Harmonizing Choice of Law in Article 9 with Emerging International Norms

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I. INTRODUCTION

The first text of the Uniform Commercial Code ("UCC") to be widely enacted was promulgated by the UCC’s sponsors, the Uniform Law Commissioners ("ULC") and The American Law Institute ("ALI"), in 1958 and lightly retouched in
Ten years later, in 1972, the sponsors promulgated amendments to Article 9. The amendments were drafted by a committee, prominent members of which had been equally prominent in the drafting effort a decade earlier. The amendments were undertaken in light of experience in the ensuing decade, particularly nonuniform changes to the official text made by various states.³

The UCC’s sponsors promulgated a complete revision of Article 9 in 1999, which was enacted by all the states by 2001. Ten years later, in 2010, the sponsors promulgated amendments to Revised Article 9. The amendments were drafted by a committee, prominent members of which had been equally prominent in the drafting effort a decade earlier. The amendments were undertaken in light of experience in the ensuing decade, particularly nonuniform changes to the official text made by various states.⁴

Marx observed that all great events repeat themselves, the first time as tragedy and the second time as farce. Ill matched though that grand observation may be to this humble bit of UCC history, it is nevertheless evoked by this: The 1972 amendments were weighty and extensive, and reflected a fundamental rethinking of at least some issues. The 2010 amendments are slight and trim, and represent no fundamental rethinking of anything at all. Indeed, the change that received by far the most attention from the drafting committee—elaboration of the statutory definition of the name of an individual debtor for the purpose of completing a financing statement—can be described, without much exaggeration, as an optional solution to a nonexistent problem.⁵

The modesty of the 2010 amendments can be attributed in part to the success of previous generations of the UCC’s artisans in honing Article 9 to do the job it was intended to do. It can also be attributed in part to institutional constraints that confined the process that produced the 2010 amendments to issues as to which there was a clamor for immediate reform, expressed by enactments of nonuniform changes to the official text, or at least by practitioners with real deals in hand.⁶ Those constraints evidently were a reaction to the prolonged agony of the multiple failed attempts to amend Article 2, which some have attributed in significant measure to insufficiently tethered aspirations of the committee originally charged with that

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4. See Annual Meeting Draft, at 1 (Reporter’s Prefatory Note).
6. For a more circumspect statement of this point, see the Annual Meeting Draft, at 1-2 (Reporter’s Prefatory Note).
revision project. The UCC’s sponsors left the committee that drafted the 2010 amendments under no illusion that it had anything like a free hand to improve Article 9. The committee’s mandate was limited to a list of narrowly-defined issues preapproved by the sponsors, and the committee’s ability to seek authority to deal with other issues was limited by the short and well defined time line for completion of the project. Partly because of its sensitivity to its limited mandate, the committee declined to craft revisions even to address many issues on the approved list.

The wisdom of this approach to the maintenance of the UCC perhaps merits reflection. For the present purpose, however, the point is that the 2010 amendments do not by any means address all of the issues that are known to be simmering in Article 9’s hearth. One of those unaddressed issues is choice of law.

To say that the 2010 amendments did not address Article 9’s choice of law rules is not quite true, but it is only a very slight falsehood. The single change to the statutory text directly addressed to choice of law is a trivial clarification of the rule that specifies the location (for the purpose of the choice of law rules) of a federally-chartered registered organization or a branch or agency of a foreign bank. Modest changes to the definitional provisions of Article 9 may alter the status for Article 9 purposes of certain forms of business organization—chiefly business trusts—which may affect the application of the choice of law rules to some such organizations. Finally, a few changes to the official comments clarify certain other results that, in the view of the drafting committee, should follow from a careful reading of the statute. The flavor of those minutiae can be gleaned from two samples. First, the comments now explain that the rule of section 9-307(e) (which provides that a debtor that is a

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9. An example is clarification of two priority issues that can arise in connection with a sale of receivables that are described in Kenneth C. Kettering, True Sale of Receivables: A Purposive Analysis, 16 AM. BANKR. INST. L. REV. 511, 536 n.106 (2008). The committee considered both issues and chose not to address either.

10. The 1999 version of section 9-307(f)(2) provides that, in general: [A] registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a State, are located . . . (2) in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location . . . . The 2010 amendments conform this language more closely to the language of federal banking laws by appending the phrase “, including by designating its main office, home office, or other comparable office.”

registered organization organized under the laws of a state of the United States is located in that state) is not qualified by the rule of section 9-307(c) (which provides that if the usual rules for determining the location of the debtor point to a jurisdiction that does not have a filing system comparable to that prescribed by Article 9, then the debtor is instead located in the District of Columbia).\footnote{U.C.C. § 9-307 cmt. 3 (as amended 2010). An example of a debtor with which the drafters were concerned is a Delaware corporation having its chief executive office in a foreign jurisdiction that has no filing system. Such a debtor should be located in Delaware pursuant to section 9-307(e), but some feared that subsections (b) and (c) might be read to apply, with the result that the debtor would be located in the District of Columbia. The drafters rejected a proposal to clarify by comment the operation of section 9-307(c) in a second respect: namely, whether it applies only to a jurisdiction that lacks a filing system in regard to personal property generally, or also to a jurisdiction that does not require filing with respect to the collateral involved in the given transaction. See Arnold S. Rosenberg, Where to File Against Non-U.S. Debtors: Applying U.C.C. §9-307(c) [Rev.] to Foreign Filing, Recording, and Registration Systems, 39 UCC L.J. 109, 132-35 (2006).} Second, readers are now warned that the special filing permitted to be made in lieu of a fixture filing against a transmitting utility must be made in the jurisdiction in which the fixture is located, not the jurisdiction in which the transmitting utility is deemed to be located.\footnote{U.C.C. § 9-301 cmt. 5.b (as amended 2010); id. § 9-501 cmt. 5.} The alterations made to Article 9’s choice of law rules by the 2010 amendments thus are all but imperceptible. The need for more substantial revision is plainly visible on the horizon, even if not sufficiently pressing to inspire action in 2010. The pressure for change has multiple sources.

In the first place, Article 9 was originally drafted with domestic transactions in mind. Transactions having an international aspect were an afterthought. The 1999 revision paid more attention to such transactions.\footnote{For a similar thought by two participants in the 1999 revision, see Neil B. Cohen & Edwin E. Smith, International Secured Transactions and Revised UCC Article 9, 74 Chi.-Kent L. Rev. 1191, 1191 (1999).} But reasons for change have continued to mount. In addition to the ever-increasing globalization of credit transactions, a factor as evident in 1999 as it is today, legal developments have occurred, or are in the process of occurring, since 1999 that cast a long shadow on Article 9.

One set of developments relates to emerging bodies of “hard law”—that is, rules intended to be directly enforceable in court—that are or may become applicable to certain secured transactions with international aspects. Treaties relating to private law of the nature addressed by the UCC are sometimes referred to as “private international law conventions.”\footnote{Many organizations might be said to create private international law, but three stand out in producing instruments that are intended to create “hard law.” These are (a) the United Nations Commission on International Trade Law (“UNCITRAL”), a subsidiary body of the United Nations established in 1966, (b) the International Institute for the Unification of Private Law (“UIPRL,”) a subsidiary body of the International Law Association established in 1930, and (c) the American Law Institute (“ALI”), a body of American lawyers and jurists established in 1923.} At present the United States is bound by two such...
conventions. The older of the two, the United Nations Convention on the International Sale of Goods (“CISG”), 16 concluded in 1980 and ratified by the United States in 1986, relates to sales rather than secured transactions. The more recent of the two, the Convention on International Interests in Mobile Equipment and its implementing Protocol on Matters Specific to Aircraft Equipment (collectively, the “Cape Town Convention”), 17 concluded in 2001 and ratified by the United States in 2004, operates somewhat as a miniature analogue of UCC Article 9 as to security interests in and leases of airframes, aircraft engines and helicopters, and rights to payment arising from such transactions.

Since the revision of Article 9 in 1999 further conventions have been concluded. Some, although drafted with the participation of United States representatives, are unlikely to be entered into by the United States, and so are of little direct interest to the maintenance of the UCC. 18 Of direct interests are two conventions signed by the United States that apply to secured transactions with an international aspect. The first of these is the United Nations Convention on the Assignment of Receivables in International Trade (the “Receivables Convention”), 19 concluded in 2001 and signed

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The official commentary on the Cape Town Convention is ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND PROTOCOL THERETO ON MATTERS SPECIFIC TO AIRCRAFT EQUIPMENT: OFFICIAL COMMENTARY (2008), and a commentary by Steven L. Harris, co-reporter for the 1999 revision of UCC Article 9 and reporter for the 2010 amendments to Article 9, in 10A WILLIAM D. HAWKLAND ET AL., UNIFORM COMMERCIAL CODE SERIES ch. 9 (2009) [hereinafter HAWKLAND].

18. Thus, on October 9, 2009 UNIDROIT concluded the Convention on Substantive Rules for Intermediated Securities (the “Geneva Securities Convention”), which was inspired by the 1994 revision of UCC Article 8. The United States has not signed the Geneva Securities Convention and is unlikely to do so.

by the United States in 2003. The second is the Convention on the Law Applicable to
Certain Rights in Respect of Securities Held with an Intermediary (the “Hague
Securities Convention”), concluded in 2006 and signed by the United States in
2007. While neither of these has been ratified by the United States as of 2010, nor
even yet entered into force, both are under active consideration, and it is quite
possible that in due course one or both will become binding on the United States.21

Another set of developments with an international dimension since the 1999
revision of Article 9 has taken the form of nonbinding “soft law.” In particular,
United States representatives have played an active role in various efforts to induce
nations to harmonize their secured transactions laws. Again, not all of these
harmonization efforts are of direct interest to the ongoing maintenance of the UCC.22

One that is of direct interest is the promulgation in 2007 by UNCITRAL of a massive
Legislative Guide on Secured Transactions (the “Legislative Guide”).23 The

UNCITRAL’s website, supra note 16. For a comprehensive discussion of the Receivables
Convention by two United States delegates, see Harry C. Sigman & Edwin E. Smith, Toward
Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United
Nations Convention on the Assignment of Receivables in International Trade, 57 BUS. LAW.
727 (2002). The ULC has issued a report on implementation of the Receivables Convention,
North American Law with Respect to the Assignment of Receivables in International Trade
Convention (June 15, 2007) [hereinafter ULC Receivables Convention Report], which is
available at the ULCs’ archival website, supra note 8.

website, http://www.hcch.net/index_en.php. A commentary by its chief drafter is ROY
GOODE ET AL., EXPLANATORY REPORT ON THE HAGUE CONVENTION ON THE LAW APPLICABLE
TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY (2005).
Commentaries by United States participants in or observers of its drafting include James
Steven Rogers, Conflict of Laws for Transactions in Securities Held Through Intermediaries,
39 CORNELL INT’L L.J. 285 (2006), and Carl S. Bjerre & Sandra M. Rocks, A Transactional

21. The Assistant Legal Adviser for Private International Law of the U.S.
Department of State wrote in the summer of 2009 that “implementation by the United States
is expected to be requested” with respect to both Conventions. Harold S. Burman, Private

22. For example, in 2002 the Organization of American States promulgated a Model
Law on Secured Transactions, which has been described by one participant as an effort to
“tropicalize” UCC Article 9 and make it acceptable to Latin American countries. See Boris
Kozolchyk & Dale Beck Furnish, The OAS Model Law on Secured Transactions: A

23. U.N. COMM’N ON INT’L TRADE LAW, UNCITRAL LEGISLATIVE GUIDE ON
SECURED TRANSACTIONS (2010), available at UNCITRAL’s website, supra note 16. A
supplement to the Legislative Guide dealing with security interests in intellectual property
was approved in 2010. For an overview of the Legislative Guide by a senior legal officer of
UNCITRAL, see Spiros V. Bazinas, The UNCITRAL Legislative Guide on Secured
Legislative Guide is a detailed statement of legislative recommendations, with extensive commentary, on all issues associated with drafting a modern secured transactions law. It is consistent with the “hard law” of the Conventions just mentioned, as well with efforts to harmonize different nations’ insolvency laws. As such, the Legislative Guide can be viewed as a statement of emerging international norms on the subject.

The emergence of these new sources of law, particularly the binding law that the foregoing Conventions represent and will represent if and when the United States ratifies those not already ratified, is profoundly significant to the development of American commercial law, quite aside from their particular terms. Part V of this paper offers some thoughts on that large topic. This paper, however, focuses chiefly on a narrower topic: namely, the fact that Article 9’s choice of law rules are not harmonious with those set forth in these Conventions and the Legislative Guide.

Harmonization for its own sake—that is, amending Article 9 to remove conflicts between it and the rules laid down by the Conventions—is a goal that the sponsors of Article 9 have forewarned, at least for the moment. Their present intention is not to amend Article 9 to remove such conflicts, but simply to rely on the supremacy of the Conventions, as treaties, over the state-law UCC. Harmonization nevertheless merits a place on a future revision agenda to the extent that it can cure problems with Article 9’s current provisions. Unlike the UCC, a fundamental element of the design of these international instruments was to work in a global setting, and so choice of law issues were always at their heart. Article 9 can benefit from the thought that was given to choice of law in those international instruments, independent of any value attached to harmonization for its own sake.

In addition to these international developments, domestic developments also call for attention to Article 9’s choice of law rules. In particular, Article 9 lacks a clear rule for determining which jurisdiction’s law governs characterization of a transaction as being a secured transaction in the first place. The UCC traditionally has given little guidance on the substantive rules for determining whether a transaction should be characterized as a secured transaction. That has left the subject to the courts. Characterization cases typically are so fact-specific that differences in attitude between courts in different states have been of little account. The situation is being changed, however, by the increasingly common enactment by states of statutes that

24. For an example of such a harmonization effort, see U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW (2005), available at UNCITRAL’s website, supra note 16. There has been a great deal of activity in the last two decades in harmonizing different nations’ insolvency laws generally, and in respect of coordination of cross-border insolvency proceedings in particular. For a reasonably current overview, see Ian F. Fletcher, Maintaining the Momentum: The Continuing Quest for Global Standards and Principles to Govern Cross-Border Insolvency, 32 BROOK. J. INT’L L. 767 (2007).

25. See infra text at note 204.
preclude recharacterization of certain classes of transactions. Given such a state-specific characterization statute, the outcome of a given case may turn on which state’s law is applied to the issue of characterization. Choice of law governing characterization is also important to transactions having an international component, for foreign laws can differ materially from American law on characterization. Article 9 does not now supply a clear or satisfactory rule on the choice of law governing characterization.

The main purpose of this paper is to table these choice of law issues for inclusion on the agenda for the next revision of Article 9. By way of background, Part II recounts the difficulty that the uniform law process has had in addressing choice of law issues. A consistent symptom, or consequence, of that difficulty has been a tendency of uniform laws to overreach in their choice of law provisions.

Parts III and IV set forth two problems with Article 9’s current choice of law provisions and demonstrate how solutions to both can be informed by reference to the emerging international norms just noted. Part III addresses the application of Article 9’s choice of law rules to extraterritorial debtors and assets, a subject on which Article 9’s current rules are so tainted by overreach that “imperialistic” is not an unfair description. Part IV addresses the failure of Article 9 to set forth a clear rule on which jurisdiction’s law should govern the characterization of a transaction as a secured transaction. The emerging sources of international norms provide a useful starting point for analyzing how that gap should be filled. The analysis also raises the interesting question of the circumstances in which it is appropriate to reverse engineer for domestic use a choice of law rule originally crafted for international use.

As a coda, Part V reflects on the broader significance of the Conventions to the development of American commercial law.

II. THE UNHAPPY ENGAGEMENT OF THE UNIFORM LAW PROCESS WITH CHOICE OF LAW

The uniform law process has perennially undervalued attention to choice of law. The rules prepared by the Uniform Law Commissioners for drafters of the uniform laws it sponsors say nothing about choice of law.26 Hence it is left to each drafting committee to decide whether and to what extent to include provisions on the subject in the uniform law that it is charged with preparing or revising. As a result, the subject has been attended to only fitfully. Indeed, the first uniform law to contain any choice of law rules was the UCC itself, which was promulgated more than half a century after the ULC began issuing uniform laws.27 Drafting committees may have

27. See 1 HAWKLAND, supra note 17, § 1-105:1, at 118. The ULC began issuing uniform laws in 1892. The first official version of the UCC was approved by its sponsors in 1951. See U.C.C. Report No. 1 (Permanent Editorial Bd. 1962), reprinted in 1978 OFFICIAL
become more sensitive to the subject over time. For example, the original 1914 version of Uniform Partnership Act said nothing about which jurisdiction’s law governs relations among partners or between the partnership and its partners, while the 1992 revision added a careful provision on the matter. But it is still not uncommon for a uniform law to say nothing at all about choice of law.

An example of an important uniform law that is silent on choice of law is the Uniform Fraudulent Transfer Act (“UFTA”), promulgated in 1984 and enacted by forty-three states. That silence is apt to prove troublesome, given the incoherence of the scanty cases on choice of fraudulent transfer law, and given the increasing nonuniformity of the substantive law of fraudulent transfer even in states that have enacted the UFTA. Some of those nonuniformities are the result of explicit nonuniform amendments to the UFTA. Other nonuniformities may be the result of implicit amendments. In particular, at least ten states, starting with Alaska in 1997, have enacted statutes validating self-settled spendthrift trusts, often referred to as “asset protection trusts.” Courts traditionally have viewed a transfer of assets to such a trust to be a fraudulent transfer per se. That position would seem impossible to maintain under the fraudulent transfer law of a state that has enacted such validating legislation, even absent an explicit amendment to the state’s fraudulent transfer law. Whether a transfer of property to a trust created under the law of a state that validates

Text, supra note 2, at xxv.


