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The Scandinavian “functional” approach to movable property from a Danish view – including the question of “tradition”

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1. Introduction to Danish property law

This article focuses on transfer of movable property in Danish property law and the Scandinavian approach when dealing with the concept of ownership. Since most research into Scandinavian property law is based on Swedish or Norwegian approaches,¹ this article takes Danish property law as its starting point.² The am-

1 See on this, Claes Martinson, How Swedish Lawyers Think about ‘Ownership’ and ‘Transfer of Ownership’ – Are We Just Peculiar or Actually Ahead? In Wolfgang Faber and Brigitta Lurger (eds.), *Rules for the Transfer of Movables – A Candidate for European Harmonisation or National Reforms?* (Sellier 2008), p. 69. Wolfgang Faber, Scepticism about the Functional Approach from a Unitary Perspective, in Wolfgang Faber and Brigitta Lurger (eds.), *Rules for the Transfer of Movables – A Candidate for European Harmonisation or National Reforms?* (Sellier 2008), p. 99: “I will basically refer to Swedish law as a representative for the Scandinavian functional approach”, p. 99, n. 8: “There is no scientific reason for this choice; the explanation simply is that I know these systems best”. Claes Martinson, *The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts*, *Juridica International* 22/2014, p. 16 *et seq.* Karoline Rakneberg Haug, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity, *EPLJ* 2017, Vol. 6 (2), p. 260., where she is focusing on legislation and case law in Norway and Sweden. Johan Sandstedt, *Comparative Property Law and the Profound Differences between Nordic Functionalism and Continental Substantialism – the (Ir) Relevance of Ownership*, in Annina H Persson and Eleonor Kristoffersson (eds.), *Swedish Perspectives on Private Law Europeanisation* (Oxford: Hart Publishing, 2017), p. 56.

2 The term “Scandinavia” in general only refers to Denmark, Norway and Sweden which also applies in a legal perspective, whereas the term “Nordic countries” also includes Finland and Iceland.

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bition of the article is not only to focus on Danish property law but also to show some differences between the Scandinavian countries and their approaches to property law – especially in regard to creditor protection. In legal comparative theory, the Scandinavian countries are known for having a common legal tradition, but although the legal systems are similar, it is also important to be aware of the differences.³

Over the last decades, internationalisation has increased in private law, and in some areas, significant legislation has been made.⁴ Other areas of private law have not been given the same attention – which is the case with property law. However, at a European level, there has been a significant effort in the field of movable property. The culmination in this context is “The Draft Common Frame of Reference” (DCFR) from 2009.⁵ The DCFR, Book VIII, “Acquisition and loss of ownership of goods” contains proposals for a harmonised set of rules on property law in cases where movable property is transferred (for instance equipment, goods, furniture and domestic animals). Whether the rules of property law will be harmonised is still an unanswered question.⁶ Property law is a nationally regulated area with very different national legal systems which will be difficult to harmonise.⁷ A harmonisation of property law in the European Union will thus require Member States to change their rule of law systems.

3 See Fr. Vinding Kruse, *A Nordic Draft Code* (Munksgaard, 1963), p. XIII, where he proposed a draft code for Denmark, Finland, Iceland, Norway, and Sweden, but it never came to anything.

4 The United Nations Convention on Contracts for the International Sale of Goods (CISG) is one example.

5 Christian von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law* (Oxford University Press, 2009). See also Brigitta Lurger and Wolfgang Faber (eds.), *Principles of European Law on Acquisition and Loss of Ownership of Goods* (Oxford University Press, 2011).

6 This article does not deal with the question whether a European harmonisation of property law is desirable or in which form it should be achieved, if at all. See for instance different opinions: Kåre Lilleholt, *Ownership of Goods in the Draft Common Frame of Reference*, in Göran Lambertz, Stefan Lindskog and Mikal Möller (eds.), *Festschrift til Torgny Håstad* (Iustus Förlag AB, 2010), p. 447 *et seq.* Torgny Håstad, *Derivative Acquisition of Ownership of Goods*, ERPL 2009, Vol. 17 (4), p. 725 *et seq.* Arthur F. Salomons, *Fifteen Questions on the Rules Regarding the Acquisition of Movables in Book VIII Draft Common Frame of Reference*, ERPL 2009, Vol. 17 (4), p. 711 *et seq.* Lars van Vliet, *Acquisition and Loss of ownership of Goods – Book VIII of the Draft Common Frame of Reference*, ZEuP 2011, p. 293 *et seq.*

7 See, for instance, Torgny Håstad, *Derivative Acquisition of Ownership of Goods* (n. 6) p. 725 *et seq.* Claes Martinson, *The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts* (n. 1) p. 16 *et seq.* Dennis Walczak, *Die Eigentumsübertragung beim Kauf beweglicher Sachen nach dem DCFR* (Mohr Siebeck, 2017), p. 3. Celia Martínez-Escribano, *Possession in the Transfer of Goods: Reflections on the DCFR*, EPLJ 2017, Vol. 6 (1), p. 53. See also Sjöf van Erp,

Contrary to other jurisdictions, there is no comprehensive civil code in the Scandinavian legal law systems.⁸ The continental European legal systems are civil code systems, where the rules are laid down in large and comprehensive Statute Books. Examples include the German “Bürgerliches Gesetzbuch” (BGB) and the French “Code Civil”.

