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The Conflict in Conflicts: Choice of Law in Canada – U.S. Secured Financing Transactions

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The financing of enterprises and transactions that span the Canada–United States border is facilitated by the similarity of the statutory regimes governing secured credit in each country. The Personal Property Security Acts *(PPSAs) of the Canadian common law jurisdictions and Article 9 of the Uniform Commercial Code, which is in effect in all U.S. states, are closely related in conceptual foundation and functional operation. Under both systems, the rights of a secured creditor are determined largely by the application of rules referable to the status of a security interest as "perfected" or "unperfected". However, identification of the particular state or provincial jurisdiction whose law governs a given security interest is of critical importance in determining whether the security interest is perfected and in establishing its consequent priority as against competing interests in the collateral. Ideally, the choice of law rules of Canadian and U.S. jurisdictions would lead to the same conclusion in the context of a given transaction. Unfortunately, the achievement of that ideal was largely undermined by the adoption in Revised Article 9 of a reformulated set of conflicts rules diverging significantly from their PPSA counterparts. This article elucidates the PPSA choice of law rules, identifies the implications of their primary points of departure from the rules of Revised Article 9, and considers whether they should be amended so as to more closely parallel the U.S. regime.*

La similitude du régime légal régissant le crédit assorti de sûretés réelles au Canada et aux États-Unis facilite le financement des entreprises et des opérations transfrontalières. Les lois sur les sûretés mobilières ou relatives aux biens personnels en application dans les territoires de common law du Canada, et l'article 9 du Code commercial uniforme en application dans tous les États américains, reposent sur un fondement conceptuel semblable et se ressemblent dans leur application fonctionnelle. Aux termes des deux régimes, les droits d'un créancier garanti sont dans une large mesure déterminés par

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l'application de règles qui renvoient au statut de la sûreté, soit une sûreté « parfaite », soit une sûreté « imparfaite». Pour savoir si la législation qui régit la sûreté lui donne le statut de sûreté parfaite et, par conséquent, quel rang elle occupe par rapport aux autres sûretés grevant les biens donnés en garantie, il est essentiel de déterminer quelle juridiction a compétence à l'égard d'une sûreté donnée. Idéalement, le choix du droit applicable, d'une province, d'un État ou d'un territoire canadien ou américain, devrait mener aux mêmes conclusions pour une opération donnée. Malheureusement, l'atteinte de cet objectif a été largement freinée par l'adoption, dans l'article 9 modifié, d'un ensemble de règles reformulées en matière de conflit de lois, qui s'éloignent notablement des lois applicables au Canada de common law. L'auteur cherche à expliquer les règles de conflit de lois des lois canadiennes ci-dessus, souligne en quoi elles divergent des règles de l'article 9 révisé et s'interroge sur la pertinence de modifications pour les rapprocher davantage du régime américain.

1. INTRODUCTION

The secured credit and lending transactions of today routinely involve parties and collateral so located as to potentially invoke the law of two or more jurisdictions in the determination of legal rights arising from or in connection with those transactions. The significant integration of the credit economies of Canada and the United States makes it particularly important that market participants are able to identify the source and content of the law that will, to a significant extent, determine the cost and the risk of their dealings with parties or collateral located in a Canadian or American jurisdiction other than their own. Ideally, all potentially relevant Canadian and United States law would be so fully harmonized as to lead to substantially the same outcomes regardless of locale. Fortunately, the broad conceptual and structural similarity of the secured financing law of the two countries is such that trading relationships involving only Canadian and American jurisdictions are likely to be considerably simpler than those involving other legal regimes. However, significant differences remain. In fact, recent reforms in the United States have increased rather than diminished those differences.

This article addresses the legal rules that determine the law governing the primary issues that may arise in connection with a secured financing transaction having features located in both a Canadian PPSA jurisdiction and in an American state. Shortly stated, the subject under discussion is choice of law or, to use the alternative general term, conflict of laws in the law of secured financing.