31. One set of nonuniformities relates to an issue commonly associated with Durrett v. Wash. Nat’l Ins. Co., 621 F.2d 201 (5th Cir. 1980), namely, whether a forced disposition of an insolvent debtor’s property (such as by a foreclosure sale), for an amount substantially less than its fair market value, can be avoided under the “constructive fraud” prong of fraudulent transfer law. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), largely put that issue to rest as to foreclosure sales challenged under the Bankruptcy Code’s integral fraudulent transfer provision, but not as to state fraudulent transfer laws. The UFTA creates safe harbors for a disposition of property resulting from noncollusive foreclosure of a mortgage or enforcement of a security interest in accordance with UCC Article 9. At least two states (California and Pennsylvania) have contracted those safe harbors, by excluding a secured creditor’s retention of ownership of collateral in satisfaction of the debt (a so-called “strict foreclosure”). At least one state (Pennsylvania) has expanded those safe harbors, by including execution sales. See UFTA §§ 3(b), 8(c), 7A U.L.A. 47-50, 178-84 (2006).

Another set of nonuniform amendments is the deletion by at least four states (Arizona, California, Indiana and Pennsylvania) of the UFTA’s “insider preference” provisions, which permit a creditor to recover a transfer of property made by an insolvent debtor on account of antecedent debt owed by the debtor to a creditor who is an insider of the debtor. See UFTA § 5(b), 7A U.L.A. 129-31 (2006).
such trusts is avoidable as a fraudulent transfer therefore would seem to depend largely upon whether the fraudulent transfer claim is governed by the law of that state or the law of some other state. The UFTA has nothing to say about that question.\textsuperscript{32}

The reasons for the fitful attention to choice of law in the uniform law process do not seem difficult to understand. It is plausible to suppose that the drafters of uniform laws assume that a choice of law provision is unnecessary for litigation in which the choice is between two enacting states, and largely futile for litigation in which the choice is between an enacting state and a nonenacting state (because if the litigation is brought in a nonenacting state, a court in that state of course will not be bound by whatever choice of law provision the uniform product might contain). Furthermore, the American legal milieu does not encourage statutory drafters to attend to the subject. Choice of law in this country traditionally has been left to the courts, with only narrow and spotty legislative incursions.\textsuperscript{33} And while scholars who specialize in choice of law today are generally in a condition not far removed from a Hobbesian war of all against all, given the acute fragmentation of scholarly thinking about most aspects of the subject, there is a surprising consensus among them that legislative direction on choice of law is generally a bad idea: “necessarily clumsy, and, therefore, arbitrary, and even policy-defeating.”\textsuperscript{34}

On top of this, the experience of the Uniform Law Commissioners in addressing choice of law issues has not been encouraging. The ULCs’ first foray into choice of law waters, with the UCC, nearly sank the whole UCC project. The UCC’s basic choice of law provision, codified as section 1-105 from the initial promulgation of the UCC in 1951 until the 2001 revision of Article 1, originally was a bald exercise in UCC imperialism. Its drafters did not count on the widespread enactment of the UCC that eventually ensued, yet they were devoutly convinced of the UCC’s merit, and so, with missionary zeal, were determined to export its good word to unbelieving states. Hence the version of section 1-105 extant just before the initial promulgation of the UCC had the simple but radical objective of securing the broadest possible application of the substantive provisions of the UCC, notwithstanding enactment of the UCC by only a limited number of states. It did so by requiring the forum state’s UCC to be applied to any transaction having any one of a number of specified contacts with the forum state, and those contacts were no more than what the drafters perceived to be the bare minimum required by the Constitution.\textsuperscript{35} The reaction to this


\textsuperscript{34} William M. Richman & William L. Reynolds, Understanding Conflict of Laws § 85, 279 (rev. 3rd ed. 2002) (“On this point something of a scholarly consensus has emerged.”).

\textsuperscript{35} U.C.C. § 1-105 (Oct. 1949), reprinted in 8 Uniform Commercial Code Drafts
by infidels, scholars outside the UCC fold, “came near to being violent.”\(^{36}\) By way of appeasement, the version of section 1-105 initially promulgated, and carried through to the 1952 official text that was the practical starting point for the enactment effort, was cosmetically reworked, but it did not abandon the basic objective of securing application of the UCC to as many transactions as the Constitution would permit.\(^{37}\) The UCC as so constituted failed of enactment by more than a single state, and observers attributed its failure in significant measure to its choice of law provision.\(^{38}\)

The coup de grâce was administered by the New York Law Revision Commission, which in 1956 magisterially rejected the 1952 version of section 1-105 as being unwise and of doubtful constitutionality, and recommended that the UCC contain no choice of law provision at all, leaving the subject to the courts.\(^{39}\) With that blow the UCC’s sponsors admitted defeat and rewrote section 1-105 yet again, this time drastically. As reconstituted in 1958, section 1-105 was cast into substantially the form that it would retain thereafter (or, more precisely, until the later fiasco of the 2001 revision of Article 1, recounted below). It provided that, subject to enumerated provisions of the UCC that specify an applicable law as to certain issues, parties are free to agree to the law of a state bearing a “reasonable relation” to the transaction; failing such an agreement, the UCC as enacted by the forum state applies to a transaction bearing an “appropriate relation” to the forum state.\(^{40}\)

409. 409-14 (Elizabeth Slusser Kelly ed., 1984) [hereinafter UCC DRAFTS]. At that stage section 1-105 was also presented in an alternative version designed for use in the event that the UCC was enacted as federal law.


38.  Leflar, supra note 36, at 93-94.


40.  U.C.C. § 1-105 (1958 Official Text, with Comments), reprinted in 20 UCC DRAFTS, supra note 35, at 311-13. The language of the 1958 provision was not changed before the 2001 revision of Article 1, aside from conforming changes to the list of choice of law provisions hard-wired into the UCC in section 1-105(2). Those conforming changes were made in connection with revisions to other articles of the UCC, beginning with the
This formulation sufficed to procure general enactment, which might be considered a happy ending. Yet brief as it is, the canonical version of section 1-105 is so ill-written that its language has been widely ignored in at least two respects. The first relates to the “appropriate relation” standard prescribed for transactions to which the parties have not agreed to a governing law. The “appropriate relation” language was the last gasp of the drafters’ imperialistic ambitions for the UCC, for it was intended to encourage a court to apply the UCC as enacted by a forum state having a constitutional minimum of contacts with the transaction in question, even if a nonenacting state has a more substantial relationship to the transaction. Courts have widely ignored the “appropriate relation” language and instead applied the local common law of conflicts to such situations. In the second place, section 1-105 literally requires a court to respect parties’ agreement to the law of a jurisdiction bearing a “reasonable relation” to their transaction only if it also happens that the forum state has a “reasonable relation” to the transaction. That limitation is generally regarded as a drafting blunder best ignored.

The inglorious history of the UCC’s basic choice of law provision repeated itself with the promulgation of Revised Article 1 in 2001. The most significant change Revised Article 1 made to former Article 1 was to rewrite the basic choice of law provision. The new provision, Revised section 1-301, broadened party autonomy by generally allowing parties to choose the law that governs their transaction regardless of whether the transaction bears any relation to the chosen jurisdiction. It then imposed various constraints on that freedom, most notably by protecting consumers in a way not contemplated by former section 1-105 from a choice of law that might prejudice the consumer’s interest. That provision proved as controversial as its predecessor. Academics denounced it as bad policy and of doubtful

1972 revision of Article 9.

41. This objective is more evident in the reasons given for revising 1952 version than in the watered-down version of those reasons that eventually appeared as the official comment to the 1958 version. See 1956 Recommendations of the Editorial Board of the Uniform Commercial Code 5-6, reprinted in 18 UCC DRAFTS, supra note 35, at 29-30.

42. Cases are gathered in 1 HAWKLAND, supra note 17, § 1-105:4, at 136-41.

43. See 1 HAWKLAND, supra note 17, § 1-105:3, at 125 (decriing this limitation as “unfortunate and inadvertent”), EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 18.12 (4th ed. 2004) (“[T]his apparent gap can be attributed to inartful draftsmanhip and disregarded.”) (footnote omitted).

constitutionality. Business interests opposed its consumer-protective features (particularly insofar as they might upset the perception that usury statutes may be contracted around by choosing the law of a state with a lax usury limit), and they were sometimes joined by others concerned that the section might validate choice of law agreements that would result in application of other substantive laws they particularly disliked. With the negligible exception of the U.S. Virgin Islands, each of the thirty-four jurisdictions that enacted Revised Article 1 by the spring of 2008 had deleted Revised section 1-301 from its enactment and replaced it with the comfortably familiar language of former section 1-105, typically renumbering it as section 1-301. The UCC’s sponsors by then had had enough, and they amended the official text of Revised Article 1 to do likewise.

Contemporaneous and even more ignominious was the fate of the choice of law provision in the now-moribund Uniform Computer Information Transactions Act (“UCITA”). UCITA, a spin-off of the ill-starred Article 2 revision project, was promulgated as a stand-alone uniform law by the ULC in 1999 after the ALI declined to consent to its issuance as part of the UCC, and it was promptly amended several times in an unsuccessful attempt to appease critics. Critics’ indictment of UCITA included a long bill of particulars, prominent among which was the fact that UCITA, like Revised Article 1, provided that, subject to constraints, parties to a transaction subject to UCITA might choose the law of any jurisdiction to govern the transaction, regardless of the absence of contacts between the transaction and the chosen jurisdiction.

Although two states enacted versions of UCITA, the general revulsion against it was such that the attorneys general of thirty-four states and territories signed a letter declaring UCITA to be fundamentally flawed, specifically instancing its choice of law provision, and at least four states were so repelled as to take the extraordinary step of enacting so-called “bomb shelter” statutes that declare unenforceable a choice of law provision in an agreement that would result in the application of the law of a UCITA-enacting state. UCITA’s treatment of choice of law thus played a significant role in UCITA’s failure. Its corpse was buried in 2003.

49. Maryland and Virginia enacted UCITA (with amendments), and at least Iowa, North Carolina, Vermont and West Virginia enacted “bomb shelter” statutes to thwart it. For an overview of UCITA’s unhappy history, see Deborah Tussey, UCITA, Copyright and Capture, 21 CARDozo ARTS & ENT. L.J. 319, 323-26 (2003).
when the ULC announced that it would no longer promote enactment of UCITA. The more modest successor project by the ALI to establish principles of law for software contracts through soft law rather than by legislation was informed by the UCITA debacle. The soft law laid down by the ALI pointedly avoids deviating from the usual principle that respects a contractual choice of law only if the chosen jurisdiction bears a reasonable relationship to the transaction.50

On at least two occasions the Uniform Law Commissioners promulgated uniform laws that were aimed solely at solving a choice of law problem. The fate of those uniform laws was equally bleak, if less ignominious. Those uniform laws were addressed to the choice of law applicable to the period within which a claim must be brought. Statutes of limitation traditionally have been characterized as “procedural” for conflict of laws purposes, with the result that the limitation period prescribed by the forum state’s law is applied. The forum-shopping to which that rule leads has been addressed in most states by so-called “borrowing statutes” that require application of a limitation period other than the forum state’s if some stated aspect of the claim is connected in some stated way with another jurisdiction. Those “borrowing statutes” are widely divergent, and the two uniform laws just mentioned were attempts by the ULC to regularize the situation. Both were almost completely ignored by the states and eventually withdrawn.51 After studying for several years the prospect of trying again, the ULC in 2005 decided not to do so, concluding that a third try was unlikely to be the charm.52

Even when the ULC has succeeded in promulgating choice of law rules that have been widely enacted, the result often has failed to hit the bull’s-eye. That notably has been the case with the choice of law rules of Article 9 of the UCC. The UCC contains several choice of law provisions specific to particular Articles of the UCC, of which those of Article 9 are by far the most elaborate.53 The Article 9 choice of law rules have been completely rewritten several times, and indeed such rewriting was an important motivation for every major amendment project before the 2010 amendments. In the 1962 version of the UCC the choice of law rules of

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53. The Article-specific choice of law provisions in the UCC are listed in U.C.C. § 1-301(c) (2008) (formerly U.C.C. § 1-105(2) (1962)). Those specific to Article 9 are U.C.C. §§ 9-301 to 9-307 (2008).
Article 9 applied to the validity of a security interest, as well as its perfection and priority. The 1972 amendments to Article 9 were largely concerned with its choice of law rules and radically changed their scope, by limiting them to matters of perfection and priority, and completely overhauled their substance. The revisions of Article 8 in 1978 and 1994, and of Article 5 in 1995, were accompanied by important amendments to Article 9’s choice of law provisions in regard to investment property and letter-of-credit rights, respectively.

A major element of the 1999 revision of Article 9 was yet another fundamental rethinking of its choice of law rules. The result was yet another comprehensive overhaul of those rules, including such basic changes as the following: (a) reconfiguration of the choice of law rules applicable to perfection to result in “one stop filing,” so that perfection by filing is now almost always in the same filing office (namely, that of the jurisdiction in which the debtor is located), regardless of the nature of the collateral (contrary to the pre-1999 scheme, which ordinarily required filing against tangible collateral in the jurisdiction in which the collateral is located and filing against intangibles in the jurisdiction in which the debtor is located); (b) radical redefinition of the location of the debtor for choice of law purposes, including (i) by deeming a domestic corporation or other domestic “registered organization” to be located in its jurisdiction of organization (contrary to the pre-1999 scheme, under which such an organization ordinarily was located in the jurisdiction of its chief executive office), and (ii) by deeming a foreign debtor to be located in the District of Columbia if the choice of law rules otherwise would point to a jurisdiction that lacks a filing system comparable to that of Article 9 (contrary to the pre-1999 scheme, under which a foreign debtor located in a jurisdiction without such a filing system ordinarily was located in the jurisdiction in which it has its major executive office in the United States, and perfection in receivables of such a debtor in some cases was allowed to be effected by notice to the account debtors without filing); and

54. See U.C.C. §§ 9-102, 9-103 (1962). As stated by Grant Gilmore, under the 1962 version the UCC’s general rule of party autonomy in regard to choice of law, set forth in U.C.C. § 1-105 (1962), was “irrelevant in any choice of law problem which involves an Article 9 security interest, since Article 9 states its own superseding rules.” 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.11, at 1278 (1965).


56. As to investment property, for the 1978 changes, see U.C.C. § 9-103(3)(a), (6) (1978) (adding a new choice of law rule specific to uncertificated securities). The 1994 changes were embodied in a new choice of law provision applicable to all investment property, U.C.C. § 9-103(6) (1994), and in conforming changes to definitions that tied into the formerly applicable choice of law provisions (notably by deleting investment property from the definition of “instrument” in U.C.C. § 9-105(1)(i) (1994)). As to letter-of-credit rights, see U.C.C. § 9-103(1)(a) (1995).
(c) creation of separate choice of law rules for issues of perfection and issues of priority, under which, ordinarily, perfection is governed by the law of the jurisdiction in which the debtor is located, priority in tangible collateral by the law of the jurisdiction in which the collateral is located, and priority in intangible collateral by the law of the jurisdiction in which the debtor is located (contrary to the pre-1999 scheme, in which issues of priority and perfection were governed by the law of the same jurisdiction).

The repeated rewriting of Article 9's choice of law provisions, supplemented by serious tinkering between comprehensive rewrites, suggests that those provisions are properly approached with more skepticism than other provisions that have been more stable.

One theme apparent from this history is that drafters of uniform laws have a tendency to overreach, by crafting the choice of law provisions of their uniform law to export its substantive reach (or allow parties to agree to its export) as widely as possible to nonenacting jurisdictions. Possible motivations hardly require elaboration. All too human pride is one. Another is desire to maximize the attainment of the political ends that the substantive rules of the uniform law were designed to meet. If intellectual justification is desired, it is easily to be had, for one strand of scholarly thought encourages courts to resolve choice of law questions by selecting the better substantive rule of law. The drafters of uniform laws would not be doing their jobs properly if they did not feel that the substantive rules they craft outshine the competition.

Sometimes this overreach has caused a backlash, but sometimes it has not. The following Part III turns to the choice of law rules of the UCC applicable to secured transactions. These rules overreach in some ways to a degree that can be described, without exaggeration, as imperialistic. That overreach has not, however, provoked a backlash—yet.

III. TAMING ARTICLE 9'S CHOICE OF LAW IMPERIALISM

The UCC's choice of law rules applicable to secured transactions can have the effect of extending the substantive reach of Article 9, in at least two respects, to the end of the universe. This scheme leads to results so bizarre that at least two of the current guardians of the UCC have declared them unacceptable, suggesting an escape


hatch that courts might use to avoid them. Unfortunately, the suggested escape hatch is a mirage under the statute as presently drafted, and would be unworkable even if the statute were redrawn to implement it. A more fundamental rethinking of Article 9’s choice of law rules is called for. The international developments described in the Introduction to this paper provide a template for revising these provisions to correct this problem when Article 9 is next amended.

