

PERMANENT EDITORIAL BOARD REPORT, JUNE 13, 2001:

**Article 9 Perfection Choice of Law Analysis Where Revised Article 9
Is Not in Effect in All States by July 1, 2001**

Permanent Editorial Board for the Uniform Commercial Code

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**PEB *Report*: Article 9 Perfection Choice of Law Analysis Where Revised
Article 9 is Not in Effect in All States by July 1, 2001**

Revised Article 9 provides for a uniform effective date of July 1, 2001 (the “Effective Date”).¹ As of June 13, 2001, revised Article 9 has been adopted in 47 states² and the District of Columbia and is scheduled to become effective in all of those jurisdictions except four³ on the Effective Date. Despite legislative efforts to enact revised Article 9 and have it become effective in the remaining states by the Effective Date, revised Article 9 will not be effective in all states by the Effective Date. As a result, a secured party seeking to perfect a security interest on or after July 1, 2001 should consider whether the perfection rules of former Article 9 or revised Article 9 will be applied to that security interest. This *Report* provides guidance for analyzing⁴ the choice of law rules of former Article 9 and

¹ Revised § 9-701. The issues discussed in this *Report* do not involve the transition rules contained in Part 7 of revised Article 9. The issues discussed in this *Report* involve matters that will arise for transactions entered into on or after the Effective Date of revised Article 9.

² Revised Article 9 has been adopted in all states except Massachusetts, New Jersey, and New York. It is awaiting the governor’s signature in six of those states. Once a state that does not have revised Article 9 in effect on the Effective Date has adopted revised Article 9 and it becomes effective in that state, or after revised Article 9 becomes effective in a state, the state would then be treated as a state in which revised Article 9 is in effect for purposes of the analysis in this *Report*.

³ Revised Article 9 will become effective on October 1, 2001, in Connecticut and on January 1, 2002, in Alabama, Florida and Mississippi.

⁴ Application of the rules discussed below can sometimes lead to counter-intuitive results. This is unavoidable. Former and revised Article 9 were each drafted on the assumption that at any particular time all states would have in effect substantially the

revised Article 9 to determine whether a security interest has been perfected.⁵

Summary

A prudent secured party that wishes to perfect a security interest on or after July 1, 2001 should make sure that the security interest will be determined to be perfected by the courts of any state – whether or not that state has enacted revised Article 9. This *Report* addresses four illustrative scenarios:

- (i) perfection of a security interest in ordinary goods by filing a financing statement;
- (ii) perfection of a security interest in accounts or general intangibles by filing a financing statement;
- (iii) perfection of a security interest in instruments by filing a financing statement; and
- (iv) perfection of a security interest in commercial deposit accounts by control.

In the first three scenarios (involving perfection by filing), in order to be sure that the security interest will be determined to be perfected by any U.S. court, the secured party in many cases will have to file financing statements *both* in the jurisdiction indicated by the choice of law rules of former UCC § 9-103 *and* in the jurisdiction indicated by the choice of law rules in revised UCC § 9-301. More particularly:

- (i) in the case of “ordinary goods” (as that term is used in former Article 9), this will mean that the secured party would make dual filings if the goods are located in a different jurisdiction

same version of Article 9. Revised § 9-701, Comment. Because that will not be true for a time, the complications described below will exist during that time.

⁵ References to revised Article 9 are to Article 9 as set forth in the 2000 Official Text of the Uniform Commercial Code. References to former Article 9 are to Article 9 as set forth in the 1995 Official Text of the Uniform Commercial Code. This *Report* assumes that, if revised Article 9 is not in effect in a state, then former Article 9 is in effect in that state. This *Report* does not address any non-uniform provisions of revised Article 9 or former Article 9 as enacted in any particular state.

than the jurisdiction in which the debtor is located (as determined under the rules of revised Article 9);

- (ii) in the case of accounts and general intangibles, dual filings will be necessary if the location of the debtor as determined under the rules of revised Article 9 is different than the location of the debtor as determined under the rules of former Article 9; and
- (iii) in the case of instruments, a secured party should be aware that perfection by filing may not be sufficient to perfect the security interest if (a) the instruments are located in a jurisdiction that has not enacted revised Article 9, or (b) the debtor is located (as determined under the rules of revised Article 9) in a jurisdiction that has not enacted revised Article 9.

