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THE PRIVATE INTERNATIONAL LAW OF SECURED TRANSACTIONS: RULES IN SEARCH OF HARMONIZATION

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I
INTRODUCTION

Based on the evidence of almost two decades, it seems likely that the secured transactions revolution that began over a half-century ago with the promulgation and widespread enactment of Article 9 of the Uniform Commercial Code will continue apace in the twenty-first century. For several decades before the turn of the twenty-first century, the revolution did not extend much beyond the United States and the Anglophone provinces of Canada, but that changed significantly in the new millennium. Much of this progress can be attributed to the work of the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission"), which has been engaged in projects relating to secured transactions since 1995.

The first UNCITRAL project resulted in the United Nations Convention on the Assignment of Receivables in International Trade (the Receivables Convention). The Convention has not yet gone into force, having been signed only by three States[1] and acceded to only by Liberia.[2] It has, however, been submitted to the United States Senate for its Advice and Consent[3] and is before the Senate at this writing.[4]

This article is also available online at http://lcp.law.duke.edu/.

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1. *See Status: United Nations Convention on the Assignment of Receivables in International Trade*, U.N. COMMISSION ON INT'L TRADE L. [UNCITRAL], http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables_status.html [https://perma.cc/TDD4-JXHP] (last visited Dec. 13, 2017) (showing Luxemburg, Madagascar, and the United States of America are the only States which have currently signed).

2. *Id.*

3. *See* Barack Obama, Message to the Senate – The UN Convention on the Assignment of Receivables in International Trade (Feb. 10, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/02/10/message-senate-un-convention-assignment-receivables-international-trade [https://perma.cc/9PF3-GJCF].

4. On March 20, 2018, the Senate Foreign Relations Committee voted to report the Receivables Convention favorably to the full Senate. *See U.N. Convention on the Assignment of Receivables in International Trade, Hearing on Treaty Doc. 114-7 before S. Foreign Relations Comm.*, 115th Cong.

The negotiations that led to the Receivables Convention were difficult. Many participants sought to create a uniform regime for assignments of receivables, whether outright or for security,[5] that would provide uniform substantive rules for the creation, third-party effectiveness, and priority of such assignments, as well as the effect of assignments of receivables on the account debtors. While the Commission reached consensus on a number of substantive rules regarding the effect of assignments of receivables on the account debtors, consensus proved elusive with respect to substantive rules for third-party effectiveness and priority. The result was a "second best" of sorts, with a uniform set of conflict of laws rules to determine which State's law is to govern those matters.[6]

While the Receivables Convention did not accomplish all that was hoped, and it still has not gone into effect, the ability of UNCITRAL to obtain consensus as to at least some matters related to secured transactions led to a decision by the Commission to further pursue work in the field. In the last decade and a half, UNCITRAL has produced a Legislative Guide on Secured Transactions[7] (with a supplement devoted to security rights in intellectual property[8]), a Guide on the Implementation of a Security Rights Registry,[9] and most recently, a Model Law on Secured Transactions[10] and a guide to its enactment.[11]

The text of the Model Law achieves a remarkable degree of substantive harmonization to create a model legal regime that adopts a very thoughtful version of the modern notice-filing based secured transactions systems that were the focus of Article 9 of the Uniform Commercial Code (U.C.C.) in the United States, the subject of refinement in Canada in the development of its Personal Property Security Acts, and have since been enacted in several nations around the world. This consensus may have been easier to achieve than the elusive consensus in the Receivables Convention, however, because a model law is "soft law"—none of its provisions are mandatory on States, which can pick and choose among its provisions.

(2018).

5. One example of such a regime is Article 9 of the Uniform Commercial Code in the United States. U.C.C. § 9-109(a) provides that Article 9 governs not only transactions creating security interests in personal property or fixtures but also outright sales of four types of rights to payment—accounts, chattel paper, payment intangibles, and promissory notes. *See* U.C.C. § 9-109(a)(1)–(3) (AM. LAW INST. & UNIF. LAW COMM'N, amended 2010).

6. *See* UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, ch. IV, art. 22–23, U.N. Sales No. E.04.V.14 (2004).

7. *See* UNCITRAL, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS, U.N. Sales No. E.09.V.12 (2007).

8. *See* UNCITRAL, UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS: SUPPLEMENT ON SECURITY RIGHTS IN INTELLECTUAL PROPERTY, U.N. Sales No. E.11.V.6 (2010).

9. *See* UNCITRAL, UNCITRAL GUIDE ON THE IMPLEMENTATION OF A SECURITY RIGHTS REGISTRY, U.N. Sales No. E.14.V.6 (2014).

10. *See* UNCITRAL, UNCITRAL MODEL L. ON SECURED TRANSACTIONS, U.N. Sales No. E.17.V.1 (2016) [hereinafter UNCITRAL MODEL LAW].

11. *See* UNCITRAL, UNCITRAL MODEL L. ON SECURED TRANSACTIONS, GUIDE TO ENACTMENT (2017).

Even as soft law, however, the Model Law and domestic enactments of it have not yet swept the world, and even optimists would have difficulty concluding that the legal regimes based on the Model Law will come to dominate secured transactions law in the near future. Most nations have not yet taken the plunge to move to a comprehensive and systematic notice-filing based system, and those that have already adopted such systems, such as the United States,[12] the Anglophone provinces of Canada,[13] Australia,[14] and New Zealand,[15] often with more detail or nuance, may not be eager to abandon their regimes for the somewhat more generic regime envisioned by the Model Law. More likely in the near future is a patchwork, with many States having modern regimes, but with the regimes differing in important respects, and many States retaining their current systems. Yet, an ever-increasing number of secured transactions touch more than one State, making the differences between secured transactions regimes of more than academic interest. Not only are there significant differences between older civil law and common law systems and more modern systems, such as U.C.C. Article 9 in the United States or the Model Law in a State that enacts it, but there are also some important differences between the regime created by Article 9—or the Canadian, Australian, or New Zealand variations on it—and that envisioned by the Model Law.[16]

Accordingly, in the early twenty-first century, we find ourselves with a steady pace toward modernization of secured transactions law along the lines of the UNCITRAL Model Law, but actual harmonization of the law, with no material differences from one State to the next, appears to be only a gleam in the distance.[17]

A second development, however, puts pressure on the legal world of secured transactions. With increased ease of cross-border communication and commerce, there are fewer barriers to international secured transactions than in the past.

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12. *See generally* U.C.C. art. 9 (AM. LAW INST. & UNIF. LAW COMM'N, amended 2010).

