 652 832 697. It is stated that the claim constitutes roughly 95 percent of the total claims registered against the estate. As of 31 October 2014, the value of the outstanding accounts receivable of the bankruptcy debtor was almost NOK 365 million.

(10) After the opening of the bankruptcy proceedings, the administrator of the estate learned that ING and PWC, on behalf of the bank prior to the opening, had written to Bergen Bunkers' debtors claiming payment of the outstanding amounts to an account in ING.

(11) The administrator contacted ING stating that the security interest is invalid and without perfection, and that the transfer of monetary claims prior to the bankruptcy in any case can be voided. ING disputed this, and the estate brought an action against ING in Bergen District Court on 9 February 2015. The estate contended that ING did not have any security interest in Bergen Bunkers AS's accounts receivable at the opening of the bankruptcy proceedings, and that ING had an obligation to reimburse the estate with the amounts the debtors had paid to ING after the opening.

(12) Bergen District Court declared that the court lacked jurisdiction pursuant to the Dispute Act sections 4-4 and 4-5, and decided on 24 August 2015 to refer the case to Oslo District Court, see the Dispute Act section 4-7 (1) and section 4-3 (1).

(13) ING submitted a principal prayer for relief to Oslo District Court that the case be dismissed since Norwegian courts lack jurisdiction, in the alternative that the question regarding the validity and perfection of the security interest be determined under English law.

(14) On 5 January 2016, Oslo District Court decided that the dismissal question was to be determined during the case preparations, that a separate decision was to be made regarding the governing law pursuant to the Dispute Act section 16-1 (2) (b), and that the decisions were to be made on the basis of a written hearing pursuant to the Dispute Act section 9-9 (2).

(15) On 24 February 2016, Oslo District Court gave judgment and order concluding as follows:

> **"1. The case is to be heard in its entirety in Oslo District Court.**
>
> **2. The question regarding the validity and perfection of the security interest is to be determined under Norwegian law.**
>
> **3. The decision regarding costs will be suspended until the district court has made a final decision in the case."**

(16) ING appealed on grounds of application of law in both the judgment and the order to Borgarting Court of Appeal, which on 21 December 2016, on the basis of a written hearing, gave judgment and order concluding as follows:

> **"1. The appeal is dismissed.**
>
> **2. ING Bank N.V. will pay to the Bankruptcy estate of Bergen Bunkers AS NOK 215 350 – twohundredandfifteenthousandthreehundredandfifty – within two weeks from the service of this decision."**

(17) Both the district court and the court of appeal concluded that the "bankruptcy exemption" in the Lugano Convention Article 1 (2) (b) is applicable, and that the consequence of this is that the courts of the country where the bankruptcy was declared have jurisdiction over the dispute. Both instances also concluded that there is no basis for establishing a firm rule on the choice of law in disputes concerning creditor protection for security interest in non-negotiable monetary claims, and found it decisive, after an overall assessment, that the case is most strongly connected with Norway.

(18) In both questions, ING has appealed the application of law to the Supreme Court. The Supreme Court's Appeals Selection Committee has agreed to hear the appeal of the judgment, and that the appeal of the order will be decided by the Supreme Court in chambers with five judges, see the Courts of Justice Act section 5 subsection 1 second sentence. The proceedings will follow the rules of the Dispute Act concerning appeals against judgments, see the Dispute Act section 30-9 (4). Thus, the appeal in its entirety will be decided by the Supreme Court in chambers with five judges.

(19) Apart from a certain gliding in the appellant's view, the case remains the same in the Supreme Court as in the previous instances.

(20) The appellant - *ING Bank N.V.* – has briefly contended the following:

(21) Norwegian courts lack jurisdiction to hear the estate's claim. The Lugano Convention has precedence and does not grant Norwegian jurisdiction in this case. Actions must in principle be brought in the state where the defendant is domiciled, see Article 2, in this case the Netherlands. The parties agree that ING cannot be sued in Norway due to some of the special jurisdiction rules in Articles 2 – 7 of the Convention.