In the fourth scenario (involving perfection of a security interest in a commercial deposit account by control), non-uniform choice of law rules outside of Article 9 will determine the law that will be applied if the court determining perfection is located in a state that has not enacted revised Article 9. If the court determining perfection is located in a state that has enacted revised Article 9, but the depositary bank (as determined by revised Article 9) is located in a state that has not enacted revised Article 9, perfection by control may not be available.

Background.

Both former Article 9 and revised Article 9 contain choice of law rules to determine which state's laws govern perfection of a security interest. Because secured parties do not have complete control over where issues of perfection may be litigated, a prudent secured party should prepare for the possibility that perfection may be determined by a court sitting in a state that has not enacted revised Article 9 (and, thus, will be applying the choice of law rules of former Article 9). If a dispute concerning the perfection arises in a federal⁶ or state court of a particular

⁶ A state court would of course apply a statutory directive from its own state on choice of law. Restatement (Second) of Conflict of Laws § 6(1) and *Comment a*. When applying state law, a federal court exercising diversity jurisdiction must apply the choice of law rules in effect in the forum state. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). *Klaxon* also

state (the “Forum State”), both former Article 9 and revised Article 9 require the application of the choice of law rules in the Forum State’s Article 9 in order to determine the state (the “Perfection State”) whose *substantive* laws govern perfection of the security interest.⁷ It should be noted that the Perfection State in many cases will *not* be the Forum State; rather, the version of Article 9 in effect in the Forum State will often direct the court to apply the laws of a different state to determine whether perfection exists.

Because revised Article 9 will not be effective in every state on or after the Effective Date, the choice of law analysis becomes quite complicated for several reasons. First, the choice of law rules themselves are in many instances significantly different under revised Article 9 than under former Article 9. Second, the substantive rules for achieving perfection under revised Article 9 are in many cases different from the substantive rules for achieving perfection under former Article 9. Third, determining whether Article 9 even applies to a security interest in certain collateral may be different under revised Article 9 than under former Article 9. In fact, a court in a Forum State may not even apply Article 9’s choice of law rules, let alone Article 9’s substantive perfection rules, if the collateral in question is not within the scope of Article 9 as in effect in the Forum State.

In all cases under revised Article 9, and in some cases under former Article 9 (for issues within the scope of this *Report*, those involving “ordinary goods” and instruments), the choice of law rules of both former and revised Article 9 determine the Perfection State directly by mandating that perfection is governed by the *local laws*⁸ (the internal, *substantive* laws)

requires that a bankruptcy court exercising federal jurisdiction apply the choice of law rules of the forum state “where no significant federal policy, calling for the imposition of a federal conflicts rule, exists.” *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 607 (2d Cir. 2001).

⁷ Former § 9-103, revised §§ 9-301– 9-307. These rules may not be varied by agreement. § 1-105(2). Nor are issues concerning the relationship of the transaction or the parties to a state relevant except to the extent expressly stated in former § 9-103 and revised § 9-301. Section 1-105(1) and (2). Revised § 9-307, Comment 3 is not to the contrary. It addresses only international transactions.

⁸ This follows from the fact that the most broadly applicable choice of law rule in former § 9-103, namely former § 9-103(1), which applies, *inter alia*, to ordinary goods and instruments, calls for application of the “law” of a specified jurisdiction. By contrast, with respect to the collateral described in former § 9-103(3), as well as former § 9-103(2) (goods covered by a certificate of title) and former § 9-103(5)

of a particular state; in such cases, that state is the Perfection State. In other cases under former Article 9 (for issues within the scope of this *Report*, those involving accounts and general intangibles), however, the choice of law rules under former Article 9 mandate that the court apply the *choice of law rules* of the state of the debtor's location as determined under former Article 9 (the "Intermediate State") in order to determine the Perfection State. Because the Intermediate State may or may not have enacted revised Article 9, the analysis in these cases will be even more complex.

Methodology, terminology, and limits of analysis.

This *Report* assumes that revised Article 9 is not in effect in every state and that a secured party would like to know what may be necessary to be sure that a court will find that the secured party's security interest is perfected, whether that court is in a state that has enacted revised Article 9 or in a state that is still governed by former Article 9. This *Report* analyzes four common types of collateral in which a security interest is claimed to be perfected by a particular method of perfection.

