CHOICE OF LAW AND ARTICLE 9: SITUS OR SENSE?

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Article 9 of the Uniform Commercial Code (Code)[1] now regulates secured transactions in forty-nine of the fifty states, the District of Columbia, Guam, and the U.S. Virgin Islands.[2] Although these many jurisdictions have enacted the Code as state law, transactions subject to article 9 are often interstate or even international in nature, thus leading to possible conflicts where each jurisdiction has enacted a different version of the Code. For example, the debtor and the secured party may be based in different Code states or the collateral may be physically located in several Code states or may be of a type that is difficult to localize.[3] Moreover, competing

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1. The original 1952 version of the Code, AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT (Text & Comment ed. 1952) was adopted only by Pennsylvania. Lengthy hearings before the New York Law Revision Commission brought about a thorough revision of the Code, *see* Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967), which became the 1962 Code. AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (Text & Comment ed. 1962). The 1962 version was ultimately adopted with varying degrees of revision by all American jurisdictions except Louisiana. In the late 1960's the Permanent Editorial Board of the Uniform Commercial Code commissioned the Review Committee for Article 9 to propose such further revisions to article 9 as experience had indicated were necessary. The results of the Committee's efforts were adopted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws as the 1972 Amendments to Article 9. AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE (Text & Comment ed. 1972). These amendments have been adopted to date by 29 states and Guam, and another state has adopted one section.

This Article will be concerned with the 1962 and 1972 amendments. Sections of the Code and its accompanying comments will be cited by section number and year. Where unambiguous, or where a section is unchanged, the year will not be indicated.

2. UCC REP. SERV., STATE CORRELATION TABLES (1979). Article 9 has not been adopted by Louisiana.

3. *E.g.*, accounts (§ 9-106), general intangibles (§ 9-106), and mobile equipment kept or used in more than one jurisdiction (§ 9-103(2)).

creditors and purchasers may relate additional jurisdictions, thus contributing to the myriad of possible conflicts.

Since its inception, article 9 has contained provisions dealing with the choice of law and multijurisdictional problems posed by regulated interstate transactions.[4] The 1962 rules on choice of law and multistate transactions have been vigorously criticized for lack of conceptual foundation and difficulty of application.[5] Yet, the substantially revised 1972 version fails to fully eliminate the weaknesses of its predecessor and has introduced new problems of interpretation. A sound, theoretical, efficient, and practical solution to the choice-of-law problem is at hand, and should be adopted in the next revision of article 9.

The nearly universal adoption of various versions of article 9 of the Code has provided a degree of national uniformity that would appear to diminish the importance of choice of law among American jurisdictions. Choice of law remains an important issue, however, because of interjurisdictional differences produced by:

1. The differences between the 1962 and the 1972 versions of article 9;
2. Various departures in different states from the original text of the uniform law;
3. Many non-Code laws and policies that relate to or affect secured transactions.

The question of which state's law applies to a given transaction is a matter of more than academic interest in a suprisingly large number of cases. Moreover, the importance in modern commerce of interstate transactions of all kinds suggests the need for some way to adapt the public-notice mechanism of each state's article 9 to interstate transactions.

In discussing multistate problems under article 9, there are actually two questions that must be addressed. The first is, "What rules should determine the law applicable to a given multistate transaction that is subject to article 9?" This is a pure choice-of-law question in the traditional sense. The second question focuses on how public notice should be given in multistate transactions to

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4. *See, e.g.*, AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE, PROPOSED FINAL DRAFT §§ 9-102 to -103 (Text & Comment ed. Spring 1950).

5. *E.g.*, Weintraub, *Choice of Law in Secured Personal Property Transactions: The Impact of Article 9 of the Uniform Commercial Code*, 68 MICH. L. REV. 683 (1970).

protect the expectations of the contracting parties against the interests of third parties, while at the same time giving such third parties, wherever they are located, reasonable notice of security interests. This is a concern of substantial import since notice filing under article 9 is not a nationwide system, but is defined by each state's article 9 on an individual basis. How these notice systems should be adapted to give notice in multistate transactions is a problem of perfection of multistate transactions.

Logically, the determination of how a multistate transaction can be perfected against competing claims of various third parties follows from the choice of law applicable to the transaction. The law chosen to apply to the transaction, or at least the perfection/public-notice aspects of it, should specify the manner and locations of public-notice filing to perfect the transaction,[6] as well as the consequences of the failure to do so. Since perfection of a multistate transaction is in all other respects similar to intrastate perfection, the problem is reduced to merely ascertaining the applicable law.

In fact, the historical development of choice of law and perfection of multistate transactions under article 9 has not taken such a clear and simple path. Instead, the question of perfection has usually depended upon territorial jurisdiction over the physical situs of the collateral, rather than on the application of the chosen rules of law to a transaction. It is the thesis of this Article that rules specifying the manner and location of notice for perfection, along with other rules regulating secured transactions, should be chosen by a choice-of-law process based upon the location of the debtor.

CONSIDERATIONS IN CHOICE OF LAW

In choosing the law to apply to a secured transaction, what interests or considerations should be faced? Certainly there is a strong policy, embodied in the Code[7] and elsewhere,[8] in favor of

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6. *See, e.g.*, § 9-401(1), specifying the place for filing a financing statement. Under various optional alternatives, the place of required public-notice filing within the state can vary according to the type of debtor and the nature of the collateral.

7. § 1-105.

8. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) specifies choice of law by agreement in contractual situations. It contains the proviso that law so chosen will not apply when:

> application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen

giving the principal parties to a transaction a substantial amount of freedom to choose the law governing their relationship. This is reflective of the policy favoring certainty and predictability, which is particularly strong when questions of commercial law are in issue. Parties to commercial transactions usually plan and contract with reference to particular applicable law. Choice-of-law rules that enable the parties to ascertain in advance with some certainty what law will govern their transaction facilitate this planning. In contrast, the choice-of-law issue in tort cases, for instance, arises ex post facto. In these cases, certainty and predictability may yield to other policies in favor of applying whatever turns out in the circumstances of the case to be the better rule.[9]

Choosing law by agreement provides certainty and predictability only insofar as the immediate parties are concerned. There are third-party considerations that must also be recognized. Third parties such as potential lenders, creditors, or purchasers are unaware of the choice-of-law made by the immediate parties to the

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state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of the effective choice of law by the parties.

Id. § 187(2)(b).

Although Professor David Cavers refers to the policy in favor of agreement in contract matters as one of his seven "principles of preference," D. CAVERS, THE CHOICE-OF-LAW PROCESS 194-98 (1965), he expressly qualifies the principle with the proviso, *"This principle does not govern the legal effect of the transaction on third parties with independent interests." Id.* at 194 (emphasis in original).

9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) sets forth seven "choice of law principles." Two of these are "the protection of justified expectations" and "certainty, predictability and uniformity of result." The Comment to § 187 suggests, "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract." *Id.* § 187, Comment e.

In contrast, the Comment to § 145 on choice of laws applicable to torts notes:

> Thus, the protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts. This is because persons who cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question. Likewise, the values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions.

Id. § 145, Comment b.

transaction unless they are privy to the principal parties' agreement. When third parties approach a transaction, they need to know what law will govern their relationship to it and how they can find out what their rights are. It would be inequitable for their rights to be governed by a choice of law to which they had not been a party, and which they could not have anticipated or provided for. Moreover, the original parties will also wish to identify the law applicable to third parties, even though they may be primarily concerned with the law governing their personal transactions. Thus, external predictability and certainty of application are high on the list of considerations of all issues involving third parties.[10]

Apart from the desirability of encouraging free choice of law by the parties in situations not involving the rights of third parties, there is also a policy favoring some kind of physical or functional relationship between the state whose law is chosen and the transaction or the parties. The notion is embedded in choice-of-law doctrine that the state whose law is chosen should not be a complete stranger to the transaction or to the parties.[11] This policy tends to restrict the parties' choice to a jurisdiction with some nexus to the transaction or to the parties.

Another important consideration involves the protective and regulatory aims of the state whose law is to be chosen. Laws are generally enacted by a jurisdiction to apply to and protect residents of that jurisdiction. If a transaction somehow affects the residents of a particular state, that state is likely to have an interest that its law

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10. As will be discussed below, *see* text accompanying note 143 *infra*, this analysis was accepted by the Review Committee in formulating the 1972 amendments to the choice-of-law rule for article 9. The Review Committee, however, seemed to be mainly concerned with determining how or where public notice of securities interests is to be given. Section 1-105, Comment 5 (1972 version) states:

> Subsection (2) spells out essential limitations on the parties' right to choose the applicable law. Especially in Article 9 parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings.

11. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971), providing that choice of regulatory law by agreement will not be given effect where "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." Professor Cavers would recognize as one of his principles of preference the power of the parties to contract that *"the law of a particular state which is reasonably related to the transaction should be applied . . . even though neither party has a home in the state and the transaction is not centered there."* D. CAVERS, *supra* note 8, at 194 (emphasis in original).

implement its policies in protection of those residents.[12] Third parties are not in a position to bargain away these protections, as is arguably the case with the original contracting parties.

In commercial transactions involving the competing claims of multiple creditors, secured parties, and purchasers, the consistency and predictability that comes from utilizing the law of one jurisdiction to govern the rights of all parties has obvious appeal. Third parties legally affected by a secured transaction usually derive their relationships with the transaction through the debtor, rather than through the secured party. This suggests the location of the debtor as the jurisdiction to regulate the transaction. In addition, creditors, purchasers, and additional secured parties are more likely to be residents of the debtor's jurisdiction than that of the secured party. Their dealings are with the debtor. Again, they probably expect to be governed by the law of the debtor's jurisdiction, not the law of the jurisdiction of the secured party. This policy suggests the jurisdiction of the debtor as providing a single source of law to determine the rights of all participants in the transaction.

CONSIDERATIONS IN PERFECTION OF SECURITY INTERESTS IN MULTISTATE TRANSACTIONS

Under the scheme of article 9, perfection of a security interest against rival claims of other creditors, secured parties, and the trustee in bankruptcy depends upon the giving of reasonable public notice of the existence of the security interest and the collateral involved.[13] When multiple states are involved—either as the location

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12. Professor Cavers identifies and defines this interest as the sixth of his seven principles of preference in the choice-of-law process:

> Where, for the purpose of providing protection from the adverse consequences of incompetence, heedlessness, ignorance, or unequal bargaining power, the law of a state has imposed restrictions on the power to contract or to convey or encumber property, its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.

D. CAVERS, *supra* note 8, at 181 (emphasis omitted).

Application of this principle to choose the law of the debtor's home state to regulate remedies and obligations on default is discussed in Cavers, *The Conditional Seller's Remedies and The Choice-of-Law Process—Some Notes on* Shanahan, 35 N.Y.U. L. REV. 1126 (1960).

13. The notion of "notice filing" to perfect security interests was the subject of considerable comment in connection with the original widespread adoption of article

of places of business of the debtor or as the siti of collateral —where should the Code require that notice be given in order to reasonably apprise those who are and will be affected of the security interest?

Possession of the collateral by the secured party[14] is usually regarded as sufficient to give public notice of a security interest and thus to perfect it,[15] regardless of where the collateral or the secured party might be. Such possession is notice at the situs of the collateral and does not involve any problem of interstate notice-giving. There is no requirement of possession within a given locality to perfect the security interest; it is merely possession by the secured party.[16]

On the other hand, the great majority of security interests are perfected not by possession, but by filing or by some kind of automatic perfection without filing. Perfection by filing is accomplished by filing a signed "financing statement," briefly describing the parties and the collateral at a state or local public office where it is available for inspection by creditors and other interested parties. In a limited group of cases the Code has declared certain security interests "automatically" perfected without any type of filing or other form of public notice.[17] Such automatic perfection is usually limited to very temporary situations where filing would be impractical or to specialized categories of collateral such as consumer goods. These exceptions aside, the Code specifies where filings must be made in order to provide sufficient notoriety of the security interest to declare it perfected against the claims of third parties.[18]

9, but in succeeding decades has been taken for granted. *See, e.g.*, 1A P. COOGAN, W. HOGAN & D. VAGTS, SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ch. 6A (1980).

14. Where the collateral is not required by the debtor for current business operations or sale, lodging the collateral with the secured party as security for an advance removes the collateral from the debtor's ostensible wealth and deprives the debtor of the ability to offer the collateral to another creditor or third party. With some kinds of collateral, such as jewelry, valuables and certificated securities, this mode of perfection is frequently employed.

15. *See* § 9-305 & Comment 1.

16. Section 9-305 authorizes, and in some cases requires, possession of the collateral by the secured party to perfect a security interest. The continued commercial and legal justification of public notice by possession has been recently questioned. *See, e.g.*, Phillips, *Flawed Perfection: From Possession to Filing under Article 9—Parts I & II*, 59 B.U. L. REV. 1, 209 (1979).

17. *E.g.*, § 9-302.

18. *See* §§ 9-301 to -306 (requirements of public notice in order to prevail over different competing claims); §§ 9-401 to -407 (mechanics of providing and obtaining notice by filing).

However, each article 9 was written to cover one state, and provides for notice filings only at locations within that state. Unless creditors in different states are specifically directed to the law of a particular state, they are unable to determine whether the requisite public notice has been given.

At least in the early days of the Code there was a policy favoring localization of public notice. Such an approach was designed to facilitate the efforts of interested third parties to learn about the security interest,[19] following the theory that interested parties would expect to find public notice in the geographic area where the collateral was physically situated.[20] Although local public notice has become less important as improved communications have made widespread access to central registries possible,[21] it is still necessary to have rules to determine the registries in which notice is to be filed in order to ascertain whether or not sufficient public notice has been given to perfect a transaction.

No state's article 9 requires an extraterritorial filing to perfect a security interest governed by its own laws.[22] Arguably, because of the historical development of the law governing secured transactions on a state-by-state rather than on a federal basis, the pattern

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19. Section 9-401 (1962 version) contains three basic alternative versions: The first alternative provides for centralized notice filing of virtually all security interests. The second and third alternatives require local filings for many kinds of security interests depending upon the type of collateral (farm equipment and consumer goods) and the type of debtor (individual or corporation). A substantial number of states enacted the second and third alternatives. *See* UCC REP. SERV., STATE CORRELATION TABLES (1979).

20. The arguments favoring a requirement of localized public notice are especially strong with respect to security interests in collateral such as fixtures. All three alternatives to § 9-401 require fixture filings in the local registry of deeds to defeat conflicting real estate interests. § 9-401 (1962 version).

21. Several states have used the adoption of the 1972 Amendments to Article 9 as the occasion to drop requirements of local filing that were enacted with the 1962 Code. *Compare, e.g.*, ME. REV. STAT. ANN. tit. 11, § 9-401 (1964) *with* ME. REV. STAT. ANN. tit. 11, § 9-401 (Supp. 1979-1980).