(22) The exemptions in the Convention for disputes concerning insolvency proceedings (Article 1 no. 2 (b) "the bankruptcy exemption") must be assessed separately for each of the estate's claims. The claim that ING does not have a security interest is not bankruptcy-specific, and is thus not covered by the exemption. However, the claim for voidance is covered by the bankruptcy exemption and must be assessed in accordance with the Dispute Act section 4-3 (1), which does not grant Norwegian jurisdiction in this case.

(23) Should the Lugano Convention also not be applicable for the claim that ING does not have a security interest, ING contends in the alternative that the bankruptcy exemption is not an independent basis for granting jurisdiction to the country where the bankruptcy was declared. Furthermore, it is undisputed that no venue can be established in Norway for the claims in the case, and it is therefore unlikely that the Dispute Act section 4-3 (1) grants Norwegian jurisdiction. Here, the connection is not strong enough. As the case stands, the Supreme Court may decide this question despite its limited competence in appeals against orders.

(24) The claim for voidance must be dealt with under Norwegian law. The validity question between the parties is subject to the rule on choice of law in contractual relationships, and the parties have agreed on English law in the case at hand. There are strong reasons for arguing that the validity question in disputes with third parties is subject to the same law, and that the perfection of the security interest must be assessed in accordance with the law of the country where the claim was made, i.e. English law, in the absence of a recognised firm rule.

(25) ING Bank N.V. has submitted the following prayer for relief:

> **"Principally:**
> **1. The case is to be dismissed.**
> **2. The judgment of the district court and the court of appeal is to be annulled.**
>
> **In the alternative:**
> **1. The questions regarding the validity and perfection of the security interest is to be decided under English law.**
>
> **In both cases:**
> **1. ING Bank N.V. is to be awarded costs in all instances."**

(26) The respondent – *the Bankruptcy estate of Bergen Bunkers AS* – has briefly contended the following:

(27) The case is covered by the bankruptcy exemption in the Lugano Convention Article 1 no. 2 (b). The provision must be read as simultaneously establishing jurisdiction in the country where the bankruptcy was declared. In the alternative, it is contended that the case is subject to Norwegian jurisdiction under the Dispute Act section 4-3. The provision must in that case be regarded as generally establishing Norwegian jurisdiction for cases covered by the bankruptcy exemption in the Lugano Convention. In the further alternative, this must be the result after a specific assessment. The application of section 4-3 in both cases is so clear that the Supreme Court should decide the issue despite its limited competence in the case.

(28) The choice of law must be made for the specific type of case – whether a charge over accounts receivable can be asserted against the security interest grantor's bankruptcy estate. No firm rule can be established. The generally accepted assessment criteria imply that the law of the security interest grantor home country is applicable.

(29) The Bankruptcy estate of Bergen Bunkers AS has submitted the following prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. ING Bank N.V. is to be ordered to pay costs in the Supreme Court to the Bankruptcy estate of Bergen Bunkers AS"**

(30) *I have concluded* that the appeal must be dismissed.

(31) The estate's action against ING is based on three main submissions:

(32) Firstly, the estate contends that ING's agreement on security interest in Bergen Bunkers' trade receivables is invalid under Norwegian rules on granting a security interest in non-negotiable monetary claims, since the conditions in neither section 4-4 nor section 4-10 of the Mortgages Act are met. One of the questions is whether the claims are against a "named debtor". These rules protect primarily the security interest grantor itself and non-priority creditors.

(33) Secondly, the estate contends that the security interest lacks perfection, see section 4-5. The question is primarily whether sufficient notice is given of the grant of security. For instance, it must be established whether notice is given by the correct legal person and whether the Mortgages Act allows pre-notification. The rules on perfection protect other creditors by preventing fraud on them, and give verifiability for the security interest grantor's financial situation.

(34) Finally, the estate argues that the security may in any case be voided in connection with bankruptcy. This statement is based on the Creditors Recovery Act section 5-7 regarding security for older debt and section 5-5 regarding extraordinary payments. The purpose of the annulment rules is to ensure equal treatment of creditors in connection with bankruptcy.

