Some Perils of Turning Small Ships into Big Boats   
On the Relevance of Addressing the Real Issues in Law

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1 A Relational Property Rights Analysis

It is easy to associate property law with ‘things.’ However, the right to property is not about handling things. Like any other law, property law is about managing relationships. More specifically, property law is about regulating and dealing with conflicts of interest among people, even if the conflicts of interest have to do with resources. In spite of this fact, the concepts of objects and property still tend to shape our understanding. As lawyers, we sort the material based on what kind of thing or object the conflicts of interest refer to. Objects can become the central focus of the legal disputes in question. Grounding our starting point in objects can even affect the way lawyers perceive the context at hand. This may mean that lawyers fail to pay attention to what the subjects’ conflict of interest actually consists of, even though it is really the subjects’ conflicts of interest that lawyers need to deal with.

Since law requires simplifications and generalisations, the use of regulatory constructions such as objects and property, fulfils important functions. Using object definitions, lawyers can, to some extent, sort between different contexts. Object definitions can provide some accuracy when it comes to identifying what is special about conflicts of interest between parties that are competing for different objects. For example, the object “ship” implies a certain environment of relationships and conflicts of interests, that differs from other objects such as land, horse or trademark.

The Swedish Maritime Code largely regulates relationships related to subjects (people, companies, etc) who handle ships. According to a central definition in the Swedish Maritime Code 1:2, vessels can be ships or boats.[[1]](#footnote-1) Relatively recently, this definition was changed.[[2]](#footnote-2) The formal effect of this change was that small ships became big boats. With the new definition, the smallest ships, with a length between 12 and 24 meters, are no longer ships.

By changing the definition, the legislator wanted to achieve some expected results.[[3]](#footnote-3) First, the legislator wanted to reduce the state’s fees for various registration measures. The change was also about making the administration of credit security less difficult to handle. Furthermore, the change addressed a difficulty in the sales process; the requirements for proof of previous owners were so high that it was difficult to prove what was required. Moreover, the change was done to coordinate regulation with maritime security regulation in a couple of aspects. It was also pursued in order to comply with EU directives in a more direct way than before. Finally, it was set out to achieve equal treatment of equal vessels.[[4]](#footnote-4) In other words, this effort was a matter of re-regulating several issues at once. To change a definition can be a useful technique for doing so. This technique needs however not be the ideal. If the need for re-regulation is to remedy an excessively high fee collection from the state, then the more obvious method is to reduce the fees. If the administration is difficult to handle, then the method could be to change the administration. Also, if the evidentiary requirements are too high, then the method could be to lower the evidentiary requirements. Moreover, when maritime safety regulation sets requirements that needs to be coordinated, it is enough to coordinate the specific requirements. The equivalent can be said about complying to EU directives in a direct or indirect way. Also, the equal treatment of equal vessels can be achieved by addressing the specific similarities. Overall, there may, however, be predominant reasons to attack what appears to be a Gordian knot of regulation. To solve all the issues in one single cut can be an appealing method.

This chapter is about observations on theoretical effects of a change of a legal definition.[[5]](#footnote-5) These observations are primarily relevant when it comes to understanding legal thinking and methodology. What I underline with this chapter is the relevance of addressing typical conflict of interests in a direct way, that is without letting the objects get in the way of the understanding. This approach includes translating the conception – “equal vessels to be treated equally”[[6]](#footnote-6) – into a more elaborate idea on the equal treatment of subjects who have interests in the context at hand.

The relationships I have looked into are primarily the relationships between buyers and sellers of ships and boats. It is the parties of these relationships that warrant equal treatment, rather than the nature of the object. To what extent equal treatment is a value that is desirable in this context, needs to be addressed by looking at the relational aspects.

In Swedish and Nordic legal thinking, object definitions and other intermediate concepts have been viewed with some scepticism. The scepticism has to do with cultural, philosophical, and political preferences. It is therefore possible to speak of a Nordic legal culture with a Nordic approach to legal thinking. Instead of starting from concepts and rights, the Nordic approach starts from an identification of the typical conflict of interest of the type of conflict at hand. The Nordic approach starts with identification of the interests of the two typical parties in a certain context. Concepts are kept aside. They are seen as relative, and treated as tools for simplifying communication. This order is due to the fact that concepts should not guide legal thinking towards abstract solutions that are and unrealistic and therefore have low material legitimacy.[[7]](#footnote-7)

Whether the Nordic tradition of thought follows such a pattern as I have just described can be examined in different ways.[[8]](#footnote-8) It is possible to examine the points, advantages, and disadvantages of such a way of thinking. A special opportunity for such an investigation occurs when there is a change of definition of ships and boats. When such a change is made it becomes relevant to compare how different relations are affected. It becomes relevant to ask questions such as:

What happens if lawyers look at the context, and take, as our starting point, some of the relationships concerned? What characteristics do the parties have, and how are they affected by the change of regulation? Do the hereby identified differences amount to any useful findings for legal actors, law enforcers, or legislators?

I have addressed these questions based on the thesis that object definitions entail risks. Objects are intermediate concepts that may, to some extent, obstruct lawyers from addressing the key issues directly. When objects become the starting point in legal proceedings, they risk obscuring the real conflicts of interest. They also risk hiding the characteristics that the parties typically have. The thesis of this project includes the assertion that a starting point (or framework) based in personal relationships, and the associated conflicts of interest that typically arise in said relationships, has predominant advantages compared to a starting point or framework where the concepts affect our perspectives. What I have done is to analyse different categories of substantive conflicts of interest regarding vessels. I have used the assumption that the subjects in the relationships may have interests that can be divided into the categories of 1) business interests, and, 2) leisure entertainment interests. With the help of these assumptions and a framework based in the relationships between parties, I have made some observations on the relevance of addressing the relational conflicts of interest, or in other words “the real issues” and not only the conceptual ones.[[9]](#footnote-9)

2 The Property Law Conflicts of Interest Have Varying Characteristics

Using a relational perspective and a starting point in the relationships, it becomes relevant to distinguish between different types of conflicts. Conflicts of interest in these relations arise because different conflicting claims are made against each other. The different kinds of claims that may end up in conflict can vary. In terms of different circumstances that may be behind these conflicts, they are indeed different. Broadly speaking, claims can be sorted into the usual categories of property rights, security rights, usufruct rights and other claims.[[10]](#footnote-10) Also the background of different claims that come into conflict with each other vary. The character of the conflicts of interest varies based on what characteristics the parties both have, and how the parties expect to use the resources that they both want to benefit from. Several variations have to do with how the two subjects who have a conflict of interest have acted. Of central importance is also how third subjects have acted. The two subjects who have the claims may have ended up in the conflict of interest due to this third subject, although they themselves may also be more or less to blame. Examples will follow below, but one example is when someone has lent something to another, and the lender has also disposed of the thing to another.