13. *See, e.g.*, Saskatchewan Personal Property Security Act, 1993 (enacted in substantially similar form in all provinces of Canada except Quebec).

14. *See Personal Property Securities Act 2009* (Cth).

15. *See* Personal Property Securities Act 1999 (N.Z.).

16. Differences include whether registration may be used to establish third-party effectiveness of a security right in collateral such as money and deposit accounts (Article 9 does not recognize registration in those cases, except when the money or deposit account is proceeds of other collateral, while the Model Law does recognize it), the types of assets in which special priority is accorded to a purchase-money security interest (Article 9 limits the category to goods, while the Model Law, which refers to the right as an acquisition security right, includes intellectual property), and whether self-help repossession of tangible collateral, so long as it can be accomplished without breach of the peace, is generally available to the secured creditor after the grantor's default (this is the case in Article 9, but the Model Law limits availability of self-help to situations in which grantor has consented in writing to the secured creditor obtaining possession without applying to a court or other authority, the secured creditor has given the grantor and anyone else in possession of the collateral notice of default and of the secured creditor's intent to obtain possession, and the person in possession of the encumbered asset does not object at the time of the secured creditor's attempt to repossess). Moreover, as discussed at length in this article, the regimes differ significantly with respect to their conflict of laws rules.

17. This is not to minimize the importance of developments to date; twenty-five years ago, even the idea of such a gleam seemed far-fetched.

These developments put more pressure than ever before on the conflict of laws rules that are part of a State's secured transactions regime. Indeed, there are two very distinct types of pressure. First, so long as there are important differences between secured transactions regimes, it is critical to have a set of rules to determine which State's legal regime will apply to particular issues in a secured transaction. Moreover, these rules are relevant and necessary not only if and when a dispute arises with respect to a secured transaction and a court or other tribunal must determine which State's law is applicable, but also at the time a transaction is entered into—or, even earlier, when it is planned and documented—so that parties understand which rules must be followed and assess the effect of those rules in pricing their transactions.

Second, even if differences between secured transactions regimes lessen over time, one important difference will remain until modern regimes decide to use a single common transnational registry—the identity of the State in whose registry to file a financing statement or other notice. For example, the internal, or local,[18] law of New York provides that most of these filings are to be made in the office of New York's secretary of state,[19] while the internal law of Jamaica states that filings are to be made in Jamaica's Security Interests Registry.[20] In which State's registry should the filing be made in the case of a multi-State transaction touching both New York and Jamaica? The answer depends on which State's law governs the perfection of the security interest—a conflict of laws question.

One could be forgiven for assuming that the Model Law, which can trace its lineage to U.C.C. Article 9, would have conflict of laws rules nearly identical to those in Article 9, but that assumption would be mistaken. Rather, the conflict of laws rules of the two regimes differ in several important respects. As a result, in many important areas, the State whose law will govern important issues in a secured transaction according to Article 9 will be different than the State whose law will govern according to the conflict of laws rules in the Model Law. Thus, the State in which any litigation takes place is critical, since it is under that State's conflict of laws rules that the conflict of law decision will be made.

This article consists largely of a comparative analysis of the conflict of laws rules under the Model Law and those under U.C.C. Article 9, identifying areas of similarity and difference and how those differences can wreak havoc with transactional planning and litigation.[21] In particular, this article examines conflict

18. Restatement of the Law (Second), Conflict of Laws, defines "local law" of a State as "the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them." *Id.* § 4(1).

19. N.Y. U.C.C. Law § 9-501(a)(2) (McKinney 2013).

20. Jamaica Security Interests in Personal Property Act § 47 (2013).

21. The conflict of laws rules in U.C.C. Article 9 (and, when applicable, elsewhere in the U.C.C.) have been chosen as the comparison point for the conflict of laws regime of the Model Law both because it is likely that Article 9 currently governs more secured transactions than any other single legal regime and because the differences between the Article 9 conflict of laws rules and those in the Model Law are more significant than the differences between the Canadian, Australian, or New Zealand rules and those in the Model Law.

of laws rules with respect to four issues of substantial importance—creation of a security right, third-party effectiveness (perfection) of such a security right, priority of a security right as against competing claimants, and enforcement of the security right.

The Article 9 regime and the Model Law conceptualize the questions that their conflict of laws regimes must address in similar, but not identical, ways. As a result, the choice of law rules that correspond to those issues are largely parallel to each other, but do not line up with each other exactly. Despite the lack of exact correspondence, however, it is easy to compare the two regimes and note their differences.

The examination that follows compares the conflict of laws rules in Article 9 and the Model Law from a comparative, rather than conceptual, framework.[22] Accordingly, the observations and conclusions set forth in this article are gleaned from the perspective of a desire for harmonization around rules that are acceptable to both regimes and practical in their operation. Thus, this article compares the two models primarily in terms of their workability and acceptability, noting aspects of each regime that are unlikely to be useful as the basis for harmonization. This is because harmonization of conflict of laws rules for secured transactions can reduce some of the unpredictability and forum-shopping that can otherwise arise from the presence of inconsistent regimes.

Importantly, the Working Group that prepared the Model Law spent comparatively little time discussing and debating the conflict of laws chapter and the number of States that participated actively in the debate was rather small. This is unfortunate because, as this paper demonstrates, there are serious workability issues associated with the conflict of laws provisions in the Model Law, and the lack of harmonization between those provisions and other existing provisions in modern regimes will result in unnecessary tension among modern secured transactions systems.

A. Creation of a Security Right

The first point of comparison of the regimes' conflict of laws rules relates to the differences between the choice of law rules governing the creation of a security right. The Model Law distinguishes the law governing the creation of a security right *qua* property right from the law governing the mutual rights and obligations of the parties to the security agreement, with the law governing the former being determined by a mandatory choice of law rule, while the law governing the latter is determinable by agreement of the parties. Article 9 does not draw this distinction, with the law governing both issues being determinable by agreement—although the range of possible agreements differs slightly from

22. Professor Charles Mooney has thoughtfully analyzed these rules from a conceptual framework in Charles W. Mooney, Jr., *Choice-of-law Rules for Secured Transactions: An Interest-Based and Modern Principles-Based Framework for Assessment*, 22 UNIFORM L. REV. 842 (2018). His analysis is essential reading for anyone interested in understanding the internal dynamics and competing interests at play in determining optimal choice of law rules.

the range under the Model Law.