Conflict of laws issues are complex enough when they require a choice between rules or principles of the national law of two or more

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countries. In the context of secured financing transactions spanning the Canada–U.S. border, the legal picture is further complicated by the fact that, for the most part, the applicable law is not national law. In Canada, the governing law is that of each of the ten provinces and three territories, while in the United States it is that of each of the fifty states.[1] The nexus between the governing law and the state or provincial registry that must be used if a security interest is to be perfected by registration means that the identification of that law is particularly critical in connection with important issues of priority as among competing claimants to property used as collateral. Since each jurisdiction has its own registry, an understanding of the relevant choice of law principles is of primary practical importance.

The complexity produced by this profusion of legal jurisdictions is considerably reduced by the fact that on the American side of the border, the relevant law is embodied in the single statutory regime represented by Article 9 of the Uniform Commercial Code, while on the Canadian side the governing law in all jurisdictions but Quebec is a *Personal Property Security Act*. Article 9 of the Uniform Commercial Code (hereafter Article 9) has been adopted with relatively few and generally minor variations across the United States.[2] Although Canadian law boasts rather less homogeneity, the provincial and territorial *Personal Property Security Acts* (hereafter the PPSA) are substantially uniform in fundamental respects. The PPSA is the progeny of the revolutionary conceptual and functional system of law represented by the early versions of Article 9. However, the two regimes differ in important respects, and

[1] In the Canadian context, the form of security created and governed by the federal *Bank Act*, S.C. 1991, c. 46, ss. 425-436, represents an exception to the general rule stated. However, *Bank Act* transactions represent a much less significant dimension of the secured credit market than do transactions governed by provincial or territorial law, and the unique issues presented by the *Bank Act* are beyond the scope of this article. Notably, recommendations contained in a 2004 Report of the Law Commission of Canada advance the most recent and perhaps most forceful of the repeated calls for abolition of *Bank Act* security. See ***Modernizing Canada's Secured Transactions Law: The Bank Act Security Provisions***, online: Law Commission of Canada <http://www.lcc.gc.ca/about/modern_toc-en.asp>.

[2] References hereafter to Article 9 or Revised Article 9 are to the Uniform Commercial Code Revised Article 9 (2000), adopted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws effective July 1, 2001, except as otherwise indicated. The abbreviation UCC, followed by numbering, is used to identify specific provisions.

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those differences have grown in the ongoing process of statutory revision, particularly as manifested in the most recent iteration of U.S. law, embodied in "Revised" Article 9. The divergence in the respective approaches of the PPSA and Revised Article 9 to choice of law is of particular consequence in cross-border financing transactions.

The following discussion focuses primarily on the provisions of the Canadian PPSAs relevant to the choice of law governing the exercise of rights associated with a security interest.[3] It begins with an overview of those provisions, identifying the primary aspects of their operation in transactions bridging the Canada–U.S. border. References to specific sections or provisions are generally to those of the Alberta *Personal Property Security Act*,[4] which is representative of the model that, with variations not relevant to this subject, is in effect in all common law jurisdictions except Ontario[5] and the Yukon. The pertinent provisions of the Ontario and Yukon statutes are virtually identical to those of the Alberta Act, subject to exceptions that will be noted as relevant. Although the limits of space and authorial expertise preclude a comparably extensive examination of the choice of law rules introduced in the United States by Revised Article 9, the primary features of those rules are identified and the significant differences between them and the PPSA choice of law rules are considered.[6]

2. CHOICE OF LAW UNDER THE PPSA

The analytical and policy challenges of choice of law are multifaceted: no single rule governs all dimensions of a given transaction or relationship. In the context of secured financing, the pivotal transaction is the contract under which money or credit is advanced to a debtor and an interest in identified property is given to the creditor to secure pay-

[3] The unique regime of the Quebec Civil Code is not considered.

[4] R.S.A. 2000, c. P-7, [PPSA].

