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## Introduction

I am pleased to introduce Volume 49, Issue #3, of the UCC Law Journal.

This issue opens with "UNCITRAL Model Law and UCC Article 9 conflict-of-laws rules compared," by Spyridon V. Bazinas and Edwin E. Smith. Mr. Bazinas is a law lecturer, author, and independent consultant on trade law reform matters. Mr. Smith is a Partner at Morgan, Lewis & Bockius LLP, and concentrates his practice in commercial and insolvency law matters. In this article, the authors compare the conflict-of-laws rules of the Model Law with those of Article 9, and discuss the extent to which they are compatible.

Issue #3 continues with "Comments of a transactional lawyer inspired by Professor Schroeder's article 'Sense, Sensibility and Smart Contracts' in the May 2020 issue of the Uniform commercial Code Law Journal." The author, Peter Siviglia, has practiced law in New York continuously for more than 50 years, concentrating on transactional and corporate matters, and has served as correspondent and special counsel to major international law firms on contract matters and negotiating. In this article, Mr. Siviglia maintains that there is not a "smart contract" embodied in computer code that will eliminate the need for lawyers and courts. The author also discusses the inevitability of ambiguity in verbal agreements,

This issue also includes an article I prepared, "Autonomous Interpretation of CISG Cases in the United States: the Ultimate Chimera," in which I decry the use by U.S. courts of UCC case law to interpret provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG).

*By Francesco Mazzotta*

*Editor in Chief*

# UNCITRAL Model Law and UCC Article 9 Conflict-of-Laws Rules Compared

*Spyridon V. Bazinas and Edwin E. Smith*[*]

*Conflict-of-laws rules are of critical importance to secured transactions (i.e., transactions in which a security interest is created by agreement in movable property to secure the payment or other performance of an obligation). In practice, the first question arising with respect to any secured transaction typically relates or should relate to asking what jurisdiction's law is applicable to the issue involved. Both the UNCITRAL Model Law on Secured Transactions and Article 9 of the Uniform Commercial contain conflict-of-laws rules dealing with the law applicable to security interests in different types of tangible and intangible movable property. The purpose of this article is to compare the conflict-of-laws rules of the Model Law with those of Article 9 and to discuss the extent to which they are compatible, including any potential differences. This article concludes that, while there are differences, the conflict-of-law rules of the Model Law and Article 9 are largely compatible. Accordingly, a significant degree of harmonization of conflict-of-laws rules for secured transactions may be achieved by countries adopting the Model Law even if the Article 9 conflict-of-laws rules remain as they are.*

## I. Introduction

Both the UNCITRAL Model Law on Secured Transactions (the Model Law)[1] and Article 9 (Article 9) of the Uniform

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[1]UNCITRAL is the acronym for the United Nations Commission on International Trade Law, the core legal body of the United Nations system in the field of international trade law (https://uncitral.un.org). The Model Law promulgated by UNCITRAL in 2016 is accompanied by a Guide to

Commercial Code (the UCC)[2] contain conflict-of-laws rules dealing with the law applicable to security interests in different types of tangible and intangible movable property. Conflict-of-laws rules are of critical importance to secured transactions (i.e., transactions in which a security interest is created by agreement in movable property to secure the payment or other performance of an obligation). In practice, the first question arising with respect to any secured transaction typically relates or should relate to asking what jurisdiction's law is applicable to the issue involved.[3]

In addition, even if the substantive secured transactions law is harmonized and is the same or similar from jurisdiction to jurisdiction, still conflict-of-laws rules are necessary to deal with such matters as where to register a notice with respect to a security interest or the scope of the applicable substantive secured transactions law. According to internationally accepted conflict-of-laws principles, the conflict-of-laws issues relating to these substantive matters will typically be resolved in accordance with the conflict-of-laws rules of the forum (*lex fori*).

There are significant adverse consequences if a secured transaction is connected with more than one jurisdiction and

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Enactment (2017), which is an article-by-article commentary, and a Practice Guide (2019), which provides practical guidance to parties involved in secured transactions in States that enact the Model Law. The rules of the Model Law are based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide"), the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement) and the Guide on the Implementation of a Security Rights Registry (the "Registry Guide"). Both the rules of the Model Law and the recommendations of the Secured Transactions Guide with respect to receivables are based on the United Nations Convention on the Assignment of Receivables in International Trade (ratified by the United States on 15 October 2019). The Model Law and all other security interest texts of UNCITRAL are available on the website of UNCITRAL (https://uncitral.un.org/en/texts/securityinterests).

[2]In this paper, references to the UCC or Article 9 are to the Official Text of the Uniform Commercial Code as promulgated by the American Law Institute and the Uniform Law Commission.

[3]Even if a transaction is, *prima facie*, connected with only one jurisdiction, the determination that the law of that jurisdiction applies requires an examination and confirmation that there are no conflict-of-laws relevant factors connecting that transaction with another jurisdiction.

the jurisdictions have different conflict-of-laws rules. The law applicable to a transaction will differ depending on the forum in which a dispute might be adjudicated. In addition, the differences in conflict-of-laws rules will encourage forum shopping, since a party to a dispute over the transaction will look to a forum that has a conflict-of-laws rule most favorable to that party. Moreover, *ex ante*, parties, not knowing in which jurisdiction a potential dispute will be heard, will often need to comply with the substantive laws of any jurisdiction whose laws may be applicable to the dispute under the conflict-of-laws rules of any potential forum hearing the dispute. The resulting uncertainty over the applicable substantive law and the need for the parties *ex ante* to comply with the substantive law of multiple jurisdictions will increase not only transaction costs but also the cost of credit generally.

Given the disadvantages of competing conflict-of-laws rules, it is a happy occasion to report that the conflict-of-laws rules of the Model Law and Article 9 are for the most part compatible with each other. Whether a dispute arises in the United States or in a jurisdiction that has enacted the Model Law, generally, with the exceptions noted below, the same substantive law would apply to matters relating to the attachment ("creation"), perfection ("third-party effectiveness"), priority and enforcement of a security interest in movable property. Thus, from a conflict-of-laws approach broad enactment of the Model Law by countries is in the interest of parties to cross-border secured transactions, including parties from the United States.

The purpose of this article is to compare the conflict-of-laws rules of the Model Law with those of Article 9 and to discuss the extent to which they are compatible, including any potential differences. Section II deals with scope and terminology and section III with the law applicable to the mutual rights and obligations of the parties to a secured transaction. Section IV deals with the law applicable to security interests in tangible assets (including tangible assets covered by negotiable documents, mobile assets, export assets, money, negotiable instruments, negotiable documents and certificated non-intermediated securities) and section V with the law applicable to security interests in intangible assets (including receivables, rights to payment of funds

credited to a bank account, intellectual property and uncertificated non-intermediated securities). Section VI deals with the law applicable to proceeds of encumbered assets and Section VII with the law applicable to the rights and obligations between third-party obligors and secured creditors. Section VIII deals with the impact of insolvency on the law applicable to security interests and Section IX with general conflict-of-laws matters (characterization and applicable conflict-of-laws rules, location and relevant time for determining location, change of applicable law, *renvoi,* mandatory law and public policy, and federal State clause). Section X contains some conclusions.

## II. Scope of Application and Terminology

### A. Scope of Application

The Model Law applies to security interests in movable assets (for terminology, see section II.B. below).[4] Like Article 9, the Model Law follows a unitary, functional and comprehensive approach to secured transactions.[5] As a result of this approach, the Model Law applies, not only to typical secured transactions, but also to transactions, such as fiduciary transfers of title, retention-of-title sales, financial leases and similar transactions, that are functionally secured transactions.

The Model Law also applies whether the parties to a secured transaction are companies, unincorporated businesses, individual tradesmen or consumers.[6] It applies as well to transactions in which the secured obligation is present or future, fixed, determined, determinable or revolving. Finally, the Model Law applies to outright transfers of receivables that take place, for example, in the context of such receivables finance transactions as factoring or securitization.[7]

The Model Law deals with matters such as the creation (attachment), third-matters effectiveness (perfection), registration (filing) of notices of security interests, priority,

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[4]ML arts. 1(1) and 2(u) and (kk).

[5]Guide to Enactment, para. 17.

[6]ML art. 2(u).

[7]ML art. 1(2).

rights and obligations of third-party obligors (e.g., a debtor on an encumbered receivable, the obligor on a negotiable instrument or the depositary bank on an encumbered right to payment of funds credited to a bank account), enforcement, conflict-of-laws and transition.

The Model Law applies to attachments (accessions) to movable property, but it contains no special provisions in this regard. However, it does not apply to attachments to immovable property (fixtures) because issues relating to immovable property do not lend themselves to harmonization at the international level, and, in any case, interested countries may enact the relevant recommendations of the Secured Transactions Guide.[8]

The Model Law does not apply to rights to payment under independent guarantees or letters of credit either.[9] The reason for the exclusion relates to the need to avoid making the Model Law longer and more complex for a narrow range of transactions in which independent guarantees or letters of credit are used as security.[10]

However, countries in which letters of credit may be used as security for credit can implement the relevant recommendations of the Secured Transactions Guide.[11] In addition, to avoid interfering with fundamental intellectual property law principles, the Model Law does not apply to intellectual property to the extent that the Model Law is inconsistent with the law governing intellectual property.[12]

Moreover, the Model Law does not deal with intermediated securities and payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon termination of all outstanding transactions.[13] The reason is twofold. First, capital market transactions raise a different set of issues and require special

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[8]Guide to Enactment, paras. 33 and 34.

[9]ML art. 1(3)(a).

[10]Guide to Enactment, para. 24.

[11]Guide to Enactment, para. 24. *See also* Secured Transactions Guide, recs. 27, 50, 107, 127, 176 and 212.

[12]ML art. 1(3)(b) and Guide to Enactment, para. 25.

[13]ML art. 1(3)(c) and (d).

rules. And, second, there are other uniform law texts that deal with substantive and conflict-of-laws issues arising in the context of transactions in which intermediated securities are used as security for credit (i.e., Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary and the UNIDROIT Convention on Substantive Rules for Intermediated Securities).[14]

Furthermore, the Model Law provides the option to countries that have specialized laws and registry systems with respect to certain types of movable assets (e.g., ships and aircraft) to exclude those types of assets, but, to avoid leaving any gaps in the law, only in so far as other specialized law governs matters addressed in the Model Law.[15]

For reasons of consistency, the Model Law does not apply to security interests in proceeds which fall outside the scope of the Model Law (e.g., intermediated securities).[16]

Even though the Model Law applies to secured transactions in which the borrower or the debtor of the encumbered receivable is a consumer, it does not affect the consumer's rights under consumer protection law.[17]

Finally, the Model Law does not override statutory limitations to the creation or enforcement of a security interest in, or the transferability of, certain types of movable assets (e.g., employment benefits, at least up to a certain amount). The only exception to this rule relates to such statutory limitations that are based solely on the character of an asset as a future asset, or a part or undivided interest in asset,[18] in which a security interest may be created under the Model Law (e.g., future or after-acquired inventory and receivables).[19]

As a general matter, the scope of Article 9 is broad enough to include all security interests in movable assets that are

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[14]Guide to Enactment, paras. 26 and 27.

[15]ML art. 1(3)(e).

[16]ML art. 1(4).

[17]ML art. 1(5).

[18]ML art. 1(6).

[19]ML art. 8.

within the scope of the Model Law. In particular, core commercial finance collateral, such as equipment, inventory, promissory notes secured by real estate mortgages (but not the mortgages themselves) and rights to payment arising from the sale or lease of inventory, the loan of money or the licensing of intellectual property or information are within the scope of both the Model Law and Article 9.

However, there are some types of collateral and other transactions excluded from the scope of the Model Law that are within the scope of Article 9. For example, a security interest in rights to payment under a letter of credit, in intermediated securities or in fixtures (i.e., goods that are or are to become so attached to immovable property so that an interest in the goods arises under immovable property law), are within the scope of Article 9 but are not within the scope of the Model Law.[20]

In addition, there are some types of collateral and transactions excluded from the scope of Article 9 that are within the scope of the Model Law. For example, some insurance claims and real estate (immovable) rents that are excluded from the scope of Article 9 are within the scope of the Model Law.[21]

### B. Terminology

Under the Model Law:

(a) "Bank account" means an account maintained by an authorized deposit-taking institution to which funds may be credited or debited;[22]

(b) "Debtor" means a person that owes payment or other performance of a secured obligation, whether or not that person is the grantor of the security interest securing payment or other performance of that obligation, including a secondary obligor such as a guarantor of a secured obligation;[23]

(c) "Debtor of the receivable" means a person that owes payment of a receivable that is subject to a security

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[20]U.C.C. §§ 9-102(a)(41), 9-109(d)(11); ML art. 1(3)(a) and (c).