A. Article 9’s Choice of Law Imperialism

It is useful to begin by reviewing the overall scheme of the choice of law rules the UCC applies to secured transactions. The current version of the UCC is the first to have distinct choice of law rules for matters relating to the validity of a security interest, matters relating to perfection, and matters relating to priority. 59 The 1962 version generally applied a single choice of law rule to all of these matters. 60 The 1972 amendments inaugurated the scheme, continued today, of applying a choice of law rule to matters bearing on the validity of a security interest that is distinct from the choice of law rules applicable to matters of perfection and priority; only in 1999 were the choice of law rules for perfection and priority in turn separated. “Validity” in this sense is to be understood to include matters bearing on the incidence of the security interest as between the debtor and the secured party, and so to include not only the creation of the security interest in a given item of property, but also its enforcement. Since 1972, choice of law on matters relating to validity of a security interest has been governed by the UCC’s general choice of law rule, which allows parties to agree to the jurisdiction whose law will govern, provided only that the jurisdiction has a “reasonable relation” to the transaction. 61 The UCC does not define “reasonable relation,” but it clearly does not mean “closest relation,” and in practice the phrase has been given lax application. 62

The familiarity of this rule of party autonomy should not obscure its unnaturalness in the setting of a secured transaction. In that setting, the rule of party autonomy is being applied to conveyance and enforcement of in rem rights in an item of property owned by the debtor, not merely the creation of in personam rights against the debtor. The law governing that conveyance is not tethered in any way to

59. Rather than the bare word “priority,” the current version of the UCC uses the phrase “the effect of perfection or non-perfection, and the priority,” to avoid any quibble as to whether “priority” includes rules that are phrased as cutting off one interest in favor of another and so do not use the word “priority.” See U.C.C. § 9-301 cmt. 2 (2008). This paper uses “priority” to cover the whole sense of that longer phrase.
60. U.C.C. §§ 9-102, 9-103 (1962); see also 1 GILMORE, supra note 54, §§ 10.8-10.11; 2 id. § 44.11.
61. U.C.C. § 9-301 cmt. 2 (2008); id. § 1-301(a) (formerly U.C.C. § 1-105(1) (1972)).
62. Cases are gathered in 1 HAWKLAND, supra note 17, § 1-105:3.
the location of the property (if tangible), or the location of the debtor or the account
debtor (if the property is a right to payment). Rather, the rule empowers the debtor
and secured party to choose the law of any jurisdiction to apply to that conveyance,
even though the property, the debtor, or both is at the far side of the universe,
provided only that the chosen jurisdiction has a “reasonable relation” to the
transaction. If, for example, Debtor grants to SP a security interest in an item of
property and SP does the deal out of an office located in New York, that relation is
surely “reasonable” enough to support a choice of New York law to govern the
security interest, even if the item is tangible property located in the nation of
Graustark, or the item is an account receivable owed to Debtor by an account debtor
located (in every meaningful sense) in Graustark. That is so even if Debtor too is
located, in every meaningful sense, in Graustark.

This choice of law rule promises more than it can deliver. If in the foregoing
example SP seeks to enforce its security interest, it is very likely to need the
assistance, or at least the acquiescence, of courts or other authorities of Graustark, and
there can be no assurance that Graustarkan authorities would give effect to the parties’
choice of New York law, or would enforce a United States judgment that was based
on the effectiveness of the parties’ choice of New York law. Indeed, the same issue
could arise if the competing jurisdiction is not the foreign country of Graustark, but
rather another state (say, Georgia). For example, notwithstanding the UCC’s choice
of law rule, one may doubt that an SP could safely effect a self-help repossession
(permited under the uniform text of Article 9, assumed to be in force in New York) of
an item of tangible collateral located in Georgia, if Georgia were to have a
nonuniform version of Article 9 that does not allow self-help repossession. The issue
is masked in domestic transactions, however, by the universal and generally uniform
enactment of Article 9 by the states of the United States (and to some extent also by
the Full Faith and Credit clause of the Constitution).63

That the UCC’s choice of law rule applicable to the validity of a security interest
promises more than it can deliver does not by itself warrant revision. There is
nothing obviously problematic with a New York court giving effect to the New York
choice of law in the foregoing example, and there is nothing that the UCC can do to
compel authorities in Graustark to respect that choice of law. This rule is, thus, not so
much a problem as a potential trap for an unwary practitioner. The drafters of the
1972 amendments, which implemented this rule, were confident that practitioners
would recognize the rule’s limits.64

63. U.S. CONST. art. IV, § 1.
64. Thus, Peter Coogan, consultant to the 1972 revision committee, in discussing the
consequences of the post-1972 rule giving parties the power to choose the law governing
validity of a security interest, observed that “the possibility of stipulating the governing
statue of frauds, for example, is not very exciting, both because most Code states will have
the same statutory provision . . . and because a careful practitioner would take care to satisfy
Accordingly, the imperialism of the UCC’s choice of law rule applicable to the validity of a security interest presents no major problem. A different issue is posed by the UCC’s choice of law rules pertaining to matters of perfection and priority. Those rules, too, are imperialistic, and their imperialism does present a problem, for they direct a court applying the uniform text of the UCC to reach results that are indefensible in the view of at least some.

The UCC’s choice of law rules pertaining to matters of perfection and priority, unlike the rule governing validity, are mandatory rules that cannot be altered by agreement of the debtor and secured party. As previously noted, the 1999 revision of Article 9 for the first time introduced different choice of law rules for perfection and for priority; under previous law the same jurisdiction’s law governed both perfection and priority. Under the current scheme, in general, priority matters in respect of tangible collateral are governed by the law of the jurisdiction in which the collateral is located, and priority matters in respect of intangible collateral are governed by the law of the jurisdiction in which the debtor is located. By contrast, perfection in respect of collateral of any type is, in general, governed by the law of the jurisdiction in which the debtor is located. The location of the debtor is, in the case of a corporation or other registered organization

all possibly relevant statutes of frauds anyway.” Coogan, supra note 55, at 530.

65. U.C.C. § 1-301(c) (2008) (formerly U.C.C. § 1-105(2) (1972)). In limited circumstances the choice of law rules effectively allow an agreement between the debtor and a third party who is holding property of the debtor to designate the law governing perfection and priority as to that property. See U.C.C. §§ 9-304(a), (b)(1) (2008) (depositary bank); id. §§ 8-110(e), 9-305(a)(3) (securities intermediary); id. § 9-305(a)(4), (b)(1) (commodity intermediary). That, of course, is not the same as a rule that can be altered by the debtor and the secured party. See infra note 169.

66. The core implementation of these general rules is U.C.C. § 9-301(1), (2), (3)(C) (2008), supplemented by id. § 9-305(a)(1) as to certificated securities. Special rules apply to the choice of law governing priority as to extracted minerals and accounts arising from sale thereof at the point of extraction (id. § 9-301(4)), goods covered by a certificate of title (id. § 9-303), deposit accounts (id. § 9-304), uncertificated securities, securities accounts and commodity accounts (id. § 9-305(a)(2)-(4)), and letter-of-credit rights (id. § 9-306).

67. The core implementation of this general rule is U.C.C. § 9-301(1) (2008), supplemented by id. § 9-305(c) as to perfection in investment property other than by possession or control.

68. U.C.C. § 9-301(2) (2008). Other exceptions to the general rule that perfection is governed by the law of the jurisdiction in which the debtor is located apply to perfection in goods by fixture filing (id. § 9-301(3)(A)), timber to be cut (id. § 9-301(3)(B)), extracted minerals and accounts arising from sale thereof at the point of extraction (id. § 9-301(4)), goods covered by a certificate of title (id. § 9-303), deposit accounts (id. § 9-304), perfection by control of uncertificated securities, securities accounts and commodity accounts (id. § 9-305(a)(2)-(4)), and letter-of-credit rights (id. § 9-306).
that is organized under the laws of a state of the United States is that state.\textsuperscript{69} For all other business organizations, foreign or domestic, the location of the debtor generally is the jurisdiction in which the debtor has its chief executive office.\textsuperscript{70} If, however, that jurisdiction does not maintain a filing system comparable to that required by Article 9, the debtor is instead located in the District of Columbia.\textsuperscript{71}

These rules implement an insistence by the drafters upon a public filing being made to perfect a security interest against any debtor, foreign or domestic. If a foreign debtor is not subject to an Article 9-style filing system in its own country, it is artificially deemed to be located in the District of Columbia so that a filing must be made there in order to perfect a security interest the foreign debtor grants. Problems arise because this artificial location of a foreign debtor in the District of Columbia has consequences other than for perfection—notably priority. Coupled with Article 9’s mandatory application to any transaction that is, in substance, a secured transaction, the result can be a truly imperialistic application of the substantive rules of Article 9 to transactions that have essentially nothing to do with the United States.

Consider the following Example 1: Fredonia is a country the secured transactions law of which does not generally require the filing of any public notice comparable to an Article 9 financing statement as a condition of a receivables financier having priority over other creditors of or purchasers from the debtor. A corporation (“Debtor”), organized and headquartered in Fredonia and operating primarily in Fredonia, enters into a secured transaction with a secured party (“SP”), organized and headquartered in Fredonia and operating exclusively in Fredonia. The subject of the transaction is an assignment for security of an account owed to Debtor by a corporation (“Account Debtor”), organized and headquartered in Fredonia and operating primarily in Fredonia. Under Fredonian choice of law rules, the assignment is, naturally, governed by the laws of Fredonia (and indeed we may also assume that Debtor and SP have agreed that Fredonian law governs the assignment). SP takes all steps necessary under Fredonian law to protect its assignment from attack by creditors of and purchasers from Debtor. Later, Creditor gets a judgment against Debtor in the courts of New York (Debtor having sufficient contacts with New York to be subject to personal jurisdiction there). Creditor then garnishes Account Debtor’s account via process issued by a New York court (Account Debtor having sufficient contacts with New York to be subject to personal jurisdiction there). SP intervenes in the New York action, objecting to Creditor’s garnishment. Which of SP or Creditor has priority in the account?

\textsuperscript{69} U.C.C. § 9-307(e) (2008).

\textsuperscript{70} U.C.C. § 9-307(b) (2008). Special rules govern the location of a debtor that is organized under the federal laws of the United States, a branch or agency of a foreign bank, and a foreign air carrier. Id. § 9-307(f)-(k).

\textsuperscript{71} U.C.C. § 9-307(c) (2008). For the 2010 comment on the scope of this provision, see supra text at note 12.
Turning the crank of Article 9 (assumed to be in force in uniform form in the forum state of New York and also in the District of Columbia) grinds out a straightforward result. The New York court will apply the choice of law rules of Article 9 as in effect in New York. Under those rules, priority in the account is governed by the law of the District of Columbia, which is the jurisdiction in which Debtor is deemed to be located for purposes of Article 9. Perfection of SP’s interest in the account is likewise governed by the law of the District of Columbia. The failure of SP to file a financing statement in the District of Columbia means that SP’s interest in the account is not perfected under Article 9 as in force in the District of Columbia. Therefore, under the priority rules of Article 9 as in force in the District of Columbia, Creditor has priority over SP’s unperfected interest in the account.

The rampant imperialism of Article 9’s choice of law rules in this example is highly counterintuitive. It also is abhorrent to at least two prominent members of the current generation of guardians of Article 9, Neil Cohen and Edwin Smith, who wrote thoughtfully on the subject just after the 1999 revision. Cohen and Smith quite reasonably consider it absurd that the UCC should have anything to do with a transaction such as Example 1, which has nothing to do with the United States and the parties to which—Debtor, SP and Account Debtor—are Fredonian entities in every meaningful sense. They suggest that the result can be escaped on the basis of a comment added to Article 9 in 1999, which states that a forum state’s UCC, including the Article 9 choice of law rules, applies to a transaction only if the transaction bears “an appropriate relation to the forum State.” By way of illustration, that comment cites to another that includes the following example (with citations updated to the 2008 version of the UCC):

77. Cohen & Smith, supra note 14, at 1238-42. Professor Cohen, director of research for the Permanent Editorial Board for the UCC, was a member of the drafting committees that prepared the 1999 revision and the 2010 amendments to Article 9. Mr. Smith was a member of the 1999 drafting committee and chaired the committee that drafted the 2010 amendments.
78. The quoted language is from comment 3 to U.C.C. § 9-307 (2008), which is devoted primarily to explicating the application to a foreign debtor of the rules of section 9-307 for ascertaining the location of a debtor. The comment concludes with the following paragraph, from which the language quoted above is excerpted: The foregoing discussion assumes that each transaction bears an appropriate relation to the forum State. In the absence of an appropriate relation, the forum State’s entire UCC, including the choice of law provisions in Article 9 (Sections 9-301 through 9-307), will not apply. See Section 9-109, Comment 9.
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) [of section 9-109(c)].

Example 4: A Belgian governmental unit grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New Mexico state court. Inasmuch as the transaction bears no “appropriate relation” to New Mexico, New Mexico’s UCC, including its Article 9, is inapplicable. See Section 1-105(1) [now section 1-301(b)]. New Mexico’s Section 9-109(c) on excluded transactions should not come into play. Even if the parties agreed that New Mexico law would govern, the parties’ agreement would not be effective because the transaction does not bear a “reasonable relation” to New Mexico. See Section 1-105(1) [now section 1-301(a)].

Under the Cohen-Smith position, therefore, a New York court adjudicating Example 1 should ignore the choice of law rules in New York’s enactment of Article 9, on the ground that the transaction lacks an “appropriate relation” to New York. The New York court should instead resolve the priority contest between SP and Creditor by applying substantive law chosen on some other basis. Cohen and Smith do not take a clear position on precisely what alternative choice of law methodology the court should follow. Rather, given the centrality of Fredonia to the transaction, they simply conclude without ado that the New York court should apply the substantive law of Fredonia, under which SP prevails.

As we previously saw, the phrase “appropriate relation” was originally introduced into the UCC for the imperialistic purpose of allowing a court in a state that enacted the UCC to apply the UCC to any transaction brought before the court, provided only that the forum state had a contact with the transaction minimally sufficient under the Constitution. It is ironic that Cohen and Smith now seek to press it into service as a tool to limit the UCC’s imperialism offshore. But even if one agrees that the result prescribed by Article 9 in Example 1 is undesirable, the Cohen-Smith position on how to fix the problem is fatally flawed.

In the first place, the comment on which it is based does not reflect the statutory text of Article 9, and indeed contradicts it. There is nothing in the text of Article 9 that states or suggests that its application is territorially constrained, either as to debtors located outside the enacting state or as to collateral located outside the enacting state. To the contrary, the choice of law provisions explicitly contemplate

79. U.C.C. § 9-109 cmt. 9 (2008). Section 9-109 sets forth the scope of Article 9, and comment 9 is addressed primarily to subsection (c) thereof, a special rule applicable to debtors that are governments and governmental units. Although the quoted Example 4 involves a governmental debtor, that fact is not relevant to the analysis.

80. See supra text at note 41.
the application of Article 9 to foreign debtors.  

As noted previously, the 1962 version of the UCC limited the application of Article 9 to collateral “within the jurisdiction of” the enacting state, but that constraint was removed in the 1972 amendments for the very purpose of eliminating any territorial limitation on the applicability of Article 9. The statutory “appropriate relation” test referred to by the 1999 comment relied upon by Cohen and Smith, now codified at section 1-301(b), does not purport to be a territorial limitation on the applicability of the UCC. It is, rather, part of the baseline rule used to determine the law applicable to a transaction in the event that the parties have failed to specify a governing law (a situation which, in any case, will rarely occur in transactions of the type under discussion, as the parties to such transactions will rarely fail to specify a governing law). In any event, the meaning of section 1-301(b) is irrelevant, for that provision by its terms is overridden by Article 9’s mandatory rules on perfection and priority, which are not territorially constrained. Cohen and Smith observe that Revised Article 1 added to section 1-301 language stating that the section (including, necessarily, that section’s reference to the mandatory choice of law rules of Article 9) is subject to section 1-102, which states that the rules of Article 1 apply only to the extent that one of the other Articles of the UCC governs the transaction. That does not support their position, for the mandatory choice of law provisions of Article 9 purport to apply to all transactions, without territorial constraint.

81. For example, U.C.C. § 9-307(c) (2008) explicitly contemplates application of Article 9 to foreign debtors insofar as it provides a special rule for debtors that would otherwise be located in a jurisdiction that does not have an Article 9-type filing system. The comments emphasize the applicability of the Article 9 choice of law rules to foreign debtors. Thus, comment 8 to id. § 9-301 states flatly: “This Article applies the same choice-of-law rules to all debtors, foreign and domestic.” To similar effect is comment 3 to id. § 9-307, up to the language relied upon by Cohen and Smith appended to the end of the comment.

82. U.C.C. § 9-102(1) (1962); see also Coogan, supra note 55, at 529-30.

83. U.C.C. § 1-301(b) (2008) (codified at section 1-105(1) from the 1962 Official Text until the ephemeral 2001 revision).

84. U.C.C. § 1-301(b)-(e) (2008) (the “appropriate relation” test applies “except as provided by subsection (c),” and subsection (c) refers to Article 9’s mandatory choice of law rules).

85. The added language currently appears in comment 6 to U.C.C. § 1-301 (2008), which reads in full as follows: “This section is subject to Section 1-102, which states the scope of Article 1. As that section indicates, the rules of Article 1, including this section, apply to a transaction to the extent that transaction is governed by one of the other Articles of the Uniform Commercial Code.” In Revised Article 1 as originally promulgated similar language appeared in the text of U.C.C. § 1-301(g) (2001), and Cohen and Smith referred to the language as it appeared in that form. See Cohen & Smith, supra note 14, at 1239 & n.118. The relocation of this language from the statutory text to a comment does not change the analysis.
It is not an accident, therefore, that no case appears ever to have followed the Cohen-Smith position by holding that, before a forum consults the choice of law rules for perfection and priority in the forum’s own Article 9, it must first determine that the transaction has an “appropriate relation” to the forum. The statute simply does not say that.