1. Model Law—Security Right as Property Right

Article 85 of the Model Law generally provides that the creation of a security right in a tangible asset is governed by the law of the State in which the asset is located. One exception relates to assets of a type ordinarily used in more than one State; creation of a security right in such assets is governed by the law of the State in which the grantor is located.[23] Another exception relates to tangible assets in transit at the time of putative creation of the security right or intended to be relocated to a State other than the State in which it is located at that time; the Model Law allows creation of a security right in such assets either under the law of the State in which the asset is located at the time of putative creation or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within a short time after the time of the putative creation of the security right.[24] The law governing creation of security rights in non-intermediated securities, even if in tangible form, is dealt with separately in Article 100. All of these rules are mandatory; that is, they cannot be changed by agreement of the parties.

Article 86 of the Model Law provides that the creation of a security right in an intangible asset is the law of the State in which the grantor is located. Exceptions are provided for security rights in rights to payment of funds credited to a bank account, intellectual property, and non-intermediated securities that are not in tangible form.[25]

2. Model Law—Mutual Rights and Obligations

Article 84 of the Model Law provides that the law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, the law governing the security agreement. Read in isolation, Article 84 would seem to provide for unlimited party autonomy in choice of law for this topic. Some limits on party autonomy, however, result from Article 93 of the Model Law. Under Article 93, courts may apply "overriding mandatory provisions of the law of the forum"[26] and, in some cases, of another State,[27]and may exclude the application of a provision of the law chosen by the parties if the result of its application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum[28] and, in some cases, of another State.[29]

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23. *See infra* note 60 and accompanying text (discussing the differences between debtor location rules in the Model Law and those in Article 9).

24. *See* UNCITRAL MODEL LAW, ch. VIII, art. 85.

25. *See id.* art. 87, 97–100.

26. *See id.* art. 93.

27. *See id.*

28. *See id.*

29. *See id.*

3. U.C.C. Article 9

In U.C.C. §§ 9-301 through 9-307, Article 9 provides a series of choice of law rules governing perfection, the effect of perfection or non-perfection, and priority of security interests. No rules are provided in Article 9, however, for determination of the law governing creation of a security interest or the law governing mutual rights and obligations of the parties. As a result, in the absence of any rules in Article 9 that govern these issues, the general choice of law rules in Article 1 of the Uniform Commercial Code apply to the determination of the governing law. These choice of law rules are found in U.C.C. § 1-301, which provides for a significant degree of party autonomy in selecting the State whose law governs matters within its scope, allowing parties to select a State whose law is to govern as long as the transaction bears a "reasonable relation" to that State.[30] No definition of the term "reasonable relation" is provided, but the term is generally understood to require a relationship that is, at the least, non-trivial. U.C.C. § 1-301 provides a secondary rule for the unusual cases in which the parties have not designated the State whose law is to govern. In those cases, the forum state's law governs so long as the transaction bears an "appropriate relation" to the transaction.[31] That phrase is typically understood as an indirect reference to the rules that the state would apply under its non- U.C.C. choice of law rules.[32]

4. Differences between Model Law and U.C.C. Article 9

There are several major differences between the Model Law and Article 9 with respect to their rules governing the determination of the law applicable to issues relating to creation of a security right. First, the Model Law's choice of law rules for creation of a security right differ from the rules applicable to the mutual rights and obligations of the grantor and the secured creditor, with the former set of rules being mandatory and not subject to contrary agreement by the parties, while the latter set are subject to broad discretion of the parties. In contrast, Article 9 does not distinguish between these issues, and both are subject to agreement by the parties.

Second, the mandatory choice of law rule in the Model Law for determining the law that governs creation of a security right in tangible assets can lead to situations in which creation issues in a single transaction are governed by the laws of different States with different, and possibly inconsistent, requirements. Consider, for example, a grantor that grants a security right in all of its inventory, wherever located, to a secured party. If that inventory is located in more than one State, the law of different States will govern the creation issue, depending on the State in which a particular item of inventory is located. A single security agreement may not suffice if the formal requirements in one State differ from

30. U.C.C. § 1-301(a) (AM. LAW INST. & UNIF. LAW COMM'N, amended 2008).

31. *Id*. § 1-301(b).

32. *See* Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 with Emerging International Norms*, 46 GONZ. L. REV. 235, 246 (2010).

those in another. Moreover, if the security right is to cover future inventory, predictions as to where that inventory will be located may be inaccurate, creating a risk that the security right with respect to that inventory will not be created because the creation requirements of the State in which that inventory is located have not been satisfied.

Third, the distinction in the Model Law between the law governing creation of a security right and the law governing the mutual rights and obligations of the parties can lead to the law of different States governing these issues. This is almost certain to occur in transactions in which a security right is granted in tangible assets located in more than one State. The security agreement will likely designate the State whose law governs mutual rights and obligations, and that State will match the location of only some (if any) of the tangible assets. It may also frequently occur in transactions involving intangible collateral because the law governing the creation of the security right will be the law of the State in which the grantor is located, while the secured creditor may insist on the law of the State of its location (or another creditor-friendly State) for mutual rights and obligations of the parties. Such a split between the law governing creation of the security right and the law governing mutual rights and obligations is unlikely to occur in the Article 9 framework. While nothing in U.C.C. § 1-301 prevents parties from exercising dépeçage and selecting the law of one State to govern creation of the security interest as a property right and the law of another State to govern mutual rights and obligations, there appears to be no practice of doing so, perhaps because it is not typical for U.S. parties to distinguish between the law governing creation of the right and the law governing the mutual obligations that inhere in that right.

B. Third-Party Effectiveness/Perfection of a Security Interest

Rules governing third-party effectiveness—in other words, perfection—and priority are the heart of any secured transactions regime; correspondingly, conflict of laws rules that determine the State whose law governs effectiveness against third parties and priority are most important segment of the conflict of laws rules with respect to secured transactions. After all, for the international system to work most efficiently, the answer to the question of which law governs perfection and priority should be the same no matter where it is asked and which State's court answers it. Even if two States have both enacted modern secured transactions laws along the lines of Article 9 or the Model Law, their laws governing perfection of non-possessory security interests will differ in one key respect—the law of State A will call for a filing to be made in a registry maintained on behalf of State A, while the law of State B will call for a filing to be made in a registry maintained on behalf of State B.[33] Thus, if the conflict of laws rules in some States point to the law of State A as governing perfection while

33. Perhaps at some point in the distant future, general international secured transactions registries will replace those organized under domestic law, but the likelihood of this occurring in the near future seems small.

the conflict of laws rules of other States point to the law of State B, a secured creditor will need to file in both registries in order to be confident that its security right will be held to be perfected under both conflict of laws rules.