[21]U.C.C. § 9-109(d)(8); ML art. 2(dd).

[22]ML art. 2(c).

[23]ML art. 2(h).

interest, including a guarantor or other person secondarily liable for payment of the receivable;[24]

(d) "Encumbered asset" means a movable asset that is subject to a security interest and a receivable that is subject to an outright transfer by agreement;[25]

(e) "Grantor" means the person that creates a security interest to secure either its own obligation or that of another person, a buyer or other transferee of an encumbered asset that acquires the asset subject to a security interest, and a transferor under an outright assignment of a receivable by agreement;[26]

(f) "Intangible asset" means any movable asset other than a tangible asset;[27]

(g) "Money" means currency authorized as a legal tender by any State;[28]

(h) "Movable asset" means a tangible or intangible asset other than immovable property;[29]

(i) "Non-intermediated securities" means securities other than securities credited to a securities account and rights in securities resulting from the credit of securities to a securities account;[30]

(j) "Priority" means the right of a person in an encumbered asset in preference to the right of a competing claimant;[31]

(k) "Proceeds" means whatever is received in respect of an encumbered asset, including what is received as a result of a sale or other transfer, lease, licence or collection of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in,

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[24]ML art. 2(i).

[25]ML art. 2(k).

[26]ML art. 2(o).

[27]ML art. 2(p).

[28]ML art. 2(t). Thus, it includes physical bank notes and coins, but does not include intangible money (e.g., virtual currency).

[29]ML art. 2(u).

[30]ML art. 2(w).

[31]ML art. 2(aa).

damage to or loss of an encumbered asset, and proceeds of proceeds;[32]

(l) "Receivable" means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security;[33]

(m) "Secured creditor" means a person that has a security interest and a transferee under an outright transfer of a receivable by agreement;[34]

(n) "Secured obligation" means an obligation secured by a security interest;[35]

(o) "Security right"[36] means a property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it a security interest, and regardless of the type of asset, the status of the grantor or the secured creditor, or the nature of the secured obligation; and the right of a transferee in an outright transfer of a receivable by agreement;[37] and

(p) "Tangible asset" means any corporeal movable asset. For the purpose of the conflict-of-laws rules, the term includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities.

Even though different terminology is used in Article 9, the substance of these terms under the Model Law will resonate with those familiar with Article 9. The term "security right" under the Model Law is substantially the same as the term

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[32]ML art. 2(bb).

[33]ML art. 2(gg).

[34]ML art. 2(ff).

[35]ML art. 2(gg).

[36]This term is used in the Model Law for translation reasons (as the Model Law has been formulated in all six official languages of the United Nations) but has the same meaning as the term "security interest." For this reason and for the ease of the reader, reference is made in this article to the term "security interest."

[37]ML art. 2(kk).

"security interest" under Article 1 of the UCC.[38] The term "grantor" under the Model Law is equivalent to the term "debtor" under Article 9.[39] The term "debtor" under the Model Law is equivalent to the term "obligor" under Article 9.[40] The term "debtor of the receivable" is equivalent to the term "account debtor" under Article 9.[41] The term "secured creditor" under the Model Law is substantially the same as the term "secured party" under the Article 9.[42] The term "movable asset" under the Model Law is substantially the same as "personal property" under Article 9.[43] The term "encumbered asset" under the Model Law is substantially the same as "collateral" under Article 9.[44] The term "receivable" under the Model Law would include under Article 9 an "account,"[45] "instrument"[46] "chattel paper,"[47] and "payment intangible"[48] under Article 9.

The term "right to receive the proceeds under an independent undertaking" under the Model Law (defined in the Secured Transactions Guide) is substantially the same as the term "letter-of-credit right" under article 9.[49] The term "attachment to a movable asset" under the Model Law (defined in the Secured Transactions Guide) is substantially

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[38]U.C.C. § 1-201(b)(35).

[39]U.C.C. § 9-102(a)(28).

[40]U.C.C. § 9-102(a)(59).

[41]U.C.C. § 9-102(a)(3).

[42]U.C.C. § 9-102(a)(73).

[43]The UCC does not define the term "personal property" as such. However, the term is used is contrast to "real property." All property that is not real property is personal property. The only exception might be "fixtures" which may be both personal property (goods) and real property. *See* U.C.C. § 9-102(a)(41).

[44]U.C.C. § 9-102(a)(12).

[45]U.C.C. § 9-102(a)(2).

[46]U.C.C. § 9-102(a)(47).

[47]U.C.C. § 9-102(a)(11).

[48]U.C.C. § 9-102(a)(61).

[49]U.C.C. § 9-102(a)(51) (defining "letter-of-credit right").

the same as the term "accession" under Article 9.[50] The term "attachment to immovable property" under the Model Law (defined in the Secured Transactions Guide) is substantially the same as the term "fixtures" under Article 9.[51] The term "creation" under the Model Law is substantially the same as the term "attachment" under article 9.[52] The term "third-party effectiveness" under the Model Law is substantially the same as the term "perfection" under Article 9.[53] The term "priority" under the Model Law is substantially the same as the term "priority" under Article 9.[54] The term "enforcement" under the Model Law is substantially the same as the term "enforcement" under Article 9.[55]

As a result, for conflict-of-laws analysis purposes, there would be a rough equivalence between the terminology used in the Model Law and that used in Article 9. For example, a right to payment arising from a sale or lease of goods would be a "receivable" under the Model Law and an "account"[56] or "chattel paper"[57] under Article 9. Other intangible assets consisting of a right to payment under the Model Law would include "payment intangibles"[58] under Article 9. A court in a Model Law jurisdiction or an Article 9 jurisdiction would apply the conflict-of-laws rules of the forum to the right to payment even though the terminology used to describe the right to payment may be different.

## III. Law applicable to the mutual rights and obligations of the parties

### A. The Model Law

Contractual matters are universally referred to the law chosen by the parties to the security agreement (i.e., the

[50] U.C.C. § 9-102(a)(1).

[51] U.C.C. § 9-102(a)(41).

[52] U.C.C. § 9-203(a).

[53] U.C.C. § 9-308.

[54] *See* U.C.C. §§ 9-317 to 9-339.

[55] *See* U.C.C. §§ 9-601 to 9-28.

[56] U.C.C. § 9-102(a)(2).

[57] U.C.C. § 9-102(a)(31).

[58] U.C.C. § 9-102(a)(61).

grantor and the secured creditor).[59] Mainly for reasons of certainty and predictability, parties to secured transactions tend to select the law applicable to their contractual relationship.[60]

Following this approach, the Model Law refers the mutual (i.e., contractual) rights and obligations of the parties to the security agreement to the law chosen by them.[61] Contractual matters include, for example: (a) what the grantor is permitted to do or prohibited from doing with the encumbered assets, such as whether the grantor has the right to use, transform, collect fruits and revenues from, and dispose of, the assets: (b) representations made and obligations undertaken by the grantor with respect to the encumbered asset, such as the obligation to maintain the asset in a good state of repair, to keep it insured against loss and to inform the secured creditor if a statutory right is asserted against the asset; and (c) the events triggering default, primarily of the grantor, but also of the secured creditor, under the security agreement.

Other matters, such as the ability of the parties to choose different laws for different aspects of their contractual relationship or to modify their choice of law, are left to other conflict-of-laws rules of the jurisdiction enacting the Model Law.[62]

By contrast, generally, conflict-of-laws rules with respect to property law matters relating to a security interest (i.e., the creation, third-party effectiveness, priority and enforcement of a security interest, as well as the effects of a security interest on a third-party obligor) are mandatory.[63] Thus, the parties to a security agreement cannot be permitted by a

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[59]*See*, for example, Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles").

[60]For a discussion of the typical reasons, *see* Philip R. Wood, "Ten Points for Choosing the Governing Law of an International Business Contract," Business Law International, Vol. 21, No. 1 pp. 5–22.

[61]ML art. 84, which is based on recommendation 216 of the Secured Transactions Guide, which in turn is based on article 28 of the Assignment Convention.

[62]For example, art. 2 (2) and (3) of the Hague Principles.

[63]ML art. 3, para. 1, and Guide to Enactment, para. 73.

choice-of-law clause to select the law applicable to, and thus avoid the application of, the substantive law of the jurisdiction to which a conflict-of-laws rule of the forum refers.

The main reason for the mandatory conflict-of-laws rules is that security interests are property (*in rem*) rights and thus affect third parties.[64] It would not only be unfair for the parties to the security agreement to be entitled to select the law that will determine rights (e.g., priority) of third parties. To the extent to which third parties do not have access to security agreements between two other parties, allowing party autonomy with respect to property law matters would also create uncertainty as to the law applicable. This would be especially in the case of a priority dispute arising between competing claimants who chose the laws of different countries having different conflict-of-laws or substantive law rules.

In the absence of a choice of law by the parties, the Model Law refers contractual matters to the law governing the security agreement as determined by the conflict-of-laws rules generally applicable to contractual obligations.

This law may be the law of the jurisdiction: (a) which is most closely connected to the security agreement (e.g., the jurisdiction in which a security agreement is entered into and performed, and in which both parties are located); (b) in which the characteristic performance of the agreement is to be made (e.g., the delivery of the goods in a sales agreement or the extension of credit in a credit agreement); or (c) in which the security agreement is entered into.[65]

For example, if the characteristic performance approach is followed, in the case of a loan agreement, the applicable law will be the law of the State in which the lender is located. In the case of a retention-of-title sale, the applicable law will be the law of the State in which the seller is located.

### B. Article 9

Article 9 takes a similar approach on the law applicable to the contractual aspects of a security agreement but leaves more room for party autonomy to operate with respect to

[64]ML art. 3, para. 2, and Guide to Enactment, para. 74.

[65]Guide to Enactment, para. 472.

some property aspects. Under Article 9, the parties may choose the law governing the creation (attachment) and enforcement of a security interest as long as the chosen law bears a "reasonable relation" to the jurisdiction whose law is chosen.[66] That reasonable relation may be established, for example, by one of the parties or tangible collateral being located in that jurisdiction.

As a result, in some circumstances it is possible that, while a court in a jurisdiction that has adopted the Model Law may apply the same law to the mutual rights and obligations of the parties as would a court in a jurisdiction that has adopted Article 9, a court in a jurisdiction that has adopted the Model Law may apply a different law to the creation or enforcement of a security interest than a court in a jurisdiction that has adopted Article 9.

While the difference in conflict-of-laws rules for the creation or enforcement of a security interest is important, its practical implications may not be as significant as they might at first appear. In a cross-border transaction where collateral is located in another jurisdiction, today any Article 9 secured party who is well advised would recognize that it might need to comply with the creation and enforcement rules of the other jurisdiction in order for the attachment of the security interest or its enforcement to be recognized in that jurisdiction. In that respect, the difference in the conflict-of-laws rules for creation and enforcement would not impact materially on the *status quo* today on these issues. Of greater importance may be the similarity for the most part between the Model Law and Article 9 of the conflict-of-laws rules for perfection, priority and other matters discussed below.

## IV. Law Applicable to Security Interests in Tangible Assets

### A. The Model Law

#### 1. General

Following the classical and generally acceptable approach, the Model Law refers the creation, third-party effectiveness, priority and enforcement of a security interest in a tangible

[66] U.C.C. § 1-301.

asset to the law of the jurisdiction in which the asset is located (*lex situs* or *lex rei sitae*).[67]

For creation issues, the relevant time for determining location of the asset is the time of putative creation of the security interest; for third-party effectiveness and priority, the relevant time is the time the issue arises (i.e., the time of the occurrence of the event that creates the need to determine the law applicable to priority); and, for enforcement issues, the relevant time is the time of commencement of enforcement (for the relevant time for determining location, see section IX.3 below).[68]

If the forum has enacted the Model Law, the characterization of an asset as a tangible asset, whether goods (equipment, inventory or consumer goods), money, negotiable instruments, negotiable documents and certificated non-intermediated securities, will be based on the definition of that term in the Model Law (for characterization issues, *see* section IX.1 below).

The Model Law contains a number of exceptions or variations to the general *lex situs* rule.[69] They are discussed in the following paragraphs.

### 2. Tangible assets covered by negotiable documents

If a tangible asset that is located in a jurisdiction is covered by a negotiable document in the possession of a secured creditor in another jurisdiction, the priority of the security interest in the asset covered by that document as against the rights of competing claimants in that asset will be determined by the law of the jurisdiction in which the document is located, and not by the law of the jurisdiction in which the asset covered by that document is located.[70] The rationale underlying this exception to the general *lex situs* rule is the need to avoid undermining the negotiability of

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[67]ML art. 85(1).

[68]ML arts. 91(1) and 88(a).