[5] R.S.O. 1990, c. P.10, [Ontario PPSA].

[6] Formal recommendations for amendment of the PPSA choice of law rules in a number of respects have been advanced by the PPSA Working Group of the Uniform Law Conference of Canada, as part of the Conference's Commercial Law Strategy. These recommendations will be noted when relevant to the discussion. See Report of the Working Group 2003, "Reform of the Law of Secured Transactions" (Report created in 2003 Proceedings of the Annual Meeting of the Uniform Law Conference of Canada), online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=2003&sub=2003> [Report].

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ment of the debt. Where the parties to the contract are located in different jurisdictions or the property subject to a security interest is located in a jurisdiction other than that of the debtor, it is necessary to identify the jurisdiction whose law applies to a number of distinct issues. These issues may be relevant to *inter partes* enforcement of the agreement, to a competition between a secured party and a third party claiming the same property or potentially to both.

In the *inter partes* context, the primary questions calling for a choice of law determination in a secured financing transaction are the following: Is the contract between the debtor and the secured party valid? If it is, does the contract give rise to a security interest? Is the security interest purportedly created by the contract valid? What procedural and substantive law governs realization of the security interest through resort to the collateral (typically by way of seizure and sale) in the event of the debtor's default? The first of these is determined by the general conflict of law principles identifying the proper law of the contract. The rest fall subject to the PPSA.

Inter partes choice of law issues occasionally arise in connection with a secured financing transaction. However, the most difficult and significant choice of law issues are generally not those relating to enforcement as between the immediate contracting parties, but rather those that involve one or more third parties. Since a secured financing transaction by definition involves a property interest conferred on or retained by the secured party, the potential for conflict between a secured creditor and a third party who asserts a property-based claim to the same *res* is patent. The relevant competing interests are typically those of another secured creditor, the debtor's trustee in bankruptcy, an unsecured creditor pursuing judgment enforcement measures or a buyer. The collision of such property-based claims calls for the application of principles of law determining their relative status or priority *inter se*.

The primary determinant of the relative rights of a secured party is the question of whether the security interest held by that person is "perfected." A perfected security interest is simply one with respect to which the relevant legal requirements for its assertion as against a judgment creditor of the debtor or another competing claimant have been satisfied. The resolution of a priority competition in which one of the claims rests on a security interest therefore calls for identification of the

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law determining whether the security interest is "perfected" and the consequences of perfection or non-perfection in terms of assertion of the security interest against competing claimants, including its priority relative to competing claims to the property. The preliminary issues of contractual validity and the characterization and validity of a security interest may also arise in the context of a third party dispute, as they do in an *inter partes* context.

The specific PPSA choice of law rules relevant to these issues will be examined shortly. At this juncture, it suffices to note that the law applicable to the issues recognized by the Act is determined either by the location of the debtor or the location of the collateral at the pertinent time which, generally speaking, is the time of attachment of the security interest.[7]

(a) Characterization

The issue of characterization is foundational to the application of the PPSA, including its choice of law rules. Before one can determine what law applies to the rights associated with a "security interest," it is necessary to establish that a contracting party in fact has such an interest within the meaning of the Act. The same primary definition of "security interest" will determine characterization under all versions of the PPSA and Article 9; that is, a security interest is an interest in personal property that secures payment or performance of an obligation.[8]

Both the PPSAs and Article 9 employ a substance test in the determination of whether a contract creates such an interest.[9] If the contract confers on one party rights in or to property of another with the principal object and result of securing a monetary obligation owed by the other, those rights will be characterized as a security interest, regardless of the form of the contract. Fundamentally, the question is whether the creditor party is entitled to resort to the property for satisfaction if the debtor defaults in meeting his or her payment obligations. An interest that meets the substance test is subject to both the *inter partes* and priority provisions of the applicable statute. Thus, it matters not which law is invoked to determine whether a security interest exists. The fact that this most

[7] The primary rules are found in PPSA ss. 5 and 7.

