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INTERNATIONAL SECURED TRANSACTIONS AND REVISED UCC ARTICLE 9

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Current Article 9¹ of the Uniform Commercial Code (the “UCC” or the “Code”) is primarily concerned with domestic secured transactions. Revised Article 9² has not varied that focus, but particular effort was made in the drafting process to accommodate international transactions and to minimize any statutory impediments to them. Several factors caused the drafters to pay increased attention to the international aspects of Revised Article 9. Two of these factors were particularly persuasive. First, there has been a dramatic increase in the globalization of credit³ since the promulgation of the original Article 9.⁴ Second, since the original promulgation of Article 9, we have seen an increase in value of business enterprises attributable to intangible assets⁵—the situs of which is less certain—in contrast to tangible assets—the situs of which is usually objectively perceptible. The increased attention to international secured transactions led to more explicit treatment of such transactions in Revised Article 9. This article analyzes the results of that attention.

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1. In this article, we refer to the 1995 Official Text of Uniform Commercial Code Article 9 as “Current Article 9.”

2. In this article, we refer to the 1999 Official Text of Uniform Commercial Code Article 9 as “Revised Article 9.”

3. See WORLD TRADE ORGANIZATION, ANNUAL REPORT OF INTERNATIONAL STATISTICS (1999).

4. The 1962 Official Text was the earliest official text to have been widely adopted by the states. Prior official texts had been adopted by only 18 states. See Report No. 1 of the Permanent Editorial Board for the UCC, *reprinted in* 1 U.L.A. xxxvii (1962).

5. See Karl-Erik Sveiby, *Measuring Intangibles and Intellectual Capital—An Emerging First Standard* (last modified Aug. 8, 1999) <<http://www.sveiby.com.au/EmergingStandard.html>>.

In Part I, this article examines the treatment of international secured transactions under Current Article 9. Part II contrasts the treatment of international transactions under Current Article 9 with the treatment of international transactions under Revised Article 9, with particular focus on issues of perfection and priority. Part III addresses inherent limitations on the applicability of Revised Article 9 to international secured transactions. Finally, Part IV highlights Revised Article 9's treatment of certain discrete aspects of international secured transactions that are not addressed in Current Article 9.

I. TREATMENT OF INTERNATIONAL SECURED TRANSACTIONS IN CURRENT ARTICLE 9

Prior to the promulgation of Revised Article 9, the UCC contained few rules to guide its application to a secured transaction with international aspects. Rather, those transactions were subject to the general rules in the Uniform Commercial Code that govern when more than one jurisdiction is involved.

Two UCC provisions are implicated. First, the applicable law governing a UCC transaction is generally determined by UCC section 1-105 (whether or not the parties have provided for governing law in their agreement). Second, the jurisdiction whose law will govern perfection and priority issues is determined by application of Current section 9-103. As will be explained in more detail below, party autonomy is given some leeway in the former cases, but not in the latter.

A. UCC Section 1-105

UCC section 1-105(1) provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

This provision contains two distinct rules. First, it generally determines the extent to which parties may, by agreement, choose the jurisdiction whose law governs their relationship. Second, it provides which jurisdiction's law will govern in the absence of an effective choice by the parties.

In the first situation, which is predominant in most heavily-lawyered secured transactions, the parties may, with one important exception relevant to Article 9 transactions, choose the governing law so long as the transaction bears a “reasonable relation” to the jurisdiction chosen. This limited grant of party autonomy is consistent with post-War theories in conflict of laws generally.⁶ The Code does not attempt to define what constitutes a “reasonable relation” or to set standards for such a determination; rather, it leaves this for judicial decision guided only by a Comment stating, “Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”⁷ Accordingly, parties selecting a jurisdiction that has only a tangential relation to the transaction to provide the governing law might face some uncertainty as to whether their choice will be given effect.⁸ As indicated above, this rule does not distinguish between transactions in which all of the jurisdictions that the transaction touches on are states of the United States and those in which one of the jurisdictions is foreign. Presumably, then, a debtor in the United States and a secured party in the creditor-friendly jurisdiction of Draconia could agree that Draconian law, rather than Current Article 9, governs their secured transaction.

The exception to this general rule of limited party autonomy for choosing the law applicable to a secured transaction is stated in UCC section 1-105(2). That section provides, *inter alia*, that the parties may not, by agreement, override the mandatory rules in Current section 9-103 determining which jurisdiction’s law governs perfection and priority issues.⁹

6. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-188 (1971).

7. U.C.C. § 1-105 cmt. 1.

8. A few states provide for greater certainty in some transactions. See, for example, N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1998) that provides:

The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of the uniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the uniform commercial code.

9. U.C.C. section 1-105(2) provides, in relevant part:

Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

....

In the second situation, less common in secured transactions, where the parties have *not* selected the governing law in their contract, UCC section 1-105(1) provides simply that the law of “this state” (i.e., the forum) governs so long as the transaction bears an “appropriate relation” to this state. Once again, the rule does not distinguish between cases in which other possible jurisdictions are sister states and those in which they are foreign nations.

As is the case with the similar concept of “reasonable relation,” “appropriate relation” is left undefined.¹⁰ It is important to note what this provision does *not* say. It does not say, for example, that the law of the jurisdiction that bears the *most* appropriate relation to the transaction governs. Such a formulation, consistent with conflict of law doctrines generally,¹¹ could easily lead to a determination that the law of a jurisdiction other than the forum governs a transaction. By requiring only that the transaction bear *an* appropriate relation to the forum, though, application of the statute can result in the forum’s law governing even in cases in which the transaction bears a closer relationship to another state. In the early days of the UCC, when it was not clear that every state would adopt the Code, this provision of the UCC made it more possible for the forum state to apply its own law—that is, the UCC.

As is the case for the rules respecting party autonomy in choice of governing law, this provision of UCC section 1-105 is subject to the mandatory rules of section 9-103.

B. Current Section 9-103

While UCC section 1-105 gives parties great autonomy to select the law governing their secured transaction and gives courts significant leeway in determining the governing law in the absence of

Perfection provisions of the Article on Secured Transactions. Section 9-103.

10. The Official Comment does provide some guidance, however:

Of course, the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not “appropriate” include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

Id. § 1-105 cmt. 2.

11. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (“The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties . . .”).

such an agreement, there is one critical context in which these general rules do not apply. That context is, of course, the body of rules that determine whether a security interest is perfected and the effect of perfection or nonperfection (including priorities).¹² In this context, there is no party autonomy to choose governing law; rather, Article 9 makes all determinations.¹³ Unlike UCC section 1-105, which merely indicates whether, in the absence of an effective agreement to the contrary, the law of *this* jurisdiction applies, Current section 9-103 tells the user *which* jurisdiction's law applies.

While Current section 9-103 is exceedingly complicated, its basic rules generally can be divided into two categories—rules applicable to most types of tangible collateral and rules applicable to most types of intangible collateral. For tangible collateral—documents, instruments, letters of credit, and “ordinary goods”¹⁴—perfection and the effect of perfection or nonperfection are governed by the law of the jurisdiction in which the collateral is located.¹⁵ This rule, like those in UCC section 1-105, does not provide for any different treatment when some aspect of the transaction is foreign.

For intangible collateral—accounts and general intangibles—as well as mobile goods¹⁶ and chattel paper subject to a nonpossessory security interest,¹⁷ perfection and the effect of perfection or nonperfection are governed (with an important exception noted below¹⁸) by the law of the jurisdiction in which the debtor is located.¹⁹ Of course, location is a concept that is hardly self-defining, particularly in the business context. After all, a business may have

12. See R. § 1-105(2).

13. See *id.* § 9-103(1)(b). This article cites to sections in “Current” Article 9 as U.C.C. § 9-XXX and to provisions in “Revised” Article 9 as R. § 9-XXX. References to “cmt.” are to the Official Comments in both Current Article 9 and in Revised Article 9, as the case may be.

14. “Ordinary goods” are goods other than mobile goods, minerals, and those subject to a certificate of title. See *id.* § 9-103(1)(a).

15. See *id.* § 9-103(1)(b). There is a temporal aspect to this definition as well. Inasmuch as tangible collateral might move from one jurisdiction to another, it was necessary for section 9-103(1)(b) to provide *when* the collateral's location was to be taken into account. The answer, according to section 9-103(1)(b), is “when the last event occurs on which is based the assertion that the security interest is perfected or unperfected.” Analysis and criticism of this rule, which was added by the 1972 amendments to Article 9, are beyond the scope of this article. See generally David Frisch, *UCC Filings: Changing Circumstances Can Make a Right Filing Wrong, But Can They Make a Wrong Filing Right?*, 56 S. CAL. L. REV. 1247 (1983); Homer Kripke, *A Draftsman's Wishes That He Could Do Things Over Again—UCC Article 9*, 26 SAN DIEGO L. REV. 1 (1989).

16. See U.C.C. § 9-103(3)(a).

17. See *id.* § 9-103(4).

18. See *infra* text following note 25.

19. See U.C.C. § 9-103(3)(b).

sites in many states, and, if incorporated, may have been granted its charter by still another jurisdiction.

Accordingly, the drafters inserted a rule for determining the debtor's location. Current section 9-103(3)(d) provides:

A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

While the "chief executive office" provision affords some guidance, it is by its nature somewhat ambiguous. While many businesses will have one location that clearly shows its "chief executive office" status, in other cases, things will not be clear. Moreover, the location of a company's chief executive office may change over time, with the moment of its change not clearly determinable.²⁰

Use of the "chief executive office" test, rather than a test more closely attuned to the particular transaction, can occasionally lead to surprising results. For example, consider the case of an engineering firm with chief executive offices in San Francisco that provides consulting services to a building contractor in Mississippi on open account. Not wishing to wait for payment, the engineering firm sells its claim against the contractor to a local Mississippi factor. Inasmuch as the claim against the contractor is an account,²¹ the sale of that account is within the scope of Article 9.²² Which jurisdiction's law governs perfection and priority issues arising out of the sale in Mississippi to a Mississippi factor of the claim against the Mississippi contractor? The answer is California because the debtor²³ is located there.²⁴ Similarly, perfection and priority issues arising from the sale by a Mississippi engineering firm of a receivable, owed by an Irish contractor and earned in Ireland, to an Irish factor would be, at least

20. See, e.g., *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 640-44 (3d Cir. 1991).

21. See U.C.C. § 9-106.

22. See *id.* § 9-102(1)(b).

23. Pursuant to U.C.C. section 9-105(1)(d), the term "debtor" includes the seller of accounts.

24. See U.C.C. § 9-103(3)(b) (stating that the "law . . . of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection" of accounts).

as far as Article 9 is concerned, governed by the law of Mississippi.²⁵

A variation on the first example, though, leads us to the one instance in which Current Article 9 contains a rule unique to international secured transactions. Assume that the engineering firm has its chief executive office not in San Francisco but, rather, in Draconia City, the capital of Draconia. Inasmuch as, under Current section 9-103(3)(d), the engineering firm—the Article 9 debtor—is located in Draconia, section 9-103(3)(b) would appear to tell us that the law of Draconia governs the perfection of the factor's interest and the effect of perfection or nonperfection. Current section 9-103(3)(b), however, is made subject to section 9-103(3)(c). That paragraph provides:

If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

Thus, in this international variation of the example, assuming that the law of Draconia does not provide for perfection of security interests by filing or recording, the factor would have two choices. It could either determine the jurisdiction in the United States in which the Draconian engineering firm has its "major executive office" in the United States and file a financing statement there or notify the Mississippi building contractor.

This choice, however, is not always easy to understand or make. After all, whatever difficulties there may be at the margins in determining where a company's chief executive office is located, in most cases it is relatively easy to observe the top of the corporate pyramid; whatever their structure, companies tend to have only one chief executive officer, and the officer's location is usually self-evident (although this could change in an era of telecommuting and electronic offices). On the other hand, a company with chief executive offices

25. Of course, in this case there would be a significant question as to whether the UCC governed at all. *See infra* Part III.

outside the United States can have a variety of types of presence in the United States.

In some cases, such a company will have an obvious chief United States office. In other cases, though, a company headquartered elsewhere might have, for example, no presence in the United States except for three roughly equal sales offices in three different states. If those offices are at the same level in the company's organizational hierarchy, how is one to determine which of the offices is the company's "major" executive office in the United States? Of course, in this case the secured party could simply file in all three U.S. jurisdictions rather than expend effort to determine which one has the major office. But what if a company has no executive office in the United States? In the case of the Draconian engineering firm, for example, it would not at all be surprising if the company had no office in the United States. Which jurisdiction governs perfection and priority issues in that case?

In this case, the second sentence of section 9-103(3)(c) saves the day. Because the collateral is an account, that sentence allows the secured party to perfect by notifying the Mississippi contractor of the assignment.

This alternative means of perfection for foreign secured transactions will not always be so handy, however. For one thing, receivables financing is often done on a "non-notification" basis; that is, the account debtor is not told of the security interest.²⁶ This is typically the case when the security interest secures a loan that the parties see no reason to publicize, but is also often the case even when the account or general intangible has been the subject of an outright sale. It is simply the case that many account debtors are more likely to pay the party with whom they have done business than they are to pay a stranger.

Another problem is logistical. It is one thing to notify a few account debtors when their accounts have been the subject of individual assignments; it is quite another thing, however, to notify 10,000 account debtors that their accounts have been sold (or used as collateral).

A third problem is temporal. Even if one can somehow notify 10,000 existing account debtors of the Article 9 debtor, it is impossible to notify account debtors that do not yet exist (or, more

26. See, e.g., U.C.C. §§ 9-103 cmt. 5(a), 9-502 cmt. 1. For the same point in the context of chattel paper, see the second paragraph of the first comment to UCC section 9-318.

properly, whose accounts do not yet exist). Yet, in a typical revolving receivables financing transaction, such a “floating lien” is exactly what is contemplated by the parties. At best, the secured party in such a situation would have to monitor constantly to determine when new accounts come into existence. Moreover, even the secured party who monitors and notifies new account debtors might find itself with lower priority than a competing secured party who either notified a new account debtor earlier or discovered a new United States executive office of the debtor and filed in that jurisdiction before the first secured party’s notification.

When the Ad Hoc Committee on International Secured Transactions of the Article 9 Drafting Committee was asked to report to the Drafting Committee its opinion as to which aspects, if any, of Current Article 9 needed change in order to more effectively accommodate international secured transactions, the Committee reported that the biggest impediment to such transactions in Article 9 was Current section 9-103(3)(c). The Committee reported on many international transactions that either were made significantly more expensive as a result of that section or did not occur because of the uncertainties associated with complying with that section.

II. TREATMENT OF INTERNATIONAL SECURED TRANSACTIONS IN REVISED ARTICLE 9

A. Overview

1. General Principles

Revised Article 9 makes no substantial changes to UCC section 1-105.²⁷ Therefore, the rules that determine the ability of parties to a secured transaction to choose the law governing their transaction (other than with respect to perfection and priority issues) have not been changed. Similarly, the rules that determine governing law in the absence of an agreement between the parties are unchanged.