In the context in which vessels are relevant, it may be appropriate to assume that one party category can be composed of a professional business operator. This professional business party may have reason to use both ships and boats in their operations. It is necessary to point out that the conditions can be such that operating each vessel constitutes an activity in itself. The vessels may have specific personnel who handle their operations and who transport buyers who use the vessels. On the other end there are also those business parties who simply use the vessels as a resource to generate liquidity or finance, such as ship-leasing companies.

Other than business parties, there is reason to count on a category of recreational parties that own and use vessels non-professionally. Recreational parties are primarily interested in using boats, rather than ships, for their purposes. It does however also happen that recreational parties use ships.

Both categories of users, business parties and recreational parties, can thus be relevant for both ships and boats. The relationships around ships can, however, be assumed to more generally refer to the relationship between business parties.

Against this set of parties, backgrounds, claims, and acts, I have in my analyses counted on at least thirty different conflicts of interest. What I present are a few of the observations I have made in my analysis of these relationships given the change in legislation. In each of the following sections I have pointed to an effect produced by the lack of a relationship-oriented perspective. In contrast to this point, I present the potential possibilities of adopting a relationship-oriented perspective.

3 Unintentional Re-regulation in Favour of the Stronger Party

Let us say that a business party and a recreational party have each made an acquisition: they have both acquired the same vessel. This occurrence happened because the seller sold the same vessel twice; this is a so-called ‘double transaction’.

The double transaction, by virtue of having two acquisitions, has led to conflict between the acquirers. Primarily, the conflict consists of the two acquirers wanting to use what they bought, even though they both cannot. The business party intends to use the vessel in their business throughout the year. The recreational party intends to use the vessel mainly during the summer months. In winter, the recreational party intends to only store the vessel. The acquirers have either paid or not paid the seller for all or part of the agreed price. This implies a number of possible alternatives regarding the payment conditions: for instance, the seller is unable to repay or compensate the acquirers for their inconvenience due to the conflict of interest.

Based on the interests described above, it is possible to conclude that the opposing interests, first and foremost, are in conflict in the desire to use the vessel. In this respect, the interests ‘collide’ in terms of the sea season of the year when the vessel is intended to be used (in Sweden, this is the summer months). Therefore, one way of dealing with this conflict could be to divide the use of the vessel. However, such a solution is not appropriate because there are interests other than the actual use of the vessel. One such interest is for example the opportunity to sell the vessel in order to make a profit. Another interest that concerns the parties is the possibility to decide on maintenance and development of the vessel. It is, in general, a matter of an interest to control the resource based on what is happening to it. Having to share decision-making powers and being locked into a relationship with the other party would be a peculiar and unattractive solution for either party; this arrangement would likely have a number of negative consequences for the parties, therefore. The cultural norms that directly address the issue of the use of objects also gives a relatively clear directive: it is evident that the solution should be to prioritise one of the parties.

In the cases when the vessel is a boat, the applicable part of Swedish law, stipulates that it is the chronological order between the acquisitions that shall be decisive in deciding ownership. The first acquirer, based on this approach, must ultimately be given priority regardless of the circumstances.[[11]](#footnote-11) This regulation gives the first acquirer a right to redeem the boat even in the cases where the latter acquirer would gain priority because of good faith and possession, as the main requirements are. Later acquirers do however basically always lose concerning the boat as such. In cases where the later acquirer has paid something to the transferor the latter acquirer can however recieve financial compensation corresponding to what they paid, but at most the market value.[[12]](#footnote-12) In order for later acquirers to get the boat, the first acquirer must refrain from using their opportunities to redeem the boat. Later acquirers are dependent on what the first acquirer chooses to do.

In the cases when the vessel is a ship, regulation is more neutral. The first acquirer is given priority, but the latter acquirer can in good faith compete with the first acquirer’s claim by applying to register as an owner. No possibility of redemption is stipulated for ships.[[13]](#footnote-13)

The regulation, therefore, distinguishes between boats and ships. Priority between acquisitions is determined in both cases by the chronology of acquisition, but first acquirers have more opportunities presented to them when acquiring a boat.

Provided the assumption that a business party and a recreational party have equal chances of being the first acquirer, the regulation appears to be neutral. The legislative change in the object’s definition may therefore not have entailed any change in the balance between the types of parties that end up in conflicts regarding large boats. Given the different conditions of the typical parties, however, it is possible that business parties have been favoured compared to recreational parties. There is reason to assume that business parties have greater opportunities to exercise the right to redeem in cases where business parties are the first acquirer. In cases where a business party is a later acquirer, there is also a relatively greater chance that the recreational party does not choose to exercise their right to redeem, compared to if the first acquirer was also a business party. This assumption is because recreational parties typically have less financial strength. There is in this regard also an inequality when it comes to taxation: a business party can pay redemption with untaxed funds, and the recreational party cannot.[[14]](#footnote-14) The change in the object definition of ships and boats, has therefore (so long as the assumption is correct), led to a disequilibrium between the typical parties. In principle, the interests of business parties have benefited compared to before the change in legislation.

This example illustrates one of the observations I have made in my analysis. The change in regulation has favoured business parties. Since this effect can be considered to be marginal it is however not the actual effect that is of importance. The frequency of double transactions of large boats is probably quite small.[[15]](#footnote-15) What I want to point out is not a difference in substance: I want to instead give an example of what can be achieved with a relationship-oriented legal perspective or framework. Such a perspective provides satisfactory conditions for ensuring the equilibrium between subjects that are regulated by these laws. The observation shows that even such parts of the problem that can appear marginal will emerge with such a perspective.