(35) First, I will consider whether this action should be dismissed because Norwegian courts lack jurisdiction to hear the case. The appeal on this point is an appeal against an order, where the Supreme Court – since the court of appeal agreed to hear the case – can only

review the court of appeal's procedure and interpretation of the law, see the Dispute Act section 30-6.

(36) If Norwegian courts lack jurisdiction, the case must be dismissed, see the Dispute Act section 4-7 subsection 3.

(37) The Lugano Convention governs jurisdiction and the recognition and enforcement of judgments in civil and commercial cases between the countries bound by the Convention. It applies as Norwegian law and has precedence for claims covered by the Convention's scope, see the Dispute Act section 4-8, see section 1-2. The Lugano Convention applies between the EU member states, Norway, Iceland and Switzerland. Within the EU, the Convention had its parallel in the Brussels Convention of 1968, which was replaced by Brussels I[1] in 2000. The rules concerned in our case are the same in EU law, and it is established law that the decisions of the European Court of Justice are a weighty source of law, see for instance the Supreme Court judgment in Rt-2011-1532 para 21.

(38) It is agreed that the Lugano Convention is, in principle, applicable in this case, since the parties are domiciled in two different Convention States, and it concerns a civil and commercial case, see Article 1 no. 1. Certain exemptions are made from this scope, among them the so-called bankruptcy exemption in Article 1 no. 2 (b). The first question is whether the case is covered by this exemption. The relevant part of the provision reads as follows:

> **"Article 1.**
> **1. This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.**
>
> **2. The Convention shall not apply to:**
> **[…]**
> **b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;**
> **[…]"**

(39) In its action for declaration, the bankruptcy estate has made two claims – that ING does not have a security interest, and that any such security can be voided. The parties disagree as to whether the bankruptcy exemption must be assessed for each of the claims. ING finds that the claims must be assessed individually, and that only the claim for voidance is covered by the exemption. The estate assumes that it is undisputed that the question of voidance is covered by the exemption. It must then be decisive whether the second question in the case is too remote from bankruptcy for the action, on an overall level, to be regarded as bankruptcy-specific. According to the estate, this is not the case.

(40) According to its wording, the Convention concerns "matters", see Article 1 no. 1. Nevertheless, it is clear that claims must be assessed individually within the Convention's scope, although the claims are made in the same case. I refer in particular to the European

[1] Translator's remark: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Court of Justice's decision of 27 September 1988 in case 189/87 Kalfeis v. Bankhaus Schröder, Münchmeyer, Hengst and Co, para 19 and para 20, see para 14.

(41) However, the bankruptcy exemption has a different wording, which points out specific areas rather than claims or cases as the relevant criterion: The exemption concerns "bankruptcy, proceedings relating to the winding-up of insolvent companies" etc. Linguistically, this wording suggests that all questions arising during bankruptcy proceedings etc. are covered by the exemption. Since the criterion is different from the Convention's main rule regarding "matters", case law relating to the Convention's rules on jurisdiction gives limited guidance in the interpretation of the bankruptcy exemption. No statements are demonstrated that can be deemed general in this case law.

(42) On the other hand, case law exists on the scope of the bankruptcy exemption itself. I base my view on the EU Court's fundamental decision of 22 February 1979 in case 133/78 Gourdain v. Nadler. The case concerned the personal liability of the general manager of a German company for the debt in a wholly owned French subsidiary where both companies were bankrupt. The claim was deemed covered by the bankruptcy exemption. In terms of which claims are covered by the bankruptcy exemption, the court stated the following in para 4:

> **"… it is necessary, if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the "liquidation des biens" or the "règlement judiciaire".**

(43) In the Supreme Court judgment in Rt-1996-25 on page 34, the following is stated regarding this decision:

> **"Bankruptcy in itself does not prevent adjudication in other countries. For instance, the enforcement venue in the Lugano Convention Article 5 (1) first option may be applied in cases concerning delivery under contract and the consequences of a potential breach. The bankruptcy exemption is limited to disputes governed by and assessed in accordance with insolvency law, […]. The purpose of the bankruptcy exemption is that bankruptcy-related questions must be decided in the bankruptcy country. The courts in other countries are not to consider the consequences of payment suspension and bankruptcy.**
>
> **Examples of bankruptcy-related claims that in legal theory are deemed covered by the bankruptcy exemption in the Brussels Convention and the Lugano Convention are annulment in bankruptcy proceedings, preferential claims [*massekrav*], claims/rights to separate assets/movable property [*separatistkrav*], recognition of receivables and cancellation of agreements under bankruptcy law provisions, […]. However, the bankruptcy exemption does not apply to the bankruptcy estate's claim against a third party for payment of the bankruptcy debtor's claim against the third party arisen before the bankruptcy, […]."**

(44) The Supreme Court thus emphasises that the bankruptcy exemption is limited to disputes governed by and assessed in accordance with insolvency law. The purpose is to exempt insolvency-related questions.

(45) There are a number of later decisions from the EU Court of Justice regarding the bankruptcy exemption. The court summarises the criteria in its decision of 4 December 2014 in case C-295/13 H v. H.K. The question was whether a claim based on the liability of the company management for payments made after the bankruptcy was declared, was covered by the exemption although the claim, in theory, could have been made outside a bankruptcy situation. The court repeats the criterion from the case Gourdian v. Nadler,

i.e. that exemptions require that the claim "derives directly from insolvency proceedings and is closely connected with them" see para 16. It is also noted that it is relevant whether the action is brought in connection with insolvency proceedings, and whether it arises from insolvency legislation or other legislation, see para 18. It is not sufficient for falling outside the exemption that the issue in theory could have arisen outside of bankruptcy, see para 20.

(46) Furthermore, it is stated that one cannot review all claims relating to the bankruptcy proceedings as one with regard to the bankruptcy exemption. The connection is assessed for each claim based on the criteria provided.

(47) The case of 10 September 2009 C-292/08 German Graphics Graphische Maschinen GmbH versus Alice van der Schee questioned whether a reservation of title would be applicable in an insolvency situation. In para 29, the court stated the following:

> **"it is therefore the closeness of the link, in the sense of the case-law resulting from *Gourdain*, between a court action such as the one at issue in the main proceedings and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of Regulation No 44/2001 [identical to the bankruptcy exemption in the Lugano Convention] is applicable."**

(48) In the case concerned, the court concluded that the connection was "neither sufficiently direct nor sufficiently close" for the exemption to apply because the action "constitutes an independent claim, as it is not based on the law of the insolvency proceedings and requires neither the opening of such proceedings nor the involvement of a liquidator". The question regarding title was not covered by the bankruptcy exemption, since "that question of law is independent of the opening of insolvency proceedings". It is expressly stated that it is not sufficient that the bankruptcy estate was a party to the dispute.

(49) In Norway, there is a close connection between a reservation of title and a security interest, while it appears to be undisputed that the categories are not equal under continental law. The German Graphics judgment did thus not concern a typical insolvency law dispute.

(50) Against this background, I find that the later judgments support and specify the criteria set by the court in the Gourdian versus Nadler case, and on which the Supreme Court based its judgment in Rt-1996-25. I cannot see that subsequent case law involves a tightening of the criteria, as the appellant contends.

(51) Thus far, I note that the case-law of the European Court of Justice is a weighty source of law when interpreting the bankruptcy exemption in the Lugano Convention, and that the summary of the general criteria I have quoted from the Supreme Court's judgment in Rt-1996-25 is still adequate. On the other hand, the subject-matter of subsequent cases heard in the European Court of Justice deviates so distinctively from ours that the decisions give limited guidance.

(52) I will now turn to the specific assessment of whether the claims in our case are covered by the bankruptcy exemption.

(53) A central criterion is, as mentioned, whether the claim "derives directly from insolvency proceedings and is closely connected with them" especially if the dispute is governed by and assessed in accordance with insolvency law.

(54) Voidance only takes place in connection with bankruptcy – and in some bankruptcy-like situations – and is based on rules of insolvency law. This claim must thus clearly be covered by the bankruptcy exemption, a view shared by both parties.

