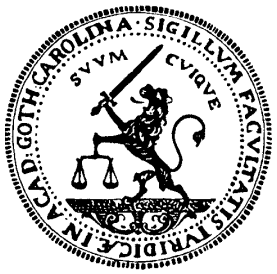

FACULTY OF LAW
University of Lund

Jonatan Lund Kirkhoff

Perfection of liens – is a reform from pledge to filing preferable?

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Jur. dr. Patrik Lindskoug

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Contents

Summary

The current Swedish rules regarding perfection of liens is fragmented. The system has only undergone partial reform and even then only because of extreme necessity. The U.S. had a security interest system that in many parts were very similar to the system that today is present in Sweden. A reform took place as a response to the fact that the system finally reached the level of intolerable complexity; thus arose UCC Article 9.

Article 9 offers a security interest system that is uniform in a manner that it unifies all the different devices that *de facto* create security interests, it also extends to more than liens. One of its many benefits is that it allows the use of almost all personal property as collateral in a credit transaction. As the reader will beware of, it differentiates between a security interest's validity *inter partes* and its validity against third parties. For a security interest to achieve validity *inter partes*, it is in most cases required that the parties have signed a security agreement, that the creditor gives value to the debtor and that the debtor has rights in the goods which become subject to the lien. Attachment is the terminology used to describe that the security interest has reached such validity. Validity against third parties requires fulfillment of the first three requirements, but also an additional step is necessary, perfection. The dominant perfection method within the UCC Article 9 is perfection via filing in a centralized filing system. This method is however supplemented with pledge, control, automatic perfection and sometimes a requirement of filing in other specific filing registers.

The Swedish system does not differentiate between attachment and perfection in manner equivalent to the differentiation that occurs within the UCC Article 9. Perfection is instead achieved by the use of pledge, notification, filing and different special considerations such as the applicability of the Sale of Chattels Act and the use of transactions classified as conditional sales. The lack of adequate perfection instruments within the Swedish system must therefore be considered as one of its deficiencies and thus creativity has been necessary to create adequate security instruments. Pledge is the predominant perfection method in Sweden, the fundamental key to achieve a valid pledge is that the pledgor has lost control of the collateral. The loss of control does not have to be absolute, and its definition and requirements have given rise to very complex considerations for Swedish courts.

The use of filing, as within the UCC Article 9, will offer a better perfection method in the manner that it offers a method that better reflects the needs and reality of the commercial market. Filing also fulfills the key purposes that have been seen to legitimize the existence of pledge to an extent that is far more generous and protective of third party interests. Conclusively, reform with a uniform system with filing as the predominant perfection method would create a more beneficial credit market climate.

Sammanfattning

De nuvarande svenska reglerna avseende sakrätt i panträtt är utspridda i olika författningar, vilka tidigare endast har reformerats vid extrem nödvändighet. USA hade tidigare ett regelverk för säkerhetsrätter som i många avseenden var väldigt likvärdigt det regelverk som idag finns i Sverige. Som ett svar på det faktum att de amerikanska reglerna hade uppnått en nivå av otolererbar komplexitet genomfördes en genomgripande reform, vilket resulterade i UCC Artikel 9.

Artikel 9 erbjuder ett enhetligt säkerhetsrättsligt system på så vis att det samlar alla de olika instrument vars funktion, *de facto*, skapar en säkerhetsrätt. Ett system har skapats som omfattar inte enbart panträtter utan även andra instrument faller under Artikel 9. En av de många fördelar med detta system är att nästan all lös egendom tillåts vara pant i en kredittransaktion. Artikel 9, vilket läsaren kommer att bli varse om, skiljer mellan en säkerhetsrätts giltighet *inter partes* och dess giltighet gentemot tredje man. För att giltighet ska uppnås *inter partes* är det i de flesta fall erfordrat att parterna har undertecknat ett säkerhetsavtal, att borgenären överlåter värde till gäldenären samt att gäldenären äger rättigheter i den egendom som är underkastad panträtt. *Attachment*, är den använda terminologin för att beskriva det faktum att säkerhetsrätten har uppnått giltighet *inter partes*. Giltighet gentemot tredje man kräver förutom giltighet *inter partes*, att ytterligare ett krav är uppfyllt, ett sakrättsmoment. Det dominerande sakrättsmomentet i UCC Artikel 9 är registrering i ett centraliserat register. Detta sakrättsmoment kompletteras av tradition, kontroll, automatiskt uppkommen sakrätt samt i vissa fall, registrering i andra specifika register.

Det svenska systemet särskiljer inte mellan giltighet mellan parterna och giltighet gentemot tredje man på samma sätt som UCC Artikel 9. Sakrätt uppnås istället genom tradition, denuntiation, registrering och i vissa fall via användandet av speciella instrument såsom lösöreköplagen och äganderättsförbehåll. Bristen på adekvata sakrättsmoment får anses vara ett av det svenska systemets defekter. Kreativitet har följaktligen varit en nödvändighet för att tillskapa adekvata säkerhetsrättsliga instrument. Tradition är det dominerande sakrättsmomentet. Det fundamentala momentet för att åstadkomma en giltig tradition är att gäldenären har förlorat sin rådighet över den pantsatta egendomen. Rådighetsavskärandet behöver dock inte vara absolut och innebörden av kravet har på så vis givit upphov till väldigt komplexa ställningstaganden av svenska domstolar. Användandet av registrering i ett centraliserat register, såsom i UCC Artikel 9, kommer att utgöra ett bättre sakrättsmoment på så vis att det är en metod som bättre reflekterar behoven och verkligheten på den kommersiella marknaden. Registering uppfyller också de syften som givit legitimitet åt tradition, i en utsträckning som är mer långtgående och beskyddande av tredje mans intresset. En reformation till ett enhetligt system med

registrering som det dominerande sakrättsmomentet, kommer slutligen troligtvis leda till ett förmånsrikare kreditklimat.

Preface

I have had a great time writing this thesis, but it has not been as great as the overall time spent in Lund. I have had an absolute wonderful time throughout my entire stay in both Lund and Boston. There have been long periods of indescribable work but also a lot of periods of fun. I will throughout my entire life carry with me all the memories in my heart.

I would like to use this opportunity to honor some people that deserve an extra thought and to whom I will always be extra grateful.

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Jonatan Lund Kirkhoff

Abbreviations

JT	Juridisk Tidskrift
NJA	Nytt Juridiskt Arkiv
f.	Following Page
ff.	Following Pages
PMSI	Purchase Money Security Interest
SOU	Statens Offentliga Utredningar
SvJT	Svensk Juristtidning
UCC	Uniform Commercial Code
U.S.	United States

1 Introduction

1.1 Background

It has become even more important that financial regulations offer a safe and efficient way for capitalization in the afterlife of the last economic recession. It is normally a vital part in a basic lending transaction that the debtor grants a security interest in favor of the creditor. Security interests have a great impact when a company or an individual seeks funds for the performance of its business or the purchase of goods. The instrument is not only beneficial for creditors; it serves the interests of both creditors and debtors. A valid security interest will protect and minimize a creditor's risk of non-repayment from a defaulting debtor. The minimized risk will in turn benefit the debtor since the involved risks affect the calculation of the interest rate, i.e. a minimized risk for the creditor normally equals a lower interest rate for the debtor.[1] Security interests are thus a very important device to achieve a secure and healthy market for capitalization.

Nations have an important task to legislate security interest regulations that construct a well-adapted and beneficial climate for capitalization. Several questions arise from the context of regulatory issues, such as questions regarding validity of security agreements, achievement of perfection, priority among competing creditors, enforcement etc. One important concern is rules regarding perfection. Perfection serves several elementary roles and more than one purpose and a creditor with a perfected security interest will normally gain priority over competing creditors. Perfection also serves the purposes of giving notice to other potential creditors of the debtor's liquidity, prevention of fictitious contracts and other fraudulent behavior.[2]

This master thesis purports to examine the present Swedish rules of perfection concerning liens in personal property.

1.2 Purpose

The purpose of this thesis is to examine the suitability of the Swedish rules regarding perfection of liens in personal property. The existing Swedish rules are fragmented, lack unanimity and are patchy and deficient.[3] It is my intention to scrutinize whether Sweden ought to reform these rules by studying the uniform rules regarding security interest in the United States, in UCC Article 9. The purpose behind this study is to see whether this uniform

[1] Warren and Walt, *Secured Transactions in personal property*, p. 8.
[2] Whaley, *Problems and materials on commercial law*, p. 753.
[3] Helander, *Kreditsäkerhet i lös egendom*, p. 756.

system, with filing as the predominant method of perfection, should be Swedish law *de lege ferenda*.

The question to be examined within the context of this thesis is thus the following:

i. Is filing a better solution than pledge, and if so, is a reformation of the Swedish system from pledge to filing preferable?

1.3 Method and disposition

To fulfil the purpose of this thesis a comparative legal dogmatic method has been applied. The thesis thus has its basis in legislation and authoritative literature. Both case law and the authoritative literature have been elementary to be able to succeed with this thesis since perfection of lien is an area within Swedish law that is very sparsely codified. *Kreditsäkerhet avseende lös egendom*, written by *Bo Helander* is specifically worth mentioning due to its extensive contribution and interesting disposition.