A more fundamental problem with the Cohen-Smith position is that even if the statutory text were amended (or is treated as having been amended) to implement the 1999 comment, so that a forum state is bound not to apply any part of its UCC to a transaction unless the forum state has an “appropriate relation” to the transaction, disastrous side-effects would ensue. The phrase “appropriate relation,” as it appears in section 1-301(b), is not elucidated in the statute. But as is the case with choice of law rules generally, that phrase draws no distinction between situations in which the other candidate jurisdictions are other states or other countries. The “appropriate relation” rule stated in the 1999 comment thus would apply equally when the jurisdictions in question are other states rather than other countries. Consider, therefore, a loan by a New York bank to a Pennsylvania corporation, secured by a nonpossessorship security interest in tangible collateral located in New Jersey. Assume that the perfection or priority of this security interest is contested in litigation brought in Florida, a forum having no contact with the transaction. The universal contemplation is that the Florida court would consult the choice of law rules in the Florida UCC to determine which jurisdiction’s laws govern perfection and priority of the security interest, and hence (assuming that Florida has enacted Article 9 in uniform form) perfection would be governed by Pennsylvania law (so that the financing statement is properly filed in Pennsylvania), and priority by New Jersey law. But the comment relied upon by Cohen and Smith, if elevated to law, would reject that contemplation. The choice of law provisions of the Florida UCC would


87. This point was more explicit in section 1-105 as written in 1962, as it lumped together “another state or nation” in the sentence applicable if parties have agreed to a governing law, which was in the same paragraph and immediately preceding the sentence containing the “appropriate relation” test, applicable when parties have not agreed to a governing law. As carried forward to today’s section 1-301, those sentences are in separate paragraphs. That should not affect interpretation, as the comment to U.C.C. § 1-301 (2008) states that the section is “substantively identical” to former section 1-105, and “[e]nhances in language are stylistic only.” In any case, there is no basis in section 1-301 or its comments for distinguishing between another state and another nation. Absence of such a distinction is consistent with general choice of law principles. See infra text at notes 158-159.

88. As to the law governing perfection in this example, see U.C.C. §§ 9-301(1), 9-307(e) (2008). As to the law governing priority, see id. § 9-301(1).
not be binding on the Florida court, for lack of an “appropriate relation” between Florida and the transaction. The Florida court instead would apply some other choice of law rules to determine which jurisdictions’ laws of perfection and priority apply, with unpredictable results. That would derange the scheme of Article 9.

Cohen and Smith tacitly recognize that the “appropriate relation” rule they rely upon cannot reasonably be applied to intra-U.S. transactions, but only to a transaction involving parties and property that are located in a foreign jurisdiction. That ad hoc limitation upon the ad hoc “appropriate relation” rule has no basis in the statutory text, nor even in the comments.

B. Better Living Through Harmonization

Problems of the type exemplified by Example 1 are not susceptible to being fixed reliably by a patch. A sure cure requires a more fundamental rethinking of Article 9’s choice of law provisions. The root of the problem is that those provisions were not designed with much thought given to international transactions. Furthermore, the thought given to those provisions has been dominated by the fact they determine which filing office within the United States must receive the public filing that is typically necessary to perfect a security interest—an essentially fortuitous by-product of the fact that, for parochial reasons, each state has chosen to maintain its own separate filing system. By contrast, three of the recent international instruments described in the Introduction—the Receivables Convention, the Hague Securities Convention and the Legislative Guide—are largely concerned with establishing choice of law rules that will work in a global setting. Although those three international instruments differ in scope, their choice of law rules are harmonious with each other, and it is easy to extrapolate them into a single pattern. That pattern is consistent in inspiration if not in detail with Article 9. So it is appropriate to consider whether features borrowed from that pattern would solve problems with Article 9’s current provisions. Examination suggests such a borrowing would be fruitful. Specifically, Article 9 might be improved by borrowing two features from that pattern, and a third feature at least merits consideration.

89. See Cohen & Smith, supra note 14, at 1238-40.
90. The Hague Securities Convention is devoted almost exclusively to setting forth a choice of law rule applicable to legal issues associated with the transfer of intermediated securities. The central concern of the Receivables Convention is to set forth a choice of law rule applicable to determining priorities in an assigned receivable, though that convention also lays down some rules of substantive law. The Legislative Guide is a comprehensive guide to design of a national law of secured transactions, of which choice of law is an important component. By contrast, the Cape Town Convention is less concerned with choice of law, for it provides its own registry system for public recordation of interests in mobile equipment covered by the convention, and its own priority rules that are keyed to filings in that registry.
The first and most important feature is that all three of those international instruments contemplate that, in a world in which some nations, like the United States, consist of more than one territorial unit having lawmakership power, choice of law governing perfection and priority proceeds in two steps.\(^91\) The first step is to identify the nation\(^92\) whose law governs perfection and priority. The fundamental rules in that first step, subject to adjustment for special situations and special types of collateral, are that for tangible collateral, perfection and priority are governed by the law of the nation in which the collateral is located, and that for intangible collateral, perfection and priority are governed by the law of the nation in which the debtor is located.\(^93\) A debtor in business is “located” for this purpose in the nation in which it has its chief executive office, and otherwise is considered to be located in the nation of its habitual residence (which is essentially the same concept of “location” as is set forth in Article 9, minus Article 9’s special rules for registered organizations and for debtors located in countries without a filing system).\(^94\) A second step then comes into play if the nation so identified is composed of multiple territorial units and it is necessary to identify which unit’s law applies. That second step consists simply of applying whatever choice of law rules apply internally within that nation. Hence, if the first step points to the United States as the relevant nation for a given transaction, the state whose law governs perfection (and hence the state in which to file a

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\(^{91}\) See Receivables Convention, supra note 19, arts. 35-37; Hague Securities Convention, supra note 20, arts. 12, 20; Legislative Guide, supra note 23, recommendations 224-26, at 517. Under the Receivables Convention, the second step of the two step process—that is, applying the internal choice of law rules of the nation identified at the first step, if that nation is comprised of multiple territorial units—is partially dependent upon the nation having made declarations contemplated by that Convention, while under the Hague Securities Convention the second step is self-executing. It is contemplated that the United States would make the required declarations upon ratifying the Receivables Convention. See Sigman & Smith, supra note 19, at 762-63; ULC Receivables Convention Report, supra note 19, at 9.

\(^{92}\) In keeping with customary usage in international instruments, the two referenced Conventions and the Legislative Guide use the word “State” to denote a sovereign nation. To avoid confusion with a state of the United States, this paper uses the word “nation” instead.

\(^{93}\) All three of the international instruments under discussion contemplate the two-step choice of law rule described in the text, but it is implemented fully only in Legislative Guide, supra note 23, recommendations 203-27, at 512-17. The Receivables Convention does not deal with tangible collateral and so does not contain choice of law rules applicable to tangible collateral. The Hague Securities Convention deals exclusively with securities held by an intermediary, the choice of law rules for which are a special case not subject to the general rule for intangible collateral. Compare U.C.C. § 9-301(1) (2008) (general rule for intangibles), with id. §§ 8-110(e), 9-305(a)(3) (rule for intermediated securities perfected other than by filing).

\(^{94}\) For further discussion of this point, see infra text at notes 101-104.
financing statement) and the law whose law governs priority—which could be different—could continue to be governed by the present rules of Article 9.

Thus, for example, if a debtor in business is a corporation organized under Delaware law having its headquarters in New York, the first step of choice of law analysis would point to the United States as the relevant nation, because the debtor is headquartered in the United States; pursuant to the second step, perfection by filing (and hence the state in which to file a financing statement) would be governed by the law of Delaware, as per Article 9’s current choice of law rules.

The point of this two-step structure is to preserve the internal conflict-of-laws rules of a multi-unit nation in a domestic transaction, while not allowing those internal conflict-of-law rules to govern the determination of whether the transaction is properly governed by the law of another nation (or its political subdivisions) altogether. The failure to separate of those two levels of analysis is the reason why the current rules of Article 9 lead to bizarre results in situations such as Example 1. For transactions in which the first step of analysis points to the United States as the relevant nation—the vast bulk of transactions with which Article 9 practitioners are concerned—the current perfection and priority rules of Article 9 could be continued without change.

A second feature that Article 9 might usefully borrow from these three international instruments is that the law of the nation identified at the first step of the two-step procedure should be defined to govern both matters of perfection and matters of priority. The choice of law rules of Article 9 since the 1999 revision purport to distinguish between foreign laws applicable to perfection and foreign laws applicable to priority. That distinction is unworkable, as Cohen and Smith ruefully acknowledged just after the 1999 revision. 95 Perfection, in American legal thought, is merely one component of a priority analysis. Under Article 9, perfection has a well-defined meaning, readily distinguishable from other aspects of priority analysis. But it is an arbitrary construct of Article 9, and there is no clear or natural way to map it onto the different secured transactions law that prevails in another country. Any such mapping is arbitrary and unpredictable. Each of the Receivables Convention, the Hague Securities Convention and the Legislative Guide applies a single choice of law rule to all of the issues that an Article 9 lawyer would refer to as perfection and priority.96 Revision of Article 9’s choice of law rules along the lines of the two-step

95. See Cohen & Smith, supra note 14, at 1206 n.45, 1244-45.
96. As to the Receivables Convention, supra note 19, see art. 5(g) (defining “priority” to include “whether any requirements necessary to render [a] right effective against a competing claimant have been satisfied”); see also Sigman & Smith, supra note 19, at 747. As to the Hague Securities Convention, supra note 20, see art. 1(1)(i) (defining “perfection”), art. 2(1)(c)-(d) (applying the same choice of law rule to perfection as to priority), art. 4(1) (stating the choice of law rule). As to the Legislative Guide, supra note 23, see recommendations 203-27, at 512-17 (applying the same choice of law rules to “the
structure previously suggested would allow Article 9 to dispense with the distinction between perfection and priority so far as the law of foreign nations is concerned, though distinct choice of law rules could continue to be maintained for perfection and priority as between different states of the United States if the first step of the choice of law determination points to the United States as the relevant nation.

A third feature that the UCC might borrow from these international instruments, less compelling than the first two but at least meriting consideration, would be to provide that the same two-step procedure for determining the law that governs priority and perfection also applies to determine the law that governs validity of the security interest. Such a rule would apply only to the law applicable to in rem rights in the collateral, not contractual or other in personam rights arising out of the credit transaction (such as the law governing a secured loan agreement). That would, of course, alter the scheme of the UCC, which since 1972 has allowed the debtor and secured party to designate the law that governs validity so long as it has a “reasonable relation” to the transaction. The choice of law rules in the Hague Securities Convention and the Legislative Guide apply the same law to validity as to priority (including perfection). The Receivables Convention does not so mandate, though it contains a number of substantive rules pertaining to validity that diminish the significance of the choice of law governing validity.

As a practical matter it is difficult to imagine a situation in which a secured creditor would not wish to comply with the secured transactions law pertaining to validity of the jurisdiction whose law governs perfection and priority. Thus, if application of the two-step choice of law rule points to the law of the nation of Ruritania as governing priority and perfection in a given transaction, a sensible secured creditor would make certain that its security interest is also valid under the laws of Ruritania, if only because of difficulty in predicting whether a Ruritanian forum would recognize a distinction between issues of validity and issues of priority or, if it did, where it would draw the line between them. It is open to question

creation, third-party effectiveness and priority of a security right”).

97. As to the Hague Securities Convention, supra note 20, see arts. 1(h), 2(1)(b)-(d), 4(1). Pursuant to Article 2, the Hague Securities Convention’s choice of law rule, Article 4(1), applies to the legal nature and effect of a “disposition” as well as its perfection and priority, and “disposition” is defined in Article 1(h) to include “any transfer of title whether outright or by way of security and any grant of a security interest.” As to the LEGISLATIVE GUIDE, supra note 23, see recommendations 203-27, at 512-17 (applying the same choice of law rules to “the creation, third-party effectiveness and priority of a security right”).

98. See Receivables Convention, supra note 19, art. 22 (choice of law provision set forth in that article governs only “the priority of the right of an assignor in the assigned receivables over the right of a competing claimant”). For discussion of this point, and of the substantive rules imposed by the Convention that lessen the significance of which nation’s law governs the validity of an assignment, see Sigman & Smith, supra note 19, at 737-42.
whether the scarcity of situations in which a choice of law rule for validity separate from that for priority and perfection makes a practical difference to a secured creditor weighs for or against creating separate choice of law rules for the two issues. However, changing the scheme of the UCC in this respect would seem to be more harmonization for harmonization’s sake, than for the sake of any substantial practical benefit. Hence the case for this third change is less compelling than the case for the two changes previously discussed.99

Assembling the above pieces, Article 9’s choice of law rules, revised in accordance with these suggested borrowings, would be as follows (in broad outline, and ignoring special cases): (a) priority, perfection, and perhaps validity of a security interest in tangible property would be governed by the law of the nation in which the property is located, (b) priority, perfection, and perhaps validity of a security interest in intangible property would be governed by the law of the nation in which the debtor is located (determined by reference to its chief executive office, if an organization, or habitual residence, if an individual), and (c) if the nation determined under (a) or (b) is composed of multiple units having lawmaking authority, the unit(s) whose law(s) govern is determined by the internal choice of law rules of that nation. In particular, point (c) means that if the nation determined under (a) or (b) is the United States, the state(s) whose laws govern perfection and priority would be determined by the current choice of law rules of Article 9.

Revision of Article 9’s choice of law rules along these lines would have at least three significant benefits. First, such a revision would tame the imperialism of Article 9’s current rules. In particular, it would resolve Example 1 in accordance with the sensible preference of Cohen and Smith, without need to invoke an ad hoc rule declaring Article 9 inapplicable in unpredictable circumstances. On the facts of Example 1, a New York court would conclude that the substantive law of Fredonia governs priority and perfection of the conflicting interests of Secured Party and Creditor in the receivable in question. SP, who by hypothesis has done everything it must do to protect its interest against competing claims under Fredonian law, would prevail over Creditor. SP’s failure to file a financing statement in the District of Columbia (of all places) in respect of this Fredonian secured transaction would be justly rendered irrelevant.

Second, as previously noted, this revision would dispense with the unworkable distinction that Article 9 currently draws between foreign laws applicable to perfection and foreign laws applicable to priority.

Finally, this revision would harmonize Article 9’s choice of law rules more closely with emerging international norms. In particular, the choice of law rules of the Receivables Convention differ from the current rules of Article 9 in three

99. See supra text at note 64.
important respects. The proposed revision would directly eliminate two of those differences, and the third could be eliminated by a small further change. Specifically, two of the important differences between the choice of law provisions of the Receivables Convention and the current rules of Article 9 relate to the location of the debtor, which controls the law that governs perfection and priority in respect of an intangible. Under both bodies of law, the baseline rule is, in essence, that an organization is located in the nation in which it has its chief executive office, and an individual is located in the nation of his residence. Article 9 modifies that baseline rule with two special rules that have no parallel in the Receivables Convention. First, Article 9 currently provides that if the debtor is a domestic corporation or other registered organization that has its chief executive office located outside the United States, the debtor is located in its state of organization (or, in general, the District of Columbia, if federally chartered). Second, Article 9 currently provides that if the ordinary choice of law rules of Article 9 would locate the debtor in a country that lacks an Article 9-style filing system, the debtor is deemed to be located in the District of Columbia. The revision of Article 9 proposed herein would conform the result under Article 9 in both cases to that of the Receivables Convention.

The third important difference between the choice of law rules of the Receivables Convention and the current rules of Article 9 relates to receivables that are “reified” into a legally significant piece of paper, such as an Article 9 instrument or tangible chattel paper. The Receivables Convention applies to reified receivables the same choice of law rule that it applies to the unreified: namely, perfection and priority are governed by the law of the country in which the assignor is located. Article 9, by contrast, provides that for a reified receivable, perfection is governed by

100. See ULC Receivables Convention Report, supra note 19, at 5-6. In addition to the three important differences, there are minor differences. Some of those minor differences may be cured by adoption of declarations and understandings to the Receivables Convention by the United States upon ratification, to conform its meaning to that of Article 9. Thus, it is proposed that the United States declare that the Convention’s phrase “place where the central administration of a person is exercised” has the same meaning as the Article 9 phrase “place where the chief executive office of a person is located.” See Proposed United States Declarations and Understandings 3 (June 11, 2007), appended to the ULC Receivables Convention Report. Other minor differences are probably negligible. An example is the location of an individual in business: Article 9 locates her at her principal residence, while she is located at her place of business by the Receivables Convention and the Legislative Guide. U.C.C. § 9-307(b)(1) (2008); Receivables Convention, supra note 19, art. 5(h); LEGISLATIVE GUIDE, supra note 23, recommendation 219, at 515.

101. Receivables Convention, supra note 19, arts. 5(h), 22; U.C.C. §§ 9-301(1), 9-307(b) (2008).


103. U.C.C. § 9-307(c) (2008); see also supra note 12 (discussing the 2010 clarification of this rule).
the law of the state or country in which the collateral is located, as is perfection in the
case of a possessory security interest. The proposed revision could conform
Article 9 to the Receivables Convention on this point simply by providing that
receivables of this type are treated as intangible property, rather than tangible
property, for the purpose of the first step of choice of law analysis (that is,
determination of the appropriate country). If the appropriate country in a given case
is the United States (as would be the case if the assignor were located in the United
States), the rules for determining the state or states whose laws govern priority and
perfection need not be changed from the rules that Article 9 currently provides.

Given the dynamics of the uniform law process, such a revision of Article 9’s
choice of law rules would require something close to consensus on the need for
revision and its direction. Opinions on that point are divided even before such a
project is a gleam in the eye of the Uniform Law Commissioners. Unlike Cohen and
Smith, Charles Mooney, co-reporter for the 1999 revision of Article 9, does not find
abhorrent the result yielded by turning the crank of Article 9 in Example 1. Mooney
argues, in effect, that the bizarre result generated by Article 9 in Example 1 is the fault
of Fredonian lawmakers, who did not enact a public filing system comparable to that
of Article 9 as part of Fredonian law. Had they done so, the result in Example 1
would change, for given a Fredonian filing system the location of Debtor for
purposes of Article 9’s choice of law rules would be Fredonia, and so Fredonian law
would govern perfection and priority. Mooney thus offers the unabashedly
imperialistic suggestion that Article 9’s choice of law rules properly induce Fredonian
lawmakers to “wake up, smell the coffee,” and enact an Article 9-style filing system,
as United States and Canadian lawmakers did many years ago.