These legislative changes reflect improving technology-of-information filing, indexing, and retrieval such as automation, micro-records and computers. No longer does the file-checker laboriously pore over drawers of alphabetized slips of papers. In most registries file searches are conducted by clerical personnel acting upon written request (U.C.C. Form 11) utilizing some form of automated equipment. This kind of operation is usually more efficient on a centralized basis.

22. The "four month rule" of § 9-103(3) (1962 version) and of § 9-103(1)(d) (1972 version) does recognize perfection for a limited period of time in "this state" by filing in another state with respect to goods moved into "this state." This appears as a very limited exception to the otherwise universal scheme of prescribing only local filings to perfect security interests governed by local law.

has been to look to the law of some other state or for the parties to specify where notice should be given (*e.g.*, the situs of the collateral) in cases where a local filing would provide insufficient notice of a security interest.[23] Thus, the cart of adequate public notice relative to the parties and collateral drags the horse of the choice-of-law determination. The simple matter of determining where to file becomes a complex matter of choice of governing law because no state's law dares prescribe notice other than within its boundaries. In this day and age could law chosen by objective rules determine places of filing for adequate notice to all affected parties? Could changes in the place of filing, and not the governing law, be keyed in a rational way to the migrations of the collateral or debtor and the need to provide local notice?

CHOICE OF LAW AND PERFECTION OF SECURITY INTERESTS IN MULTISTATE TRANSACTIONS IN THE 1962 ARTICLE 9 AND THE 1972 AMENDMENTS

The 1962 Code and 1972 amendments have merged the concepts of choice of applicable law and determination of place-of-notice filing for transactions involving more than one state. In the 1962 Code, there is virtually a complete muddling of choice-of-law rules and rules for perfection of multistate secured transactions developing from the notion of territorial coverage of each state's article 9. Section 9-102(1) provides that "this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this State . . . ."[24] This language suggests that the governing law is chosen according to the situs of the collateral only.[25] This "situs rule" also logically requires that public notice by filing be given in accord with the law of each jurisdiction in which the collateral is

23. This is the approach taken in both the 1962 Code and the 1972 amendments. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 253 (1971), providing that the effect of a dealing with a chattel subject to a valid security interest after the chattel has been removed to a new state is to be determined according to the law of the new state.

24. § 9-102(1) (1962 version).

25. It can be argued that the § 9-102 situs rule does not address what law governs collateral *not* "within the jurisdiction of this state." The forum is not referred to the law of another state by § 9-102 if the collateral is not located in the forum. Local law is chosen only if the collateral is in the forum. Does that mean that the forum is free to apply its own law to apply to a security interest in collateral located in a state other than the forum? Having in mind the uniformity and universality of the Code, such an approach would ignore the clear intention of the drafters that each state's article 9 was to apply to collateral within that state.

physically located in order to perfect a security interest in that collateral.[26]

The special rules of section 9-103 modify section 9-102. Functionally, these rules address the problem of adequate public-notice filing in multistate transactions. However, the rules in section 9-103 are phrased almost exclusively in terms of choice of law. The 1962 Code provides for local public notice of a security interest in collateral located in another state by specifying that perfection and the effect of perfection or nonperfection of the security interest in the collateral is to be governed by the law of that other state.[27] Under this approach, the law applicable to a given transaction may be simultaneously the laws of several states.[28] It becomes difficult to determine which law should apply to the transaction as a whole as well as to the rights of the principal parties between themselves, and which law should be applied only to public-notice issues and to the rights of the third parties.[29]

The 1972 amendments attempted a partial separation of actual choice-of-law questions from those concerned with perfection of security interests in multistate transactions. Under the 1972 version, choice-of-law questions, other than those relating to perfection, are treated like any other choice-of-law question subject to section 1-105. The section authorizes choice of law by agreement and specifies a "contacts"-type test in the absence of agreement. On the other hand, the 1972 amendments specify mandatory rules for choice of law involving perfection and nonperfection of a security interest in transactions involving more than one state.[30] The line was thus ostensibly drawn to distinguish between matters

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26. There is nothing in article 9 that directly says that a filing in "this state" is necessary to perfect a security interest in collateral located in "this state." Section 9-401 specifies the office in which a filing must be made to perfect a security interest under "this state's" article 9. And § 9-102 says that "this state's" article 9 applies to collateral physically located in "this state." Again, there is no mention of applicability of another state's article 9 to collateral located within the other state. Again, there is other state.-Presumably the drafters assumed that the law of the location of that collateral would specify a local filing to perfect a security interest in it.

27. *See* § 9-103(1) to (3) (1962 version).

28. This would be the case where collateral is located in several states, a not uncommon situation in modern commercial financing.

29. The problem of defining potentially overlapping areas of immediate-party issues ("validity") and third-party issues ("perfection") has been the subject matter of considerable critical analytical comment. *See, e.g.*, 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY §§ 10.8-.10 (1965); Weintraub, *supra* note 5.

30. § 9-103(1)(b), (2)(b), (3)(b), (5) (1972 version).

involving only the original parties to the transaction and matters involving the legitimate interests of third parties.[31]

Significantly, in the 1972 amendments, the notion of territoriality of coverage was done away with completely.[32] The law applicable to a given transaction or collateral is determined not by the location of that collateral within the "jurisdiction" of a state, but by the choice-of-law rules of article 9. On issues other than perfection, the choice is made by agreement or "appropriate relation."[33] On perfection issues, law is chosen by the rules set forth in the new section 9-103.[34] The 1972 amendments, however, continue to treat the extraterritorial-notice problem by a choice-of-law mechanism established by section 9-103 to deal with "perfection."

Choice of Law Under the 1962 Code

Overall, the 1962 Code choice-of-law provisions adopted the progressive "appropriate relation" approach. Section 1-105, which applies generally to choice-of-law problems under the Code, was qualified by several exceptions. One of the primary exceptions refers to those situations subject to the provisions of article 9 cover-

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31. The official statement of the reason for the 1972 amendment follows:

> The effect of the foregoing changes will be to have questions as to the creation and validity of security interests determined according to the conflict-of-law rules in Section 1-105. The cross-reference in that section to Article 9 should be amended to exclude the reference to Section 9-102. Questions as to perfection and the effect of perfection or non-perfection of security interests—*i.e., questions as to the rights of third parties*—will be determined by Section 9-103.

REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, FINAL REPORT 230 (April 25, 1971) [hereinafter cited as FINAL REPORT].

32. The language of § 9-102 "so far as concerns any personal property and fixtures within the jurisdiction of this State" was deleted in the 1972 amendments. The Review Committee for article 9 stated in the "Reasons for 1972 Change" of § 9-102, "The omissions in the first paragraph of subsection (1) make applicable the general choice-of-law principles of Section 1-105 (except for special rules stated in Sections 9-103), instead of an incomplete statement in this section."

33. § 1-105.

34. § 9-102, Comment 3 explicates that

> [i]n general, problems of choice of law in this Article as to the validity of security agreements are governed by Section 1-105. Problems of choice of law as to perfection of security interests and the effect of perfection or non-perfection thereof, including rules requiring re-perfection, are governed by Section 9-103.

Whether default, remedies, or priorities among claimants are "validity" or "perfection" remains in doubt.

ing secured transactions, specifically sections 9-102 and 9-103.[35]

The extent of the article 9 exception to the broad choice-of-law criteria of section 1-105 has never been entirely clear. Are the special article 9 rules intended to apply to all aspects of secured transactions? Or are there some aspects of secured transactions that may be governed by the general choice-of-law rules set forth in section 1-105? Little light is shed upon the questions by the Comment to section 1-105, suggesting that the limitation upon the parties right to choose applicable law arose from the recognition that "parties taking a security interest or asked to extend credit which may be subject to a security interest must have sure ways to find out whether and where to file and where to look for possible existing filings."[36] Given this perspective, one could infer that the original parties to a secured transaction are free to choose law under section 1-105 on issues other than those of public notice to third parties.[37]

In fact, secured transactions are often governed in part by other articles in the Code, in particular article 2 on sales.[38] Law governing these outside issues can be chosen under section 1-105 free from any limitation.[39] Moreover, some secured transactions in-

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35. *See* § 1-105(2) (1962 version). The § 9-102 exception was deleted in § 1-105(2) (1972 version).

36. § 1-105, Comment 5. In Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960), the Pennsylvania Supreme Court observed:

> We agree with the court below that "as between parties it is lawful for them to agree as to what law shall apply; but where, as here, we are dealing with the rights of creditors in the property of one of the contracting parties, then the law of the state of such party's domicile or place of business shall apply."

Id. at 647, 161 A.2d at 21 (quoting lower court) (citing § 9-103(1), choosing law based upon the location of the office where the assignor of accounts keeps his or her records, as modifying the § 1-105 agreement printed in the security documents).

37. This position is advanced by Professor Weintraub in Weintraub, *supra* note 5, at 693-96. *See, e.g.*, Atlas Credit Corp. v. Dolbrow, 193 Pa. Super. Ct. 649, 165 A.2d 704 (1960) (local law chosen on the basis of § 1-105 without mention of § 9-102 or § 9-103; the issue was rights on default).

38. The Comment to § 2-102 specifically states that "[t]he Article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel mortgage though *it regulates the general sales aspects of such transactions*." (emphasis added).

39. In Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963), Connecticut residents had purchased an airplane upon conditional sale from a dealer in Massachusetts, and had subsequently removed the collateral to Connecticut. Upon default the plane was repossessed, returned to Massachusetts, and sold. The buyers sued the conditional seller in Massachusetts based upon an alleged oral modification of their payment obligation. The court held that Massachusetts law

volve issues that are not addressed by any of the Code sections. In such cases the controlling law is determined by non-Code choice-of-law rules.[40] Nonetheless, the accepted view is that all secured-transaction issues governed by the rules of the 1962 article 9 are subject to the article 9 choice-of-law rules rather than those of section 1-105.[41]

Section 9-102 not only defines the scope of coverage of article 9 within the field of law, but also provides for the territorial applicability of the local article 9 to collateral within the jurisdiction of the state.[42] As such, the question of which state's article 9 governs a given secured transaction will be determined by the situs of the collateral in question:

> In general this Article adopts the position, implicit in prior law, that the law of the state where the collateral is located should be the governing law, without regard to possible contacts in other jurisdictions. Thus the applicability of the Article is by this Section stated to extend to transactions concerning "personal property and fixtures within the jurisdiction of this state." This "narrow" approach, appropriate in the field of security transactions, should be contrasted with the "broad" approach stated in Section

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(under which the modification would be valid) applied and that Connecticut law (under which the modification would be invalid) did not, despite the fact that Connecticut law would be chosen by § 9-103(2) to govern "validity and perfection" of a security interest in mobile goods. The court noted:

> This section [9-103] does not aid the defendant. Section 1-201(37) defines "security interest" as "an interest in personal property or fixtures which secures payment or performance of an obligation." The issue in the case at bar involves the duties of the parties under the primary obligation; neither party contests the validity or perfection of the security interest.

345 Mass. at 432-33, 187 N.E.2d at 671 (quoting § 1-201(37)). Professor Weintraub finds the *Skinner* result "desirable in selecting the better of two unsatisfactory Code approaches to choice of laws." Weintraub, *supra* note 5, at 694. *See also* Associates Discount Corp. v. Palmer, 47 N.J. 183, 219 A.2d 858 (1966) (action for deficiency).

40. *See, e.g.*, Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963) (usury law).

41. *See, e.g.*, Professor Gilmore's argument that § 1-105 is "irrelevant in any choice of law problem which involves an Article 9 security interest." 2 G. GILMORE, *supra* note 29, § 44.11, at 1278.

42. As suggested in note 23 *supra*, this construction depends upon a negative inference to the effect that where the collateral is not within the jurisdiction of the forum state, 1) the article 9 of the forum state does not apply, and 2) the forum should look to the law of the state of location of the collateral. This last step cannot be fairly read from § 9-102. There is nothing in § 9-102 itself which says which law applies if the collateral is not "within the jurisdiction of this state." One could argue that if the collateral is not in the forum state the court is free to choose law based on other criteria, such as § 1-105 or even common law choice-of-law doctrines.

> 1-105 with reference to the applicability of the Act as a whole. Section 9-103 states special rules relating to the applicability of this Article where the collateral consists of certain types of intangibles or mobile equipment, or property which is brought into this state subject to a security interest which attached in another jurisdiction.[43]

While this blanket territorial or situs rule has some foundation in history,[44] it has been bitterly criticized by able commentators.[45] It certainly seems difficult to comprehend in the light of hindsight. A principal infirmity is that the situs rule inadequately addresses transactions involving collateral moving from state to state or collateral localized in several states. In particular there are two questions that are not directly answered by the situs rule set forth in section 9-102. The first of these is, "At what time must the collateral be within the jurisdiction of 'this state' for this state's law to be chosen—at the time of attachment, at the time the existing claim arose, at the time of suit, or at some other time?"[46] The other is, "When a single secured transaction involves collateral located in several different states, does the law of the several different states simultaneously govern the rights of the contracting parties between themselves as well as the different claims between and among third parties to the collateral?"

What particular policies are advanced by choice of law based upon physical location of collateral in secured transactions? There is the notion of local sovereignty over collateral within the process

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43. § 9-102, Comment 3 (1962 version).

44. *See, e.g.*, RESTATEMENT OF CONFLICT OF LAWS §§ 265-281 (1934), setting forth detailed rules of choice of law for mortgages of movables. By way of example, the basic rule provides that "[t]he validity and effect of a mortgage of a chattel are determined by the law of the state where the chattel is at the time when the mortgage is executed." *Id.* § 265.

45. *See, e.g.*, 1 G. GILMORE, *supra* note 29, § 44.11, at 1280; Weintraub, *supra* note 5, at 702-05.

46. Professor Weintraub suggests that while a "literal interpretation" of § 9-102 would apply local law if the collateral was in the forum state at the time the choice-of-law decision was made, a preferable approach, at least in default and repossession situations, would be to apply the law of the situs of the collateral at the time of repossession. Even this approach, he acknowledges, is "far from satisfactory." Weintraub, *supra* note 5, at 702-03. Professor Gilmore, on the other hand, maintains flatly that "[w]hen § 9-102 refers to collateral 'within the jurisdiction' it is talking about the time when the security interest attaches—or the period during which the security relationship continues—subject in any case to the rules of § 9-103." 2 G. GILMORE, *supra* note 29, § 44.11, at 1280. *In re* Longnecker, 7 UCC Rep. 264 (W.D. Mich. 1969) (location of collateral at "the time of the creation of the security interest"), seems to adopt the Gilmore view.

jurisdiction of the courts of a particular state. Yet, it is hard to see what particular interest or policy of a state is advanced by the application of its law to movable collateral that happens to be located within the state. Where goods are purchased in a state other than the debtor's home state, and are later moved to that home state, what interest does the state of purchase have in the application of its law to regulate the security aspects of the transaction? Article 9 was not enacted to protect the rights of collateral. It is difficult to accept the proposition that the overall policies involved in regulating a secured transaction change depending upon the physical movement of the collateral.[47]

The strong choice-of-law policies of certainty and predictability are clearly not reflected in the situs rule. Personal property subject to article 9 is movable practically by definition. On the other hand, persons involved with commercial transactions, particularly lenders or potential creditors, need a legal standard that can be determined in advance with certainty so that they will be able to accurately gauge a credit risk. A creditor unable to ascertain clearly and in advance what legal standard will apply to determine and regulate the transaction must protect himself or herself under all conceivable standards. This increases the transaction cost and adds an "insurance factor" to burden the transaction without a significant, identifiable benefit.