It is fundamental for the reader to have a basic understanding of the Swedish system regarding perfection of lien. Chapter II, provides an essential overview of the Swedish system and is therefore one of the basic chapters in this thesis. Chapter III presents the purposes that legitimize the existence of pledge as the primary perfection method of security interests in Sweden. Chapter IV has the same purpose as above mentioned regarding Chapter II, with the difference that it provides the reader with a comprehensive overview of the system used in the UCC Article 9. Chapter V, presents *Helander's* view regarding the need and necessity of a reform of the Swedish security interest regulations into a uniform system. It also briefly provides his thoughts upon the use of registration as the predominant perfection method. Finally, Chapter VI provides an analysis of the structure of a potential reform. It also provides a systematic analysis whether filing would more efficiently fulfil the purposes presented in Chapter III.

1.4 Delimitations

The focus of this thesis is upon achievement of perfection of liens in personal property. Because of the narrow subject matter, several delimitations require execution. Real estate is the property most used as security for credit. Nevertheless, the use of other kinds of collateral has steadily increased.[4] Perfection of securities in real estate is well divorced from perfection of security interests in personal property. Any matters concerning security interests in real estate will thus not be included in this

[4] Helander, *Kreditsäkerhetsrätt i lös egendom*, p. 754.

thesis.[5] Security interests and the laws regulating securities raise many interesting questions. This thesis will however only address the requirements for the emergence of a security interest's validity against third parties, i.e. the requirements for achieving perfection.

The Swedish rules regarding perfection differentiate between two categories of perfection. There is a difference whether the discussion of perfection concerns perfection in security interests or perfection in a purchase of personal property. This thesis will only analyze perfection in security interests; thus, every reference to perfection intends perfection in a security interest. Furthermore, the use of the word security interest concerns lien as a security interest. Additionally, lien is the only security interest covered by this thesis. The terminology security interest and lien is thus alternatively used together without any difference in meaning. The use of lien or security interest, will only refer to a lien or a security interest originating from a consensual agreement between a creditor and debtor (*Sw. Legal panträtt*). Statutory lien will hence not be included within the scope of this thesis.[6]

The definition of lien is not consistent. It is defined as a security agreement between a creditor and a debtor that holds validity *inter partes*. Thus, the achievement of the lien's validity against third parties requires an additional step, perfection. Perfection does not affect the lien's validity *inter partes.* This clarification is required since lien sometimes is defined as a security interest holding validity both *inter partes* and against third parties. Authors using this definition thus conclude that a lien only exists upon perfection.[7]

A few assumptions are required. Liens, as instruments are legitimate and necessary for a modern economy to operate efficiently. This precludes any discussion regarding a potential abolition of lien as a security interest. Further, a fundamental prerequisite for achievement of perfection is that the collateral is individualized and determined, (*Sw. Specialitetsprincipen*). This condition does not often create any practical issues.[8] It is not discussed further and thus assumed as fulfilled. Lastly, the U.S. security interest system in the UCC Article 9, is the only system that will be examined apart from the Swedish system. This delimitation must take place due to obvious limitations in space. This instead opens the possibility for a more narrow and thorough examination of the above presented issues.

[5] Helander, *Kreditsäkerhetsrätt i lös egendom*, p. 18.
[6] Helander, *Krediträtt i lös egendom*, p. 36 p.
[7] Helander, *Kreditsäkerhet i lös egendom*. p. 36 f.
[8] Walin, *Panträtt*, p. 34ff.

2 Validity against third parties

2.1 Function and Background

Possession of lien has no economical value per se.[9] It is instead a guarantee for repayment, normally of a debt, upon a debtor's default.[10] The instrument supports granting of credit and capitalization, since the lien holder's priority to the collateral enhances the willingness to provide credit.[11] The lien agreement (i.e. a security agreement) is, despite its purpose, not sufficient enough to protect a creditor against certain third party claims. Such a complete shield is only achieved upon perfection of the security interest. The moment of perfection is therefore extremely important in order to maximize the benefits above mentioned. The requirements of perfection thus call for great attention since failure to comply imposes a great risk of credit loss upon the creditor. An unperfected creditor lacks protection in three different situations. First, against a third party creditor that has a perfected security interest in the collateral. Secondly, against a bankruptcy trustee claiming interest in the collateral's value on behalf of the estate. Lastly, against a third party that has acquired title to the goods that the security interest is attached to.[12]

The Swedish rules regarding perfection are fragmented. The solutions to important problems are often left to be decided by the courts within this area of law.[13] The accomplishment of perfection is dependent upon the nature of the collateral in which lien is sought.[14] The study of perfection therefore requires studies of several statutes, principles and cases.

Below follows a description of the different methods of perfection in Swedish law, pledge, notification, filing and lastly other rules of perfection via some specialized instruments.

2.2 Pledge

Pledge (lat. *traditio*) is the dominant method for a creditor to achieve perfection in lien. Perfection is accomplished when the pledgor pledges the collateral into the possession of the pledgee, either directly from the pledgor or via a third party, holding possession of the pledgor's collateral. Another way to pledge is by the use of notification to a third party having the collateral in his possession, this method will be examined further in section

[9] Walin, *Panträtt*, p. 21.
[10] Zackariasson, SvJT, *Svensk rättspraxis – Sakrätt 1982-2001*, p. 837 f.
[11] Håstad, *Sakrätt avseende lös egendom*, p. 282.
[12] Helander, *Kreditsäkerhet i lös egendom*, p. 22 ff.
[13] Helander, *Kreditsäkerhet i lös egendom*, abstract.
[14] Walin, *Panträtt*, p. 70.

2.2.[15] The Swedish Commercial Code, chapter 10 § 1 and the Promissory Notes Act, 22 §, states that pledge requires a pledgee's possession of the collateral. The codifications do not state any other formal requirements regarding the lien agreement. Thus, an oral lien agreement is in addition to possession all that is required.[16] The possibility to achieve perfection through pledge has a major impact upon the Swedish system of perfection in security interests. The Swedish Supreme Court has held that a possible abandonment of pledge could not be made by judicial means; a change would instead have to be made by the legislature.[17]

The requirement of the pledgee's possession of the collateral for the fulfillment of a valid pledge gives a false image of unity regarding the meaning of possession. The current legislation provides little guidance to its actual meaning.[18] Nevertheless, it is true that it often is clear whether possession of the collateral has passed from the debtor to the creditor. However, it is also true that in many cases it is ambiguous whether possession has passed or not.[19] The requirements for a valid pledge have been debated and they have in general been divided into three separate requirements.

A. The pledgor must lose control of the collateral.

B. The pledgee must have independent control over the collateral.

C. The lien transaction must be open and published to third parties.[20]

The above mentioned statutory text seems to require the pledgee's actual possession of the collateral, requirement B.[21] However this requirement has long been criticized as inadequate and inappropriate within authoritative literature. The Supreme Court of Sweden has confirmed the criticism by ruling in accordance with it. Thus, the requirement can therefore be considered as obsolete and hence I shall not examine it further.[22] The requirement of publicity, requirement C, is also considered as obsolete. Justice of the Supreme Court, *Bo Svensson*, has expressed that the focus upon whether a valid pledge has occurred or not is dependent upon the pledgor's loss of control, a view that is consistent with the view of the

[15] Walin, *Panträtt*, p. 75.
[16] Walin, *Panträtt*, p. 81.
[17] NJA 1997 s. 660, the case involved sale of goods and not lien, which further decreases the possibility of a change in the Supreme Court's precedent regarding lien.
[18] Helander, *Kreditsäkerhet avseende lös egendom*, p. 375 ff.
[19] Helander, *Kreditsäkerhet avseende lös egendom*, p. 375 ff.
[20] NJA 1956 s. 485.
[21] Håstad, *Sakrätt avseende lös egendom*, p. 287 f.
[22] Walin, *Panträtt*, p. 83, Myrdal, *Borgenärsskyddet*, p, 83 f, Håstad, *Sakrätt avseende lös egendom*, p. 288, NJA 1996 s. 52, NJA 2000 s. 88.

authoritative literature in the area.[23] Thus, neither the publicity requirement nor the requirement of independent control is nowadays worth much study.

Lastly, the pledgor's loss of control must be satisfied throughout the entire duration of the security interest period. This requirement is according to *Hessler* motivated by the increased risk of non-equal treatment of the existing creditors.[24] The condition is pursuant to *Helander* justified by the fact that a lien transaction increases the risk of fraudulent transactions.[25] This requirement is nevertheless not absolute; exceptions exist, such as when the pledged collateral by mistake has returned in the pledgor's control.[26]

Below follows a brief presentation of the first requirement, together with a case-law based exemplification of the how the Supreme Court has ruled in cases involving its application.