(55) The claim that ING has no security interest – based on the submissions that the security interest is invalid and lacks perfection – is made in connection with the insolvency proceedings. This is not sufficient for the bankruptcy exemption to apply. At the same time, legal sources show that it is not necessarily decisive when determining the scope of the exemption that one type of claims may also be made without being connected to insolvency proceedings.

(56) The validity and perfection of the security interest are not dependent on what one would normally refer to as rules exclusively based on insolvency law. Nevertheless, to which extent the estate must respect that a security interest is created on its assets is a central issue in the insolvency proceedings. A core task for the estate is to secure and maintain assets for distribution among all bankruptcy creditors. This is illustrated by the EU Court's decision in the mentioned case H versus H.K., where the Court quotes the Commission's statement that it must be of significance that the relevant provision "seeks to preserve the distributable assets". A clarification of whether specific assets are to be excluded from the estate is also mentioned in the Supreme Court judgment in Rt-1996-25 on page 34 as an example of bankruptcy-related claims covered by the bankruptcy exemption.

(57) It is a typical and customary part of the administration of an estate to consider security interests. Insolvency law contains a number of provisions – both procedural and substantive – regarding the position of security interests in bankruptcy proceedings involving a security interest grantor. For example, the Creditors Recovery Act section 8-14 describes the right to dividend when the creditor holds a security interest in the debtor's assets. The Bankruptcy Act section 117 a concerns the estate's sale of over-encumbered assets, and of the administrator's tasks and legitimacy, for instance in connection with abandonment of the estate's assets to the secured party. And the Bankruptcy Act section 136 has special rules on the secured party's position when the estate is returned to the debtor.

(58) These examples show that the handling of a security interest in the estate's assets is an important part of the bankruptcy proceedings. The estate must respect the validity, perfection and priority of the security interest, irrespective of whether the questions must be decided in accordance with what one would strictly categorise as rules of insolvency law.

(59) The granting of a security interest may have a fundamental impact on the estate, and the insolvency proceedings and the rules governing them may strongly affect the contents and effects of alleged security interests. This interwovenness gives the security interest questions a different character than for instance the question whether the estate may register a claim or is liable for a claim that has not arisen from the bankruptcy. Under the circumstances, such questions may also be significant for the assets available for distribution among the creditors. But they must be answered based on general property law. The decision is not influenced by the fact that the questions arise in connection with insolvency, which may be the case for the decision of a security interest question. And the solution is not based on the same interests as those covered by the insolvency rules –

the concern for the creditor community and the balancing of interests between this community and the individual creditors.

(60) Considerations such as these must also be assumed to form the basis for the bankruptcy exemption, see the criterion "closely connected" with a case concerning bankruptcy in the Gourdain v. Nadler case: Circumstances that are practically and legally closely connected to the insolvency proceedings, should not, in the sense of jurisdiction, be distinguished from them only because questions related to these circumstances may also arise outside the insolvency proceedings or be partly governed by legislation that is not insolvency-specific. Such a distinction would be inappropriate in terms of legal administration since it would break up the close connection between the issue of validity and perfection of the security interest and the rules under bankruptcy law on distribution of the estate's assets.

(61) Against this background, I find that the estate's claim for a judgment that ING has no security interest is also covered by the bankruptcy exemption in the Lugano Convention Article 1 no. 2 (b).

(62) The consequence of this is, however, that the Lugano Convention does not expressly determine the jurisdiction in the case. According to ING, this means that the Dispute Act section 4-3 (1) determines the question – the bankruptcy exemption alone provides no solution.

(63) The wording of the exemption suggests the following: Exemptions are made from the application of the Convention in the specific circumstances, without it being stated what applies instead. And without such clear indications, one may argue that national rules on jurisdiction must therefore apply.