One may doubt the realism of that suggestion. In an extraterritorial transaction
such as that described in Example 1, ordinarily the secured creditor will require the
cooperation, or at least the acquiescence, of Fredonian authorities to enforce its rights
in the collateral, should that become necessary. And Fredonian courts are not bound
to respect, and almost assuredly would not respect, a priority determination issued by
a New York forum applying District of Columbia law. The problem posed by
Example 1 arises only because of (a) the atypical assumption that all the relevant
parties to the extraterritorial transaction in that case happen to have contacts with
New York sufficient to render them susceptible to personal jurisdiction in New York,
plus (b) the further assumption, probably also atypical, that the New York court
would not dismiss the action on the ground of forum non conveniens. Reconstructing
the domestic secured transactions law of Fredonia to impose an Article 9-style filing
system may be a good thing for Fredonia, but it does not seem likely that a Fredonian

105. Mooney, supra note 86, at 195-96 & n.38.
106. See Cohen & Smith, supra note 14, at 1244-45 (making a similar point).
lawmaker not already disposed to make such a change would be persuaded to do so on account of the effect it might have in multiply-atypical offshore litigation over a domestic Fredonian transaction.

In any case, the international developments referred to earlier in this paper transpired after the contributions by Cohen-Smith and Mooney, and they change the calculus. If, for example, the Receivables Convention is ratified by the United States and comes into force, it would preempt the choice of law provisions of Article 9 with respect to a transaction to which it applies. For American practitioners, some value must be attached to harmonizing Article 9’s choice of law provisions with that instrument. Harmonization also seems likely to have desirable virtues offshore. In litigation, foreign courts are more likely to respect Article 9 if its provisions are in tune with international norms. And to the extent that the United States has an interest in inducing other nations legislatively to harmonize their secured transactions laws to the norms reflected in such products as the Legislative Guide, it is in a better position to do so if its own basic secured transaction law, embodied in Article 9, is in harmony with those norms.

No change is costless, and revision of Article 9’s choice of law rules along the foregoing lines would have at least two significant costs (aside from the dubious cost of relieving whatever pressure the current scheme imposes on Fredonian lawmakers to enact an Article 9-style filing scheme). It would complicate Article 9’s choice of law rules. It would also dilute Article 9’s current rule that locates a domestic registered organization in the state under whose laws it is organized, by making that rule inapplicable to a domestic registered organization that has its chief executive office outside the United States. If the Receivables Convention becomes binding on the United States, however, these costs will be borne by practitioners as to the large class of transactions to which the Receivables Convention applies (or might apply, given factual uncertainty), whether Article 9 is revised or not.107

The need to revise Article 9’s current choice of law rules may not be perceived as strong, given the dearth of reported cases applying those rules to reach bizarre results comparable to Example 1. The dearth of such litigation is not easy to explain fully. One contributing factor may be a practice by risk-averse lawyers who represent secured creditors to take whatever steps are necessary to protect their client under the substantive law of each jurisdiction in which litigation is plausible. That, however, would not explain the absence of cases such as Example 1, in which the secured creditor has not done everything everywhere (and not unreasonably so), and a dispute is litigated in a forum which the failure makes a difference. Such litigation might be deterred by the anticipated difficulty of enforcing the judgment rendered by such a forum, and by doctrines such as forum non conveniens that would discourage the filing of such suits.

107. On the scope of the Receivables Convention, see infra text at notes 198-199.
I suspect that a role is also played by simple failure of the bar to assimilate the fact that Article 9 provides for such a bizarre result as Example 1. Article 9 is perhaps the best-drafted statute of comparable scope and complexity that exists in American law. But it nevertheless provides, or appears to provide, for some strange results that certainly should have been taken advantage of in litigation, but have not been litigated, for reasons difficult to explain except on the ground of collective cognitive failure.  

In any case, it is anyone’s guess how long the placid avoidance of litigation that pushes the Article 9 choice of law rules to their limits will continue.

IV. FILLING ARTICLE 9’S VOID ON CHOICE OF LAW GOVERNING CHARACTERIZATION

For centuries, Anglo-American courts have held that a transaction, however structured, will be treated as a secured transaction if its substance is that of a secured transaction. The UCC heartily acknowledges that doctrine. But the UCC has little to say about the substantive standards that should govern such recharacterization, and even less to say about which jurisdiction’s recharacterization law should be applied. The choice of law question is an important one, due partly to the increasing nonuniformity of the laws of the states of the United States, and partly to longstanding divergence between American law and the laws of other countries. The emerging international norms for secured transactions law described earlier in this paper provide useful guidance for future revisers of Article 9 on how best to address the subject. This Part IV summarizes the substantive law of recharacterization, the modest existing doctrine on choice of law governing recharacterization, and the

108. An example is the standard for error in the name of the debtor set forth on a financing statement. Before the 1999 revision, such an error did not invalidate the filing if the error was a “minor error[] [that is] not seriously misleading.” U.C.C. § 9-402(8) (1972). Since 1999, Article 9 has had no tolerance whatever for any deviation from the exact string of characters that constitutes the debtor’s name, if the filing is made at a filing office that lacks a “standard search logic.” U.C.C. § 9-506(b)-(c) (2008). “Standard search logic” is not defined, but many filing offices—including most if not all real estate filing offices described in id. § 9-501(a)(1)—lack anything plausibly describable as a “standard search logic.” In such a filing office, a filing against “Debtor Corp.” would be invalid against a debtor whose certificate of incorporation states its name to be “Debtor Corporation”. See id. § 9-503(a)(1). It is hard to believe that such filing offices are not rife with filings containing comparably trivial deviations that should render them invalid, but reported cases are strangely absent. Cf. In re C.W. Mining Co., 69 U.C.C. Rep. Serv. 2d (West) 830 (Bankr. D. Utah 2009) (holding that a financing statement naming “C W Mining Company” (without periods) was insufficient to perfect against a corporation whose name, per its charter, is “C. W. Mining Company” (with periods), when filed in a filing office that does have a standard search logic and a search using that logic against the correct character string did not turn up the filed financing statement).
emerging international norms just mentioned, and then uses those elements to suggest an appropriate revision of Article 9.

A. Recharacterization Under the UCC and its Choice of Law Void

The question of whether it is appropriate to recharacterize a transaction as a secured transaction might arise in an infinity of settings, but in modern practice two settings predominate. The first is equipment leasing, a transaction that has been routine since the beginning of the economic expansion that followed World War II. The second is the sale of a receivable. Recharacterization of receivables sales has been a subject of perennial low-key interest for at least a century, because usury statutes typically are written to apply only to lending transactions and not to sales. As a result, recharacterization of a nominal sale of a receivable could render the transaction subject to an otherwise inapplicable usury statute, resulting in the imposition of draconian sanctions on the buyer-lender. The steady erosion of usury statutes in recent decades dimmed the significance of recharacterization to receivables sales, but the issue flared into prominence again with the development of securitization in the early 1980s. Securitization is, in essence, the issuance of receivables-backed debt (or interests having substantially the economic attributes of debt) that is designed to be insulated from any future bankruptcy of the originator of the financing. The transaction structure entails the conveyance of the receivables by the originator to another entity formed for the purpose of the financing. For the structure to achieve its purpose it is essential that the originator’s future bankruptcy court (using the term loosely to include the administrator of any collective insolvency proceeding) treat this conveyance as a sale, in accordance with its form, and not recharacterize it as a loan to the originator secured by the receivables. “True sale” treatment is thus essential to the success of the securitization structure.

In modern practice, the potential for recharacterization has been significant chiefly in the event of the institution of a bankruptcy proceeding for the nominal equipment lessee or the nominal receivables seller. A bankruptcy court need not necessarily apply the same standards for recharacterization for purposes of bankruptcy law as would apply under nonbankruptcy law, but the present discussion is confined to the latter setting.110

Notwithstanding the wide potential applicability of the recharacterization doctrine, the UCC gives scant guidance as to the circumstances in which recharacterization is appropriate. One of the UCC’s few firm statements on the subject is a narrow rule that a purported retention of title by a seller of goods following delivery to the buyer must be recharacterized as a reservation of a security

110. See id. at 555-62.
interest. As to equipment leases, the general rule under the original version of the UCC continues in force today, and leaves the courts to their own devices by telling them merely that recharacterization may be appropriate depending upon “the facts of each case.” The 1987 addition of Article 2A to the UCC to govern equipment leasing added many words pertaining to recharacterization, but they ultimately add little to the general rule, for they amount to a declaration that leases with certain extreme terms are to be recharacterized per se, and a repudiation of the holdings of certain cases in the early days of the leasing boom that wrongly declared the presence of certain other terms as mandating recharacterization. Leases are not commonly at the extreme, and so the UCC still leaves the courts nearly on their own in analyzing recharacterization. The UCC is even more reticent about the standards for recharacterizing a sale of a receivable as a security interest that secures an obligation, for the statutory text has never said anything about the subject, and the comments do little more than affirm that, because of the statutory silence, courts are on their own. The 2010 amendments to Article 9 make no changes pertinent to recharacterization in any setting, beyond adding to the comments a statement that the subjective intention of the parties with respect to characterization of a transaction is irrelevant to recharacterization analysis—a point that, as the new comment rightly states, always was properly the case.

The minimal guidance given by the UCC on the proper circumstances for recharacterization leaves the subject to the courts. Choice of law rules are of little consequence when the only candidate jurisdictions are states or other jurisdictions of the United States that have adopted no relevant statute beyond the uniform text of the UCC, for while the substantive doctrine governing recharacterization may not be particularly clear under that regime, it is equally unclear in each jurisdiction. The

113. U.C.C. § 1-203(b)-(c) (2008). The 1962 UCC also added to the “facts of each case” standard glosses comparable to those included in the 1987 revision, but much briefer. U.C.C. § 1-201(37) (1962).
114. The comments to the 1962 version of Article 9 made this observation once, U.C.C. § 9-502 cmt. 4 (1962), and the 1999 revision repeats it thrice. U.C.C. § 9-109 cmt. 4 (2008); id. § 9-109 cmt. 5; id. § 9-318 cmt. 2.
115. U.C.C. § 9-109 cmt. 2 (as amended 2010) (“Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.”). The 1962 UCC framed the rule on recharacterization of a lease in terms of whether the lease was “intended as security,” but the drafters of that language were merely using the phrasing employed by courts of the time and certainly did not mean it to be taken literally as a reference to the parties’ subjective intention. See Kenneth C. Kettering, Securitization and Its Discontents: The Dynamics of Financial Product Development, 29 CARDOZO L. REV. 1553, 1618-20 (2008).
The effect of differences in approach by courts in different UCC jurisdictions is mitigated by the UCC principle favoring uniform application of the UCC among enacting jurisdictions. It is further mitigated because recharacterization cases typically are quite specific to their facts.

However, the uniformity of recharacterization doctrine among the states is eroding. At least three genres of nonuniform statutes on the subject have been enacted by a significant number of states, two applicable to certain leases and the third applicable primarily to certain receivables sales.

One of these genres pertains to so-called TRAC (“terminal rental adjustment clause”) leases. The prototypical TRAC lease provides that at the end of the lease term, the leased goods are sold or appraised, and the difference between that actual end-of-term value and the value that had been projected at the outset of the lease is for the account of the lessee (so that if the actual value is higher, the excess is to be paid to the lessee by the lessor, and if lower, the shortfall is to be paid to the lessor by the lessee). The TRAC lease is a child of the federal tax laws, which give a tax benefit to lessors of commercially-used motor vehicles. The commercial law status of the TRAC lease has been a subject of contention, with a slim majority of the courts that have faced the issue without benefit of special legislation holding that a TRAC lease should be recharacterized as a secured transaction. After unsuccessfully trying to persuade the Article 2A drafting committee to bless TRAC leases as true leases, the motor vehicle leasing industry embarked on an eminently successful effort to procure state enactment of anti-recharacterization statutes applicable to TRAC leases. Today every state but two has enacted such legislation, in most cases codified outside the state’s UCC.

These anti-recharacterization enactments are by no means uniform, and cases have turned on differences in the wording of different states’ enactments.

118. The two holdouts are Kentucky and New Mexico. For a compilation of these statutes, see Memorandum from Edwin E. Huddleson, Gen. Counsel, Am. Auto. Leasing Ass’n (Apr. 21, 2004), available at http://www.elfaonline.org/pub/advocacy/state/PDFs/TRAC-2004.pdf. For the industry’s failed effort to induce the Article 2A drafting committee to bless TRAC leases as true leases, see Corinne Cooper, The Madonnas Play Tug of War with the Whores or Who is Saving the UCC?, 26 LOY. L.A. L. REV. 563, 574-76 (1993).
119. For instance, In re Brankle Brokerage & Leasing, Inc., 394 B.R. 906, 909-10 (Bankr. N.D. Ind. 2008), held that the nonuniform amendments to the North Carolina UCC applicable to TRAC leases did not shield the TRAC lease before the court from recharacterization. At least one commentary has asserted that the result would have been different had the court applied the anti-recharacterization law of California or Washington. See Teresa D. Davidson et al., Leases, 64 BUS. LAW. 1187, 1189-90 & n.22 (2009).
The second genre of nonuniform anti-recharacterization statutes pertains to “rent to own” transactions. Such a transaction is a close substitute for a credit sale of a consumer durable, with the exception that the customer may walk away from the transaction at any time. The transaction is structured as a lease in order to avoid the application of consumer protection laws that would apply to a credit sale. Every state but three has enacted an industry-backed statute on such transactions, and among other things such statutes typically exempt such a transaction from recharacterization as a secured transaction.

The third genre of nonuniform anti-recharacterization statutes surely dominates the previous two in importance, if measured by the dollar volume of transactions subject to them. That genre consists of statutes procured by the securitization industry to prevent recharacterization of a receivables sale. Nine states have enacted statutes of broad applicability for this purpose. Those statutes fall into two patterns. The earliest, enacted by Texas and Louisiana in 1997, takes the form of an amendment to the state’s UCC that precludes recharacterization of a sale of receivables, whether or not made in connection with a securitization transaction, absent “fraud or intentional misrepresentation.” The seven statutes of the other pattern, the earliest of which dates from 2001 and of which Delaware’s evidently was the model, are outside the enacting state’s UCC, and preclude recharacterization of a sale of property of any kind (not just receivables), but only if made in a securitization transaction.

In addition to these broad enactments, since the early 1990s states have enacted many narrower anti-recharacterization statutes applicable to receivables sales. Most of these were enacted as part of statutes the primary purpose of which was to allow the state’s public utilities to levy charges on their customers in order to recover costs of specified types (such as the cost of conservation-related investments, so-called “stranded cost” investments previously made by electrical utilities that they could not expect otherwise to recover after rate deregulation, and costs related to recovery from specified natural disasters). Such statutes commonly came to include provisions

120. See Elizabeth Renuart & Kathleen E. Keest, The Cost of Credit § 7.5.3.5, at 326 (4th ed. 2009). The three holdout states that have no RTO legislation are New Jersey, North Carolina and Wisconsin. See Jim Hawkins, Renting the Good Life, 49 WM. & MARY L. REV. 2041, 2052 n.37 (2008).


allowing the utility to accelerate its recovery of these allowed costs by securitizing the
foregoing revenue stream, and the statute facilitates such securitization by awarding
true sale status to the utility's transfer of that revenue stream to the utility's
securitization vehicle. That such narrowly-tailored anti-recharacterization statutes to
date have been mostly confined to utilities is fortuitous. At least one state has enacted
such a statute to facilitate the securitization of municipal tax liens.123 Most recently,
Louisiana enacted a statute that is carefully gerrymandered to apply to a firm that
operates a web-based exchange for sellers and buyers of trade receivables.124 The
statute provides, in effect, that all sales of receivables through the exchange are to be
considered true sales governed by Louisiana law.125

Choice of law considerations can eviscerate these state anti-recharacterization
statutes. That state X has enacted such a statute is of no help to a party intended to be
benefited by it, if the characterization of the transaction is litigated in a forum whose
choice of law rules call for characterization to be determined under the substantive
law of a jurisdiction other than X. Some of these anti-recharacterization statutes have
been accompanied by attempts to wish away the choice of law problem. Delaware
has tried the direct tactic of amending its UCC to provide that if an agreement is
governed by Delaware law, then the characterization of the transaction subject to that
agreement is also subject to Delaware law—and, hence, the Delaware anti-
recharacterization statute referred to earlier.126 Louisiana’s recent enactment for the
benefit of its locally-based receivables exchange relies on a novel in terrorem twist,
by providing that anyone who attempts to challenge the true sale status of a sale made
over the exchange, or the applicability of Louisiana law to the sale, is personally
liable to pay the legal fees, travel expenses and other litigation expenses of the buyer
of the receivable (seemingly regardless of whether the challenge is successful).127

123. For citations to and further description of the state anti-recharacterization statutes
referred to in this paragraph, see Kettering, supra note 9, at 518-19.

124. The Louisiana legislation, Act 958 of 2010 (introduced as S.B. 256), added
sections 3131.1 through 3131.9 to title 9 of the Louisiana Revised Statutes. The firm in
question, The Receivables Exchange, LLC, a Louisiana limited liability company, describes
itself as “eBay for receivables.” Simona Covel, Getting Your Due: Entrepreneurs are Trying

125. LA. REV. STAT. ANN. §§ 9.3131.5(A)–9.3131.6(A) (as added 2010). The statute
decrees the true sale status of a purported sale within its scope, but it also expressly
preserves without amendment Louisiana’s earlier nonuniform anti-recharacterization statute,
LA. REV. STATE ANN. § 10:9-109(e) (2002), noted supra note 121, which precludes
recharacterization of a sale of receivables only absent “fraud or intentional
misrepresentation.”

126. DEL. CODE ANN. tit. 6, § 9-111(b) (2005) (enacted 2005). As to the Delaware
anti-recharacterization statute, see supra note 122.