1. The first type is *ordinary goods*⁹ in which a security interest is claimed to be perfected by a filed financing statement.¹⁰ It is useful to analyze this category because ordinary goods are very

(minerals and certain related accounts), the choice of law rule prescribed by former § 9-103 calls for application of the "law (including the conflict of laws rules)" of a specified jurisdiction. It is clear from the text and history of former § 9-103(1) that the reference in former § 9-103(1) to the "law" of a specified jurisdiction means the *local* law of that jurisdiction, and not "the law (including the conflict of laws rules)" of that jurisdiction. See Prefatory Comments to 1972 Revisions to Article 9, comment F-6, footnote 8. See also Restatement (Second) of Conflict of Laws § 8 (reference to "the law" of a jurisdiction generally refers to the "local law" of the chosen jurisdiction). This *Report* does not further address collateral of the types described in former §§ 9-103(2) and (5).

⁹ Former Article 9 had different choice of law rules for "mobile goods" and other kinds of goods (such as non-mobile goods and goods covered by a certificate of title). Former §§ 9-103(1), (2), and (3). Revised Article 9 does not recognize a separate category of "mobile goods." This *Report* refers to goods that are not "mobile goods" and that are not covered by a certificate of title as "ordinary goods." Both former and revised Article 9 have special choice of law rules for goods subject to a certificate of title. Former § 9-103(2), revised § 9-303. This *Report* does not address such goods.

¹⁰ A security interest in goods may also be perfected by possession of the goods under both former and revised Article 9. Former § 9-305, revised § 9-313(a).

commonly used as collateral. In addition, the choice of law rules for determining which state's law governs perfection of a security interest in ordinary goods by filing are different under revised Article 9 than under former Article 9.

2. The second type is *accounts* and *general intangibles* in which a security interest is claimed to be perfected by a filed financing statement.¹¹ Like ordinary goods, accounts and general intangibles are commonly used as collateral. Two reasons make this category particularly useful to analyze. First, the choice of law rules for determining which state's law governs whether a security interest in accounts and general intangibles has been perfected by filing are often different under revised Article 9 than under former Article 9. Second, the choice of law rule under former Article 9 directs the court in the Forum State to apply the *choice of law* rules (rather than the local substantive law) of the state in which the debtor is located, as determined under former § 9-103(3)(d). This choice of law rule under former Article 9, applicable where the collateral is mobile goods, chattel paper (if perfection is claimed by filing), accounts, and general intangibles, is unlike the choice of law rules for most other collateral under former Article 9.¹² For most other collateral, the choice of law rules under former Article 9 direct the court in the Forum State to apply the local law (the internal, *substantive* laws) of a particular state to determine whether a security interest is perfected, without regard to the choice of law rules of that state.

3. The third type is *instruments* in which a security interest is claimed to be perfected by a filed financing statement. This category is chosen for analysis because revised Article 9 adds filing as a permitted method of perfecting a security interest in

¹¹ The filing of a financing statement is the only way to perfect a security interest in these types of collateral under both former and revised Article 9. Former § 9-302(1), revised § 9-310(a). When discussing perfection, this *Report* ignores temporary methods of perfection, such as temporary automatic perfection in proceeds under former § 9-306(3) and revised § 9-315(d).

¹² Former Article 9 does direct a state to consider the choice of law rules of another state where the collateral is goods covered by a certificate of title (former § 9-103(2)) and minerals (former § 9-103(5)).

instruments.¹³ Filing is not a permitted method of perfecting a security interest in instruments under former Article 9; thus, if the Perfection State is a state that has not enacted revised Article 9, a filed financing statement will not be effective to perfect the security interest in instruments.

4. The fourth type is commercial¹⁴ *deposit accounts* in which a security interest is claimed to be perfected by control under revised Article 9. This category is chosen for analysis because a security interest in commercial deposit accounts as original collateral is governed by revised Article 9, but not by former Article 9.¹⁵ Revised Article 9 provides a method of perfecting a security interest in a deposit account and also provides a choice of law rule to determine which state's law governs whether a security interest in a deposit account has been perfected. Because security interests in deposit accounts as original collateral are not governed by former Article 9, former Article 9 contains no substantive method of, and no choice of law rule concerning, perfection of a security interest in a deposit account taken as original collateral.

This *Report* first explains the choice of law rules under revised Article 9 and former Article 9 for each of these four types of collateral in which a security interest is claimed to be perfected by a particular method. It next analyzes the choice of law issues arising in a Forum State in which revised Article 9 is in effect. It then analyzes the choice of law issues arising in a Forum State in which revised Article 9 is not in effect.