2.2.1 Loss of control

The use of a standard based upon a pledgor's loss of control still leaves issues for the courts to decide. A new concept in the need for definition is created and many authors have tried to explore its content.[27] The prevalent meaning in authoritative literature and in case-law is that the determinative feature is the pledgor's possibility of disposal of the pledged collateral. Whether this disposal has been duly authorized or not is not decisive. The determinative factor is instead solely based upon the pledgor's possibility of disposal.[28] This thesis will not dig deeper into the meaning of loss of control. The following cases from the Supreme Court instead serve the purpose of illustrating that the establishment of loss of control sometimes can be far from simple and obvious to the parties involved in a pledge transaction.

i. *NJA 1956 s. 485* – A question arose in a bankruptcy whether the creditor (a bank) had a perfected security interest or not. The bankruptcy trustee claimed, *inter alia*[29] that the debtor had not lost control over the collateral and that the security interest therefore had not attached. The creditor changed the padlocks on the hatch normally used to gain access to collateral, the seed. The debtor could though still access the seed through roof hatches used for replenishment and taking of specimens. Access could thus only be

[23] Lindskog, *Om sakrättsligt misstroende*, JT, p 276, Helander, *Kreditsäkerhet avseende lös egendom*, p. 375 ff, .Bo Svensson's, Justice of the Supreme Courts, comment to the case NJA 2000 s. 88, NJA 1996 s. 52.
[24] Hessler, *Allmän sakrätt*, p. 361p.
[25] Helander, Kreditsäkerhet avseende lös egendom, p. 400.
[26] NJA 1958 s. 422.
[27] Myrdal, *Några synpunkter på borgenärsskyddet*, JT, p. 472.
[28] Myrdal, *Borgenärsskyddet*, p. 80.
[29] Other claims made by the bankruptcy trustee concerned lack of the pledgee's control and lack of publicity.

gained via costly and unusual measures. The Court of Appeal held, and the Supreme Court affirmed, that the fact that the debtor could access the collateral through the roof hatches did not create lack of perfection. The pledgor had lost his control of the collateral since he could not gain access to it via normal measures. A valid pledge had thus come into existence.

ii. *NJA 1986 s. 409* – A son (the debtor) borrowed money from his mother (the creditor). The mother received a lien in the son's hunting weapons to secure the debt. The rifles were locked inside a special locker designed to contain weapons. Both the son's mother and father possessed keys to the locker and the son would thus have to ask for the keys to gain access to the weapons. The enforcement service (*Sw: Kronofogdemyndigheten*) held the pledge to be invalid and seized the weapons while seeking recovery for the son's unpaid tax debts. The father's testimony in court stated that the son was always allowed access to the weapons if he so wanted. The Court of Appeal held, and the Supreme Court affirmed, that the son, even after the weapons had been used as collateral had an unfettered opportunity to dispose them. Thus, the court held, the son did not lack control over the collateral and the pledge were therefore ruled to be invalid.

iii. *NJA 1996 s. 52* – A received a lien in a negotiable promissory note stored in an open bank deposit. The Supreme Court held that B (the pledgor) still had control over the collateral since he had not pledged it unconditionally. B had reserved its rights to, in community with A, recapture the collateral from the bank deposit. The Supreme Court therefore ruled the loss of control to be insufficient, since the pledge was conditional.

2.3 Notification

Perfection of lien in goods which are in possession of a third party is achieved by notification to the third party of the lien agreement's existence, given by either the pledgor or the pledgee. A valid notification to a third party by the pledgee requires, according to Act (1936:88) regarding collateral in chattels[30] (*Sw: Lag om pantsättning av lös egendom som innehaves av tredje man*) in the possession of a third party, that the notification undertakes the showing of the lien agreement to the third party. No such requirement is upheld if the notification instead is made by the pledgor.[31] If a lien exists in personal property not possible of possession, i.e. intangibles such as a non negotiable promissory notes, then the notification shall be made in accordance with the Promissory Notes Act, 31 § (*Sw: Skuldebrevslag*). It must then be made to the pledgee from where the non

[30] def: a movable article of personal property
[31] Act (1936:88) regarding collateral in chattels.

negotiable promissory note originates. Thus, no showing of a written document is required.[32]

2.4 Registration

Some liens can neither be perfected by neither pledge nor notification. To accomplish perfection in a lien in vessels (larger than 12 x 4 meters) or in vessels under construction, the Maritime Act, chapter 3, requires registration and a subsequent pledge of the registration document to the pledgee. For a boat smaller than 12 x 4 meters, perfection will be accomplished through either pledge of the boat or by notification as discussed under sections 2.1 and 2.2. A lien sought in an aircraft also requires registration.[33]

Another nonpossessory security interest recognized under Swedish law is the business mortgage (*Sw: Företagshypotek*), which is a floating charge on substantially all property of a tradesman or company. A business mortgage reaches inventory, accounts receivables, goods, and other assets, but not bank accounts, stock, real estate, ships or aircraft. Perfection is achieved by registration in the Register of Chattel Mortgages. The charge does not attach to specific assets until an event of crystallization such as bankruptcy of the debtor. The debtor can, prior to crystallization, transfer collateral to a bona fide purchaser, free and clear of the business mortgages. Thus, the purchaser will have rights in the collateral superior to the rights of the bankruptcy estate, business mortgagees and judgment creditors.[34]

2.5 Special considerations

This section will in a non-exhaustive[35] way describe some special methods of how a creditor can achieve perfection of a security interest, via instruments that fall outside the scope of the normal perfection methods described in section 2.1-2.3.

No solution is offered to a creditor who wants to use a nonpossessory security interest in a debtor's chattels without applying the business mortgage instrument. This precludes a creditor's possibility to perfect a security interest in a single chattel belonging to the debtor. The preclusion can be avoided via a reclassification. A security interest disguised as a transition of legal ownership results in the applicability of the Sale of Chattels Act (*Sw: Lösöreköplag*). The buyer (the creditor) achieves a perfected interest, in the "purchased" chattels remaining in the care of the

[32] Håstad, *Sakrätt avseende lös egendom*, p. 302 f.
[33] The Swedish Commercial Code, chapter 10 § 7, Håstad, *Sakrätt avseende lös egendom*, p. 301 f.
[34] Rosenberg, *Where to File Against Non-U.S. Debtors: Applying UCC § **9-307(c)**[Rev] to Foreign Filing, Recording, and Registration Systems*, UCC Law Journal, p. 60.
[35] More special methods exist, e.g. perfection of lien in buildings situated on land owned by a person other than the owner of the building.

seller (the debtor), when the buyer's (creditor's) rights has been registered and publicly proclaimed in the specific manner required. The seller (debtor) has, as soon as his/its obligations are fulfilled, the right to repurchase the sold goods. The buyer (creditor) has likewise the right upon the seller's (debtor's) default to receive the goods and, through a sale of the purchased goods, cure the non fulfillment of the obligation.[36]

The use of conditional sale basically gives a seller the opportunity to have a lien in sold goods until it is fully paid and the transition of legal ownership will hence not occur until the purchase price is fully paid. This creates another situation where the collateral is under the pledgor's control instead of the pledgee. *Håstad* means, that exceptions like these undermine the importance of the perfection rules discussed in section 2.1 – 2.3, due to the fact that the collateral is allowed to remain under the pledgor's control.[37]

[36] Håstad, *Sakrätt avseende lös egendom*, p. 294.
[37] Håstad, *Sakrätt avseende lös egendom*, p. 294.

3 Policy Arguments & Purposes

3.1 Introduction

Helander concludes that there are many reasons why pledge and other methods of achieving perfection cannot be regarded as having an intrinsic value. Their existence must instead be justified by reasonable grounds.[38] It is hence logical for this thesis to use these reasonable grounds when investigating whether a reformation should take place or not. The rationale being that a reformation only would be preferable if the reformed system would equally or better serve the underlying purposes of the current rules. However, if one or several of the presented purposes lack importance today, it would of course not matter that these purposes were satisfied by the reformed system.

One aspect to keep in mind is that the underlying purposes are not always explained by logical reasons. Historical reasons are sometimes the explanatory factor, and the grounds can also be hard to separate from each other since they occasionally intertwine.[39]

3.2 Publicity

Publicity has been seen as an instrument to help potential creditors in their valuation of a debtor's creditworthiness. A creditor should be able to proceed with the assumption that all property in the possession of the debtor would be available for execution upon the debtor's default, unless another inference could be drawn from the contents of certain registers. The purpose is today according to authoritative literature lacking in substance. It is nowadays not unusual that debtors are in possession of property either as a credit sale or as a hire. These forms of possession do not affect the debtor's total amount of assets and can therefore misrepresent the creditworthiness.[40] Another argument for its lacking importance is, that there are no guarantees that the property in the debtor's possession are remaining in the debtor's possession at the time of default.[41] *Helander* is of the opinion that the criticism is justified. However, he also states that there still could be some credit transactions of more unsophisticated nature where the potential debtor's possessed assets could have effect upon a prospective credit transaction. He further declares that the mere fact that the debtor possesses some goods in the form of a lease or through a credit sale should not come

[38] Helander, *Kreditsäkerhet avseende lös egendom*, p. 349.
[39] Helander, *Kreditsäkerhet avseende lös egendom*, p. 350 f.
[40] Håstad, *The Importance of Tradition*, p. 10.
[41] Johansson, *Ändamålsenliga sakrättsmoment – om rådighet, sken och rådighetssken*, SvJT, p. 346, Helander, *Kreditsäkerhet avseende lös egendom*, p. 351 ff.

as a surprise for the creditors since both these instruments are well-known phenomena.[42]

The requirement for a method of perfection gives a third party, who is on the verge of concluding a purchase agreement, lien agreement etc., an opportunity to be acquainted with the legal status of the goods. It prevents lack of knowledge of the fact that the goods already are e.g. burdened with a lien. This is also the key feature in preventing a debtor from having the opportunity of disposing of the collateral twice, unless the second creditor consents to use collateral in which he will not receive the highest priority.[43] Publicity thus protects later pledgees and other acquirers of the collateral from acquiring rights in collateral which is already burdened with an attaching security interest.