[69]These exceptions are introduced by language in ML art. 85(1) ("Except as provided in in paragraphs 2 to 4 and articles 98 and 100, . . .").

[70]ML art. 85(2).

the document, recognizing that the person who controls the document also controls the asset.[71]

As the Model Law leaves the definition of the term "negotiable document" to the law governing negotiable documents, the characterization of a document as a negotiable document will be based on the relevant law of the forum.

### 3. Mobile assets

In the case of a security interest in a mobile asset (i.e., an asset ordinarily used in more than one jurisdiction), the law applicable to that security interest is the law of the jurisdiction in which the grantor is located.[72]

What matters for this rule is the ordinary use of assets of this type and not to the actual use of any individual asset. For example, to the extent motor vehicles may cross national borders in their ordinary use, the rule will apply to a particular motor vehicle even if it is actually used only in one single jurisdiction. Absent this approach, the *lex situs* rule could result in the law of more than one jurisdiction, leading to an instable choice-of-law rule.

### 4. Export goods

A security interest in export goods (i.e., tangible assets that are in transit or destined to be moved to another jurisdiction) may be created and made effective against third parties under the law of the jurisdiction of its ultimate destination, if the asset reaches that destination within a short period of time (e.g., within 45–60 days after the putative creation of the security interest to allow sufficient time for the asset to reach its destination).[73]

This rule gives a secured creditor a choice to create a security interest and to make it effective against third parties either under the law of the jurisdiction of origin or under the law of the jurisdiction of destination of the assets. The rea-

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[71]For the same reason, in principle, a security interest in a tangible asset made effective against third parties by possession of the negotiable document covering that asset has priority over a security interest in the asset made effective against third parties by any other method (ML art. 49(1)).

[72]ML art. 85(3).

[73]ML art. 85(4).

son for this rule is to ensure that the secured creditor does not necessarily have to bear the cost of the creation and third-party effectiveness of a security interest under the law of more than one jurisdiction.

This rule applies to creation and third-party effectiveness (not to priority or enforcement). Where two secured creditors establish third-party effectiveness under the law of the same jurisdiction (i.e., the jurisdiction of origin or the jurisdiction of destination), under the general *lex situs* rule, the law of that jurisdiction will govern priority and enforcement.

Where one secured creditor establishes third-party effectiveness under the law of the jurisdiction of origin and another secured creditor establishes third-party effectiveness under the law of the jurisdiction of destination, the priority dispute will be resolved under the law of the jurisdiction where the encumbered asset is located at the time the priority dispute arises (i.e., the time the second security interest was made effective against third parties).[74]

### 5. Third-party effectiveness of a security interest in certain types of assets by registration

To make its security interest effective against third parties by registration, the secured creditor has to register in the registry in the jurisdiction in which the grantor is located.[75] The reasons for this rule are to: (a) achieve one of the key policy objectives of the Model Law, that is, to enhance certainty and transparency by providing for the registration of notices of security interests;[76] and (b) ensure that secured creditors would be able to achieve third-party effectiveness by registration under the law of, and competing claimants would need to search in the registry of, only one jurisdiction.

However, this rule is a limited exception to the *lex situs* rule. First, it applies only to security interests in certain

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[74]ML art. 91(1)(b).

[75]ML art. 98. For the application of this rule to security interests in rights to payment of funds credited to a bank account, see section V.A.7 below.

[76]Secured Transactions Guide, rec. 1(f). The key objectives and fundamental policies of the Model Law are the same as the key objectives and fundamental policies of the Secured Transactions Guide (*see* Guide to Enactment, paras. 16 and 17).

types of tangible assets, i.e., negotiable instruments, negotiable documents and certificated non-intermediated securities. Second, it applies only if the grantor's jurisdiction recognizes registration as a method of third-party effectiveness. And, third, it applies only to third-party effectiveness issues. Thus, this rule does not alter the law applicable to other security interests in tangible assets in general or to other matters. For example, questions of priority as against competing claimants continue to be determined, under the general *lex situs* rule, by the law of the jurisdiction in which the asset is located at the time the priority dispute arises (i.e., when a competing security interest becomes effective against third parties).

With the third limitation comes a fourth, practical, limitation. This rule and this exception to the *lex situs* rule only work if also the jurisdiction in which the encumbered asset is located recognizes registration as a method of third-party effectiveness (i.e., has enacted the Model Law or its equivalent). If that is not the case, this rule will not work, since a jurisdiction that does not have a registration system, generally or only for these types of assets, will obviously not have a priority rule that ranks creditors who perfect by registration according to the order of registration.

The following scenario clarifies the application of this rule. Grantor grants a security interest in a negotiable promissory note to Secured Creditor 1 and then to Secured Creditor 2. Grantor and Secured Creditor 1 are located in jurisdiction A. Secured Creditor 2 and the promissory note are located in jurisdiction B. Both countries A and B have adopted the Model Law which provides for registration of notices of security interests as method for achieving third-party effectiveness. Both Secured Creditor 1 and Secured Creditor 2 have to register a notice in the registry of jurisdiction A (in which the grantor is located) to achieve third-party effectiveness of their security interests, even though the promissory note is located in jurisdiction B. In any case, their priority

would be determined under the law of jurisdiction B (in which the promissory note is located).[77]

Nevertheless, under the priority rules of the Model Law, a security interest in a negotiable instrument, negotiable document or certificated non-intermediated security made effective against third parties by registration would be subordinate to a competing security interest made effective by possession.[78] In the above-mentioned scenario, where both countries have adopted the Model Law, if Secured Creditor 1 registered a notice in the registry of jurisdiction A and Secured Creditor 2 took possession of the promissory note in jurisdiction B, Secured Creditor 2 would have priority, as priority would remain subject to the law of the jurisdiction in which the promissory note was located.

The security interest of Secured Creditor 1 would still have priority over: (a) the administrator of the grantor's insolvency, if registration took place before the commencement of insolvency proceedings (subject to any exceptions under insolvency law); and (b) the grantor's judgment creditors, if registration took place before the judgement creditor took action to have the judgment enforced.[79] If jurisdiction B, however, in which the encumbered asset is located does not recognize registration as a method of third-party effectiveness, generally or only for these types of assets, and a first-to-register priority rule, the rule cannot work.

### 6. Certificated non-intermediated securities

With respect to security interests in certificated or uncertificated non-intermediated securities (e.g., securities not held in a securities account but directly from the issuer), the approach in the Model Law is based on the premise that there is no perfect conflict-of-laws rule and that the rule with most advantages and least disadvantages would be a rule that would refer all matters to the law of one and the

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[77]ML art. 85(1) states "Except as provided in paragraphs 2 to 4 and articles 98 and 100 . . . ."

[78]ML arts. 46(1), 49(1) and 51(1).

[79]Guide to Enactment, para. 511.

same jurisdiction.[80] These matters include the creation, third-party effectiveness, priority and enforcement of a security interest, as well as its effectiveness against the issuer.

To implement this approach, the Model Law draws a distinction between debt securities (e.g., bonds) and equity securities (e.g., shares), and not between certificated and uncertificated securities. With respect to security interests in equity securities, the Model Law refers all matters to the law of the issuer's location.[81] In the case of a corporation, this law is the law under which the corporation has been incorporated; and, in the case of a partnership, it is the law under which the partnership has been created.

With respect to security interests in debt securities, the Model Law refers all matters to the law governing the securities.[82] This law is the law selected by the parties as the law governing their contractual rights and obligations arising from these securities. In the absence of such a choice of law (which would be extremely rare for debt securities), the forum will determine the applicable law under its own conflict-of-laws rules.

As a result of this approach, the law of one jurisdiction applies to all issues relating to a security interest in such types of securities; and, in the case of certificated securities, the holder of the certificate cannot manipulate the applicable law by moving the certificate from one jurisdiction to another. This provides greater certainty in the determination of the applicable law and thus facilitates the use of certificated non-intermediated securities as security for credit.

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[80]For example, on the one hand, a conflict-of-laws rule referring all issues with respect to a security interest in certificated non-intermediated securities to the *lex situs* would allow a secured creditor to manipulate the applicable law by moving the certificate from country to country. On the other hand, a conflict-of-laws rule that would depart from the *lex situs* with respect to security interests certificated non-intermediated securities would result in referring security interests in some tangible assets to the *lex situs* and other types of tangible assets to another law (for a detailed discussion of all the various approaches and their comparative advantages and disadvantages, *see* A/CN.9/WG.VI/WP.65/Add.4, art. 93, https://undocs.org/en/A/CN.9/WG.VI/WP.65/Add.4).

[81]ML art. 100(1).

[82]ML art. 100(2).

The exception mentioned above (see section IV.A.5) applies also to security interests in certificated debt or equity securities.[83] Thus, if the law of the jurisdiction in which the grantor is located recognizes registration as a method of third-party effectiveness, to make a security interest in such securities effective against third parties by registration, a secured creditor has to register a notice in the registry of the grantor's jurisdiction.

If, however, one security interest was made effective against third parties by registration in the grantor's jurisdiction and the other was made effective against third parties by possession in the issuer's jurisdiction, the latter would have priority. This would be so because the law of the jurisdiction in which the encumbered asset was located would be the applicable law to priority and, if that law was based on the Model Law, the security interest in the certificated non-intermediated security would have priority.[84]

### B. Article 9

Article 9 takes a similar approach to the law applicable to security interests in tangible assets, such as goods,[85] instruments,[86] tangible chattel paper,[87] tangible documents,[88] and disintermediated (directly-held) certificated securities[89] but with some differences:

- As mentioned above (*see* section IV.B), the law applicable to the attachment and enforcement of a security interest in tangible assets under Article 9 is generally the law chosen by the parties in their security

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[83]ML art. 100 does not contain the language that introduces this exception in ML arts. 85(1) and 86 ("Except as provided in articles 98, . . ."") or in ML art. 97 ("Subject to article 98, . . ."). However, for the same reasons, this exception applies to negotiable instruments, negotiable documents and rights to payment of funds credited to a bank account, it also applies to certificated non-intermediated securities.

[84]ML arts. 51(1) and 100.

[85]U.C.C. § 9-102(a)(44) (defining "goods").

[86]U.C.C. § 9-102(a)(47) (defining "instrument").

[87]U.C.C. § 9-102(a)(79) (defining "tangible chattel paper").

[88]U.C.C. § 1-201(b)(16) (last sentence) (defining "tangible document of title").

[89]U.C.C. § 8-102(a)(4) (defining "certificated security").

agreement assuming that the "reasonable relation" test is met, rather than, as in the Model Law, the law of the jurisdiction in which the tangible asset is located.[90]

- Under the general conflict-of-laws rule of Article 9, before applying exceptions, the law applicable to the perfection and priority of a security interest in a tangible asset is the law of the jurisdiction of the debtor (the grantor), rather than, as under the Model Law, the law of the jurisdiction in which the tangible asset is located.[91] To understand this difference, it is important to explain the role played in Article 9 by the filing of a financing statement. Under Article 9 the most common method of perfection of a security interest in tangible assets is by the filing of financing statement providing the name of the debtor and the secured party and an indication of the collateral.[92] The financing statement is filed in a filing office in the jurisdiction in which the debtor is located.[93] Article 9 has its own special rules to determine where the debtor is located (*see* section IX.2 below).
- Article 9 does not have any special conflict-of-laws rules for mobile assets or export goods as does the Model Law.[94]
- Under Article 9, perfection, the effect of perfection and non-perfection, and priority of a possessory security interest in a certificated non-intermediated (directly-held) security is governed by the law of the jurisdiction where the security certificate is located, unlike under the Model Law the jurisdiction of the issuer of equity securities or the law governing debt securities.[95]

Despite the difference in general conflict-of-laws rules-the Model Law pointing to the law of the jurisdiction in which

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[90]U.C.C. § 1-301(a) and ML 85(1).

[91]U.C.C. § 9-301(1).

[92]U.C.C. § 9-310.

[93]U.C.C. § 9-301(1); *see* U.C.C. § 9-305(c)(1) for directly-held certificated securities.

[94]Article 9 does, though, have some roughly analogous rules concerning a change of applicable law. *See* U.C.C. § 9-316 and ML art. 85(3).

[95]U.C.C. § 9-305(a)(1) and ML art. 100.

the tangible asset is located and Article 9 pointing to the law chosen by the parties for creation and enforcement issues and to the jurisdiction in which the debtor (grantor) is located for perfection and priority issues-the exceptions to each general rule often produce similar results.