This *Report* does not exhaustively discuss all choice of law issues that may arise under revised Article 9 and former Article 9 in any dispute relating to a security interest. This *Report* focuses on choice of law issues for determining perfection and concentrates on the four identified types of collateral in which perfection of a security interest is claimed by a particular method.

¹³ Former Article 9 did not permit a secured party to perfect a security interest in instruments by filing a financing statement, but revised Article 9 does. Former § 9-304(1); revised § 9-312(a).

¹⁴ Revised Article 9 does not provide for a security interest in a deposit account as original collateral in a consumer transaction. Revised § 9-109(c)(13).

¹⁵ Former Article 9 did not cover a security interest in a deposit account as original collateral, but revised Article 9 does. Former § 9-104(l); revised § 9-109, Comment 16.

This *Report* does not address choice of law issues for determining perfection of a security interest in these types of collateral as proceeds of other collateral, perfection of a security interest in other types of collateral, perfection by other methods, or achieving or maintaining perfection of a security interest either in proceeds of collateral or following a change in the location of the debtor or of the collateral. Nor does this *Report* address choice of law rules for determining attachment¹⁶ of a security interest, the effect of perfection or non-perfection of a security interest, priority of a security interest, enforcement of a security interest, or the rights of account debtors and other persons obligated on collateral in which a security interest is claimed. Further, this *Report* does not address any special transition choice of law issues that may arise if revised Article 9 does not take effect in a particular state until after the Effective Date. An analysis of all of these choice of law issues that are excluded from the discussion in this *Report* would be lengthy and highly complex. That analysis is beyond the scope of this *Report*.

The choice of law rules of revised Article 9 and former Article 9.

Revised Article 9. Revised §§ 9-301 to 9-307 provide the choice of law rules that determine the Perfection State – that is, the state whose substantive law governs whether a security interest has been perfected.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* The state in which the debtor is located is the Perfection State for purposes of determining whether a security interest in ordinary goods has been perfected by filing.¹⁷ Revised Article 9 contains its own rules for determining where a debtor is located. A debtor that is a registered organization¹⁸ organized under the law of a state is located in that state.¹⁹ A debtor that is an

¹⁶ Generally, § 1-105 provides the choice of law rules for the attachment of a security interest. When discussing perfection, this *Report* assumes that the security interest has attached under former Article 9 or revised Article 9, as applicable. See former § 9-203 and revised § 9-203.

¹⁷ Note that for security interest in ordinary goods perfected by possession the Perfection State would be the state where the ordinary goods are physically located. Revised § 9-301(2) .

¹⁸ Revised § 9-102(a)(70) defines registered organization as “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.”

¹⁹ Revised § 9-307(e).

organization, but not a registered organization, is located in the state in which the debtor has its chief executive office.²⁰ A debtor who is an individual is located in the state in which the debtor principally resides.²¹ Special rules determine the location of foreign debtors, federally-chartered debtors, certain banks, and other specified categories of debtors.²²

- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* The state in which the debtor is located, as determined under revised Article 9, is the Perfection State for purposes of determining whether a security interest in accounts and general intangibles has been perfected by filing.²³
- *Instrument in which a security interest is claimed to be perfected by filing:* Likewise, the state in which the debtor is located, as determined under revised Article 9, is the Perfection State for purposes of determining whether a security interest in an instrument has been perfected by filing.²⁴
- *Deposit account in which a security interest is claimed to be perfected by control:*²⁵ The state in which the *bank where the deposit account is maintained* (the “depository bank”) is located is the Perfection State for purposes of determining whether a security interest in a deposit account has been perfected.²⁶ Generally, revised Article 9 provides that the depository bank is located in the state whose law is expressly specified as the depository bank’s location for Article 9 choice of law purposes in the deposit account agreement

²⁰ Revised §§ 9-307(b)(2) and (3). If the debtor has only one place of business, it is located at its place of business and not at its chief executive office. For convenience, this *Report* (including the attached chart) assumes the debtor is an organization having more than one place of business and is therefore located at its chief executive office.

²¹ Revised § 9-307(b)(1).

²² See revised §§ 9-307(c), (f), (h), (i) and (j).

²³ Revised § 9-301(1). The only method of perfecting a security interest in accounts and general intangibles is filing a financing statement. Revised § 9-310(a).