3.3 Fraudulent transactions

Perfection is often legitimized by its preventive effect upon sham and antedated transactions. It is the purpose that often, if not always, is regarded as being the most important one.[44] Protection is primarily sought against a debtor that by unfair means attempts to "rescue" property, from the effects of bankruptcy or other economic situations of demanding character.[45] Pledge, notification and registration are consequently used to control (since a third party becomes a witness to the transaction) and objectively determine a time for when perfection is achieved, which complicates fraudulent transactions.[46] A bankruptcy trustee's remedy is to use the rules of reclamation in the Swedish Bankruptcy Act (*Sw: Konkurslag*). The remedy can be used to reclaim assets affected by a fraudulent transaction, if the trustee can establish that the time for the transaction's actual occurrence falls within the time limits of the remedy.[47] One problem still remains. As expressed by *Göransson*, "it takes two to tango". This vivid saying basically locates the problem that it is not always an external and credible person that participates in and/or views the transaction. This undermines the efficiency of the mentioned purpose, since a debtor who wants to perform a sham or antedated transaction needs an accomplice to be able to succeed with his intentions. *Göransson* extends his conclusion by saying that the current Swedish system may endanger creditors, since a debtor together with his accomplice could orchestrate a pledge without major difficulties.[48]

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[42] Helander, *Kreditsäkerhet avseende lös egendom*, p. 353 f.
[43] Helander, *Kreditsäkerhet avseende lös egendom*, p. 355.
[44] NJA 1979 s. 451, NJA 1987 s. 3, NJA 1988 s. 257, NJA 1995 s. 367 and NJA 1998 s. 545.
[45] It is without a special survey hard to establish how extensive the perfection rules prevents sham and antedated transactions, although, it seems generally accepted that this effect actually exists, Myrdal, *Borgenärsskyddet*, p. 43.
[46] Helander, *Kreditsäkerhet avseende lös egendom*, p. 359 f.
[47] Helander, *Kreditsäkerhet avseende lös egendom*, p. 360 f.
[48] Göransson, *Traditionsprincipen*, p. 645.

3.4 Orderliness

Hellner views the creation of orderliness as being more important than any other purpose. Perfection creates a safe and easily determinable fact that a court can base their adjudication upon in a priority dispute regarding collateral.[49] *Helander* describes perfection as something that creates a reasonably simple and objective finding of fact, which he concludes will lead to a reduced amount of priority conflicts. *Helander* notes that this purpose is mostly to serve as a protection for creditors.[50] Though, *Göransson* states that the view that orderliness would prevent disputes does not seem to be accurate. He states that the establishment and determination of whether a valid pledge exists is far from simple and obvious in all cases. The question does *per se* create disputes. This is according to *Göransson* the reason why a statement that purports that the use of pledge decreases priority conflicts seems to be inaccurate.[51] *Myrdal* says that it is in the interest of the commercial climate that complicated priority disputes are avoided. He further seems to agree with the view that the existing perfection methods in Sweden have a decreasing effect upon the amount of priority conflicts, regardless of *Göransson's* criticism.[52]

3.5 Surrender of control

The surrender of control of the collateral, involved when a debtor pledges the collateral into the hands of a creditor, has been seen to prevent the debtor from entering into thoughtless lien agreements. The purpose is essentially to prevent debtors from living beyond their assets and to support the existence of a healthy credit market.[53] *Myrdal* concludes that the purpose of surrender is not an independent purpose; rather it is an underlying purpose to the prevention of fraudulent transactions.[54] It has also been stated that the surrender of control serves to protect unsecured creditors in a bankruptcy procedure. The rationale is the fact that the assets that the debtor cannot afford to surrender will be subject to unsecured creditors' claims. The question is to what extent this purpose has relevance; its preventive effect can, according to *Helander*, be debated.[55] He concludes that it is conspicuous that not all perfection methods require the debtor's surrender of control of the collateral, e.g. the business mortgage. *Hessler* is of the opinion that the meaning of surrender can vary in different contexts. He concludes that surrender sometimes can be fulfilled by the fact that the existence of a security interest in goods becomes public. Prospective creditors can then by use of their knowledge of the security interest chose

[49] Hellner, *Speciell avtalsrätt*, p. 251.
[50] Helander, *Kreditsäkerhet avseende lös egendom*, p. 362.
[51] Göransson, *Traditionsprincipen*, p. 634 ff.
[52] Myrdal, *Borgenärsskyddet*, p .49.
[53] Helander, *Kreditsäkerhet avseende lös egendom*, p. 362.
[54] Myrdal, *Borgenärsskyddet*, p. 45 ff.
[55] Helander, *Kreditsäkerhet avseende lös egendom*, p. 362 ff.

not to enter into a credit transaction with the debtor. This could, according to *Hessler*, to some extent and in some contexts also be viewed as a surrender of control.[56] *Helander* further states that it could be hard to establish if the surrender would have any *de facto* effect upon the protection of unsecured creditors. It is a fact that unsecured creditors in most cases never receive any distribution from a corporation that undergoes a bankruptcy procedure, regardless of the existence or non-existence of surrender.[57] *Johansson* says that if the requirements of perfection can be motivated in any other way, the purpose of surrender can be left without regard. He also says that surrender as a purpose cannot be considered to control the more precise design of perfection.[58]

3.6 The pledgee's control of the collateral

A strong reason that legitimizes pledge as a way to achieve perfection is the fact that the pledgee has the actual power over the collateral. *Helander* does not see this as an end in itself. Instead, it serves to protect the pledgee from the pledgor's possible use of the collateral that will extinguish or damage the pledgee's rights to the collateral. It is also considered that the pledgee's control will generate practical opportunities to collect from the collateral against a defaulting pledgor.[59] *Helander* is unsure if this could be regarded as a purpose since it does not protect any third party interests like the other purposes. It only relates to and affects the relationship *inter partes*. The pledgee's control of the collateral should thus not be seen as a purpose and a requirement for valid perfection.[60] The lack of the pledgee's control of the collateral has also, according to the Swedish Supreme Court's rulings, not been held to be decisive for the determination of the existence of a valid pledge.[61]

[56] Hessler, *Allmän sakrätt*, p. 353.
[57] Helander, *Kreditsäkerhet avseende lös egendom*, p. 364.
[58] Johansson, *Ändamålsenliga sakrättsmoment*, SvJT, p. 347.
[59] Helander, *Kreditsäkerhet avseende lös egendom*, p. 364 f.
[60] Helander, *Kreditsäkerhet avseende lös egendom*, p. 364 ff.
[61] NJA 1996 s. 52, NJA 2000 s. 88.

4 UCC Article 9

4.1 History and Background

Subsection §9-109 (a)(1) of the UCC Article 9 creates the following basis of applicability for Article 9:

> "Except as otherwise provided in subsections (c) and (d), this article applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;..."

The security devices, pre UCC Article 9, in the U.S. security interest system were piecemeal in a way similar to the current situation existing in Sweden. Security interests were created by the use of pledge, trust receipt, chattel mortgage, conditional sale, factor's lien and field warehousing.[62] A troubling factor was the system's lack of coordination. The devices used to create a security interest often overlapped each other in different ways. The overlapping structure tended to impose difficulties upon the parties at the stage when the adequate security device was supposed to be determined. The stakes were high; a wrongful categorization could have disastrous consequences because of the fact that the requirements for a valid security interest differed among the different devices. A transaction registered as a conditional sale, but ruled by a court to be a chattel mortgage, could severely harm the creditor. The security interest would most likely not be valid since validity of chattel mortgage securities required registration in a register, established especially for this type of security device. The above cited article thus creates the foundation of the uniformity required to avoid the issues herein exemplified. The subsection is hence of major importance since its "umbrella" function, collects all security interest devices, regardless of their form, under the applicability of the same rules, UCC Article 9.[63]

The ambiguity created by the pre-Code system used in the U.S. produced uncertainty within the U.S.'s commercial market, an effect that tended to increase the costs for credit transactions involving personal property as security. Another troublesome fact for the security system in the U.S. was the fact that the states differed regarding which security devices that they recognized. A device used in State A ran the potential risk of not being recognized within State B's jurisdiction. In early 1940, the situation reached "the state of intolerable complexity".[64] The drafters of the UCC Article 9 strived to find a functional approach to the area of chattel security law. They first tried to produce a series of separate statutes on each major type of financing: business equipment, consumer goods, agricultural products,

[62] Whaley, *Problems and Materials on Commercial Law*, p. 755 ff.
[63] Helander, *Kreditsäkerhet avseende lös egendom*, p. 81.
[64] Helander, *Kreditsäkerhet avseende lös egendom*, p. 81.

inventory, accounts and intangibles. The drafters found, as the work proceeded, that there were more similarities than differences among the various kinds of transactions. Hence, they decided to draft a unified statute that covered all secured transactions in personal property.[65] This objective led to the drafting of a very extensive article. Due to its nature, an article has been created that is not always easy to overview and comprehend.[66]

However, the requested result from the reform and its underlying objectives and policies that today permeate the UCC Article 9 are, "a) to simply, clarify and modernize the law governing commercial transactions; b) to permit the continued expansions of commercial practices through custom, usage and agreement of the parties; c) to make uniform the law among the various jurisdictions".[67]

4.2 The scope of Article 9

Article 9 primarily covers consensual security interests in personal property and fixtures. The applicability of Article 9 is in general according to § 9-109(a)(1) to, "a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;". The definition of a security interest is hence of a fundamental importance. Section 1-201(37) UCC states that, a "Security interest means an interest in personal property or fixtures which secures payment or performance of an obligation…". The parties' intention and the function of the agreement is hence the determinative factor that the courts look upon when they determine whether Article 9 applies to the contract or not. The parties will consequently find it difficult, or even impossible, to make a transaction that has the economic characteristics of a security interest into something else without changing the transaction's substance. Hence, the parties cannot render it inapplicable merely by casting their arrangement in the language of some particular pre-Code device or in the language of some other transaction, such as lease.[68]