127. LA. REV. STAT. ANN. §§ 9:3131.5(C)(2), 9:3131.6(B)(2) (as added 2010). Discussion of the extent to which these provisions may be enforceable under relevant choice
of law rules and constitutional norms is beyond the scope of this paper.
The choice of law problem cannot be wished away, however. The Delaware legislature (for example) can enact statutes to control the choice of law rules applied by the Delaware courts, but it can do nothing to control the choice of law rules applied by courts in other jurisdictions, nor can it control the choice of law rules applied by bankruptcy or other federal courts sitting in Delaware. The only way to render reasonably predictable the applicability or inapplicability of a state anti-recharacterization statute to a given transaction is widespread enactment of a uniform choice of law rule for characterization.

At present the statutory text of the UCC does not set forth a rule on which jurisdiction’s law governs characterization of a transaction. At first blush the issue therefore might seem to be governed by the UCC’s general rule of party autonomy, under which, absent a specific contrary command in the UCC, the parties to a transaction governed by the UCC may choose which jurisdiction’s law applies to the transaction, so long as that jurisdiction has a reasonable relation to the transaction. A comment added to Article 9 in the 1999 revision indeed states that the law governing characterization of a transaction is to be determined pursuant to this rule of deference to the contractual choice of the notional debtor and the notional secured party. Some courts have so held, though typically with so little ado that the court appears not to have given serious attention to the point. However, the characterization of a transaction is commonly litigated by a third person who was not a party to the original transaction, such as the bankruptcy trustee of one of the parties. Other courts deciding such characterization cases have concluded that it is not reasonable to bind a third person to a contractually-designated law to which it never

128. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941), famously held that a federal court in a diversity case must apply the choice of law rules of the forum state, but the Supreme Court has never laid down a rule on how bankruptcy courts are to select which state’s substantive law to apply to issues governed by nonbankruptcy law. Courts are much divided on the subject. See Kettering, supra note 9, at 524.

129. U.C.C. § 1-301(a) (2008) (formerly U.C.C. § 1-105(1) (1962)).

130. U.C.C. § 9-301 cmt. 2 (2008) (discussing the limited scope of the mandatory choice of law rule set forth in § 9-301: "For example, 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 [now section 1-301] ....").

agreed. There is good support in other UCC comments for that position, and it is consonant with the general policy embodied in the UCC’s express choice of law provisions, which allow parties to a transaction to choose the law governing a transaction as between themselves but not insofar as the choice would affect third parties. If the contractually-chosen law is dismissed, however, the UCC gives no clear guidance on how the law that governs characterization should be selected. Among the rules that might be considered plausible candidates are the following: (a) the fallback rule applicable when parties have not agreed to a governing law, which directs the court to apply the law of the forum state if it bears an “appropriate relation” to the transaction; (b) the choice of law rules of Article 9 pertaining to perfection or the different choice of law rules pertaining to priority, which govern third party rights intimately bound up with the outcome of a characterization dispute, or (c) some supplementary principle of law outside the UCC.

Insofar as the Restatement (Second) of Conflicts of Laws is consulted as an oracle of supplementary principles of law, its guidance is Delphic. Chancellor Hawkland, addressing the subject, focused on general principles set forth in sections 7 and 8 of the Restatement (Second). In Hawkland’s view, section 7 suggests that the law of the forum governs characterization, while section 8 suggests that the issue should be governed by the mandatory provisions of the UCC that determine the law that governs perfection and priority (though Hawkland does not address which of

132. For cases so holding that pertain to the law governing whether a lease should be recharacterized as a security interest, see Carlson v. Tandy Computer Leasing, 803 F.2d 391 (8th Cir. 1986); In re Eagle Enters., Inc., 223 B.R. 290 (Bankr. E.D. Pa. 1998), aff’d, 237 B.R. 269 (E.D. Pa. 1999). For cases so holding that pertain to the law governing whether a title retention agreement in a sale of goods should be recharacterized as a security interest, see Usinor Indussteel v. Leeco Steel Prods., Inc. 209 F. Supp. 2d 880 (N.D. Ill. 2002); Hong Kong & Shanghai Banking Corp. v. HFH USA Corp., 805 F. Supp. 133 (W.D. N.Y. 1992). See also J.C. Rozendaal, Note, Choice of Law in Distinguishing Leases from Security Interests Under the Uniform Commercial Code, 75 Tex. L. Rev. 375 (1996).

133. See U.C.C. § 1-302 cmt. 1 (2008) (stating, in the context of the UCC provision that generally validates variation by agreement of the terms of the UCC, that “the effect of an agreement on the rights of third parties is left to specific provisions of the Uniform Commercial Code and to supplementary principles applicable under Section 1-103”); id. § 9-401 cmt. 3 (stating that the law chosen to govern a secured transaction by the debtor and the secured party is not necessarily the law that should govern rights of a third party, such as an account debtor on collateral, notwithstanding id. § 1-301).

134. See U.C.C. § 1-301(c) (2008) (listing mandatory UCC choice of law rules) (formerly U.C.C. § 1-105(2) (1962)); see also 1 Hawkland, supra note 17, § 1-105:5, at 145 (“Choice of law is mandated in [the circumstances specified in § 1-301(c)], obviously, because all of them involve third parties who should not, on principle, be bound by the agreement between the original parties to which they were not privy.”).

135. U.C.C. § 1-301(b) (2008) (formerly U.C.C. § 1-105(1) (1962)).


137. U.C.C. § 1-103(b) (2008).
Hawkland declared it a “close question,” and offered no conclusion, which of these alternatives is preferable. Actually, a comment to the Restatement (Second) elsewhere states that characterization is to be determined by reference to a group of later rules applicable to title to property, the operative provision of which in the case of chattels looks to the law of the state having “the most significant relationship” to the transaction, amplified by the injunction that in the absence of an effective choice of law by the parties, “greater weight will usually be given to the location of the chattel . . . than to any other contact . . . .” It is not clear, however, whether this guidance (such as it is) was intended to apply only to characterization as between the parties to the transaction or for all purposes, for the quoted provision by its terms applies only to choice of law “as between the parties.” Nor is it clear how this guidance applies, if at all, to characterization of a transaction involving intangible property, about which the Restatement (Second) says next to nothing. The confusion is of only academic interest, however, for it would be perverse for Article 9 to depend upon any of these murky pronouncements, given the hard-edged certainty for which Article 9’s choice of law rules otherwise strive.

B. The Law Governing Characterization Under the Conventions

When future revisers of Article 9 turn to clarifying the rule on choice of law governing characterization, a useful starting point not available to their predecessors will be the private international law conventions referred to earlier in this paper. The two conventions to which the United States is presently party, the CISG and the Cape Town Convention, do not speak in a way useful to Article 9 revisers about the law that should govern characterization. But the two pending conventions, the Receivables Convention and the Hague Securities Convention, do. And, as we will shortly discuss, they speak with one voice, in that they both provide, in effect, that the jurisdiction whose law governs perfection and priority (as an Article 9 lawyer would say) also governs characterization of a transaction, at least insofar as characterization is relevant to a priority dispute.

138. 1 Hawkland, supra note 17, § 1-105:5, at 148-50.
139. Restatement (Second) of Conflict of Laws § 244 & cmt. e (1971). Comment e to section 244 states that courts should decide issues “such as whether the conveyance amounted to a sale or to the transfer of a security interest . . . by reference to the law selected by application of the rules stated in this Chapter.” The Introductory Note to Chapter 9, Topic 3, which immediately precedes section 244, is to similar effect.
140. The final paragraph of the Introductory Note to Chapter 9, Topic 3, states that intangibles embodied in a document “are in general governed by the same law as the document itself,” but as to other intangibles it has little more to say than “[s]ome rules . . . are stated in this Chapter . . . .”
Characterization is important to the operation of both the CISG and the Cape Town Convention, but both leave the choice of law question to be determined by the forum court, based on its own local choice of law rules. Thus, the CISG applies to certain international “sales” of goods. But it does not define “sale,” and it explicitly avoids addressing the effect that a contract for sale of goods may have on property interests in the goods sold, which is the sine qua non of characterization.\footnote{Characterization is important to the operation of both the CISG and the Cape Town Convention, but both leave the choice of law question to be determined by the forum court, based on its own local choice of law rules. Thus, the CISG applies to certain international “sales” of goods. But it does not define “sale,” and it explicitly avoids addressing the effect that a contract for sale of goods may have on property interests in the goods sold, which is the sine qua non of characterization.}

Accordingly, the CISG leaves determination of the law that governs characterization to the choice of law rules of the forum. Cases worldwide have held, for this reason, that the CISG does not govern the validity of a title retention clause, a classic subject of recharacterization under the laws of some jurisdictions (including, as noted earlier, the United States under the UCC).\footnote{Characterization is important to the operation of both the CISG and the Cape Town Convention, but both leave the choice of law question to be determined by the forum court, based on its own local choice of law rules. Thus, the CISG applies to certain international “sales” of goods. But it does not define “sale,” and it explicitly avoids addressing the effect that a contract for sale of goods may have on property interests in the goods sold, which is the sine qua non of characterization.}

The Cape Town Convention is similarly unhelpful to UCC revisers. As previously noted, that Convention operates like a miniature analogue of UCC Article 9 as to financing of airframes, aircraft engines, helicopters, and rights to payment arising from such financing.\footnote{Characterization is important to the operation of both the CISG and the Cape Town Convention, but both leave the choice of law question to be determined by the forum court, based on its own local choice of law rules. Thus, the CISG applies to certain international “sales” of goods. But it does not define “sale,” and it explicitly avoids addressing the effect that a contract for sale of goods may have on property interests in the goods sold, which is the sine qua non of characterization.}

Some provisions of the Convention apply differently to the different kinds of “international interests”—namely, security agreements, leases, and title retention agreements—to which the Convention applies, and so there is need to characterize a given transaction for purposes of the Convention. As to the standards governing that characterization, however, the Convention refers to “the applicable law,” which is defined to mean the domestic law that the forum state would apply pursuant to its own choice of law rules.\footnote{Characterization is important to the operation of both the CISG and the Cape Town Convention, but both leave the choice of law question to be determined by the forum court, based on its own local choice of law rules. Thus, the CISG applies to certain international “sales” of goods. But it does not define “sale,” and it explicitly avoids addressing the effect that a contract for sale of goods may have on property interests in the goods sold, which is the sine qua non of characterization.}

Hence the Convention, like the CISG, does not really take a position on the law that should govern characterization of a transaction.

By contrast, the two pending conventions do take a position on that choice of law issue, and both provide, in effect, that the jurisdiction whose law governs characterization is the same as the jurisdiction whose law governs perfection and priority, at least insofar as characterization is relevant to a priority dispute.

Thus, the Receivables Convention applies to internationally-linked assignments of receivables, where “receivable” includes all contractual claims to money subject to

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narrow exceptions, and “assignment” includes an outright sale or a security transfer.\textsuperscript{145} The core of the Convention is the rule it sets forth to specify the law that governs priority of the assignment. That rule is that the jurisdiction in which the assignor is located is the jurisdiction whose internal law governs priority.\textsuperscript{146} The Convention uses the term “priority” to cover the concepts that Article 9 refers to separately as “perfection” and “priority.”\textsuperscript{147} Because the Convention also defines “priority” to include characterization of an assignment, insofar as characterization is relevant to a priority dispute, the internal law of the jurisdiction of the assignor’s location governs characterization.\textsuperscript{148} As we have seen, the “location” of the assignor is defined in the Convention in a manner similar to the definition of a debtor’s “location” in Article 9 of the UCC that is used to determine the law that governs perfection and priority under Article 9, though with some differences.\textsuperscript{149} The Convention does not, however, contain a choice of law rule applicable to characterization of the transaction for purposes other than priority—specifically, for the purpose of determining rights as between the assignor and the assignee.\textsuperscript{150}

Similarly, the core of the Hague Securities Convention is a choice of law rule, specifically a rule that specifies the law that governs certain issues pertaining to securities held in a securities account at a securities intermediary. The applicable law is, in general, the internal law of the jurisdiction chosen by the customer and the

\textsuperscript{145} Receivables Convention, supra note 19, arts. 1-5 (scope and definitions).

\textsuperscript{146} Receivables Convention, supra note 19, art. 22; see also id. art. 5(i) (defining “law” of a jurisdiction to exclude its choice of law rules). The Convention’s designation of the law of the nation in which the assignor is located to determine priority is subject to an exception applicable if the resulting priority is “manifestly contrary to the public policy of the forum [jurisdiction],” and another exception that preserves certain priorities of the forum court in the event that the assignor becomes subject to an insolvency proceeding in a jurisdiction other than the jurisdiction in which it is located. Id. art. 23.

\textsuperscript{147} Id. art. 5(g) (“‘Priority’ means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes . . . whether any requirements necessary to render the right effective against a competing claimant have been satisfied.”); see also Sigman & Smith, supra note 19, at 746–47.

\textsuperscript{148} Id. art. 5(g) (“‘Priority’ means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination . . . whether or not it is a security right for indebtedness or other obligation . . . .”); see also Sigman & Smith, supra note 19, at 754.

\textsuperscript{149} See supra text at notes 101–104.

\textsuperscript{150} Optional Part V of the Receivables Convention, comprising Articles 26-32, includes additional choice of law rules applicable to certain assignments to which the Convention would not otherwise be applicable. Issues of characterization as between assignor and assignee typically would appear to relate to “mutual rights and obligations of the assignor and the assignee arising from their agreement” within Article 28, which are to be governed by “the law chosen by them.” However, it is not contemplated that the United States would adopt Part V, which is intended for countries with a less developed internal law of receivables assignments.
intermediary, so long as the intermediary has sufficient contacts with the chosen jurisdiction.\textsuperscript{151} The issues to which the law of the chosen jurisdiction applies include the requirements for perfection of a disposition (whether a complete disposition or a transfer for security), priorities in the security as result of the disposition, and whether the disposition should be characterized as a transfer for security.\textsuperscript{152} The Convention in this respect is quite similar to the rules of the UCC on the law that governs perfection and priority of a security interest in securities held through an intermediary where perfection is by control, except that Article 9 lacks the Convention’s clear statement that its rule applies to characterization as well.\textsuperscript{153} Unlike the Receivables Convention, the law specified by the Hague Securities Convention as governing characterization applies as between the parties to the transaction, as well as for the purpose of determining priority.\textsuperscript{154}

\textbf{C. Reverse Engineering the Conventions’ Rule for Domestic Use}

The Receivables Convention and the Hague Securities Convention contain parallel choice of law rules on characterization of a transaction, in that both provide, in effect, that the jurisdiction whose law governs characterization is the same as the jurisdiction whose law governs perfection and priority, at least insofar as characterization is relevant to a priority dispute. But the rules of both Conventions are choice of law allocations between different nations, not between different states of the United States. Both Conventions are generally aimed at transactions that cross national borders, and so do not generally apply domestically—that is, they do not displace the internal choice of law rules of a nation that is composed of territorial units with distinct legal systems, such as the states of the United States, that apply when the candidate jurisdictions are different territorial units of that nation.\textsuperscript{155} And,

\textsuperscript{151} Hague Securities Convention, \textit{supra} note 20, art. 4(1) (basic choice of law rule), art. 10 (defining the chosen “law” to be exclusive of the choice of law rules of the chosen jurisdiction).

\textsuperscript{152} Article 2(1) of the Hague Securities Convention defines the legal issues governed by the Convention’s choice of law rule, which include perfection (Articles 1(1)(i) and 2(1)(c)), priority (Article 2(1)(d)), and the “legal nature” of a disposition (Article 2(1)(b)). \textit{See also} Goode, \textit{supra} note 20, at 51-53; Bjerre & Rocks, \textit{supra} note 20, at 114-15.

\textsuperscript{153} U.C.C. §§ 8-110(b), (e), 9-305(a)(3) (2008).

\textsuperscript{154} Hague Securities Convention, \textit{supra} note 20, art. 2(1) (“This Convention determines the law applicable to . . . (b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary.”). “Third parties” seemingly refers to persons other than the securities intermediary and its customer, and so seemingly includes the transferee in a disposition. “Disposition” is defined in Article 1(h) to include an outright transfer or a transfer for security.

\textsuperscript{155} Nevertheless, both Conventions are potentially applicable to some transactions that are, in a practical sense, entirely domestic. \textit{See infra} text at notes 196-199.
as previously mentioned, in circumstances in which either Convention points to the law of a given nation and it is necessary to determine a particular territorial unit of that nation as being the jurisdiction whose law applies, each Convention adheres (either of its own force or by allowing the operation of the Convention to be modified by a declaration by that nation) to the nation’s internal conflict of law rules.\textsuperscript{156} Would it make sense for the UCC to adapt for domestic use the same choice of law principle developed for international use by these Conventions?\textsuperscript{156}

The question has a man-bites-dog flavor, for it reverses the more usual tendency of American courts and lawmakers to respond to international questions with answers originated for domestic use.\textsuperscript{157} But regardless of the direction in which the parallel is drawn, the fact is that, as the reporter for the \textit{Restatement (Second) of Conflict of Laws} wrote, “[b]y and large, American courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes.”\textsuperscript{158} The \textit{Restatement (Second)} itself declares that the rules it lays down “apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations.”\textsuperscript{159} Hence, as a general matter, a court in New York considering the law to be applied to a given issue in a transaction having contacts with New York and Georgia cares not whether the Georgia is the one north of Florida or the one north of Turkey; both are equally foreign to New York.

To be sure, some commentators have argued that easy equation of domestic and international choice of law methodology is a mistake. But there is much less to those arguments on inspection than may first appear. Eugene Scoles, whose work is perhaps the most commonly cited today for skepticism towards equation of choice of law methodologies in the two settings,\textsuperscript{160} in fact was not so much an advocate of severance of methodology in the two settings as an opponent of the rigid “vested

\textsuperscript{156} Hague Securities Convention, supra note 20, art. 12; Receivables Convention, supra note 19, arts. 35-37; see also supra text at notes 91-94.