4 Legislation that Counteracts Its Purpose

In connection to the observation about the effects of the right to redeem in double transaction cases concerning vessels, it is relevant to point out also another observation, from an earlier act of the legislator. This second observation is that the effect in the first observation had not occurred if the Swedish legislator had distinguished between double transactions and so-called unauthorised transactions, that is transactions where someone who does not have the right to sell the vessel sells it anyway.[[16]](#footnote-16)

When the legislator constructed the legislation applicable for boats and movables in general, the Good Faith Acquisition of Personal Property Act of 1986, the legislator made the choice to establish a right to redeem. The reason was to balance the interests between the parties after an unauthorized transaction. It is rather clear that the legislator did not analyse how this right to redeem would turn out in a double transaction conflict.[[17]](#footnote-17) The right to redeem has its foundation in a balance that the legislator has made around affection values that an object might have for an owner.[[18]](#footnote-18)

The right to redeem in the case of double transactions is a result of a legislating technique that does not distinguish between human relationships: the legislator did not take into account that the right to redeem has the opposite effect when it comes to double transactions (i.e. compared to unauthorised transactions). In effect, the right to redeem counteracts the preservation of affection values if it is used in cases of double transactions! This may be, in some cases, rather relevant, since a later acquirer can have owned the property for quite some time and established himself as the owner of the vessel.

The legislative process for the good faith acquisition of personal property is, therefore (in itself) an illustrative example of the main theme of this chapter: it demonstrates what can happen when lawyers do not keep apart different relationships where the typical interests of those involved differ.[[19]](#footnote-19) What I am pointing out, however, is not a flaw in the legislator’s work. My ambition is constructive. The point I am making is that there is reason to consider aspects that appear first with a more pronounced relationship-oriented starting point than one in which objectification and intermediate concepts tend to entail. The Nordic functionalist tradition of thought has only helped facilitate its practitioners to pay attention to this obstacle, but it has not helped them to get past the obstacle on a regular basis.

5 Lack of Regulations in the Interest of Limiting Damage

The conflict of interest in the case of double transactions does not only include the interest in getting priority regarding the ship. Both parties also have an interest in limiting the damages and their inconveniences. In the above-mentioned regulations, the legislator did not use specific regulation for double transactions. Because of this, the parties’ interest in limiting their damages from a double disposition has not been noted. With a relationship-oriented starting point regarding the conflict of interest, these aspects become clearer.

In the case of a double transaction, the circumstances do not have to be such that both acquirers have paid what they agreed on with the transferor. In such cases, there is a way to limit the damage of a double transaction: after the conflict is discovered, both acquirers can wait to pay anything more than what they have already paid to the seller. As long as the acquirers dispute which of them who should be given priority, they attain support for withholding payment to the seller with reference to breach of contract and fault.[[20]](#footnote-20) However, once one of these claimants has been given priority, that acquirer is in principle obliged to pay (albeit with a deduction for the costs the acquirer has had). At the same time, the losing acquirer has the right to recover what they may have paid to the transferor, but they may be left without practical opportunities to get something back.[[21]](#footnote-21) The transferor may be insolvent, and the risk for this is probably significantly larger than usual when someone has made a double transaction.[[22]](#footnote-22) Even if the winning acquirer pays the transferor, the transferor cannot use the payment without further actions to pay the losing acquirer.[[23]](#footnote-23)

Under conditions as those described, the two acquirers need to identify that they have a common interest in limiting the damages. There is no regulation that helps them regarding this in either the Good Faith Acquisition of Personal Property Act or the Swedish Maritime Code, or any other property law regulation that can be applied to double transactions.[[24]](#footnote-24) No part of the property law regulation on this issue appears to have been constructed on the basis of an analysis of the conflict of interest where these payment aspects are included. Such an analysis could, in a balance between the interests, have led to an explicit rule that the winner must pay the loser instead of the transferor.[[25]](#footnote-25)

However, despite the lack of rules on double transactions, the two acquirers can, in some cases, succeed in cooperating to limit the overall damages. Namely, the acquirers can agree that the person who paid the most to the transferor must win the dispute between the acquirers; at the same time as this, they also agree that the person who paid the least must be allowed to buy the vessel (or whatever object is relevant). In order for the acquirers to succeed in this, however, it is required that they communicate despite the disagreement they have about the vessel (the object). This part of the conflict can greatly hamper possibilities because neither party wants to suggest that they may lose.

Communication difficulties can however be counteracted in some cases. When the loser has possession of the vessel (object), the loser can, as the possessor, claim the right of retention (lien) in relation to the transferor. When the circumstances are such, this possessor can succeed in not having to give up the object without receiving the amount that the winning acquirer owes to the transferor. Another legal ground that the losing party can use against the winning party and the transferor (bankruptcy estate) is that the losing party has taken over the transferor’s right to payment from the winning party through surrogacy.

Whether or not the two acquirers should have to deal with these factors without clear normative support can be discussed. That the outcome regarding limitation of damage can depend on tactics of this kind, as has now been indirectly described, can be questioned. The legal uncertainty may have some advantages in dispute resolution, but the discussion is whether a rule on the matter would not have been preferable anyway.[[26]](#footnote-26)

What I pointed out in this section is a further example of what can come out of the application of a relationship-oriented framework to the resolution of conflicts of interest. Such a starting point or framework means that the conflict of interest is handled by taking into account all parts or factors in the relationship. With a starting point or framework in objects, on the other hand, the perspective is easily limited to the question of where the vessel (or object) should go.

6 A Semi-unintentional Choice of More Risk

From what has been mentioned above, it follows that the change in the object definition in the Swedish Maritime Code 1:2 affects both double transactions and unauthorised transactions. Unauthorised transactions lead to a different type of relationships than double transactions because the parties’ typical interests are different in the two cases. With a relationship-oriented perspective, it therefore becomes appropriate to ask the question of what the change in the object’s definition can be assumed to have meant for parties who risk ending up in conflicts of interest due to unauthorised transactions.

Based on the conflict of interest regarding unauthorised transactions, it is appropriate to consider who may be the typical parties: they are subjects who have opposing claims on vessels. As assumed above, these parties can be business parties as well as recreational parties. Regardless of background, the parties have an interest in exclusive priority in the first place. However, they also have other interests such as limiting the harm they suffer if their interests collide. To illustrate the conflict of interest, I have used an example with some variables.