²⁴ Revised § 9-301(1). A security interest in instruments may also be perfected by the secured party taking possession of the instruments. Revised § 9-313(a).

²⁵ “Control” is the only method of perfecting a security interest in a deposit account as original collateral under revised Article 9. Revised § 9-312(b)(1).

²⁶ Revised § 9-304.

between the debtor and the depository bank.²⁷ If no such specification is made, the depository bank is located in the state whose law generally governs that deposit account agreement.²⁸

Former Article 9. Former § 9-103 provides the choice of law rules that determine the Perfection State.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* Generally, the state in which the ordinary goods are physically located at the time that perfection is claimed is the Perfection State for purposes of determining whether the a security interest in the ordinary goods has been perfected by filing.²⁹
- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* The law (*including the conflict of laws rules*) of the state in which the debtor is located (the “Intermediate State”) governs whether a security interest in accounts and general intangibles has been perfected by filing.³⁰ The rules for determining the debtor’s location are different under former Article 9 than under revised Article 9. Under former Article 9 a debtor generally is located in the state in which the debtor has its chief executive office, regardless of whether the debtor is an individual or an organization and regardless of whether the debtor, if an organization, would be considered as a registered organization under revised Article 9.³¹ This reference to *the law including the conflict of laws rules* of the Intermediate State, which is different than most other collateral under former Article 9, and different than all types of collateral under revised Article 9, requires a court in a Forum State in which former Article 9 is in effect to apply the choice of law rules of the Intermediate State to identify the Perfection State (*i.e.*, the state

²⁷ Revised § 9-304(b)(1).

²⁸ Revised § 9-304(b)(2).

²⁹ Former § 9-103(1).

³⁰ Former § 9-103(3).

³¹ See former § 9-103(3)(d). If the debtor has only one place of business, it is located at its place of business and not at its chief executive office. If the debtor has no place of business, the debtor is located at the debtor’s residence. For convenience, this *Report* (including the attached chart) assumes the debtor has more than one place of business and is therefore located at its chief executive office.

whose *substantive* law will govern whether a security interest in accounts and general intangibles has been perfected by filing).³²

- *Instrument in which a security interest is claimed to be perfected by filing:* The state in which the instrument is physically located at the time that perfection is claimed is the Perfection State for purposes of determining whether a security interest in the instrument has been perfected.³³
- *Deposit account in which a security interest is claimed to be perfected by control:* Because former Article 9 does not include within its scope a security interest in a deposit account taken as original collateral,³⁴ former Article 9 provides no choice of law rule governing the perfection of a security interest in a deposit account.

Revised Article 9 in Effect in the Forum State.

Application of revised Article 9 choice of law rules to determine the Perfection State. Following the Effective Date, a court in a Forum State in which revised Article 9 is in effect will apply the choice of law rules of revised Article 9 to determine which state's laws govern whether a security interest is perfected. Those choice of law rules direct the court in the Forum State to look to the *substantive* laws of the Perfection State to determine whether perfection has been achieved. Where perfection of a security interest in ordinary goods, accounts, general intangibles, or instruments is claimed by filing, the Perfection State is the state of the debtor's location, as determined under revised Article 9. Where perfection of a security interest in a deposit account is claimed by control, the Perfection State is the state of the location of the depository bank where the deposit account is maintained.

Revised Article 9 in effect in the Perfection State. If the court in the Forum State in which revised Article 9 is in effect determines the Perfection State and revised Article 9 is in effect in the applicable Perfection State,³⁵ then the *substantive* perfection rules³⁶ of the Perfection

³² Former § 9-103(3)(b).

³³ Former § 9-103(1). Note that former Article 9 does not permit a security interest in an instrument to be perfected by filing. See former §§ 9-304(1) and 9-305.

³⁴ Former § 9-104(l).

³⁵ As discussed above, the identity of the Perfection State may depend on the kind of collateral (e.g. deposit accounts) and method of perfection (e.g. possession).