Section 9-103 of the 1962 Code qualifies the situs rule of section 9-102, particularly with respect to perfection of security interests in multistate transactions. Section 9-103 addresses both choice of law and public notice. It does not, however, speak in the broad terms of section 9-102.[48] Instead, it speaks in terms of law governing "validity" or "validity and perfection" of security interests. For instance, section 9-103(1) of the 1962 Code chooses the law of the location of the assignor's records concerning accounts and contract rights to govern both "validity and perfection of the security interest"[49] in such collateral. But does "validity and perfection" in-

47. *See, e.g.*, Weintraub, *supra* note 5, at 702-03.

48. Section 9-102 applies "this Article" to "any personal property and fixtures within the jurisdiction of this state" "[*e*]*xcept as otherwise provided in Section 9-103 on multiple state transactions.*" § 9-102 (1962 version) (emphasis added).

49. § 9-103(1) (1962 version). Note that § 9-103(1), unlike § 9-102, not only chooses "this Article" to govern validity and perfection of security interests in accounts when the records office is located in "this state," but also when the records office is not located in "this state," specifies that such a security interest is governed "by the law (including the conflict of law rules) of the jurisdiction where such office is located." § 9-103(1) (1962 version).

clude all article 9 issues such as priorities and rights on default?[50] It is doubtful that the drafters could have intended that different aspects of a single security agreement be governed by the laws of different states, particularly concerning accounts and contract rights—collateral that is difficult to localize.[51]

Law chosen by sections 9-102 and 9-103 not only governs the transaction between the parties, but also specifies where filings are to be made in order to give public notice to perfect the security interest against the claims of third parties.[52] In most cases the law of the same jurisdiction governs the transaction and specifies where notice is to be given.[53] However, section 9-103 does not hesitate to separate those issues in certain cases. For instance, part of section 9-103(3) deals only with continued perfection of a security interest created in ordinary goods before they are brought into the state (incoming goods).[54] Public notice given under law applicable to the goods when they were located outside of the state will be deemed sufficient under the laws of that state after they have arrived, at

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50. For the argument that the terms "validity and perfection" were intended to cover all article 9 security issues both between the parties and against third parties, *see* 2 G. GILMORE, *supra* note 29, § 44.11, at 1276. For the argument that certain article 9 issues, including default rights, are not encompassed by the terms "validity" and "perfection" as used in § 9-103 but are relegated to the broader coverage of § 9-102, see Weintraub, *supra* note 5, at 697-702.

51. Once again, however, this does not mean that all aspects of the secured transaction are so regulated. As suggested before, *see* notes 37-39 *supra* and accompanying text, most secured transactions, such as retail-installment sales acts, home-solicitation sales acts, usury laws and the like, are also regulated by laws other than article 9. These laws often are designed to protect residents of the state of enactment and are applied to effectuate their regulatory or protective purposes regardless of the choice-of-law rules set forth in article 9.

52. That the primary focus of the § 9-103 rules was the determination of a place of filing to perfect a security is suggested by the policy analysis set forth in Comment 2 to § 9-103 (1962 version) (emphasis in original):

> If we bear in mind that one of the principal questions involved is where certain financing statements shall be filed, two things become clear. *First*: since the purpose of filing is to allow subsequent creditors of the *debtor-assignor* to determine the true status of his affairs, the place chosen must be one which such creditors would normally associate with the assignor; thus the place of business of the assignee and the places of business or residences of the various account debtors must be rejected. *Second*: since the validity of the assignment against third parties may depend on the filing of a financing statement in the proper place, it is vital that the place chosen be one which can be determined with the least possible risk of error.

53. *E.g.*, § 9-103 (1962 version).

54. In that sense § 9-103(3) is not a true choice-of-law provision at all. It merely determines which acts abroad are to be given effect if made applicable by § 9-102 to collateral arriving in "this state" from another jurisdiction.

least for a limited period of time.[55] The choice of law governing "validity" of a security interest in incoming goods is that of the state where the collateral was when the security interest attached.[56]

While there is little question concerning the framers' intention that sections 9-103(1) and (2) should apply to all article 9 issues, the reference in section 9-103(3) to "validity" alone is somewhat more confusing.[57] Comment 7 to the 1962 section 9-103 is not totally successful in clarifying the situation. The Comment states:

> Note that even after the four month period, it is the law of the jurisdiction where the security interest attached which determines its validity. That is to say, such matters as formal requisites continue to be tested by the law with reference to which the parties originally contracted; other matters (rights of third parties, rights on default and so on) are governed by this Article.[58]

Apparently, the drafters of the 1962 Code considered the law chosen by the original parties to the transaction to be the law of the situs of the collateral at the moment the security interest attached.[59] They reached this conclusion although there is not in fact any necessary correlation.

The 1962 section 9-103 erodes the section 9-102 situs rule with respect to the location of collateral which is (a) likely to shift (mo-

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55. § 9-103(3) (1962 version).

56. *Id.*

57. *Compare* 2 G. GILMORE, *supra* note 29, § 44.11, at 1276 ("The term 'validity' as used in subsection (3), and presumably in the other subsections, means 'formal requisites.' ") *with* 1 G. GILMORE, *supra*, § 10.9, at 320 ("For present purposes [discussion of § 9-103] we may take [validity] to encompass all aspects of the security transaction other than perfection."). *See also* General Motors Acceptance Corp. v. Whisnant, 387 F.2d 774, 777 (5th Cir. 1968) (" '[V]alidity' as used in this statute pertains to the status of the security interest between debtor and secured party. A security interest may be valid and yet be unperfected."); Comment, *Section 9-103 and the Interstate Movement of Goods*, 9 B.C. INDUS. & COM. L. REV. 72, 78-82 (1967).

58. § 9-103, Comment 7 (1962 version).

59. *See* § 1-105 (1962 version); Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l, Inc., 399 Pa. 643, 161 A.2d 19 (1960). For instance, if a New York creditor entered into a security agreement with a Massachusetts debtor and gave value, and the Massachusetts debtor subsequently acquired collateral located in New Hampshire, the "validity" of the security interest of the New York creditor in this collateral would be determined by the law of New Hampshire, even if the security agreement specifically provided to the contrary and even if the collateral were subsequently moved to Massachusetts.

bile goods) or (b) hard to identify (accounts, contract rights, intangibles). This is a step in the direction of subjecting a secured transaction to the law of a particularly appropriate state rather than applying law based on the location of property within the geographical limits of state jurisdiction.

Under section 9-103(1), validity and perfection of a security interest in accounts or contract rights is governed by the law of the jurisdiction where the assignor keeps its records concerning them. This may or may not be the jurisdiction of the assignor's chief place of business. Similarly, it may or may not be a jurisdiction that could reach the claim represented by the account through legal process.[60] The reasons for such a choice of law are reported in the Comment to section 9-103 of the 1962 Code. Unfortunately, the usual choice-of-law considerations of certainty, predictability, and the legitimate regulatory interests of different tangent jurisdictions fail to be reflected in the section 9-103(1) choice of the records' state. The Comment reads: "Subsection (1), following some of the existing state statutes, adopts the rule that security interests in accounts or contract rights are covered when the office of the assignor where he keeps his records concerning them is in this state."[61] This refers to section 9-103(1) as specifying the appropriate locus to *file* to perfect a security interest in accounts and contract rights. Yet section 9-103(1) is a choice-of-law section that determines the law to govern all aspects of a security interest involving accounts and contract rights.

Mingling choice-of-law concepts with requirements of interstate notice for perfection raises interesting questions when a security interest covers accounts recorded and on file in several different jurisdictions. The laws of the different states may differ concerning the validity of the security interest between the parties or with respect to other matters.[62] The differences should not be too significant if both are article 9 states. However, where foreign countries are involved, and with the transition from the 1962 to the 1972 Code even among the various Code states, there can be significant differences in the law applicable to article 9 issues of a given secured transaction depending upon the location of the assignor's records.

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60. The validity of process against a debt or chose in action usually depends ultimately upon personal jurisdiction over the account debtor, not the assignor.

61. § 9-103, Comment 2 (1962 version).

62. Such other matters may include procedures and remedies on default, or priorities among conflicting claimants.

From a choice-of-law standpoint, it is difficult to identify the particular policies related to the location of the office of the assignor's accounts records. It can be argued that the state of the debtor's residence may have policies designed to protect resident debtors or to regulate their businesses. It is hard to imagine policies consciously adopted by states to regulate businesses that keep accounts-receivable records within that state, but are not otherwise connected with it. The haphazardness involved in identifying state interests associated with storage of account records is increased by the existence and increasing use of modern communications and record-keeping systems involving computers, remote memory banks, multiple copies, and the like.[63] It is often difficult, if not impossible, to identify the office in which the records are in fact kept.

The Comment to the 1962 section 9-103 anticipates some of the difficulty inherent in the application of section 9-103(1). In cases where it is difficult to determine the state in which the assignor's records are kept, the author of the Comment suggests filing in any state in which it can be argued that the assignor's accounts records are kept.[64] Notwithstanding the burden this places on the secured party, this step might address the requirement of filed notice of the security interest. It does not, however, assist the court in determining which jurisdiction's law should govern the transaction and which jurisdiction's law should specify where notice by filing should be given.

Section 9-103(2) of the 1962 Code adopts a similar approach to choose law governing "validity and perfection" of security interests in general intangibles and mobile goods. Here it is not the location of the office where the assignor's account records are kept that determines the law to be applied to security interests in mobile collateral or general intangibles; rather, it is the "chief place of business of the debtor."[65] Determining the debtor's chief place of

63. For example, in a large multistate company, records of a customer's account may be simultaneously maintained by a district sales office, a regional credit office, and the national financial headquarters, all located in different states.

64. § 9-103, Comment 2 (1962 version). Where the chief executive office of the debtor is located in a 1962 Code state (*e.g.*, South Carolina), but its receivable records are kept in a 1972 Code state (*e.g.*, Maine), a court in South Carolina will be referred by its own § 9-103(1) to the law, including the conflict-of-law rules, of Maine, which law in turn will refer back to the law of South Carolina by its § 9-103(3)(b) (1972 version).

65. § 9-103(2) (1962 version). "Chief place of business" is not defined in the Code itself. Section 9-103, Comment 3 (1962 version) suggests:

business is somewhat easier than ferreting out the office in which the debtor's account records are kept since it provides for only one state per debtor.[66] Moreover, choosing governing law based on the state of the chief place of business of the debtor would give recognition to established choice-of-law principles. To the extent that a state's article 9 is designed to protect and regulate the business of local debtors, those policies are effectuated by this choice-of-law rule. There are many parts of article 9 that protect debtors and persons who are likely to be involved with a debtor at his or her place of business.[67] To the extent that article 9 regulates third-party interests created through the debtor, the law of the debtor's chief place of business is likely to be appropriate as the law of the location where third-party contacts with the debtor are focused.[68] It is the single location to which other creditors would most likely gravitate to ascertain their rights with respect to the debtor or their property. Finally, and most importantly, choosing law based upon the chief place of business of the debtor provides a degree of certainty, predictability, and ascertainability not available when choice of law is based on the changing and dispersed locations of collateral or on the location of different kinds of records. One can

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"Chief place of business" does not mean the place of incorporation; it means the place from which in fact the debtor manages the main part of his business operations. That is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing. The term "chief place of business" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief place of business" of a multistate enterprise with decentralized, autonomous regional offices. A secured party in such a case may easily protect himself at no great additional burden by filing in each of several places. Although under this formula, as under the accounts receivable rule stated in subsection (1), there will be doubtful situations, the subsection states a rule which will be simple to apply in most cases, which will make it possible to dispense with much burdensome and useless filing, and which will operate to preserve a security interest in the case of non-scheduled operations.

66. This is to be contrasted with both the accounts-records rule of § 9-103(1) and the collateral-situs rule of § 9-102, both of which would choose law of multiple states if collateral or records were dispersed.

67. The most obvious of these are default remedies and procedures (§§ 9-501 to -507) (protecting the debtor) and provisions protecting buyers in the ordinary course of business (§§ 9-307 to -308) (tending to protect persons dealing with the debtor at its place of business).

68. Attaching creditors, purchasers and subsequent secured parties are all more likely to deal with the debtor at, or in relation to, its chief place of business than in any other one location. Comment 3 to § 9-103 (1962 version) suggests that "[t]hat is the place where persons dealing with the debtor would normally look for credit information, and is the appropriate place for filing."

justify a selection of law based on the location of the debtor not only as an administratively convenient place to file financing statements, but also because such a rule tends to implement generally accepted policy considerations in a choice-of-law system.[69]

On the other hand, the situs choice-of-law rule of 1962 section 9-102 has few choice-of-law justifications other than historical ones. There is a notion that tangible property within the territorial jurisdiction of a state should be governed by the law of that state. This rule, well founded for real estate,[70] has long been qualified with regard to personal property.[71] For instance, almost everywhere in America the descent and distribution of personal property upon death is governed not by the law of the jurisdiction in which the property is physically located, but by the law of the residence of the owner.[72]

It may be argued that when a security interest is claimed in property located within a particular jurisdiction, public notice should be given in that jurisdiction so that local creditors will not be misled by the debtor's ostensible ownership in locally situated property. But this problem is not one concerning choice of law. It concerns the policy in favor of public notice and where that notice should be given in order that its purpose be effectuated. There is no reason why the law of one jurisdiction—properly applicable to determine rights in a secured transaction—should not specify where public notice should be given within or without the jurisdiction of the governing law in relation to the collateral or to the parties.

Apart from the matter of notice to local third parties, what policy interest does the state in which movable collateral is located have in regulating secured transactions concerning it? On most issues, where two states are involved, the state of residence of the debtor or perhaps even the state of another claimant has a more immediate interest in regulating the transaction than does the state of location of the collateral. Professor David Cavers, in an important article, has analyzed choice-of-law considerations applica-

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69. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 & Comment e (1971) (Comment e is quoted at note 9 *supra*).

70. *See, e.g., id.*, § 223.

71. *See, e.g., id.*, § 244.