In Danish law, rules on *real property* are regulated in the statute “tinglysningsloven” (the Registration of property Act). This Act lays down the conditions and legal effects of registration of rights of real property. According to Section 1 of the Registration of Property Act, rights regarding real property must be registered in order to obtain protection of the transfer against creditors’ and other transferees’ rights of the property.

To a very limited extent, the land registry system is used as a model for systems of registration of security rights regarding other assets such as vehicles and other movables. For movables, a requirement of registration of rights in “Personbogen” (the personal records) only applies to chattel mortgages, whereas to vehicles the requirement of registration in “Billbogen” (the motor vehicles securities register) is extended to include mortgage, reservation of title and creditor’s proceedings. Rights other than those mentioned for vehicles and other movables cannot be registered in order to obtain protection of transfer.

This Article only deals with questions regarding movable property, which also in Danish property law includes, for instance, intellectual property, animals, vehicles, aircrafts and ships.⁹

In the Scandinavian legal law systems, property law on *movables* is primarily regulated by unwritten law – as opposed to legislation – i.e. it is established in case law, customary law and the legal doctrine. The Danish rules on movable property law are unwritten law, legal principles and only fragmentally based on provisions in different statutes. In the absence of a general code, movable property law has developed through court practice under the influence of legal theory. The current rules are the result of the development over more than a century, where issues of doubt have been clarified, and the rules have developed further under the influence of the development of society. Many problems have not been subject to legislation, for instance the protection of transfer of movable property

European Property Law: a new and rapidly developing area of research and teaching, EPLJ 2012, Vol. 1 (1), p. 1 *et seq.*, who argues that property law has been “nationally oriented”.

⁸ In the Scandinavian systems, the main contents of most law are in the form of written law. However, in certain legal areas, especially within property law the law is unwritten. In the absence of a general code, property law has among others developed through court practice. More of which later below in section 1.

⁹ For rights in ships and in aircrafts separate registrations systems are established.

against the seller’s creditors. However, this does not mean that there are no rules – they are just not written down in the statutes.¹⁰

2. The “historical” development in Danish property law

In private law, there is a distinction between the law of obligations and the law of property. The law of obligations deals with claims in connection with performance of contracts *inter partes* – whereas the law of property deals with the right to enforce a right to the movable property against third parties.

Danish legal theory has abandoned the concept of a substantial distinction between the law of obligations and the law of property, because the distinction does not have any impact on the materiel questions. Instead, obligatory rights and property rights are interdependent.¹¹ A principle of division (of obligatory rights and property rights) like the “Trennungsprinzip” in German law does not exist in Danish legal theory, which in turn means that the transfer of a right does not require a transaction separate from the personal obligation *inter partes* known as “the German principle of abstraction” (Abstraktionsprinzip). In this way, Danish law has abandoned the property concept, which continues to constitute the basis for, for instance, German law.¹²

The contents of the Danish rules on property law can be traced back to the 1890s, when Denmark moved away from a formalised property concept (the so-

10 More of which later in section 4.

11 Fr. Vinding Kruse, *Das Eigentumsrecht* (Walter De Gruyter & Co, 1931), p. 195. Alf Ross, *Om ret og retfærdighed* (Nyt Nordisk Forlag Arnold Busck, 1971), p. 237. Peter Mortensen, *Indledning til tingsretten* (2nd edn., Karnov Group Denmark A/S, 2012), p. 26. This is also the dominating comprehension in Norwegian law see, for instance, Sjur Brækhus, *Omsetning og kreditt 3 og 4* (Universitetsforlaget AS, 1998), p. 5. Kåre Lilleholt, *Allmenn formuerett* (2nd edn., Universitetsforlaget, 2018), p. 49 *et seq.* Hans Fredrik Marthinussen, *Tredjemannsproblemene – Om formuerettslige argumentasjonsmønstre* (Cappelen Damm Akademisk, 2016), p. 37 *et seq.* Opposite to Danish law the comprehension is not unchallenged in Norwegian law see, for instance, Erlend Baldersheim, *Til spørsmålet om eighedsrettens overgang*, Tfr 2012, Nr. 1 pp. 137–163. Erlend Baldersheim, *Til tingsrettens teori* (Cappelen Damm Akademisk, 2017), pp. 20 and 111.

12 Swedish and Norwegian law follow the same approach as the Danish when handling the law of obligations and the law of property. See, for instance, Kåre Lilleholt, *Allmenn formuerett* (n. 11) p. 50. Henrik Hessler, *Allmän Sakrätt* (P.A. Norstedt & Söners Förlag, 1973), p. 3 *et seq.* See also Martin Lilja and Jan-Ove Færstad, *National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain*, in Wolfgang Faber and Brigitta Lurger (eds.) (Sellier, 2011), pp. 216–217.

called “substantial property concept”). Until this point, the concept of ownership and transfer of ownership not only in Danish law but also in the Scandinavian countries was influenced largely by the same movements as the rest of Europe.¹³

The substantial property concept implied that conflicts were solved based on the definition of the concepts or terms (that is “Because X is the owner, X is entitled to ...”). Denmark abandoned this substantial concept in favour of a functional property concept.¹⁴ Some particularly important contributions to the development came from the legal scholar Carl Torp’s theory, where he pointed out that “ownership” constitutes a different number of legal facts to which different legal consequences should be reconnected.¹⁵ Later on, the legal scholar Fr. Vinding Kruse also joined the debate arguing that there could not be one single criterion for the transfer of ownership usable in all situations – meaning that the buyers consequently would be protected against creditors at one time and competing transferees at a different point in time.¹⁶ The legal scholar Alf Ross has also contributed to the development stating that the right to ownership only is a reference to different legal functions. He states that it is impossible to ascribe an independent semantic reference to the word ownership, and that the concept of rights is a tool for the technique of presentation but nothing more.¹⁷

Different situations require different requirements, and therefore “the concept of ownership” is not applied in the Danish system. In other words, regulation of conflicts under Danish law does not require that one person is categorized as the owner, i.e. ownership can be divided.