An acquirer of a vessel has ended up in a conflict of interest with the person who was robbed of their vessel, by someone who then sold this vessel to the acquirer. (Instead of theft, this can be a case of fraud or embezzlement.[[27]](#footnote-27) The actions can, in principle, also be such that they did not necessarily constitute a criminal act; they can be misunderstandings or the like. The “crime victim” therefore does not necessarily have to be a crime victim.)

During the relevant course of events, the ship had no crew. The acquirer is, in this example, a recreational party and the “crime victim” is a business party. The latter’s interest is to be able to run their business. For this purpose, the business party wants to get the vessel back. The recreational party’s interest is to keep the vessel. In this example, the recreational party paid a down payment for the vessel and had possession of it.

The example thus includes parties with different interests and variables regarding the circumstances. In terms of regulation, the outcome depends on whether the vessel is a boat or a ship.

Regulation for ships means that the business party must be vigilant; they must not neglect information from the register in case someone else applies to be registered as the owner of the ship. If the business party does not react until someone, in this case the recreational party, has acquired the ship in good faith and has applied for registration, then the acquirer shall be given priority.[[28]](#footnote-28) It does not matter if the business party has been exposed to theft, fraud, embezzlement or anything else.[[29]](#footnote-29) If an owner of a ship does not pay attention to the registration and acts on time, the owner may lose, *in principle*.

Regulations that are supposed to be used for boats provide significantly greater opportunities for the trader: the oldest right is given priority. In the case of a theft offense, the business party shall be given priority over the acquirer due to the character of the offense.[[30]](#footnote-30) Regardless of whether the recreational party has acted in good faith, and regardless of whether they have started using the boat, the business party must then be given priority. The business party must also be given priority in other cases, but then they need to redeem the boat; this later party needs to pay a sum corresponding to the down payment that the recreational party has paid (if the recreational party has gotten possession of the boat in what was then and still is in good faith).[[31]](#footnote-31)

The regulations seem to make it easier for a crime victim to win a dispute over a boat than a dispute over a ship. Given the assumptions made in previous sections about business parties as being financially stronger and more capable to redeem than recreational parties, the change in the object definition could have entailed a re-prioritisation of interests in favour of business parties. One aspect to consider, however, is that there is insurance: a common insurance for boat owners covers damage due to several categories of property crime. Even recreational parties can be assumed to regularly have such insurance. The difference in power ratios, therefore, does not have to be as significant as previously assumed. Let it therefore be assumed from this point that a change in the regulatory model from ship to boat does not entail any re-prioritisation between the parties.

However, the relationship-oriented starting point (or framework) does not only involve the issue of re-prioritisation between interests. With such a starting point, it also becomes relevant to ask which model most evidently satisfies the interests of the parties, as seen as a whole.

A difference between the two regulatory models refers to the risk that an acquirer is assumed to take on given the requirements that are set for a good faith acquisition. The regulation of ships can then be assumed to give little practical opportunity to fulfil the requirement that the acquirer’s transferor, the “criminal”, must be registered in the ship register. The requirements to succeed in being registered are high.[[32]](#footnote-32) According to the preparatory work for the change in the legislation, which turned small ships into large boats, the requirements include showing documentation of the entire chain of owners from the time the ship was built. The requirements set by the authority responsible for the register are said to be so high that in some respects they even pose problems for legitimate acquisitions.[[33]](#footnote-33) Compared to the requirements set for good faith acquisitions of boats, the risks for good faith acquisitions of ships appear to be less pertinent; the regulation of ships can be assumed to have a significant preventive effect. By comparison, the requirements set in the regulation that is used for boats seems to involve greater risks. Admittedly, these requirements may also cover register checks in a significant proportion of cases, but not all boats are covered.[[34]](#footnote-34)

Another difference between the regulations has to do with the fact that the regulation of ships provides certain opportunities for an injured party to receive compensation from the register holder, that is the state.[[35]](#footnote-35) Such an opportunity entails a limitation of the risks and damages. The effects of the damage are spread out to the collective. To address the conflict of interest between parties, such a limitation of harm is important. Given an assumption that the possibility for private risk limitation through insurance are the same for ships and boats, there will be a difference if in addition there is also a state risk limitation for one kind of vessel.

The comparison thus indicates that the conflict of interest is to a greater extent handled through the regulation of ships, than through the regulation of boats. It appears that the total risk is lower for both parties in the regulation model for ships. A relationship-oriented perspective tends to lead to an aspect like this being noticed.

As mentioned at the beginning of this section, it is conceivable that the choice of perspective in this case only implies an insignificant difference when it comes to paying attention to different aspects in a choice of regulatory model. In any such choices, regulators are expected to investigate and make assumptions about effects so that comparisons can be made. In regard to good faith acquisitions of large boats, it is possible that the frequency of unauthorised dispositions is so low that it is not worth the costs and inconvenience to use the system to better minimise the risks. In the case of changing the object definition in the Swedish Maritime Code there were, as mentioned, several reasons behind it. What I have just reported is an illustration of the fact that a relationship-oriented perspective (that is based on the conflicts of interest between the subjects being regulated), does, with a certain probability, lead to the interests of total risk levels being noticed. It may seem that this is not remarkable at all, but nevertheless, there is a point to be made: my point is that the relationship-oriented perspective, which is based on the approach of addressing conflict of interest between people, is a tool for the purpose of settling disputes. This tool can be used consciously for the benefit of the analysis behind a legal decision.

7 Attention to the Fact that Disputes Are a Matter of Prioritisation between Different Interests

In the examples I have used above, business parties and recreational parties have two different categories of interests. These differences are relevant in relationships where the parties have claims on vessels that ‘collide’. What I have pointed out is the risk of overlooking the interest and thereby “the real issue”. Something I have not touched upon is the possibility of consciously prioritising between the parties based on their different interests. In an equilibrium between different interests there could however be reason to do so. One aspect of the relationships around vessels that could cause such consideration is that vessels do not have to be seen as objects only. The conflicts of interest can be about enterprises, projects, and also human beings, more so than about vessels. Ships and personnel can therefore be a somewhat integrated resource, and so can the customers who buy transports that are performed by staff with the use of the vessel. By only paying attention to the vessel, lawyers may end up with a result where none of the parties get what they are interested in.

Let us say that an acquirer has acquired a part of a business that includes a ship, personnel, and customers. The acquirer has signed employment agreements with the personnel who manned the vessel at the time of acquisition. This acquirer has also taken over agreements with the transport customers who have had goods shipped with the ship for a long time on a regular basis. The idea on the part of the acquirer is to take over part of the role, and part of the business, that the transferor had.