72. *Id.*, § 260. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (1971) provides that "[t]he devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death."

ble to pre-Code default remedies now covered by Part 5 of article 9.[73] The state of debtor's residence usually has the paramount interest in the protection of the debtor and in regulating the foreclosure of a security interest, even where the collateral is located in another state. Regulatory laws protect the interests of a party to a transaction, not the interests of the inanimate property. The laws embodied in the Code concerning creation, perfection, and enforcement of security interests are designed to regulate the rights of particular parties, debtor, secured party, and third parties. It was with reference to these parties that these laws were enacted by the various legislatures. Surely in the choice of applicable law, one should look first to the personae involved and their identification with the interests of given jurisdictions rather than to the property over which they are contending.

The section 9-102 situs rule chooses law poorly in terms of identified "principles of preference."[74] The specialized approach of section 9-103 still ties the choice-of-law decision to the nature and location of the collateral. In the case of section 9-103(1) (accounts and contract rights), this approach produces a choice-of-law rule both difficult to apply and impossible to justify conceptually.[75] Section 9-103(2), applicable to intangibles and mobile equipment—which seeks a convenient location for public notice of security interests in this hard-to-place collateral—specifies the location of the debtor for such notice in the form of a choice-of-law rule. This rule, arrived at indirectly, seems to reflect essential policy considerations in the choice-of-law process. The section 9-103(2) rule of the 1962 Code was expanded by the 1972 amendments, which

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73. Cavers, *supra* note 12.

74. Even Professor Cavers, who would give the parties to a secured transaction some latitude to choose law by agreement, *see* D. CAVERS, *supra* note 8, at 181-98, does not mention situs of movable property as a significant factor in developing his "principle of preference." One source suggests situs of the collateral as one of the several "contacts" that should be taken into account, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 251 (1971), as well as "domicile, nationality, place of incorporation and place of business of the parties," *id.*, § 251. Comment e, and the "intensity of the interest" of a non-situs state in having its law apply. *Id.*, § 251, Comment g.

75. The best explanation for the choice-of-records office for accounts and contract rights appears to be historical. As § 9-103, Comment 2 (1962 version) indicates, that was the location specified by previous statutes dealing with this subject matter. Where there was little or no historical precedent (general intangibles and mobile goods) a good choice was made based upon the cited criteria. The existence of the prior statutes, relics of another era, may have resulted in a less rational choice for accounts and contract rights.

should become the basic requirement for multistate perfection of security interests in all collateral.

Perfection of Multistate Transactions under the 1962 Code

Section 9-103 of the 1962 Code addresses not only choice of law in situations involving more than one jurisdiction, but also the place to file notice of a security interest in property located in different jurisdictions, which moves from one jurisdiction to another, or which is difficult to locate such as accounts, contract rights, or general intangibles. Under the situs rule of section 9-102, only filing in the jurisdiction where the collateral is physically located is effective to perfect a security interest. This is because "this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state"[76] and because the article specifies the office of the local Secretary of State as the place to file to perfect a security interest.[77] Thus, perfection of a security interest is governed by the law of the particular state in which the collateral is physically located. The rule appears fairly simple. If a secured transaction involves collateral located in different jurisdictions, the security interest must be perfected in accord with the law of each one of those jurisdictions.[78] And the article 9 of each one of those jurisdictions specifies that to perfect a security interest one must file in one or more specified local offices.[79]

Section 9-103 of the 1962 Code addresses the filing situation where collateral has moved from one state to another. It also addresses difficult-to-localize collateral such as accounts, contract rights, and general intangibles. Finally, it addresses security interests in collateral covered by certificates of title where perfection is by a means other than what is specified in article 9.[80] In all cases

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76. § 9-102(1) (1962 version).

77. § 9-140(1) (1962 version). Filing at locations other than the office of the secretary of state is prescribed for certain kinds of collateral (*e.g.*, farm products) and certain kinds of debtors (*e.g.*, individuals) under alternative versions of § 9-401(1). All specified locations are within "this state."

78. This requires a two-step analysis. The first is to determine where the collateral is located and thus what law will specify the locations of filing. The second is to consult that law for the actual locations in which filings are required.

79. Section 9-140(1) specifies the place to file "in order to perfect a security interest."

80. Section 9-302(3) (1962 version) exempts from the filing provisions of article 9 property subject to certificate-of-title statutes. Section 9-302(4) provides that "[a]

section 9-103 proceeds from the basic rule of section 9-102 that the law of the jurisdiction of the location of the collateral is the governing law and thus the place to file.

Section 9-103(1), as mentioned above, redefines this rule for accounts and contract rights and provides that the law of "this state" will govern all issues *and* specify the place of filing (*i.e.*, locally) if the office where the assignor keeps his or her records concerning the accounts or contract rights is within "this state."[81] Section 9-103(2) performs a similar function for mobile goods and intangibles, keyed to the chief place of business of the debtor.[82] Section 9-103(3) addresses the situation where collateral is moved interstate after a security interest has been created. It provides, as a matter of choice of law, that the "validity" of the security interest is to be determined by the law (including the conflict of law rules) of the jurisdiction where the property was situated when the secu-

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security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official."

81. § 9-103(1) (1962 version). If the significance of the requirements of § 9-103(1) is limited to filing, the failure of the rule to prescribe an unambiguous choice of law can be overcome by filing in all conceivable jurisdictions, a course of action recommended by Comment 2 to that section:

> In the great majority of cases the test of subsection (1) is easy to apply; some situations remain, which will have to be worked out on a case by case basis, and which neither this nor any other statutory formula can settle in advance beyond the possibility of a doubt. There is, however, one easy answer: if there might be more than one state in which it could be claimed that the assignor keeps his records, let the assignee file in all such states. Filing is simple and inexpensive, and the entire problem can thereby be avoided.

§ 9-103, Comment 2 (1962 version).

82. It should be noted that the 1962 Code does not address the problem of changes in the location of the chief place of business of the debtor. The Comment suggests, "Similarly, if the chief place of business of the debtor is moved into 'this state' after a security interest has been perfected in another jurisdiction, the secured party should file in this state, since Section 9-401(3) is inapplicable." § 9-103, Comment 3 (1962 version). *Accord*, Community State Bank of Hayti v. Midwest Steel Erection, Inc., 22 UCC Rep. 1059, 1060-61 (D.S. Dakota 1977) ("When coupled with SDCL § 57-38-6 [9-401(4)], the South Dakota Uniform Commercial Code clearly contemplates the requirement that a secured creditor 'follow' the principal financial office of his debtor."). In General Electric Credit Corp. v. Western Crane & Rigging Co., 184 Neb. 212, 166 N.W.2d 409 (1969), the court applied the law of the jurisdiction of the debtor's chief place of business when the security interest attached, notwithstanding a subsequent shift to another state. According to Professor Weintraub, this approach "seems incorrect both in terms of official comment 5 to section 9-103 and because it apparently fails to give reasonable protection to a subsequent purchaser or creditor who is likely to look for a recorded interest in mobile equipment at the new headquarters of the debtor." Weintraub, *supra* note 5, at 711-12 (footnote omitted).

rity interest "attached."[83] Perfection must follow the collateral, subject to a four-month overlap where some local recognition will be given to perfection in the prior situs of the collateral.[84] Finally, section 9-103(4) dictates that where the collateral is or has been covered by a certificate of title, perfection is governed by the law of the state issuing the certificate. If the security interest is perfected as required by the issuing state's law, it is considered perfected in "this state."[85]

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83. § 9-103(3) (1962 version). This rule is modified in cases where the parties, at the time the security interest attached understood the collateral would be kept in "this state" and where it is in fact moved to "this state" within 30 days of attachment. In such cases the second sentence of § 9-103(3) provides that the "validity" of the security interest is determined by the law of "this state."

Whether the drafters of § 9-103(3) meant this sentence to apply only to "validity" as opposed to "validity and perfection" has been doubted by some commentators. Professor Gilmore argues that perfection also should be governed by the law of the state into which the goods are removed so that a filing in that state would be sufficient for perfection. 1 G. GILMORE, *supra* note 29, § 22.9, at 629-30. *See* J. WHITE & R. SUMMERS, HANDBOOK ON THE LAW OF THE UNIFORM COMMERCIAL CODE § 23.18, at 850-51. These arguments assume that the sentence is really a modification of the third sentence of § 9-103(3) (the four-month rule) which does apply to perfection rather than the first sentence (validity determined by law of state of attachment) which is undeniably limited to validity. If one views the function of the second sentence of § 9-103(3) as modifying the first, then restricting its effect to validity does not seem as nonsensical as has been argued. *See* Ward, *Interstate Perfection of the Motor Vehicle Security Interest: A Bottleneck in Section 9-103*, 34 ALB. L. REV. 251, 271 (1970); Comment, *supra* note 57, at 79-82. Professor Vernon appears to assume that "validity" refers to place of filing and discusses the effects of this provision only from that standpoint. Vernon, *Recorded Chattel Security Interests in the Conflict of Laws*, 47 IOWA L. REV. 346, 377-78 (1962). *But see* Taylor, *Section 9-103(3) of the UCC: Ambiguities, Unanswered Questions and Suggestions for Statutory Revision*, 35 TENN. L. REV. 235, 239 (1968) ("Use of 'validity' alone suggests that only the effectiveness between the secured party and debtor is to be determined by the designated law.").

84. The four-month rule only applies where the security interest was perfected out of state and the collateral was subsequently moved to "this state." In General Motors Acceptance Corp. v. Manheim Auto Auction, 25 Pa. D. & C.2d 179 (C.P. 1961), a New York conditional seller perfected a purchase-money security interest in an automobile by filing within 10 days of purchase under New York law. Within the ten-day period and before the filing was made the debtor removed the auto to Pennsylvania. Even though under pre-Code New York law the perfection related back to date of purchase, the Pennsylvania court observed that § 9-103(3) is limited to situations where "the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this state." 25 Pa. D. & C.2d at 186 (quoting § 9-103(3)). Since "the automobile was brought into Pennsylvania before the actual perfection took place, . . . in our opinion, the code does not, under such circumstances, continue a perfected security interest for four months since there was no perfected security interest to continue." *Id.*

85. § 9-103(4) (1962 version).

The problems of distinguishing between issues relating to "perfection" and those related to other aspects of a secured transaction—and of fragmentation of law applicable to a given transaction—are serious drawbacks of the 1962 article 9. An additional element of complexity is introduced by the reference to several states' laws to govern perfection of a security interest.

What is encompassed by the term "perfection" as used in the 1962 section 9-103 is often difficult to say.[86] For instance, local variations of the Code or differences between the 1962 and the 1972 Code may give third parties different rights vis-a-vis either a perfected or an unperfected security interest. One example is furnished by section 9-307(2). In most Code states a purchase-money security interest in consumer goods is automatically perfected without any kind of filing.[87] In those states section 9-307(2) creates a special priority in favor of a consumer casual purchaser without knowledge of an unfiled, though perfected, purchase-money security interest.[88] In a few states—such as Maine before it enacted the 1972 Code[89]—filing is required to perfect all nonpossessory security interests. Such states do not need, and usually have not enacted, section 9-307(2). If a debtor removed consumer goods subject to an automatically perfected, New Hampshire[90] purchase-money secu-

86. Although article 9 states how a security interest may be "perfected" in "this state" and also states what happens when a security interest is not "perfected," there is nowhere in article 9 a definition of "perfection" that applies to security interests in general and that could be applied to the laws of several states. So long as all of the states involved have adopted the Code, the problem is largely an academic one. But when one is involved with foreign jurisdictions (such as Canada or Mexico), which do not have precisely the same law of chattel security, then the abstract elements of "perfection" are of greater importance. Is "perfection" measured by the degree of publicity of notice of the security interest to third parties? Or is it a functional test based upon whether or not a court would hold the interest of the secured creditor superior to the claims of a range of other possible claimants? The Comment is of no help on this point.

87. *See* § 9-302(1)(d). A purchase-money security interest is defined in § 9-107.

88. Section 9-307(2) (1962 version) provides:

> In the case of consumer goods . . . a buyer takes free of security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes . . . unless prior to the purchase the secured party has filed a financing statements covering such goods.

89. Although Maine is now a 1972 Code state, *see, e.g.*, 11 ME. REV. STAT. ANN. tit. 11, §§ 9-102 to -505 (Supp. 1979-1980), it is treated as a 1962 Code state for purposes of the instant examples. For these examples only, see 11 ME. REV. STAT. ANN. tit. 11, §§ 9-301(1)(d) to -307 (1964) (current version at 11 ME. REV. STAT. ANN. tit. 11, §§ 9-103(1)(d) to -307 (Supp. 1979-1980)).

90. Although New Hampshire is now a 1972 Code state, *see, e.g.*, N.H. REV. STAT.

rity interest to Maine, and, within four months of the removal, sold those goods to a casual consumer purchaser, would the purchaser be protected under the New Hampshire section 9-307(2) or would the secured party be able to take advantage of the fact that Maine had not enacted section 9-307(2)?

If the problem is one of choice of law, under the 1962 section 9-102 the law of the situs of the collateral would be applied, at least if suit were brought in the Maine courts.[91] Section 9-102 provides that the security interest is subject to the law of Maine because the collateral is located in Maine. But Maine's section 9-103(3) indicates that the New Hampshire security interest "continues perfected" in Maine. Even though the New Hampshire security interest was perfected in New Hampshire without any filing, the Maine court could apply the Maine law that a consumer purchaser does *not* take free of a perfected security interest.[92] Maine would not have a substantial policy interest in applying the New Hampshire law protecting a New Hamphsire purchaser. Nor is there any reason to give a Maine purchaser more protection on collateral brought into the state subject to a security interest perfected without filing than he or she would have on collateral subject to a security interest perfected by a foreign filing of which he or she was ignorant.[93] On the other hand, had the security interest been perfected as required by Maine's law, there would have been a public filing which the purchaser could have discovered. By recognizing the New Hampshire perfection and by applying the Maine rules concerning the rights of third parties, the court effectuates the policies of neither state and achieves the worst of both worlds.

Two other aspects of the 1962 version of section 9-103 warrant comment. The first of these is the so called "four month rule."[94]

ANN. §§ 382-A:9-101 to -507 (Supp. 1979), for purposes of this Article it is treated as a 1962 Code state permitting automatic perfection subject to the rights of a consumer purchaser under § 9-302.

91. Maine's article 9 would apply to the collateral "within the jurisdiction of this state." Suppose suit were brought in New Hampshire. Only by negative inference could the New Hampshire court read its own § 9-102 to specify that the issue would be decided by Maine law. *See* note 25 *supra*.

92. § 9-307(2).

93. Where the foreign security interest is perfected by filing, the problem becomes a straightforward balancing of the interests of the original secured party against the interests of the purchaser without knowledge.

94. § 9-103(3) (third sentence) (1962 version); *see* notes 83-84 *supra*.

This rule provides for continued perfection of a security interest already perfected under the laws of another state in collateral that is brought into "this state" for a period of four months after arrival.