13 See Karoline Rakneberg Haug, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity (n. 1) p. 242.

14 About the historical development towards a functional approach in Sweden and Norway, see, for instance, Martin Lilja and Jan-Ove Færstad, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain (n. 12) p. 27 *et seq.* and p. 214 *et seq.* Karoline Rakneberg Haug, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity (n. 1) p. 251 *et seq.*

15 Carl Torp, Dansk tingsret (2nd edn., G.E.C.GAD-København, 1905), p. 333 *et seq.* During the convention of the Nordic lawyers, he suggested the new approach to the concept of ownership. Det Tiende Nordiske Juristmøde 1902, Annex IV, p. 7.

16 Fr. Vinding Kruse, Das Eigentumsrecht (n. 11) p. 190 *et seq.* Fr. Vinding Kruse’s German work is based on his earlier Danish work, Ejendomsretten I (3rd edn., G.E.C. Gad, 1951).

17 Alf Ross, Tû-Tû, Harvard Law Review 1957, Vol. 70 (5), pp. 822 and 825, Alf Ross, Ejendomsret og ejendomsovergang (Levin & Munksgaard, 1935), p. 26. Alf Ross, Om ret og Retfærdighed (n. 11), p. 274 *et seq.*

3. The “Scandinavian” functional method

When it comes to transfer of ownership in movable property, there is a distinction in the legal systems in Europe between the use of either a substantial (unitary) approach or a functional approach. Most continental countries follow the substantial approach, where the characteristic element is the unitary principle that defines one particular moment in time, at which “ownership” passes from the transferor to the transferee. Most aspects or effects linked to the right of “ownership” with all its consequences will also pass at this specific moment in time.¹⁸ The substantial approach is also codified law in the German jurisdictions by for instance article 903 of BGB¹⁹ about ownership.

In the Scandinavian legal systems, there is no particular moment in time, where “ownership” passes from the transferor to the transferee. Instead, the Scandinavian legal systems are based on the “functional approach”.²⁰ Under the functional approach “transfer of ownership” means that the conflict is solved on the basis of the particular type of conflict. Different aspects or types of conflicts are dealt with separately and on their own merits. Focus is on separate aspects and relations, and therefore conflicts are solved without using “ownership” as a connecting factor between a specific legal consequence and its conditions. A specific moment is not decisive in all relations, and therefore the moment of transfer of ownership is not a question posed, since it is considered irrelevant.²¹ Instead, the different types of conflicts are identified and handled together with the legal consequences.²² Different requirements apply for different types of conflicts.

18 Karoline Rakneberg Haug, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity (n. 1) p. 236. Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 13. Why it is simplified see Wolfgang Faber, Scepticism about the Functional Approach from a Unitary Perspective (n. 1) p. 97 and 104 *et seq.*

19 Bürgerliches Gesetzbuch.

20 For a more historical view of the Scandinavian functionalism, see for instance, Karoline Rakneberg Haug, The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity (n. 1), Lars Björne, Realism och Skandinavisk Realism del IV (Rättshistoriskt Bibliotek, 2007). Thor Falkanger and Aage Thor Falkanger, Tingsret (8th, edn., Universitetsforlaget, 2016), p. 74 *et seq.*

21 Carl Torp, Dansk tingsret (n. 15) p. 333 *et seq.* Peter Mortensen, Indledning til tingsretten (n. 11) p. 81. Torgny Håstad, Sakrätt avseende lös egendom (6th edn. Norstedts Juridik, 2000), p. 209. Torgny Håstad, Derivative Acquisition of Ownership of Goods (n. 6) p. 727. Kåre Lilleholt, Allmenn Formuere (n. 11), p. 51 *et seq.*

22 Torgny Håstad, Derivative Acquisition of Ownership of Goods (n. 6) p. 726 *et seq.*, also made it clear that, “It also seems unnecessary or actually dubious to insert the word *owner* or *ownership* as a resting point between the fact that creates a certain legal result and the result itself.”

The Scandinavian property law systems have abandoned the substantial (unitary) approach. Instead, emphasis is on the individual considerations within each *type* of conflict. The question about who has the right to the goods can be divided into three set of rules: 1) The buyer's protection against the seller's prosecuting creditors. (The term "prosecuting creditors" is reserved for creditors whose rights are enforced by a court order, i.e. according to a decision by the bailiff court (fogedretten) or the bankruptcy court (skifteretten)). 2) The seller's protection against the buyer's prosecuting creditors. 3) Good faith acquisition depending on the conflict; "double sale" or "conflict of the title". Each set of rules contains fixed rules, which have been laid down on the basis of the considerations in each type of conflict in question. More of which later in section 4.

It is a general theme in the Scandinavian theory of law that the rules regarding property law must not be influenced by discretion, but rather by fixed rules, which result in predictable outcomes.²³ Thus, the parties to the agreement can calculate their legal position beforehand and take the steps necessary in order to ensure their rights.