(64) The reason for the bankruptcy exemption is, however, that the application of the Convention's main rules on insolvency-related disputes would entail that the jurisdiction is split between several nations. The purpose of the exemption is to avoid such a split. This concern could entail that the national jurisdiction rules that otherwise would be relevant, should not unconditionally become applicable. Furthermore, the concern for harmony of rules and efficiency in cases concerning bankruptcy proceedings entails that disputes with sufficient connection to bankruptcy should be subject to the jurisdiction of the country where the bankruptcy was declared. This is emphasised in the Supreme Court decision in Rt-1996-25 on page 34:

> **"The purpose of the bankruptcy exemption is that bankruptcy-related issues are decided in the country where the bankruptcy was declared. Other countries' courts are not to consider the consequences of payment stops and bankruptcy."**

(65) Here, the Supreme Court seems to rely directly on the Lugano Convention. With a different interpretation, it would have been natural that the Supreme Court had considered whether Norwegian jurisdiction was relevant in the case.

(66) The preparatory works of the newly adopted regulation of cross-border insolvency proceedings support such an interpretation. Here, the Ministry discusses "whether the Lugano Convention imposes jurisdiction on Norwegian courts" in cases covered by the bankruptcy exemption, see Proposition no. 88 L (2015-2016) to the Storting page 34. Although it is not expressly set out in the review, it seems to be assumed that Norwegian courts have jurisdiction by virtue of the Convention – the question is whether the

jurisdiction is exclusive. On page 35, the Ministry concludes that it would be preferable that the question was determined by law, but that the scope of the bankruptcy exemption should primarily be determined by the European Court of Justice.

(67) In my view, policy considerations strongly suggest that disputes covered by the bankruptcy exemption are subject to the jurisdiction of the country where the bankruptcy was declared. This is where the issues are most relevant, and the concern for procedural economy, legal costs and uniformity of law suggest the same.

(68) ING has strongly contended that one cannot derive a jurisdiction rule from the Lugano Convention when the Convention is assumed not to be applicable as a result of the bankruptcy exemption. For the reasons I have mentioned, I will not automatically endorse this. But I do not find it necessary to take an individual stand as to whether, in this context, a jurisdiction rule can be derived directly from the bankruptcy exemption. I find that the reasons pointed out are sufficient, under any circumstances, to establish a general rule under the Dispute Act section 4-3 that the requirement for sufficient connection is met in disputes covered by the bankruptcy exemption when the bankruptcy proceedings are initiated in Norway. In such cases, there is no need for a further assessment of whether the connection to Norway is sufficient.

(69) This also means that it is not necessary to further assess whether the circumstances of our case fall within the scope of the Dispute Act section 4-3. Hence, it is also not relevant that the Supreme Court's competence in the case is limited because the court of appeal has not concluded on the application of the provision.

(70) Consequently, there is no basis for dismissing the case from Oslo District Court due to a lack of jurisdiction.

(71) I will now review the choice of law. It is agreed that the question regarding annulment of the security interest is governed by Norwegian law. The question is whether the validity and perfection of the security are to be decided under English law.

(72) The approach to the question is described as follows in the Supreme Court judgment in Rt-2011-531 para 29:

> **"To determine the choice of law – where this is not governed by any act, custom or other firm rules – one must identify the country to which the case, after an overall consideration – is most strongly or closely connected (the 'Irma Mignon formula'), see for instance Rt-2009-1537 (the bookseller judgment) para 32."**

(73) In the two cases – Rt-2011-531 and Rt-2009-1537 – the Supreme Court has started by examining whether there is a "firmer rule" on the choice of law in the relevant field. In this assessment, it would be relevant to emphasise the choice of law solution applied in the EU, although Norway is not formally bound by the rule, see the Supreme Court judgment in Rt-2009-1537 para 34:

> **"[...] Norway is not bound by the Regulation. However, to the extent we do not have deviating legislation, the concern for legal homogeneity suggests that we, when deciding issues pertaining to choice of law, should rely on the solution chosen by the EU member states."**

(74) This is also relied on in the Supreme Court judgment in Rt-2011-531 para 46.

(75) However, if there is no firm rule on the choice of law, neither under Norwegian nor EU law, one must apply a more discretionary assessment of the country to which the case, after an overall consideration, is most closely connected.