The four-month rule has been chiefly considered in the context of public notice to local creditors, potential secured parties, or purchasers in the state into which the collateral is brought. The interests of the initial secured party who perfected under the law of the state from where the goods were removed are fostered by indefinite perfection despite removal by the debtor.[95] Often such removal is without the knowledge of the secured party; it may be contrary to the terms of the security agreement or even fraudulent. On the other hand, an indefinite suspension of the situs rule may mislead local creditors in the state where the goods are located who expect a local filing for any perfected security interest.[96]

The four-month rule of the 1962 Code attempts to continue the viability of the situs rule by mediating this conflict. For four months after removal, the original security interest will be deemed perfected. After that time, if perfection is not accomplished under the law of the new situs, perfection lapses.[97]

It should be noted that the four-month rule is not phrased in terms of choice of law. Under section 9-102, the applicable law

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95. The four-month rule is actually a limitation upon the generally followed pre-Code common law under which a foreign security interest, if perfected under the law of the jurisdiction of attachment, would be recognized indefinitely in other states, at least in the absence of factors or conduct by the secured party which would make it unjust or inequitable to continue such recognition. For discussions of pre-Code common law and statutory treatment of this issue, see Vernon, *supra* note 83, at 361-67; Weintraub, *supra* note 5, at 705-08.

96. Professor Weintraub argues that a secured party should be required to file in the new state promptly upon learning of the change in location of the goods: "That failure [in § 9-103] to impose a reasonable re-perfection requirement is an outrageous regression in the protection afforded to those who deal with a debtor in [the new state]." Weintraub, *supra* note 5, at 714.

97. There has been a considerable debate about whether the four-month period of continued perfection is conditional upon actual re-perfection under the law of the state to which the goods have been removed within the four months. The prevailing scholarly view appears to be that perfection for four months is not dependent upon re-perfection within that period. *E.g.*, 1 G. GILMORE, *supra* note 29, § 22.8 at 627. *Contra*, J. WHITE & R. SUMMERS, *supra* note 83, § 23-18, at 848-50; Vernon, *supra* note 83, at 377-78. The cases tend to reflect this view. *See* American State Bank v. White, 16 UCC Rep. 1359 (Kan. Supp. Ct. 1975); Associate Discount Corp. v. Woods, 5 UCC Rep. 1268 (Mass. App. Div. 1968); Churchill Motors, Inc. v. A.C. Lohman, Inc., 16 A.D.2d 560, 229 N.Y.S.2d 570 (4th Dep't 1962). *Contra*, United States v. Squires, 378 F. Supp. 798, 15 UCC Rep. 718 (S.D. Iowa 1974); Arrow Ford, Inc. v. Western Landscape Constr. Co., 23 Ariz. App. 281, 532 P.2d 553, 16 UCC Rep. 1124 (1975).

shifts immediately upon movement of the goods. The four-month rule is merely a means of providing continued protection to one party upon movement of the goods to another jurisdiction.

A second noteworthy feature of section 9-103 involves goods subject to state certificates of title, usually motor vehicles.[98] The mobility of motor vehicles and the ubiquity of motor-vehicle transactions has caused a flood of reported cases attempting to allocate losses from interstate fraud and resolve conflicts between property and security interests.[99] The nationwide adoption of certificate-of-title laws was designed to minimize not only theft but also fraudulent transactions involving automobiles. The notion is that once an automobile is certificated, all property interests in that automobile must be created through that certificate. Article 9 defers completly to the various state certificate-of-title statutes so far as the steps for perfection of security interests in certificated property are concerned. Section 9-103(4) states that the perfection of a security interest in collateral covered by a certificate of title is governed by the law of the jurisdiction issuing the certificate even after the collateral has been brought to "this state."[100] Unfortunately, these laws are not uniform and contain diverse provisions concerning the creation, perfection, and enforcement of security interests in certificated collateral.[101]

Under section 9-103(4), however, only the perfection of a security interest in certificated property is governed by the jurisdiction issuing the certificate. This leaves other issues relating to a security interest in certificated property to be covered under local law, such as section 9-102. The rights of parties on default, ques-

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98. In addition to motor vehicles, state certificate-of-title laws sometimes cover mobile homes, boats, trailers, skimobiles, and other movables. In recent years most, if not all, states have enacted various forms of certificate-of-title laws covering at least automobiles and trucks. For a discussion of the background of this legislation as well as a thorough examination of the security problems which attend interstate movements of certificate-of-title property, *see* Meyers, *Multi-state Motor Vehicle Transactions Under the Uniform Commercial Code: An Update*, 30 OKLA. L. REV. 834 (1977).

99. *See, e.g.*, First Nat'l Bank v. Stamper, 93 N.J. Super. 150, 225 A.2d 162 (1966); Hardware Mut. Cas. Co. v. Gall, 15 Ohio St. 2d 261, 240 N.E.2d 505 (1968); General Motors Acceptance Corp. v. Manheim Auto Auction, 25 Pa. D. & C.2d 179 (C.P. 1961).

100. *See also* § 9-302(3) to (4) (1962 version), providing that security interests in certificate-of-title property can be perfected under the law of "this state" not by filing but by the procedures specified in the title law.

101. For an analysis of various types of certificate-of-title laws, see Ward, *supra* note 83.

tions of validity, and even perhaps the rights of casual purchasers under section 9-307 might be determined by law chosen by section 9-102 as modified by the other subsections of 9-103.

The multistate-perfection provisions of the 1962 article 9 have been vigorously criticized by able judges and commentators.[102] These provisions fail to rationally reflect choice-of-law considerations. They also fail to resolve successfully problems of notice-based priorities in multistate transactions. The criticisms include the anomaly of law chosen to govern the rights of parties by the situs of the collateral, the difficulty in determining what article 9 issues are covered by the section 9-102 situs rule as opposed to the various special rules set forth in section 9-103, and the doubt as to what aspects of secured transactions are covered by the exceptions set forth in section 9-103(4).[103] Consideration of choice of law and reasonable public notice appear to be hopelessly intermixed. Application of the combination of sections 9-102 and 9-103 has resulted in various kinds of illogical results. The cry for reform of choice-of-law and multistate-perfection rules was raised soon after the adoption of the 1962 Code and has consistently continued.[104]

Choice of Law Under the 1972 Amendments

The choice-of-law and perfection-of-multistate-transactions provisions of article 9 underwent thoroughgoing revision in the 1972 amendments. Spurred on by the numerous criticisms of the 1962 rules, the Review Committee for article 9 made several new proposals designed to rationalize and improve the conceptual basis and practical applicability of choice-of-law rules with reference to secured transactions.

The most important change was the elimination of the situs rule of the 1962 section 9-102. The Review Committee undoubtedly reasoned that basing choice-of-law considerations upon the location of collateral is illogical if not absurd.[105] The law governing

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102. *E.g.*, *In re* Moore, 7 UCC Rep. 578 (D. Me. 1969); 1 G. GILMORE, *supra* note 29, at §§ 10.8-.10; Weintraub, *supra* note 5.

103. *See* sources cited in note 102 *supra*. Professor Gilmore, for example, suggests that "Subsection (4) [of § 9-103] was a last-minute addition to Article 9; it appears to have been imperfectly thought through and is clearly defective in its drafting." 1 G. GILMORE, *supra* note 29, § 10.10, at 328.

104. *See, e.g.*, 1 G. GILMORE, *supra* note 29, § 10.9, at 323-25; Weintraub, *supra* note 5, at 717-18.

105. In the General Comment on the Approach of the Review Committee for Article 9, the Committee suggested that the situs rule of § 9-102 was the result of inadvertence in drafting:

the legal relationship between the principal parties, as well as the rights of third parties concerned with that relationship, should be determined irrespective of the location of the collateral.

In fashioning a replacement for the situs rule, the Review Committee made a distinction between "questions involving perfection," which the Committee viewed as involving the rights of third parties, as opposed to all other questions, primarily involving the rights of the actual parties to the transaction.[106] The 1972 article 9 provides that issues other than those concerning perfection and the effect of perfection or nonperfection of a security interest are to be treated like any other Code choice-of-law questions. They are subject to the general choice-of-law rules set forth in section 1-105. These rules were not altered from the 1962 Code, and provide for choice of law by agreement so long as the state chosen has at least a "reasonable relation" to the transaction. If no law is agreed upon, the law will be that of the state having an "appropriate relation" to the transaction.[107]

By making all issues other than perfection subject to the general rules of section 1-105, the drafters of the 1972 amendments apparently intended that questions such as rights upon default, formal requisites, and even actual existence of a security interest between the parties as well as against creditors, transferees, donees, and the like, would be governed by law chosen by section 1-105. Since these nonperfection questions primarily concern the rights of the parties to the transaction rather than third parties, arguably the parties should be free to choose law by agreement,

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> Section 9-102(1), basically intended as a scope provision on the coverage of Article 9, seems to deal with conflict of laws matters by its phrase "so far as concerns any personal property and fixtures within the jurisdiction of this state." The Committee proposes to delete this phrase and a related cross-reference, thus making Section 9-102 silent on conflicts of laws problems.

FINAL REPORT, *supra* note 31, at 230.

106. In the "General Comment," the Review Committee equated perfection questions with those involving the rights of third parties:

> The effect of the foregoing changes will be to have questions as to the creation and validity of security interests determined according to the conflict of laws rules in Section 1-105. The cross-reference in that section to Article 9 should be amended to exclude the reference to Section 9-102. Questions as to perfection and the effect of perfection or nonperfection of security interests—*i.e., questions as to the rights of third parties*—will be determined by Section 9-103.

FINAL REPORT, *supra* note 31, at 230 (emphasis added).

107. § 1-105 & Comments 1-2 (1972 version).

subject to a reasonableness test.[108] In fact, however, very few article 9 issues relate solely to the parties of the immediate transaction. Indeed, whether or not a security interest exists directly affects not only the parties to the transaction, but also purchasers of the collateral and creditors.[109]

Provisions governing the rights of the parties upon default also regulate the rights of third parties,[110] including other secured parties and persons claiming an interest in the collateral. In fact, one good reason why a particular aspect of a secured transaction is subject to a rule of article 9 instead of being left to bargaining between the parties is because the interests of some third party or another may be involved.[111]

The new section 9-103 provides special rules for choosing law to govern "perfection and the effect of perfection or non-perfection."[112] This terminology appears to be an attempt to delineate the areas of legitimate third-party concern. But the construction may not be entirely clear. There are many Code provisions which make the rights of a third party depend not upon perfection or the effect of perfection or nonperfection, but rather upon some status or action of the third party.[113] Is the question whether a lien creditor with notice will have priority over a nonperfected security interest a question of perfection or of the effect of perfection or nonperfection of the security interest?[114] The rights of a consumer

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108. In an article otherwise severely critical of the 1972 amendments, Charles Levenberg concedes that "[t]here is no sound reason for prohibiting the parties to a secured transaction from selecting the law applicable to an aspect of their transaction that will not affect the rights of third parties." Levenberg, *Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code*, 56 MINN. L. REV. 117, 144 (1971).

109. § 9-201 (1972 version).

110. For a thorough analysis of the default-remedies problem in the context of pre-Code law, see Cavers, *supra* note 12.

111. Were there no interest other than those of the immediate parties at stake, there would be little ground for codifying a rule rather than leaving the issue to the parties' own freely reached and clearly expressed agreement. The very fact that a legislature has seen fit to enact a rule regulating a contractual transaction suggests that the regulated issue affects the interests of persons not party to the agreement, whether they be identifiable third parties or the public. The degree of specificity and intensity of this third-party interest may vary from issue to issue. But it underlies all resolutions by compulsory rule rather than by bargain.

112. § 9-103(1)(b), (2)(b), (3)(b), (5) (1972 version).

113. *E.g.*, § 9-307.

114. *Compare* § 9-301(1)(b) (1962 version) *with* § 9-301(1)(b) (1972 version). There is no question about whether or not the security interest is "perfected." The question relates to the *priority* of a third party with respect to collateral subject to a concededly unperfected security interest.

purchaser on a casual sale as conferred by section 9-307(2) depend not upon perfection of the security interest, but upon whether or not the secured party has *filed*.[115] The Code sections relevant to these and other important priority issues are not uniform in all Code states.[116] The borderline problems posed may be more real than imaginary.

Arguments that even these issues are susceptible to resolution by law chosen by the debtor and secured creditor run afoul of the obvious need for a single basis for resolution among multiple third parties. If a single debtor has contracted with two separate secured parties to be bound by different states' laws with respect to the two transactions, what law would involve priority problems between the two creditors? And how would either secured party be able to know in advance which law would govern? The only common elements are the debtor and the collateral. The location of the collateral is a poor basis for choosing law applicable to a transaction which might involve collateral in many jurisdictions or collateral moving from jurisdiction to jurisdiction. This leaves the location of the debtor as the most reliable common element upon which to base a choice-of-law rule for issues touching the interests of third parties.

It is also not clear that, as a matter of public policy, agreement should be the overriding choice-of-law consideration in determining the appropriate law to govern secured transactions even on issues involving only the interests of the contracting parties. Such transactions frequently involve parties of unequal bargaining power using printed-form agreements. Law chosen by such agreements is often the law chosen by the creditor secured party.[117] Such a choice can contravene state policies of protection of local debtors.

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115. *See* § 9-307(2) (1972 version). A buyer of consumer goods "takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods." *Id.*

116. Other priorities rules that turn on issues other than "perfection and the effect or perfection or non-perfection" are priority for future advances, §§ 9-301(4), -307(3) (1972 version), and priority of a purchase-money security-interest financer, § 9-312(3) (1972 version), to name only two. These rules differ between the 1962 and 1972 versions and are subject to local variations.

117. *See, e.g.*, Headrick, *The New Article Nine of the Uniform Commercial Code: An Introduction and Critique*, 34 MONT. L. REV. 218, 246 (1973) ("The creditor in effect dictates the contract. He should not also be allowed to dictate a choice-of-law clause to get around the public policy provisions which are intended to protect the debtor.").

Such policies usually would favor application of the law of the debtor's locality.[118] In addition, choice of law by agreement under section 1-105 has the obvious drawback that no one who may be affected by a secured transaction, other than the debtor or the secured party, has any reliable way to determine the applicable law.[119]

The 1972 amendments represent a step forward in disentangling article 9 from the old situs rule. The new rules, however, draw distinctions which are not realistic or easy to apply. The prevalence of third-party concerns in all article 9 issues and the difficulty of devising a defensible delineation suggests that perhaps choice by the parties is the wrong choice-of-law focus for any article 9 issue.

Perfection of Multistate Transactions under the 1972 Amendments

The 1972 amendments have attempted to rationalize many of the problems of the 1962 Code in the perfection of multistate transactions. The 1962 Code scheme of choosing law of different states to govern the perfection of multistate transactions was retained. The 1972 version also continues the notion that perfection of security interests is governed by the laws of different states depending in some cases upon the location of collateral. This echo of the situs-test notion is a serious defect in the 1972 amendments' approach to the perfection of multistate transactions.