This example also includes the condition that the transferor actively wanted the acquirer to take over: for the transferor, this was a way to meet the interests of the staff and customers, since the transferor struggled economically. After the deal was completed, the transferor went bankrupt. However, due to the difficulties that led to the bankruptcy, a representative of the transferor made the mistake of transferring the vessel, and note, only the vessel, to another acquirer before the bankruptcy occurred. This other acquirer had so far only agreed on the terms of acquiring the vessel and intends to use it in another activity: this is an activity that the current staff prefers not to work in.

What has happened can generate several different conflicts of interest. For the conflict of interest between the two acquirers, it can be stated that the regulation does not mention anything about the interests painted in the example: the regulations do not mention those interests as being relevant for how the conflict of interest is to be handled. Nor do the regulations concerning the possible conflict of interest between the transferee and the transferor’s creditors indicate anything. The regulations of validity of transfers, transfer perfection and recovery, are silent.[[36]](#footnote-36) Nothing is mentioned about taking into account the interests of staff and transport customers. The notion that a party’s interests coincide with other subjects’ interests because they are affected by the conflict of interest is cut off by the regulation. In other words, it is cut off by the object’s definition. The regulations are concentrated on objects: in this case, the vessel. An exemption that to some marginal extent acknowledges these kinds of interests is rules on priority for personnel.[[37]](#footnote-37) The regulation of conflicts of interest between acquirers and creditors does not however mention anything about the enterprise aspects or the going concern aspects. There are also regulations that affect a related situation that could become relevant if the transferor had instead waited to act and let a bankruptcy trustee take care of the business.[[38]](#footnote-38) However, the transferor has not then had the opportunity to influence the circumstances.

Can a relationship-oriented perspective, that is based on addressing conflicts of interest between people, contribute something regarding the legal handling of property law conflicts as they are now indicated? – The answer is a resounding yes. Such a perspective can operate as a reminder that property law definitions of objects are limitations in relation to the conflicts of interest that lie behind them. By taking typical conflict of interests between people as a starting point, it becomes clear that objects and concepts are tools for dealing with something that is more complex; this reminder serves the purpose of justifying why the tools fit, or why they do not. This is hereby an important and relevant part of the thought process for lawyers in all roles.

What I have pointed out in the example of this section is not that the acquirer of the business should be given priority due to their and others’ interest in that particular solution. I have not solved the conflict. Instead, I have pointed out that a relationship-oriented perspective, or framework, that is based on typical conflicts of interest, is important for understanding what lawyers do in their legal thinking. It may be an inevitable fact that a changed definition of an object, by which small ships become large boats, can determine how a conflict of interest, such as that in the example of vessels, is to be handled. With a relationship-oriented perspective or framework based on the typical conflicts of interest, lawyers can however understand why we make such decisions. We can understand how it relates to the real problem we deal with, and how we can justify our decisions. By doing so we get the advantage of not being subconsciously directed by the object definition. Instead, we have made a conscious prioritisation between the interest behind the conflict.

8 The General Point

With the title of this chapter, I give attention to the fact that there are perils of turning small ships into big boats. The general theme of what I have presented is however that that perils like these occur whenever lawyers use concepts or draws lines with legal definitions. As lawyers we need the concepts, the norms, and the mutual ideas of what we mean when we communicate. We need the simplifications. What I have addressed is not meant to be used to oppose those fundamentals of law. From what I have illustrated of my analyses, it is however relevant to not become too closely tied to these fundamentals. It is namely also a fundamental of law that the real conflicts that lawyers deal with are relational. The conflicts of interest are between people. To deal with these conflicts of interests from a relational starting point, is rather useful. By using the concepts, norms and mutual legal ideas as tools in the process, the quality and understanding of what we do can be upheld and maintained. In this way we can make an elaborated decision on when to cut through the Gordian knot, and when to choose a more nuanced and delicate solution. To deal directly with “the real issues” is useful, and not something marginal that can be more or less set aside and forgotten in the process.

Table of Authorities

National Legislation

Sweden

The Act on Instruments on Debt (Lag (1936:81) om skuldebrev))

The Land Code (Jordabalk (1970:994))

The Ship Register Regulation (fartygsregisterförordningen 1975:927)

The Act on registration of boats (lag (1977:377) om registrering av båtar)

Good Faith Acquisition of Personal Property Act (Lag (1986:796) om godtrosförvärv av Lösöre)

Bankruptcy Act (Konkurslag (1987:672))

Swedish Maritime Code (Sjölag (1994:1009))

The Act on Accounts for Financial Instruments (Lag (1998:1479) om värdepapperscentraler och kontoföring av finansiella instrument))

Income Tax Act (Inkomstskattelag (1999:1229))

Bibliography

Books and Book Chapters

Baldersheim E, *Til tingsrettens teori* (Oslo: Cappelen Damm 2017).

Blandhol S, *Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode*, (Köpenhamn: djøf 2005).

Dalberg-Larsen J, *Pragmatisk retsteori,* (Köpenhamn: Jurist og Økonomforbundets Forlag 2001).

Håstad T, *Sakrätt avseende lös egendom*, (6 ed, Norstedts 1996 and 2000).

Letto-Vanamo P och Tamm D, “Nordic Legal Mind”, in Pia Letto-Vanamo, Ditlev Tamm och Bent Ole Gram Mortensen (eds) *Nordic law in European context*, Cham, (Schweiz: Springer 2019).

Lilleholt K, ‘Europeisering av nordisk tingsrett?’, in Lars Gorton and others (eds) *Festskrift till Göran Millqvist*, (Stockholm: Jure 2019).

Lilleholt K, *Ownership of Goods in the Draft Common Frame of Reference, Festskrift till Torgny Håstad (*Iustus 2010.).

Lilja M, National Report on the Transfer of Movables in Sweden, in Faber W och Birgitta Lurger B (eds), Volume 5 Sweden, Norway and Denmark, Finland, Spain. (Sellier European Law Publishers, 2010).

Martinson C, *Kreditsäkerhet i fakturafordringar* (Iustus, 2002).

Martinson C, Transfer of title concerning movables part iii – Eigentumsübertragung an beweglichen Sachen in Europa Teil iii National report Sweden, Peter Lang GmbH 2006.