In connection with the DCFR project, the Scandinavian functional approach to property law served as a work method in the development of the DCFR rules on transfer of ownership. This meant that the issues associated with transfer of movables were divided into different types of conflicts for instance, the conflict between a buyer and the seller's creditors.²⁴ It was pointed out that there was an important dividing line between the Scandinavian functional approach and the continental substantial approach as the functional approach has been described as a fragmented approach, while the substantial approach has been described as a more unitary approach.²⁵ Finally, the DCFR was based on a unitary system.²⁶

23 For Danish property law see Lars Hedegaard Kristensen, *Studier i erhvervsfinansieringsret* (Jurist- og Økonomforbundets Forlag, 2003), p. 11, for Swedish property law Knut Rohde, *Handbok i sakrätt* (Norstedts Förlag, 1985), p. XXII, and for Norwegian property law Sjur Brækhus, *Omsetning og kreditt 3 og 4* (Universitetsforlaget, 1998), p. 3 *et seq.*

24 See Wolfgang Faber, *Overview of Content and Methodology*, 14 *Edinburgh L. Rev.* 2010 p. 502, where he also explains how the work group applied the functional approach. Christian von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law* (n. 5) p. 4380.

25 See different variations, Brigitta Lurger and Wolfgang Faber (eds.), *Principles of European Law on Acquisition and Loss of Ownership of Goods* (n. 5) p. 407, where the concepts "unitary and functional" are used. Whereas Torgny Håstad, *Derivative Acquisition of Ownership of Goods* (n. 6) p. 725, uses the concepts "unitary rule and issue-by-issue approach". See also Johan Sandstedt, *Comparative Property Law and the Profound Differences between Nordic Functionalism and Continental Substantialism – the (Ir) Relevance of Ownership* (n. 1) p. 55.

26 Opposite to Scandinavian countries, the DCFR has a rule defining ownership in article VIII-1:202 DCFR.

This is clear from the comments to the provision on the “requirement for the transfer of ownership in general” (VIII.-2:101).²⁷ As pointed out by Johan Sandstedt, the question about “ownership” from a Scandinavian functional perspective contrary to a continental substantial perspective makes it difficult to participate in the Europeanisation discussions, because the method is normally not something that is reflected on within the framework of one’s own paradigm.²⁸

When speaking of transfer of movable property, the Scandinavian functional approach has been questioned by lawyers and scholars with a background in the continental European legal systems.²⁹ For instance, the following has been indicated: “In my experience, a rather widespread scepticism among lawyers from unitary systems, who are getting into contact with the functional approach, is the assumption that deciding each problem separately, based on the individual interests involved, will bear a considerable risk of uncertainty and unpredictability of judicial decisions.”³⁰

Based on Danish property law, the below part of the article documents that the functional approach in property law is not “uncertain and unpredictable”.

4. Transfer of movables by sales agreement in Danish property law

4.1 Introduction

Although the concept of transfer of ownership is not used in the functional approach, words as *owner* and *ownership* are used in legal acts and discussions in

²⁷ The authors admit that the unitary approach “may cause difficulties in understanding for a Scandinavian lawyer”, but consider that the latter approach would leave “continental European lawyers” feeling insecure. See Christian von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law* (n. 5) pp. 4379–4380.

²⁸ Johan Sandstedt, *Comparative Property Law and the Profound Differences between Nordic Functionalism and Continental Substantialism – the (Ir) Relevance of Ownership* (n. 1) p. 55.

²⁹ See Jakob Fortunat Stagl, *Eigentumsübertragung beim Kauf beweglicher Sachen im DCFR und CESL*, *RebelsZ* 2015, Vol. 79 (1), p. 4, where he expresses that the functional approach is practically useless. In addition, see also Christian von Bar and Eric Clive (eds.), *Principles, Definitions and Model Rules of European Private Law* (n. 5) p. 4380. Lars van Vliet, *Acquisition and Loss of ownership of Goods – Book VIII of the Draft Common Frame of Reference* (n. 6) p. 294.

³⁰ Wolfgang Faber, *Scepticism about the Functional Approach from a Unitary Perspective* (n. 1) p. 116.

Danish property law. However, the word *ownership* does not have any substance but only shows who can enforce a right to a good.

In Danish property law, there is no presumption that one and the same person is considered “owner” in every respect at one and the same point in time. The term *transfer of movables* does not only entail one problem, but several different legal problems. These problems are solved according to each specific potential type of conflict. As mentioned *supra* – no general legislation covers these problems. There are different solutions for different types of conflicts – and the problems are solved on the basis of each type of conflict on its own merits, and not based on a definition of ownership.

The party’s rights to the goods are based on the contractual agreement between the two parties.³¹ The recognized legal status between the contracting parties is the basis of the agreement. The contract will normally be binding, when the parties have reached a consensus, without any requirement to any physical transfer or payment.³² One does not distinguish between the underlying obligation and the declaration of transfer. The party’s right to the movables depends on the sales agreement.

4.2 The structure of the transfer of movable property

As mentioned above, the functional approach in Danish property law implies that the transfer of movable property rights cannot be attached to one single criterion; “the concept of ownership”. Solution of problems must be based on an analysis of the considerations that are relevant in the various relations on which the conflicts occur. By using the “issue-by-issue approach” solutions to property law conflicts are founded by weighing of the interests considered to be relevant in the particular type of conflicts. This means that there is not one rule regulating the transfer of ownership, instead there are several rules – one for each type of conflict situation. One has to distinguish between the relation *inter partes* and the protection against third parties.