It should be noted, however, that Article 1 of the Uniform Commercial Code is in the process of revision. The Article 1 Drafting Committee has tentatively decided to recommend significant changes to the rules that are now set out in UCC section 1-105. Those changes, which, like Current UCC section 1-105, apply to all

27. The cross reference in section 1-105(2) to Current section 9-103 is updated to refer to Revised sections 9-301 through 9-307.

transactions (and not just secured transactions), would give parties significantly more autonomy to select by agreement the law governing their transaction. In particular, Revised section 1-302 would generally allow parties to a domestic nonconsumer transaction to choose the law of any state to govern their transaction, whether or not the transaction bears a relationship to the chosen state. Parties to international transactions would be given enhanced autonomy as well. So long as a transaction bears a reasonable relation to a country other than the United States, Revised section 1-302 would allow the parties to designate by agreement the law of any country—not limited to countries to which the transaction bears any relation.²⁸

Revised Article 9 makes dramatic changes, however, in the rules governing the determination as to which jurisdiction's laws govern perfection and priority issues. These changes are, for the most part, changes that affect all secured transactions—not just those that cross national borders. Yet, by their nature, these changes will play out in important ways when they are applied to international transactions. In addition, the Revised statute contains one rule unique to international transactions that is designed to replace and improve upon Current section 9-103(3)(c).

2. Determination of the Law Governing Perfection of a Security Interest

a. The Unified Single Filing Rule

One of the most important changes in Revised Article 9 is the adoption of a unified single filing rule. By “single filing,” we mean that dual state and local filings are eliminated in favor of a rule that requires the filing of only one financing statement, usually at a statewide office such as that of the secretary of state.²⁹ By “unified,” we mean that the same rule determines the jurisdiction in which filing must take place in virtually all cases.

The unified rule is quite simple. With only a few exceptions,³⁰

28. See U.C.C. § 1-302(a) (Sept. 1997 Draft).

29. See R. § 9-501(a)(2). The exceptions to this generalization are financing statements relating to as-extracted collateral or timber to be cut and fixture filings when the collateral is goods that are or are to become fixtures, in which case the proper place to file is the office designated for the filing or recording of a record of a mortgage on the related real property. See *id.* § 9-501(a)(1).

30. The exceptions are security interests represented by fixture filings, see *id.* § 9-301(3)(A), security interests in timber to be cut, see *id.* § 9-301(3)(B), and security interests in as-extracted collateral, see *id.* § 9-301(4).

perfection of nonpossessory security interests by filing is governed by the law of the jurisdiction in which the debtor is located.³¹ This, of course, is the rule in Current Article 9 for intangible collateral and mobile goods.³² The innovation in Revised Article 9 is the extension of the “location of debtor” rule to tangible collateral such as goods. One efficiency benefit of the new rule is that perfection of a security interest in goods located in many jurisdictions is governed in a unified fashion by the law of a single jurisdiction—the jurisdiction in which the debtor is located. Under Current Article 9, by way of contrast, as many different laws as there are jurisdictions in which tangible collateral is located govern perfection of such dispersed collateral, with the result that filings in many states may be necessary for perfection.³³

Revised section 9-301 does not distinguish between transactions in which collateral or parties are located in a foreign country and entirely domestic transactions. In both cases, perfection of a nonpossessory security interest is governed by the law of the jurisdiction in which the debtor is located. Yet, as demonstrated below, this “location of debtor” rule is applied to many international transactions differently than to domestic transactions.

b. Determining the Location of the Debtor

Revised section 9-307 is quite complex. The residual rule, which is set forth in Revised section 9-307(b), applies to all cases other than those described elsewhere in this section. The residual rule provides that:

- (b) **[Debtor’s location: general rules.]** Except as otherwise provided in this section, the following rules determine a debtor’s location:
 - (1) A debtor who is an individual is located at the individual’s principal residence.
 - (2) A debtor that is an organization and has only one place of business is located at its place of business.
 - (3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

This residual rule, which is essentially identical to the location-of-debtor rules in Current section 9-103(3)(d), is somewhat deceptive,

31. *See id.* § 9-301(1).

32. *See* U.C.C. § 9-103(3)(b).

33. *See id.* § 9-103(1)(b).

though, in that qualifications and exceptions in the remainder of the section frequently preempt its application.

The most prominent exception to the residual rule appears in Revised section 9-307(e). That subsection provides:

- (e) **[Location of registered organization organized under State law.]** A registered organization that is organized under the law of a State is located in that State.

A “registered organization,” as defined in Revised section 9-102(a)(70), is “an organization organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized.” Examples of registered organizations include domestic corporations, limited liability companies, and limited partnerships.³⁴ It is important to note that corporations chartered by foreign governments are not, under this definition, registered organizations because they are not organized under the laws of a state.

Thus, for the great bulk of domestic Article 9 debtors, Revised Article 9 will eliminate all uncertainty as to the jurisdiction whose law governs perfection. Rather than having to determine which office of a corporation that does business nationwide is its chief executive office and monitoring the corporation’s activities to detect any changes in that determination,³⁵ a secured creditor need merely ascertain the jurisdiction under whose laws the debtor incorporated. This can be ascertained with certainty, without the need for judgment calls that often accompany a determination of the *chief* executive office.

Because a registered organization must be chartered by a state or the United States, though, this certainty-enhancing exception to the residual rule does not apply to foreign debtors. Indeed, when the collateral is goods located in the United States, Revised Article 9 may actually decrease certainty. Under Current Article 9, the jurisdiction in which the goods are located governs the perfection of a security interest in those goods without regard to the location of the debtor.³⁶ Thus, when a debtor incorporated under the law of the Cayman Islands, with a small office there but major offices in Jamaica and Florida, grants a security interest in goods located in Illinois, Current Article 9 tells us that perfection of that security interest is governed

34. See R. § 9-102 cmt. 11.

35. For difficulties in this regard under current law, see, for example, *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 640-44 (3d Cir. 1991).

36. See U.C.C. § 9-103(b).

by the law of Illinois. This answer can be reached with little investigative cost and carries virtually no ambiguity. Revised Article 9, on the other hand, requires the secured party to ascertain the location of the debtor.³⁷ Because the debtor does not qualify as a registered organization, the residual rule requires a determination of the location of the debtor's chief executive office. This determination is accompanied by the same difficulties that are attendant, under Current Article 9, to transactions in which the collateral is intangible.

If it is determined that the debtor's chief executive office is not in the United States, a second exception to the residual rule becomes critically important. Revised section 9-307(c) which, by its nature, is relevant only when the debtor is not located in the United States under the residual rule, provides:

- (c) **[Limitation of applicability of subsection (b).]** Subsection (b) applies only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction 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. If subsection (b) does not apply, the debtor is located in the District of Columbia.

All United States jurisdictions, having adopted Article 9, generally require information concerning the existence of nonpossessory security interests to be made generally available in a filing system as a condition of the secured party's obtaining priority over lien creditors.³⁸ Thus, the first sentence of this subsection need only be scrutinized carefully when the debtor is foreign under the residual test.

If the debtor is a foreign corporation with its chief executive office outside the United States, subsection (c) requires a careful determination.³⁹ If that is the case, the secured party must determine whether the jurisdiction in which the chief executive office is located is one "whose law generally requires information concerning the

37. See R. § 9-301(1).

38. See U.C.C. §§ 9-301(1)(b), 9-302(1)(a).

39. If either of these two criteria is not met, however, subsection (c) diminishes in importance. If the debtor's chief executive office is foreign but it is incorporated in the United States, the debtor is deemed to be located in the state of incorporation. See R. § 9-307(e). If the debtor is incorporated outside the United States, but its chief executive office is in the United States, it is deemed located in the state in which its chief executive office is located. See *id.* § 9-307(b)-(c).

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."⁴⁰

Thus, to apply the rule in subsection (c) in order to determine how to perfect its security interest as a matter of *domestic* law, the debtor must investigate *foreign* law. Obviously, this increases the chance of error. Even if the relevant foreign law is accurately determined, Revised Article 9 requires a judgment call in order to apply section 9-307(c)—the secured party must decide whether that law *generally* requires public filings or the like as a condition of priority over lien creditors.⁴¹ The qualification inherent in the word “generally” is an important one. After all, even under Current Article 9, not all nonpossessory security interests must be filed; there are several temporary perfection and automatic perfection rules for such interests.⁴²

If it is determined that the jurisdiction of the foreign debtor does not qualify under the first sentence of Revised section 9-307(c), the second sentence governs and the debtor is deemed located in the District of Columbia. This rule, admittedly arbitrary and counterintuitive,⁴³ provides great ease and certainty by enabling perfection to occur through filing a financing statement in the United States. This would appear to be a significant advantage over Current Article 9. Current section 9-103(3)(c), by way of contrast, requires a determination of which office of the debtor in the United States (if, indeed, there are any) is the “major” such office in order to be able to perfect by filing a domestic financing statement. When the debtor has no office in the United States, the only alternative provided by that section is perfection by notification of account debtors.⁴⁴

40. *Id.* § 9-307(c).

41. While we are not aware of any jurisdictions for which this judgment call would be difficult, as many countries reform their secured credit law, such a “close case” is certainly possible.

42. *See, e.g.*, U.C.C. § 9-302.

43. After all, most such debtors will not have any connection whatsoever with the District of Columbia. In this regard, it must be remembered that the location-of-debtor rules in Revised section 9-307 apply *only* for the purpose of determining governing law. *See* R. § 9-307(k); *see also id.* § 9-307 cmt. 2.

44. *See supra* Part I.B for a more detailed analysis of Current section 9-103(3)(c).

3. Determination of the Law Governing Priority Issues and Other Effects of Perfection or Nonperfection

Unlike Current Article 9, Revised Article 9 distinguishes in many cases between the law that governs perfection and the law that governs the effect of perfection or nonperfection, including priority issues. The general rule, once again subject to significant exceptions, is in Revised section 9-301(1): “Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.” Thus, when the general rule applies, the same jurisdiction’s law governs both perfection and its effect.

The major exception to this rule of unified treatment of perfection and priority issues is found in Revised section 9-301(3). That subsection provides:

- (3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:
 - (A) perfection of a security interest in the goods by filing a fixture filing;
 - (B) perfection of a security interest in timber to be cut; and
 - (C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

Thus, when the collateral is tangible, priority and effect-of-perfection issues are governed by the law of the jurisdiction in which the *collateral* is located. As a result, Revised Article 9 can bring about a situation in which the law of one jurisdiction (that of the debtor’s deemed location) governs perfection (and accordingly requires filing to be done there), while the law of another jurisdiction (that of the collateral’s location) governs priority issues and other effects of perfection or nonperfection.

The purpose of this carefully parsed rule is stated in Official Comment 7 to Revised section 9-301. The drafters recognized that the rules governing priority and other effects of perfection and nonperfection by their nature apply not only to resolve disputes between competing Article 9 secured parties but also to disputes between an Article 9 secured party and a lien creditor or other claimant to the collateral whose interest does not arise through and is not otherwise governed by Article 9. With this observation in mind, the drafters believed it inappropriate for Article 9 to provide that the

law of a jurisdiction other than that where the collateral is located would determine the relative rights of a person who has a lien on the collateral under the law of the jurisdiction where the collateral is located.

This rule, eminently sensible in the context of domestic transactions, may pose some difficulties in the context of international transactions, however. Let us say, for example, that a debtor incorporated under the laws of Illinois grants to an Illinois bank a nonpossessory security interest in goods located in Draconia. By application of Revised sections 9-301 and 9-307, it is clear that perfection of this security interest is governed by the law of Illinois; thus, an Illinois filing will perfect the security interest, and failure to make such a filing will leave the security interest unperfected. Revised section 9-301(c), however, tells us that it is the law of Draconia, rather than the law of Illinois, that determines the bank's rights as against other claimants to those goods. Yet, under the law of Draconia, the rules governing priority of the bank's security interest may be so inextricably tied to what we would consider concepts of perfection that they cannot easily be separated.⁴⁵

B. Application of Revised Article 9 Rules to International Secured Transactions

The best way, of course, to gain an understanding of the differences between the application of Revised Article 9 to a transaction with international aspects and the application of Current Article 9 to the same transaction is to create a prototypical transaction with several variations and compare the application to these variations of the Current and Revised versions of Article 9.

Let us start by imagining Debtor, a company whose income derives primarily from the sale of inventory. In some cases, the inventory is sold for cash; in other cases, though, Debtor receives accounts, chattel paper, or promissory notes (all of which are Article 9 "instruments" but not all of which qualify as negotiable instruments under UCC section 3-104) in exchange for the inventory. Debtor has

45. The Article 9 Drafting Committee decided to separate the determination of the law governing the effect of perfection or nonperfection and the law governing priorities from the determination of the law governing perfection at a meeting some time after the meeting at which the Ad Hoc Committee on International Secured Transactions made its report and the Drafting Committee adopted the rules governing such transactions. It is possible that the Drafting Committee did not consider fully enough the effect of this bifurcation on international secured transactions. For further analysis of this point, see *supra* text accompanying note 28.

borrowed money from Finco, an asset-based lender, secured by a security interest in Debtor's inventory. As part of a securitization, Special Purpose Entity ("SPE") purchases accounts from Debtor as inventory is sold (and subsequently borrows against those accounts from Moneycenter). Now let us add some geography to these facts and observe the application of Revised Article 9.

1. Example 1

Assume that Debtor and SPE are organized as Delaware corporations and each has its chief executive office in New York City. The inventory of Debtor is located in warehouses in Bayonne, New Jersey; Oakland, California; Toronto, Ontario; and Tijuana, Mexico. The buyers of Debtor's inventory (some of whom pay cash, but others of whom pay with instruments or buy on credit as described above) are located throughout the United States, Canada, and Mexico. Instruments and chattel paper received on sale of the inventory by Debtor are brought to Debtor's fiscal office in Connecticut; when sold to SPE, they are brought to SPE's office in New York.

a. Inventory

In this example, applying Current Article 9 to the inventory would lead to the conclusion that perfection and priority are governed by the law of the jurisdiction in which the inventory is located.⁴⁶ Accordingly, perfection of the security interests in inventory in New Jersey and California would require filing (perhaps dual central and local) in both of those states, and perfection of the security interests in inventory in Canada and Mexico⁴⁷ would require doing whatever those jurisdictions require in order to perfect a security interest in this type of goods. Priority would be governed by the same jurisdiction.

Revised Article 9 leads to different conclusions. Under Revised Article 9, perfection of a security interest in goods is governed by the debtor's location.⁴⁸ In this case, the debtor, a Delaware corporation, is located in Delaware. Accordingly, filing of a financing statement in Delaware would perfect Finco's security interest in the inventory

46. See U.C.C. § 9-103(1)(b).

47. This analysis assumes that the transaction is sufficiently related to a United States jurisdiction for the application of the UCC. For further analysis of this point, see the discussion *infra* Part III.C.

48. See R. § 9-301(1).

located not only in New Jersey and California but also, to the extent that Article 9 applies at all,⁴⁹ in the inventory located in Canada and Mexico.