[8] PPSA s. 1(1)(tt). UCC 1-201(b)(37).

[9] PPSA s. 3(1), UCC 9-101, 9-202.

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fundamental conceptual construct is shared by the PPSAs and Article 9 and is the reference point of their choice of law rules permits the interface of these systems of law in a manner that, in spite of its challenges, is much less difficult than is the interface of either system with the laws of virtually any other country.[10]

Beyond the generic concept of "security interest," all jurisdictions have adopted extended definitions of the term that, for policy reasons not directly relevant to this discussion, bring within the scope of their statutes transactions that do not create interests satisfying the substance test. The content of these extended definitions differs as among jurisdictions. Since the transactions falling within them are subject to the respective statutes for purposes of determining the status of third party rights but not *inter partes* rights under the contract,[11] the issue of characterization raised by these definitions is of significance only in relation to questions of priority.[12]

The extended definition adopted by all PPSA jurisdictions other than Ontario stipulates that "security interest" includes the interest of (a) a transferee pursuant to an outright transfer of an account or chattel paper, (b) a consignor who delivers goods to a consignee pursuant to a commercial consignment and (c) a lessor pursuant to a lease for a term of more than one year, notwithstanding that that interest does not secure

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[10] The *Personal Property Security Act* 1999 (N.Z.), 1999/126 of New Zealand employs the same conceptual structure as do the Canadian PPSAs and Article 9. In addition, law reform initiatives in a number of countries around the world whose economies are relatively less developed than those of North America and Europe are increasingly bringing that generic structure, or one resembling it, to other legal systems.

[11] PPSA s. 55(1) provides, in effect, that those provisions of the Act that govern the exercise of *inter partes* rights do not apply to a transaction that does not secure payment or performance of an obligation.

[12] Issues that are not addressed by the mandatory Article 9 choice of law rules fall within the Uniform Commercial Code's basic choice of law provision in Article 1, which gives the contracting parties considerable autonomy in selecting the applicable law. Those issues include attachment, validity, characterization and enforcement. See the prefatory comment to Part 3 of Article 9. The Article 1 choice of law provision is expressly subject to the mandatory rules of §9-301 through §9-307 with respect to the law governing perfection, the effect of perfection or non-perfection and the priority of security interests. Since perfection affects third party rights, the applicable law must be readily ascertainable and cannot be determined by the agreement of the immediate parties.

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payment or performance of an obligation.[13] The definition in the Ontario Act captures non-security transfers of accounts and chattel paper, but not commercial consignments or leases for a term of more than one year.[14] Article 9 falls between the two, in that it covers commercial consignments[15] and non-security transfers of accounts, payment intangibles, promissory notes and chattel paper,[16] but not true leases of any duration.[17]

The characterization issue that arises from these differences in secondary definition is if, in the determination of whether a transaction creates a "security interest" for purposes of the application of the statute's choice of law rules, a court should apply the law of its own jurisdiction or the law of another jurisdiction. This question was presented to the Ontario Court of Appeal in *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*[18]

The choice of law rule adopted in all the PPSAs with respect to the perfection and priority of a security interest in motor vehicles held as equipment stipulates that the governing law is that of the jurisdiction where the debtor is located when the security interest attaches.[19] Since that rule is by its terms relevant only to a "security interest", its application presupposes the preliminary conclusion that the transaction under consideration gives rise to a security interest.

In *GMAC Commercial Credit*, the Ontario Court of Appeal considered the applicability of the rule to a long-term lease of truck trailers

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13 PPSA s. 1(1)(tt)(ii). The terms "commercial consignment" and "lease for a term of more than one year" are defined in ss. 1(1)(h) and (z), respectively.

14 Ontario PPSA s. 1(1) "security interest".

15 Although Article 9 does not employ the PPSA term "commercial consignment", its definition of "consignment" amounts to substantially the same thing. See PPSA s. 1(1)(h), UCC 9-102(a)(20).