In Danish property law, one has to start with the sales agreement *inter partes*, i.e. between the seller and the buyer. The consensus between the parties determines their position and this relation *inter partes* is reflected towards third parties. On that basis, the starting point is the sales agreement that is the regulation *inter partes*. Subsequently, each party’s relation to the third party has to be

³¹ This also applies in connection with gifts.

³² Peter Mortensen, *Indledning til tingsretten* (n. 11) p. 186.

handled – whether it is between the buyer and the seller’s successor or the seller and the buyer’s successor. Furthermore, one has to distinguish between whether the successor is a transferee or a creditor.

4.3 The sales agreement *inter partes*

In Danish law, the fundamental assumption is that ownership to movables is transferred immediately between the parties (*inter partes*), provided that the agreement concerns specified goods. No delivery or payment, etc., is required.³³ Ownership passes from the seller to the buyer when the goods are specified in the agreement between the two parties. This will be the case when handling sale of specific goods, because the agreement concerns goods that are specified.³⁴ If the agreement only concerns generic goods, the legal effect of the transfer against third parties will first occur from the moment of the specification of the goods – that is when the goods have been separated and notified to the buyer. Until that point, the buyer only has a personal claim against the seller.

4.4 Protection against third parties

Protection against third parties follows the principle of *prior tempore, potior jure*.³⁵ The protection of property rights in connection with sales agreements concerns situations in relation to third parties who lay claim to the same goods. When handling different competitive claims to the same goods one has to distinguish between the different types of conflicts, and each type of conflict is therefore also dealt with separately. The question raised below is therefore; who has the right to enforce the right to the movables.

The sales agreement *inter partes* also has effect against third parties, unless one of two exceptions are fulfilled: 1) the right of the third party precedes the right of the buyer (and the buyer does not meet the requirements for good faith acquisition of ownership), or, 2) the third party meets the requirements of extinguishment (i.e. to extinguish a right for which a group of general requirements must be fulfilled – among others taking possession of the movable property and being in good faith).³⁶

³³ Peter Mortensen, *Indledning til tingsretten* (n. 11) p. 186.

³⁴ Peter Mortensen, *Indledning til tingsretten* (n. 11) pp. 83 and 187.

³⁵ Fr. Vinding Kruse, *Ejendomsretten II*, (3rd edn. Gad, 1951) p. 828. Peter Mortensen, *Indledning til tingsretten* (n. 11) p. 130.

³⁶ No general legislation exist as to extinguishment of rights in movable property.

The rules on conflict with third parties are based on each individual type of conflict, i.e. “it is relative”. Each of the typical conflicts is thus separately regulated – and the rules used in connection with one type of conflict are not necessarily identical to the rules used in connection with another type of conflict. The conflicts can be divided into three types of conflicts and consequently three sets of rules:

1) The buyer’s protection against the seller’s prosecuting creditors.³⁷

2) The seller’s protection against the buyer’s prosecuting creditors. The set of rules lays down that the buyer’s prosecuting creditors can claim the same right as the buyer has under the Danish Sale of Goods Act. The decisive factor is thus which right the seller has to the movable property under the Danish Sale of Goods Act, cf. section 4.5.2 below.

3) Good faith acquisition depending on the conflict; “double sale” or “conflict of the title”. To extinguish a right it is among others a condition that the transferee is in good faith and has taken possession of the movable property. Opposite to Danish law, good faith acquisition is prescribed by law in Swedish law (*Lag om godtrosförvärv av lösöre*) and Norwegian law (*Lov om godtroerverv av løsøre*). This means that in Swedish and Norwegian law the principle of extinguishment is the main rule contrary to the principle of vindication in Danish law. This being so, the rules on good faith acquisition are regulated very differently in Denmark, Sweden and Norway.

In the following, only conflicts regarding protection against creditors are discussed.

4.5 The relation to creditors

If either the seller or the buyer becomes insolvent, one of the key questions is, how each party’s right to the goods as stipulated in the sales agreement has effect against the creditor, that is the bankruptcy estate. Consequently, at what point does either the seller or the buyer get a right that has priority over the other contracting party’s creditors? In this section, I will firstly address the problem from a Danish view. Secondly, in section five particularly the buyer’s relations to the seller’s creditors from a Norwegian and Swedish perspective will be in focus.

³⁷ As mentioned above in section 3, the term “prosecuting creditors” is reserved for creditors whose rights are enforced by a court order, i.e. according to a decision by the bailiff court (*fogedretten*) or the bankruptcy court (*skifteretten*).

4.5.1 The seller’s creditors

The situation deals with the question of when and how the buyer is protected from the seller’s creditors. The protection of a transfer from the seller’s creditors occurs at the time of conclusion of the sales agreement between the contracting parties with regard to sale of *specific goods*. No payment or delivery (physical control) is required, since the ownership is transferred at the time of contracting. When the contract concerns specific goods, it is sufficient for the buyer to gain protection against the seller’s creditors from the time of conclusion of the contract.³⁸ This is based on the assumption that the creditors have no particular interests to take account of, and therefore the buyer is protected even though the movables are still in the seller’s possession.