Under the general conflict-of-laws rule of Article 9, if the tangible collateral is located in a particular jurisdiction and the secured party is claiming a possessory security interest in the collateral in that jurisdiction, the law of that jurisdiction governs the perfection, effect of perfection or non-perfection and priority of the security interest.[96] The general conflict-of-laws rule of the Model Law would produce the same result.[97]

Under the general conflict-of-laws rule of Article 9, if the tangible collateral is located in a particular jurisdiction and the secured party is claiming a non-possessory security interest in the collateral, for example, by the filing of a financing statement (registration) in the jurisdiction in which the debtor is located, the law of the jurisdiction in which the tangible collateral is located governs the effect of perfection and non-perfection of the security interest but not perfection itself.[98] Perfection itself is governed by the law of the jurisdiction in which the debtor is located.[99] With respect to perfection (third-party effectiveness), the general conflict-of-laws rules of the Model Law would produce the same result (*lex situs*); and a special conflict-of-laws rule of the Model Law would produce a similar result (law of the grantor's location), if the collateral consists of such types of tangible assets as negotiable instruments, negotiable documents and certificated non-intermediated securities and the jurisdiction in which the tangible asset is located recognizes registration of a notice in a registry as a method of third-party effectiveness for a security interest in these types of assets.[100]

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[96]U.C.C. § 9-301(2).

[97]ML art. 85(1).

[98]U.C.C. § 9-301(3)(C).

[99]U.C.C. § 9-301(1).

[100]ML art. 98. For another difference, *see* section IX.2 below.

## V. Law Applicable to Security Interests in Intangible Assets

### A. The Model Law

#### 1. General Rule

Generally, the Model Law refers the creation, third-party effectiveness, priority and enforcement of a security interest in an intangible asset to the law of the jurisdiction in which the grantor is located.[101] As is the case with the *lex situs* rule for security interests in tangible assets, this conflict-of-laws rule too has the advantage that it refers all matters to the law of one jurisdiction that is easy to determine and is likely to be the jurisdiction in which the main insolvency proceeding relating to the grantor will be opened.[102]

The location of the grantor is defined as: (a) the grantor's place of business; (b) in the case of places of business in more than one State, the grantor's place of central administration;[103] and (c) in the case of no place of business, the grantor's place of habitual residence (for a discussion of the location of the grantor, *see* section IX.2 below). This rule is also subject to certain exceptions or variations.[104] They are discussed below.

#### 2. Receivables relating to immovable property

Under the Model Law, the law applicable to the priority of a security interest in receivables arising from a sale or lease of, or secured by, immovable property as against the right of

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[101] ML art. 86 and 88(b).

[102] For a discussion of the advantages and disadvantages of the various approaches and a comparison of this approach (which is also followed in the UN Convention on the Assignment of Receivables in International Trade) with the approach in a proposal of the E.U. for the law applicable to third-party effects of assignments of claims with references to the relevant bibliography, *see* Spyridon V Bazinas, The law applicable to third-party effects of assignments of claims: the UN Convention and the EU Commission Proposal compared, Uniform Law Review, Volume 24, Issue 4, December 2019, pp. 609–632.

[103] This is generally interpreted as being the same as the centre of main interests (COMI), in which a person's main insolvency proceedings is most likely to be opened.

[104] These exceptions are introduced by language in article 86 ("Except as provided in articles 87 and 97–100, . . .").

a competing claimant that is registrable in the immovable property registry in which rights in the relevant immovable may be registered is the law of the jurisdiction under whose authority the immovable property registry is maintained.[105]

The reason for this rule is avoid undermining immovable property law and the immovable property registry. However, the problem with this rule is that for a person to determine the law applicable to the priority of a security interest in a receivable, that person needs to determine whether the receivable arose from a sale or lease of, or is secured by, immovable property.

### 3. Rights to payment of funds credited to bank accounts

As agreement could not be reached on one conflict-of-laws rules, the Model Law contains two options for the law applicable to a security interest in rights to payment of funds credited to a bank account for the legislator in a jurisdiction enacting the Model Law to choose from.[106]

The main advantage of both options is that all matters are referred to one and the same law. These matters include the creation, third-party effectiveness, priority, enforcement of a security interest, as well as the rights and obligations between the deposit-taking institution and the secured creditor.

The first options refers all matters relating to a security interest to the law of the jurisdiction in which the deposit-taking institution maintaining the account has its place of business and, in the case of places of business in more than one jurisdiction, the law of the jurisdiction in which the office maintaining the account is located.[107] This approach is based on the need to refer all secured transactions to the law under which a deposit-taking institution operates.

The second option refers all matters to the law of the jurisdiction expressly stated in the account agreement as the jurisdiction whose law governs the account agreement or, if

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[105]ML art. 87.

[106]The encumbered asset is that right to payment of the account holder as against the deposit-taking institution, not the account relationship as a whole.

[107]ML art. 97.

the account agreement expressly provides that the law of another jurisdiction is applicable to all those matters, the law of that other jurisdiction. The second option is supplemented by the default rules of article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (e.g., the law of the jurisdiction in which the office of the deposit-taking institution, through which the account agreement was entered, is located). The rationale underlying this option is that a bank account should be treated in the same way as a securities account and party autonomy should be recognized, even though to a limited extent.

#### 4. Intellectual property

With respect to security interests in intellectual property, the Model Law follows a hybrid (or imperfect) approach in the sense that it refers some matters to the law of the jurisdiction in which the intellectual property is protected (the "*lex protectionis*") and other matters to the law of the jurisdiction in which the grantor is located. This was one of the most difficult issues that the Model Law had to address, and all possible approaches and their comparative advantages and disadvantages were examined at some length.[108]

The creation, third-party effectiveness and priority of a security interest in intellectual property are referred to the *lex protectionis*.[109] The rationale underlying this approach is the need to have, for simplicity and legal certainty reasons, to the extent possible, one and the same law apply to all property rights in intellectual property.

However, to facilitate creation and third-party effectiveness, in particular in a typical intellectual property finance case which involves a portfolio of intellectual property assets protected under the laws of different countries, the Model Law gives the option to a secured creditor to have a security interest created under the law of the jurisdiction of the grantor's location.[110]

For the same reason, the Model Law also gives a secured

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[108]Intellectual Property Supplement, Chapter X.

[109]ML art. 99(1).

[110]ML art. 99(2).

creditor the option of making a security interest effective against third parties under the law of the jurisdiction of the grantor's location, as against a judgment creditor of the grantor and the administrator in the grantor's insolvency (but not as against a competing secured creditor or a transferee of the encumbered intellectual property, the priority of which remains subject to the *lex protectionis*).[111]

Again, for the same reason, the Model Law refers enforcement of a security interest in intellectual property to the law of the jurisdiction in which the grantor is located. Intellectual property finance would become more difficult and costly if the secured creditor had to take all the different enforcement actions (e.g., notification of the debtor, repossession and disposition of the encumbered assets, distribution of proceeds) under the laws of multiple countries.[112]

### 5. Uncertificated non-intermediated securities

As already mentioned (*see* section IV.A.6 above), with respect to security interests in non-intermediated securities (e.g., shares and bonds not held in a securities account but directly by the issuer), whether certificated or uncertificated, the Model Law draws a distinction between debt and equity non-intermediated securities and refers all matters with respect to security interests in equity securities to the law of the issuer's location,[113] and all matters with respect to security interests in debt securities to the law governing the securities.[114] Thus, the distinction between certificated and uncertificated securities is not relevant for the purpose of determining the law applicable to security interests in such securities.

### 6. Letters of credit

As already mentioned (*see* section II.A above), the Model Law does not apply to security interests in letters of credit. The reason is to avoid making the Model Law even longer and more complex, in particular for countries that do not

[111] ML art. 99(2).

[112] ML art. 99(3).

[113] ML art. 100(1).

[114] ML art. 100(2).

have secured finance practices based on letters of credit.[115] However, a jurisdiction interested in facilitating the use of letters of credit as security of credit can enact the relevant recommendations of the Secured Transactions Guide. They are briefly summarized below.

- To avoid unduly interfering with the rights and obligations of the parties under a letter of credit, the encumbered asset is not the right to draw on a letter of credit but the right to receive the proceeds of payment. Reference is made to independent undertakings in the sense of commercial or stand-by letters of credit, confirmations of letters of credit, independent undertakings (including demand or first-demand guarantees or counter-guarantees or any undertaking recognized as independent by law or practice rules).
- Matters covered are: (a) the rights and duties of the guarantor/issuer, confirmer or nominated person that has received a request for an acknowledgement or that has or may pay or otherwise give value under an independent undertaking; (b) the right to enforce a security right in the right to receive the proceeds under the independent undertaking against the guarantor/issuer, confirmer or nominated person; and (c) the effectiveness against third parties and priority of a security right in the right to receive the proceeds under the independent undertaking.
- In principle, the law applicable to all these matters is the law of the jurisdiction specified in an independent undertaking of a guarantor/issuer, confirmer or nominated person.[116] If the applicable law is not specified in the independent undertaking of the guarantor/issuer or confirmer, the law applicable to all the matters is the law of the jurisdiction of the location of the branch or office of the guarantor/issuer or confirmer indicated in the independent undertaking. In the case of a nominated person, the applicable law is the law of the jurisdiction of the location of the nominated person's branch or of-

[115]Guide to Enactment, para. 24.

[116]Secured Transactions Guide, rec. 212.

fice that pays or otherwise gives value under the independent undertaking.[117]

- Where the payment or other performance of a receivable, negotiable instrument or other claim is secured by a right to receive the proceeds under an independent undertaking, the law applicable to a security interest in the receivable, negotiable instrument or other claim is also the law applicable to the issue of whether the security interest in the right to receive the proceeds is created and made effective against third parties automatically.[118]

### 7. Third-party effectiveness of security interests in certain types of assets by registration

The exception mentioned above (see section IV.A.5 and 6), applies also to security interests in rights to payment of funds credited to a bank account. Thus, if the law of the jurisdiction in which the grantor is located recognizes registration as a method of third-party effectiveness, to make its security interest in that type of asset effective against third parties by registration, the secured creditor has to register of a notice in the registry of the grantor's jurisdiction.[119] However, all other matters (creation, priority and enforcement of a security interest, as well as the rights and obligations between the deposit-taking institution and the secured creditor) remain subject to the law applicable to security interests in rights to payment of funds credited to a bank account (e.g., the law of the jurisdiction in which the deposit-taking institution, or the office with which the bank account is held, is located).[120]

The following scenario clarifies the application of this rule. Grantor grants a security interest in a right to payment of funds credited to a bank account to Secured Creditor 1 and then to Secured Creditor 2. The grantor and Secured Creditor 1 are located in jurisdiction A. Secured Creditor 2 is lo-

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[117]Secured Transactions Guide, rec. 213.

[118]Secured Transactions Guide, rec. 214.

[119]ML art. 98.

[120]ML art. 97(1), option A. This exception is introduced by language in ML art. 97(1) ("Subject to article 98, . . .").

cated in jurisdiction B, in which also the deposit-taking institution or its relevant office has its location. Both jurisdiction A and jurisdiction B have adopted the Model Law. To make their security interests effective against third parties by registration, both Secured Creditor 1 and Secured Creditor 2 have to register a notice in the registry of jurisdiction A (the grantor's jurisdiction). Their priority, though, will be determined under the law of jurisdiction B (the jurisdiction of the location of the deposit-taking institution or its relevant office).

However, if Secured Creditor 1 registers a notice in jurisdiction A (the grantor's jurisdiction) and Secured Creditor 2 obtains a transfer of the bank account or a control agreement in jurisdiction B (the jurisdiction of the location of the deposit-taking institution or its relevant office), Secured Creditor 2 will have priority.[121]

Again, for this rule to apply, the law of the jurisdiction of the location of the deposit-taking institution or its relevant office (or, if a jurisdiction selects option B in ML art. 97, the law of the jurisdiction expressly stated in the account agreement as the jurisdiction whose law applies) has to also recognize registration as a method of third-party-effectiveness, generally or for this type of asset. Otherwise, it will not have the first-to-register priority rules to give priority to a security interest made effective against third parties by registration under the law of the grantor's location.

### B. Article 9

Article 9, as with the law applicable to a security interest in tangible assets, takes a similar approach to the law applicable to security interests in intangible assets, such as accounts, electronic tangible chattel paper, electronic documents, disintermediated (directly-held) uncertificated securities, and general intangibles, by looking to the law of the jurisdiction of the debtor (the grantor) for the applicable law.[122] However, there are some differences:

- Article 9 generally follows the Model Law's second op-

[121]ML arts. 47 (3) and 97(1), option A.