Similarly, because secured creditors decide whether to extend credit, and on what terms, based on the priority that their security rights will have vis-à-vis competing claimants for the same collateral under applicable law, a chaotic world in which the applicable law—and, therefore, the priority of their security rights—depends on which State's court is adjudicating the matter adds uncertainty and risk to transactions even when the legal systems of the relevant States provide clear answers to questions of priority.

Accordingly, the advantages of a world in which the State whose law is applied to questions of perfection and priority is the same no matter where those questions are litigated would be significant. One might hope and expect that Article 9 and the Model Law create such a world, but those hopes and expectations would quickly be dashed. Rather than providing the same rules for determining the law applicable to perfection and priority issues, these competing regimes differ in several important respects.

The biggest, and most fundamental, difference in the conflict of laws rules between those of Article 9 and those of the Model Law relates to the law governing perfection. There are some notable differences with respect to the law that governs security rights in intangible collateral, but they are dwarfed by the differences with respect to the law that governs security rights in tangible assets.

1. Intangible Assets

Under Article 86 of the Model Law, perfection of security rights in intangible assets is governed by the law of the State in which the grantor is located. This does not seem dramatically different from the rule in Article 9, which, under U.C.C. § 9-301(1), is that perfection is governed by the law of the State in which debtor is located. The rules use different terminology, with the Model Law referring to "effectiveness against third parties" and "grantor[s]," while Article 9 refers to "perfection" and "debtor[s]," but the difference so far is only in the wording. The rules differ, however, with respect to how the grantor/debtor's location is determined. In Article 90, the Model Law provides two sets of rules for determining a grantor's location, one for a grantor that has a place of business and one for a grantor who does not. A grantor that has one place of business is located in the State in which that place of business is located,[34] while a grantor that has more than one place of business is located "in the State in which the central administration of the grantor is exercised."[35] A grantor that has no place of business is located in the State in which in it has his or her habitual residence.[36]

Article 9, on the other hand, has a general location rule for debtors and a series of special rules that frequently override the general rule. The general

34. *See* UNCITRAL MODEL LAW, ch. VIII, art. 90.

35. *Id.*

36. *Id.*

location rule is similar to, but not quite the same as the general rule in the Model Law. Under the general location rule in U.C.C. § 9-307(b), a debtor who is an individual is located at the individual's principal residence.[37] A debtor that is an organization is located at its place of business[38] and, if it has more than one place of business, at its chief executive office.[39]

Comparing the two sets of rules, we see some similarities and some important differences. In the case of an organization with only one place of business, the Model Law location rule is essentially identical to the general rule in Article 9. Under the Model Law, that organization is located in the State in which that place of business is located, and under the Article 9 general rule, the organization is located at its place of business. Similarly, in the case of an individual who does not have a place of business, the rules are nearly identical. Under the Model Law, that debtor is located in the State of his or her "habitual residence," and under the Article 9 general rule that debtor is located in the State of his or her "principal residence." It does not seem likely that the difference in phraseology between "habitual residence" and "principal residence" will generate different results.

A difference that is perhaps slightly more significant appears in the case of an organization that has more than one place of business. Under the Model Law, that organization is located in the State in which its central administration is exercised;[40] under the Article 9 general rule, that organization is located at its chief executive office.[41] It does not appear that there would be many occasions in which the State in which an organization's central administration is exercised is different that the State in which its chief executive office is located, although there might be some room for different results if the office of the organization's chief executive is in a different State than that in which central administration is generally exercised. Perhaps this is possible in a world of telecommuting and multiple electronically linked offices.

The biggest difference, however, between the Model Law location rule for debtors and the Article 9 general rule arises in the case of an individual who has one or more places of business. Under the Model Law, the location rule for such an individual is the same as the location rule for an organization that has one or more places of business—the individual is located at his or her only place of business or, if he or she has more than one place of business, the place of central administration.[42] Under the Article 9 general rule, however, an individual is located at his or her principal residence regardless of whether or where that individual does business.[43] So, for example, in the case of an individual whose principal residence is in France, but whose only place of business is in

37. U.C.C. § 9-307(b)(1) (AM. LAW INST. & UNIF. LAW COMM'N, amended 2010).
38. *Id.* § 9-307(b)(2).
39. *Id.* § 9-307(b)(3).
40. *See* UNCITRAL MODEL LAW, ch. VIII, art. 90.
41. U.C.C. § 9-307(b)(3).
42. *See* UNCITRAL MODEL LAW, ch. VIII, art. 90.
43. U.C.C. § 9-307(b)(1).

Switzerland, the individual would be located in Switzerland under the Model Law location rule, but in France under the Article 9 general rule.

U.C.C. § 9-307 contains several special rules for determining a debtor's location that override the general rule described above. Two of those rules are of particular importance. First, under U.C.C. § 9-307(e), a "registered organization"—a U.S. domestic corporation or similar juridical entity[44]—is located in its U.S. state of organization, even if its chief executive office is in another U.S. state or in a foreign State. This rule can, quite obviously, make a dramatic difference in determining, under Article 9, which law governs perfection of a security interest. A debtor that is, for example, a Delaware LLC but whose chief executive office or place of central administration is in the Bahamas is located in the Bahamas under the Model Law but in Delaware under Article 9. The number of entities of this sort (organized under the law of a U.S. state but with the chief executive office outside the United States) is believed to be rather small, however. As a result, the biggest impact of the location rule in U.C.C. § 9-307(e) is to change the location of a U.S. registered organization from the U.S. state where its chief executive office is located to the U.S. state under whose laws it is organized.

A second special rule is found in U.C.C. § 9-307(c). Under that rule, a debtor that would be found to be located outside the United States under the rule of U.C.C. § 9-307(b) (and whose location is not changed by application of other special rules such as the rule for registered organizations under U.C.C. § 9-307(e)) will, nonetheless, not be treated as located in the foreign State unless the foreign State is one "whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral." A State that has perfection rules like those in Article 9 or in the Model Law will pass this "test," but so-called non-filing jurisdictions will not. If the debtor's location under U.C.C. § 9-307(b) is in a State that "fails" the test in subsection (c), the debtor is located in the District of Columbia.[45] As a result, because under U.C.C. § 9-301 the law governing perfection of a non-possessory security interest is that of the debtor's location, perfection of a security interest granted by a debtor that would otherwise be located outside the U.S. may be governed by the law of the District of Columbia and requires the filing of a financing statement there. There is no analog to this rule in the Model Law choice of law rules. Rather, under those rules, perfection of a security interest in intangible assets is governed by the law of the debtor's location whether or not that State's domestic law provides for perfection by filing.