Revised Article 9 tells us, in addition, that the law governing priority of Finco's security interest in the various items of inventory is that of a different jurisdiction than the law governing perfection. According to Revised section 9-301(3)(C), priority would be governed by the law of the jurisdictions in which the inventory is located. Thus, New Jersey and California law, respectively, would determine Finco's priority with respect to inventory located there, and Canadian and Mexican law would determine Finco's priority with respect to the inventory located in those nations.⁵⁰

b. Accounts

Applying Current Article 9 to the sale of the accounts from Debtor to SPE would lead us to the conclusion that perfection of SPE's interest would be governed by the law of Debtor's location. Under Current section 9-103(3)(d), that location is the state of New York. Therefore, SPE should file a financing statement with respect to the sale of accounts in the appropriate New York filing offices. Similarly, perfection of Moneycenter's security interest in those accounts would be governed by New York law because SPE is located there as well. In both cases, the location of the account debtors is irrelevant for Article 9 purposes.⁵¹

Revised Article 9, once again, leads to different conclusions. Under Revised Article 9, perfection would once again be governed by the law of Debtor's location and SPE's location, but in both cases Revised Article 9 tells us that those parties are located in Delaware, under whose laws they are incorporated. Thus, SPE and Moneycenter should file financing statements in Delaware. Again, the location of the account debtors is irrelevant for Revised Article 9 purposes. In the case of accounts, in contrast to the situation for tangible collateral,⁵² priority will also be determined by the law of the debtor's

49. See *id.* § 9-401 cmt. 3; see also *infra* text accompanying notes 76-78.

50. Whether the priority rules of those nations can meaningfully be separated from their perfection rules, and whether a court in Canada or Mexico would agree to such a bifurcated approach, are issues discussed at greater length. See *infra* Part III.D.

51. Of course, if litigation occurs at the location of the foreign account debtors in Canada or Mexico, Revised Article 9 cannot, by its own force, assure that its rules will be applied by the foreign forum. See *infra* text accompanying notes 111-15.

52. See *supra* text accompanying notes 46-50 (inventory); *infra* Parts II.B.1.c, II.B.1.d (chattel paper and promissory notes).

location.

c. Chattel Paper

Application of Current Article 9 to the sale of chattel paper from Debtor to SPE depends on whether SPE will take possession of this paper. If, as is likely, SPE takes possession, Current section 9-103(4) applies the same rules as those governing security interests in goods. Thus, so long as the chattel paper is in Connecticut, that state's law will determine perfection and priority; after the chattel paper is moved to New York, that state's law takes over.

A similar analysis applies to Moneycenter's security interest in the chattel paper granted by SPE. Just to make things interesting, let us assume here that SPE retains possession of the chattel paper. In that case, Current section 9-103(4) tells us to apply the intangible collateral rules of Current section 9-103(3). Thus, both perfection and priority would be governed by the law of New York—the home of SPE's chief executive office and, thus, under Current Article 9, its location.⁵³

Not surprisingly, Revised Article 9 provides some different answers. With respect to SPE's possessory interest in the chattel paper, though, the answer is the same. Revised section 9-301(2) provides that “[w]hile collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.” Thus, Connecticut law would govern both perfection and priority issues while SPE has possession of the chattel paper in Connecticut, and New York law would govern thereafter.

With respect to Moneycenter's nonpossessory security interest in the chattel paper granted by SPE, though, Revised Article 9 differs from Current Article 9. Perfection would be governed by the law of the jurisdiction in which SPE is located under the general rule of Revised section 9-301(1); the exception in section 9-301(2) for possessory security interests would be inapplicable. As a Delaware corporation, SPE would be deemed to be located in Delaware. Thus, in order to perfect its security interest, Moneycenter should file a

53. There is a potential problem here. In a priority dispute between two secured creditors with a security interest in chattel paper, one of whom perfects by filing and the other of whom perfects by possession, Current section 9-103(4) seems to tell us that priority of the possessory security interest in the chattel paper is governed by its location, but that priority of the interest perfected by filing is governed by the debtor's location. This conflict is resolved in Revised Article 9. See *infra* note 54.

financing statement in Delaware.

Even though Delaware law determines whether Moneycenter's security interest is perfected, this does not mean that Delaware law also establishes the effect of that perfection including Moneycenter's priority. Rather, Revised section 9-301(3)(C) tells us that such issues are governed by the jurisdiction in which the chattel paper is located—that is, initially Connecticut, then New York.⁵⁴

d. Promissory Notes

Let us assume that even the nonnegotiable promissory notes taken by Debtor qualify as instruments under Current and Revised Article 9.⁵⁵ The sale of these instruments from Debtor to SPE would be outside the scope of Current Article 9; according to Current section 9-102(1)(b), Current Article 9 governs sales of accounts and chattel paper, but not instruments. Thus, general choice-of-law rules would determine which jurisdiction's law governs these sales.⁵⁶ The grant by SPE to Moneycenter of a security interest in those promissory notes would, however, be within the scope of Current Article 9. Determination of the jurisdiction whose law governs perfection and priority issues follows the same rules as security interests in goods.⁵⁷ Thus, the law of the jurisdiction in which the promissory notes are located—Connecticut or New York—would govern. Under Current Article 9, of course, a security interest in instruments may be perfected only by the secured party taking possession of them.⁵⁸

Again, Revised Article 9 gives us a different answer. First, the sale of the promissory notes is governed by Revised Article 9.⁵⁹ Perfection of SPE's interest, assuming that SPE takes possession of the promissory notes, is governed by the law of the jurisdiction in which the promissory notes are located—initially Connecticut and later New York. Priority and other effects of perfection are governed by the law of that jurisdiction as well.

54. Thus, unlike Current Article 9, Revised Article 9 provides a coherent answer to the question of which law governs priority—whether the security interest is perfected by filing or possession, it is the location of the chattel paper that governs.

55. See U.C.C. § 9-105(1)(i); R. § 9-102(a)(47).

56. A good argument can be made that determination of the law that governs the sales of the Article 9 instruments that are also negotiable instruments under UCC Article 3 would be determined by application of UCC section 1-105.

57. See U.C.C. § 9-103(1).

58. See *id.* § 9-304(1).

59. See R. § 9-109(a)(3). "Promissory note" is defined in section 9-102(a)(65).

The law governing Moneycenter's security interest in the promissory notes granted by SPE will depend on whether Moneycenter takes possession of them. If Moneycenter takes possession, the jurisdiction in which the promissory notes are located will govern all perfection and priority issues. If, on the other hand, Moneycenter does not take possession,⁶⁰ perfection will be governed by the law of SPE's location—that is, Delaware. Assuming that Revised Article 9 is in effect in Delaware, filing a financing statement there will perfect Moneycenter's security interest. In the case of such a nonpossessory security interest, though, priorities and other effects of perfection will be governed by the jurisdiction in which the promissory notes are located—Connecticut, then New York.

2. Example 2

Let us change the facts of Example 1 slightly by keeping all facts the same except that both Debtor's and SPE's chief executive offices are in Toronto. The impact of these changes on the analyses performed with respect to Example 1 is as follows.

a. Inventory

These changes with respect to the debtor would have no effect on governing law under Current Article 9. Governing law is determined on the basis of the locations of the collateral, which have not changed. Also, the change in location of Debtor's chief executive office will have no impact on the law governing perfection in Revised Article 9; when a debtor is a domestic corporation, it is deemed to be located in the state of its incorporation (here Delaware) without regard to where the corporation's chief executive office is located. Finally, these changes in the fact pattern will not change which jurisdiction's law governs other perfection and priority issues. These matters will be governed by the law of the jurisdiction in which the collateral is located.

b. Accounts

These changes with respect to the accounts would bring about a different answer as to governing law under Current Article 9. According to Current section 9-103(3)(b), the law of the jurisdiction

60. Under Revised Article 9, a security interest in instruments may be perfected by filing. *See id.* § 9-312(a).

in which Debtor is located would govern all perfection and priority issues. Both Debtor and SPE are now located in Ontario because their chief executive offices are in Toronto. Thus, Canadian law would govern the perfection of SPE's interest granted by Debtor and the perfection of Moneycenter's security interest granted by SPE. If, contrary to fact,⁶¹ Canada did not provide for perfection of these security interests by filing or recordation, the jurisdictions in which Debtor had its major executive office in the United States would govern perfection by filing.⁶²

Under Revised Article 9, the fact that the executive offices are now in Toronto would not change the analysis. Perfection of the interest granted by Debtor to SPE would be governed by the law of Debtor's location, which would still be Delaware. Similarly, perfection of Moneycenter's interest granted by SPE would be governed by the law of SPE's location—also Delaware.

c. Chattel Paper

Under Current Article 9, perfection of a security interest in chattel paper varies depending on whether the security interest is possessory or nonpossessory. Assuming, as we did above, that SPE's interest is possessory, Current section 9-103(4) tells us to apply the same rule as in the case of goods. Thus, wherever SPE takes the chattel paper, the law of that jurisdiction will govern all perfection and priority matters. Assuming again that Moneycenter's interest is nonpossessory, Current section 9-103(4) tells us to apply the rules in section 9-103(3). Under Current section 9-103, matters concerning perfection would now be governed by the law of Ontario—SPE's location—assuming, of course (as is the case) that Ontario law provides for the perfection of the security interest by filing or recordation.

Under Revised Article 9, this change in the chief executive offices of Debtor and SPE has less effect. In the case of SPE's possessory security interest, Revised section 9-301(2) tells us that the jurisdiction in which the chattel paper is located governs perfection and its effect. Thus, assuming that the change in chief executive offices does not change where the chattel paper is kept, the location of the chief executive office of Debtor has no effect on the governing law. In the case of Moneycenter's nonpossessory security interest, we

61. See the various Canadian Personal Property Security Acts.

62. See U.C.C. § 9-103(3)(c).

look to SPE's location to determine the law governing perfection of the security interest. As a registered organization, SPE is deemed located in its state of incorporation, which is Delaware. Under Revised section 9-301(1), then, Delaware law governs perfection of the security interest, as in Example 1. Priority and the effect of perfection are governed by the law of the jurisdiction in which the chattel paper is located, also as in Example 1.

d. Promissory Notes

The sale of the promissory notes from Debtor to SPE would remain outside the scope of Current Article 9. The security interest granted by SPE to Moneycenter, though, would be governed by Current Article 9. Under Current Article 9, issues relating to perfection and priority of that security interest would be governed by the location of the promissory notes; the location of the debtor is not relevant.

Under Revised Article 9, the change of the chief executive office to Toronto would not change the law governing perfection of the security interests. In the case of SPE's possessory interest, the location of the promissory notes will determine the governing law for both perfection and priority issues. In the case of Moneycenter's nonpossessory interest, the law of SPE's location—Delaware—will govern perfection, and the law of the location of the promissory notes will govern priority.

3. Example 3

Example 3 has the same facts as Example 1 (with the chief executive offices of Debtor and SPE in New York), but Debtor and SPE are incorporated under the laws of the Cayman Islands.

a. Inventory

The jurisdiction in which Debtor is incorporated is not relevant for perfection and priority issues under Current Article 9. These matters are governed by the jurisdictions in which the inventory is located. Under Revised Article 9, on the other hand, this change in the facts is quite significant. Perfection of a security interest in goods is governed by the law of the jurisdiction in which the debtor is located. Since Debtor no longer qualifies as a registered

organization,⁶³ our analysis must start with the residual rule in Revised section 9-307(b). Under that rule, Debtor is deemed to be located in New York, the location of its chief executive office. Because none of the exceptions to the residual rule is applicable, New York law will govern perfection, and a financing statement filed there will perfect Finco's security interest. Priority and the effect of perfection will continue to be governed by the jurisdictions in which the collateral is located.

b. Accounts

Debtor and SPE are located in New York under Current Article 9's chief executive office test. Thus, under Current Article 9, New York law would govern perfection and priority of the security interest granted by Debtor to SPE and the security interest granted by SPE to Moneycenter. Under Revised Article 9, on the other hand, this change in the facts is quite significant. Perfection of a security interest in accounts is governed by the law of the jurisdiction in which the debtor is located. Since Debtor and SPE are not registered organizations,⁶⁴ our analysis must start with the residual rule in Revised section 9-307(b). Under that rule, Debtor and SPE are deemed to be located in New York, the location of their chief executive offices. Once again, since none of the exceptions to the residual rule is applicable, New York law will govern perfection, and a financing statement filed there will perfect the security interests of SPE and Finco. Priority and the effect of perfection will also be governed by New York law under the rule of Revised section 9-301(1).

c. Chattel Paper

Under Current Article 9, perfection of a security interest in chattel paper varies depending on whether the security interest is possessory or nonpossessory. Assuming again that SPE's interest is possessory, Current section 9-103(4) tells us to apply the same choice-of-law rule as in the case of goods. Thus, wherever SPE takes the chattel paper, the law of that jurisdiction will govern all perfection and priority matters. Assuming again that Moneycenter's interest is nonpossessory, Current section 9-103(4) tells us to apply the rules in

63. Under Revised section 9-102(a)(70), a registered organization must be chartered by a state or by the United States.

64. See *supra* text accompanying note 34.

section 9-103(3). Under Current section 9-103, matters concerning perfection would now be governed by the law of New York because, as the location of SPE's chief executive office, it is deemed to be its location.

Applying Revised Article 9 to SPE's possessory security interest in the chattel paper, we note again that the jurisdiction in which the chattel paper is located governs perfection and its effect. The fact that Debtor is incorporated in the Cayman Islands has no effect. With respect to Moneycenter's nonpossessory security interest, Revised section 9-301(1) tells us to turn to the law of the jurisdiction in which SPE is located for rules governing perfection. Because SPE is not a registered organization, the residual rule of Revised section 9-307(b) is applicable and SPE is deemed to be located in New York. Thus, filing a financing statement in New York will perfect Moneycenter's security interest. The priority of that security interest will be determined under the law of the jurisdiction in which the chattel paper is located.

d. Promissory Notes

The sale of the promissory notes from Debtor to SPE would remain outside the scope of Current Article 9. The security interest granted by SPE to Moneycenter, though, would still be governed by Current Article 9. Under Current Article 9, issues relating to perfection and priority of that security interest would be governed by the location of the promissory notes; the location of the debtor is not relevant.

Again, the sale of the promissory notes from Debtor to SPE is governed by Revised Article 9. Perfection and priority of this possessory interest are governed by the location of the promissory notes. With respect to Moneycenter's nonpossessory security interest, perfection is governed by the location of SPE, which is New York. Priority and other effects of perfection or nonperfection are governed by the law of the jurisdiction in which the promissory notes are located.