\textsuperscript{158} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 10, reporter’s note (1971); see also ALBERT A. EHRENZWEIG, \textit{A TREATISE ON THE CONFLICT OF LAWS} § 6, at 10 (1962) ("Traditionally . . . American texts and casebooks in the law of conflict of laws have treated interchangeably cases and principles relating to international and to interstate problems.") (footnote omitted).

\textsuperscript{159} \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 10 (1971).

rights’ methodology embodied in the first Restatement of Conflict of Laws. His point was that if conflict of laws is viewed as a body of rules to be applied according to fixed contacts in the spirit of the first Restatement, then the potential variations in policy between interstate and international transactions are such that separate bodies of rules should be developed for use in the two settings. “If, however, conflict of laws is essentially a method or an approach for the solution of interstate or international problems of private litigants,” then no separate methodology is necessary, for “the necessary distinctions will be built into the policies that guide the court to a solution.”

This is more a warning about the proper approach to the whole discipline of choice of law, than a special caution about equation of choice of law methodology in the international and domestic settings.

This underscores the fact that the main lines of scholarly thought on choice of law are of little assistance in deciding how Article 9’s choice of law rule should be designed with respect to characterization. The scholarly backlash from the “vested rights” methodology of the first Restatement has been such as to promote skepticism of rigid choice of law rules of any sort, whether judicially created or imposed by statute. That, however, is a bullet that the drafters of Article 9 bit long ago, when they decided that certainty in applying priority and perfection rules applicable to competing claims to an item of property outweighs any other considerations in designing choice of law rules applicable to those issues.

The Restatement (Second) qualifies its general equation of choice of law in the interstate and international settings with the pertinent, if uninformative, reservation that “[t]here may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.” The reasons it gives in support of a potential severance of international from domestic choice of law methodology bite particularly on situations in which a choice of law rule developed for domestic settings is sought to be extended to an international setting. Those reasons have much less bite on the man-bites-dog setting in which a choice of law rule established for use in an international setting is evaluated for domestic use.

Specifically, the comments to the Restatement (Second) adduce four factors, which boil down to two, that may support severance of international from domestic choice of law methodology. Other commentators who have questioned the equation of methodology in the international and domestic settings commonly echo

161. Scoles, supra note 160, at 1600-01. For a similar position, see Luther L. McDougal, III et al., American Conflicts Law § 6, at 10-12 (5th ed. 2001).

162. Restatement (Second) of Conflict of Laws § 10 (1971).

163. Id. § 10 cmt. d; see also Mathias Reimann, A New Restatement—For the International Age, 75 Ind. L.J. 575, 576 n.7 (2000) (similarly boiling down the four factors adduced by that comment).
the same two factors. The first is the greater diversity of foreign national laws as compared with domestic state laws, which enhances the need for escape hatches from a too-rigid choice of law methodology that would otherwise require application of an unacceptably repugnant substantive law. The second is the inapplicability to other nations of U.S. constitutional provisions, such as full faith and credit and due process, that are binding domestically.

Both of these factors should inspire caution in U.S. diplomats negotiating international commercial conventions that lay down choice of law rules binding on U.S. citizens in international transactions. But if such rules are adopted for international transactions, neither of those factors supplies much reason not to apply the same choice of law rules by analogy to domestic transactions. The first factor—greater diversity of foreign national laws as compared with domestic state laws—certainly does not apply, for if a particular choice of law rule is deemed appropriate to select as between potentially very diverse national laws, one should be even more comfortable applying the same rule as between comparatively harmonious state laws. Likewise, if a particular choice of law rule is deemed appropriate to select between the substantive law of different nations, even though foreign nations’ substantive laws need not be bound by American notions of due process, it is hard to see a reason for discomfort in applying the same choice of law rule to select between different states, which are so bound.

The fact that the Full Faith and Credit Clause does not apply extraterritorially, however, may be a reason for caution in importing international choice of law norms into domestic practice in some settings. This can be seen by examining the recent statutory revision efforts aimed at allowing parties to designate the law that governs a contract or other transaction between them, regardless of contacts between the chosen jurisdiction and the transaction. Those efforts were, specifically, the proposed revision of the baseline choice of law rule for transactions governed by the UCC initially contained in the 2001 revision of UCC Article 1, and the choice of law rule contained in UCITA, promulgated in 1999, discussed earlier in this paper. The former, in particular, was justified in significant part by reference to international norms embodied in treaties (to none of which the United States is party) that similarly allow contracting parties broad autonomy to select the law governing the contract, even if the transaction bears no relation to the state whose law is selected.


165. See supra text at notes 44-49.

previously discussed, both of these revision efforts failed. Long before their failure was evident, William Woodward stated a case against them, asserting that such expansion of parties’ autonomy to choose the law governing their transactions would unduly erode the power states traditionally have had to enact legislation to benefit their constituents, by allowing such legislation to be evaded through contractual choice of law clauses.\textsuperscript{167} The Full Faith and Credit Clause requires states to enforce each other’s judgments (provided that they meet the requirements of due process), regardless of the law that the adjudicating court applied to the controversy.\textsuperscript{168} In international law, by contrast, there exists no analogous authority that requires courts of one nation to enforce the judgments of other nations. Such enforcement usually occurs, but as a matter of comity, and that means that the enforcing court need not enforce a judgment that would violate the enforcing court’s public policy. A choice of law rule for contracts that defers to party autonomy thus is subject to an escape hatch in the international setting that is not present in the domestic setting.

That concern, however, is of little relevance to the present issue. For one thing, it applies most forcefully to a choice of law rule that permits party autonomy. The choice of law rule applied by the two Conventions to characterization of a transaction as being a secured transaction is based on territorial or other autonomous factors.\textsuperscript{169} Such a rule is less readily manipulable by the parties to the transaction. More fundamentally, the purpose of Article 9’s priority rules is to establish a regime in which the priority of competing claims to an item of property is knowable \textit{ex ante}. That purpose necessarily requires states potentially interested in the transaction to cede power they might otherwise have to impose competing priority schemes in the interest of benefiting their constituents. Hence Woodward’s concern for preventing erosion of state police power has no place in the present discussion, unless one is prepared to sacrifice a core purpose of Article 9 to it.

The wisdom of importing to the UCC the choice of law principle set forth in the Conventions with respect to characterization of a transaction must be tested on its

\begin{footnotesize}
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  \item Law Applicable to Contractual Obligations art. 3(1), \textit{opened for signature} June 19, 1980, 19 I.L.M. 1492). The second of these has not entered into force.
  \item Woodward, supra note 44, at 749-57.
  \item U.S. Const. art. IV, § 1.
  \item The choice of law rule applicable to the priority of an assignment of receivables under the Receivables Convention is purely territorial: the governing law is that of the jurisdiction in which the assignor is “located” (Article 22), and “location” is defined by reference to the assignor’s central administration or, for an individual, habitual residence (Article 5(h)). The choice of law rule applicable to transfer of an intermediated security by the Hague Securities Convention selects the law designated by the agreement between the intermediary and its customer, given sufficient presence of the intermediary in the chosen jurisdiction (Article 4). That is not a rule of party autonomy, for such a rule would select the law designated by the transferor and transferee. See Rogers, supra note 20, at 287-88. The UCC rule is similar. See supra note 65.
\end{itemize}
\end{footnotesize}
merits. But the foregoing at least suggests that such importation is a proper starting point.

D. Filling Article 9’s Void on the Law Governing Characterization

The foregoing suggests that Article 9, like the two Conventions just discussed, should provide that the jurisdiction whose law governs priority with respect to a secured transaction should also govern whether a given transaction should be characterized as a secured transaction for purposes of determining priorities in the property in question. Once recognized, this principle is indeed the merest common sense. Insofar as characterization is an element of priority analysis, it makes no sense to employ a different body of law to determine the character of a transaction than applies to the rest of the priority analysis.

As we have seen, however, a comment added to Article 9 in 1999 takes the very different position that characterization should be governed by the UCC’s baseline rule of party autonomy on choice of law, with the result that the governing law is the law agreed to by the parties to the transaction, provided only that the chosen law has a reasonable relation to the transaction.\(^{170}\) It appears that this comment has been overlooked by courts to date, and that no court has employed it in deciding a case. That is just as well, for the rule set forth in that comment leads to unacceptable results.

Consider, for example, *Hong Kong and Shanghai Banking Corp. v. HFH USA Corp.*\(^{171}\) In that case a German commercial partnership, Finkenrath, sold industrial goods to an American corporate buyer, Eli, and shipped and delivered the goods to a warehouse in New York. Eli had, in the meantime, granted its bank, HKSB, a security interest in its existing and future inventory (including these goods), which HKSB had duly perfected by filing. The goods had been sold under a contract governed by German law that contained a title retention clause, valid under German law, under which Finkenrath retained title to the goods pending payment in full. Finkenrath filed no financing statement and gave no notice to HKSB, but when a dispute arose between Finkenrath and Eli, Finkenrath asserted rights in the goods superior to those of HKSB. If characterization of the transaction were governed by

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171. 805 F. Supp. 133 (W.D. N.Y. 1992). Similar issues were raised, with the same result, in *Usinor Industeel v. Leeco Steel Prods., Inc.*, 209 F. Supp. 2d 880 (N.D. Ill. 2002), but the result was easier to reach in *Usinor* because in that case the contract of sale did not contain a choice of law clause designating a foreign national law (French, in that case) as governing. Rather, the contract relied on the applicability of the CISG. As the court correctly noted, the CISG does not govern property rights in sold goods, which are left to domestic law. *Id.* at 886-87; *see also supra* text at notes 141-142. Hence the court in *Usinor* was left to decide the law governing characterization of the transaction without any contractual designation of the governing law.
the German law agreed to by Finkenrath and Eli, Finkenrath indeed would have prevailed over HKSB, for the UCC rule that recharacterizes the retention of title to the goods by Finkenrath as a mere retention of a security interest in the goods by Finkenrath simply would not apply. The court sensibly rejected that position and analyzed the character of the transaction under the New York UCC, under which HKSB’s perfected security interest prevailed over Finkenrath’s unperfected security interest.

Such problems are not confined to title retention agreements. In re Eagle Enterprises, Inc., for example, involved the lease of various items of equipment, located in Pennsylvania and Virginia, the terms of which were of the kind that the UCC insists upon recharacterizing as a sale with retained security interest: the lease could not be terminated before the end of its 36-month term, and gave the lessee an option to buy the equipment for one dollar. The lessor, UCS, had filed no financing statement, and the lessee filed for bankruptcy, which would ordinarily result in the avoidance of the unperfected security interest UCS would be deemed to have under the UCC. But UCS was a German company, and the leases were, by their terms, governed by German law. If characterization were governed by German law, the leases would have been true leases and would not have been recharacterized. The court sensibly applied the UCC, not German law, to determine the character of the transaction.

To allow the debtor and secured party to choose the law governing characterization when issues of priority are at stake, contrary to the holdings of HKSB and Eagle Enterprises, would permit secret liens to be created wholesale by foreign entities, and by domestic entities that are smart enough to route their domestic dealings through a foreign affiliate. Those two cases reached the sensible result, but they did so without having to contend with the contrary language of the subsequently-issued 1999 comment. Moreover, at least one court later held to the contrary on facts essentially the same as those of HKSB, without even noticing the support given to its conclusion by the 1999 comment. That case, Diesel Props S.r.l. v. Greystone Business Credit II LLC, effectively allowed a secret lien to have priority over a perfected Article 9 security interest, by giving effect to a title retention agreement, unsupported by a financing statement, as to sold goods shipped and delivered to the buyer in the United States under a contract for sale governed by Italian law.

Article 9 plainly should be revised to displace that comment in favor of the rule set forth in the two referenced Conventions: that is, the jurisdiction whose law governs priority with respect to a secured transaction should also govern whether a

given transaction should be characterized as a secured transaction for purposes of determining priorities in the property in question. A harder question is whether the same choice of law rule should apply to determining characterization as between the notional debtor and the notional secured party—that is, when characterization is not considered as an element of a priority contest. As we have seen, the Conventions take different positions on that question, with the Hague Securities Convention applying the same choice of law rule to characterization as between debtor and secured party as for priority purposes, while the Receivables Convention takes no position on the law that should govern characterization for any purpose other than priority.

At first blush, it seems sensible to allow the debtor and secured party to choose the law governing characterization as between each other, under the UCC’s baseline rule of party autonomy for choice of law. In that setting, by definition, no third party rights need be considered, and it is the unworkability of the rule of party autonomy when third party rights are affected that leads to rejection of that rule when characterization is considered for the purpose of determining priority.

Yet there is still something odd about party autonomy in choosing the law governing characterization, even as between the notional debtor and the notional secured party. As I have discussed elsewhere, the purpose of the recharacterization doctrine is paternalistic. It is designed to protect a debtor from a forfeiture he might suffer upon his later default in performance absent recharacterization. Or, to state the point another way, strict foreclosure—the power of a creditor to retain property in satisfaction of a debt—can work a forfeiture on a debtor, and for that reason secured transaction law does not allow a debtor to enter into an enforceable agreement to be subject to a strict foreclosure (at least not before default). The point of recharacterizing as a secured transaction a transaction that parties have structured in some other way is to assure that this paternalistic stricture against allowing a debtor to contract into a potential forfeiture cannot be evaded by use of a different transaction structure. It would be strange to allow parties to evade this paternalistic protection indirectly, by choosing the governing law of a jurisdiction that does not recognize the doctrine or that applies it laxly, when they are not permitted to waive the protection directly.

Strange though it is, the anomaly of allowing parties to evade legal doctrines mandatory in one jurisdiction through a contractual choice of a laxer jurisdiction’s law is deeply embedded in modern choice of law jurisprudence. The analytical framework for enforcing contractual choice of law clauses in the Restatement...
(Second) of Conflicts of Laws, which is popular even with courts that otherwise have no use for the Restatement (Second), provides that an ordinarily applicable law of a jurisdiction must rise to the status of a “fundamental policy” before it will be given effect, if parties otherwise subject to it have chosen the law of a different jurisdiction to govern their contract. Many paternalistic legal doctrines (usury being the most familiar) have been widely held not to rise to the status of “fundamental policy,” with the result that they can be evaded through a choice of law agreement even though they cannot be waived directly.

Moreover, even if one were to take the paternalistic purpose of the recharacterization doctrine so seriously as to decline to allow parties to evade it by a contractual choice of law, it is not at all clear that the proper jurisdiction to govern characterization of a transaction as between the parties is the same as the jurisdiction whose law governs characterization for priority purposes. The choice of law rules pertaining to priority (and which, as discussed, should also apply to characterization for priority purposes) are chosen with a view to the interests of potential contestants to a priority contest. Thus, for instance, the UCC’s basic choice of law rule for priority in tangible collateral is keyed to the jurisdiction in which the collateral is located, a fact readily ascertainable and not readily manipulable by the debtor. For the purpose of determining the characterization of a transaction as between the parties, however, the jurisdiction that has the best claim to imposing its view of the appropriate degree of paternalism on the debtor would seem to be not the jurisdiction in which the collateral is located, but rather the jurisdiction in which the debtor is located. That differs from all of the other choice of law rules potentially applicable to characterization that we have discussed.

The stakes on this point are low, however, for litigation over characterization of a transaction in modern practice seems almost invariably to arise for purposes of priority, and only rarely for the paternalistic purpose of overriding, for the benefit of the notional debtor, the rights and duties agreed to between the notional debtor and secured party.

Lurking in the background is the political question of the likelihood of uniform enactment of any proposed choice of law rule on characterization. Edward Janger, in

180. As to usury, see Restatement (Second) of Conflict of Laws § 203 (1989).
182. See Kettering, supra note 9, at 552-54 (noting financiers’ comparative lack of interest in imposing the forfeitures that would be permitted if the recharacterization doctrine were abandoned).
considering the circumstances in which the uniform law process is likely to fail, observed that any setting that creates an opportunity for a jurisdiction to capitalize on an interstate externality (e.g., by favoring local businesses and thus attracting business, at the expense of other jurisdictions) is apt to create a race to the bottom that will disrupt the likelihood of uniform enactment. The tinkering with choice of law provisions done directly in Delaware and indirectly in Louisiana, noted earlier, suggests that at least some interest groups in some states might believe they can do better with nonuniform rules on the law governing characterization than by adhering to uniform rules. But the Delaware and Louisiana enactments were not made in contravention of a uniform statutory provision as to the law governing characterization; rather, they filled a void. And it is hard to see any realistic opportunity for a state to benefit from a nonuniform approach to choice of law on characterization if a uniform statutory provision is adopted, for the result of nonuniformity would be a chaotic situation in which the outcome of litigation would depend on the forum in which it happens to be brought.

V. THE NEW ORDER OF CONVENTION-MADE LAW

The preceding portion of this paper considers specific ways in which the Conventions can be used to inform and improve Article 9. This coda offers some reflections on the larger subject of the significance of the Conventions for American commercial law.