16 Article 9 differentiates between "accounts" (UCC 9-103(a)(2)) and "payment intangibles" (UCC 9-102(a)(61)), both of which would fall within the more general PPSA definition of "accounts" (s. 1(1)(b)).

17 UCC 1-201(b)(37).

18 (2004), 28 D.L.R. (4th) 487, 2004 CarswellOnt 1283, (sub nom. *TCT Logistics Inc., Re*) 70 O.R. (3d) 321, 6 P.P.S.A.C. (3d) 163, 45 B.L.R. (3d) 68, 185 O.A.C. 181, 48 C.B.R. (4th) 246 (Ont. C.A.); leave to appeal to the S.C.C. dismissed (2004), 2004 CarswellOnt 4009, 2004 CarswellOnt 4010, 201 O.A.C. 198 (note), 337 N.R. 198 (note) (S.C.C.) [*GMAC Commercial Credit Corp.*].

19 Ontario PPSA s. 7, Alberta PPSA s. 7.

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between an Ontario lessor and an Alberta lessee. Because the transaction in question was a "lease for a term of more than one year," the lessor's interest was by definition a security interest under the Alberta PPSA. However, since a non-security lease does not involve a security interest as defined by the Ontario Act and the lease did not create an interest satisfying the generic substance test, the transaction as characterized by Ontario law was not one falling within the scope of the PPSA. In concluding that the PPSA conflicts rule described in the previous paragraph applied to the determination of the lessor's rights as against those of a competing claimant, the Court of Appeal inferentially adopted the Alberta statute's definition for purposes of characterization of that interest as a security interest, rather than the definition utilized under the Ontario Act. Since the conflicts rule identified Alberta law as the law determining perfection and priority of the security interest, the lessor's failure to perfect by properly registering a financing statement in the Alberta Personal Property Registry resulted in subordination of its interest to that of a competing secured party and to the lessee's trustee in bankruptcy.

The issue that arose in *GMAC Commercial Credit* could easily arise in the context of a dispute spanning the Canada–U.S. border; that is, one in which the deciding court is Canadian and either the debtor or the leased goods are located in the United States.[20] If the lessor's interest were to be characterized in accordance with a non-Ontario PPSA, the choice of law rule applicable to the perfection and priority of a security interest in the goods would apply. In contrast, a court applying Article 9 (or the Ontario PPSA) to the question of characterization would conclude that the transaction does not create a security interest, with the result that neither the Article 9 nor the PPSA choice of law provisions relating to the perfection and priority of a security interest would be relevant.

None of the PPSAs explicitly address choice of law for purposes of the question of characterization. In *GMAC Commercial Credit*, the

[20] If the transaction is a lease of mobile goods held by the debtor as equipment, the issue would arise when the debtor is located in the United States (PPSA s. 7). If the transaction is a lease of non-mobile goods or a lease of mobile goods held by the debtor as consumer goods, the issue would arise when the goods are located in the United States (PPSA s. 5).

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Ontario Court of Appeal inferentially decided that foundational question by reference to the statutory criterion determining validity, perfection and the effect of perfection or non-perfection. In other words, the Court in effect expanded the choice of law rule applicable to the latter issues to encompass the issue of characterization. At least one commentator argues that the Court reached the right result, but on the basis of untenable reasoning.[21]

Notably, a recommendation adopted by the Uniform Law Conference of Canada in 2003 proposes that the PPSAs be amended to state that the term "security interest," for the purposes of applying their choice of law provisions, means a security interest as defined by the statute of the enacting jurisdiction. If adopted, such an amendment would lead to a different result on facts paralleling those involved in *GMAC Commercial Credit*. Since the interest of a lessor under a true lease is not a security interest under the Ontario PPSA, its choice of law rule applicable to perfection and priority would not come into play and the conclusion that registration under Alberta law is required to preserve the lessor's rights against a competing party would be avoided. The lessor would be entitled to recover the leased goods on the basis of its rights as owner.