In order for the buyer to obtain protection against the seller’s creditors, it is important to distinguish between contracts that concern specific goods and contracts that concern generic goods. If the purchase concerns generic goods, the contract itself does not give the buyer priority over the seller’s creditors. A specification of the goods is required to gain protection. Further, it is required that the specification of the goods must be *binding* on the seller – through appropriation (individualization) of the goods.³⁹ The appropriation is binding when it would be a breach of contract, if the seller does not deliver exactly these goods. In addition, the appropriation also has to be *normal*. The appropriation is normal when it is ordinary under the circumstances of the sales agreement, i.e. when the appropriation is a natural part of the business trade.⁴⁰ If the requirements are not fulfilled, the creditors should not be precluded from taking proceedings against property which their debtor (the seller) has at his disposal. Delivery in itself (tradition) is of no importance, but if the goods have been delivered to the buyer, naturally the goods are also specified.

³⁸ Peter Mortensen, Indledning til tingsretten (n.11) p. 225 *et seq.*

³⁹ Peter Mortensen, Indledning til tingsretten (n. 11) p. 229 *et seq.*

⁴⁰ Michael Elmer and Lise Skovby, Ejendomsretten 1 (4th edn., Jurist- og Økonomforbundets Forlag, 1999), p. 57 *et seq.*

4.5.2 The buyer's creditors

Seller – buyer – buyer's creditors

When the contracting parties have concluded the sales agreement, the question remains whether the seller is protected from the buyer's creditors. The question is, whether the seller's right of the movables have priority over the rights of the buyer's creditors. According to Section 28 of the Danish Sale of Goods Act, the decisive rule is the moment of physical delivery (transfer of physical control) to the buyer. The seller's right to repossession of the goods from either the buyer or the buyer's creditors is forfeited when the goods have been physically delivered/“handed over” to the buyer. If the movable property has not been “handed over”, the seller's right of the movable still has priority over the rights of the buyer's creditors, and the seller can withhold his performance, if the buyer does not pay according to the agreement. Although the rule in Section 28 of the Danish Sale of Goods Act, only applies to the relation between the seller and the buyer, the legal effect is thus reflected towards third parties. This is due to the fact that the buyer's creditors get the same right as the buyer had himself – no more, no less. So to speak, they can always take proceedings against the goods when the seller's right to repossession is forfeited in relation to the buyer.⁴¹ The result is that the seller's right to the movables no longer can be opposed to the buyer's creditors after the physical control of the movables has been transferred from the seller to the buyer. Transfer of physical control refers to a physical action where the movables are physically handed/given over to the buyer or his representative.⁴² In U 1972.628 H, the Danish Supreme Court ruled that as long as the buyer had the exclusive control over the place where the movables were located, the movables had been handed over to the buyer.

According to Section 28, Subsection 2 of the Danish Sale of Goods Act, the seller can reserve the right to the goods after they have come into the buyer's possession. That is, the seller's right to terminate the contract subsists also after handing over the goods, if the seller must be deemed to have reserved his right in such respect, for instance in a “cash sale only” situation. In practice, Section 28, Subsection 2 will be met, if the conditions for a valid retention of title exist.⁴³

⁴¹ Bo von Eyben, Danish Property Law, in Børge Dahl, Torben Melchior and Ditlev Tamm (eds.), *Danish Law in a European Perspective* (2nd edn., Thomson Publishers, 2002), p. 228.

⁴² Michael Elmer and Lise Skovby, *Ejendomsretten* 1 (n. 40) p. 110.

⁴³ The criteria for a valid retention of title are laid down in the Credit Contracts Act, Section 34.

4.6 Briefly about the seller’s protection against the buyer’s creditors in regard to Swedish and Norwegian property law

In both Danish, Swedish and Norwegian law, the Sale of Goods Act is of significance for the relation between the seller and the buyer’s creditors. Similar in all three countries is that, as long as the goods have not been handed over to the buyer, the seller’s right of stoppage is protected, and his rights in respect of the goods are therefore also protected against the buyer’s creditors.⁴⁴ Additionally, the regulations between the seller and the buyer’s creditors are differently regulated by the national rules in each country. In Norwegian law, the rules on sales lien (*salgspant*)⁴⁵ are e.g. used in relation to the seller’s right, which is not known in Danish Law, whereas Swedish law among others operates with the rules of retention of title.⁴⁶ In addition to this and contrary to the Danish Sale of Goods Act, the Sale of Goods Act in both Sweden and in Norway has been changed in accordance with the United Nations Convention on Contracts for the International Sale of Goods (CISG).⁴⁷ A further comparison of this topic will fall outside the scope of this article.

5. The buyer’s protection against the seller’s creditors in Norwegian and Swedish property law

5.1 The use of tradition

As mentioned above, the Scandinavian functional approach entails that the concept of ownership is not used in determining the legal position of the party, and

⁴⁴ Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 83. Jan-Ove Færstad and Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 251.

⁴⁵ This requires that the seller in relation to his protection against the buyer’s creditors fulfills specific rules. Berte-Elen Reinertsen Konow, *Løsøre pant over landegrenser* (Fagbokforlaget, 2006), p. 94.

⁴⁶ Torgny Håstad, *Sakrätt avseende lös egendom* (n. 21) p. 180 *et seq.*

⁴⁷ However, neither the Sale of Goods Act in Swedish or Norwegian law has changed in accordance to the rule in CISG, where the seller’s right to terminate the sale is not prejudiced by handing over the goods. Johnny Herre, *Framtida lagstiftningsarbete på köprättens område*, SvJT 2000, p. 306 *et seq.*

therefore the discussion about *tradition* (the transfer of physical control) does not become relevant in the discussion about “when” ownership passes.⁴⁸ However, in Norwegian and Swedish law the tradition principle is important when it comes to the buyer’s right to the movables and how to obtain protection of these rights against the seller’s creditors.