State's revised Article 9 determine whether the security interest is perfected.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* Under the revised Article 9 of the Perfection State, a security interest in all ordinary goods may be perfected by properly filing a financing statement in that state.³⁷
- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* Revised Article 9 of the Perfection State requires the filing of a financing statement to perfect a security interest in accounts and general intangibles. Under the revised Article 9 of the Perfection State, a security interest in accounts and general intangibles is perfected by properly filing a financing statement in that state.³⁸
- *Instrument in which a security interest is claimed to be perfected by filing:* Under the revised Article 9 of the Perfection State, a security interest in *all* instruments may be perfected by properly filing a financing statement in that state.³⁹
- *Deposit account in which a security interest is claimed to be perfected by control:* Under the revised Article 9 of the Perfection State (which in this case will be the state of the location of the *depository bank*, not the location of the debtor), a secured party may perfect a security interest in a deposit account taken as original collateral only by obtaining control of the deposit account.⁴⁰

Revised Article 9 not in effect in the Perfection State. If the court in the Forum State in which revised Article 9 is in effect determines the Perfection State, and revised Article 9 is not in effect in the Perfection State,

³⁶ These substantive perfection rules include those that specify the method(s) of perfection, the filing office, and the formal requirements for an effective financing statement.

³⁷ Revised §§ 9-310(a), 9-501(a).

³⁸ Revised §§ 9-310(a) and 9-501(a).

³⁹ Revised §§ 9-310(a) and 9-501(a).

⁴⁰ Revised § 9-312(b)(1).

then the *substantive* perfection rules⁴¹ of the Perfection State's *former* Article 9 will determine whether the security interest is perfected.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* Under the former Article 9 of the Perfection State, a security interest in ordinary goods is perfected by properly filing a financing statement in the Perfection State.⁴² It is important to note that even though former Article 9 is in effect in the Perfection State, former Article 9's choice of law rules (requiring filings in each of the states where the goods are physically located) are *not* applicable. The filing in the Perfection State perfects the security interest in *all* of the goods wherever located (if the Forum State has enacted revised Article 9). However, former Article 9's rules in part 4 determine the effectiveness of the filing made in the Perfection State, *not* the rules in part 5 of revised Article 9. For example, part 4 of former Article 9, which is in effect in the Perfection State, requires the debtor to sign the financing statement.⁴³ Part 5 of revised Article 9, which is not in effect in the Perfection State, contains no such signature requirement;⁴⁴ instead, the filing must only be authorized by the debtor, generally in a record authenticated by the debtor.⁴⁵
- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* The former Article 9 of the Perfection State would allow a security interest in accounts and general intangibles to be perfected by filing in the Perfection State.⁴⁶ Thus, if the secured party properly files a financing statement in the Perfection State, the security interest in *all* of the accounts and general intangibles is perfected (if the Forum State has enacted revised Article 9). Under the revised Article 9 of the Forum State, the court in the Forum State will not apply the choice of law rules

⁴¹ These substantive perfection rules include those that specify the method(s) of perfection, the filing office, and the formal requirements for an effective financing statement.

⁴² Former §§ 9-302(1) and 9-401.

⁴³ Former § 9-402(1).

⁴⁴ Revised § 9-502.

⁴⁵ See revised §§ 9-509 and 9-510.

⁴⁶ Former §§ 9-302(1) and 9-401.

of the Perfection State, and it will not matter where the debtor is located under former § 9-103(3).

- *Instrument in which a security interest is claimed to be perfected by filing:* Under the former Article 9 of the Perfection State, the filing of a financing statement in the Perfection State will *not* perfect a security interest in an instrument. Former Article 9 generally requires that the secured party perfect its security interest in the instrument by taking possession of the instrument.⁴⁷ Even though revised Article 9 is in effect in the Forum State, any financing statement filed by the secured party in the Perfection State will be ineffective to perfect the security interest in the instrument.
- *Deposit account in which a security interest is claimed to be perfected by control:* A security interest in a deposit account as original collateral is excluded from the scope of the former Article 9 still in effect in the Perfection State.⁴⁸ Even though revised Article 9 is in effect in the Forum State, whether the secured party's security interest in the deposit account is perfected is determined by the laws of the Perfection State, which laws will be laws other than former Article 9. Those other laws may well be the common law of the Perfection State, which may or may not be well developed in that State and which may or may not recognize the common law equivalent of control as a method of perfection.

Revised Article 9 not in Effect in the Forum State.