4. Example 4

For the last two examples, we will move more aspects of the debtors' operations offshore. First, let us assume that Debtor is a corporation organized under the laws of the nation of Draconia, a country without a filing system for security interests, and that Debtor

has its chief executive office in Draconia. Debtor has some inventory in Illinois, in which it has granted a security interest to Finco. The accounts, chattel paper, and promissory notes generated by the sale of that inventory are sold by Debtor to SPE, a Cayman Island corporation with chief executive office in New York. SPE borrows from Moneycenter against those rights to collect from Debtor's customers.

a. Inventory

Under Current Article 9, Finco's security interest in Debtor's inventory is governed by the law of Illinois—the location of the collateral. Under Revised Article 9, though, perfection of that security interest is governed by the location of the debtor. If the residual rule of Revised section 9-307(b) applied, Debtor would be deemed to be located at the location of its chief executive office in Draconia. The exception in Revised section 9-307(c) overrides the residual rule, however. Accordingly, because the law of Draconia does not require 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, Debtor is deemed, for Revised Article 9 purposes, to be located in the District of Columbia.⁶⁵ Accordingly, Finco should file a financing statement in the District of Columbia. Effect of perfection and priority issues with respect to that security interest are governed by the law of Illinois, the location of the collateral.

b. Accounts

Under Current Article 9, the law governing SPE's interest in Debtor's accounts is determined primarily by application of Current section 9-103(3)(c). First, though, we look to Current section 9-103(3)(b), which tells us that the law of the debtor's location usually governs. Next, though, Current section 9-103(3)(c) tells us that because Draconia (the home of Debtor's chief executive office) does not provide a filing system, SPE's interest is governed by the law of the jurisdiction in the United States in which Debtor has its major executive office. If the office in Illinois is Debtor's only "executive

65. See R. § 9-307(c).

office” in the United States, then, Illinois law will govern perfection and priority issues. If Debtor has more than one United States “executive office,” though, a determination must be made as to which one is the major one. SPE would be well-advised to take no chances and file in each state in which a U.S. office is located. Perfection and priority issues as to Moneycenter’s security interest in the receivables would be governed by the law of New York, SPE’s location under the chief executive office rule.

Under Revised Article 9, the analysis is, of course, different. Perfection and priority issues with respect to SPE’s interest in Debtor’s accounts are governed by the law of Debtor’s location. As described above, because the law of Draconia does not require 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, Debtor is deemed, for Revised Article 9 purposes, to be located in the District of Columbia. Thus, SPE should file a financing statement in the District of Columbia.

For perfection and priority issues with respect to Moneycenter’s interest in the receivables granted by SPE, we turn to the law of the jurisdiction in which SPE is located. Because SPE’s chief executive office is in New York, it is located there. Accordingly, Moneycenter should file a financing statement in New York.

c. Chattel Paper

Under Current Article 9, perfection of a security interest in chattel paper varies depending on whether the security interest is possessory or nonpossessory. Assuming again that SPE’s interest is possessory, Current section 9-103(4) tells us to apply the same choice-of-law rule as in the case of goods. Thus, wherever SPE takes the chattel paper, the law of that jurisdiction will govern all perfection and priority matters. Assuming, again, that Moneycenter’s interest is nonpossessory, Current section 9-103(4) tells us to apply the rules in section 9-103(3). Under Current section 9-103, matters concerning perfection would now be governed by the law of New York, which, as the location of SPE’s chief executive office, is deemed to be its location.

Applying Revised Article 9 to SPE’s possessory security interest in the chattel paper, we note again that the jurisdiction in which the

chattel paper is located governs perfection and its effect. The fact that Debtor is incorporated in Draconia and has its chief executive office there has no effect. With respect to Moneycenter's nonpossessory security interest granted by SPE, Revised section 9-301(1) tells us to turn to the law of the jurisdiction in which SPE is located for rules governing perfection. Because SPE is not a registered organization, the residual rule of Revised section 9-307(b) is applicable, and SPE is deemed located in New York. Thus, filing a financing statement in New York will perfect Moneycenter's security interest. The priority of that security interest will be determined under the law of the jurisdiction in which the chattel paper is located.

d. Promissory Notes

The sale of the promissory notes from Debtor to SPE would remain outside the scope of Current Article 9. The security interest granted by SPE to Moneycenter, though, would still be governed by Current Article 9. Under Current Article 9, issues relating to perfection and priority of that security interest would be governed by the location of the promissory notes; the location of the debtor is not relevant.

Again, the sale of the promissory notes from Debtor to SPE is governed by Revised Article 9. Perfection and priority of this possessory interest is governed by the location of the promissory notes. With respect to Moneycenter's nonpossessory security interest, perfection is governed by the location of SPE, which is New York. Priority and other effects of perfection or nonperfection are governed by the law of the jurisdiction in which the promissory notes are located.

5. Example 5

Example 5 has the same facts as Example 4, except that Draconia has a filing system for perfection of security interests.

a. Inventory

Under Current Article 9, Finco's security interest in Debtor's inventory is governed by the law of Illinois—the location of the collateral. Under Revised Article 9, though, perfection of that security interest is governed by the location of the debtor. Under the residual rule of Revised section 9-307(b), Debtor is deemed to be located at the location of its chief executive office in Draconia.

Because Draconia has a filing system that complies with Revised section 9-307(c), District of Columbia law is not invoked. Finco should file in Draconia to perfect its interest under Revised Article 9. The priority of that security interest, though, will be governed by the law of Illinois.

b. Accounts

Under Current Article 9, the law of the location of the debtor—Draconia—governs perfection and priority rules arising from the grant of the interest from Debtor to SPE. Because Draconia has a filing system, this rule of Current sections 9-103(3)(b) and (d) is not overridden by Current section 9-103(3)(c). Perfection and priority of the security interest granted by SPE to Moneycenter are governed by the law of New York—the location of SPE.

Under Revised Article 9, Debtor is again deemed located in Draconia. Thus, perfection and priority of the interest granted by Debtor to SPE are governed by the law of Draconia; SPE's interest should be perfected by filing in Draconia. Perfection and priority of the security interest granted by SPE to Moneycenter are governed by the law of the location of SPE—New York.

c. Chattel Paper

Under Current Article 9, perfection of a security interest in chattel paper varies depending on whether the security interest is possessory or nonpossessory. Assuming again that SPE's interest is possessory, Current section 9-103(4) tells us to apply the same choice-of-law rule as in the case of goods. Thus, wherever SPE takes the chattel paper, the law of that jurisdiction will govern all perfection and priority matters. Assuming, again, that Moneycenter's interest is nonpossessory, Current section 9-103(4) tells us to apply the rules in section 9-103(3). Under Current section 9-103, matters concerning perfection would now be governed by the law of New York, which, as the location of SPE's chief executive office, is deemed to be its location.

Applying Revised Article 9 to SPE's possessory security interest in the chattel paper, we note again that the jurisdiction in which the chattel paper is located governs perfection and its effect. The fact that Debtor is incorporated in Draconia and has its chief executive office there has no effect. With respect to Moneycenter's nonpossessory security interest granted by SPE, Revised section 9-301(1) tells us to

turn to the law of the jurisdiction in which SPE is located for rules governing perfection. Because SPE is not a registered organization, the residual rule of Revised section 9-307(b) is applicable and SPE is deemed to be located in New York. Thus, filing a financing statement in New York will perfect Moneycenter's security interest. The priority of that security interest will be determined under the law of the jurisdiction in which the chattel paper is located.

d. Promissory Notes

The sale of the promissory notes from Debtor to SPE would remain outside the scope of Current Article 9. The security interest granted by SPE to Moneycenter, though, would still be governed by Current Article 9. Under Current Article 9, issues relating to perfection and priority of that security interest would be governed by the location of the promissory notes; the location of the debtor is not relevant.

Again, the sale of the promissory notes from Debtor to SPE is governed by Revised Article 9. Perfection and priority of this possessory interest is governed by the location of the promissory notes. With respect to Moneycenter's nonpossessory security interest, perfection is governed by the location of SPE, which is New York. Priority and other effects of perfection or nonperfection are governed by the law of the jurisdiction in which the promissory notes are located.

III. INHERENT LIMITATIONS ON APPLICABILITY OF REVISED ARTICLE 9

A. Introduction

Article 9 provides a remarkably complete system for resolving legal issues concerning secured transactions. Part 3 of Revised Article 9, moreover, unlike its predecessor, provides comprehensive rules for determining which law governs perfection and priority issues in multijurisdictional transactions. It would be natural, therefore, for attorneys to believe that they can ascertain the correct answer to international secured transaction issues by mastering Article 9 and, when Article 9 indicates that the law of a foreign jurisdiction governs, referring to that law. For the reasons described in Part III of this article, however, that belief, while seductive, would be incorrect. Part III explores both the limits of the rules provided in Part 3 of Revised

Article 9 and the inherent limitations on the applicability of those rules to international secured transactions, particularly with respect to issues of attachment, rights, and duties of account debtors and other persons obligated on collateral, perfection, priority, and enforceability.

As Part III details, there are at least five limitations on the utility of Revised Article 9's rules for international secured transactions. First, not all important issues that are likely to arise in an international secured transaction are governed by the comprehensive scheme of Part 3 of Revised Article 9. Second, even when the Part 3 rules appear to be applicable by their own terms, it will not always be clear whether those rules actually apply to a transaction with minimal relation to a Revised Article 9 jurisdiction. Third, Part 3 rules sometimes require a bifurcation of foreign legal systems that may be impossible or unpredictable. Fourth, there is no guarantee that a foreign forum will apply the Revised Article 9 choice-of-law rules and substantial reason to doubt that it will do so. Fifth, there is no guarantee that a foreign forum will enforce the judgment of a United States court applying Revised Article 9.

The existence of these limitations should not be interpreted as a failing of Revised Article 9. Indeed, with the exception of the third limitation (the bifurcation required by the Revised Article), these are issues that cannot be resolved solely under domestic law. At most, Article 9 can determine the results *under Article 9* for a transaction with international implications. It cannot determine when Article 9's rules will be applied in a foreign forum and cannot require a foreign forum to respect judgments made in the United States by application of those rules. Thus, the limitations set out below are primarily inherent in the idea of crafting domestic law to solve transnational problems.

B. Issues Not Addressed by Part 3 of Revised Article 9

1. Attachment

While Part 3 of Revised Article 9 provides comprehensive rules for resolving matters of perfection and priority, it is silent as to the governing law for matters of attachment. Inasmuch as attachment is one of the elements of perfection,⁶⁶ it might be argued that the Part 3 rules cover attachment. That argument, however, is refuted by

66. See *id.* § 9-308(a).

Official Comment 2 to Revised section 9-301, which explicitly states that “the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement is governed by the rules in Section 1-105.” Accordingly, to examine the rules concerning attachment in international secured transactions, we must be guided by UCC section 1-105.

a. Conflict Between Revised Article 9 and Substantive Law of Foreign Jurisdiction

Assume that a debtor located in Draconia grants to a secured party located in Euphoria (a state of the United States that has enacted Revised Article 9) a security interest in all of the debtor’s assets, wherever located, including after-acquired assets. The security agreement states that the law governing the security agreement is the law of Euphoria. Furthermore, assume that value is given, the debtor has rights in the currently-existing collateral, and the debtor signs the security agreement, which reasonably describes the collateral.

Certainly, under the substantive rules of Revised Article 9, the security interest has attached, at least with respect to currently-existing collateral.⁶⁷ But will those attachment rules of Revised Article 9 be applied to make this determination? After all, the debtor is not located in a Revised Article 9 jurisdiction. If the goods or other tangible personal property assets included in the collateral are located outside of a Revised Article 9 jurisdiction, or if the collateral includes intangible rights governed by the law of a non-Revised Article 9 jurisdiction, application of the Revised Article 9 attachment rules may be problematic. This is the case because concepts of property law and assignability in a non-Revised Article 9 jurisdiction may be implicated.

Let us assume that Draconia, where the debtor is located, has a legal culture and tradition very different from that from which Revised Article 9 emerged. Security interests in personal property are much more difficult to create under Draconian property law than under Revised Article 9. Under Draconian law, a security interest in goods and other tangible personal property must be evidenced by a physical transfer of possession of the collateral to the secured party as pledgee. Moreover, accounts and other intangible personal property assets may not be voluntarily encumbered in bulk but must be

67. *See id.* § 9-203(a)-(b).

separately identified. Finally, after-acquired personal property collateral must be voluntarily encumbered by a separate writing executed after the collateral has come into existence and the debtor has rights in it. Since these concepts are property law concepts under the law of Draconia, parties may not, under Draconian law, contract out of them merely by choosing the law of another jurisdiction to govern the conveyance of a security interest.

These obstacles, of course, do not exist in Revised Article 9. Revised Article 9 permits nonpossessory security interests in goods and other tangible personal property.⁶⁸ It permits security interests in personal property in bulk by general description without specific identification.⁶⁹ It does not require, for the security interest to attach to after-acquired personal property assets, a separate writing at the time that the assets come into existence and the debtor acquires rights in the assets.⁷⁰

Likewise, we might imagine that, under the law of Draconia, account debtors and other persons obligated on collateral are free to negotiate restrictions on assignments to rights to payment. We might also imagine that clauses or rules of law prohibiting the encumbering of leasehold interests in goods or licensee interests in intellectual property licenses are strictly enforced under Draconian law.

Revised Article 9, however, overrides antiassignment clauses on contractual rights to payment and also permits a security interest to attach in a debtor's leasehold in goods or licensee interest in intellectual property, notwithstanding an antiassignment clause in the lease or license agreement and notwithstanding a rule of state law in the Revised Article 9 jurisdiction preventing the security interest from attaching.⁷¹

b. Possible Limitations of Revised Article 9

If, at any point, it must be determined if the secured party's security interest in any of the assets has attached, it will be important to know if the Revised Article 9 attachment rules govern. This question could be critical either because attachment is an element of perfection (as is the case in the United States under Article 9) or because the dispute is solely between the debtor and secured party. In

68. *See id.* § 9-205.

69. *See id.* § 9-108.

70. *See id.* § 9-204.

71. *See id.* §§ 9-406(d), (f), 9-407, 9-408(a), (d).

any event, if the attachment dispute implicates any of the property law and assignability concepts of Draconian law that differ from those of Revised Article 9, determining the applicability of Revised Article 9 is critical. While the parties contracted, in the security agreement, that the law of Euphoria would govern—and that choice likely fulfills the requirement of UCC section 1-105 that the transaction bear a reasonable relation to the jurisdiction chosen in light of the secured party's presence there—one should not be overconfident that the law of Euphoria will definitely resolve these matters. Indeed, the answer may depend on whether the forum that resolves the dispute is in Draconia or Euphoria.