5.2 The Norwegian approach

In Norwegian property law, the question of tradition is to some extent relevant when determining whether the buyer’s right is protected against the seller’s creditors. The general rule is that the movables have to be removed from the seller’s control (*fråtaking av innehaving*).⁴⁹ From the time physical control is transferred, the seller’s creditors cannot oppose the buyer’s right.⁵⁰

In general, transfer of physical control refers to a physical action, and the movables should be given over to the buyer or his representative to obtain a right that has priority over the rights of the seller’s creditors. From the time physical control of the movables is transferred, the buyer has gained protection against the seller’s creditors. This would for instance mean that from the moment the buyer has obtained all the keys to a car or a new stove has been placed at the buyer’s place or delivered at his disposal, physical control has been transferred.

Furthermore, tradition is also fulfilled according to Norwegian property law as long as the seller’s disposal of the movables effectively has been removed, without requiring that the buyer physically has the goods.⁵¹ It is sufficient, if the buyer gets full access to the place where the movables are stored, at the same

48 Kåre Lilleholt, *Allmenn formuerett* (n. 11) p. 51 *et seq.* Claes Martinson, *The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts* (n 1) p. 19. Torgny Håstad, *Sakrätt avseende lös egendom* (n. 21) p. 209.

49 It has been discussed during the last century. See, for instance, Kåre Lilleholt, *Godtruerverv og kreditorvern* (3rd edn., Universitetsforlaget AS, 2007), p. 190. Kåre Lilleholt, *Allmenn formuerett* (n. 11) p. 301 *et seq.* Sjur Brækhus and Axel Hærem, *Norsk Tingsrett* (Universitetsforlaget 1964), p. 513. Gjelsvik, *Norsk tingsrett* (3rd edn. by Erik Solem, Nikolai Olsens Boktrykkeri 1936), p. 287 *et seq.*

50 Kåre Lilleholt, *Godtruerverv og kreditorvern* (n. 49) p. 192. Jan-Ove Færstad and Martin Lilja, *National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain*, (n. 12) p. 242.

51 See, for instance, Kåre Lilleholt, *Godtruerverv og kreditorvern* (n. 49) pp. 190 and 192. Kåre Lilleholt, *Allmenn Formuerett* (n. 11) p. 304 *et seq.*

time as the seller is being stripped of access to dispose of the movables, for instance, if the buyer receives all the keys to a storage room.⁵²

The general rule is that some form of tradition is decisive when it comes to obtaining a right of priority over the seller's creditors. However, the claim of the seller's dispossession is modified – for instance, where the seller possesses the movables on behalf of the buyer. This would be the case, if transport of the specific goods to the buyer has to be arranged or modifications have to be made to the specific goods.⁵³ This means that the buyer in some cases will be protected against the seller's creditors from the time of conclusion of a sales contract concerning specific goods, by which the principle of tradition is also modified.⁵⁴

5.3 The Swedish approach

Under Swedish law, situations concerning the buyer's position in case of the seller's bankruptcy are handled by using the principle of tradition. The development of the tradition principle is based on the argument that it prevents creditor fraud, and therefore the deciding moment is when the seller is cut off from his possibilities of controlling and disposing of the goods.⁵⁵

During the last century, the tradition principle has been elaborated further through court decisions, legal doctrines and various regulations that all take this principle as a starting point.⁵⁶

52 Jan-Ove Færstad and Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 241.

53 Kåre Lilleholt, Godtruerverv og kreditorvern (n. 49) p. 194 *et seq.* Kåre Lilleholt, Allmenn Formuerett (n. 11) p. 305.

54 Further, about modifications of the requirement of tradition see Jan-Ove Færstad and Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 244. Kåre Lilleholt, Godtruerverv og kreditorvern (n. 49) pp. 192 and 194. Kåre Lilleholt, Allmenn Formuerett (n. 11) p. 305.

55 Torgny Håstad, Sakrätt avseende lös egendom (n. 21) p. 212. Göran Millqvist, Sakrättens grunder (8th edn., Norstedts Juridik AB, 2018), p. 139. Claes Martinson, The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts (n. 1) p. 25.

56 See Martin Lilja, National Report on the Transfer of Movables in Europe Vol. 5: Sweden, Norway and Denmark, Finland, Spain, (n. 12) p. 58. Göran Millqvist, Sakrättens grunder (n. 55) p. 140. More about the tradition principle, see Ulf Göranson, Traditionsprincipen (Iustus Förlag, 1985). Dag Mattsson and Henrik Martz, Lösöre köp och registerpant, SvJT 2015, Nr. 4, p. 335 *et seq.* Daniel Vargö, Traditionsprincipens fördelar, SvJT 2013, Nr. 10, p. 1051 *et seq.* Jens Andreasson, Wolfgang Faber, Shubhashis Gangopadhyay, Claes Martinson and Stefan Sjögren, Prioritet för köpare – en fråga om tradition eller princip? SvJT 2015, p. 709 *et seq.*

According to the tradition principle, the seller has to lose the physical control of the goods. The tradition requires that the seller, at least factually, has lost the possibility of having control of the goods.⁵⁷ The tradition principle entails that it does not leave room for agreements to leave the goods with the seller. However, if the sales agreement is registered in accordance with the sales act for movables (Lösöreköplagen), the registration has the same effect as tradition, but the requirements according to the act have to be fulfilled in order for the buyer to be protected against the seller's creditors.⁵⁸