Article 9 also applies to agricultural lien, sale of accounts, chattel paper, payment intangibles, promissory notes, consignments etc. The factoring or sale of rights to payments by the person entitled to those payments to a third person has long been regarded as a financing transaction. These transactions are now, since the 1999 revision of the Code, more fully covered by Article 9. The provision reaches sophisticated forms of business finance devices such as inventory floor-planning and accounts receivable financing. It also governs the rights of the so-called, "financing buyer", who advances money to the seller and acquires an interest in the goods that are to be supplied,

[65] William & Walt, *Secured Transactions in Personal Property*, p. 17 ff.
[66] Professor Stephen McJohn, Suffolk University Law School, UCC Article 9 amounts to a comprehensive text that exceeds more than one hundred pages.
[67] UCC §1-102(2).
[68] White & Summers, *Uniform Commercial Code*, p. 1152 f.

which secures the supplier's duty to deliver the goods. Thus, an Article 9 security interest can also secure a non-monetary obligation.[69]

One of the most litigated issues under the UCC is the "lease vs. security interest" issue. This question concerns the issue whether a contract labeled lease is a true lease – and hence falls outside Article 9 – or if it is a security agreement that creates a security interest under the terms in §1-203. A lessor, in the belief the lessor has a lease agreement with the lessee, which in fact is an installment sale, has retained a security interest securing the obligation of the lessee. A lessor, who does not comply with the requirements in Article 9, will then not be entitled to enforce its interest, not even against the lessee. Furthermore, a lessor that does not file a financing statement loses priority against every creditor that, under Article 9 or any other law, takes priority over an unsecured security interest.[70]

Even though an interest is a security interest that falls under the definition in §1-201(37), Article 9 may not apply since either §9-109(c) or §9-109(d) might exclude its applicability. Example of a security interest that is excluded from Article 9 is a security interest that is governed by federal law. However, according to the wording of §9-109(c)(1), Article 9 does apply to the extent that the federal law does not resolve the problems presented. Most federal laws do not cover the field of security interest and are therefore constantly supplemented by Article 9.[71] Article 9, also only reaches lien agreements originating from a consensual contract between the parties; the creation of statutory or judicial lien consequently falls outside the rules of Article 9. Real estate, landlord's lien, transfer of claims for wages, a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose, are some examples of a laundry list of exclusions that for different reasons are excluded from the applicability of Article 9.[72]

4.2.1 Classification of collateral

UCC Article 9 classifies personal property into different categories. The categorization is of importance since achievement of perfection varies depending on which category the collateral belongs to. It is thus of importance to briefly present this categorization to give the reader an opportunity to understand the systematization of Article 9.

Article 9 uses three main categories, which then categorize the collateral into subsections. The three main categories and their subsections are the following:

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[69] White & Summers, *Uniform Commercial Code*, p. 1154 f.
[70] White & Summers, *Uniform Commercial Code*, p. 1155 p, In re Architectural Millwork of Virginia, Inc., 226 B.R. 551, 39 U.C.C. Rep. Serv. 2d 36, W.D. Virginia, 1998.
[71] Whaley, *Problems and Materials on Commercial Law*, p. 781.
[72] Whaley, *Problems and Materials on Commercial Law*, p. 781 ff, §9-109(c)-(d).

i. *Goods* – are defined as "…all things that are movable when a security interest attaches… The term does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction."[73] The category is then further divided into the following subsections, a) Consumer goods, b) Equipment, c) Farm products, and d) Inventory. The equipment category function as a catchall category, i.e. goods that does not fall under any of the other subcategories is defined as equipment for the purpose of Article 9.[74]

ii. *Quasi-Tangible Property* – is defined as a piece of paper used as collateral. This category has the following subcategories, a) Instruments, b) Investment Property (stocks, bonds, and right to accounts containing the same), c) Documents (warehouse receipts and bill of ladings) and, d) Chattel Paper.[75]

iii. *Intangible Property* – is defined as property having no physical form, the subcategories are the following, a) Accounts, b) Health-Care Insurance Receivables (a subcategory of accounts) , c) Deposit Accounts, d) Letter of Credits Rights, e) General Intangibles, and f) Payment Intangibles (a subcategory of General Intangibles). General Intangibles has the same catchall function as Equipment, i.e. intangible property not falling into any of the other categories is categorized as General Intangibles.[76]

As mentioned above, the categorization is important since Article 9 makes many legal distinctions based upon the categorization. As an example, the technical steps required when perfecting a security interest in a negotiable instrument, a family car, or a hardware store's inventory is completely different. It is the debtor's announced use of the collateral that is the determinative factor deciding the categorization of the collateral.[77] In, *In re Troupe*, the bankruptcy court said "the classification of the goods is to be determined as of the time of the creation of the security interest. The classification does not change because of a later change in manner in which the collateral is used. If the law were otherwise, a secured party would be required to continually monitor the use that was being made of the collateral".[78] Thus, the debtor's intended use of the collateral at the time of the creation of the security interest is decisive for the classification.

[73] UCC §9-102(a)(44).
[74] Whaley, *Problems and Materials on Commercial Law*, p. 791 f.
[75] Whaley, *Problems and Materials on Commercial Law*, p. 791 f.
[76] Whaley, *Problems and Materials on Commercial Law*, p. 791 f.
[77] Whaley, *Problems and Materials on Commercial Law*, p. 791 f.
[78] In re Troupe, 340 B.R. 86, 2006 WL 689515.

4.3 Creation of a security interest

A security interest is a bundle of rights in property – the collateral – which belongs to the secured party. The moment when the secured party obtains his security interest is by the UCC Article 9 called attachment.[79] It occurs when the security interest becomes enforceable against the debtor, with respect to the collateral, unless the parties in an agreement have expressly postponed it.[80]

Three requirements need to be fulfilled for the security interest to achieve attachment status, i.e. for it to become enforceable and valid against the debtor:

i. Either the collateral is by agreement in possession of the secured party or the debtor has authenticated a security agreement,

ii. value is given from the creditor to the debtor, and

iii. the debtor must have rights or the power to transfer rights in the collateral.[81]

4.3.1 Possession or authenticated writing

A contract between a creditor and a debtor, that personal property shall be used as collateral, can be made orally if the creditor is in the possession of the collateral. However, an authenticated[82] writing is a requirement if the creditor lacks possession of the intended collateral. The authenticated writing, i.e. a security agreement, is a contract in which the debtor grants the creditor a security interest in the collateral.[83] There is no requirement for the use of any "magic" words for a security agreement to qualify as such an agreement. Nonetheless, the agreement must to an objective observer, show that the debtor intended to transfer an interest in personal property as a security to the creditor.[84]

Another prerequisite for a valid security agreement is that the collateral is described, which is upheld to enable identification of the collateral subject to the agreement. Identification is not necessary if the creditor either has control or possession over the collateral. The collateral subject to the agreement is then instead identified through the creditor's possession or

[79] Nordstrom *et al*, Problems and Material on Secured Transactions, p. 113.
[80] UCC §9-203(a)
[81] LoPucki *et al*, *Commercial Transactions, A Systems Approach*, p. 826, UCC §9-203(a)-(b).
[82] The security agreement must be authenticated by the debtor. Authenticated is normally defined as authenticated by a signature, but it is more widely defined in the context of the UCC, authenticated is according to UCC §1-201(b)(37) defined as, "any symbol executed or adopted by a party with present intention to authenticate writing".
[83] UCC §9-102(a)(73)
[84] White & Summers, *Uniform Commercial Code*, p. 1187.

control of it.[85] A super generic description of the collateral, e.g. "all the debtor's assets", is rejected. Instead the description is allowed only if it "reasonably identifies what is described".[86] Reasonable identification is according to UCC Article 9 fulfilled when descriptions like, "inventory", "equipment" or "farm products" are used. Thus, the UCC Article 9, allows description by category to reasonably identify the collateral.[87]

4.3.2 Value has been given

UCC §9-203(b)(1), requires for attachment that "value has been given". It is not designated which party that must give value, but it is logical and practical that it is the secured party that must give value, an interpretation that the courts have agreed upon.[88]

A secured creditor typically gives value through a loan of money, by providing the debtor with a line of credit. Value is though also given when the creditor gives a binding promise to make a loan at some future date, acquires a security for a preexisting claim, by accepting delivery under a preexisting contract for purchase or, in return for any consideration sufficient to support a simple contract. The value requirement is thus broadly defined and easy to satisfy for a creditor.[89]

4.3.3 The debtor has right in the collateral

Nemo dat quod non habet – one cannot give what one does not have. This phrase describes the logical prerequisite that a debtor giving security interest in personal property must have right in, or the power to transfer rights in the collateral. The debtor's rights in the collateral are not determined by Article 9, it is rather determined by Article 2 and 2a of the UCC and the common law. Rights in the collateral extend, in the context of the UCC Article 9, beyond title. It includes any case where the debtor has "the power to transfer right in the collateral to a secured party". Full ownership is hence not required and nothing in Article 9 shows any intention of limiting the debtor's possibility to convey a security interest in any right held by him.[90] A debtor that acquires rights in the collateral at a later date, than the signing date of the security agreement, postpones the attachment of the security interest until the rights have been acquired.[91]

[85] White & Summers, *Uniform Commercial Code*, p. 1187 f, UCC §9-203(b)(3).
[86] UCC §9-110.
[87] White & Summers, *Uniform Commercial Code*, p. 1188 f, UCC §9-108.
[88] Nowka, *Mastering Secured Transactions*, p. 30 f.
[89] White & Summers, *Uniform Commercial Code*, p. 1192, Nowka, *Mastering Secured Transactions*, p. 30 f, UCC §1-204.
[90] White & Summers, *Uniform Commercial Code*, p. 1192.
[91] Nowka, *Mastering Secured Transactions*, p. 31 f.