Martinson C, How Swedish lawyers think about ’ownership’ and ’transfer of ownership’, in Wolfgang Faber och Brigitta Lurger (eds) Rules for the transfer of movables: A candidate for European harmonisation or national reforms?, Sellier European Law Publishers 2007 p 69–95.

Martinson C, Blev vi nordiska jurister lämnade i sticket eller har det obemärkt runnit vatten under broarna? – Bensinfallet, i Jan Kleineman, (ed), *Pragmatism v principfasthet i nordisk förmögenhetsrätt*, (22–23 november 2018, at Stockholms Center for Commercial Law, 2019).

Martinson C, Något om behoven av att underhålla och utveckla den nordiska (funktionalistiska) rättstraditionen – Segelbåtsfallet, in Lars Gorton and others (eds) *Festskrift till Göran Millqvist*, (Stockholm: Jure 2019) 461–480.

Rakneberg Haug K, *Transfer of Movables: A Comparison of the Unitary Approach and the Scandinavian Functional Approach*, (Universiteit van Amsterdam, 2021).

Rune C, *Rätt till skepp*, (2 ed, Sjörättsföreningen i Göteborg skrifter 68, 1991).

Sandstedt J, Sakrätten, *Norden och europeiseringen: nordisk funktionalism möter kontinental substantialism*, (Stockholm, Jure 2013).

Tiberg H, *Båtköpet*, Jure, 2018.

Official Documentation

Memorandums

Schelin J, Regelförenkling för sjöfarten, promemoria, 2015.

Preparatory Works

Kungl. Maj:ts proposition med förslag till lag om ändring av sjölagen (1891:35 s.1): proposition 1973:42.

Om godtrosförvärv av lösöre: proposition 1985/86:123.

Förvärv av stöldgods i god tro: proposition 2002/03:17.

Regelförenkling för sjöfarten: proposition 2016/17:205.

Public Inquiries

sou 1965:14: Godtrosförvärv av Lösöre.

sou 1984:16: Förvärv i god tro.

Journal Articles

Faber W and Martinson C, Can ownership limit the effectiveness of EU consumer contract law directives? A suggestion to employ a ‘functional approach’, Austrian Law Journal 2019 p 85–123.

Hagberg L, Tvättning av skepp, Svensk Juristtidning 1995 p 594–597.

Håstad T, Derivative Acquisition of Ownership of Goods, European Review of Private Law 4–2009 p 725–741.

Martinson C, Är den nordiska rättskulturella tanketraditionen ofullgången? – En illustration utifrån exemplet civilrättsliga sanktioner mot nyttjande av annans egendom, Tidsskrift for Rettsvitenskap 2019 3–4 p 209–268.

Martinson C, Det nordiska funktionalistiska angreppssättet och obehörig vinst – Dieselfallet, Juridisk tidskrift 2019–20 (1) p 148–170.

Martinson C, The Scandinavian approach to property law, Juridica International 22/2014 s 16–26.

Millung-Christoffersen A, The Scandinavian ‘functional’ approach to movable property from a Danish view – including the question of ’tradition’, European Property Law Journal 8(1) 2019 p 4–22.

Rakneberg Haug K, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity, European Property Law Journal 6(2) 2017 236–271.

Schelin J, Sjölagen – En åldrande nordisk dinosaurie?, Juridisk tidsskrift 2006–07 (5] p 140–147.

iii Others

Enkullen E, Skeppsregistrets uppbyggnad och funktion i Sverige och Cypern – en jämförande studie, (Examensarbete i Sjörätt).

Martinson C, Ejendomsrettens overgang – Norden kontra verden, Nordiska Juristmötet 2008 (on-line) and in njm 2011 p 823–843.

Sundholm K, Kommentar till sjölagen, Karnov/Juno 2020-12-30.