(1) Foreign Forum

There is a significant likelihood that if the court hearing the attachment dispute is in Draconia, application of Article 9 might be limited. First, a Draconian court, applying its own choice-of-law rules, might view its property law rules as mandatory law and, therefore, not avoidable by a contractual choice of a different jurisdiction's law.⁷² This view might be understandable with respect to goods or other tangible personal property physically situated in Draconia. The Draconian court, viewing tangible personal property within its jurisdiction, may well conclude that conveyances of goods and other tangible personal property situated in Draconia must be accomplished under Draconian law. If the Draconian court

72. Generally accepted international choice-of-law rules recognize circumstances in which a forum state need not apply the law of the contract if to do so would lead to a result contrary to a fundamental public policy of the forum state. See Convention of the Organization of American States on the Law Applicable to International Contracts, Mar. 17, 1994, art. 11, 33 I.L.M. 733, 734 [hereinafter OAS Convention] ("Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements."); *id.* at art. 18 ("Application of the law designated by this Convention may only be excluded when it is manifestly contrary to the public order of the forum."); Council Convention on the Law Applicable to Contractual Obligations, 80/934, art. 7, 1980 O.J. (L 266) 1, 2 [hereinafter Treaty of Rome] (mandatory rules); *id.* at art. 16 (*ordre public*); *Convention on Assignment in Receivables Financing*, 30th Sess., art. 32, U.N. Doc. A/CN.9/WG.II/WP.102 (1999) [hereinafter Draft UNCITRAL Receivables Convention] (mandatory rules); *id.* at art. 33 (public policy); INTERNATIONAL INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.4 (1994) [hereinafter UNIDROIT PRINCIPLES] ("Nothing in these Principles shall restrict the application of mandatory rules . . . which are applicable in accordance with the relevant rules of private international law."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) ("The law of the state chosen by the parties . . . will be applied . . . unless . . . the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.").

determines that application of its property law is mandatory in this situation, the court would likely hold invalid the grant of a nonpossessory security interest, the grant of a security interest in bulk, and the security interest in after-acquired assets for which a subsequent separate writing is lacking.

Even if the Draconian court does not view Draconian property law as having mandatory application to property in Draconia, it might nonetheless apply that law to the grant of the security interest despite the contractual choice of Euphorian law. After all, the choice-of-law principles in Draconia may not allow as much party autonomy in selecting governing law as is allowed by UCC section 1-105. Assuming that the Draconian court would find that the debtor is located in Draconia,⁷³ it may apply Draconian property law principles to conveyances by the debtor on the theory that the location of the secured party is insufficient to permit that location's law to be contractually selected. Thus, it may apply those principles not only to goods and other tangible personal property situated in Draconia but also to assets for which a situs might be difficult to determine, such as goods in transit, mobile goods, or intangible assets.

Applicability of the rules in Revised Article 9 that would override assignability restrictions between account debtors and the Draconian debtor is even more problematic. Even choice-of-law rules respecting party autonomy and, thus, giving effect to contractual selection of governing law do not fully resolve this issue; after all, the account debtors were not party to the security agreement that chose the law of Euphoria. Thus, the Draconian court might not apply Revised Article 9 to override the assignability restrictions that are enforceable under Draconian law. That would be particularly likely where, for example, the lease or license agreement creating this collateral is governed by the law of Draconia⁷⁴ or where the

73. The issue of the location of a debtor that is a corporation or other legal entity, of course, may not in and of itself be easy to determine. The court might look to the jurisdiction of the debtor's legal organization, of its chief executive or other center of its activities, or of its registered office. Even the jurisdiction of its chief executive office or other center of activities may be subject to factual dispute. See, e.g., Lynn M. LoPucki, *Cooperation in International Bankruptcy: A Post-Universalist Approach*, 84 CORNELL L. REV. 696, 704-25 (1999) (discussing the difficulties of determining a debtor's "home country" among countries seeking international cooperation in the bankruptcy cases of multinational companies).

74. Under widely accepted international choice-of-law principles, parties have significant latitude to choose the law to govern their contractual relationships with each other. See OAS Convention, *supra* note 72, art. 7 (stating that "[t]he contract shall be governed by the law chosen by the parties"); Treaty of Rome, *supra* note 72, art. 3(1) (stating that "[a] contract shall be governed by the law chosen by the parties"); UNIDROIT PRINCIPLES, *supra* note 72, art. 1.1 (stating that "[t]he parties are free to enter into a contract and determine its content");

Draconian court viewed freedom of contract to create such restrictions as a paramount public policy of Draconia.⁷⁵

Of course, there may well be circumstances in which Revised Article 9's invalidation of the antiassignment clause of the lease or license agreement may be respected by the Draconian court. For example, the lease or license agreement may be governed by the law of a Revised Article 9 jurisdiction. This may be the case because Draconia's choice-of-law rules lead to that conclusion or because the parties to the lease or license agreement selected that law to govern their contract. Under its own choice-of-law principles, the Draconian court might, absent a public policy concern, apply the law of the Revised Article 9 jurisdiction chosen by the parties to the question of whether the antiassignment clause is enforceable. In any event, if, under Draconian conflicts rules, the lease or license agreement would be governed by the law of a Revised Article 9 jurisdiction and Draconian public policy is not such so as to override that law, then the Draconian court would look to Revised Article 9 and likely conclude that the security interest in the accounts attached notwithstanding the antiassignment clause in the lease or license agreement.

Still, there is some cause for concern. The rendering ineffective of an antiassignment clause would in many countries be considered as unusual and contrary to widely respected views of freedom of contract.⁷⁶ While it would seem likely that a Draconian court would merely apply the law of the contract to determine whether the antiassignment clause is effective, a secured party relying on the application of Revised Article 9 in a foreign forum to render ineffective an antiassignment clause may wish to proceed with caution.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 (stating that "[i]ssues in contract are determined by the law chosen by the parties in accordance with the rule of § 187"); *id.* § 187(1) (stating that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue"). Presumably, the enforceability of a restriction on assignment would, as an initial matter at least, be governed by the law chosen by the parties to govern their contract. This is the tentative conclusion of the Working Group on International Contract Practices of the United Nations Commission on International Trade Law ("UNCITRAL"). See Draft UNCITRAL Receivables Convention, *supra* note 72, art. 30.

75. See *supra* note 73.

76. The extent to which an antiassignment clause should be rendered ineffective in the context of receivables financing has been hotly debated by the Working Group dealing with the Draft UNCITRAL Receivables Convention. See Spiro V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution*, 8 DUKE J. COMP. & INT'L L. 315, 330-32 (1998).

(2) Revised Article 9 Forum

There may even be limits to the application of Revised Article 9 to the attachment of the secured party's security interest if the dispute is heard in the courts of Euphoria. Although UCC section 1-105 would seem to provide the court in Euphoria with a sufficient legal basis to apply Revised Article 9 to allow a security interest to attach, the history of choice-of-law decisions concerning cases under the UCC suggests that section 1-105 is often given less-than-robust effect even by American courts. Indeed, an American court may pause before giving effect to a choice-of-law clause designating the law of Euphoria where the security agreement encompasses goods or other tangible personal property assets situated in Draconia or, if the court views the debtor itself as located in Draconia, assets, such as goods in transit, mobile goods, or intangible assets, whose situs is difficult to determine. In these cases, the Euphorian court may be reluctant to apply Revised Article 9 attachment rules. Instead, as a matter of international comity⁷⁷ and non-UCC choice-of-law principles, equities may be viewed by the Revised Article 9 court to favor deference to Draconian law for determining the attachment of a security interest in these assets.⁷⁸

Moreover, in addressing the issue of assignability of accounts and other intangible assets, the court in Euphoria may be even more likely to apply non-UCC choice-of-law rules.⁷⁹ As noted above,⁸⁰ UCC

77. The often cited definition of "comity" is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); see also *In re Maxwell Communications Corp.*, 93 F.3d 1036 (2d Cir. 1996).

78. Choice-of-law rules outside of the UCC would typically require an analysis of the jurisdiction that has the "most significant relationship" to the parties, the collateral, and the security interest itself in order to determine which law governs the validity of a grant of a security interest in a chattel. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2)(c), 251(1).

79. The possibility of a Revised Article 9 court applying non-UCC choice-of-law principles to determine the enforceability of an assignment restriction in a contract is recognized in Official Comment 3 to Revised section 9-401. That Official Comment uses the example of a debtor in State X entering into a contract with an account debtor in State Y. The contract is governed by the law of State Y. In the example, State X has adopted Revised Article 9, but State Y has not. The Official Comment states:

This Article does not provide a specific answer to the question of which State's law applies to the restriction on assignment in the example. However, assuming that under non-UCC choice-of-law principles the effectiveness of the restriction would be governed by the law of State Y, which governs the . . . agreement, the fact that State X's Article 9 governs the secured transaction between [the secured party] and [the debtor] would not override the otherwise applicable law governing the agreement.

80. See *supra* text accompanying note 74.

principles of party autonomy in choice-of-law matters are less applicable when the issue, such as restrictions on assignment, has an impact on parties that did not participate in the choice of law. Rather, the court might look to Draconian law on the issue of assignability in the event that the lease or license agreement is, by agreement of its parties, governed by Draconian law.⁸¹ It might also look to Draconian law if the account debtor or person obligated on the collateral was located in Draconia and the court felt that it should defer to Draconia's paramount public policy on matters relating to permitted restrictions on assignability.⁸²

Absent paramount public policy considerations, though, if the parties to the lease or license agreement chose the law of a Revised Article 9 jurisdiction to govern it and that choice of law is effective under UCC section 1-105 or other applicable law, the Euphorian court would likely apply Revised Article 9 to render the antiassignment clause ineffective and thus to permit the security interest to attach.

2. Rights and Duties of Account Debtors and Other Obligors

a. Conflict Between Revised Article 9 and Substantive Law of Foreign Jurisdiction

Concerns also arise with respect to the rights and duties of account debtors and other persons obligated on collateral. The secured party may be assuming that the rights of and duties to the secured party of each account debtor or other obligated person are as set forth in Part 4 of Revised Article 9. This may not be the case, though, if the account debtor or other person obligated on collateral is not in a Revised Article 9 jurisdiction or if the relevant rights and duties of the account debtor or other person are governed by the law of a non-Revised Article 9 jurisdiction.

Let us revisit Draconia. We might imagine that under Draconian law an account debtor on an account owed to the debtor need not follow a notice of assignment and payment instruction from a secured party if the contract between the debtor and the account debtor giving rise to the account prohibits assignment. Draconian law might also provide that, if a security interest in an account is created by the debtor, the secured party is affirmatively liable to the account debtor

81. See *supra* note 74.

82. See *supra* note 72.

for the debtor's nonperformance of the contract with the account debtor.

Revised Article 9, of course, produces a different result. The antiassignment clause is ineffective under Revised Article 9,⁸³ and the account debtor must follow the notice of assignment and payment instruction to be discharged.⁸⁴ Moreover, the secured party is not liable for the debtor's nonperformance under the debtor's contract with the account debtor.⁸⁵

b. Possible Limitations on the Application of Revised Article 9

(1) Foreign Forum

If a dispute arises in a Draconian court concerning the account debtor's rights and obligations, the applicability of Revised Article 9 may be limited. As discussed above in the context of attachment, if the contract under which the account debtor's obligation arises is governed by the law of Draconia, the Draconian court, by applying its choice-of-law rules, may give effect to Draconian substantive law.⁸⁶ If so, the account debtor would be able to ignore the notice of assignment and payment instruction or, if the debtor did not perform, bring an action against the secured party for the debtor's nonperformance. Similarly, even if the contract between the debtor and the account debtor states that it is governed by the law of a Revised Article 9 jurisdiction, the Draconian court might view both freedom of contract to restrict assignability and account debtor protection as paramount public policies of Draconia and apply Draconian substantive law notwithstanding the contractual choice of law.⁸⁷

(2) Revised Article 9 Forum

The applicability of Revised Article 9 rules may not even be certain if the matter is heard in the courts of a jurisdiction such as Euphoria that has enacted Revised Article 9. In the absence of the firm rules in Part 3 of Revised Article 9, the court, guided only vaguely by UCC section 1-105, might look to Draconian law for the

83. See R. § 9-406(d).

84. See *id.* § 9-406(a).

85. See *id.* §§ 9-402, 9-405(a)-(b). Revised Article 9 does provide for exceptions in consumer transactions. See *id.* § 9-405(c)-(d).

86. See *supra* Part III.B.1.a.

87. See *supra* note 72.

rules governing those matters affecting the account debtor if the underlying contract between the debtor and the account debtor states that it is governed by Draconian law.⁸⁸ Alternatively, the court might defer to Draconia's paramount public policy on issues of freedom of contract regarding restrictions on assignability and account debtor protection.⁸⁹ The Euphorian court should, however, absent deference to any paramount public policy of Draconia, apply Revised Article 9 if the contract between the debtor and the account debtor is stated to be governed by the law of a Revised Article 9 jurisdiction.

3. Enforcement of the Security Interest After Default

Another area of uncertainty with respect to international secured transactions concerns enforcement of the security interest after the debtor's default. Once again, the detailed rules of Part 3 of Revised Article 9 do not apply here. Yet, this is an area of critical importance, for the value of a secured transaction as compared to the extension of unsecured debt is in the ability of the secured party to enforce its rights upon default. A secured party who cannot be certain that the full panoply of rights given to secured parties in Part 6 of Revised Article 9 will be available will price its transaction accordingly.

a. Conflict Between Revised Article 9 and Substantive Law of Foreign Jurisdiction

Let us assume that the security agreement in question states that it is governed by the law of Euphoria—a jurisdiction that has enacted Revised Article 9 and the transaction, as required by UCC section 1-105, bears a “reasonable relation” to Euphoria—perhaps because the secured party is located there.

What if the debtor is not located in Euphoria, though? Alternatively, what are the secured party's rights if the goods or other tangible personal property included in the collateral are located outside of a Revised Article 9 jurisdiction, or if the collateral includes intangible rights governed by the law of a non-Revised Article 9 jurisdiction? Will the secured party have access to all of the rights given to secured parties by Part 6 of Revised Article 9? Will the debtor have the protections afforded by that Part?

Revised Article 9, we know, provides certain rights to the

88. See *supra* note 74.

89. See *supra* note 72.

secured party. Antiassignment clauses relating to rights to payment are ineffective to prevent enforcement of a security interest in a right to payment.⁹⁰ Self-help repossession remedies are permitted,⁹¹ nonjudicial foreclosure sales are permitted,⁹² and the secured party may, subject to certain protections of the debtor and third parties, retain collateral in partial satisfaction of the secured debt.⁹³ Revised Article 9 also contains important debtor protections, however, including the right to notice at various points in the enforcement process and the right to assure that all aspects of the disposition of collateral are commercially reasonable.

Under the law of Draconia, we might imagine by way of contrast, antiassignment clauses are strictly enforced, self-help repossession remedies are prohibited, only judicial foreclosure sales are permitted, and the secured party may not retain, even with the consent or acquiescence of the debtor, collateral in partial satisfaction of the secured debt.

b. Possible Limitations on the Applicability of Revised Article 9

(1) Accounts

The secured party may wish to collect amounts due from account debtors directly, rather than seek turnover of those payments from the debtor. This right, of course, is explicitly granted by Revised Article 9.⁹⁴ If the account debtor is located in Draconia, though, the account debtor may resist paying the secured party directly, especially if the underlying contract between the debtor and the account debtor contains an antiassignment clause. It is likely that the analysis of this issue regarding direct enforcement against the account debtors will parallel the analysis of attachment and account debtor rights and obligations, as discussed above, relating to an account containing an antiassignment clause.⁹⁵

(2) Tangible Personal Property: Foreign Forum

The secured party might also, however, wish to exercise Revised

90. See R. § 9-406(d).

91. See *id.* § 9-609. The secured party may, however, proceed to take possession of collateral without the use of judicial process only if "it proceeds without breach of the peace." *Id.* § 9-609(b)(2).