[122]U.C.C. § 9-301(1). This approach is generally consistent with the UN Convention on the Assignment of Receivables in International Trade which the United States has ratified but which is not yet in effect. For a

tion for a security in funds credited to a deposit account.[123] Nevertheless, unlike under the Model Law, perfection by the filing of a financing statement (registration) is not a permitted method of perfection for a security interest in funds credited to a bank account as original collateral.[124] As a result, there is no conflict-of-laws rule in Article 9 expressly addressing the law applicable to perfection by filing of a security interest in funds credited to a bank account as original collateral.[125]

- Intellectual property is considered to be a "general intangible" under Article 9. The perfection, effect of perfection or non-perfection and priority of a security interest in a general intangible is determined by the law of the debtor's (grantor's) location.[126] However, U.S. federal law on intellectual property for copyrights, patents, trademarks and mask works may to some extent preempt a rule in Article 9.[127]
- Under Article 9, except for perfection by the filing of a financing statement,[128] perfection, the effect of perfection and non-perfection, and priority of a security interest in an uncertificated non-intermediated (directly-held) security is governed by the law of the issuer's jurisdiction.[129] If a security falls within the definition of "security,"[130] there is no distinction for conflict-of-laws

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discussion of the Convention, *see* Spiros V. Bazinas, Richard M. Kohn, Louis F. Del Duca, Implementing a Global Uniform International Receivables Financing Law: Facilitating a Cost-Free Path to Economic Recovery, UCC Law Journal, Vol. 44, July 2012, 277–316.

[123]U.C.C. § 9-304 and ML art. 97, option B.

[124]U.C.C. § 9-312(b)(1).

[125]ML arts. 18(1), 25 and 98 (even though such a security interest made effective by registration ranks last; ML art. 47).

[126]U.C.C. § 9-301(1).

[127]*See* U.C.C. § 9-109(c)(1).

[128]U.C.C. § 9-305(c).

[129]U.C.C. § 9-305(a)(2).

[130]U.C.C. § 8-102(a)(15) (defining "security"); *see also* U.C.C. § 8-103.

purposes between an equity security and a debt security as there is under the Model Law.[131]

- Article 9 specifically covers within its scope a right to the proceeds of a draw under a letter of credit, a so-called "letter-of-credit right." The conflict-of-laws rules generally follow those in the Secured Transactions Guide.[132]

Notwithstanding these differences, the conflict-of-laws rules between the Model Law and Article 9 on security interests in intangible assets are quite similar for common types of intangible assets, in particular for core rights to payment, such as trade receivables, loan receivables and royalties arising under intellectual property licenses. Under the Model Law and under Article 9, as a general matter, third party effectiveness (perfection) of a security interest in intangible assets and priority are governed by the law of the jurisdiction of the grantor's (the debtor's) location.

## VI. Law Applicable to Security Interests in Proceeds of Encumbered Assets

### A. The Model Law

The discussion so far has related to original encumbered assets. The Model Law has a different conflict-of-laws rule for a security interest in an asset that extends to its identifiable proceeds (a term that is broadly defined as whatever is received in respect of an encumbered asset, including civil and natural fruits, and thus includes also proceeds of proceeds).[133] This rule is an imperfect conflict-of-laws rule in that it results in the application of different laws if the proceeds are not of the same kind as the original encumbered assets. The law applicable to the creation of a security interest in proceeds is the law of the jurisdiction whose law governs the creation of the security interest in the original encumbered assets, and the law applicable to the third-party effectiveness and priority of a security interest in proceeds is referred to the law of the State whose law governs those

[131]ML art. 100.

[132]U.C.C. § 9-306 and Secured Transactions Guide, recs. 212–214.

[133]ML art. 2(bb).

matters in the case of a security interest in original encumbered assets of the same kind as the proceeds.[134]

Thus, if the original encumbered asset is inventory and the inventory is subsequently sold, the receivables generated is proceeds. Under the Model Law, the law applicable to the question of whether the secured creditor automatically acquires a security interest in the receivables as proceeds of the original encumbered inventory will be the law of the location of the inventory at the time of the creation of the security interest in the inventory; and the law applicable to the third-party effectiveness and priority of the security interest in the receivables as proceeds will be the law that would be applicable to a security interest in the receivables as original encumbered assets (that is, the law of the jurisdiction of the grantor's location).

Where the original encumbered asset and the proceeds are of the same kind, the same law will apply to all matters. However, where the proceeds are of a different kind than the original encumbered asset, different laws will apply to creation, on the one hand, and to third-party effectiveness and priority, on the other. In addition, this approach may lead to problems where the law governing creation recognizes a broad right in proceeds (e.g. including in civil and natural fruits), while the law governing third-party effectiveness and priority recognizes a narrower right in proceeds.

In any case, this rule will apply to proceeds derived from the original encumbered asset as a result of a disposition by the grantor or other event but prior to enforcement. The law applicable to the distribution of proceeds derived from a disposition of the encumbered asset pursuant to post-default enforcement proceedings remains subject to the rules discussed above (i.e., it is referred, in the case of tangible assets, to the law of the location of the assets at the time of commencement of enforcement, and, in the case of intangible assets, to the law of the grantor's location).[135]

### B. Article 9

Under Article 9, the law applicable to the attachment of a

[134]ML art. 89.

[135]ML arts. 85(1) and 86.

security interest in proceeds is the law chosen by the parties in their security agreement assuming that the "reasonable relation" test is met[136] rather than, as in the Model Law, the law of the jurisdiction in which the tangible asset is located or, in the case of an intangible asset, in which the debtor is located. Otherwise, the conflict-of-laws rules in Article 9 for a security interest in proceeds generally follow those of the Model Law.[137]

## VII. Law Applicable to the Rights and Obligations Between Third-Party Obligors and Secured Creditors

### A. The Model Law

The Model Law deals also with the law applicable to the rights and obligations between a third-party obligor (i.e., the debtor of an encumbered receivable, the obligor under an encumbered negotiable instrument or the issuer of encumbered non-intermediated securities) and a secured creditor.

Matters covered include: (a) the rights and obligations between the secured creditor and the debtor, obligor or issuer; (b) the conditions under which the security right may be invoked against the debtor, obligor or issuer, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor, obligor or issuer; and (c) whether the obligations of the debtor, obligor or issuer have been discharged.

The law applicable to all these matters is the law of the law governing the legal relationship between the grantor and the relevant debtor of the receivable, or the relevant obligor under the instrument or the issuer of the document. For example, in the case of a receivable arising from a sales contract, the law chosen by the seller/grantor and the buyer/debtor of the receivable to govern the sales contract will apply to all these matters. The purpose of this rule is to avoid changing the law applicable to the rights and obligations of a third-party obligor.

### B. Article 9

Article 9 does not contain an express conflict-of-laws rule

[136] U.C.C. § 1-301(a).

[137] U.C.C. § 9-315.

governing rights and obligations of third-party obligors. However, an Official Comment in Article 9 suggests that the applicable law will be determined, as under the Model Law, by the law governing the relationship between the debtor (the grantor) and the account debtor (the debtor).[138]

## VIII. Impact of Commencement of Insolvency on the Law Applicable

In recognition of the need for certainty as to the law applicable to security interests, in general and in particular in the case of the grantor's insolvency, the Model Law provides that, in principle, the commencement of insolvency with respect to the grantor, does not change the law applicable to security interests.[139]

However, this principle does not go as far as to exclude the application of the law applicable in the case of insolvency (i.e., the law of the jurisdiction in which the insolvency proceedings take place; *lex fori concursus*) to mandatory insolvency law matters, such as the avoidance of fraudulent or preferential transactions, the treatment of secured creditors, the ranking of claims and the distribution of proceeds.[140]

The approach is similar with respect to Article 9. In the United States, while Article 9 is a state law, the Bankruptcy Code[141] is federal law. Although the U.S. Supreme Court has not definitely stated a conflict-of-laws rule in a bankruptcy case applicable to security interests, the common practice is for bankruptcy courts to apply the non-bankruptcy conflict-of-laws rules of the forum state (*lex fori concursus*).[142]

## IX. General Conflict-of-Laws Matters

### 1. Characterization and applicable conflict-of-laws rules

The Model Law is based on the assumption that, in the case of judicial or other proceedings in a jurisdiction, a court

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[138]U.C.C. § 9-401, cmt. 3.

[139]ML art. 94.

[140]Guide to Enactment, para. 500.

[141]11 U.S.C.A. § 101 et seq.

[142]See, e.g., In re SemCrude, L.P., 407 B.R. 112, 69 U.C.C. Rep. Serv. 2d 245, 172 O.G.R. 1 (Bankr. D. Del. 2009).

or other authority in that jurisdiction will apply its own substantive law to determine the legal character of a transaction (i.e., whether it is a secured transaction or not) and a matter (i.e., whether a matter relates to priority or enforcement).

In addition, the Model Law is based on the premise that a court or other authority in a jurisdiction will apply the conflict-of-laws rules of that jurisdiction and the substantive law that is applicable under these conflict-of-laws rules.

Like the Model Law, Article 9 does not have an express conflict-of-laws rule on characterization of a transaction. Courts generally apply the substantive law of the forum to determine the law governing characterization when third party rights are affected.[143]

### 2. Location of the grantor

As already mentioned, the Model Law defines location of the grantor by reference to: (a) the grantor's place of business; (b) in the case of places of business in more than one jurisdiction, the grantor's place of central administration; and (c) in the case of no place of business, the grantor's habitual residence.[144]

The term "place of business" is used in a broad sense to mean the place in which the grantor exercises its activities. The term "place of central administration" refers to the real seat, as opposed to the statutory seat, of a legal person. This term is generally interpreted to be the same as the centre of main interests, which is the place in which the main insolvency proceedings with respect to the grantor is likely to be opened.

This approach minimizes the risk of conflict between the law governing insolvency and the law applicable to security interests and thus the risk that the law applicable to security interests will change as a result of the grantor's insolvency.

Under, article 9, a debtor (grantor) that is a corporation, limited liability company, limited partnership or statutory or

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[143] *See, e.g.*, In re Eagle Enterprises, Inc., 237 B.R. 269, 39 U.C.C. Rep. Serv. 2d 534 (E.D. Pa. 1999).

[144] ML art. 90.

common law business trust organized under the law of a U.S. jurisdiction is located in that jurisdiction.[145] Another type of organization, such as a general partnership, is located the jurisdiction of its place of business or, if it has more than place of business, in the jurisdiction of its chief executive office.[146] An individual is located in the jurisdiction of the individual's principal residence.[147]

There is one other difference worth mentioning. Under Article 9, if the debtor's location for purposes of Article 9 is in a jurisdiction other than the United States and that jurisdiction does not have a filing system like the one for Article 9, the debtor is viewed to be located in Washington, D.C.[148]

A financing statement may then be filed in the filing office in Washington, D.C. to perfect the security interest by filing. Under the Model Law, if perfection by registration is not a permitted method of perfection (third-party effectiveness) under the law of the jurisdiction of the debtor's (the grantor's) or the asset's location, then perfection (third-party effectiveness) may not be achieved by registration.

### 3. Relevant time for determining location

Where the encumbered assets or the grantor moves from one jurisdiction to another, the issue arises as to which location is relevant for determining the law applicable to a security interest. As already mentioned, under the Model Law, the relevant time for determining the location of encumbered assets or the grantor is different depending on the type of issue involved in each case.[149]

Thus, for creation issues, the relevant time is the time of the putative creation of a security interest. This means that, if a security interest was validly created under the law of jurisdiction A when the asset or the grantor was located there, the law of jurisdiction A will continue to apply and, as

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[145]U.C.C. § 9-307(e); *see* U.C.C. § 9-102(a)(71) (defining "registered organization").

[146]U.C.C. § 9-307(b)(2), (3); *see* U.C.C. § 1-201(b)(25) (defining "organization").

[147]U.C.C. § 9-307(b)(1).

[148]U.C.C. § 9-307(c).

[149]ML art. 91.

a result, the security interest will continue to be held to have been effectively created even after the move of the asset or the grantor to jurisdiction B whether or not the creation requirements of the law of jurisdiction B have been satisfied.[150]

However, for third-party effectiveness and priority issues, under the Model Law, the applicable law will be that of the location of the asset or the grantor "at the time when the issue arises." This is the time of the occurrence of the event that creates the need to determine the law that would be applicable to third-party effectiveness or priority.

For example, if an insolvency proceeding commences in State B in respect of the grantor that is located in State A at the time of the creation of a security interest in a receivable, the law applicable to the effectiveness of the security interest will be the law of State B if at the time of commencement of the insolvency proceeding the grantor is located in State B. As a result, for the security interest to be effective against the insolvency administrator either in Jurisdiction A or in Jurisdiction B, the third-party effectiveness requirements of the law of Jurisdiction B must have been fulfilled prior to the commencement of the insolvency proceeding.[151]

The approach in Article 9 is similar.

#### 4. Change of applicable law because of a change in the location of the asset or the grantor

Even though this matter is addressed in the chapter on third-party effectiveness as an issue of continuity in effectiveness, it should also be discussed in this context as it relates to a change of the law applicable to a security interest.