The amendment proposed by the Uniform Law Conference on this point is consistent with the relatively minimal body of case law that exists on the question of characterization. The cases addressing the issue have done so primarily in the context of situations in which it was necessary to decide whether goods brought into the jurisdiction of the deciding court were subject to a security interest in order to determine whether registration in that jurisdiction was required. For the most part, the courts have applied the PPSA of their own jurisdiction to that decision.[22]

[21] Jacob S. Ziegel, "Ontario PPSA Choice of Law Rules and Ambulatory Definition of Security Interest: GMAC Commercial Credit Corp. v. TCT Logistics Inc." (2004) 40 Can. Bus. L.J 412.

[22] *Tunney, Re*, 18 C.B.R. (4th) 311, 2000 CarswellBC 1556, 2000 BCSC 1144, 1 P.P.S.A.C. (3d) 277 (B.C. S.C.); *Juckes (Trustee of) v. Holiday Chevrolet Oldsmobile (1983) Ltd.* (1990), 68 D.L.R. (4th) 142, [1990] S.J. No. 103, 1990 CarswellSask 42, 1 P.P.S.A.C. (2d) 24, 82 Sask. R. 303, 79 C.B.R. (N.S.) 143 (Sask. Q.B.). See *contra*, *Intex Moulding Ltd., Re* (1987), 38 D.L.R. (4th) 111, 1987 CarswellOnt 174, 64 C.B.R. (N.S.) 74, 7 P.P.S.A.C. 91, 59 O.R. (2d) 454 (Ont. S.C.), *Bank of Nova Scotia v. Gaudreau* (1984), 48 O.R. (2d) 478, 1984 CarswellOnt 105, 27 B.L.R. 101,

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(b) Validity of Security Interest

The primary choice of law rules of the PPSA partner the issue of validity with those of perfection and the effect of perfection or non-perfection; that is, the same law applies to all of them. As will be seen shortly, the meaning of the legally distinctive terminology of "perfection" is implicitly established by the PPSA's internal usage, which follows that inaugurated by Article 9. However, the meaning of "validity" is not obvious.

Notably, the statute speaks not to contractual validity in general, but to the validity "of a security interest". Hence the choice of law rules do not purport to supplant the proper law of the contract, which is presumably left to govern issues associated with the existence and enforceability of the contract *qua* contract.[23] The question, then, is whether a contract that is extant and enforceable under its proper law creates an interest that, under the law determined by the PPSA choice of law rule, is a "valid" security interest. A valid security interest is presumably one carrying rights that may be asserted against other parties. The question to be addressed by the law identified by the PPSA choice of law rule is, therefore, whether the relevant interest is enforceable against the opposite contracting party (*i.e.*, the "debtor") or, if the dispute involves a competing third party claimant, against third parties.

If the law identified as the applicable law is that of a PPSA or Article 9 jurisdiction, the answer is easy to determine. Under both systems, a security interest is enforceable for those purposes when it has "attached." Under the PPSAs, a security interest has attached for purposes of *inter partes* enforcement when the person holding the interest has given consideration for that interest amounting to "value" as defined

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4 P.P.S.A.C. 158 (Ont. H.C.). For a non-PPSA analysis involving collateral in which a bank held an interest in collateral located in California, where the interest was characterized as a security interest under Article 9 but not under the law of Alberta, see *Canadian Deposit Insurance Corp. v. Canadian Commercial Bank* (November 1, 1996), Doc. Edmonton 8503 23319, [1996] A.J. No. 951 (Alta. Q.B.).

[23] This point has not been authoritatively decided. One commentator states that "validity" refers at least to the formal requisites for the creation of a security interest, but suggests that it is "unclear" whether the term covers such issues of contractual validity as capacity, illegality, fraud and redemption. See Richard H. McLaren, *Secured Transactions in Personal Property in Canada*, 2nd ed. looseleaf (Toronto: Carswell, 1989) at §6.01[1].