Application of former Article 9 choice of law rules to determine Perfection State generally. Following the Effective Date, a court in a Forum State in which former Article 9 is in effect will apply the choice of law rules of former Article 9 to determine the state whose laws will govern whether a security interest is perfected. The former Article 9 choice of law rules will in most cases directly identify the Perfection State and will direct the court in the Forum State to apply the *substantive* laws of the Perfection State to determine whether perfection has been achieved. The Perfection State, in the case of ordinary goods, is each state in which the goods are physically located at the time that perfection is claimed. The Perfection State, in the case of accounts and general intangibles, is the state whose laws apply

⁴⁷ Former §§ 9-304(1) and 9-305.

⁴⁸ Former § 9-104(l).

under the choice of law rules of the Intermediate State (as more fully explained below). The Perfection State, in the case of an instrument, is the state in which the instrument is physically located at the time that perfection is claimed. Because a security interest in a deposit account as original collateral is excluded from the scope of the former Article 9 of the Forum State, the choice of law rules of former Article 9 will not apply to the determination of the Perfection State. Instead, a court in the Forum State will apply the Forum State's general choice of law rules, which will be found in law other than former Article 9, to determine which state's laws determine whether the secured party's security interest in the deposit account is perfected. Those other choice of law rules may or may not be well developed.

Application of former Article 9 choice of law rules to determine Perfection State in the case of accounts and general intangibles. The choice of law analysis under former Article 9 to determine whether a security interest in accounts and general intangibles is perfected by filing deserves further explanation. The court in the Forum State in which revised Article 9 is not in effect will apply the substantive law of the Perfection State to determine whether the security interest in accounts and general intangibles is perfected by filing. The court in the Forum State will identify the Perfection State by the following analysis.

First, the court in the Forum State must determine the Intermediate State. That state is the state in which the debtor is located under former Article 9. Under former § 9-103(3)(d), a debtor is located at its chief executive office, regardless of whether the debtor is an organization or an individual and, if the debtor is a registered organization, regardless of the jurisdiction under whose laws the debtor is organized.

Second, the court in the Forum State must then determine the Perfection State. That determination will be made under the choice of law rules in effect in the Intermediate State. Those choice of law rules will be found, of course, in the version of Article 9 in effect in the Intermediate State.

If revised Article 9 is in effect in the Intermediate State, the court in the Forum State will apply the choice of law rules in the Intermediate State's revised Article 9 to determine the Perfection State. Under the Intermediate State's revised Article 9 choice of law rules, the Perfection State is the state in which the debtor is located. The court in the Forum State will determine the debtor's location for this purpose under the

revised Article 9 debtor location rules in effect in the Intermediate State, not the debtor location rules of former Article 9 in effect in the Forum State. The revised Article 9 debtor location rules, unlike the debtor location rules in former Article 9, are based on whether the debtor is an organization or an individual and, if the debtor is a registered organization, the jurisdiction under whose laws the debtor is organized.

If revised Article 9 is not in effect in the Intermediate State, the court in the Forum State will apply the choice of law rules in the Intermediate State's former Article 9 to determine the Perfection State. Under the Intermediate State's former Article 9 choice of law rules, the Perfection State is the state in which the debtor is located under former Article 9. Once again, under former § 9-103(3)(d), a debtor is located at its chief executive office, regardless of whether the debtor is an organization or an individual and, if the debtor is a registered organization, regardless of the jurisdiction under whose laws the debtor is organized. In this case, the Intermediate State and the Perfection State will be the same state.

Revised Article 9 in effect in the Perfection State. If former Article 9 is in effect in the Forum State and revised Article 9 is in effect in the Perfection State, then the *substantive* perfection rules⁴⁹ of the Perfection State's revised Article 9 will determine whether the security interest is perfected.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* Under the revised Article 9 of the Perfection State, a security interest in ordinary goods is perfected by properly filing a financing statement in the Perfection State. It must be remembered that, even though revised Article 9 is in effect in the Perfection State, revised Article 9's own choice of law rules (which permit perfection by filing for *all* ordinary goods, wherever located, in the state in which the debtor is located under revised Article 9) are not applicable. Instead, filing a financing statement in the Perfection State will perfect the security interest *only* in the ordinary goods physically located in the Perfection State (if former Article 9 is in effect in the Forum State). A security interest in ordinary goods physically located in any other state must be perfected by filing a financing statement in that other Perfection State under its version of Article 9.

⁴⁹ These substantive perfection rules include those that specify the method(s) of perfection, the filing office, and the formal requirements for an effective financing statement.

- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* Revised Article 9 of the Perfection State requires a security interest in accounts and general intangibles to be perfected by properly filing a financing statement in the Perfection State. Even though revised Article 9 is in effect in the Perfection State, revised Article 9's own choice of law rules, which require perfection by filing for accounts and general intangibles in the state in which the *debtor* is located (as determined under revised Article 9), are not applicable. Indeed, the Perfection State may not even be the state where the debtor is located under revised Article 9.
- *Instrument in which a security interest is claimed to be perfected by filing:* Under the revised Article 9 of the Perfection State, a security interest in instruments may be perfected by properly filing a financing statement in the Perfection State. Even though revised Article 9 is in effect in Perfection State, revised Article 9's own choice of law rules, which permit perfection by filing for *all* instruments, wherever located, in the state in which the debtor is located (as determined under revised Article 9), are not applicable. Instead, filing a financing statement in the Perfection State will perfect the security interest *only* in the instruments that are physically located in the Perfection State. A security interest in instruments physically located in any other state must be perfected by a method effective under the version of Article 9 in effect in that state.
- *Deposit account in which a security interest is claimed to be perfected by control:* Under the revised Article 9 of the Perfection State, a security interest in a deposit account taken as original collateral is perfected only if the secured party has control of the deposit account.

Revised Article 9 not in effect in the Perfection State. If former Article 9 is in effect in the Forum State and in the Perfection State, then the *substantive* perfection rules⁵⁰ of the Perfection State's former Article 9 will determine whether the security interest is perfected.

⁵⁰ These substantive perfection rules include those that specify the method(s) of perfection, the filing office, and the formal requirements for an effective financing statement.

- *Ordinary goods in which a security interest is claimed to be perfected by filing:* Under the former Article 9 of the Perfection State, a security interest in ordinary goods physically located in a Perfection State is perfected by properly filing a financing statement in that Perfection State.
- *Accounts and general intangibles in which a security interest is claimed to be perfected by filing:* Former Article 9 of the Perfection State requires a security interest in accounts and general intangibles to be perfected by properly filing a financing statement in the Perfection State.⁵¹ That filing will perfect a security interest in *all* accounts and general intangibles.
- *Instrument in which a security interest is claimed to be perfected by filing:* Under the former Article 9 of the Perfection State, the filing of a financing statement will *not* perfect a security interest in instruments.
- *Deposit account in which a security interest is claimed to be perfected by control:* A security interest in a deposit account as original collateral is excluded from the scope of the former Article 9 of the Perfection State. Whether the secured party's security interest in the deposit account is perfected will be determined by the laws of the Perfection State, which will be found in law other than former Article 9.

Conclusion.

The foregoing analysis is relevant because revised Article 9 will not be in effect in all states on the Effective Date. The analysis indicates that a secured party planning a transaction under revised Article 9 should address the possibility that revised Article 9 is not in effect in a Forum State, an Intermediate State, or a Perfection State. In doing so, the secured party should consider the possibility that more than one jurisdiction might be the Forum State and that there may be several Perfection States. The secured party should then consider whether to comply with any of the perfection rules of former Article 9 and, in the case of collateral under revised Article 9 that is not within the scope of former Article 9, whether to

⁵¹ Note again that in this circumstance, the Perfection State is determined by the choice of law rules of the Intermediate State. Where former Article 9 is in effect in both the Forum State and the Intermediate State, the Perfection State would be the Intermediate State.

comply with any determinable perfection rules under other applicable law apart from former Article 9. The analysis set forth in this *Report* is summarized in the attached table.

A secured party should consider complying with the *substantive* perfection rules of (i) revised Article 9, (ii) former Article 9, *and* (iii) other law to the extent *any* of the following applies:

- Tangible collateral, such as ordinary goods and instruments, is or might in the future be located in a state other than the state in which the debtor is located under revised Article 9.
- The debtor's location, as determined under either former Article 9 or revised Article 9, is or might in the future be in a state other than the state in which the debtor is located under revised Article 9.
- The collateral consists or will consist of assets, such as deposit accounts, that are outside the scope of former Article 9, and the perfection of a security interest in those assets, under choice of law rules of revised Article 9 or under the choice of law rules under other law, may require action in a state in which former Article 9 is still in effect.

These concerns apply whether the dispute concerning the perfection of the security interest is litigated in a forum located in a state in which revised or former Article 9 is in effect.⁵²

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⁵² Of course, the secured party may not be able to control the location of the litigation.

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