If the applicable law changes, as a result of a change in the location of the asset or the grantor, a security interest remains effective against third parties until the earlier of: (a) the time third-party effectiveness would have lapsed under the previously applicable law; and (b) a short time af-

[150] Guide to Enactment, paras. 491 and 492.

[151] Guide to Enactment, paras. 491 and 492.

ter the applicable law changed as a result of a change in the location of the asset or the grantor.[152]

If the security interest is continuously effective against third parties under this rule, its third-party effectiveness and, possibly, its priority date back to the date they were first established under the law that was first applicable.[153]

The time period should be sufficient to allow the secured creditor to find out about the change in the applicable law and take the necessary steps to ensure the continuity of the third-party effectiveness of its security interest (e.g., 45–60 days).[154]

Article 9 takes a similar approach when a change of applicable law occurs. It provides various grace periods for the secured party to continue the perfection and, in some cases. the priority of its security interest following a change in applicable law.[155]

### 5. *Renvoi*

To avoid circularity, uncertainty as to the law applicable to security interests and a result that would be contrary to the expectations of the parties, the Model Law excludes *renvoi*.[156] Thus, the reference to the law of a jurisdiction is to the substantive law rules (not to the conflict-of-laws rules) of that jurisdiction (for an exception in the case of a country with several jurisdictions, *see* section IX.6 below).

The approach in Article 9 is similar. In its conflict-of-laws rules, Article 9 refers to the "local law" of a jurisdiction. That term excludes the conflict-of-laws rules of the jurisdiction.[157]

### 6. Overriding mandatory rules and public policy

Following generally acceptable conflict-of-laws principles, the Model Law provides that the forum may exclude the ap-

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[152]ML art. 23(1).

[153]ML art. 23(2).

[154]Guide to Enactment, para. 132.

[155]U.C.C. § 9-316.

[156]ML art. 92 and Guide to Enactment, para. 494.

[157]U.C.C. § 9-301, cmt. 2.

plication of a provision of the applicable law it is manifestly contrary to its public policy or overriding mandatory rules.[158]

For example, if under the law of the forum (whether general notions of fairness or specific statutory provisions) a security interest may not be created in employment benefits (at all or up to a certain amount), the forum may refuse to recognize the validity of a security interest even though it was validly created under the applicable law.

The forum may do so even if a security interest is contrary to overriding mandatory rules or the public policy of another jurisdiction with a close connection to a secured transaction.[159] These rules generally apply not only to judicial proceedings in the forum but also to arbitral proceedings.[160]

However, to avoid undermining certainty as to the law applicable to third-party effectiveness and priority, a court or arbitral tribunal in the forum may not apply its own third-party effectiveness and priority rules in the place of the displaced provisions of the applicable law. It has to apply other third-party effectiveness and priority provisions of the applicable law.[161]

Article 9 does not have a rule that permits a court to override, based on public policy, a mandatory conflict-of-laws rule in Article 9.

### 7. Federal State clause

The Model Law deals with the law applicable where the country whose law is applicable to an issue has two or more territorial units or jurisdictions, each of which has its own substantive law, and possibly its own conflict-of-laws rules.[162]

In principle, the Model Law provides that a reference to the law of a multi-unit country is in principle a reference to the law applicable in the relevant unit and not to its conflict-of-laws rules (exclusion of *renvoi*). For example, in the case of a security interest in a receivable created by a grantor

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[158]ML art. 93(1) and (3).

[159]ML art. 93(2) and (4).

[160]ML art. 93(5).

[161]ML art. 93(6).

[162]ML art. 95.

with its central administration in territorial unit A, the law applicable to that security interest is in principle the law of territorial unit A.

However, if the internal conflict-of-laws rules of the multi-unit country or, in the absence of such rules, of the relevant territorial unit, refer security interests to the law in force in another territorial unit of that country, the substantive law of that other unit will apply (internal *renvoi*). In the above-mentioned example, if territorial unit A has a conflict-of-laws rule under which the law applicable is the law of the grantor's statutory seat and that place is in territorial unit B, the substantive law of territorial unit B will apply.

The purpose of this exception to the exclusion of *renvoi* rule is to ensure that, where the applicable law is that of a unit of a multi-unit country, a court in a country outside that multi-unit country will apply the substantive law of the same unit as a court in that multi-unit State would do under its internal conflict-of-laws rules.

Since Article 9 is state law (i.e., the law of a territorial unit), Article 9 contains no similar provision.

## X. Conclusions

In recognition of the importance of conflict-of-laws rules, both the Model Law and Article 9 contain a comprehensive set of conflict-of-laws rules dealing with the law applicable to security interests in all types of movable assets that fall under the scope of application of the Model Law or Article 9.

Under the general conflict-of-laws rules of the Model Law, the creation, third-party effectiveness, priority and enforcement of a security interest in a tangible asset is referred to the law of the jurisdiction in which the asset is located (*lex situs*); and, in the case of a security interest in an intangible asset, those matters are referred to the law of the jurisdiction in which the grantor is located.

Under the general conflict-of-laws rules of Article 9, the parties to a secured transaction may choose the law applicable to the attachment and enforcement of a security interest, as long as the chosen law bears a "reasonable relation" to the jurisdiction whose law is chosen. The "reasonable relation" may be established, for example, by one of the parties or tangible collateral being located in that jurisdiction.

The perfection and priority of a security interest in a tangible asset perfected by possession are referred to the law of the jurisdiction where the asset is located. The priority of a security interest in a tangible asset not perfected by possession is also referred to the law of the jurisdiction in which the asset is located. Otherwise, the perfection and priority of a security interest are generally referred to the law of the debtor's location.

In addition, some asset specific conflict-of laws rules of the Model Law are substantially the same as those in Article 9 (e.g., the second option for a security interests in a right to funds credited to a bank account), and other asset-specific rules of the Model Law are somehow different from those in Article 9 (e.g., for security interests in intellectual property and non-intermediated securities).

Despite the differences between the conflict-of-laws rules of the Model Law and those of Article 9, for security interests in core commercial assets, such as equipment, inventory and receivables, the conflict-of-laws rules in the Model Law and Article 9 are largely in harmony. As a result, adoption by a jurisdiction of the Model Law should in most respects be beneficial for planning secured transactions that touch both an Article 9 jurisdiction and a jurisdiction that has adopted the Model Law.

# Comments of a Transactional Lawyer Inspired by Professor Schroeder's article "Sense, Sensibility and Smart Contracts

*Peter Siviglia*[*]

*This little article was inspired by the paper of Professor Jeanne Schroeder, "Sense, Sensibility and Smart Contracts", in the May 2020 issue of the Uniform Commercial Code Law Journal.*

*The article, written by a transactional attorney, maintains that there is, and can be, no such a thing as a "smart contract" embodied in computer code that will eliminate the need for lawyers and courts.*

*The article also decries the inevitability of ambiguity in verbal agreements, closing with a maxim of the great coach of the Green Bay Packers, Vince Lombardi, and a poem, both, in their own ways, challenging that inevitability.*

**First, Full Disclosure**: I am a fossil, born in Brooklyn, N.Y., in 1940. Perhaps that is why I did not know what a

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*Peter is the author of one of Thomson Reuters' best selling works in the commercial field: Commercial Agreements — A Lawyer's Guide to Drafting and Negotiating, Thomson Reuters, supplemented annually, and now in its 28th year of publication. In 2019 Carolina Academic Press published a new work, Transactional Skills — Contract Preparation and Negotiating, and a second revised and expanded edition of Exercises in Commercial Transactions. In addition, Peter has written numerous articles on contract preparation and other legal topics, and a book of poetry and other writings, The Sidelines of Time, Archway Publishing. He also lectures on contract preparation and business transactions at Continuing Legal Education programs.*

"smart contract" is until I read Professor Schroeder's article. Also, Brooklyn common "sense"—not "sensibility"—teaches that there ain't no such thing as a "smart contract". There are smart lawyers and good contracts, but not "smart contracts."

The comments that follow focus primarily on Part V of the article: "**Ambiguity and Natural Language**".

Professor Schroeder notes that proponents of smart contracts maintain that smart contracts "would be unambiguous because they are a series of pre-programmed instructions", written in code, not words. Well, those proponents are right about one thing: A Contract is a Set of Instructions. A contract is a simply set of rules for a business relationship like a partnership or for a transaction like the purchase of a business.

Being a set of instructions, the prime directive in the preparation of any contract is **"Accuracy Stated as Simply as Possible."** But the proponents are wrong about a smart contract's being unambiguous—and surely it will not be comprehensive—for two reasons:

*First*, the statement assumes that programmers will be flawless in creating code that eliminates ambiguity: a mighty assumption since they're translating contracts expressed in verbal language; and

*Second, and most significantly*, no model or form, regardless of the language in which it is written, code or otherwise, can anticipate all the variables that might arise in any transaction, like a partnership, or the license of intellectual property, or shareholder or employment arrangements, or the acquisition of a business.

*Commercial Agreements: A Lawyer's Guide to Drafting and Negotiating*[1] contains models (precursors to the smart contract?) for numerous types of transactions accompanied by extensive commentary and legal citations. Philip Beaumont of Chadbourne Park, who reviewed the work when it was first published more than 25 years ago, called me before submitting the review to caution that no model will fit any transaction perfectly. I referred Mr. Beaumont to § 1.4, which

[1]Peter Siviglia, published by Thomson Reuters.

reads in part as follows, and which he mentioned in his review:

> The function of this work is to provide adaptable models for several common types of commercial transactions . . .

The key word in the foregoing [sentence] is "adaptable". No matter how standard or basic a provision may seem, it must be examined carefully to determine whether any changes are required to conform it to the particular transaction. The greatest danger in using forms — enhanced by computer banks with their instant access to data — is the use of clauses without critical examination. No form, no matter how cleverly prepared, will fit every transaction just by filling in blanks or substituting alternate clauses. If a form happens to fit a transaction, the fit is only by coincidence . . . Even forms as basic as those contained in the first three chapters — a promissory note, a guarantee and a pledge of stock — will require adaptation to each particular situation.

So, as much as I would like to think that those models are, in modern terms, "smart", they're not. If I did my job well, they're adaptable, identifying most, if not all, of the relevant considerations, and offering at least one method of treating them. The silicon-based unit cannot—at least not yet, and maybe never—anticipate all the variables and their solutions in a transaction. It takes the carbon-based unit to do that. Let me give you an example. Loan agreements for real estate development projects typically require property damage insurance and audited financial statements. In a real estate development project (1) where the borrower was a single purpose company created solely to acquire the real estate and to build a high rise condominium and to exploit the property, and (2) where the existing structure was to be demolished, and (3) where the borrower and its assets alone secured payment of the loan (known as "project financing"), we persuaded the lender not to require property damage insurance during the demolition phase and not to require certified financial statements.

Only the carbon-based unit, applying itself to a "real" situation in "real" time, will recognize issues like that and develop solutions.

* * *

Let's now address ambiguity in the contract. Ambiguity is

the greatest trickster in contract preparation, and it is the fabric from which litigators style their suits. Let me give you a few examples:

A. Misplacement of modifiers: Relative clauses and prepositional phrases.

Ambiguous: The employee was entitled to severance payments "on termination of her employment by the Company." There are two possible antecedents of the prepositional phrase "by the Company": "termination" and "employment").

From the company's point of view, the relevant language should have been written: "on termination by the Company of her employment".

**Place the phrase next to the word it modifies.**

From employee's point of view, the relevant language should have been written: "on termination of her employment with the Company".

Ambiguous: "The fee will not be payable with respect to renewals or extensions of contracts which are concluded after the year 2000". There are two possible antecedents of the "which" clause: "renewals or extensions" and "contracts").

The intended meaning: The fee will not be payable with respect to contact renewals or extensions which are concluded after the year 2000.

**Place the relative clause next to the word or words it modifies.**

**Better yet, rewrite the sentence eliminating the clause**: The fee will not be payable with respect to a renewal or extension of any contract if the renewal or extension is concluded after the year 2000.

B. Beware the Use of Pronouns:

Ambiguous: John wrote to Bob every day while **he** was away.

Corrected: John wrote to Bob every day while John was away.

**Repeat the noun: Avoid the use of pronouns.**

C. Punctuation:

Just for fun: "It's time to eat children." versus "It's time to eat, children". Without that comma, the kiddies are on the menu.

On a more serious note, let's look at a comma error that

meant $5 million. Truckers in Maine claimed they were entitled to overtime pay because the following statutory exclusion from overtime pay did not apply to them. The statute excluded from overtime pay:

the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment **[no comma]** or distribution of:

(1) Agricultural produce;

(2) Meat and fish products;

(3) perishable food.

