



SCHOOL OF LAW

## MEMORANDUM

To: Drafting Committee for Amendments to the Model Tribal Secured Transactions Act  
From: Stephen L. Sepinuck  
Date: August 25, 2015  
Re: Choice of Law Issues

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Section 9-301 contains the general choice-of-law rule for the MTSTA. It differs from the Official Text of the UCC in some significant ways. Specifically, the Official Text of the UCC provides that, in general, perfection, the effect of perfection, and the priority of a security interest in collateral is governed by the law of the jurisdiction where the debtor is located. In contrast, MTSTA § 9-301(1) provides that perfection, the effect of perfection, and the priority of a security interest in collateral are governed by the MTSTA (as enacted by a Tribe or Nation):

- (A) if the security interest is created pursuant to this [act];
- (B) from the time that the debtor becomes subject to the jurisdiction of this [Tribe] [Nation] (Section 9-316(d) and (e)); or
- (C) from the time that the collateral is transferred to a person that thereby becomes a debtor and is subject to the jurisdiction of this [Tribe] [Nation].

There are several *potential* problems created by this language.

First, the MTSTA does not explain or define when a security interest is “created pursuant” to it. Perhaps this language is intended to cover a security interest created by the Tribe or Nation. Perhaps the language is intended to cover a security interest created pursuant to an agreement that expressly chooses the MTSTA (as enacted by a Tribe or Nation) as the governing law. If this language is to be retained, the Drafting Committee might wish to consider adding language to the MTSTA explaining what “created pursuant to this [act]” means.

Second, the MTSTA does not explain or define “the time that the debtor becomes subject to the jurisdiction of this [Tribe] [Nation].” Section 9-316(d) does state that “a debtor becomes subject to the jurisdiction of this [Tribe] [Nation] if: (1) the debtor is an individual whose principal residence comes to be within this jurisdiction or who becomes a member of this [Tribe] [Nation].” However, that language expressly applies only “[f]or the purposes of this section only,” and thus leaves unclear whether this language applies to § 9-301. Accordingly, the Drafting Committee might wish to consider applying the definition in § 9-316(d) to § 9-301.

Third, the difference in language between UCC § 9-301 and MTSTA § 9-301 creates the potential for both sources of law to purport to apply to the same transaction. For example, consider a member of a Tribe or Nation (that has enacted the MTSTA) who resides in downtown Spokane, Washington (not on Tribal property). If that member were to grant a security interest in consumer goods, both Washington law and the MTSTA would purport to govern perfection, the effect of perfection, and priority.

It is not clear how much, if any, of a problem such a conflict of law could create. If the debtor were to seek bankruptcy protection (in the Eastern District of Washington), the bankruptcy court would likely apply the law of Washington State, not the law of the Tribe or Nation of which the debtor is a member. Similarly, if an issue of priority or perfection were to be litigated in state court or in a non-bankruptcy federal court, the law of the forum state would, pursuant to that forum's § 9-301, look to Washington law, not to the law of the Tribe or Nation of which the debtor is a member. On the other hand, if the issue became the subject of an arbitration proceeding, the arbitrator might choose to look to either Washington law or the law of the Tribe or Nation of which the debtor is a member. If the matter were litigated in a tribal court, that court would likely apply tribal law.

The Drafting Committee should consider whether the potential conflict-of-law problem is sufficiently serious to resolve by amending the MTSTA, such as by conforming its choice-of-law rules to those in UCC Article 9. Note, one might be tempted to think that a cautious secured party could and would guard against this problem by simply perfecting both under the law of the debtor's location and under the law of the Tribe or Nation of which the debtor is a member. However, the secured party might have no way of knowing that the debtor is a member of a Tribe or Nation and legal prohibitions on nondiscrimination might prevent or deter the secured party from inquiring about such status.

Irrespective of what the Drafting Committee decides with respect to the issue discussed above, the Drafting Committee might wish to consider a different change to the MTSTA's choice-of-law rules. Specifically, the Drafting Committee might wish to add a rule dealing with enforcement of a security interest on tribal property. A Tribe or Nation has a significant interest in what happens on tribal property. This is evidenced by, among other things, the fact that the MTSTA does not permit repossession without judicial process unless the debtor consents in writing after default. *See* MTSTA § 9-609(a). However, the MTSTA does not currently apply to enforcement of a security interest on tribal property if the debtor is not a member of the Tribe or Nation and the security interest was not created pursuant to the act. Assuming that a Tribe or Nation could assert jurisdiction over such a matter – an issue beyond the scope of this memorandum – the Drafting Committee might wish to consider adding a rule that makes the MTSTA govern any act to enforce a security interest on tribal property.