92. See *id.* §§ 9-610 to 9-619.

93. See *id.* §§ 9-620 to 9-622.

94. See *id.* § 9-607.

95. See *supra* Part III.B.1-2.

Article 9 self-help repossession remedies relating to tangible personal property assets located in Draconia, either to sell personal property assets in a nonjudicial foreclosure sale or, if the debtor consents or does not object, to retain personal property assets in partial satisfaction of the secured debt.

A Draconian court, hearing a dispute as to whether the secured party can exercise these Revised Article 9 remedies, might not apply Revised Article 9. As in the case of our analysis of attachment,⁹⁶ the Draconian court may view the secured party's remedies as property law remedies that are mandatory under Draconian law with respect to tangible personal property in Draconia. If so, it would not defer to the choice in the security agreement of Euphorian law as the law governing the secured party's enforcement rights. If the debtor is found by the Draconian court to be located in Draconia, the court may use a similar analysis to mandate the application of Draconian law for enforcement of the security interest against goods in transit, mobile goods, and intangible assets for which the situs is difficult to determine.⁹⁷ Even if the Draconian court did not determine that the enforcement scheme for security interests under Draconian law is mandatory and, therefore, would otherwise give effect to Revised Article 9 remedies as required by the choice-of-law clause in the security agreement, it might nevertheless regard some of the individual Article 9 remedies, such as self-help repossession, as being contrary to Draconian public policy and therefore unenforceable in Draconia.⁹⁸

(3) Tangible Personal Property: Revised Article 9 Forum

The application of Revised Article 9 remedies might also be limited in a court in Euphoria. Even in light of the choice-of-law clause in the security agreement and the effectiveness granted to such clauses by UCC section 1-105, the Euphorian court may hesitate to permit application of Revised Article 9 remedies with respect to goods in Draconia or with respect to intangibles and other collateral that is not site-specific if the court views the debtor to be located in

96. *See supra* text accompanying notes 67-71.

97. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 254 (1971) (determining the law governing the enforcement of a security interest in a chattel, requiring a determination of which jurisdiction has the "most significant relationship to the parties, the chattel and the security interest").

98. *See supra* note 72.

Draconia.⁹⁹ As a matter of international comity and non-UCC choice-of-law rules, the Revised Article 9 court may defer to Draconian law as the more appropriate law to apply.¹⁰⁰

Any uncertainty about the applicability of the Revised Article 9 Part 6 rules may cause additional problems for the secured party. Under Revised Article 9, most buyers at a foreclosure sale are assured that they are getting good title to the assets they purchase. This may not be the case, however, under the law of Draconia, especially if the foreclosure sale follows Revised Article 9 procedures rather than Draconian procedures. Thus, potential buyers at a foreclosure sale for assets located in (or repossessed from) Draconia or for intangible assets owned by the Draconian debtor cannot be assured that the title of the successful buyer of the assets would be recognized by a Draconian court. Without that assurance, though, bidding might be chilled. Not only might this result in a lower price obtained and a larger, perhaps uncollectible, deficiency, but it also might not be commercially reasonable under Revised Article 9 itself for the secured party to proceed in conducting such a foreclosure sale in these circumstances.¹⁰¹

C. Perfection

Unlike issues of attachment, assignability, and enforcement, the mandatory choice-of-law rules in Part 3 of Revised Article 9 deal specifically with the law that governs perfection of security interests. Even so, total reliance on those provisions could be quite risky. For one thing, the transaction may be so tangentially related to a Revised Article 9 jurisdiction that the provisions may not be applied even in the courts of that jurisdiction. Second, the Part 3 provisions require a court applying them to parse a distinction between rules of perfection, which may be governed by the laws of one jurisdiction, and rules of priority, which may be governed by the laws of a different jurisdiction.¹⁰² Such a fine parsing may be impossible or, at least, difficult to predict in advance with any degree of certainty.

99. See *supra* Part III.B.1.b(2).

100. See *supra* note 77.

101. "Every aspect of a disposition of collateral . . . must be commercially reasonable." R. § 9-610(c). If the secured party proceeds to dispose of collateral in a manner that is not commercially reasonable, a court may enjoin the secured party from proceeding. See *id.* § 9-625(a). Furthermore, the secured party is liable to the debtor for any damages caused by the secured party's failure to proceed in a commercially reasonable manner. See *id.* § 9-625(b).

102. See *supra* Part II.A.3.

Third, there is a significant likelihood that, if a dispute concerning perfection or priority were heard in a foreign forum, that forum would not apply the choice-of-law rules in Revised Article 9. Fourth, in some cases, foreign enforcement of a United States judgment may be denied.

The remainder of Part III closely examines issues of perfection and priority in the context of international secured transactions.

1. Conflict Between Revised Article 9 and Substantive Law of Foreign Jurisdiction

Even if it is clear that a security interest has attached, there are concerns as to whether that security interest is perfected. After all, while attachment (and its twin concept of enforceability)¹⁰³ gives the security interest value as against the debtor, perfection is necessary to assure that the security interest also has value as against third parties.

Let us assume once again that the debtor and secured party have entered into a security agreement that grants the secured party a security interest in all of the debtor's assets, wherever located, including after-acquired assets, and that the security interest has attached. The security agreement may provide that the law of the secured party's jurisdiction governs, but that choice-of-law clause is meaningless under Revised Article 9 for issues governed by the mandatory rules of Part 3.¹⁰⁴ Assume also that the secured party will file a financing statement in the location of the debtor, the jurisdiction whose law will govern perfection as provided in Part 3, Subpart 1, of Revised Article 9, in order to perfect its security interest in collateral (all of which are of the types in which a security interest may be perfected by filing a financing statement under Part 3, Subpart 2).

In determining where the debtor is deemed to be located, Revised Article 9 tells us that the debtor, if not organized under the laws of a "state,"¹⁰⁵ may be located in the District of Columbia.¹⁰⁶ That would be the case if the debtor, for example, has its chief executive office in Draconia and Draconia does not have a public filing system for the perfection of security interests. Thus, if the secured party,

103. See R. § 9-203.

104. See U.C.C. § 1-105(2); R. § 9-301.

105. Revised section 9-102(a)(76) defines the term "State" to exclude a foreign jurisdiction. As discussed *supra* text accompanying note 34, a "registered organization," as defined in Revised section 9-102(a)(70), must be organized under the law of a "State" to be located in that state for Revised Article 9 choice-of-law purposes. See also R. §§ 9-301(1), 9-307(e).

106. See R. § 9-307(c).

having investigated Draconian law, determines that no Draconian filing system exists, it will file a financing statement in the District of Columbia to perfect its security interest granted by its Draconian debtor.

The security interest, under Revised Article 9, is perfected in so much of the collateral as may have a security interest perfected by the filing of a financing statement.¹⁰⁷ But, once again, if the debtor can be perceived as not actually located in a Revised Article 9 jurisdiction (despite the location rules of Revised section 9-307), if goods or other tangible personal property included in the collateral are located outside of a Revised Article 9 jurisdiction, or where the collateral includes intangible rights governed by the law of a non-Revised Article 9 jurisdiction, perfection may be problematic.

Let us continue our comparison with the secured transactions law of the mythical jurisdiction of Draconia. Under Draconian law a secured party, to be perfected, must have physical possession of goods or other tangible personal property collateral as a pledgee. Also, under Draconian law, a secured party does not have a perfected security interest in accounts or other intangible collateral unless the account debtor or other person obligated on the collateral has been notified of the security interest and has been directed to make payments to the secured party.

Once again, Revised Article 9 takes a different approach. A security interest in goods and other tangible personal property collateral need not be perfected by possession.¹⁰⁸ Moreover, Revised Article 9 does not require for perfection of a security interest in accounts and similar claims against third parties that the secured party give notification of the security interest and direction to pay to account debtors and other persons obligated on the collateral.¹⁰⁹ Rather, perfection of an attached security interest in accounts and similar collateral would in most instances be achieved by the filing of a financing statement.¹¹⁰

107. *See id.* §§ 9-308(a), 9-310.

108. *See id.* § 9-310.

109. While Part 4 of Revised Article 9 does have provisions dealing with the rights and duties of account debtors, those provisions do not concern the steps required to be taken by the secured party to perfect its security interest in any claim that the debtor has against the account debtor.

110. *See R.* § 9-310.

2. Possible Limitations of Revised Article 9

Let us imagine a fairly typical secured transaction. The secured party has a security interest in the debtor's goods and accounts. The secured party has taken all steps necessary to perfect under Revised Article 9 by filing a financing statement in the debtor's location as determined under Revised section 9-307. The secured party does not have physical possession of the debtor's goods and has not notified account debtors of the security interest or provided them with payment instructions. If a dispute arises concerning whether the secured party's security interest in the goods and the accounts has been perfected, Revised Article 9 would appear to provide a positive answer. As we shall see, though, if any of the parties or the goods could be seen as located in Draconia, reliance solely on Revised Article 9 may be problematic.

a. Foreign Forum

What would be the case if a dispute concerning the perfection of the secured party's security interest in goods located in Draconia were heard in the courts of Draconia? Under Draconian law, the security interest is vulnerable to the interest of a lien creditor levying on the goods if the secured party does not have physical possession of the goods. In this case, of course, the secured party does not have physical possession of the goods and, thus, would have an unperfected security interest under Draconian law. Is it likely that a Draconian court would apply the perfection rules of Revised Article 9 rather than those of Draconian law? While the answer obviously depends on the choice-of-law rules that the Draconian court would be bound to apply, we suspect that very few countries outside the United States would apply U.S. law to a security interest in goods located within their borders.¹¹¹ It is likely that a Draconian court would be particularly reluctant to apply Revised Article 9's perfection rules if the result would be to disadvantage local secured creditors who would be surprised that the debtor's goods were encumbered under perfection rules of a foreign country that were largely unknown to the

111. The Official Comments to Revised Article 9 warn of Revised Article 9's potential limitations here. Official Comment 9 to Revised section 9-109 states:

Article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice-of-law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security interest granted by a foreign airline to a New York bank are litigated overseas, the court may be bound to apply the law of the debtor's jurisdiction and not New York's Article 9.

creditors and difficult for them to discover.¹¹²

The analysis is similarly problematic if a dispute concerning the perfection of the secured party's security interest in accounts were heard in the courts of Draconia. Once again, the security interest in the accounts is perfected under Revised Article 9 while it is unperfected under Draconian domestic law. Applying its own choice-of-law rules, the Draconian court might look to the law of the debtor's location to determine whether the security interest is perfected. If that court found that the debtor was located in a jurisdiction such as Euphoria that has enacted Revised Article 9, the secured party would prevail; if the court, on the other hand, found that the debtor was located in Draconia, the interest would be unperfected. In any event, though, the determination of where the debtor is located would be based on Draconian rules for that determination rather than Revised Article 9's rules. In making that determination, the Draconian court may look to one or a variety of attributes of the debtor to determine its location. For example, a debtor incorporated in Euphoria but with its chief executive office in Draconia might be viewed by the Draconian court to be located in Draconia although, for purposes of Part 3 of Revised Article 9, the debtor is viewed to be located in Euphoria.¹¹³ To reverse the facts, a debtor incorporated in Draconia but with its chief executive office in Euphoria might be viewed by the Draconian court to be located in Draconia although, for purposes of Part 3 of Revised Article 9, the debtor is located in Euphoria.¹¹⁴

But the Draconian court, applying its own choice-of-law rules to determine the perfection of the secured party's security interest in the accounts, might not even look to the law of the debtor's location. It might, for example, look separately at the law governing each individual account. Thus, in a secured transaction involving security interests in a large number of accounts, there may not be a single body of law governing perfection of the security interests. Rather, the interest in each account would be accompanied by its own perfection rules; some accounts might be governed by the law of Draconia, others by the law of Euphoria, and still others by different nations. While such a choice-of-law rule is unwieldy and might be surprising to a practitioner accustomed to Article 9, it is found under the laws of

112. See R. § 9-109 cmt. 9.

113. See *id.* §§ 9-301(1), 9-307(e).

114. See *id.* §§ 9-301(1), 9-307(b)(3).

many jurisdictions. If the Draconian court took this approach, looking to the substantive law of the jurisdiction whose law governs the account,¹¹⁵ the costs of investigating the substantive law of each account would in many such instances be prohibitive. Matters are even more confusing and uncertain if it is not clear what approach the Draconian court would take.

b. Revised Article 9 Forum

At first glance, it would seem clear that the secured party that followed Revised Article 9's perfection rules would prevail if the dispute concerning perfection were heard in the courts of a Revised Article 9 jurisdiction. Surely, one would think, that court would apply Revised Article 9's choice-of-law rules to determine perfection. If those choice-of-law rules would lead to the application of Revised Article 9's substantive rules for perfection (usually involving filing in the debtor's location as determined by application of Revised section 9-307),¹¹⁶ it would appear that a secured party that has complied with those rules would be found to have a perfected security interest. Yet, even in this scenario, there is room for uncertainty.

Let us assume that the debtor is incorporated in Draconia and has its chief executive office there, and the perfection issue arises in a dispute between a Draconian creditor who has levied upon goods of the debtor in Draconia and the secured party which, although it has a major office in Euphoria, is incorporated in Vongoli and has its chief executive office in Draconia. The Draconian creditor has some presence in Euphoria, and the secured party has used this nexus to gain jurisdiction. Revised sections 9-301 and 9-307, by their terms, seem to tell us that the secured party has a perfected security interest if and only if it has complied with the perfection rules of the District of Columbia. Yet, applying that rule would mean that, in a dispute between a Draconian lien creditor and a Draconian secured creditor involving goods in Draconia, we should follow the dictates of one U.S. jurisdiction with minimal contacts with the parties and no contacts with the disputed goods to apply the perfection rules of a different U.S. jurisdiction with no contacts with the parties or the goods.

115. Arguably the Draconian court might look not to the substantive rules but to the choice-of-law rules of the jurisdiction whose law governs the account. Such an approach, of course, would increase the risk of *renvoi*.

116. See *supra* Part II.A.2.b.

Certainly such an application of the rules in Part 3 of Revised Article 9 would take the rather ambitious location rules of that Part to absurd heights. Surely we should not assume that a Revised Article 9 court, if it even heard such a dispute, would blindly apply the Revised Article 9 choice-of-law and substantive perfection rules to what would appear to be an entirely Draconian domestic matter. Especially without a creditor located in a Revised Article 9 jurisdiction to protect, it is almost impossible to imagine what interest would be served in such a circumstance by application of the Revised Article 9 choice-of-law and substantive perfection rules—other than perhaps the unjustified policy of encouraging forum shopping for Revised Article 9 jurisdictions.

Indeed, it is clear that it was not the intention of the drafters of Revised Article 9 to apply its choice-of-law rules for perfection and priority in such a situation. As noted earlier, Official Comment 3 to Revised section 9-307 states that application of the section assumes that the transaction in dispute “bears an appropriate relation to the forum State.”¹¹⁷ If such a relation is absent, states the Comment, “the forum State’s entire UCC, including the choice-of-law provisions in Article 9 (Sections 9-301 through 9-307), will not apply.”