Summarizing briefly—for intangible collateral, both the Model Law and Article 9 refer matters governing perfection and priority to the State in which the

44. *See id.* § 9-102(a)(71).

45. *Id.* § 9-307(c).

debtor is located. There are important differences in these conflict of laws rules, however, that spring from different rules that determine a debtor's location.

2. Tangible Collateral

In the case of a non-possessory security interest in tangible collateral, the differences between the conflict of laws rules of the two systems is substantial. Under the general rule in Article 85(1) of the Model Law, perfection and priority of a security right in a tangible asset are governed by the law of the State in which the asset is located. Under Article 9, however, while priority of a security interest in tangible collateral is governed by the law of the State in which the asset is located, perfection of such a security interest is governed by the law of the State in which the debtor is located.[46] This rule, part of Article 9 since 2001, has substantial practical advantages in transactions in which a debtor grants a blanket security interest in tangible assets such as inventory or equipment that are located in a large number of U.S. states. Under former Article 9, which was similar to the Model Law in this regard, perfection of a security interest in tangible collateral was governed by the law of the state in which the collateral was located. As a result, an extension of credit secured by tangible collateral located in all fifty U.S. states required fifty separate state filings in order for all of the security interests to be perfected. Indeed, it was a desire to avoid such costly and duplicative fifty-state filings that was a primary motivating factor in changing the Article 9 conflict of laws rule from one that looked to the location of the collateral to one that looks at the location of the debtor.

The result of this change, however, is that, under the Article 9 conflict of laws rules, perfection of a security interest in tangible collateral may be governed by the law of one jurisdiction while priority of that security interest may be governed by the law of a different jurisdiction. This is not problematic in the United States, where the perfection issue boils down to a question of which state is the proper state in which to file a standardized form that is essentially the same in every U.S. state, where priority rules are substantially identical, and where the dividing line between perfection and priority is clear.

When one of the jurisdictions involved is not a U.S. state, however, but, rather, is a foreign State, one or more of those statements may not be true. In that case, applying the U.S. bifurcated conflict of laws rule for nonpossessory security interests in tangible assets can be problematic. Add to that the fact that a tribunal outside the U.S. applying the Model Law conflict of laws rules for perfection and priority would almost certainly reach different conclusions as to the applicable law, and it is clear that the difference between Article 9 and the Model Law in this regard is a recipe for chaos.

46. *See id.* § 9-301(1) (general rule indicating that the law governing perfection and priority is the law of the state in which the debtor is located) and § 9-301(3)(C) (special rule for priority of non-possessory security interest in tangible collateral indicating that the law governing priority of such a security interest is the law of the state in which the collateral is located).

II
ENFORCEMENT

No simple choice of law principle seems fully to do justice in the context of enforcement. This is the case, in no small part, because the secured transactions law of "enforcement," unlike that of third-party effectiveness (perfection) or priority, is not a rule or set of rules that answers a single question. Rather, the questions addressed by the law of enforcement[47] include, at least, the following five issues, and it is far from clear that a single choice of law rule should determine the law governing all of them:

1. How and when the secured party may obtain physical possession of tangible collateral (including whether this may be accomplished extra-judicially through "self-help");
2. How and when the secured party may dispose of collateral (including whether this may be accomplished extra-judicially, competing claimants' rights to be notified, etc.);
3. Under what circumstances, if any, other secured parties (or other competing claimants) may take over the enforcement promise;
4. How the proceeds of disposition must be distributed (to other secured parties, other competing claimants, etc.);
5. What remedies are available to an aggrieved party.[48]

A. Law Applicable to Enforcement under the Model Law

Neither the Model Law nor Article 9 is completely satisfactory in the application of its conflict of laws rules to these issues. The Model Law remits all enforcement issues with respect to tangible collateral to the law of the State in which the collateral is located at the time of commencement of enforcement.[49] Tying the law governing enforcement to the location of the collateral certainly makes sense for some issues. For example, it seems wholly appropriate that, when collateral is located in a State that, out of concern for the public order, does not allow self-help repossession, the secured party should not be able to obtain possession of the collateral without the debtor's consent and without going to court, even if the parties have agreed that their mutual rights and obligations are governed by the law of a different State.

The rule in the Model Law is problematic, however, in its application to some self-help repossession scenarios and curious in many other enforcement scenarios. First, the converse of the self-help example in the previous paragraph suggests that the law of the situs of the collateral at the time of commencement of enforcement may not be the appropriate law to govern the availability of self-

47. For this purpose, this article uses "the law of enforcement" to refer to the law governing the matters covered in Part 6 of U.C.C. Article 9 or Chapter VII of the Model Law. *See* U.C.C. §§ 9-601–624; UNCITRAL MODEL LAW, ch. VII.

48. *See supra* note 47.

49. *See* UNCITRAL MODEL LAW, ch. VIII, art. 88.

help repossession. Consider a debtor and secured party, both located in State X, who have agreed that their mutual rights and obligations are to be governed by the law of State X, which does not allow extra-judicial repossession. Assume that, at the time of the debtor's default, some of the collateral happens to be located in State Y which allows self-help repossession. Should this mean that the secured creditor can exercise self-help to repossess the collateral even though the legal system with respect to which the secured creditor and grantor entered into their agreement does not provide for that remedy? That would be a rather difficult position to defend.

Second, tying the law governing enforcement of a security interest in tangible collateral to the location of the collateral at the time of commencement of enforcement can bring about questionable results in the case of non-possessory security interests in tangible collateral. A debtor that realizes that it is on the verge of default can unilaterally determine the law governing enforcement of the security interest in easily-transported collateral by simply moving it to another State, presumably one with an enforcement regime that favors the interest of the debtor. Under the rule in the Model Law, there is nothing that the secured party can do to prevent this. The security agreement can make such relocation an event of default, but that is little solace to a secured creditor who already had other grounds on which to declare default and, in any event, the default does not relocate the law governing enforcement to the previous location. Similarly, while the Model Law provides that "[a] person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner,"[50] it is not clear whether the debtor's transportation of the collateral would violate this standard and, if so, what sort of remedy a court might award in order to protect the secured party's interests. The risk of strategic relocation of collateral such as equipment is probably low. After all, equipment is typically used in premises owned or leased by the equipment's owner and often in a setting, such as a factory or office, where it is used in conjunction with other equipment. A debtor that is insolvent, or close to it, is unlikely to be able to easily find a substitute premises in another State in which its equipment can be productively used. If, however, the collateral is inventory, moving it to a State in which the secured creditor cannot repossess it quickly could be attractive to a debtor who believes that the extra time will be beneficial to it.