The Swedish tradition principle is mandatory, and as opposed to the Danish agreement principle the tradition principle entails that the buyer has not obtained priority against the seller's creditors as to the conclusion of the sales contract concerning specific goods.⁵⁹

The tradition principle has been discussed intensely in Sweden in the last couple of years, and the principle has been questioned.⁶⁰ In the nineties, the question about consumer protection in case of the sellers' insolvency was debated. The rules were reviewed, and the tradition principle was exempted in the Consumer Sales Act, which entered into force in 2002.⁶¹ The consumer (buyer) is protected from the seller's creditors as to the conclusion of the contract in consumer sales, if the goods have been specified.

In 2013, the tradition principle was on the Swedish agenda again, and the appointed committee on movables (Lösöreköpskommittén) proposed in their report from 2015 that the tradition principle should be replaced by an agreement principle.⁶² The arguments put forward favoring protection of the buyer were also based on strengthening economic trade with other countries, which are not famil-

⁵⁷ SOU 2018:15, p. 65. (Statens offentliga Utredningar: Lösöreköp och registerpant).

⁵⁸ SOU 20018:15, p. 63. The registration rules are not applicable for every kind of transaction. For instance, registration of ships follows another act.

⁵⁹ More about the agreement and tradition principle in Swedish law, see Patrik Lindskoug, *Avtalsprincip eller traditionsprincip – Några sakrättsliga erfarenheter från det danska perspektivet*, TFR 2015, Vol. 128 (2), p. 184 *et seq.*

⁶⁰ See, for instance, Daniel Wargö, *Traditionsprincipens fördelar*, SvJT 2013, Nr. 10, p. 1051. Tor-kel Gregow, *Avtalsprincipens fördelar*, SvJT 2013, Nr. 10, p. 1062. Staffan Myrdal, *Oklarheter med traditionsprincipen*, SvJT 2013, Nr. 10, p. 1074.

⁶¹ Proposition 2001/02:134.

⁶² See SOU 2015:18. This was a very proactive development in Swedish property law. See, for instance, Torgny Håstad, *Sakrätt avseende lös egendom* (n. 21) p. 216, who wrote that abolishing the tradition principle was very complicated, and therefore he doubted that recommendations would be given in the near future. However, in continuation of the decision by the Swedish Supreme Court, NJA 2008, p. 684, Torgny Håstad argued that an agreement principle was to be considered instead of the tradition principle: "Det förefaller alltså finnas övertygande skäl för att helt avskaffa traditions-principen."

iar with or practicing the tradition principle.⁶³ A transition to a model using the agreement principle requires statutory regulation, and therefore it was also proposed to pass a new act on the right to purchased movable (Lag om rätt till köpt lösöre).⁶⁴ The assumption was that the movable has to be specified in the agreement, before the buyer obtains protection against the seller’s creditors.⁶⁵ It was suggested that the new law was to come into force on January 1st 2018. However, such an act has not been implemented yet.⁶⁶ Therefore, the tradition principle is still the main requirement for the buyer’s protection against the seller’s creditors in Swedish law.

6. Conclusions

The Scandinavian legal systems are based on a “functional approach”. This entails that in the Scandinavian legal systems there is no particular moment in time where “ownership” passes from the transferor to the transferee comparable to the substantial approach. When speaking of “transfer of ownership”, the functional approach means that the conflict is solved on the basis of the particular type of conflict. Focus is on separate aspects and relations, and therefore conflicts are solved without using “ownership” as a connecting factor between a specific legal consequence and its conditions.

In Danish property law, the tradition principle is not used in relation to the rules governing the insolvency of the transferor. The starting point in Danish property law is the rights according to the sales agreement, and therefore the buyer already obtains priority over the seller’s creditors at the time of conclusion of the sales contract. If the contract is final, clear and concerning specific goods, the buyer is protected against the seller’s creditors even if physical control has not yet been transferred.

Contrary to Danish Property law, both Swedish and Norwegian property law are operating with the concept “transfer of physical control” when handling the

⁶³ See, for instance, Dag Mattsson and Henrik Martz, *Lösöreköp och registerpant*, SvJT 2015, Nr. 4, p. 340. The proposal abolishing the tradition principle on a general basis has been criticized and discussed in different aspects, see Jens Andreasson, Wolfgang Faber, Shubhashis Gangopadhyay, Claes Martinson and Stefan Sjögren, *Prioritet för köpare – en fråga om tradition eller princip?* SvJT 2015, Nr. 9, p. 709 *et seq.*

⁶⁴ SOU 2015:18, p. 15 ff.

⁶⁵ See Dag Mattsson and Henrik Martz, *Lösöreköp och registerpant*, SvJT 2015, Nr. 4, p. 342 *et seq.*

⁶⁶ <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2015/03/sou-201518/>

buyer's protection against the seller's creditors. However, the tradition principle is most extensive in Swedish property law, which has also led to discussions about the use of tradition instead of the agreement principle.

The different approaches towards the tradition principle also entail, that it is not possible to talk about "one single" Scandinavian approach when discussing the question of creditor protection e.g. Here one has to distinguish between the Scandinavian countries (Denmark, Norway and Sweden), since there is not a common legal tradition in all aspects of property law.

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