Yet, as professors are fond of reminding their students, the Comment is not the law. When the revision to UCC Article 1 is complete, the point will likely be clearer. Proposed Revised section 1-302(e), in its current incarnation, explicitly states that the mandatory choice-of-law rules of the Uniform Commercial Code, including those in Part 3 of Revised Article 9, apply only to the extent that the UCC would govern the transaction.¹¹⁸

Even before the enactment of Revised Article 1, though, we have confidence that U.S. courts would reach the same conclusion as the Comment. One would think that, even in the absence of UCC section 1-105 itself explicitly requiring an “appropriate relation” to the forum state for the courts of that state to apply its Uniform Commercial Code, the courts would require such a relation as a matter of non-UCC choice-of-law principles. Normally, of course, the forum would follow a statutory directive from its own state on choice of law.¹¹⁹ It is well-established, though, that a forum state should not literally apply

117. See also *supra* Part I.A.

118. See U.C.C. § 1-302 (Draft Sept. 1997).

119. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971). Comment a, in fact, uses the Uniform Commercial Code as an example of a statute that directs the forum state on which jurisdiction’s law to apply. See *id.* § 6(1) cmt. a.

a choice-of-law provision in a statute beyond its intended range, especially where the result would defeat justified expectations.¹²⁰ In guiding a court as to Revised Article 9's intended range, the Official Comments should be helpful to indicate a statutory intent that there be an "appropriate relation" to the forum state for the forum state to apply its Uniform Commercial Code. In fact, a court should be particularly reticent to apply Revised Article 9's choice-of-law perfection rules to a transaction entirely involving parties and property in a foreign jurisdiction where legal relationships and, therefore, justified expectations differ significantly from those that would be applicable to domestic parties under Revised Article 9.¹²¹ Thus, we are confident that any U.S. courts faced with this issue before the enactment of Revised Article 1 will come to the correct conclusion, but explicit statutory authority for that conclusion will be welcome.

If the dispute has enough contacts with a Revised Article 9 jurisdiction to justify application of its choice-of-law rules, some caution in relying on those rules may still be appropriate, though. Consider a priority dispute between a creditor located in Draconia who, using the Draconian judicial process, has attached or levied upon goods of the debtor located in Draconia or has garnished an account owed to the debtor by a Draconian account debtor and a secured party that has perfected its security interest in the goods and the account by the filing of a financing statement in the appropriate jurisdiction under Revised Article 9. Revised Article 9 provides that a levying creditor has superior rights to an unperfected secured party but is subordinate to a secured party whose interest was perfected before the levy. Draconian law, while not so neatly dividing the analytical steps between perfection and priority, provides for essentially the same result. Under Revised Article 9, though, the security interest is perfected (and, therefore, the secured party would prevail), while under Draconian law the secured party would be subordinate to the levying creditor.

Although the statutory choice-of-law rule for perfection under Revised Article 9 would seem to provide that the secured party will prevail, one could imagine the entreaties to the Revised Article 9 court to ignore the statutory choice-of-law rule for perfection under Revised Article 9 in favor of international comity and non-Revised

120. *See id.* § 6(1) cmt. b.

121. *See id.* § 10 & cmt. d.

Article 9 choice-of-law rules.

Those entreaties might be deafening in the case of a debtor that, apart from the deemed location rules of Part 3 of Revised Article 9, would be viewed by the court to be located in Draconia. The levying creditor could justifiably ask why a local substantive law in the United States should govern on the issue of perfection of a Draconian debtor's goods located in Draconia, or accounts owed by Draconian account debtors to a Draconian debtor. We think that, so long as the secured transaction bears an appropriate relation to the Revised Article 9 forum, that forum should apply the Revised Article 9 rules, but one may speculate that the court would be troubled, under principles of international comity and non-Article 9 choice-of-law rules, by that decision.

Even if we are correct in our conclusion that the Revised Article 9 court should apply the Revised Article 9 rules for perfection in such a case, however, the secured party should not yet begin to plan its victory party. Two significant hurdles that the secured party faces might make such a victory purely Pyrrhic. First, the Revised Article 9 court would have limited ability to enforce in any practical way a decision awarding priority to the secured party. The goods and account debtors in question are located in a different country and the Revised Article 9 court has no jurisdiction over them. While other jurisdictions in the United States would be bound by the full faith and credit clause of the Constitution¹²² to enforce that judgment, foreign courts are not so bound. Indeed, enforcement of U.S. judgments abroad is a serious problem in many contexts.

Second, even if the Revised Article 9 court concluded that the secured party's interest is perfected, it must be remembered that the dispute is not about perfection—it is about priority. In this case, the dispute is about priority between a secured party with a security interest perfected under the Revised Article 9 rules and a levying creditor in Draconia. Revised Article 9, as noted in Part II of this article,¹²³ has different choice-of-law rules for priority matters than for perfection issues.¹²⁴ In the case of goods, for example, priority is governed by the location of the goods.¹²⁵ Thus, in this case Revised Article 9 tells a court to take the Revised Article 9 determination that

122. See U.S. CONST. art. IV, § 1.

123. See *supra* Part II.

124. See generally *supra* Part II.A.3.

125. See R. §§ 9-301(2) (for possessory security interests), 9-301(3)(C) (for nonpossessory security interests).

the secured party is perfected and apply the foreign priority rules in light of that determination. But, as stated above, Draconia does not clearly distinguish between perfection and priority. A U.S. court could easily conclude that Draconian priority law denies priority to any secured creditor that does not take action in Draconia to gain priority over a lien creditor and, therefore, deny ultimate victory to the perfected secured party. This difficulty in separating perfection rules from priority rules is discussed in greater detail below.¹²⁶

In sum, we believe that when the choice-of-law rules governing perfection point to application of Revised Article 9 perfection rules, failure to follow those rules is likely to be fatal to the secured party's claim, but following those rules may not guarantee success.

D. Priority

As noted above, the choice-of-law rules in Revised Article 9 sometimes distinguish between the law governing perfection, which is generally the law of the debtor's deemed location, and the law governing priority, which is generally the law of the debtor's deemed location for intangible collateral such as accounts but the law of the location of the collateral for tangible collateral such as goods. The dichotomy between perfection and priority is clear in Article 9 and is second nature to American commercial lawyers, but not all countries have such a clear divide between these two related concepts. Thus, the possibility of divided governance of these two issues regarding a security interest poses few problems when the jurisdictions involved are sister states in the United States, but has the potential to become incoherent when one of the jurisdictions is not a state.

1. Conflict Between Revised Article 9 and Substantive Law of Foreign Jurisdiction

Let us revisit a priority dispute considered earlier. The dispute is between a creditor located in Draconia who, using the Draconian judicial process, has attached or levied upon goods of the debtor located in Draconia or has garnished an account owed to the debtor by a Draconian account debtor and a secured party that has perfected its security interest in the goods and the account by the filing of a financing statement in the appropriate jurisdiction under Revised Article 9. Revised Article 9 provides that a levying creditor has

126. See *infra* Part III.D.2.b.

superior rights to an unperfected secured party, but is subordinate to a secured party whose interest was perfected before the levy. Draconian law, though, does not divide the concepts of perfection and priority. Under Draconian law, a secured party who takes physical possession of tangible collateral has priority over another secured party with a security interest in the same collateral who does not have possession of it and also has priority over a lien creditor whose lien arises while the secured party has possession of the collateral. Similarly, under Draconian law, a secured party who has notified account debtors of its security interest has priority both over a competing secured party who has not notified the account debtors and over a lien creditor.

With this contrast between the two legal systems in mind, it is clear that, if the Revised Article 9 rules for both perfection and priority govern the situation, the secured party will prevail. Similarly, it is clear that if Draconian substantive law applies *in toto*, the secured party will lose to the other secured party and to the levying creditor. Yet, Revised Article 9 tells us that, for the goods at least, neither U.S. law nor Draconian law tells the entire story.

2. Possible Limitations of Revised Article 9

When the collateral is intangible,¹²⁷ Revised Article 9 provides that the same law that governs perfection governs priority.¹²⁸ When, however, the collateral is tangible,¹²⁹ Revised Article 9 requires a court applying it to dissect foreign law to extract its priority rules separately from its perfection rules. It is certainly possible, if not likely, that this requirement of differential analysis will not be followed by foreign courts.

a. Foreign Forum

Let us assume that a Draconian court hears the dispute concerning the priority, as against the other claimants described above, of the secured party's security interest in the debtor's goods situated in Draconia and of the secured party's security interest in accounts owing to the debtor by Draconian account debtors. Because

127. For these purposes, all types of collateral except negotiable documents, goods, instruments, money, or tangible chattel paper are "intangible." See R. § 9-301(3).

128. See *id.* § 9-301(1).

129. By "tangible," we mean negotiable documents, goods, instruments, money, or tangible chattel paper. See *id.* § 9-301(3).

Draconia does not distinguish between perfection and priority, the Draconian court would likely reach the same result in the priority dispute as it did in the perfection dispute as discussed above. Whichever law the Draconian court would apply to the perfection issue would be applied to the priority issue as well. More likely than not, a Draconian court would apply its own law to the priority of competing claims to tangible collateral located in Draconia. For the accounts—money owed by Draconians to a Draconian company—the Draconian court is also likely to apply its own law.

b. Revised Article 9 Forum

In contrast, a court in a jurisdiction such as Euphoria that has enacted Revised Article 9, should, following the text of Revised Article 9, at least initially keep the concepts of perfection and priority separate. But applying that separation to Draconian law may be easier said than done.

Let us examine the security interest in the goods. The secured party has filed a financing statement in the District of Columbia, the deemed location of the Draconian debtor with chief executive offices in Draconia. Thus, applying the choice-of-law rules in Revised section 9-301, the Euphorian court should conclude that the secured party has a perfected security interest in those goods. Of course, the secured party is not seeking a declaratory judgment on the abstract question of whether its security interest is perfected. Rather, it is hoping to prevail over a competing party in Draconia.

Revised Article 9 tells the Euphorian court, having determined that the secured party's security interest in the goods is perfected under the laws of the District of Columbia, to apply Draconian law to the question of whether that perfected security interest has priority over a competing secured party and a levying creditor. But Draconia has no body of law labeled "priority" that is separate from a body of law labeled "perfection." What is the Euphorian court to do? The answer depends, we suppose, on which way the Euphorian court conceptualizes Draconian law. If the Euphorian court force feeds Draconian law into the American two-step dance of perfection and priority, it may conclude that (1) perfection in Draconia requires possession of goods and (2) a perfected secured party has priority over a levying creditor. If the Euphorian court declines to bifurcate Draconian law, however, it may simply conclude that a levying creditor has priority over a competing party that does not have

possession of the goods.

If the Euphorian court chooses the first method of conceptualizing Draconian law (by bifurcating it), Revised Article 9 will result in the secured party having priority. This is the case because the Euphorian court, having already determined that the secured party is perfected under the law of the District of Columbia, will apply Draconian law to conclude that a perfected security interest has priority over a lien creditor. If, on the other hand, the Euphorian court chooses the second method of conceptualizing Draconian law, it will conclude that the lien creditor prevails.

There is no obvious reason for the Euphorian court to pick one method of conceptualizing Draconian law over the other. Ultimately, we suggest, though, what the Euphorian court does will have little import. Inasmuch as the collateral is located in Draconia, the secured party will be at the mercy of Draconian courts to enforce its interest and the Draconian courts, not bound to respect the Euphorian priority determination,¹³⁰ are likely to ignore a determination inconsistent with the result that would have obtained had the dispute been litigated in Draconia.

With respect to the secured party's security interest in the accounts, Revised Article 9's command is clearer. Since Revised Article 9 does not require a U.S. court to distinguish between perfection rules and priority rules for intangible collateral such as accounts, a literal application of Revised Article 9 will lead the Euphorian court to find that the secured party has priority over its competitors. Once again, though, winning in theory is not what the secured party seeks; rather, it wants to collect from the account debtors and have first priority to those receipts. If collecting those funds requires the cooperation of courts in Draconia, the secured party might have the same type of difficulty described above.

c. U.S. Bankruptcy Court as Forum

If the court hearing the dispute regarding the secured party's collateral is not a state court in Euphoria but, rather, a United States bankruptcy court, there is still more trouble for the secured party. In a bankruptcy case in which the debtor is the bankruptcy debtor—an admittedly unlikely event for a debtor with so many contacts in Draconia—even the statutory basis for applying the perfection and

130. See *supra* text accompanying notes 122-23.

priority rules mandated by Revised Article 9 would be less compelling. The trustee in bankruptcy, of course, has the status under federal bankruptcy law of a levying creditor on the date of the commencement of the case.¹³¹ That status does not appear to be limited to the status of a levying creditor in a United States jurisdiction. Notwithstanding the secured party's compliance with the perfection steps under Revised Article 9, a bankruptcy trustee might be able to assert the status of a hypothetical Draconian lien creditor to defeat the secured party's security interest if a Draconian court, applying its own choice-of-law and priority rules, would permit a Draconian lien creditor to prevail over a Revised Article 9 secured party who has not taken the requisite steps to prevail under Draconian law.¹³²

Moreover, the bankruptcy court might have another basis to limit the application of Revised Article 9. That would be the case if the debtor is a Draconian debtor and a "foreign representative"¹³³ of the debtor, appointed in a "foreign proceeding,"¹³⁴ commences a case under the U.S. Bankruptcy Code ancillary to that proceeding. The U.S. bankruptcy court has sufficient flexibility to enjoin actions by the secured party and to order a turnover of collateral to the foreign representative.¹³⁵ In doing so, the court is merely to be "guided" by "protection of claim holders in the United States against prejudice."¹³⁶ One may speculate to what extent the U.S. bankruptcy court may view the Revised Article 9 secured party, as a claim holder in the United States, to be "prejudiced" by the failure of the court to apply Revised Article 9's aggressive choice-of-law and perfection rules literally to situations where under non-Revised Article 9 choice-of-law rules there is no or only a minimal nexus to the Revised Article 9 jurisdiction.

E. Summary

The foregoing discussion leaves us with five general conclusions

131. See 11 U.S.C. § 544(a)(1)-(2) (1994).

132. Cf. *In re McGee*, 196 B.R. 78, 83 (Bankr. W.D. Mich. 1996) (ruling that the trustee avoided transfer by U.S. debtor of Bahamian property under Bankruptcy Code § 544(a)(3) because insufficient steps were taken by the debtor under Bahamian law to perfect the transfer against a bona fide purchaser of the property).

133. See 11 U.S.C. § 101(24).

134. See *id.* § 101(23).

135. See *id.* § 304(b)(1)-(2).

136. *Id.* § 304(c)(2).

relating to Revised Article 9's applicability to international secured transactions.

First, while a great deal of attention has been paid to the choice-of-law rules in Part 3 of Revised Article 9, those rules do not govern all conflict of law issues concerning international secured transactions. Issues other than perfection and priority will be governed by the much less precise rules of UCC section 1-105 until the proposed revisions to Article 1 are enacted.