Third, inasmuch as the law governing enforcement of a security interest in tangible collateral determines some rights of third parties in the enforcement process, this conflict of laws rule means that those parties not only have no control of the law governing their rights *ab initio*, but also have no ability to prevent changes in that law even after they may have extended credit or otherwise relied on the law of the location of the collateral at that time. The enforcement chapter of the Model Law governs not only secured creditor and debtor behavior during the enforcement process but also matters of critical

50. *Id.* ch. IV, art. 4.

economic importance to third parties such as the distribution of proceeds of disposition.[51] Thus, potential changes in those rules, resulting from a change in the location of the collateral, adds to the risk borne by those third parties in a way that does not appear to be justified by any policy.

Fourth, the Model Law provides no guidance as to what constitutes "commencement" of enforcement. Perhaps no guidance is needed if one assumes that all foreclosures proceed judicially; in those cases, taking the action necessary to commence the judicial foreclosure procedure would seem to constitute commencement of enforcement. If the secured creditor proceeds extra-judicially, however, what constitutes commencement of enforcement? Does enforcement commence when the secured creditor takes possession of the encumbered asset or when it first attempts to do so, even if unsuccessfully? What if, before repossession or an attempt at it, the secured creditor sent a letter to the grantor stating that the grantor is in default under the security agreement and demanding that the grantor make the encumbered assets available to the secured creditor so that the secured creditor can easily take possession of them? Does that constitute commencement of enforcement, locking in the governing law, or can the debtor obtain better rules by quickly moving the collateral to a more debtor-friendly State? The Model Law provides no guidance.

The Model Law conflict of laws rule for enforcement of a security right in intangible collateral causes less difficulty. Under that rule, which appears in Article 88(b) of the Model Law, the law governing enforcement of a security right in an intangible asset is the law that governs the priority of that security right. This rule is less troubling for a number of reasons. For one thing, issues relating to repossession are absent in the case of intangible collateral—which, by its nature, cannot physically be possessed—so the law governing enforcement of a security right in such collateral primarily relates to the disposition and distribution process. Second, it is somewhat more difficult for a debtor to change its location—the determinant of the law governing priority and, thus, the law governing enforcement of a security right in intangible collateral—on the eve of enforcement than to relocate tangible collateral. Finally, while there does not appear to be any particular reason to tie the law governing enforcement with respect to intangible collateral to the grantor's location, it does not appear that any other connecting factor, other than perhaps the law selected by the parties, would be preferable.

When the collateral consists of both tangible and intangible assets, the Model Law rules present an additional difficulty. Because the rule that determines the law governing enforcement of the security right in the tangible assets is different than the rule for intangible assets, it may be the case that different bodies of law govern enforcement with respect to tangible and intangible assets in which a security right has been granted. In cases in which the secured creditor seeks to dispose of both intangible and tangible encumbered assets in the same

51. *Id.* ch. VII, art. 79.

transaction, this may result in two different (and possibly inconsistent) legal systems governing the same act of disposition.

B. Law Applicable to Enforcement under U.C.C. Article 9

Article 9's conflict of laws rules for determining which law governs enforcement of a security interest have some difficulties as well. Conflict of laws rules for enforcement are not addressed in U.C.C. § 9-301, so the general U.C.C. conflict of laws provision— U.C.C. § 1-301—provides the relevant conflict of laws rule. Section 1-301 allows parties to select the law governing their transaction if the transaction bears a reasonable relation to the State whose law is selected.[52] Does this mean that, if parties select as governing law the law of a State that allows self-help repossession, such repossession is allowed even inside a State that does not allow such self-help out of concern for the public order? This should not be the case. Indeed, such self-help might be seen as violating a fundamental policy of the State in which it occurs. If litigation about the repossession occurs in that State, and that State, like the Model Law, has a "fundamental policy" override to otherwise-applicable choice of law rules, the State might provide some relief, albeit after the fact. It should be noted in this regard, however, that no such provision appears in the text of the conflict of laws rules in U.C.C. Article 1,[53] although many believe that such a rule, which appears in Restatement of Conflict of Laws (Second) § 187, is implicit or that such a limitation is applicable to U.C.C. transactions through U.C.C. § 1-103(b), which allows supplementation of U.C.C. rules by common law principles in some contexts. What happens, however, if litigation about enforcement occurs in a U.S. state, and the choice of law clause selects the law of a State that provides fewer protections than under the U.C.C.? While many of the debtor protections in Article 9 are not waivable by contract, it is far from clear which, if any, of these are expressions of fundamental policy that cannot be avoided by a choice of law.

There is probably no single ideal choice of law solution to these multiple issues that is not hopelessly complex. This is because the topic of enforcement embraces at least three distinct sorts of issues:

1. *Mutual rights and obligations between the grantor and the secured creditor.* Governing these rights and obligations by the law chosen by the parties to govern their other mutual rights and obligations makes the most sense.
2. *Rules that protect third parties, such as required notices of proposed disposition, rights to complain about unreasonable dispositions that deprive competing claimants of the possibility of a surplus, etc.* In some ways, governing these rights by the law that applies to perfection or priority seems to be the best fit inasmuch as those topics also address

52. U.C.C. § 1-301(a) (AM. LAW INST. & UNIF. LAW COMM'N, amended 2008).

53. Such an exception was stated explicitly in the proposed 2001 text of Revised U.C.C. § 1-301, but that language was not enacted and was eventually removed from the Official Text of the Uniform Commercial Code.

third-party rights. But the laws governing perfection (under the Model Law) and priority (under both the Model Law and Article 9) are manipulable by the grantor in the case of tangible collateral by moving the collateral from State to State. It is not clear how this would apply to a situation in which a *secured creditor* takes possession of the collateral in State A and then moves it to State B, which has fewer protections for third-party claimants. This sort of manipulation would be troublesome if it impaired the rights of the grantor or competing claimants. Such unilateral manipulation would not be possible if third-party rights were governed by the law applicable to the mutual rights and obligations of the grantor and secured creditor.

3. *Rules that protect the public order, such as rules limiting the ability of a secured creditor to obtain possession of the collateral extra-judicially.* If the law of the State in which such actions would take place prohibits those actions, there is a strong case for applying the law of that State.