The truckers maintained that the word "distribution" was the second object of the preposition "for", to wit: "packing for shipment or **[for]** distribution. Because a comma did not follow the word "shipment", the court agreed with the truckers, resulting in their receiving about $5 million in overtime pay.

Please note that the problem raised by the punctuation in the foregoing example could have been solved by proper itemization without changing the punctuation, to wit:

the (A) canning, (B) processing, (C) preserving, (D) freezing, (E) drying, (F) marketing, (G) storing, (H) packing for shipment [**no comma**] or (I) distribution of . . . *[From the trucker's point of view, the "(I)" before "distribution would be omitted.]*

Yes, most of those errors in ambiguity are grammatical errors. Therefore, it is worth noting what the author, Stephen King, has said concerning grammar: "Bad grammar produces bad sentences." And bad sentences produce playgrounds for litigators.

What disturbs me most in Professor Schroeder's article is the nearly total, if not total, acceptance of the inevitability of ambiguity. Yet, having practiced transactional law continuously for more than 50 years, I cannot accept that acquiescence. All of the contracts that I have written and that have been involved in litigation—and there haven't been many—have been enforced against the defaulting party, without exception on summary judgement, based solely on the words of the contract. In one case a Federal District Court in New York, quoting in its opinion the entire contract (it was only one page), wrote "Nothing could be more clear . . ."; and recently a Texas appellate court, in a unanimous

three-judge opinion, repeatedly citing the contract's "clear wording" and "unambiguous" text, concluded that "Under the Agreement's unambiguous language . . . [the defendant] must pay the Fee." These two contracts alone meant, respectively, about $8.5 million about $21 million to our clients.

In my more than 50 years of practice, I have never encountered a concept, no matter how complex—including complex mathematical formulae often found in financing documents—that could not be expressed precisely in the English language. The English language is a magnificent instrument, and when used properly, it is capable of the precision of any code. And unlike code, language doesn't have to be created. It need only be used carefully.

How good is the English language? Well, in one transaction with a French speaking party, we had to have the contract that I had written in English translated into French. In the midst of doing the translation, the translator called to tell me that the French language could not express some of the terms with the accuracy of English. I told him to do the best he could. (I didn't ask for a language supremacy clause. I didn't want to risk losing on the language that would govern the contract, because we did have arbitration in England.)

The fault, then, dear Reader, lies not in our language, but in our writers, who are their own worst enemies. Why? Because writers tend to read the words they write to mean what they think they should mean, not what they actually mean. To put it in biblical terms, it is easier for a lawyer to pass through the eye of a needle than to write a sentence that means the same thing to everyone who reads it and means what the lawyer intended it to mean.

Three of the most common human flaws in contract preparation are lack of knowledge (*e.g.*, grammar), lack of skill, and lack of patience.

With regard to lack of knowledge, learn the rules of the language, which should have been taught in secondary school. That's where I learned them.

With regard to lack of skill, you can help attune your mind to ambiguity through your expository writing. Take the same care in your expository writing (correspondence; memoranda; briefs) as you would writing a contract.

And with regard to lack of patience, employ religiously the two disciplines that my wife, the English teacher, impresses on her students. I do.

- Read the document aloud: This distancing focuses the mind on the text, revealing flaws that hide in silence.
- Set the document aside, preferably overnight: Distancing results in your reading the text more objectively and critically, as if someone else had written it.

At one point in her article, Professor Schroeder cites two commentators who point to problems in contracts "drafted under tight schedules". However, in over 50 years of practice, I have never encountered a deal where time was "of the essence". In one transaction in which our client had raised a syndicate of lenders to finance a management buy-out of a publicly-held company, my client asked me, following a meeting in September with management and its attorneys, when I thought the transaction would close. I replied "not for a while; there'll be litigation which will be settled; so probably not until next August at the earliest." "Impossible!!!", he cried. "I'll lose my syndicate if it doesn't close by December." "Well, it won't", I said, "and you won't lose your syndicate." The result? Remarkably, the deal closed the following August, and our client did not lose any member of the syndicate.

Once upon a time, when I wore a younger man's clothes, a partner pressed me for a memo that I was working on. I replied: "The problem is complex. Do you want it fast or do you want it right?" The partner backed off with no adverse consequences.

I trust Ms. Austen and Professor Schroeder would agree that those two incidents represent the triumph of sense over sensibility. So if you are being pressed to produce an agreement for which you need more time to do the job right, and if you're denied the time you need, you can call me. I'll do one of two things: I'll get you the time you need . . ., or I'll get you fired.

* * *

On reflection, proponents of smart contracts and I—and perhaps Professor Schroeder—have one objective in common.

The proponents argue, as the Professor notes, that smart contracts "may eventually virtually eliminate the role of courts in contracting", or, simply put, eliminate contract litigation. While I, with desperate hope, broadcast that **the task of transactional attorneys is to place commercial litigators on the endangered species list**.

* * *

Well, I think we should end this little sermon with the insightful and sensible words of Vince Lombardi, the legendary coach of the Green Bay Packers:

The only place success comes before work is in the dictionary.

Or, to put it in terms of poetic sensibility —

***Writer's Rhyme*****
*Word by word*
*line by line,*
*I'm gonna make*
*this writing fine.*
*I'll reread*
*'til I know*
*that each sentence*
*says it so.*
*Check the grammar*
*and the meaning;*
*be the critic;*
*do the screening.*
*Dictionary's*
*not for show:*
*Helps me get*
*those words to flow.*
*Watch the diet;*
*hem it in.*
*Do not fear*
*to make it thin.*
*Simple is*
*a goal to praise:*

*Let's untie*
*that wordy phrase.*
*Every word*
*let's be sure*
*follows the last*
*with meaning pure.*
*"Won't be easy,"*
*so 'tis said,*
*but effort will*
*put me ahead.*
*Word by word*
*line by line,*
*I'm gonna make*
*this writing fine,*
*even though*
*it takes some time,*
*I'm gonna make*
*this writing fine;*
*I'm gonna make*
*this writing fine.*

# Autonomous Interpretation of CISG Cases in the United States: The Ultimate Chimera

*Francesco Mazzotta, Editor in Chief*[*]

*Despite the fact that CISG has been in force for several years, despite the fact that the number of CISG cases is growing, despite some good examples, it is clear many U.S. courts have not embraced the "international" character of the Convention. To the contrary, many of them have taken steps to "domesticate" the CISG. As long as these trends continue, American jurisprudence will have a limited impact on the development of the CISG.*

This note reviews cases issued by federal courts in the United States over the past three years that sought to interpret various provisions of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Interestingly, of the many federal cases, only a handful actually provide an in-depth analysis of CISG provisions. This article focuses on the *Delchi*[1] problem, *i.e.*, Uniform Commercial Code (UCC) case law can be used to construe the meaning of CISG provisions.

Article 7(1) of the CISG provides:

> In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

CISG Article 7(1). As one prominent commentator explained:

> [I]n interpreting the CISG regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international

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[1]Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995).

> trade. Many legal writers construe the reference to the obligation to have regard to the convention['s] "international character" in its interpretation to mean that the CISG is to be interpreted autonomously, not nationalistically, *i.e.* not in the light of domestic law, despite the fact that once put in force, international conventions become part of the domestic law. Consequently, one should not have recourse to any domestic concept in order to solve interpretive problems arising from the CISG. Many commentators have argued that what has just been said is true even where the expressions employed by the CISG (but this is generally true for any uniform law convention) are textually the same as expressions which within a particular legal system have a specific meaning — such as avoidance, reasonable, good faith, trade usages, etc.— they must be interpreted autonomously. Such expressions as well have to be considered to be independent and different from the domestic concepts, since the expressions employed by uniform law conventions, such as the CISG, are intended to be neutral. Indeed, it has often been noted that any choice of one expression rather than another is the result of a compromise and does not correspond to the reception of a concept peculiar to a specific domestic law, at least where it is not apparent from the legislative history that the drafters wanted a specific concept to be interpreted in the light of a specific domestic law.

Franco Ferrari, Gap-Filling and Interpretation of the CISG: Overview of International Case Law, 7 Vindobona Journal of International Commercial Law & Arbitration, 64–65 (2003) (internal quotation marks omitted).

With this background, it is instructive to revisit the *Delchi* court's reasoning. As described:

> An early U.S. federal court of appeals opinion stated, without benefit of supporting reasoning or authority, that "[c]aselaw interpreting analogous provisions of Article 2 of the [U.C.C.], may also inform a court where the language of the relevant CISG provisions tracks that of the UCC." This statement flatly contradicts Article 7(1), which requires that the Convention be interpreted from an international perspective, and it threatens the very purposes of the CISG — to replace divergent national sales law with uniform international rules for international sales transactions. It has nevertheless been repeated in a disturbing number of subsequent U.S. CISG decisions, and actually put into action in several . . .
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> . . .
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> The practice of using domestic U.S. sales law cases as a guide

> to interpreting the CISG, and the decisions that have employed the technique, have been roundly condemned by scholars—to no effect, thus far, in the courts. This may reflect an increasing tendency among U.S. judges to look primarily to other (U.S.) judicial opinions for guidance in their decisions. Thus it may well be that, until an American court issues a published opinion condemning this violation of a U.S. treaty obligation, the pernicious practice of consulting decisions on U.C.C. Article 2 for guidance in construing the Convention will persist.

John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, 128 (Harry M. Flechtner ed., 4th ed. 2009).

The United States has a long history of issues with noncompliance with CISG Article 7(1), and the last three years are no exception. Here, I will highlight two cases representing the worst offenders and one case shining some light of hope in curtailing homeward trends.

The award for worst offender goes to *Hellenic Petroleum LLC v Elbow River Marketing LTD*, decided by the U.S. District Court in California's Eastern District.[2]

The basic underlying issue before the district court was whether the parties had a contract under the CISG. In the course of analyzing the issue, the district court noted that the complaint failed to allege that there was an offer and an acceptance. It added:

> Another missing element is consideration. However, CISG is neither explicit nor specific on the element of consideration, but "[b]ecause caselaw interpreting the CISG is relatively sparse, [courts are generally] authorized to interpret it in accordance with its general principles, 'with a view towards the need to promote uniformity in its application and the observance of good faith in international trade.' " *Hanwha Corp. v. Cedar Petrochemicals, Inc., 760 F. Supp. 2d 426, 430 (S.D.N.Y. 2011)* (citation omitted). In particular, "[c]aselaw interpreting analogous provisions of Article 2 of the [UCC] may . . . inform a court where the language of the relevant CISG provisions tracks that of the UCC." *Delchi*, 71 F.3d at 1028; *see also Martini E Ricci Iamino S.P.A., 30 F. Supp. 3d at 965* ("CISG is the international analogue to Article 2 of the Uniform Commercial Code."). The Court therefore looks to Article II of the

[2]Hellenic Petroleum LLC v. Elbow River Marketing LTD., 2019 WL 6114892 (E.D. Cal. 2019).

> UCC for guidance on the element of consideration. Under that article, "[v]alue is any consideration sufficient to support a simple contract," but "[a]bsence or failure of consideration is matter of defense as against any person not a holder in due course[]." ULA Appendix I, Uniform Commercial Code §§ 25, 28. Hellenic Petroleum, however, fails to allege what was the consideration for limiting the delivery of propane on its account to $1 million. Without consideration, it appears to the Court that the oral agreement to limit the delivery of propane has an effect of amending the written agreements, as opposed to an independent contract.

*Hellenic*, at *3 (citation to the record omitted).

I disagree with the district court's assessment that the "CISG is neither explicit nor specific regarding consideration." On the contrary,

> [t]he CISG takes a very clear approach towards consideration. Article 29(1) of the CISG states that '[a] contract may be modified or terminated by the mere agreement of the parties' thereby clearly indicating that there is no place for consideration in the CISG. Indeed, the Secretariat Commentary specifically states that Article 29(1) of the CISG was intended to 'eliminate' and 'overrule' the common law requirement of consideration. Consideration, however, was not only discussed in regard to Article 29(1) of the CISG but also in regard to other Articles in the CISG and likewise rejected. [Professor John] Honnold concluded from the constant rejection of the doctrine of consideration during the negotiations of the CISG that this permanent rejection of consideration under the CISG by the working party members when the issue came to the fore (because consideration was a barrier to enforcing the agreement) amounted to one of the 'general principles' pursuant to Article 7(2) of the CISG.

Petra Butler, The Doctrines of Parol Evidence Rule and Consideration—A Deterrence to the Common Law Lawyer?, in Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods 54–66 (Singapore 2005).[3]

The second worst offender would be *Acco, Ltd. v. Rich Kids*

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[3] *See also* Camilla Baasch Andersen in A Practitioner's Guide to the CISG, 324 (Francesco G. Mazzotta ed., 2d ed. 2018) (dispensing with consideration in case of contract modification "is in line with the decision to avoid the doctrine of consideration throughout the CISG"); Peter Huber, A New Textbook for Students and Practitioners, 24 (2007).