(76) Thus, the first question is whether any "firm rule" exists determining which country's law to apply when resolving disputes regarding creditor protection in connection with security interest in non-negotiable claims. ING contends that one must distinguish between the validity and the perfection of the security interest, since only perfection is particularly connected to the third party's legal status. I do not share this view. The conditions for validity are also there to protect the creditor community; they do not exclusively apply to the relationship between the parties – the security interest grantor and the secured party.

(77) There is no Norwegian legal provision regulating the choice of law in such cases.

(78) In the preparatory works of the Mortgage Act, it is stated that a security interest in non-negotiable claims is "governed by the law of the debtor's home country", see Proposition to the Odelsting no. 39 (1977-1978) page 75. However, the statement appears categorical and unfounded, and it is old in an area marked by judicial development. Nor is it specifically related to any bill. Thus, I will not place much emphasis on the statement. I will also not attach any importance to the judgment in Rt-1933-897, where the Supreme Court abandoned the debtor's country as that of choice of law, because the situation concerned a transfer of a claim between persons who were both domiciled in a different country and in accordance with the law of that country. This case is different from ours.

(79) The parties agree that EU's Regulation of 17 June 2008 on the law applicable to contractual obligations (Rome I) does not solve third party conflicts, see Article 14 no. 1, and I share that view. Also, there are no other sources that do, see Giuditta Cordero-Moss, International private law, 2013, page 257.

(80) Work is being done in the EU to determine the choice of law in third party conflicts. The draft Rome I contained a provision identifying the cedent's (the transferor's) home country as a connecting factor for the effects of a transfer vis-à-vis a third party. The member states, however, could not agree on this solution, and the provision was not adopted. In Article 27 para 2, an audit provision was nevertheless included, which requires the Commission to prepare a report on this issue. Until this work gives results, the above-mentioned concern for uniform rules has no relevance to the decision of these choice of law issues.

(81) Many theorists have discussed the choice of law question in cases like this. They have reviewed several options. One is the law of the claim, i.e. the law of the country the parties have chosen for the claim in which a security interest is granted or which is otherwise identified as the law of the claim. This is the view of the appellant, based on the bunkers deliveries being governed by English law. Another option is the law of the cedent's, in this case the mortagor's, country. This is the view of the respondent, based on Bergen Bunkers being domiciled in Norway. A third option is the law of the country of the property in which a security interest is granted (*lex rei sitae*). A final option is to apply the law of the home country of the *debitor cessus*, i.e. the law to which the debtor is subject according to the account receivable in which a security interest is granted.

(82) Theorists disagree to a certain extent as to which option to choose, and some do not give any clear recommendation. But they seem mostly to agree on what, effectively, is the law of the security interest grantor's home country, see Sjur Brækhus, *Sikkerhet i certepartier og certepartifrakter* [Security in charter parties and charter party freight], 1976 page 57, Giuditta Cordero-Moss, *Internasjonal privatrett* [International private law], 2013 page 281, Hans Fredrik Marthinussen, *Internasjonale konkurser* [International bankruptcies], 2014 page 53, and Jens Edvin A. Skoghøy, *Factoringpant* [Factoring mortgage], 1990 page 504. On the other hand, in *Lov og Rett 2013* [widely read law journal], page 67 to 84, Silje Karine Nordtveit recommends applying the law of the claim as the general rule.

(83) These analyses are rather extensive. But although their recommendations are largely concurrent, I cannot see how they alone can be deemed to have established a firm Norwegian rule on the choice of law in third party conflicts regarding security interest in non-negotiable claims. Nor can I see any other proof of the existence of such a rule.

(84) As mentioned, the solution must therefore be based on an overall assessment of the country with which the case is most strongly or closely connected.

(85) The concern for predictability – and thus the concern for clarity – is vital in insolvency law. Another central concern is that the various issues that may arise in connection with third party conflicts regarding security interest in non-negotiable claims should if possible be governed by the law of the same country. This creates harmony between solutions that should often be considered in context, and it prevents the application of conflicting rules for various parts of the dispute with the possible outcome that there will be no solution.