III
BRINGING THE SYSTEMS CLOSER TOGETHER

As the above analysis demonstrates, the differences in choice of law rules between those that appear in Article 9 and those recommended by the Model Law present a serious obstacle to international secured transactions touching both the U.S. and a State that enacts the Model Law. In some cases, such as when the differing choice of law rules for creation of a security interest point to different States with different rules for creation, the differing rules will have the practical effect of forcing the parties to a secured transaction to take whatever steps, and follow whatever form, is necessary to satisfy the creation rules of more than one State. If the rules in the States pointed to by the Article 9 choice of law rules and the Model Law choice of law rules are essentially identical, the added cost is limited to the cost of determining the nature of both rules. If the rules of one State are more onerous than the other, but compliance with the more onerous rules will also satisfy the rules of the less onerous State, the additional cost of complying with the more onerous rule will be part of the parties' cost analysis of a potential transaction. If the rules of one State are inconsistent with the rules of the other State, however, such that entirely different actions must be taken under the laws of each State to create a security interest, this duplicative action will, of course, add cost to a transaction.

In cases in which the States pointed to by the different choice of law rules have non-identical rules governing perfection, the differing choice of law rules will have the practical effect of requiring secured creditors to take whatever steps are necessary under the laws of two or more States in order to perfect their security interests. This could be as simple as filing a notice with respect to a secured transaction in multiple registries in different States, or more complex if one or both of the States to which the competing conflict of laws rules points requires action other than the registration of a notice, such as notification of an account debtor. This duplicative action is wasteful and can add cost to a secured transaction. At least, however, a secured creditor can determine in advance which perfection rules will apply under the differing choice of law rules and comply with all of them.

In the case of priority rules, there is potential for more confusion. A creditor considering extending credit will need to consider, as well, all of the States in which the issue of priority might be litigated and assess, under the law applicable under the choice of law rules of each such State, its priority status as against competing claimants. If those priority rules differ, such a creditor might make a probabilistic assessment of the likelihood of litigation establishing priority occurring in one or the other of the possible forums with their differing choice of law rules; alternatively, such a creditor might, instead, simply choose to be risk averse and assume, for purposes of making credit decisions, that litigation will occur in the State whose choice of law rules point to the State whose law gives the creditor the lowest priority. Thus, the inconsistent choice of law rules can reduce access to credit or increase its cost.

Finally, in the case of the rules governing enforcement of a security interest, the confusion may border on chaos. Neither the Article 9 choice of law rules nor those in the Model Law are models of clarity, and the Model Law rules are particularly unclear. Moreover, the potential for inconsistent and conflicting rules over a wide range of issues—repossession of collateral, disposition or collection of collateral, rights of third parties, distribution of proceeds, redress for violations—is high.

Needless to say, this is not a good situation. The greatest tension will occur, of course, in transactions involving *ab initio* both the United States and a State that has enacted the conflict of laws provisions in the Model Law inasmuch as the forums of either State might be the locus of litigation. Even in the absence of such an obviously difficult situation, however, it is entirely possible that a transaction not initially involving both the United States and a Model Law State could nonetheless be litigated in such a State as the result of a peripatetic debtor or the movement of collateral. However the situation arises, the result in a dispute with significant economic stakes should not be determined by a party steering the dispute to a forum with conflict of laws rules favorable to its side.

As a result, there would be significant benefit to harmonizing the conflict of laws rules of the two systems. In this spirit, it would be beneficial if UNCITRAL and the proprietors of the Uniform Commercial Code considered two sets of adjustments to their conflict of laws rules with respect to security rights to bring them in greater harmony with each other. The first set of proposed adjustments is with respect to the law governing enforcement of security rights, and the second is with respect to the law governing third-party effectiveness and priority of security rights in tangible collateral. The former recommendation will involve a greater adjustment to the Model Law, while the latter would require a small, but important, adjustment to the conflict of laws rules in Article 9. As with the general theme of this article, this suggestion is more pragmatic than conceptual, aiming for workability more than for purity.

A. Harmonization of Choice of Law Rules Concerning Enforcement

As stated above, the Model Law's conflict of laws rules for enforcement of a security right are problematic in significant respects. It appears that they were drafted with a focus on judicial repossession and disposition of collateral consisting of tangible assets, rather than on non-judicial repossession, intangible assets, and modern methods of disposition not connected to any particular place, such as disposition via Internet auctions. The Article 9 rules are not without difficulty, but they seem to have fewer difficulties than the rules in the Model Law.

Both the Model Law and the Article 9 conflict of laws rules could benefit from some revision, with a result somewhat closer to the Article 9 rule than to the Model Law rule. In particular, both sets of rules could be revised to converge on the following principles:

1. Except as noted in paragraph 2, all of the enforcement rules that govern the conduct of the secured creditor vis-à-vis the grantor, and their mutual rights and obligations, should be governed by the law governing their security agreement. This is essentially the rule under Article 9.[54]
2. Even if, under the law governing the security agreement, a secured creditor can take possession of the collateral without applying to a court or similar tribunal, non-judicial repossession cannot take place if such repossession is not allowed under the law of the State in which the collateral is located. In other words, if either the law governing the security agreement or the law of the State in which the collateral is located does not allow non-judicial repossession, the secured creditor may not use this method of enforcement. This recognizes that the State in which the collateral is located has an interest in maintaining public order within its borders.
3. The State whose law governs the security agreement should also govern the rights of third parties in the enforcement process. It must be conceded, however, that analysis of this issue does not yield a clean, logical answer. After all, referring the issue to the law of the State in which tangible collateral is located, either at the time of commencement of enforcement (as under the Model Law), or at the time of any particular enforcement action, such as disposition or distribution of the proceeds, is capable of manipulation by either or both of the debtor and the secured party. Applying the law of the State whose law governs the security agreement is appealing, but third parties are not parties to the security agreement, so it would be fictional to base a choice for this rule on consent or agreement by the third parties. Referring the matter to the law of the State in which the

54. *See* U.C.C. § 9-301 cmt. 2 (noting that this issue is governed by U.C.C. § 1-301, rather than the Article 9 choice of law rules).

debtor is located has some appeal as well, but the result could be that the rules governing disposition of the collateral and distribution of proceeds as between the secured party and debtor would be governed by the law of one State, while the rules governing the same issues between the secured party and third parties would be governed by the law of a different State. Since different States might have different and inconsistent rules governing disposition and distribution, this rule could prove unworkable. While none of these alternatives is without difficulty, having the State whose law governs the security agreement also govern the rights of third parties in the enforcement process may be the least difficult alternative inasmuch as it does not result in an odd and difficult form of dépeçage, in which two different, and possibly inconsistent, sets of rules would govern disposition and distribution depending on whether a court is looking at that process from the perspective of the debtor or from the perspective of third parties.[55]