Replacing the 1962 section 9-102 situs test, the 1972 amend-

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118. Two leading commentators have suggested that the state of the debtor's location or residence should provide law governing rights upon default. Cavers, *supra* note 12, at 1140; Weintraub, *supra* note 5, at 690-91. *See also*, Headrick, *supra* note 117, where the author suggests that "[r]ules on foreclosure are typically rules of public policy against which the parties are practically powerless to stipulate," *id.* at 247, and that default rights should be governed by nonCode choice-of-law rules. *Id.* at 247-48. These rules usually call for the state of location of the debtor. *Cf.* Hawkland, *The Proposed Amendments to Article 9 of the UCC—Part 6: Conflict of Laws and Multistate Transactions*, 77 COM. L.J. 145, 149 (1972) (§ 1-105 does not provide satisfactory choice of laws in default situations).

Professor Cavers discusses these protection policies in formulating a principle of preference favoring application of protective provisions to protect a person with a home in the state with the protective law. D. CAVERS, *supra* note 8, at 181-87.

119. The same debtor could easily "agree" with several different secured parties upon different states' governing law. In the absence of agreement among them, presumably a "contacts" type test would be applied. *See* § 1-105 (1972 version). Such a test is usually applied only after a dispute has arisen and is of little help in planning.

ments substitute the "last event" test to determine the jurisdiction whose law determines whether a security interest in ordinary goods is perfected and the effect of perfection or nonperfection.[120] According to this test, so far as ordinary goods, instruments, and documents are concerned, perfection issues are governed by the law of the jurisdiction where the collateral was physically located at the occurrence of the last event upon which the assertion is based that the security interest is perfected or unperfected.[121]

The drafters of the 1972 amendments apparently thought that wherever collateral may be moved during the process of acquisition, financing, and use, there should be some way to determine the law under which the security interest is perfected and where a filing should be made to give notice of the security interest.[122] In the ordinary case, where a filing is made in the jurisdiction where the collateral ultimately comes to rest, that filing is the most recent event upon which the claim of perfection is based.[123] The test works the same way as did the situs test of the 1962 Code. It produces the presumably desirable result of a required filing in the jurisdiction where the collateral is physically located. Such a filing gives creditors in the geographic vicinity of the collateral local access to security information.

In fact, however, the abolition of the situs test of the 1962 section 9-102 may have fatally undercut the assumptions upon which

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120. § 9-103(1) (1972 version).

121. § 9-103(1) (1972 version). The last-event test underwent an initial round of comment and analysis in Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 532-44 (1973); Kripke, *The "Last Event" Test for Perfection of Security Interests Under Article 9 of the Uniform Commercial Code*, 50 N.Y.U. L. REV. 47 (1975); Levenberg, *supra* note 108.

122. The last-event test is actually a rephrasing of a proposal to base choice of laws upon the location of the collateral at the time of the dispute. Following a draft presented by the Review Committee, REVIEW COMMITTEE FOR ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PRELIMINARY DRAFT NO. 2 (February 1, 1970), Justice Robert Braucher, Reporter to the Review Committee, distributed a revised draft of § 9-103 which became known as the "Braucher Draft." The Braucher Draft is very similar to § 9-103 as ultimately approved, but provided in proposed § 9-103(1)(b) that: "Perfection and the effect of perfection or nonperfection of a security interest in collateral are governed by the law (including the conflict of laws rules) of the jurisdiction where the collateral is when a conflicting claim arises." The change was made to the phraseology of the last-event test when it was pointed out that the Braucher version would choose law only ex post facto in disputes and would furnish no basis for planning or ascertaining perfection requirements in advance.

123. This assumes that the filing takes place after the collateral arrives in the state of destination. As is discussed below, *see* text accompanying notes 130-133, this result does not obtain where the filing took place before the arrival of the collateral.

the last-event test of the 1972 section 9-103 was apparently founded. As stated before, the last-event test requires resort to the jurisdiction where the collateral was physically located at the time of the last event upon which the assertion is based that the security interest is perfected. Under the 1972 Code, there are five events upon which an assertion of perfection can be based: (1) agreement by the parties;[124] (2) reduction of the agreement to writing;[125] (3) the giving of value by the secured party;[126] (4) the acquisition of rights in the collateral by the debtor;[127] and (5) the giving of public notice by filing in a public office.[128] There is no requirement that these events occur in a particular chronological order.

The problem with the 1972 Code is that the last event is that which associates the collateral with the law of the jurisdiction where the collateral is physically located at the time the event occurs. As one leading commentator has pointed out, this test might choose law totally unintended by the parties.[129] For instance, it is easy to conceive of a typical secured transaction where a secured party is financing on a continuous basis the acquisition of inventory by the debtor. A filing has been made in Maine,[130] the state of the debtor's chief place of business. The secured party has advanced value to the debtor, and a written security agreement has been signed. The only remaining event upon which a claim of perfection could be based is the acquisition by the debtor of rights in the collateral. If the debtor acquires rights in the collateral in, say New Hampshire, where there is no filing, it can be asserted that the law of New Hampshire will govern perfection of the security interest.[131] That is the jurisdiction where the last event occurred upon

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124. § 9-203(1)(a) (1972 version).

125. § 9-203(1)(a) (1972 version).

126. § 9-203(1)(b) (1972 version).

127. § 9-203(1)(c) (1972 version).

128. §§ 9-302, -304, -306 (1972 version).

129. Coogan, *supra* note 121, at 537-44. Professor Coogan's doubts are shared by at least two other commentators. R. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 9-4, at 220 (1973); Levenberg, *supra* note 108, at 143-150.

130. Maine is a 1972 Code state. *See, e.g.*, ME. REV. STAT. ANN. tit. 11 §§ 9-102 to -505 (Supp. 1979-1980).

131. Moreover, under the law of New Hampshire the security interest would be unperfected because in order to perfect a security interest under New Hampshire law a filing must be made in the appropriate public office in New Hampshire. This assumption is made for purposes of this Article, treating New Hampshire as a 1962

which is based the assertion that the security interest is perfected.[132] This means that even if the collateral is brought, as expected and intended, to Maine (where a financing statement is on file), perfection of the security interest would still be tested by the law of New Hampshire from whence the collateral came (where presumably there was no filing). The filing some time ago in Maine would not lead to choosing the law of that jurisdiction because the filing was not the last event upon which the assertion of perfection is based. Perhaps that filing was the first event; certainly it was earlier in the chain than the last event.

This reading is reinforced by the abolition of the situs rule of the 1962 section 9-102. There is no longer any validity to the notion of territorial effectiveness of a filing. A filing is effective to perfect a security interest governed by the law of the jurisdiction requiring the filing, and there is no longer any provision that "this state's" article 9 applies to "personal property and fixtures within the jurisdiction of this state."[133]

There is nothing in the 1972 article 9 that says that a filing in the office of the Secretary of the State of Maine is sufficient to perfect a security interest in collateral located in Maine. Instead, the 1972 article 9 says that a filing in the office of the Secretary of the State of Maine is effective to perfect a security interest to which Maine's article 9 applies. Maine's article 9 applies to those transactions or that collateral to which it is given application by section 1-105 (questions other than perfection) and by section 9-103 (questions involving perfection and the effect of perfection or nonperfection). Thus, if the filing in the debtor's state is the only filing upon which the secured party can base its claim that its security interest is perfected, the claim is doomed to failure unless the collateral was physically located in that state at the time the filing was made *and* at that time the filing was the last event necessary to perfect the security interest.

This was obviously not the result intended by the drafters of the 1972 amendments. Undoubtedly, they intended that such a fil-

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Code state, although it is actually a 1972 Code state. *See, e.g.*, N.H. REV. STAT. ANN. §§ 382-A:9-101 to -507 (Supp. 1979).

132. New Hampshire law would also be chosen as the jurisdiction where the collateral was located at the time of the "last event . . . on which is based the assertion that the security interest is . . . *unperfected*." § 9-103(1)(b) (1972 version) (emphasis added).

133. § 9-102(1) (1962 version).

ing in the home state would acquire the validity necessary to perfect the security interest at least upon the movement of the collateral back to the home state where the filing had been made. This is the position advanced by more than one distinguished Code scholar construing the 1972 amendments.[134] But this position really cannot be sustained without some notion of territorial validity of a filing. The notion was valid under the 1962 section 9-102; it simply does not exist in the post-1972 article 9. The argument that bringing collateral into Massachusetts should be considered the last event on which the assertion of perfection is based is necessarily premised on the assumption that a Massachusetts filing perfects security interests in collateral located in Massachusetts. Such a notion can no longer be inferred in light of the article 9 language of the 1972 revisions.[135]

Actually, the problem just discussed—where collateral is purchased by the debtor outside of the state in which it is to be kept—has been mitigated as to purchase-money security interests by the 1972 section 9-103(1)(c). That section specifies that perfection and the effect of perfection or nonperfection of a purchase-money security interest in goods acquired in one state but intended to be kept in another is governed by the law of the state where the goods are ultimately to be kept for the first thirty days after possession is given to the debtor and thereafter if they are moved to the intended state within the thirty days.[136] In the first situation discussed above, if the parties to a purchase-money security interest intend that the collateral is to be kept in Maine, and if

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134. Kripke, *supra* note 121, at 48-49; *accord*, Haydock, Book Review, 21 WAYNE L. REV. 183, 187-88 (1975).

135. The last-event test may, in fact, work as intended only where the collateral is removed to a 1962 Code state, where a better argument can be made for territorial validity of filings. So long as a substantial number of states retain the 1962 Code, there remains the possibility of such anomalous results.

136. This provision can be compared to § 9-103(3) (1962 version), which applies only to questions of "validity" but is not restricted to purchase-money security interests (defined in § 9-107).

There is no definition of the word "kept" in the Code. A Comment states that "section [9-103] uses the concepts that goods are 'kept' in a state or 'brought' into a state, and related terms. These concepts imply a stopping place of a permanent nature in the state, not merely transit or storage intended to be transitory." § 9-103, Comment 3 (1972 version).

This new version of the "thirty day rule" does preserve the requirement of § 9-103(3) (1962 version) that the "understanding" exist at the time the security interest attaches. For new complications raised by this requirement in the context of revised article 9, see Coogan, *supra* note 121, at 536-37.

the goods arrive in Maine within thirty days after the debtor acquires possession of the collateral, Maine law regulates perfection of the security interest from the point of attachment to thirty days after possession by the debtor and thereafter if the collateral has arrived in Maine within that time. Applicability of Maine law and perfection by a Maine filing is based on the choice-of-law provisions of section 9-103, not the ghost of the 1962 concept of territorial coverage.[137]

What needs to be done to assure perfection of security interests in incoming goods under the last-event test of the 1972 Code? One commentator has suggested that the security agreement specify that attachment of the security interest is postponed until the collateral has reached the debtor's destination state.[138] Then the attachment would be the last event, which would necessarily occur in the destination state, and thus the law of that state would be selected to govern perfection. That law requires a filing in its own filing office to perfect a security interest subject to its law. That filing would have long since been made, and the security interest would be perfected.[139]

Obviously, this approach leaves the secured party insecure as to collateral en route. Other options would be filing in the state of acquisition or refiling after arrival of the collateral in the destination state.[140] The former option could be excluded as burdensome; the latter also leaves the secured party temporarily exposed. Unless the facts fit the revised section 9-103(1)(c), the last-event test provides an insecure basis for reliable perfection of multistate transactions.

The 1972 amendments did take steps forward in rationalizing the provisions of the 1962 Code concerning accounts, contract rights, general intangibles, and mobile goods. Choice of law based on the location of the records office of the assignor of the ac-

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137. This provision short-circuits the last-event test and invokes the law of the destination state directly, without regard to the location of the collateral at various points in the perfection process.

138. Coogan, *supra* note 121, at 543.

139. This suggestion is only effective where the collateral is in fact removed to the destination state. It leaves the secured party awkwardly vulnerable if the collateral is moved elsewhere.

140. Filing in the state of acquisition would likely be the last event and would in any case provide perfection in case the law of the acquisition state was selected by a later event. Refiling after the collateral had arrived in the destination state would of necessity be a later event than anything that took place when the collateral was elsewhere and would thus choose local law.

counts[141] was abolished. The sole criterion for choosing applicable law governing perfection of security interests in accounts, general intangibles, and mobile goods is the "location" of the debtor, a term defined in section 9-103(3)(d).[142] The effect of this change, so far as perfection is concerned, is to center choice of law around a single point. A single state's law determines perfection questions concerning all security interests in all collateral of that description involving all third parties.

Still left alive is the notion that one state's law governing validity, default rights, and certain rights of third parties may be chosen by agreement or by "an appropriate relation" under section 1-105, and another state's law may be chosen under section 9-103 to govern perfection issues in the same secured transaction. While choice of different states' laws to govern different aspects of a single transaction is not necessarily undesirable where there are good reasons for that result, in planning commercial transactions there is some value in hard and clear rules for determining choice of law in advance. This enables the parties to know their rights and responsibilities in advance. It also enables third parties faced with a secured transaction to determine how they will be affected by it before committing themselves. The importance of this policy with respect to questions of perfection and nonperfection was clearly recognized by the Review Committee for article 9 in the drafting of the 1972 amendments.[143] It is hard to understand, however, why they did not extend this policy to all article 9 issues and subject them to general choice-of-law rules rather than leaving some issues to section 1-105.

The 1972 amendments also address problems of continuing perfection of security interests in collateral moving from state to state. The 1962 four-month rule of continued perfection, when collateral is moved from a state in which a security interest is perfected to another state, was revised.[144] Under the 1972 Code, perfection is continued for four months. If any act required for perfec-

141. § 9-103(1) (1962 version).

142. Section 9-103(3)(d) (1972 version) reads:

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

143. *See* § 9-103, Comment 1 (1972 version).

144. *Compare* § 9-103(3) (1962 version) *with* § 9-103(1)(d) (1972 version).

tion under the law of the state to which collateral is removed is not accomplished before the end of the four months, the security interest becomes unperfected as against a purchaser as of the time of removal.[145] On the other hand, the lien creditor (including a trustee in bankruptcy) who attaches the collateral during the four-month period does not get the benefit of the secured party's failure to perfect during that time.[146]

This attempt to mediate between the interests of the initial secured party and persons dealing with the collateral in the state to which it is removed is based on choice-of-law situs notions. Although the situs rule of the 1962 section 9-102 was abolished, its echo sounds in section 9-103(1)(d) of the 1972 amendments. As discussed above, the law governing perfection is that of the jurisdiction where the collateral was at the time of the last event upon which the claim of perfection or nonperfection is based.[147] Nothing in the new article 9 indicates that a change in the collateral's location after the occurrence of the last event (and the attendant choice of law governing perfection) invalidates that choice. Nevertheless, section 9-103(1)(d) states that a perfected security interest in collateral moved into "this state" remains perfected "but if action is required by Part 3 of this Article to perfect the security interest" it becomes unperfected unless "the action" is taken within four months.[148] But the determination of whether action is required by Part 3 of "this Article" to perfect the security interest depends wholly upon whether or not the law of "this state" applies to that collateral and security interest. If the law of this state is not applicable, no action is required "by Part 3 of this Article" to perfect the security interest. Without the situs rule of the 1962 section 9-102 to apply "this state's" law to collateral within the jurisdiction of this state, the last-event test determines the applicable law. That is the law of the jurisdiction where the collateral was when the last event occurred. So long as that law continues to apply, the act of filing that originally afforded perfection will continue to do so.