4.4 Validity against third parties

Perfection is just as important as attachment since a perfected security interest defeats most other claimants to the collateral, by giving the perfected security interest priority in the collateral. One of the key situations where perfection gives priority is in the case of a bankruptcy. An unperfected security interest will be treated as a general creditor's claim and therefore most likely not receive any distribution from the bankruptcy procedure.[92]

UCC offers different methods for a creditor to achieve perfection. Filing of a financing statement is the dominant method, supplemented by pledge and automatic perfection and also in some occasions replaced by pledge and control. By pledging the collateral, i.e. a creditor takes possession over the collateral, perfection is achieved.[93] A purchase money security interest (PMSI) in consumer goods perfects automatically. It is granted to a seller or lender, whose willingness to extend credit permits the debtor to acquire the collateral.[94] Perfection of a security interest in investment property, stocks, bonds, brokerage accounts and the like, may be perfected by control, while a security interest in deposit accounts and letter of credits rights only can be perfected via control. The UCC Article 9 also requires, for perfection of a security interest in cash to occur, that the cash is pledged to the secured party. This is the circumstance when possession and control replaces filing as the method of perfection.[95]

Issues relating to priority fall outside the scope of this thesis and will not be discussed further. This thesis focuses upon whether filing should replace the dominant perfection method in Sweden, the pledge. The methods mentioned above that supplement and/or replace the use of filing within the UCC will hence not be discussed further. The presentation above only serves the purpose of presenting the fact that the UCC offer several methods and sometimes requires perfection via other methods than filing.

4.4.1 Filing

The UCC states that, "except as otherwise provided[96] a financing statement must be filed to perfect all security interests and agricultural liens".[97] Thus, a financing statement must be filed to perfect all security interests, and where a security interest is not within one of the exceptions, filing is

[92] White & Summers, *Uniform Commercial Code*, p. 1150.
[93] Whaley, *Problems and Material on Commercial Law*, p. 825.
[94] Whaley, *Problems and Material on Commercial Law*, p. 828.
[95] White & Summers, *Uniform Commercial Code*, p. 1210.
[96] UCC §§9-310(b), 9-312(b).
[97] UCC §9-310(a)

essential for its perfection.[98] Prior to the UCC's filing system, filing was haphazard and non uniform; some states had state-wide filings systems for some types of collateral, while other states provided for recording of chattel mortgages in the local offices where real estate mortgages were recorded. UCC revolutionized in two ways, first it provided for filing of a separate skeleton document instead of recording of the actual document executed by the parties, second, filing in a single state-wide register was introduced, which today has replaced filing in different local registers.[99]

An important feature of the filing system in the UCC Article 9, is the fact that once a financing statement has been filed at the filing office it will be effective for five years. Thus, a creditor can take advantage of the same financing statement, when and if he extends more credit to the debtor, and still have the same priority standing in the collateral as of the date when he first filed the financing statement. This holds as long as the financing statement is valid. It is important to note that invalidity will not occur, *per se*, due to fulfillment of the debtor's repayment obligation; a termination procedure must hence be completed. *Helander* does not consider this as a weakness of the registration system; he rather sees it as a consequence of the chosen system. A creditor can protect himself by either requiring that a subordination agreement is signed by him and the secured party or, by requiring that a termination agreement is registered in respect of the secured creditor's financing statement.[100]

It should also be mentioned that filing in the state-wide register is precluded if the collateral is covered by a certificate of title, e.g. automobiles. Perfection is then achieved when the creditor complies with the state certificate of title law, which normally requires a notation on the certificate of title to facilitate that the goods, is subject to a security interest.[101]

4.4.1.1 Basic requirements

UCC Article 9 upheld three initial requirements that need to be fulfilled for the financing statement to be effective. It must provide the name of the debtor, the name of the creditor or a representative of the secured party and also contain a description of the collateral subject to the financing statement.[102] Article 9 also contains certain additional requirements, for example, a financing statement is to provide a mailing address to the debtor, it must also be communicated in a medium that is authorized by the filing

[98] Sommers v. International Business Machines, 640 F.2d 686, 30 U.C.C. Rep. Serv. 1757 (5th Cir. 1981), Witmer v. Kleppe, 469 F.2d 1245, 11 U.C.C. Rep. Serv. 838 (4th Cir. 1972), Bank of Drexel v. Kyser, Inc., 685 S.W.2d 230, 40 U.C.C. Rep. Serv. 1476 (Mo. Ct. App. W.D. 1984).
[99] White & Summers, *Uniform Commercial Code*, p. 1215.
[100] Helander, *Kreditsäkerhet avseende lös egendom*, p. 201 ff.
[101] White & Summers, *Uniform Commercial Code*, p. 1217, UCC §9-311.
[102] White & Summers, *Uniform Commercial Code*, p. 1218, UCC §9-502.

office and an amount equal or greater than the application fee must be tendered.[103]

The connection between the initial and the additional requirements are at first sight hard to understand but still explainable. A financing statement that fails to meet the initial requirements of §9-502 is ineffective, even if it is accepted by the filing and indexed by the filling office. A financing statement that complies with the initial requirements, §9-502, but fails to comply with the additional requirements, §9-516(b), and if the filing officer accepts it, the filing is for most purposes effective. If instead the initial requirements are fulfilled and the filing office refuses to accept the financing statement for reasons other than the reasons in §9-516(b), the filing is for most purposes effective. A filing officer's effective refusal right only extends to the scope of §9-516(b).[104]

UCC Article 9 offers a uniform financing statement that has been adopted by most states in the U.S. The combination of the use of identical documents and the documents conformity with the requirements, should facilitate uniformity and also minimize the cases in which filing is done improperly.[105]

4.4.1.2 Description of the collateral

Description of the collateral in the financing statement follows the same requirements as for description of the collateral in the security agreement. One major difference is though that the requirement for description in the financing statement accepts super generic terms, such as, "all the debtor's assets".[106] The ability to provide minimal information via the use of a super generic description potentially results in the situation that a third party finds all the debtor's assets to be subject to a security interest. The extent of the security interest will thus not be described and the third party must instead seek more detailed information from the involved parties to clarify the extent of the security interest. A third party's need for further investigation will hence depend on the level of detail contained in the financing statement. The less stringent description requirement is explained by the fact that the financing statement only aims to create publicity of the fact that some of the debtor's property are subject to a security interest.[107]

[103] White & Summers, *Uniform Commercial Code*, p. 1219 f, UCC §9-516(b).
[104] White & Summers, *Uniform Commercial Code*, p. 1222 f.
[105] White & Summers, *Uniform Commercial Code*, p. 1223, UCC §9-521.
[106] White & Summers, *Kreditsäkerhet avseende lös egendom*, p. 1228 ff.
[107] Helander, *Kreditsäkerhet avseende lös egendom*, p. 178 f.

4.4.2 Filing and its benefits

One of the fundamental reasons why pledge existed as a pre-Code method to perfect a security interest was because of its publicity-creating power. This power was still fundamental when filing as a perfection method was developed. The drafters of the UCC drew their attention to the fact that filing set aside some of the deficiencies regarding pledge's publicity-creating power and that it more efficiently created publicity.[108]

One aspect of the publicity requirement is that it provides third persons with information about the collateral. A third person who is about to acquire rights in the collateral can hence receive information whether the collateral is subject to a security interest or not. Furthermore, filing as a perfection method has a preventive affect upon sham and antedated transactions. These are two legitimizing reasons for the use of filing, which have been equivalently highlighted as two of the legitimate reasons for the use of pledge in Sweden.

Despite the fact that filing and pledge share many features in common, differences still exist. By the use of filing, determination of a time when the transaction took place is easier to establish. This creates facts upon which it is less problematic to determine priority conflicts, since the time for filing often is essential for such determination.[109]

A difference, when filing is used, in regards to pledge is that the pledgee has to carry a special risk when the collateral remains in the possession of the pledgor. One concern is that a pledgor will probably not have the best interest of the pledgee in mind when he faces financial difficulties. The possibilities for the pledgor to act unfairly must therefore be considered as increased when filing is used. Also, the efficiency of filing's publicity effect will be dependent upon the formation of the filing system.[110]

Authors of authoritative literature in the U.S. have claimed that it is obvious that filing will be the most dominant perfection method within the UCC. One of the reasons for this is that perfection through possession has been seen as costly and cumbersome in regards to many types of collateral.[111] *Spivak, inter alia*, states that, the possessory type of security interest is suitable only in a limited number of situations. He says that the underlying purpose of Article 9 is to provide rules relating to secured transactions, which offer legal protection to the secured party, the debtor and to third parties, and at the same time permit the greatest economic benefit to society, by allowing the use of secured collateral. He continues, "if possession were

[108] Helander, *Kreditsäkerhet avseende lös egendom*, p. 165 ff.
[109] White & Summers, *Uniform Commercial Code*, p. 1194, Helander, *Kreditsäkerhet avseende lös egendom*, p. 165 p, Squillante, *Commercial Code Review, A summary of Leading Decisions and Articles*, p. 81, 1968.
[110] Helander, *Kreditsäkerhet avseende lös egendom*, p. 165 ff.
[111] Summers, *Secured Transactions Under The Uniform Commercial Code*, Commercial Law Journal, p. 355.

the only …[method of perfection], substantially all financing of manufactures would cease and all installment buying by consumers would come to an end". Possessory types of security devices, such as pledge, will, therefore, according to *Spivak*, mostly be used when the collateral's economic utility is limited or non-existent.[112] It is observable that *Spivak* is referring to the commercial reality that a pledgor often within its business has a need to maintain possession of the collateral. This should probably be considered as one of the main reasons why filing was chosen as the dominant perfection method and not pledge.