B. Harmonization of Choice of Law Rules Concerning Perfection and Priority with Respect to Tangible Collateral

1. Subject to the principle stated in paragraph 2, consideration should be given to changing the Article 9 choice of law rule that determines the law governing perfection of security interests in tangible collateral to refer to the law of the State in which the collateral is located. This is the rule in the Model Law, as well as in a number of other States,[56] while the Article 9 rule under which perfection is governed by the law of the State in which the debtor is located has not attracted non-U.S. adherents. Accordingly, it is unlikely that harmonization will occur without this change. The effect of this change in the context of domestic transactions involving multiple U.S. states would be substantially ameliorated, however, by the principle stated in paragraph 2.
2. In cases in which the tangible collateral is located in a state in the United States, the rule in paragraph 1 should be supplemented by an additional rule that redirects the governing law to the U.S. state in which the debtor is located under the Article 9 rules that determine the location of a debtor.[57] For example, in the case of tangible collateral located in North Carolina and owned by a debtor that is a Delaware corporation, the principle in paragraph 1 would initially

55. Professor Mooney takes a different view, opining that "the STCOL [secured transactions choice of law] rules under the Model Law that generally follow the rules for perfection and priority would better meet the interests of third parties." Mooney, *supra* note 22.

56. *See, e.g.*, *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 5(1) (providing the choice of law rule in Ontario).

57. *See* U.C.C. § 9-307.

remit the topic of perfection to the law of North Carolina, but the principle in this paragraph would then redirect the choice of law determination to Delaware. The result of application of this principle would be that perfection of a security interest in tangible collateral located in a U.S. state would be governed by the same law as it is currently governed by under U.C.C. §§ 9-301 and 9-307.[58] In addition, this two-step process would be consistent with the Model Law. Article 95 of the Model Law provides that if the law applicable to an issue is the law of "a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue," then "[t]he internal conflict-of-laws rules of that State, or in the absence of such rules, of that territorial unit determine the relevant territorial unit whose substantive law is to apply."[59] In other words, for collateral located in the United States, the Model Law first remits the determination of the law governing perfection to the United States; then, the Model Law defers to the internal conflict of laws rules in the United States to determine which U.S. state will provide the law governing the issue. This proposal for Article 9 would be consistent with the Model Law approach yet also consistent with the current Article 9 status quo under which only one U.S. filing is required no matter how many U.S. states are the situs of tangible collateral. The primary effect of the proposal would be to eliminate the situation, rejected by other States, in which Article 9 concludes that the law of a U.S. state governs perfection of a security interest in tangible collateral located outside the United States. One additional tweak would be needed in order to make this a fully-functional rule under Article 9. The tweak relates to rather unusual situations in which tangible collateral is located in the United States but the debtor is, under U.C.C. § 9-307(b), located in a foreign jurisdiction that satisfies the test in U.C.C. § 9-307(c). In such a case, the current Article 9 rule provides that perfection is governed by the law of the foreign jurisdiction in which the debtor is located.[60] Under the rule proposed here, in order to harmonize the U.S. rule under Article 9 with the Model Law, redirecting the issue to a non-U.S. jurisdiction would not occur. Accordingly, if the debtor is located outside the United States under current U.C.C. § 9-307, there would be a need for a rule to designate a U.S. jurisdiction, such as the District of Columbia, as the

58. Kenneth Kettering has made a similar proposal. *See* Kettering, *supra* note 32, 259–61.

59. UNCITRAL MODEL LAW, ch. VIII, art. 95.

60. For example, in the case of collateral located in Maine owned by a debtor located in the province of New Brunswick under the location of debtor rules in U.C.C. § 9-307, current Article 9 provides that perfection of the security interest in that collateral is governed by the law of New Brunswick because the New Brunswick Personal Property Security Act would satisfy the test in U.C.C. § 9-307(c). (If, under U.C.C. § 9-307(b), the debtor is located in a foreign jurisdiction that does not satisfy the test in subsection (c), the debtor is located in the District of Columbia.)

location of that debtor. Another possibility would be to provide that perfection of a security interest in such collateral is governed by the law of the U.S. state in which the collateral is located. This alternative rule does not involve an arbitrary designation, such as the designation of the District of Columbia, but could result in the need for multiple filings if the foreign debtor has collateral located in more than one U.S. state.

3. A choice of law rule for perfection of security interests in tangible collateral along the lines of paragraphs 1 and 2 would yield results identical to current Article 9 in all but two situations. First, in the case of collateral located in a foreign jurisdiction owned by a debtor located in the United States, current Article 9 provides that perfection is governed by the law of the U.S. state in which the debtor is located, while the rule proposed here would remit the perfection issue to the law of the foreign jurisdiction.[61] This would not cause significant disruption of transactional planning, however, inasmuch as thoughtful secured creditors today seek to be perfected under the law of a foreign State in which collateral is located because the conflict of laws rules of that State almost certainly would apply the law of that State to the perfection issue because the collateral is located there. Second, in the case of collateral located in the United States but owned by a debtor who, under U.C.C. § 9-307, is located outside the United States, current Article 9 provides that perfection is governed by the law of the foreign State in which the debtor is located, while the rule proposed here would govern perfection by the law of a U.S. state. Again, this would cause little disruption inasmuch as thoughtful secured creditors already take into account that litigation about perfection might occur in a State whose conflict of laws rules look to the location of the collateral.

IV
CONCLUSION

Until the unlikely event of world-wide harmonization of secured transactions laws, conflict of laws rules will remain a critically important part of the international secured transactions regime throughout the twenty-first century. If those rules were consistent with each other, parties to secured transactions would be able to predict with some degree of certainty which State's law will apply to various aspects of a secured transaction. Unfortunately, that consistency is absent today. In particular, the conflict of laws rules in the UNCITRAL Model Law and in Article 9 of the Uniform Commercial Code in the United States differ in

61. Professor Mooney, who favors the current rule in Article 9, nonetheless notes that "support for the location-of-assignor rule [for tangible assets] is somewhat weaker than in the case of receivables." Mooney, *supra* note 22.

important respects. This difference has the potential to add unnecessary uncertainty and expense to secured transactions. Moves toward harmonization of these conflict of laws rules, perhaps along the lines suggested in this article, would be beneficial. While they would not create substantive harmonization of secured transactions law across borders, they would add an important degree of predictability and certainty in our non-harmonized world.