This apparent conflict can only be resolved by reading the new

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145. § 9-103(1)(d) (1972 version). "Purchaser" is defined in § 1-201(32) to (33) to include a secured party.

146. This appears by negative implication from the text of § 9-103(1)(d) (1972 version). Such a construction is suggested by the Review Committee for Article 9. FINAL REPORT, *supra* note 105, at 245. It appears to have the unanimous agreement of the commentators. *E.g.*, Coogan, *supra* note 31, at 535-36.

147. § 9-103(1)(b) (1972 version).

148. § 9-103(1)(d) (1972 version).

section 9-103(1)(d) as follows: "but if action *would be* required by Part 3 of this Article to perfect the security interest, *were the perfection and effect of perfection or non-perfection subject to this State's law.*" The drafters of the 1972 amendments apparently assumed that removal from a perfection state would cause loss of perfection as would have been the case under the 1962 section 9-102.[149] There is no longer any basis in article 9 for such an assumption.

The 1972 amendments also deal with certificate-of-title collateral. Here, again, the solution offered to resolve the difficulty with the 1962 Code is pragmatic rather than conceptual. The 1972 article 9 continues to defer to certificate-of-title statutes on perfection of security interests in certificated collateral. An article 9 security interest in certificate-of-title property is perfected not as prescribed by article 9, but as required by the certificate-of-title law.[150] The perfection or nonperfection of the security interest is governed by the law of the jurisdiction issuing the certificate until four months after the goods are removed from that jurisdiction or until "registration" in another jurisdiction, whichever is later.[151] "Registration" apparently intensifies the need for localized notice to such an extent that the ghost of the situs rule reappears.[152] Four months

149. Under § 9-102(1) (1962 version), "this Article applies [to collateral] within the jurisdiction of this state." By negative implication, "this state's" article 9 does not apply to collateral outside the jurisdiction of "this state," especially if the state in which the collateral is located is another 1962 Code state. *See* § 9-102, Comment 3 (1962 version).

150. § 9-302(3)-(4) (1972 version).

151. § 9-103(2) (1972 version).

152. The assumption apparently is that the goods will be subject to local law. Comment 4(e) to § 9-103 (1972 version) suggests that "in any event the security interest perfected out of state becomes unperfected unless reperfected in this state under the usual four-month rule (paragraph (2)(d) of the section)."

The secured party may ask what he or she can do for protection in this situation, particularly if he or she cannot speedily find the debtor and obtain cooperation. The Comment suggests,

> One difficulty is that no state's certificate of title law makes any provision by which a foreign security interest may be reperfected in that state, without the cooperation of the owner or other person holding the certificate in temporarily surrendering the certificate. But that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party. The only solution for the out-of-state secured party under present certificate of title laws seems to be [to] reperfect by possession, i.e., by repossessing the goods.

§ 9-103, Comment 4(e) (1972 version).

after arrival, registered certificate-of-title collateral is no longer "covered" by a certificate of title under section 9-103.[153]

Choice of law governing perfection is thus accomplished by a two-step reference—first to the law of the state issuing the certificate and then by that state's article 9 to its title-certificate law. Compromised is the insoluble conflict between two victims of a mobile debtor's fraud—the secured party in the origin state and the subsequent purchaser or secured party in the removal state who might rely on a clean, local, fraudulently obtained certificate. A nonprofessional buyer relying on a clean, local certificate is given priority over the original secured party.[154]

Chattel paper is also specially treated in the 1972 choice-of-law/multistate-transactions sections.[155] Again, the residue of the situs rule is found. Section 9-103(4) states that a possessory interest in chattel paper is governed by the last-event test, which chooses the law of the jurisdiction where the collateral was physically located at the time of the last event upon which perfection or nonperfection of the security interest is asserted. A nonpossessory (filed) security interest is governed by the law of the jurisdiction in which the debtor is located.[156]

This formulation, reasonable on its face, poses real problems as long as some jurisdictions retain the 1962 Code.[157] A debtor "located" in New Hampshire gives a nonpossessory security interest in chattel paper to a secured party who files in New Hampshire to perfect.[158] The debtor then takes the chattel paper to Maine and

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153. § 9-103(2)(b) (1972 version). Presumably choice of law governing perfection of a security interest in such collateral would be by the last-event test of § 9-103(1)(b) or according to the debtor's location for mobile goods under § 9-103(3).

154. § 9-103(2)(d) (1972 version). This priority is very similar to that provided by § 9-307(2) to consumer buyers of consumer goods subject to unfiled security interests.

155. § 9-103(4) (1972 version). The 1962 Code has no special choice-of-law rules for security interests in chattel paper.

156. A security interest in chattel paper may be perfected by possession under § 9-305 or by filing under § 9-304(1). Section 9-103(4) (1972 version) applies the rules of § 9-103(1) (last-event test) to "a possessory security interest in chattel paper," and the rules of § 9-103(3) (location of debtor) to "a nonpossessory security interest in chattel paper."

157. Although it is fashionable among Code commentators to deprecate transitional problems in anticipation of evolving uniformity, the fact that in the nearly eight years following the adoption of the 1972 amendments only 30 American jurisdictions have substantially fallen into line, leaving the 1962 Code in force in over 22 jurisdictions, suggests that transitional nonuniformity is becoming a way of life.

158. Although New Hampshire is now a 1972 Code state, *see, e.g.*, N.H. REV.

pledges it to a secured party there.[159] Which state's law governs the question of priority between these two conflicting security interests in the same collateral? If suit is brought in Maine, local law applies to the possessory security interest.[160] The last-event perfection by the Maine secured party's possession of the chattel paper occurred while the collateral was in Maine. On the other hand, Maine's 1972 Code applies New Hampshire law to the nonpossessory security interest of the New Hampshire creditor since the "location of the debtor" is New Hampshire.[161] If both states have accepted the 1972 amendments the problem is not a serious, practical one, although troublesome as a matter of theory.[162] During the transition period of state-by-state adoption of the 1972 amendments the conflict could be real in result as well as in theory.[163]

The chattel-paper problem is illustrative of the conceptual weakness found in both the 1962 and the 1972 Codes of basing a choice of law to govern a transaction wholly or partly on the physical location of collateral at various times. Focus upon the changing location of the collateral as the designator of applicable law ignores the basic policy of concern for the interests of the parties and not of the collateral.

A situs rule may be appropriate to determine questions of ownership of an immovable res such as real estate, as location is the essence of real estate. Real estate forms the ground over which territorial administration is spread. The applicability of local law to real estate questions reflects valid policies that have never been questioned.[164] Personal property, however, is a different matter, as

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STAT. ANN. §§ 382-A:9-101 to -507 (Supp. 1979), for purposes of this Article it is treated as a 1962 Code state.

159. Maine is now a 1972 Code state. *See, e.g.*, ME. REV. STAT. ANN. tit. 11, §§ 9-102 to -505 (Supp. 1979-1980).

160. The court in Maine would look to Maine's § 9-103 (1972 version) and find that law governing perfection of a possessory security interest in chattel paper is chosen by the last-event test of § 9-103(1)(b).

161. *See* ME. REV. STAT. ANN. tit. 11, § 9-103(3)(b), (4) (Supp. 1979-1980).

162. It is hard to conceive of the relative rights of two different claimants being determined by different bodies of law.

163. Applying New Hampshire's 1962 article 9 to determine perfection of the nonpossessory security interest in the removed chattel paper would probably produce a lapse in perfection four months after removal. §§ 9-102, -103(3) (1962 version). Although Maine's § 9-103(4) (1972 version) refers to the law of New Hampshire, that law only applies to property "subject to the jurisdiction of this state." That jurisdiction perhaps could be extended by reading § 9-103(3) (1962 version) to address collateral moving both in and out of the state.

164. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 & Comments (1971).

there is no unbroken tradition of situs-based choice of law.[165] Nor is there any overriding policy relating the law of the situs to questions involving security interests in movables.[166] Especially when mingled with party-based tests and with type-of-transaction tests, a situs-based approach to choice-of-law questions presents unsound and insoluble problems of application without even the consolation of a satisfactory theory.

The 1972 amendments accomplished a conscious, but incomplete, divorce from territoriality by abolishing the situs test of the 1962 section 9-102 and by restricting the section 9-103 rules to perfection issues. The presence of situs considerations in the last-event test, the four-month rule, and the chattel-paper tests are flaws that continue to exist in the 1972 scheme. Perfection of security interests in certificate-of-title collateral is still handled clumsily by reference to nonuniform certificate-of-title statutes. There is a fuzzy borderline between those choice-of-law questions that are resolved by section 1-105 and those relating to perfection that are governed by the rules of section 9-103. Finally, it is not clear that the section 1-105 choice-of-law rule adequately reflects policies of certainty and fairness to third parties on article 9 issues other than perfection. The 1972 amendments represent a step forward, but not far enough.

A PROPOSAL FOR 1982

There must be a better way. The better way can be found by totally and finally alienating the matter of determining choice of law from the location of collateral. Process "jurisdiction" of a state's courts over things (such as collateral) must be separated from the policy of public notice to perfect a security interest under the law chosen to apply to the transaction. Virtually all article 9 issues affect not only the parties to the immediate transaction but other parties as well.[167] The usual policy consideration favoring the free-

165. *See, e.g., id.*, § 244 & Comments.

166. *See, e.g., id.*, § 257.

167. Indeed, one of the primary justifications for having secured transactions regulated by article 9 rules rather than by contract between the parties is the high likelihood that the interests of third parties will be involved. For example, § 9-207, which concerns the care and handling of collateral in the hands of the secured party, may at first seem to address only issues between the secured party and the debtor. But in fact, other lienors, creditors of the secured party, and even unsecured creditors of the debtor all have interests that are treated at least indirectly by the rules set forth.

dom of contracting parties to choose the applicable law is dwarfed in importance by the policies of certainty, predictability, and accessibility to third parties, all of which favor choice of law by clear-cut rules. The time has come to make the choice-of-law determination on article 9 issues depend on the location of the debtor.[168]

The state of location of the debtor is here suggested because it is the jurisdiction with the most substantial, rational relation to a secured transaction. First, the location of the debtor is likely to be the location where other parties do business with the debtor. The debtor is the one common element. Choosing the law of the debtor's location will produce one body of law to govern the transaction as well as the rights of all parties to the transaction. Second, applying the law of the state of the debtor's location gives recognition to that state's legitimate interest in protecting its debtor residents. Third, other parties who become involved in a secured transaction almost invariably do so through the debtor. They are involved as competing secured parties of the debtor, purchasers from the debtor, or creditors of the debtor. Such parties are able to ascertain the location of the debtor and thus the law that would affect them. They are without this ability where the law chosen is by agreement or by some other less clear-cut rule.

The approach taken by the 1972 amendments—permitting the parties to agree on the applicable law as to nonperfection issues—has some initial appeal.[169] However, on critical issues, such as perfection and default rights, that approach is subject to criticism.[170] There does not appear to be any compelling reason to retain it for the very few article 9 issues that actually do concern only the immediate parties.

Of course, choice of law by the debtor's location would apply only to article 9 issues. Aspects of a secured transaction not governed by article 9, but by other parts of the Code, would be sub-

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168. This is not a totally novel suggestion. Professor Coogan, in his critique of the 1972 amendments, advanced the proposal somewhat more tentatively in the context of perfection by filing. Coogan, *supra* note 121, at 555-58. And, as has been shown above, there has been substantial support for applying the state law of the debtor in default and in other situations to effectuate policies protecting local residents.

169. This appeal is that of flexibility. One of the Code's purposes is "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties." § 1-102(2)(b).

170. The drafters of the 1972 amendments rejected choice of law by agreement so far as perfection is concerned. For criticism of that approach to determine default rights, see Cavers, *supra* note 12, at 1142-46; Weintraub, *supra* note 4, at 690-91.

ject to the choice-of-law rules of section 1-105.[171] Law governing matters in secured transactions not regulated by the Code at all would not be chosen by either the article 9 rules or by the section 1-105 rules, but by non-Code choice-of-law principles.[172] The overwhelming advantage of choosing law to govern all article 9 issues by the location of the debtor is the elimination of the conceptual and practical problems of differentiating between matters involving the immediate parties to the transaction and those involving third parties and the specification of one source of law for all article 9 aspects of a single transaction. In fact, a single source of law would govern all transactions involving the same debtor. Priorities between conflicting security interests would all be adjusted according to the same standard.[173]

Is there any policy interest left in favor of choosing law based upon the location of collateral? Collateral does not have a legally cognizable right to special-interest treatment by the state of its location comparable to the expectation of local protection for parties. The only reason to choose law based upon the collateral's location is to institutionalize some kind of local notice of security interests in local collateral.[174] Such notice is arguably for the protection of local creditors who might rely upon the debtor's ostensibly unencumbered possession of the collateral. Such creditors might have difficulty checking on the status of security interests in such collateral without some kind of local filing.

These arguments bear little weight in the commercial world.[175] In the common situation where the collateral is located in the same state as the debtor, a notice filing in the state of the collateral's location is by definition unnecessary. Even in those cases where the collateral may be located elsewhere, the activity in credit transactions is usually centered at the debtor's chief place of business, not where the collateral is warehoused. Under the 1972 amendments, filings for receivables, mobile goods, and intangibles

171. *See, e.g.*, Skinner v. Tober Foreign Motors, Inc., 345 Mass. 429, 187 N.E.2d 669 (1963).

172. *See, e.g.*, Cooper v. Cherokee Village Dev. Co., 236 Ark. 37, 364 S.W.2d 158 (1963).

173. This is particularly important because of many differences in priorities between the 1962 and the 1972 Codes. *Compare, e.g.*, §§ 9-301, -312(3) (1962 version) *with* §§ 9-301, -312(3) (1972 version).

174. As discussed throughout this Article, the nature and location of public notice of security interests has been closely intertwined with choice of law in both the 1962 and 1972 Codes.

175. *See* Coogan, *supra* note 121, at 555-58.

are made at the debtor's location, even though such collateral may be the proceeds of the collateral for which situs-notice-filing is still required.[176] Giving public notice of nonpossessory security interest in all collateral—except for certificate-of-title property—at the location of the debtor, also would obviate the need for any four-month rule on movements of collateral and would reduce the potential for fraud. It is far more difficult for a debtor to relocate his or her residence than it is to move the collateral. It is much easier to check the states of the debtor's current and prior location than the states of current and prior location of the goods. Once the principle is accepted that a secured transaction should be governed by the law of the debtor's location, public notice of all security interests in property of that debtor could be given at that location. The intricate provisions of section 9-103 could be replaced by a single section choosing law governing secured transactions according to the location of the debtor.