1. Regarding the definition of vessel (fartyg), see, for example, Christer Rune, *Rätt till skepp*, (2 ed, Sjörättsföreningen i Göteborg skrifter 68, 1991) 17–19. [↑](#footnote-ref-1)
2. Svensk författningssamling 2017:1056 in force by 1 February 2018. [↑](#footnote-ref-2)
3. Compare the motives for the earlier definition, proposition 1973:42, 121–122. [↑](#footnote-ref-3)
4. See proposition 2016/17:205 p 19–23. Johan Schelin, Regelförenkling för sjöfarten, (promemoria, 2015)  85–90. [↑](#footnote-ref-4)
5. For the connected theme of legislative techniques there are several other aspects, see for example Johan Schelin, “Sjölagen – En åldrande nordisk dinosaurie?”, Juridisk tidskrift 2006–07, 140–147. [↑](#footnote-ref-5)
6. Johan Schelin, Regelförenkling för sjöfarten, (promemoria, 2015)  90. (My translation of the quote). [↑](#footnote-ref-6)
7. See, for the theme, in general, ie: Sverre Blandhol, *Nordisk rettspragmatisme: Savigny, Ørsted og Schweigaard om vitenskap og metode*, (Köpenhamn: djøf 2005) 51–73. Jørgen Dalberg-Larsen, *Pragmatisk retsteori,* (Köpenhamn: Jurist- og Økonomforbundet 2001). Pia Letto-Vanamo och Ditlev Tamm, “Nordic Legal Mind”, in Pia Letto-Vanamo, Ditlev Tamm och Bent Ole Gram Mortensen (eds), Nordic law in European context, (Cham, Schweiz: Springer 2019)  1–19. Martin Lilja, ”National Report on the Transfer of Movables in Sweden”, in Wolfgang Faber och Birgitta Lurger (eds), (volume 5 Sweden, Norway and Denmark, Finland, Spain, Sellier European Law Publishers, 2010) 1–204. Johan Sandstedt, *Sakrätten, Norden och europeiseringen: nordisk funktionalism möter kontinental substantialism*, (Stockholm, Jure 2013). Erlend Baldersheim, *Til tingsrettens teori*, (Oslo: Cappelen Damm 2017). Karoline Rakneberg Haug, ”The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity”, European Property Law Journal 6(2) 2017 236–271. Astrid Millung-Christoffersen, “The Scandinavian ‘functional’ approach to movable property from a Danish view – including the question of ’tradition’” European Property Law Journal 8(1) 2019 4–22. Kåre Lilleholt, “Europeisering av nordisk tingsrett?”, (Lars Gorton and others (eds) Festskrift till Göran Millqvist, (Stockholm: Jure 2019) 385–395. Kåre Lilleholt, “Ownership of Goods in the Draft Common Frame of Reference”, (Festskrift till Torgny Håstad, Iustus 2010) 447–454. Torgny Håstad, “Derivative Acquisition of Ownership of Goods”, European Review of Private Law 4-2009 725–741. For the narrower theme see also: Claes Martinson, *Transfer of title concerning movables part iii – Eigentumsübertragung an beweglichen Sachen in Europa Teil iii National report Sweden*, (Peter Lang GmbH) 2006. Claes Martinson, “How Swedish lawyers think about ’ownership’ and ’transfer of ownership’”, (in Wolfgang Faber och Brigitta Lurger (eds) Rules for the transfer of movables: A candidate for European harmonisation or national reforms?, Sellier European Law Publishers 2007) 69–95. Claes Martinson, “Ejendomsrettens overgang – Norden kontra verden”, “Nordiska Juristmötet 2008 (on-line) and in njm 2011) 823–843. Claes Martinson, “The Scandinavian approach to property law”, Juridica International 22/2014 16–26. Claes Martinson, ”Något om behoven av att underhålla och utveckla den nordiska (funktionalistiska) rättstraditionen – Segelbåtsfallet”, (Lars Gorton and others (eds) Festskrift till Göran Millqvist, Stockholm: Jure 2019) 461–480. Claes Martinson, ”Det nordiska funktionalistiska angreppssättet och obehörig vinst – Dieselfallet”, Juridisk tidskrift 2019–20 (1) 148–170. Claes Martinson, ”Blev vi nordiska jurister lämnade i sticket eller har det obemärkt runnit vatten under broarna? – Bensinfallet”, (Jan Kleineman, (ed), Pragmatism v principfasthet i nordisk förmögenhetsrätt, 22–23 november 2018, at Stockholms Center for Commercial Law, 2019). Claes Martinson, ”Är den nordiska rättskulturella tanketraditionen ofullgången? – En illustration utifrån exemplet civilrättsliga sanktioner mot nyttjande av annans egendom”, Tidsskrift for Rettsvitenskap 2019, (3–4) 209–268. Wolfgang Faber and Claes Martinson, “Can ownership limit the effectiveness of EU consumer contract law directives? A suggestion to employ a ‘functional approach’”, Austrian Law Journal 2019 85–123. [↑](#footnote-ref-7)
8. See last footnote, but also the methods of Karoline Rakneberg Haug, *Transfer of Movables: A Comparison of the Unitary Approach and the Scandinavian Functional Approach,* (Universiteit van Amsterdam) 2021. [↑](#footnote-ref-8)
9. The term is not used with any derogatory intent, and it is not meant to imply that other lawyers deal with something other than the real issues or real problems. It is, however, important to point out that the Nordic approach can be understood by the preference and ambition to address the conflict of typical interests. [↑](#footnote-ref-9)
10. This is of course basics of property law. Cf Torgny Håstad, *Sakrätt avseende lös egendom*, (6 ed, Norstedts 1996 and 2000). [↑](#footnote-ref-10)
11. Good Faith Acquisition of Personal Property Act (godtrosförvärvslagen) § 2, 3 and 5. C.f. Hugo Tiberg, *Båtköpet,* (Jure, 2018) 11–16. [↑](#footnote-ref-11)
12. Good Faith Acquistion of Personal Property Act (godtrosförvärvslagen) § 6. See also next section. [↑](#footnote-ref-12)
13. Swedish Maritime Code (sjölagen) 2:10. Proposition 1993/94:195 176. Proposition 1973:42 246–249, 142–143. Christer Rune, *Rätt till skepp*, (2 ed, Sjörättsföreningen i Göteborg skrifter 68, 1991) s 83–85. Katrin Sundholm, ”Kommentar till sjölagen”, Karnov/Juno 2020-12-30, footnote 67. Torgny Håstad, *Sakrätt avseende* *lös egendom*, (6 ed, Norstedts 1996 and 2000) 74–75. [↑](#footnote-ref-13)
14. Income Tax Act (inkomstskattelagen) 16:1, cf 18:7. It does not have to be about formal redemption. Compensation paid in a settlement can also be paid with untaxed funds. [↑](#footnote-ref-14)
15. This is a pure assumption. I have seen statistics on stolen boats for parts of Sweden, but no statistics on double sales. Note also that Sweboat (ie the national boating industry in Sweden) was a reference body in the introduction of the Good Faith Acquisition Act without indicating anything about their financial needs or the factual circumstances regarding their boats. [↑](#footnote-ref-15)
16. See the Good Faith Acquisition of Personal Property Act (godtrosförvärvslagen) § 2, the Swedish Maritime Code (sjölagen) 2:10, the Act on Instruments on Debt (skuldebrevslagen) § 14. Compare the opposite technique in the Act on Instruments on Debt (skuldebrevslagen) 31 § 2 p, the Land Code (jordabalken) 17:1–2, the Act on Accounts for Financial Instruments (lagen om kontoföring av finansiella instrument) 6:3. [↑](#footnote-ref-16)