Second, even when a dispute concerns perfection or priority and it arises in a Revised Article 9 forum, we cannot be sure that the forum will invariably apply the choice-of-law rules in Part 3, Subpart 1, of Revised Article 9. Our analysis of the text of Revised Article 9 and the Official Comments makes it clear that the intent of the choice-of-law rules in Revised Article 9 was only to govern transactions to which the UCC could properly apply at the threshold. If, by extreme example, a transaction with a French debtor and a French secured party concerning a security interest in inventory located in France or accounts owed by French account debtors was somehow litigated in a Revised Article 9 forum, the choice-of-law rules in Revised Article 9 do not take the position, and should not be interpreted as providing, that the failure of the French secured party to file a financing statement in the District of Columbia is fatal to the perfection of the French secured party's security interest in the inventory or the accounts. Indeed, if there is any doubt as to the threshold applicability of the UCC to the transaction, the applicability of Revised Article 9's choice-of-law rules should be similarly doubtful.

Third, to the extent that Revised Article 9's choice-of-law rules bifurcate the law governing a dispute, with Revised Article 9 governing perfection but foreign law governing priority, there is a risk that, while Revised Article 9 itself can be bifurcated into these two concepts, it may not be possible to do so to the applicable foreign law. This anomaly may put foreign and Revised Article 9 courts in a difficult position, possibly resulting in certain cases in which the choice of law for priority governs the choice of law for perfection as well.

Fourth, Revised Article 9 cannot predict how a foreign forum will address basic Revised Article 9 issues, such as attachment, the rights and duties of account debtors and other obligors on collateral, enforceability, perfection, and priority. For example, even if Revised Article 9's choice-of-law rules clearly indicate that Revised Article 9

governs a particular substantive question such as perfection, Revised Article 9 does not and could not provide any assurance that a foreign forum in which the issue of perfection arises, applying its choice-of-law rules, would also apply Revised Article 9's substantive law rules. At most, Revised Article 9 can tell us what a Revised Article 9 court should do. Parties to international transactions must still make an assessment of foreign substantive and choice-of-law rules in assessing legal risks in international secured transactions.

Fifth, there will be cases in which a party to an international secured transaction obtains a judgment in an American court under Revised Article 9 but will need the assistance of a foreign court to enforce that judgment. Revised Article 9 provides no particular assurance that a foreign court will give effect to judgments rendered by U.S. courts.

IV. DISCRETE PROVISIONS UNDER REVISED ARTICLE 9 RELATING TO INTERNATIONAL SECURED TRANSACTIONS

Revised Article 9 continues from Current Article 9 provisions applicable to particular international secured transactions. For example, Revised Article 9 retains the reference to commodity contracts being traded on a foreign board of trade as being included within the term "commodity contract."¹³⁷ Revised Article 9 also retains the deemed location rule, for purposes of choice of law for perfection and priority, of a foreign air carrier under the Federal Aviation Act of 1958, as amended.¹³⁸

However, Revised Article 9 addresses two international secured transactions issues not addressed in Current Article 9: the applicability of Revised Article 9 to a security interest granted by a foreign government or unit of a foreign government; and, for purposes of applying Revised Article 9's choice-of-law rules for perfection and priority, the location of a domestic branch of a foreign bank. Revised Article 9 also expands the circumstances under which compliance by a secured party with an international treaty of the United States will constitute the equivalent of the filing of a financing statement under Revised Article 9. Each of these provisions is discussed below.

137. See R. § 9-102(a)(15); U.C.C. § 9-115(b).

138. See R. § 9-307(1)(j); U.C.C. § 9-103(3)(d).

A. Security Interest Granted by a Foreign Country or Foreign Governmental Unit

Revised Article 9 expands its scope beyond Current Article 9 in relation to security interests granted by foreign governments and foreign governmental units.

Current Article 9 excludes from its scope “a transfer by a government or governmental subdivision or agency.”¹³⁹ Accordingly, where a government or governmental subdivision or agency wishes to grant a security interest, it would do so under law other than Current Article 9. Similarly, questions of perfection, priority, and enforceability relating to that governmental security interest would be governed by other law. A government or governmental unit or agency, of course, may be subject to a specific statute dealing with governmental secured transactions. But, in the absence of a specific statute, parties to governmental secured transactions are left to non-UCC security devices. These security devices may be difficult to ascertain or cumbersome to apply.

Revised Article 9 expands the reach of Article 9 to these governmental security interests so long as there is no specific statute dealing with the governmental secured transactions.¹⁴⁰ In doing so, Revised Article 9 fills a gap and avoids the necessity of parties to a governmental secured transaction turning to non-UCC security devices.¹⁴¹

But Revised Article 9 goes even further. It literally applies Revised Article 9 to security interests granted by a foreign government or foreign governmental unit to the extent that no statute of the foreign country governs the creation, perfection, priority, or enforcement of the security interest.¹⁴² Accordingly, where no such statute exists, Revised Article 9 purports to supply one.

139. U.C.C. § 9-104(e).

140. Revised section 9-109(c)(2) expands Revised Article 9's scope to include a security interest granted by a government or governmental unit located in the forum state. Revised section 9-109(c)(3) expands Revised Article 9's scope to include a security interest granted by a government or governmental unit located outside of the forum state. Revised Article 9 applies to those governmental security interests only “to the extent” that a statute of the relevant jurisdiction does not “expressly” govern the “creation, perfection, priority, or enforcement” of the security interest. The term “governmental unit” is defined in Revised section 9-102(a)(45).

141. This “gap filling” was modeled on nonuniform versions of Current section 9-104(e) as enacted in New York and Massachusetts. *See* MASS. GEN. LAWS ch. 106, § 9-104(e) (1998); N.Y. U.C.C. LAW § 9-104(e) (McKinney 1998).

142. Revised section 9-109(c) expressly refers to a security interest granted by a foreign country or by a governmental unit of a foreign country. The term “governmental unit,” as defined in Revised section 9-102(a)(45), expressly includes a foreign governmental unit.

In view of Revised Article 9's inclusion within its scope of foreign governmental secured transactions for which an applicable secured transactions statute is otherwise lacking, we may analyze the inherent limitations of Revised Article 9's applicability to the security interest, created by a foreign government or foreign governmental unit debtor and purportedly within Revised Article 9's scope, exactly as we have analyzed those limitations for our Draconian debtor in Part III. The limitations discussed in Part III to the applicability of Revised Article 9 are equally relevant to the foreign government debtor or foreign governmental unit debtor. Moreover, the Official Comments to Revised Article 9 stress, in the case of a foreign government debtor or foreign governmental unit debtor, the same caveat that there be an "appropriate relation" to a forum state for that state to apply its Uniform Commercial Code including Revised Article 9.¹⁴³

B. Location of a Domestic Branch of a Foreign Bank

As discussed above, if a multinational debtor is a "registered organization" that is not organized in a "state," it is generally viewed, for Revised Article 9 choice-of-law purposes, as located where the debtor has its chief executive office.¹⁴⁴

But Revised Article 9 provides a major exception from this general rule where the debtor is a foreign bank branch or agency located in a "state." In that case, Revised Article 9 treats the branch or agency as a debtor separate from the foreign bank for choice-of-law purposes. That separate choice-of-law debtor—i.e., the branch or agency—is viewed to be located in the state where the branch or agency is licensed if all of the branches and agencies of that bank are licensed in that state.¹⁴⁵ If the foreign bank has branches and agencies in different states then, for Revised Article 9 choice-of-law purposes, each branch or agency is located in the state that federal law

143. Official Comment 9 to Revised section 9-109 provides:

If a transaction does not bear an appropriate relation to the forum State, then that State's Article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

The Official Comment then proceeds to discuss an example of how Revised Article 9 should not be applied by a New Mexican court hearing a dispute concerning a security interest in equipment located in Belgium granted by a Belgian governmental unit in favor of a Swiss secured party.

144. See *id.* § 9-307(b)(3).

145. See *id.* § 9-307(i).

designates as its location¹⁴⁶ or, if federal law permits the branch or agency to designate its location as that of a particular state, then the state so designated.¹⁴⁷ Otherwise, the branch or agency is viewed to be located, for Revised Article 9 choice-of-law purposes, in the District of Columbia.¹⁴⁸

The result is that a foreign bank branch or agency located in the United States may qualify, for Revised Article 9 choice-of-law purposes, as a separate debtor located in a Revised Article 9 jurisdiction even though Revised Article 9 would otherwise view the multinational debtor to be located in a foreign jurisdiction.¹⁴⁹ In addition, in some cases a foreign bank branch or agency located in a state other than the District of Columbia may qualify as a debtor located in that state even though Revised Article 9 would otherwise view the entire multinational debtor to be located in the District of Columbia.¹⁵⁰

The treatment of a foreign bank branch or agency as a separate debtor for Revised Article 9 choice-of-law purposes is understandable given the customary use of branches and agencies by foreign banks outside of their home jurisdictions, their separate regulation and supervision of their jurisdictions of operation, and their well established market practices. Foreign banks generally tend to operate outside of their home jurisdiction through branches and agencies in contrast to other business entities that more often establish separate subsidiaries. A foreign bank branch or agency operating in the United States is, moreover, subject to federal or state banking regulation and supervision largely as if it were a separate legal entity. In addition, foreign bank branches and agencies operating in the United States commonly grant security interests and sell loan obligations in the interbank loan participation and syndication and securitization markets with a good deal of local autonomy. To apply the normal location of the debtor rules of Revised section 9-307(b) to a foreign bank branch or agency operating in a Revised Article 9 jurisdiction

146. *See id.* § 9-307(f)(1).

147. *See id.* § 9-307(f)(2).

148. *See id.* § 9-307(f)(3).

149. This would be the case if the debtor were a non-bank foreign registered organization and the chief executive office of the debtor were in a jurisdiction that has a public filing system for the perfection of security interests. *See id.* § 9-307(c).

150. This would be the case if the debtor were a non-bank foreign registered organization and the chief executive office of the debtor were not in a jurisdiction that has a public filing system for the perfection of security interests. In that case the debtor would be viewed to be located, for Revised Article 9 choice-of-law purposes, in the District of Columbia. *See id.* § 9-307(c).

would be contrary to, and would dramatically upset, common expectations that the local branch or agency is, for all practical purposes, a separate business operation.

Furthermore, the justification for applying the Revised Article 9 normal location of the debtor rules is lacking in this instance. The certainty desired as to the debtor's location is obtained through the branch or agency licensing scheme. An inquiry by a potential secured party into where a particular branch or agency is licensed should result in certainty roughly equivalent to that obtained by the secured party that is considering extending credit to a registered organization whose location is evidenced as a matter of public record.

Indeed, Revised Article 9's foreign bank branch or agency location rules create far more certainty than Current Article 9 does on choice-of-law issues for branches or agencies of foreign banks. Under Current Article 9, the secured party that is considering extending credit to a branch or agency of a foreign bank operating in the United States would need either to ascertain where the foreign bank's chief executive office in the United States is located in order to determine the jurisdiction that governs perfection or, alternatively, if the collateral is accounts or general intangibles for money due or to become due, to notify account debtors.¹⁵¹ Revised Article 9 dispenses with both the factual inquiry needed to ascertain where the chief executive office in the United States is located and the awkwardness (and at times impracticality) of notifying account debtors to achieve perfection. It also avoids the risk that a secured party who, having determined the debtor's chief executive office in the United States and having filed to perfect its security interest in that jurisdiction, would be defeated by an earlier secured party who had earlier perfected its security interest by notifying account debtors without the knowledge of the filed secured party.¹⁵²

This is not, however, to say that the foreign bank branch or agency choice-of-law location rules in Revised Article 9 are without risk. Many of the same choice-of-law issues discussed in Part III may be raised in a perverse way if, for example, the insolvency administrator of a foreign bank appointed in the jurisdiction of the bank's foreign head office outside of the United States takes the position that a security interest in branch or agency assets, especially

151. See U.C.C. § 9-103.

152. Current section 9-103(3)(c) refers only to perfection. Presumably, priority would be determined by the "first to file or perfect" priority rule of Current section 9-312(5).

intangible ones, must be perfected under the law of the head office jurisdiction. Given the nature, however, of foreign branch and agency operations, together with their separate regulation on a federal or state level in the United States, such choice-of-law issues would appear to be likely resolved in deference to Revised Article 9's foreign branch bank and agency location rules.

C. Compliance with an International Treaty of the United States

Revised Article 9 treats more comprehensively than does Current Article 9 the status and effect of international treaties to which the United States is a party. Current Article 9 provides that it does not apply to certain transactions governed by federal statutes.¹⁵³ Revised Article 9 makes clear, however, that federal preemption of Revised Article 9 includes federal treaty preemption.¹⁵⁴ Moreover, while Current Article 9 defers to a federal treaty registration or filing system as a substitute for filing under Current Article 9,¹⁵⁵ Revised Article 9 goes further. It provides that it is equivalent to filing under Revised Article 9 if the requirements under the treaty are met for a secured party to obtain priority over a subsequent lien creditor, even if the federal treaty does not require registration or filing for the secured party to obtain that priority.¹⁵⁶ A secured party that complies with the federal treaty requirements for obtaining priority over a subsequent lien creditor is also entitled to notice of a foreclosure sale of its collateral by a competing secured party¹⁵⁷ and to notification of a proposal by a competing secured party to accept collateral in whole or partial satisfaction of its secured obligations.¹⁵⁸

In addition, Revised Article 9 would permit compliance with the requirements of a federal treaty for priority over a subsequent lien creditor to be equivalent to a protective filing by a consignor, lessor or other bailor of goods, or a buyer of a payment intangible or a

153. See U.C.C. § 9-104(a).

154. See R. § 9-109(c)(1).

155. See U.C.C. § 9-302(3)-(4).

156. See R. § 9-311(a)(1)-(b). For example, the treaty could provide for perfection automatically upon attachment or by some method other than filing or registration. In order for the method of perfection to provide the same public notice as does filing, however, the Drafting Committee assumed that whatever method of perfection is established by treaty, the method would be public and easily discoverable by subsequent parties. See *id.* §§ 9-310(b)(3), 9-611(c)(3)(C), 9-621(a)(3).

157. See *id.* § 9-611(c)(3)(C).

158. See *id.* § 9-621(a)(3).

promissory note.¹⁵⁹

Revised Article 9 also states explicitly what is implicit under Current Article 9: a federal treaty may require a purchase money security interest in consumer goods to be perfected under the relevant treaty provisions even though perfection would otherwise be automatic under Article 9.¹⁶⁰

CONCLUSION

While not without difficulties, the rules in Revised Article 9 governing international secured transactions represent a significant improvement over Current Article 9. Revised Article 9 provides greater certainty in determining how to perfect, from Article 9's perspective, an international security interest. While the answer to that question will not resolve all, or even most, issues surrounding such transactions, even that degree of certainty will enable transactions to go forward with reduced risk. Nonetheless, Revised Article 9 does not, and could not, resolve all issues concerning international transactions. Foreign legal systems and fora are not sister states with the same approach to these issues as Article 9. Differing conceptions and degrees of respect for determinations of other legal systems lead to a degree of uncertainty that should not be ignored or minimized.

159. *See id.* § 9-505.

160. *See id.* § 9-309(1).