Even if interests favoring public notice at the collateral's location predominate over the policies of certainty and commercial reasons favoring filing at the debtor's location, such interests need not and should not dictate the applicability of collateral-situs law to determine perfection. These interests can be accommodated merely by requiring local-state filings to perfect a security interest in certain kinds of collateral. The law of the debtor's state could require that notice be given in all states in which collateral is located to perfect a security interest in that collateral. The debtor's state law should prescribe how a security interest in different kinds of collateral located within or without the state is to be perfected. The rights of various purchasers (no matter where located), the rights of attaching and levying creditors, and the rights of other secured parties and their priority—in short, all article 9 issues—would be governed by that law. Take, for example, a New York secured party and a debtor located in Massachusetts. It is proposed that Massachusetts law govern all article 9 questions affecting the secured transaction. Massachusetts law would provide a means of perfecting a security interest in goods located both in Massachusetts and elsewhere. Ideally, filing would be required only in

176. So long as the collateral is inventory, the 1972 amendments determine place of filing by the last-event test. When a sale transforms inventory into accounts, there must be a filing in the state of the debtor's location to continue the perfection. Section 9-306(3)(a) (1972 version) continues perfection into proceeds only when the filing for inventory is in the same office as would be a filing for accounts.

Massachusetts as the state of the debtor's location.[177]

What is now called multistate perfection could lose its multistate character if filing were required only at the debtor's location. Proposed section 9-103 would select debtor-location law to govern all article 9 aspects of the security interest. Debtor-location law specifies in sections 9-302 and 9-401 how a security interest governed by that law is perfected and where to file.[178] The filing could be made in the office of the local secretary of state and would perfect the security interest under the chosen law, regardless of the collateral's location.[179] The terms "central office," "mo-

177. However, if deemed appropriate as a matter of public notice, the Massachusetts § 9-302 could specify filing in states other than Massachusetts to perfect the security interest in goods that may be located at one time or another in those states. If the goods were moved from one state to another by the debtor, a four-month rule could continue the validity of the filing until the secured party had the opportunity to refile in the new jurisdiction.

Section 9-103 would be drastically changed. It might look like:

§ 9-103. *Choice of Law.* All questions within the scope of this Article shall be governed by the law of the jurisdiction in which the debtor is located.

or

§ 9-103. *Choice of Law.* This Article shall apply to all questions within its scope where the transaction involves a debtor located within this state.

The two alternative versions of proposed § 9-103 parallel the forms of choice-of-law provision in the 1962 and 1972 versions. The first alternative is comprehensive and refers to another state's law if the debtor is not located in this state. *See, e.g.*, § 9-103(3)(b) (1972 version). The second alternative only applies "this state's" article 9, and refers to law of another state where the debtor is not local only by negative implication. *See, e.g.*, § 9-102 (1962 version). Obviously the first alternative is to be preferred.

178. In those states with local county or municipal filings, some slight changes would have to be made for situations that would require a local filing in the county or town in which the collateral is located. Fixture filings also would have to be provided for where the collateral is attached to real estate and the real estate is located in another state.

179. On the other hand, if situs notions were to be retained to the extent they are reflected in the 1972 amendments, section 9-302 could be amended to provide:

(5) Filings to perfect those security interests that may be perfected by filing shall be made as follows:

a. Documents, instruments, and ordinary goods—in the central office of the jurisdiction in which the collateral is located at the time of filing or attachment of the security interest, whichever is later. Movement of collateral into a jurisdiction where there is an effective filing describing the goods shall be the equivalent of a filing at the time of such movement.

b. Accounts, intangibles, chattel paper, and mobile goods—at the office of the ____ of this State.

c. Minerals or accounts arising from the sale of minerals at well-head—

bile goods," and "located" could easily be defined in section 9-105.[180]

There is still the problem of choosing law when the debtor's location changes. Under the proposal, a change in the debtor's location would produce an immediate change in the applicable law.[181] However, it does not appear necessary or wise to attempt to delay or adjust the effect of a change of location upon the choice-of-law determination. Certainty, predictability, and ascertainability—the reasons for suggesting the location of the debtor in the first place—also suggest that choice of law follow the location of the debtor strictly and directly.[182]

On the other hand, to the extent that the matter is only of public notice, policy favors a compromise between the interests of the original secured creditor and persons who may not get notice of a security interest upon a change of the debtor's location. To effect such a compromise, an amendment should be added in the perfection-by-filing provisions—and not in the choice-of-law provisions—such as:

> §9-302(b). A filing effective to perfect a security interest governed by this Article shall remain effective until the earlier of either of the following occurs:
>
> i. The expiration of four months after a change in the debtor's location to a new jurisdiction.
>
> ii. The expiration of effectiveness under Section 9-403.[183]

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at the central office of the jurisdiction where the well-head is located. This proposed revision of § 9-302, specifying how public notice is to be given (not § 9-103 specifying what law is to apply), requires filings in the same location as appears to have been intended for § 9-103 (1972 version). Since under proposed § 9-103 this state's article 9 will apply only if the debtor is located in this state, a filing in this state will perfect security interests in accounts receivable, mobile goods, and intangibles to which "this state's" article 9 applies.

180. "Located" is defined in § 9-103(3)(d) (1972 version). "Mobile goods" are defined in § 9-103(3)(a) (1972 version). "Central Office" could be defined as, " '*Central Office*' means single-records office maintained by a state or other similar jurisdiction where filings are made to perfect security interests in accounts under the law of that jurisdiction."

181. Note that the proposal, along with the 1962 Code and the 1972 amendments, does not address the question of "location when?" In default of specification, probably the court would look to the debtor's location at time of dispute.

182. Professor Coogan briefly mentions the problem of a change in the debtor's location and concludes that "these problems would appear to be somewhat more manageable—if revised 9-103(3) is any guide—than those raised by a location of collateral rule." Coogan, *supra* note 121, at 558.

183. This proposed language is based upon the proposal to have place-of-notice-filing, as well as choice of law, determined by location of the debtor. If

These provisions reflect a practical compromise similar to that set forth in section 9-103 of the 1972 Code with respect to accounts, general intangibles, and mobile goods.[184] They relate, however, only to the duration and effectiveness of filing, not to the applicability of a given jurisdiction's law.

How would these provisions handle movements of a collateral and a debtor between adopting states and jurisdictions retaining the 1962 and 1972 versions?[185] If, for example, Massachusetts adopted the proposal and a debtor located there moved its location to state A, which has retained the 1962 version—what would be the effect on choice of law and perfection by filing for collateral consisting of accounts (records kept at the debtor's "location") and inventory (kept in both Massachusetts and state A)?

First of all, so far as Massachusetts is concerned, its law would apply and a filing under its law would perfect a security interest in all collateral so long as the debtor is located in Massachusetts. Removal of the debtor to state A would terminate the basis for appli-

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collateral-situs notice filing to the extent required by the 1972 article 9 were to be retained, proposed § 9-302(6) could look like:

> § 9-302(6)(a). If the parties to a transaction creating a purchase-money security interest in goods understand at the time the security interest attaches that the goods will be kept in a particular jurisdiction, a filing in the central office of that jurisdiction will perfect the security interest for thirty days after it attaches and the debtor receives possession of the collateral and thereafter if the goods are taken into that jurisdiction before the end of the thirty-day period.
>
> § 9-302(6)(b). A filing effective to perfect a security interest in documents, instruments, and ordinary goods shall remain effective with respect to such collateral until the earlier to occur of:
>
> i. The expiration of four months after removal of such goods to another jurisdiction.
>
> ii. The expiration of effectiveness under Section 9-403.
>
> A filing effective to perfect a security interest in accounts, general intangibles, chattel paper, or mobile goods shall remain effective with respect to such collateral until the earlier to occur of:
>
> i. The expiration of four months after a change in the location of the debtor to a new jurisdiction.
>
> ii. The expiration of effectiveness under Section 9-403.

184. *See* § 9-103(3)(e) (1972 version). The four-month rule of that section continues the differentiation between the rights of a "purchaser" during the four-month period and those of other claimants. This distinction was not carried forward into the proposal. Were it thought worthy of preservation the proposal could be easily modified to accommodate it.

185. As has been suggested before, the slow pace of state-by-state adoption of major changes to the Code causes transition problems to be substantial considerations.

cability of Massachusetts law. A combination of 1962 sections 9-102 and 9-103(1) would choose state *A* law for the accounts and state *A* inventory and would require a state *A* filing to continue perfection. Choice of law regarding the Massachusetts inventory would be unclear, but the existing Massachusetts filing and the state *A* filing would continue perfection.[186] The situation would be no worse than a move from one 1962 Code state to another.[187] Different combinations involving the direction of the move, the type of collateral, and the version of Code in force can be tried. In each case, the problems and risks involved with the move are no greater than those associated with interstate movements of the debtor and the collateral under the 1962 and 1972 versions. Universal adoption of the proposal would make the consequences of interstate movements much simpler and more rational than is the case under either of the existing versions.

There remains the certificate-of-title problem. One commentator has suggested federal filing and certification as the only permanent solution to the myriad problems, raised and extensively discussed elsewhere, in perfecting security interests in movable, titled collateral.[188] This suggestion is probably correct. Nonetheless, certain improvements can be made in article 9 to ameliorate presently perceived problems.

First of all, perfection of security interests in certificate-of-title collateral should be governed by article 9 rather than the various title acts. The 1962 and 1972 versions of article 9 essentially state that perfection of security interests in certificate-of-title collateral is governed by the certificate-of-title acts.[189] It would not be difficult to shift the emphasis and provide in article 9 for the perfection of security interests in certificate-of-title collateral. For example, section 9-304 could be amended by the addition of a new subsection (7) providing:

> (7) A security interest in goods covered by a certificate of title issued by this or any other state is perfected only by an official notation of the name and address of the secured party under the

186. State *A*'s § 9-102 would choose Massachusetts law as the situs of the inventory collateral. Proposed Massachusetts § 9-103 would choose State *A* law as the location of the debtor. There would be a filing in both states. A court in either state could conclude either way and the secured party would be protected.

187. The 1962 Code has no four-month rule on change of location of the debtor.

188. Meyers, *supra* note 98.

189. *See* § 9-302(3)-(4) (1962 version); § 9-302(3)-(4) (1972 version).

> designation "secured party" or the equivalent upon the original certificate of title.[190]

Sections 9-302(3) and (4) in the 1972 Code could be amended to delete any reference to certificate-of-title collateral. A new section 9-302(1)(h) could be added:

> (h) A security interest perfected by notation on a certificate-of-title under Section 9-304.[191]

Article 9 would become the law governing the rights and priorities of the parties to security interests in certificate-of-title collateral. And the article 9 that would be applied would be that of the debtor's location.

This proposal does not by itself solve the notice-fraud problem of interstate movement of certificate-of-title collateral and subsequent sale upon a clean or forged certificate.[192] That problem can be addressed, although not solved, by providing in the new section 9-304 that:

> Such perfection shall continue so long as such certificate is outstanding.[193]

This policy resolution follows the similar scheme of the Interstate Commerce Act applying to common carriers' revenue equipment.[194]

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190. This proposal is obviously rudimentary and could be expanded to include any other details that would be required for proper notation. The details of the functioning of the official need not be specified, however, so long as what is required for perfection is clearly spelled out. The terms "certificate of title" and "notation" should probably be defined in § 9-105. An appropriate exception could be made for goods held for sale as inventory by a dealer. *See* § 9-302(3)(b) (1972 version).

191. This section would only then exempt certificate-of-title security interests from perfection by filing, but not from perfection under article 9.

192. Such a problem, addressed by § 9-103(2) (1972 version), is inherent in the nature of the collateral and in present limitations on record keeping resulting from federalism. The ultimate solution is computerized federal motor-vehicle title registration.

193. If the special adjustments reflected in § 9-103(2) (1972 version) were to be incorporated into the proposal, the following clause could be added:

> Provided that if the goods are removed to a jurisdiction other than that which issued the certificate, perfection shall continue for four months after the goods are removed and thereafter until the goods are registered in the other jurisdiction.

194. 49 U.S.C. § 11304 (Supp. II 1978). Under the terms of this federal legislation, a security interest in certain common-carrier motor vehicles perfected in one state is declared perfected in all states, indefinitely and without regard to movements of the collateral between states. For a scholarly discussion of the federal act's

A rule of universal recognition of security interests perfected by notation has the virtues of simplicity and certainty for the initial financer. It leaves some burden of fraud risk on subsequent financers and purchasers. The harshness of such a rule can be mitigated by the creation of a limited priority for subsequent purchasers without affecting the perfected status of the prior security interest. The priority afforded nonprofessional purchasers in the 1972 choice-of-law provisions could be treated as a straight priority matter in section 9-307:

> (4) A buyer who is not in the business of selling goods of that kind, to the extent that he or she gives value and receives delivery of them after issuance of a certificate of title covering the goods by the state in which the goods are located at the time of his or her purchase, takes free of any security interest which is not shown on the certificate of title and of which he or she does not have knowledge.

Such a scheme, following the concept of the Interstate Commerce Act, may not be as beneficial as federal certification and filing. It would be a marked improvement, however, over both the 1962 and the 1972 versions of article 9.

CONCLUSION

In the field of regulating secured transactions, as addressed by article 9 of the Code, important policies of ascertainability, predictability, and certainty suggest choice of law by objective rules rather than by the parties' agreement or by an ex post facto analysis of the "relations to various jurisdictions." These same considerations and the traditional concern of state protection of its debtor residents point to the jurisdiction of the debtor's location as the source of law to govern interstate secured transactions.

Choice of law should not be used as the mechanism to determine the location of public notice of security interests. The debtor's location should be selected as the state whose law determines how security interests in collateral of that debtor are to be perfected and where filings should be made. Article 9 should apply to specify how security interests in certificate-of-title property are to be perfected as well as to state the priorities of parties with respect to such collateral.

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predecessor and its relationship to article 9, see 1 G. GILMORE, *supra* note 29, §§ 23.1-.4, at 632-41.

The time has also come to specify the debtor's state as the location for filing to perfect a security interest in all of the debtor's collateral. This logical step in the same direction followed by the 1972 amendments would vastly simplify perfection problems in multistate transactions without significantly affecting legitimate interests favoring adequate public notice of security interests. Even if this filing change were not adopted, the present, inherent confusion between choice of law and public notice could be eliminated by determining choice of law only by location of the debtor. Then, each state's article 9 could provide for perfection of security interests through both in- and out-of-state filing calculated to give reasonable public notice to third parties.

The changes in article 9 proposed here are not profound. Transitional problems may not be completely avoided, but adopting these proposals would provide a firm conceptual base for a practical system of choice of law and public notice in interstate and, ultimately, international secured financing.