If the United States becomes bound by the Receivables Convention and the Hague Securities Convention, that fact, together with the United States’ earlier entry into the Cape Town Convention, will mark the start of a new era of American commercial law whose consequences are potentially revolutionary, and all the more consequential for not being predictable. That fact has only just begun to percolate into the consciousness of scholars whose primary home is commercial law (as contrasted with scholars who approach the subject from a home in transnational law, who have for more than a century considered the systemic consequences of different approaches to harmonization or unification of international private law). To be sure, there is a growing literature on the doctrinal issues associated with those international instruments. But scholarly discourse on commercial law reform in this country has long moved beyond doctrine to incorporate a powerful dose of inquiry


184. See supra text at notes 126-127.

into the different institutional procedures by which such law is or can be made, and their consequences. Thus we have had long running discussions of such matters as the pros and cons of federalization of commercial law as contrasted with the states being the dominant lawmakers; the virtues, vices, and likely behavior of the ULC and the ALI (which are the bodies that have been primarily responsible for drafting commercial laws at the state level); and the probable success or failure of the uniform law process in addressing commercial laws of different types. Parallel consideration of the systemic consequences for American commercial law of the international dimension is much less developed.\textsuperscript{186}

The reason, I submit, is simply that the revolution has not quite arrived. The international dimension of commercial law will have a far greater significance for American commercial law if and when all three named Conventions become binding on the United States than is presently the case. To date the stakes have been low, because international instruments other than the three named Conventions have not been mandatory law. The premier commercial law convention to which the United States is party is the CISG, which has been acceded to by dozens of other countries. The CISG has had little influence on commercial law practice in the United States, because it is not mandatory law, and lawyers around the world (including but not limited to United States lawyers) generally disdain its use.\textsuperscript{187} As a result, the CISG has had minimal effect on the development of American commercial law. Scant attention was given to conforming UCC Article 2 to the CISG in the amendments to Article 2 that were promulgated in 2003 (which amendments have in any event failed to garner any legislative interest).\textsuperscript{188}

The CISG, though not mandatory, at least is hard law. Other international instruments have influenced the drafting of American commercial statutes in recent decades. But, aside from the optional CISG and the three named Conventions, the international instruments in question have been mere soft law. Their influence has been diluted because American statutory drafters were under no compulsion to follow them, and did not follow them further than they liked. For example, the near-

\textsuperscript{186} For a thoughtful contribution, see Amelia H. Boss, \textit{The Future of the Uniform Commercial Code Process in an Increasingly International World}, 68 OHIO ST. L.J. 349 (2007). For entry to the sizable literature on the institutional procedures by which American commercial law is made and their consequences, see \textit{id.} at 350-52 and note 202 infra.

\textsuperscript{187} CISG, \textit{supra} note 16, art. 6 (parties to a contract for the sale of goods otherwise subject to the CISG may opt out of all or any part of the CISG). As to the marginal use of the CISG by United States lawyers, see Mathias Reimann, \textit{The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care}, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 115 (2007). For a recent evaluation centering on Australia and canvassing the literature worldwide, see Lisa Spagnolo, \textit{The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers}, 10 MELBOURNE J. INT’L L. 141 (2009).

\textsuperscript{188} See Boss, \textit{supra} note 186, at 363-64.
contemporaneous drafting of UCC Article 4A and the UNCITRAL Model Law on International Credit Transfers allowed each to be informed by the other to some extent, but they diverge substantially. One scholar has cited as the “best example” of state adoption of provisions from an international instrument the Uniform Electronic Transactions Act (“UETA”), promulgated in 1999 and widely enacted, which drew heavily on an UNCITRAL Model Law on Electronic Commerce. UETA, however, by no means mirrors the Model Law. Perhaps the most forcefully touted example of harmonization of American commercial law with international norms was the enactment in 2005 of Chapter 15 of the Bankruptcy Code. The principal Congressional report described Chapter 15 as being not merely patterned on the UNCITRAL Model Law on Cross-Border Insolvency but as “incorporat[ing]” it. Yet commentators have decried significant differences between the two.

The three Conventions previously mentioned are quite different. They are (or, if and when they become binding upon the United States, will be) mandatory law. Unlike the CISG, parties cannot avoid their application by reciting a standard incantation in their transaction documents. Unlike the various model laws just mentioned, they are not merely suggestions to drafters of American statutes. Nor will they require any implementing legislation after ratification; they will come into force of themselves. And the mandatory law of those Conventions will preempt sizable chunks of the UCC.

An equally important feature of these Conventions is their broad scope. While they are written to apply only to transactions that, in a defined sense, are of international interest, the scope of each is broad enough to make them applicable to transactions that are in fact entirely domestic. Thus, the Cape Town Convention applies to a security interest in or lease of an airframe, aircraft engine or helicopter of more than minimal size, so long as the debtor or lessor is located in the United States.

190. Boss, supra note 186, at 397 n.207.
194. See Burman, supra note 21, at 756-57 (the Cape Town Convention and CISG “have been considered to be self-executing treaties,” and the Receivables Convention and the Hague Securities Convention “are likely to be proposed as self-executing treaties”).
or the item is registered in the United States, even if the item has never left and never leaves the United States. A financier holding such a security interest or lease is bound to register its interest in the international registry maintained pursuant to the Convention, or be at risk of losing priority to a competing claimant, quite independently of the provisions of the UCC.

If the Hague Securities Convention is ratified, a prudent practitioner will be compelled to treat it as potentially displacing the choice of law rules of UCC Articles 8 and 9 in virtually any transaction involving a security held by an intermediary. That is because that Convention applies “in all cases involving a choice between the laws of different [countries],” a phrase that the drafters consciously declined to limit to any list of factors connecting the transaction to a different country. A lawyer structuring a transaction could rarely if ever be certain ex ante that a court adjudicating an eventual dispute might not decide that some factor (perhaps quite peripheral) makes the transaction “involv[e] a choice.” That risk is by no means remote if it should turn out, for instance, that an adverse claim to the securities credited to the account is asserted by a person from a different country.

A comparable risk applies under the Receivables Convention. As with the other Conventions, the Receivables Convention by its terms applies only to a transaction that has a specified quantum of international interest. But as with the others, the required quantum of international interest is defined broadly enough to include transactions that the uninstructed would think of as domestic. For example, the Receivables Convention would govern the assignment by one United States party to another United States party of a receivable owed by a United States party, if at some earlier date the receivable had been assigned in a transaction subject to the Convention. Hence a lawyer structuring what seems to be a domestic receivables deal will have to structure the deal to comply with the Receivables Convention, as well as the UCC, unless the lawyer can be certain that the facts rule out any possibility that (for instance) some of the receivables were previously assigned in a

195. See Cape Town Convention, supra note 17, art. 3(1); Aircraft Protocol, supra note 17, art. IV(1) (requiring a connection between the Convention and the transaction); Cape Town Convention art. 2 (defining the “international interests” to which the Convention applies); Aircraft Protocol art. II(2) (defining the “aircraft objects” to which the Convention applies). Article 50 of the Convention allows a signatory nation to declare that the Convention will not apply to a transaction that is an “internal transaction” in relation to that nation, but the United States has not made such a declaration.


197. See Bjerre & Rocks, supra note 20, at 116-17.

198. See Receivables Convention, supra note 19, at 1(1)(a), 2-3 (stating that the Convention generally applies only if the assignment or the assigned receivable is “international” in a defined sense).

199. See id. art. 1(1)(b); Sigman & Smith, supra note 19, at 732-33.
transaction subject to the Convention. Query how often that conclusion could safely be reached.

The unexpected application of the Receivables Convention to a transaction is probably more likely to cause a different result than the unexpected application of the Hague Securities Convention to a transaction. The rules of each Convention differ from the rules of the UCC that would otherwise apply, but the difference is probably greater in the case of the Receivables Convention than in the case of the Hague Securities Convention.

That these three Conventions would set forth mandatory rules of law, that those rules differ significantly from the rules of the UCC that would otherwise apply, and that the application of those rules is not confined to a small group of transactions that are obviously international, is revolutionary in itself. Also important is the inducement that arises from these Conventions to amend the UCC to conform to the Conventions, even as to situations to which the Conventions do not apply. The inducement is likely to be stronger than any inducement drafters may have to conform to transnational soft law, for these Conventions create hard facts that must be lived with, and for a user to have to deal with two differently-patterned schemes of hard law is a much greater annoyance than mere lack of conformity to soft international norms. And of course, to the extent that future international instruments are entered into by the United States, the same dynamic will exert a strong pull on the UCC to conform to those new pronouncements.

These three mandatory Conventions, together with others that may follow, and the strong gravitational pull that they will exert to conform domestic law, will change American commercial law more profoundly than previous incursions into international waters. One important point is that lawmaking via mandatory Conventions amounts to piecemeal federalization of commercial law, but with few of the advantages that have been claimed for federalization via federal statutory law.

200. See supra text at notes 100-104.

201. Both the Hague Securities Convention and the UCC generally provide that the substantive law that governs perfection and priority in an intermediated security is that of the jurisdiction in which the relevant intermediary is located, and that such location generally can be designated by agreement between the intermediary and its customer. Hague Securities Convention, supra note 20, art. 4(1); U.C.C. §§ 8-110(e), 9-305(a)(3) (2008). Among the situations in which the two laws can prescribe different results are the following: (a) under the Convention, the agreement between intermediary and customer is effective to designate the intermediary’s location only if the intermediary has, at the time of the agreement, an office regularly engaged in securities account maintenance activities in the designated nation, while the UCC rule is not so qualified, (b) the form and specificity with which the agreement must designate the intermediary’s location may differ under the two laws, and (c) the intermediated “financial assets” to which the two laws apply may differ. See Bjerre & Rocks, supra note 20, at 116 n.27, 118 n.32.

202. For an admirably balanced review of the arguments for and against federalization
Three advantages typically have been claimed for federalization of commercial law as compared with the present system, under which states are the primary lawmakers. The first is simply that federal law is uniform, while state laws can be and often are nonuniform, which adds to transaction costs for all who must deal with those laws. Lawmaking through mandatory Conventions certainly imposes uniformity in that simple sense. Of course it also creates a different kind of nonuniformity, in that it creates a new body of law that transaction planners must take into account as potentially applicable to their transactions.

The second advantage to federalization of commercial law, as compared with state responsibility, is that it is easier to amend federal law than it is to amend the laws of fifty states and various territories. Federalization thus makes it easier to correct errors and to update the law to reflect new developments. Lawmaking by mandatory Conventions lacks that benefit entirely. Once an international agreement has been signed and sealed it would be exceedingly difficult to undo or improve it—in all probability, far more difficult even than changing a uniform law under the ULC process. Hence unification of private law by such Conventions is apt to lock suboptimal law into place.

A third advantage often claimed for federalization of commercial law, by proponents of federalization, relates to interest group politics, and generally revolves around the contention that the uniform law process is the captive of business interests. This is often coupled with a critique of the uniform law process as being inherently undemocratic, or less democratic than would be the creation of a federal law, in the sense that a broad array of interests allegedly will find it easier to be heard at the federal level than in the uniform law process. Commentators are widely divided on this subject, and indeed generally give the impression of talking past each other. Whatever one’s view on the likely winners and losers in shifting from state to federal responsibility for commercial lawmaking, however, one point seems reasonably clear about the parallel comparison between state lawmaking and lawmaking via Convention: the Convention process is inherently less democratic and considerably more empowering to insiders. A private law convention is negotiated by the Department of State on behalf of the executive branch of the federal government, and


for ratification requires approval by two-thirds of the Senate. The U.S. delegations to the intergovernmental organizations at which these conventions are negotiated are appointees of the executive branch. While it appears that the Office of Private International Law within the State Department has taken care at least to coordinate with the ULC and other bodies traditionally involved in drafting American commercial laws, that has been an act of grace. There is nothing in the process that assures any degree of consultation by the executive branch with anybody other than the Senate, apart from whatever political ruckus those who have not been consulted might be able to raise in the Senate. In the uniform law process, drafting sessions are open to the public, and anyone can attend, speak, and be placed on the distribution list. The intergovernmental organizations that drafted the Conventions are not known for having comparable open-door policies, and their meetings in any case typically take place outside the United States, raising the costs of participation greatly.

Related is the fact that in the uniform law process, drafting takes place in the shadow of the need to obtain consensus of all interested constituencies, for the dynamics of enactment by fifty state legislatures are such that any organized opposition to a proposed uniform law is likely to defeat enactment in an unpredictable but potentially large number of states. Instruments such as the Conventions, by contrast, which require only the negotiators and two-thirds of one legislative body, the Senate, are not subject to the same constraint, or at least not to the same degree. As a result, the two processes are likely to generate different substantive rules. With no need, or lesser need, to strive for consensus, the process by which a Convention is created and ratified is likely to result in law that is more decisive, and that leaves less to the discretion of courts, than law drafted by the uniform law process. Whether one views that outcome as good or bad depends largely on whether one approves or disapproves the decisive rules generated by that comparatively closed process.

Aside from the substance of the law created by the Convention process, creation of such law is apt to have important effects on the legal culture that must cope with it. It will enhance the ever-growing complexity of the law, and with it the tendency of responsible practitioners to specialize ever more narrowly. Both tendencies will be strengthened to the extent that the UCC does not advertise that its terms have been superseded by other law. It seems unlikely that the UCC will do so, if the reaction of the drafting committee for the 2010 amendments to Article 9 is any guide. The ULCs’ steering committee on Scope and Program requested the drafting committee to consider amending Article 9 to harmonize its terms with those of the Receivables Convention. The drafting committee unanimously voted not to do so, citing among other reasons that “international transactions in receivables tend to be lawyered transactions among sophisticated parties.”

So they are; and that drafting

204. See Stephen L. Sepinuck, Joint Article 9 Review Committee Meeting Notes for
committee was, naturally, composed of just such highly sophisticated lawyers as such parties would, or should, employ. But such decisions ratchet up the expertise required in order to deal with this branch of the law.

Finally, the coming into effect of the Conventions is apt to raise issues hitherto remote from the consciousness of commercial lawyers. An example comes from the fact that the Receivables Convention excludes from its scope securities held through an intermediary, but not securities held directly. As a result, a simple pledge of certificated securities may be subject to the Receivables Convention, if and when it is ratified. None but initiates would ever guess that such a transaction would be subject to a treaty that is nominally directed at assignments of receivables. The consequences could easily be significant, for the Receivables Convention’s choice of law rules may well point to a jurisdiction different from that pointed to by the UCC as governing perfection and priority of a security interest in a directly-held security. 205 To avert that unpleasant result, the draft of the declarations and understandings proposed to be adopted by the Senate in connection with ratification by the United States includes an “understanding” that the Receivables Convention does not apply to any securities, including securities held directly rather than through an intermediary—a proposition flagrantly contrary to the plain terms of the Receivables Convention. 206 Will that understanding, if adopted as proposed, be binding on American courts, or courts in other countries party to the Receivables Convention? Whether and in what circumstances courts should give effect to reservations, declarations and understandings to treaties has been a hotly contested area of academic debate, though chiefly in respect to human rights treaties. As to those, a substantial body of academic opinion asserts that reservations, declarations and understandings are not necessarily binding on American courts, much less foreign courts. 207 Case law, however, is scant. 208 Commercial lawyers will have to be prepared to make their


205. See Sigman & Smith, supra note 19, at 734 n.41 & 749.


208. For example, Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005), enforced for domestic purposes a Senatorial “understanding” about the definition of torture in a convention to which the United States was party, given the expressed agreement of the Senate and the President, even though the “understanding” might well be invalid under international norms governing the interpretation of treaties. The court noted: “To date, several courts have enforced reservations, understandings, or declarations, but we are not aware of any court that has considered their validity in any detail.” Id. at 141; see also Restatement (Third) of Foreign Relations Law of the United States § 314 cmt. d (1987) (stating flatly that “understandings” are binding as part of domestic law).
own judgments about what courts, in this country and perhaps in others, will say on the subject.

VI. CONCLUSION

This paper is principally concerned with exploring how the choice of law rules of Article 9 might be improved by reference to the thinking that went into the Cape Town Convention, the Receivables Convention and the Hague Securities Convention. Hence this paper does not purport to address all gaps in, or debatable aspects of, the Article 9 choice of law rules, for the foregoing Conventions do not always supply solutions of use to the drafting of the UCC. An example are the substantive rules set forth in Part 4 of Article 9, which relate to such matters as the enforceability of a contractual or statutory restrictions on the assignability of a receivable, and the rights and duties of the account debtor as to an assigned receivable. Article 9 confesses agnosticism about which jurisdiction’s law should govern such matters. The Receivables Convention supplies no useful guidance on the point. It contains its own self-executing provisions on the enforceability of certain contractual restrictions on the assignability of receivables of certain types, and on the rights and duties of the account debtor. But as to matters not governed by those self-executing provisions it defers to national law, and states no rule as to which national law should govern.

From a broader perspective, this paper may prove to be the first of a long procession mining the lode instituted by the Cape Town Convention, the Receivables Convention and the Hague Securities Convention, considered collectively as a new species of law. Previous excursions into international waters by American commercial lawmakers—the optional CISG, and the drafting of some United States commercial statutes informed by soft international norms—were mere toe-dipping compared with these Conventions. Doctrinally, these three Conventions are most important for their effect on rules pertaining to choice of law, simply because choice of law rules are the main focus of two of them. But the ramifications of these Conventions, and their possible successors, run much deeper, and they have only begun to be explored.

210. Receivables Convention, supra note 19, arts. 9-10, 13-21; see also Sigman & Smith, supra note 19, at 739-46.
211. For example, the Receivables Convention, supra note 19, art. 8(3), provides that, except for enumerated self-executing provisions of the Convention, the “Convention does not affect any limitations on assignments arising from law.” It takes no position on which “law” should govern. By contrast, the LEGISLATIVE GUIDE, supra note 23, at 398 & recommendation 217, rather summarily recommends (translated into Article 9 terminology) that the law applicable to a receivable should govern the relationship between the account debtor and the assignee, whether the account debtor’s obligation has been discharged, and the enforceability of a purported assignment as against the account debtor.
Of course much depends upon the ratification of the latter two Conventions, and still more on the extent to which further comparable international instruments are developed and become binding. Some commentators have expressed doubt that traditional treaty law of the sort exemplified by these three Conventions has a lively future, and consider that softer methods of promulgating international norms will be ascendant. Yet there is potential, at least, to revolutionize the structure of American commercial law.

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