[112] Spivak, *Secured Transactions*, p. 78 f.

5 Authoritative literature

5.1 Introduction

This section will provide the reader with the opinions of the authoritative scholars in the field. Focus is upon their opinions regarding whether it is preferable for Sweden to reform its security rules, i.e. create a uniform system and replace pledge with a filing method as the predominant perfection method.

5.2 Reform

Helander points out the fact that the biggest difference between Sweden and the U.S. regarding law regulating liens in personal property is that the Swedish system is piecemeal and lacks uniformity. The fact that regulations and case-law has been enacted and ruled during different time periods has mostly created reforms of *de lege lata* without consideration of how all the rules and case-law would interact. *Helander* states that many of the occurring problems within Swedish security laws can be explained due to its lack of coordination of the type that exists in the UCC Article 9. He further states, that reasons exists to believe that it would be easier to overcome many of the ambiguities and shortcomings, if Sweden were to abandon the current approach of partial reforms. If the entire area that has relevancy to this area of law underwent a comprehensive and integrated reform, replaced with a system similar to the UCC Article 9, it would, according to *Helander*, facilitate the creation of a modern and efficient system of security rights in personal property. [113]

The reason for the modern business world's wishes to have a system that allows all personal property to be used as security for credit is according to *Helander*, enough of a reason *per se* for a reform. It is also important that the reform takes a functional perspective, essentially, that all the actual possibilities to achieve a security interest regardless of whether it is a conditional sale or disguised as an ownership transaction are included. This has been achieved within the UCC Article 9 by the use of a functional definition of security interest. Security interest is as a security interest regardless of its form, if it *de facto* has effect as a security interest. *Helander* takes the standpoint that a more adequate definition like this has an intrinsic value since it prevents uncertainty and complexity. He further states that it seems clear that all security interests whose function is the same should be treated in an equivalent manner in a modern legal system.[114]

[113] Helander, *Kreditsäkerhet avseende lös egendom*, p. 679 ff.
[114] Helander, *Kreditsäkerhet avseende lös egendom*, p. 693 f.

The UCC Article 9 was drafted mainly with focus upon commercial transactions and the existing needs within this area. The legislation has though not been limited to only transaction of commercial character; instead it applies to all transactions including a security interest, regardless of whether it is a transaction on a personal or commercial level. On the personal level, sections of the UCC Article 9 are applied where its applicability is suitable to security interest transactions of this character. Article 9 contains an extensive catalogue of definitions which can be compared to the lack of determination of key definitions within Swedish law. *Helander* believes that this creates consistency to the system.[115] It can also be concluded that Article 9 has been accepted with a lot of appreciation within the U.S. and it has further had a great impact upon similar reformations in other countries. Lastly, the pre-Code's state of intolerable complexity, which has been described as one of the reasons why reform took place in the U.S., was not much more complex than the current complexity of the Swedish rules.[116] *Helander* looks forward to a future reform and he concludes UCC Article 9 to be an excellent role model.

5.3 Filing vs. Pledge

The U.S. pre-Code discussions of whether filing could replace pledge were met with some reluctance. The hesitation is today reversed and the question at the present time is instead whether pledge ever can be seen as a suitable alternative to filing. *Helander* says that filing offers a way to use personal property, which is relatively simple, cheap and effective, for which Swedish law lacks a suitable instrument.[117] Due to the extensive development of the computer age, many new technological instruments also exists that can be used if a new security interest system based upon filing is created.[118]

A reason for filing instead of pledge is, as has been mentioned above, that mostly all personal property can be used as collateral. Filing would preclude the need for reclassification of a security interest as a transfer of ownership via the applicability of the rules in the Sale of Chattels Act. Filing would instead create an opportunity for the parties to classify the transaction in accordance with its actual function, which *Helander* views as beneficial *per se*.[119] The Swedish legislator has in its legislative work stated that no need exists for another non-possessory security interest than the business mortgage due to the fact that the Sale of Chattels Act is used to a minimum

[115] Helander, *Kreditsäkerhet avseende lös egendom*, p. 690 f.
[116] Helander, *Kreditsäkerhet avseende lös egendom*, p. 682 f.
[117] Helander, *Kreditsäkerhet avseende lös egendom*, p. 682 ff.
[118] Helander, *Kreditsäkerhet avseende lös egendom*, p. 682 f,
The fact that this source was published 1984 strengthens the argument extensively. The technology development has taken a tremendous pace since the publication, with e.g. constant internet access and online access to databases. Today both filing of, and search for a potential security interest can be made electronically, which enhances the systems efficiency drastically.
[119] Helander, *Kreditsäkerhet avseende lös egendom*, p. 693 ff.

extent.[120] *Helander* believes that the possibilities for a non-possessory security interest in chattels is important and hence disagrees with the legislator. The current formalities that exist within the Sale of Chattels Act complicate the use of chattels that cannot be subject to a security interest via a business mortgage.[121] Filling thus creates a simplified and modernized expansion of the possible areas where chattels can be used as a security.[122]

[120] SOU 1974:55, p. 206 ff.
[121] Helander, *Kreditsäkerhet avseende lös egendom*, p. 733ff.
[122] Helander, *Kredisäkerhet avseende lös egendom*, p. 90 f.

6 Analysis

6.1 Introduction

This section will thoroughly analyze whether a uniform reform of the current Swedish security interest rules is preferable. The analysis also intends to twist and turn the question whether filing is a more suitable perfection method in comparison with pledge. As I have already stated in my thesis, the underlying purposes of why pledge occurs within the Swedish security interest system is of value for the evaluation of filings suitability. Hence, the analysis will to a great extent follow the disposition used in Chapter III. It is my opinion that the chosen disposition brings clarity to an extent required for a successful analysis to take place. Note that the different subsections to some extent overlap each other.

6.2 Reform

The pre-Code security system in the U.S. was complex to an intolerable level. It has been stated within this thesis that the Swedish rules are close to reaching the same level of complexity. Many benefits could be achieved by the use of the UCC Article 9 as a role model for a future reform. The use of a system that acknowledges transactions as security interests, regardless of their form, together with the use of filing as a perfection method, would create an opportunity to use almost all personal property as collateral. The uniformity would further lower the transactional costs of a credit transaction since it would make every step upon the involved parties less complex. A reformation would simplify, bring clarity and also modernize the law governing security interests. A reform stands out as a necessity, when compared to the current system with partial reforms that interacts in a non satisfactory way. A reformed system would provide a system better adapted to improved interactions between the instruments. The system used under Article 9 also has an extensive catalogue of definitions which helps to bring clarity, and the authoritative literature has seen this itself to have an intrinsic value.

A system like the UCC Article 9 would also prevent the current use of reclassification via e.g. the Sale of Chattels Act, since all security interests fall under its scope regardless of its form. The problems with these instruments applicability will thus be defeated. The reformation in the U.S. has received a lot of appreciation and has also been used as a role model for several other countries when their security interest system has undergone a reform. The system is of course not flawless but it is a direct improvement and modernization of a Swedish system that no longer reflects commercial reality. An integrated and comprehensive system, such as the UCC Article

9, must be a solution that is superior to the enactment of piecemeal legislation.

An overall reformation of the Swedish system would be beneficial for the creation of a healthy and secure credit market. Many incentives are present why a reform would be favorable, and there are few, if any, present arguments to my knowledge that would contradict this analyze. The only negative aspect of a reform in consistence with the UCC Article 9 model is that its extensive feature tends to give it a structure that is hard to overview and sometimes also hard to comprehend. This however cannot defeat all the presented benefits that a reform would involve.

In summary, the UCC Article 9 does not have to be a "buy all" concept; but it certainly has extensive value as a role model for future discussions within the Swedish legislator.

6.3 Publicity

One of the purposes for the use of pledge is its publicity creating power. It generates publicity to other creditors of the fact that a debtor's assets are subject to security interests. A creditor should be able to assume that the assets in the possession of the debtor are free from security interests, due to the fact that they are not pledged into the possession of another creditor. This has been seen as essential for the facilitation of an evaluation of the debtor's creditworthiness. This effect and rationale has been strongly questioned in the authoritative literature. It is nowadays not uncommon that a debtor has assets in his possession due to a credit sale or hire. It is thus hard for a creditor to establish which property that is owned by the creditor merely by looking at his possession. This complicates the evaluation of the creditworthiness.

It is my belief that registration would offer publicity to an extent that is much greater than the publicity effect that pledges offer. It is further my belief that it would set aside some of the publicity deficiencies that the use of pledge gives rise to. This was the same conclusion reached by the legislature in the U.S before the enactment of Article 9.[123] The problem that no publicity will be created when the collateral remains in the possession of the debtor will be resolved since filing offers the publicity needed. Filing of all security interests in one centralized system will give rise to a greater publicity-creating power. A potential creditor only needs to make a search in one uniform register to find out the extent of the security interests, this will thus create more accurate evaluation data when the debtor's creditworthiness is appraised. The high pace of technology development has made it possible to create an efficient filing system. The instant and easy access to both the Internet and databases containing information regarding security interests are of course vital for filing to have an efficient publicity

[123] See Section 4.3.2.

effect. Easier access to the information will, therefore, increase its publicity effect.