*Jean Corp.*, decided by the U.S. District Court for the Southern District of New York.[4]

> In their post-trial briefing, the Rich Kids Defendants and the Paco Defendants each contend that the United Nations Convention on Contracts for the International Sale of Goods ("CISG") applies to the breach of contract claim, at least as to the first two purchase orders to GTH, since GTH is a Chinese company. However, this is not material to any of defendants' arguments, since neither group of defendants identifies any relevant differences between the CISG and New York law. Rather, the Rich Kids Defendants make arguments based only on the UCC's provisions and the Paco Defendants argue that any difference between the UCC and CISG is immaterial to their liability for contract-based claims because they never entered an agreement with plaintiffs.

*Acco, Ltd.* at *4, n.4 (citations omitted).

Even if the outcome would be identical, it is erroneous to conclude that there are no "relevant differences between the CISG and New York law." Indeed, there are differences that the district court failed to consider.

> A number of differences between the two codes were identified in *Miami Valley Paper, LLC v. Lebbing Engineering & Consulting Gmbh, 2009 WL 818618 (S.D. Ohio 2009)*. In particular, the court noted that the [CISG] applies the common law "mirror image" rule for contract formation, and lacks the equivalent of a statute of frauds or parol evidence rule. Relying on *Miami Valley Paper*, the decision in *Weihai Textile Group Import & Export Co., Ltd. v. Level 8 Apparel, LLC, 2014 WL 1494327 (S.D. N.Y. 2014)*, explained some additional variances:
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> > The [CISG] differs from contract principles under New York law in a few important ways. First, "the CISG has no statute of frauds, and does not require contracts for sale to be concluded in writing, instead allowing a contract to be proved by any means, including witnesses. Similarly, a contract may be modified without a writing. Second, "the CISG contains no parol evidence rule but allows the Court to consider statements or conduct of a contracting party to establish, modify, or alter the terms of a contract."

George W. Thompson, Transnational Contracts, § 4:1 (2020) (citations omitted).

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[4] Acco, Ltd. v. Rich Kids Jean Corp., 2017 WL 4350576 (S.D. N.Y. 2017).

Reliance on "presumed" analogies between New York law and the CISG to apply the UCC was similarly addressed by the Court of Appeals for the Second Circuit, which in a recent summary order noted:

> On February 4, 2016, an arbitration panel of The Cocoa Merchants' Association of America, Inc. ("CMAA") ruled that Cooperativa Agraria Industrial Naranjillo Ltda. ("Naranjillo") had defaulted on its contractual obligations to deliver cocoa butter to Transmar. It ordered Naranjillo to pay Transmar $2,606,626.60. The award was based on six nearly identical contracts Naranjillo and Transmar entered into on August 30, 2012 for delivery of UTZ Certified cocoa butter over the course of six months in 2013.
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> The district court vacated the CMAA's award by order of September 22, 2016. *Cooperativa Agraria Industrial Naranjillo Ltda. v. Transmar Commodity Group Ltd., No. 16-cv-3356, 2016 WL 5334984 (S.D.N.Y. Sept. 22, 2016)* ("Naranjillo"). . . . The district court relied on Section 10(a)(4) [of the Federal Arbitration Act], which allows for vacatur, in relevant part, "where the arbitrators exceeded their powers." It found that Naranjillo and Transmar had not actually agreed to arbitrate their disputes before the CMAA or anywhere else, so the CMAA did not have any power to rule on their dispute. *Id.* at *4–6.
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> In coming to this conclusion, the district court applied New York law. *Naranjillo*, 2016 WL 5334984, at *4. It did so in error. As a contract between the United States and Peru, it is governed by the CISG. "Generally, the CISG governs sales contracts between parties from different signatory countries" unless the parties clearly indicate an intent to be bound by an alternative source of law. *Delchi*, 71 F.3d at 1027 n.1 ("The CISG . . . is a self-executing agreement between the United States and other signatories . . ."); Status, United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (showing that Peru is a signatory country). Although the CMAA's standard contract contains a choice-of-law provision designating New York law, the parties dispute whether that document is part of these contracts at all. The CMAA's choice of law provision therein therefore cannot guide us.
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> Even if the district court is correct that the "caselaw interpreting the CISG is relatively sparse," that fact alone does not warrant substituting New York law for the CISG. In fact, we have specifically [held] that "[b]ecause there is virtually no case law under the [CISG, at least as of 1995], we look to its

> language and to 'the general principles' upon which it is based." *Delchi*, 71 F.3d at 1027. Moreover, New York law differs from the CISG in several important respects. In particular, Article 8(3) requires courts to give "due consideration" to extrinsic evidence of the reasonable expectations of the parties if their subjective intent is at odds. *See* U.N.C.I.S.G. Art. 8(3), available at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d 1384, 1389 (11th Cir. 1998)* (calling Article 8(3) "a clear instruction to admit and consider parol evidence . . ."). Moreover, Article 9(2) evinces "a strong preference for enforcing obligations and representations customarily relied upon by others in the industry," which, of course, cannot but be demonstrated through extrinsic evidence. *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc., 201 F.Supp.2d 236, 281 (S.D.N.Y. 2002), rev'd in part on other grounds, 386 F.3d 485 (2d Cir. 2004)*; U.N.C.I.S.G. Art. 9(2). New York law, by contrast, has long applied the "four corners rule" that prohibits extrinsic evidence unless the face of the document is ambiguous. *See Kass v. Kass, 91 N.Y.2d 554, 566-67, 673 N.Y.S.2d 350, 696 N.E.2d 174 (1998)*.
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> The district court erred as a matter of law by relying primarily on the face of the contract and the document allegedly incorporated by reference. It should have also considered extrinsic evidence concerning "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties," U.N.C.I.S.G. Art. 8(3), and "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type" at issue here. U.N.C.I.S.G. Art. 9(2). Because additional fact-finding will be required in order to adduce such evidence, the district court abused its discretion in failing to allow discovery, hold an evidentiary hearing, or both. *See Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 103 (2d Cir. 2013)* ("We review a decision to deny an evidentiary hearing for abuse of discretion."). Of course, we express no view as to whether such extrinsic evidence should lead to the same or a different result.

Transmar Commodity Group Ltd. v. Cooperativa Agraria Industrial Naranjillo Ltda., 721 Fed. Appx. 88, 89–90 (2d Cir. 2018) (some internal citations omitted). Thus, once

again, UCC and CISG are not interchangeable,[5] and relying on the "presumed" analogies between the two as a way to avoid the CISG and its "sparse" case law directly contravenes the CISG, which is binding, federal law.

Similarly, trial and appellate counsel do very little, if anything, to steer the courts in the right direction. Additionally, counsel's role in the unhealthy development of CISG case law is not limited to the litigation phase. In fact, it goes back to the negotiation of agreements potentially subject to the CISG. It is at that time that counsel take great care to avoid the application of the CISG, as the relatively small number of disputes where the CISG applies would suggest. It appears that sticking to the UCC seems more predictable than the CISG, a less developed (in the United States) and less predictable set of rules.

However, there are signs of hope, at least from some courts, that autonomous interpretation can be achieved. One case deserves mention because of its reliance and/or mention of non-U.S. sources: *Zodiac Seats US LLC vs Synergy Aerospace Corp.*, decided by the U.S. District Court for the Eastern District of Texas.[6]

> Synergy argues that it is based in Colombia, while Zodiac argues Synergy is based in Brazil. Colombia adopted the CISG in 1999, and reaffirmed it in 2000. *See* Corte Constitucional [CONSTITUTION] May 10, 2000 (Colum.); *see also* U.N. General Assembly, United Nations Commission on International Trade Law: Case Law on UNCITRAL TEXTS (Clout), 4, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/123 (Sep. 26, 2012). Brazil entered the CISG in 2014, after the formation of the contracts (*e.g.*, purchase orders) at issue. *See* Juan Antonio Gaviria-Gil, The Puzzle of the Lack of Colombian Cases on the CISG, 26 INTERNATIONAL LAW, Revista Colombiana de Derecho Internacional, 289, 301 (2015). Thus, for the CISG to apply, Synergy must establish that its place of business with regard to the contracts at issue was in Colombia.

*Zodiac*, at *2 (some record citations omitted).

Where, for example, the parties know that the contract being

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[5] *See also* William P. Johnson et al., International Contracts Committee, 53 Year in Rev. (ABA) 61, 63–64 (2019), Kristen David Adams & Candace M. Zierdt, C.I.S.G., 74 Bus. Law 1311, 1312–13 (2019).

[6] Zodiac Seats US LLC v. Synergy Aerospace Corporation, 2019 WL 1776960 (E.D. Tex. 2019).

> negotiated and concluded in State A is to be performed in State B, where the seller has another place of business, the text of Article 10 does not give any indication as to which criteria should prevail in determining the place of business. Internationality and Private International Law, 4 INTERNATIONAL CONTRACT MANUAL § 84:7 (citing Bianca-Bonell Commentary on Int'l Sales Law, [Giuffrè]: Millan (1987), available at http://www.cisg.law.pace.edu/cisg/biblio/preamble-bb.html).

*Zodiac*, at 3, n.2.

> At issue in this case is not just from where communications emanated, but also when those communications were sent. Scholars interpreting the CISG explain that when Article 10 "refers to the performance of the contract, it is referring to the performance that the parties contemplated when they were entering into the contract." Guide to CISG Article 10, Secretariat Commentary, available at PACE LAW SCHOOL INSTITUTE OF INTERNATIONAL COMMERCIAL LAW, "Place of Business, subparagraph (a)," http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-10.html (last updated Aug. 29, 2006). Moreover, "[t]he phrase 'the contract and its performance' refers to the transaction as a whole, including factors relating to the offer and acceptance[,] as well as the performance of the contract. The location of the head office or principal place of business is irrelevant for the purposes of [A]rticle 9 and [A]rticle 10 unless [that location] has the closest relationship to the contract and its performance." Secretariat Commentary on Article 9, Article 10 regarding 1978 Draft, CISG, available at https://cisgw3.law.pace.edu/cisg/text/secomm/secomm-10.html. Thus, the Court must consider from where Synergy's communications with Zodiac regarding entering into the contract emanated.

*Zodiac*, at *3.

> The parties do not clarify what role, if any, German Efromovich held in the negotiations of the contract. Nor do the parties state when the Brazil meeting took place, or if it was related to the dispute presently before the Court. "The location of the head office or principal place of business is irrelevant" for determining Synergy's principal place of business. *See* 4 INTERNATIONAL CONTRACT MANUAL § 84:7 (internal quotations and citations omitted).

*Zodiac,* at *3, n.4.

The above to show that some courts are less reluctant to go beyond American caselaw, and more willing to embrace the international character of the CISG by considering sources that are free from domestic bias.

In conclusion, despite the fact that CISG has been in force for several years, despite the fact that the number of CISG cases is growing, despite some good examples, it is clear many U.S. courts have not embraced the "international" character of the Convention. To the contrary, many of them have taken steps to "domesticate" the CISG. As long as these trends continue, American jurisprudence will have a limited impact on the development of the CISG.

# Current Literature

*Francesco G. Mazzotta*

## Article 2 & 2A

Stephen A. Plass, Federalizing Contract Law, 24 Lewis & Clark L. Rev. 191 (2020) (discussing problems with federalizing contract law).

## Article 9

Heather Hughes, Blockchain and the future of secured transactions law, 3 Stan. J. Blockchain L. & Pol'y 21 (2020) (discussing relationship between blockchain-based contracts and secured transactions under UCC Article 9).

Note, Chasing Perfection: Collateral indications and ambiguous debtor names on financing statements under Article 9, 61 V.C.L. Rev. 2229 (arguing that Article 9 collateral indication requirements on the financing statement must not be construed to require third parties to search outside a secured lender's filings to determine what collateral may be subject to a security interest).

James D. Prendergast, James S. Cochran, and Bradley N. Gibson, Into the Forest Primeval: Is it Real Property or Goods; or, Heaven Forbid, Inventory? 36 No. 2 Prac. Real Est. Law. 11 (2020) (Discussing difficulties in identifying "timber to be cut" as a "good" under Article 9).

## Miscellaneous

Steven L. Schwarcz, Soft Law as Governing Law, 104 Minn. L. Rev. 2471 (arguing for an innovative use of soft law: as a set of rules to choose as all or part of the governing law of business contracts).

Alan M. White, Stop Teaching Consideration, 20 Nev. L.J. 503 (2020) (Survey of contemporary case law to demonstrate the incoherence of, and in some contexts the harm being done by, consideration doctrine).