17. Since double disposition is not specifically mentioned in the Good Faith Acquisition of Personal Property Act, the question of the right of redemption may appear unclear when the effects become evident. The governmental proposition 1985/86:123 on good faith acquisitions of movables, for example, does not mention the matter, and the considerations presented there are whether the right of disposal should be limited even in the case of unauthorised dispositions. However, see the Council on Legislation’s considerations on pages 29–31 in the proposition; in sou 1984:16 Acquisitions in good faith, 206, it is stated very briefly that the right to redeem shall also apply in the event of a “double sale” (“i tvesalufallet”). In the first sou 1965:14 Acquisition in good faith of movables 204, it is stated that the right to redeem would also be used in the case of double disposition. Also note Torgny Håstad, *Sakrätt avseende lös egendom*, (6 ed, Norstedts, 1996 and 2000) 85. [↑](#footnote-ref-17)
18. See proposition 1985/86:123 on good faith acquisitions of movables, 10. In sou 1984:16 Acquisitions in good faith, 186–206, the right of redemption is stated to be motivated by pure fairness, but the proposal still becomes what is seen as a “general right” to redeem. In the first sou 1965:14 Acquisition of movable property in good faith 12, the proposal was a right of redemption “where the property for him has a value of a different nature than the purely economic or it is otherwise of special importance for him to regain the property”. sou 1965:14 Acquisition of movables in good faith, 201–206. – Also note that when the Good Faith Acquisition of Personal Property Act was written, it did not stipulate an exception for stolen property. That exception was introduced through Svensk författningssamling 2003: 161, see proposition 2002/03:17 Acquisition of stolen goods in good faith. [↑](#footnote-ref-18)
19. None of the consultative bodies whose opinions are set out in the proposition have pointed to the issue of the right to redeem after a double disposition. Some of them did, however, express their preference for a general right to redeem, and interestingly explained this preference with the assumption that it would avoid random results, see proposition 1985/86:123 on good faith acquisition of chattels, 66–68. [↑](#footnote-ref-19)
20. Sales of goods act (köplagen) § 41. [↑](#footnote-ref-20)
21. In the case that the losing acquirer has paid something to the transferor, the loser has the right to recover the payment, Sales of goods act (köplagen) § 41. [↑](#footnote-ref-21)
22. See further on this assumption Claes Martinson, *Kreditsäkerhet i fakturafordringar*, (Iustus, 2002) 306–307, 272–273. [↑](#footnote-ref-22)
23. The winning acquirer must, in principle, pay. In the event of bankruptcy, the acquirers cannot, with the effect of set-off, settle that the winner acquires the loser’s claim on the transferor and thereby acquires a set-off position, Bankruptcy Act (konkurslagen) 5:15–16. [↑](#footnote-ref-23)
24. Good Faith Acquistion of Personal Property Act (godtrosförvärvslagen) § 2, the Swedish Maritime Code (sjölagen) 2:10, the Act on Instruments on Debt (skuldebrevslagen) § 14. Compare the opposite technique in the Act on Instruments on Debt (skuldebrevslagen) 31 § 2 st, the Land Code (jordabalken) 17:1–2, the Act on Accounts for Financial Instruments (lagen om kontoföring av finansiella instrument) 6:3. [↑](#footnote-ref-24)
25. Compare the Good Faith Acquisition of Personal Property Act (godtrosförvärvslagen) § 7 on payment to redeem. [↑](#footnote-ref-25)
26. However, despite the lack of a rule on the probability that the matter can be resolved by a Supreme Court precedent, the decisions of the two acquirers certainly seems significant. If the losing acquirer demands it of the winner, the winner can reduce the funds and object to the insolvency estate’s claim against who is considered the right payee. In the dispute between the bankruptcy estate and the losing party, the losing party can, as mentioned, assert priority on the grounds of the right of retention (lien) or doctrine of surrogacy. Given these opportunities for cooperation with winning acquirers that nevertheless exist, the forecast for the losing party can be good. [↑](#footnote-ref-26)
27. But not in the case that the business party sold with a retention of title clause, because the seller may then be considered to have a completely different set of interests in the conflict of interest; it will be a matter of a security interest instead of interest in using the ship or boat directly or indirectly. [↑](#footnote-ref-27)
28. The Swedish Maritime Code (sjölagen) 2:9–10. Proposition 1993/94:195 s 176. Katrin Sundholm, Kommentar till sjölagen, Karnov/Juno 2020-12-30, footnote 63–66. Torgny Håstad, Sakrätt avseende lös egendom, 6 ed, Norstedts 1996 (2000) p 74–75. Christer Rune, *Rätt till skepp*, (2 ed Sjörättsföreningen i Göteborg skrifter 68, 1991) 81–83. [↑](#footnote-ref-28)
29. Proposition 1973:42 p 245–249, 143–144. Christer Rune, *Rätt till skepp*, (2 ed, Sjörättsföreningen i Göteborg skrifter 68, 1991) 85. [↑](#footnote-ref-29)
30. Good Faith Acquisition of Personal Property Act (godtrosförvärslagen) § 3. [↑](#footnote-ref-30)
31. Good Faith Acquisition of Personal Property Act (godtrosförvärslagen) § 5–6. C.f. Hugo Tiberg*, Båtköpet*, (Jure, 2018) 11–16. [↑](#footnote-ref-31)
32. Compare The Swedish Maritime Code (sjölagen) 2:18. The Ship Register Regulation (fartygsregisterförordningen) § 14. Cf Erik Enkullen, *Skeppsregistrets uppbyggnad och funktion i Sverige och Cypern – en jämförande studie*, (Examensarbete i Sjörätt) 24, 27, 18–20. For an example that the requirements do not make acquisitions impossible after illegitimate transactions see, Lennart Hagberg, ”Tvättning av skepp”, Svensk juristtidning 1995 594–597. [↑](#footnote-ref-32)
33. Johan Schelin, Regelförenkling för sjöfarten, (promemoria, 2015) 87–88. Compare the Swedish Maritime Code (sjölagen) 2:22. [↑](#footnote-ref-33)
34. The Act on registration of boats (lagen om registrering av båtar) stipulates that certain boats must be registered. [↑](#footnote-ref-34)
35. The Swedish Maritime Code (sjölagen) 22:4. See for comments Erik Enkullen, *Skeppsregistrets uppbyggnad och funktion i Sverige och Cypern – en jämförande studie*, (Examensarbete i Sjörätt) 34–35. Christer Rune, *Rätt till skepp*, (2 ed, Sjörättsföreningen i Göteborg skrifter 68, 1991) 148–149. [↑](#footnote-ref-35)
36. The Swedish Companies Act (aktiebolagslagen) 17 chapter. The Swedish Maritime Code (sjölagen) 2:9 or Consumer Sales Act § 49 and the principle of traditio (traditionsprincipen). Bankruptcy Act (konkurslagen) 4 chapter. Proposition 1973:42 p 241–246, 141. [↑](#footnote-ref-36)
37. The Swedish Maritime Code (sjölagen) 3:36 p 1. [↑](#footnote-ref-37)
38. Bankruptcy Act (konkurslagen) 7:8. With a general insolvency settlement (compare the proposal in sou 2010:2 Ett samlat insolvensförfarande) that provides an opportunity to reconstruct operations, the alternative of letting a bankruptcy administrator or a business reconstructor handle the societal interests of staff and customers could have been an obvious approach. [↑](#footnote-ref-38)