As mentioned[124] in the thesis, the efficiency of filing's publicity creating-power will be dependent upon the structure of the filing system. The UCC Article 9 allows for filing of a financing statement that use super generic words, such as "all the debtor's assets", to describe the collateral subject to the security interest. This is in my view a deficiency. The financing statement will, if a super generic word is used, merely give notice to other creditors and answer the question whether a further examination is needed or not. The security agreement does not, to the contrary, allow the use of super generic descriptions of the collateral. I cannot see any reasons that motivate differentiated description requirements. It would instead in my view be beneficial to use equivalent description requirements in both the financing statement and the security agreement. There is no need for a differentiation due to the fact that the extent of the security interest will, never be more extensive than its description in the security agreement. There is no rationale for saying that equivalent requirements will in any manner complicate the use of filing. It is a fact that super generic descriptions are not allowed in the security agreement, thus, the description that the parties use in the security agreement could easily be incorporated in the financing statement and consequently not cause any need of extra drafting. Equivalent requirements would instead be beneficial for the creditor, since it potentially would make the evaluating of the debtor's creditworthiness less complicated. If the financing statement would provide more accurate information about the security interest's extent, it would create fewer situations where the creditor needs to turn to either the debtor or the secured party for information about their transaction. It also prevents the complicated issue of a potential refusal by the creditor to reveal the extent of the security interest. A rationale debtor would of course be willing to reveal this information to a potential creditor since he is in need of further credit. It is though more reliable to turn to the creditor for information. The debtor could have incentives to reveal information that is incorrect, since it could strengthen his opportunities to receive more credit. A party refusing to reveal the extent of the security interest could lead to the necessity of litigation. This can hardly be beneficial for the credit market, it neither creates better predictability nor simplicity as the UCC Article 9 wishes to fulfill. There exist, in my view, overwhelming reasons to abandon the different levels of description that occur within the UCC Article 9.

Even if the publicity purpose's strength and magnitude has been questioned in the authoritative literature, mainly due to the publicity deficiencies that pledge gives rise to, it is still my view that it has some significance for the evaluation of creditworthiness and upon preventing dual dispositions. The use of filing would further strengthen the publicity purpose since its publicity creating power is greater and thus put the purpose on a better standing.

[124] See Section 4.2.3

6.4 Fraudulent transactions

Pledge's preventive effect upon fraudulent transactions is seen as its most important function. The fact that possession is required is seen to complicate a debtor's attempt to "rescue" personal property from e.g. the claws of a bankruptcy trustee. Pledge though has one major deficiency that *Göransson* has pointed out by the saying, "it takes two to tango". A sham or antedated transaction would of course require two persons acting together in an attempt to sham other creditors from assets, at least if the debtor has any intention to succeed with his fraudulent behavior. The fraudulent partners would then still have some opportunities to antedate the transaction and to pledge the collateral into the accomplice's possession without the knowledge of third parties. The accurate time of the pledge's occurrence would then be hard to establish if the credit agreement is antedated and no objective party has observed the actual time of the pledge. This is a deficiency, even if the extent is unclear, that strongly erodes the legitimate purpose of the pledge.

It is clear from my point of view that perfection via filing offers a much greater preventive effect upon sham and antedated transactions. The, "it takes two to tango", problem would be precluded due to the fact that registration will take place in a centralized and objective filing system that cannot be bypassed. Since the time for perfection hence will be decided by a fact that is objectively determinable, the whole possibility of fraudulent transaction would more or less be precluded. The only problem is if the debtor manages to bribe a filing officer at the filing office, though this scenario is highly unthinkable. The use of filing via an objective third party would hence be beneficial since it would much more efficiently prevent fraudulent transactions.

6.5 Orderliness

The authoritative literature within Sweden has upheld orderliness as one of the important purposes that legitimize the use of pledge. Pledge creates, according to the literature, a reasonably simple and objective finding of fact that will lead to a reduced amount of priority conflicts. This effect has though also been questioned, but the authors have overall agreed that some orderliness is created via pledge.

As previously mentioned, registration would be made via an objective third party, the filing office. It is obvious to me that perfection via filing would in a satisfactory manner create a system of perfection that would extend the clarity that pledge offers. A creditor that only has to search in one register would of course in a clearer and more distinct way be able to examine the standing of a debtor's assets. If a reformation in accordance with the UCC Article 9 would take place in Sweden and filing was to be the predominant perfection method, orderliness would be created to an extent that the current

rules are far from achieving. Today's tremendous development of computer technology will of course play its part in creating a system with prevailing orderliness, since both filing of a security interest and a later search of existing security interests could be made within one uniform database.

6.6 Surrender of control

The surrender of control of the collateral that the pledge includes for the debtor has been seen to fulfill several purposes. It should e.g. prevent the debtor from entering into thoughtless lien agreements and also protect unsecured creditors if bankruptcy occurs. It is obvious that use of filing at first sight won't fulfill this purpose since the collateral normally stays in the debtor's possession. The question is if the lack of surrender is as significant as it may appear at first sight. It is also necessary to determine if such a lack of surrender of control has any significance at all.

First of all, the surrender of control has within the authoritative literature been described as a purpose that lacks independency and importance. The purpose has also mainly been stated to prevent the debtor from entering into thoughtless lien agreements. There is a major error in the conclusion that surrender is needed to stop thoughtless lien agreements. It is from my point of view highly unthinkable that filing would have less effect upon thoughtless lien agreements. The rationale is that a creditor will probably not enter into a credit transaction if the debtor's assets do not offer a security that to an accurate extent secures the obligation. Thoughtless lien agreements would hence be unlikely since it also would require that the creditor expose itself to a severe risk of credit loss. Thoughtless lien agreements would thus be prevented due to creditors' unwillingness to expose themselves to a greater risk of credit loss. This reasoning of course excludes the fact that some creditors are willing to enter into credit transactions without a security but against a significant increase in interest rate. This type of creditor exists regardless of whether pledge or filing is used as the predominant perfection method and is thus not of importance since no collateral is given or evaluated.

Surrender of control has further been seen to protect unsecured creditors. This conclusion is based on the basis that unsecured creditors will receive distribution from the money collected by the sale of the debtor's assets that are not subject to a security interest. However, there once again exists a clear error when the effects of surrender are evaluated. It is widely known that unsecured creditors almost never receive any distribution when the bankruptcy trustee distributes the liquidating venture's assets in accordance to the Rights of Priority Act, (Sw: *Förmånsrättslagen*). Thus, this effect of surrender can therefore to almost its full extent be regarded as obsolete and inaccurate. Lastly, *Hessler* has stated that the meaning of surrender in some context can be fulfilled by the mere fact that the existence of a security interest becomes public. Prospective creditors would, according to *Hessler*, be able to use their knowledge about the existing security interests and

hence choose not to enter into a credit transaction with the debtor. *Hessler* believes that this to some extent can be regarded as a surrender made by the debtor. Filing perfectly matches *Hessler's* definition of surrender and it would hence fulfill the underlying surrender of control purpose.

Regardless of whether *Hessler's* definition of surrender is used or not, the strength and effect of surrender as a purpose has been widely questioned. The fact that filing lacks the same effect of surrender that pledge generates cannot in any manner be seen to reduce filing's suitability as a perfection method. The mere fact that filing does not fulfill surrender of control of the collateral in its traditional interpretation cannot be used as an argument against the use of filing.

6.7 The pledgee's control of the collateral

The pledgee's control over the collateral has been seen to protect the pledgee from the pledgor's use of the collateral in a manner that might be harmful to the pledgee. Hence, this purpose is intended to protect the pledgee and not a third party interest. Filing would of course not offer such protection since its main characteristic is that the collateral remains within the possession of the pledgor. Despite the lack of fulfillment, its effect is only in regards to the pledgee and not in regards to any third party interest. A pledgee that fears for the value of the collateral can always contractually require that the collateral is pledged into his possession. The lack of fulfillment cannot render filing inappropriate primarily due to the fact that the purpose only has effect *inter partes* and not against third parties. Another argument is that the Swedish perfection system via the use of the Sale of Chattels Act already offers a solution were the collateral maintains in the possession of the pledgor. To deny filing due to its lack of the pledgee's possession would therefore be inconsistent with the present method used in Sweden.

6.8 Miscellaneuos

Other arguments that suggest that filing is a necessary and better alternative than pledge is that pledge in U.S. law has been seen to be more costly and more cumbersome than filing. Another great argument in favor of filing is that commercial reality requires a security interest solution where the debtor maintains possession of the collateral. *Spivak* has described the necessity in a moderate manner by saying that if possession were the only perfection method, substantially all financing of manufacturers would cease and all installments by consumers would come to an end. There is nothing controversial in *Spivak's* statement. Debtors are on some occasions dependent upon possession of the collateral for the fulfillment of their obligation. The use of filing would hence be more tailored to fit the

commercial reality of today's society. The use of the Sale of Chattels Act demonstrates that debtors at times need to possess the collateral.

6.9 Conclusions

It is my conclusion that filing offers a better perfection solution than pledge. A reformation of the Swedish system would hence be preferable. A uniform and comprehensive system, like the UCC Article 9 would affect the Swedish credit market in a beneficial way, since it would meet the commercial markets' need for modern legislation and give rise to simplicity and clarity.

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