(86) Against this background, I will turn to reviewing the possible choices of law. I repeat that the EU has no firm choice of law rule for these matters, and I endorse the recommendation of Cordero-Moss, see International private law, page 90:

> **"The choice of law in each case should thus not be seen as a single act to be carried out freely in accordance with the judge's discretion, but as part of the system under international private law – which gives predictability for the parties involved."**

(87) I mention first that the option 'the law of the country of the property in which security interest is granted (*lex rei sitae*) is not relevant when the security interest concerns non-negotiable claims that lack immediate geographical connection. One may add to this option that the "place" of the claim is the creditor's residence or business location, based on the notion that the claim belongs to the creditor's assets. But I find it more natural to assess this in line with the option 'the law of the security interest grantor's home country'.

(88) Brækhus points out that there are important arguments in favour of choosing the law of the cedent's/security interest grantor's home country, see Sikkerhet i certepartier og certepartifrakter [Security in charter parties and charter party freight], page 55:

> **"The claim is one of the creditor's assets; it is the creditor that is entitled to dispose over it, for instance by using it as security. Particularly in issues regarding perfection of security interest in relation to the cedent's bankruptcy estate, the connection to the cedent's home country is strong. If perfection is established by registration in the cedent's home country, […], it is difficult to rely on another law than the law of this country."**

(89) Skoghøy expresses similar views, see Factoring Security page 504:

> **"Those who have granted credit to the debtor have normally done so in accordance with the rules applicable for the creditors' right of seizure in the country where the security interest grantor lives or has his place of business. For the secured party, the rule is that the legal status between him and the security interest grantor must normally be established based on the law of the country where the security interest grantor is resident […]. He must then accept that the right of seizure for the security interest grantor's creditors is determined under the law of the same country."**

(90) I share this view. This concerns the validity of the security interest and its perfection – not the claim. Then, the law of the security interest grantor's home country is, in my view, closer than the law of the claim. Normally, the law of the security interest grantor's home country will also be the law of the country where the bankruptcy was declared.

(91) In my view, the connection to the law of the country that applies to the *debitor cessus*, is even more remote than to the law of the security interest grantor's home country. It is true that problems may arise – as Brækhus also points out – if "notice is to be given in one state in accordance with the rules applicable in a different state", but I have difficulties seeing how this consideration can set aside the basic notion that the law of the security interest grantor's home country is the natural choice for determining the terms for perfection. This applies even more where an overall security interest is created on several claims with debtors in different countries.

(92) If – as a final option – the law of the claim is applicable, the parties will have control of the choice of law. This is the clear main rule in the *inter partes* relationship between the security interest grantor and the secured party and between the *debitor cessus* and the security interest grantor. But the rule may lead to so-called forum shopping if applied in third party disputes, typically between the security interest grantor's bankruptcy estate and the secured party – as in this case. This could be in conflict with the central concerns for mandatory rules, verifiability, equality and efficiency during the insolvency proceedings. The autonomy of the parties should not affect the validity and perfection of the security interest in the form of a binding choice of law. I find that this must be decisive.

(93) Consequently, I conclude that the issues regarding the validity and perfection of the security interest must be decided under the law of the security interest grantor's home country. This implies that the case in its entirety must be decided under Norwegian law.

(94) Hence, the appeal must be dismissed. The appellant is ordered to pay the respondent's costs in the Supreme Court, see the Dispute Act section 2-2 subsection 1, as I cannot find that any of the exemptions are applicable. The respondent has claimed compensation for costs in the amount of NOK 995 194, of which fees constitute NOK 976 500. I base my decision on the statement of costs.

(95) I vote for this

J U D G M E N T  A N D  O R D E R :

1. The appeals are dismissed.

2. ING Bank N.V. will pay to the Bankruptcy estate of Bergen Bunkers AS costs of NOK 995 194 – ninehundredandninetyfivethousandonehundredandninetyfour – within 2 – two – weeks from the service of this judgment and order.

(96) Justice **Bergh:** I agree with the justice delivering the leading opinion in all material aspects and with his conclusion.

(97) Justice **Webster:** Likewise.

(98) Justice **Arntzen:** Likewise.

(99) Chief Justice **Øie:** Likewise.

(100) Following the vote, the Supreme Court gave this

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