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by the Act, and the contracting party identified as the "debtor" has a property interest constituting "rights" in the subject property.[24] A security interest has attached for purposes of enforcement against third parties only when an additional requirement is satisfied; namely, that the party holding the interest is in possession of the subject property or the debtor has signed an agreement describing the property in prescribed fashion.[25]

Unlike Article 9, the PPSAs append a temporal qualification to the choice of law rule determining the validity of a security interest. Section 5 refers to the law of the jurisdiction where the collateral is situated *when the security interest attaches*. Similarly, section 7 refers to the law of the jurisdiction where the debtor is located *when the security interest attaches*. Because the PPSAs and Article 9 share the concept and terminology of attachment, this qualification is unlikely to present difficulties in cases involving only those systems. A Canadian court called upon to apply the rule would almost certainly interpret it as referring to the time at which the security interest attaches in accordance with the requirements of the law identified as the governing law.

Consider, for example, a case involving a debtor located in Montana, where the choice of law rule is provided by section 7 of the PPSA. Since that section stipulates that the validity of a security interest in identified types of collateral is governed by the law of the jurisdiction where the debtor is located when the security interest attaches, a Canadian court would look to Article 9 to determine when, as well as if, the security interest attached.[26] That is, it would apply the Article 9 provi-

[24] PPSA s. 12.

[25] PPSA ss. 12, 10. Article 9 employs the same basic criterion for attachment, except that the requirement of possession or a written agreement applies in the context of both *inter partes* and third party enforcement. Article 9 additionally provides for automatic attachment in relation to security interests falling within certain limited categories. See UCC 9-203.

[26] There is, admittedly, an element of circularity in this analysis. If the question of "validity" of a security interest is essentially coextensive with the question of whether it has "attached", the choice of law rule in effect posits that the law determining *whether* a security interest has attached is the law of the identified jurisdiction *at the time of attachment* of the security interest. That is, the conclusion that the interest *has* attached is implicit in the determination of the point in time at which the question is to be addressed.

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sions determining attachment rather than those of the PPSA.[27]

The analysis to this point may be summarized as follows: A Canadian court faced with a conflict of laws question falling within the PPSA would first look to general conflicts doctrine to identify the proper law of the contract relevant to the transaction in order to determine whether enforceable contractual rights arise under that law. Assuming that a valid and enforceable contract is found to exist, the court must then determine whether that contract creates a "security interest." In so doing, it would most likely apply the definition of security interest contained in its own PPSA. If the contract does give rise to a security interest as so defined, the court will determine the "validity" of the security interest by applying the law of the jurisdiction identified by the relevant PPSA choice of law rule (*i.e.*, either the location of the collateral or of the debtor at the time of attachment). If that jurisdiction is an American state, the question will be whether the interest is an "attached" security interest under the provisions of Article 9 relevant to attachment of the type of security interest in question.[28] Unlike the PPSA, Article 9 provides for the automatic attachment of a security interest in prescribed circumstances. Hence resort to Article 9 for purposes of determining validity may invoke not only its generic attachment rules, which parallel those of the PPSA, but its automatic attachment rules as well, with the result that an attached security interest may be found to exist notwithstanding that such an interest would not be recognized by domestic law.

(c) The Meaning of "Perfection and the Effect of Perfection or Non-perfection"

The PPSA choice of law rules identify the law applicable to "the perfection and the effect of perfection or non-perfection" of a security interest.[29] As was mentioned earlier, the term "perfection," which ap-

[27] The proper approach is less obvious in cases in which the choice of law rule identifies a jurisdiction that does not share the concept and terminology of attachment. The Uniform Law Conference of Canada has therefore recommended that the PPSAs be amended to clarify that the term "attachment" does not refer to the domestic attachment rules of the PPSA, but to the rules governing the creation of a security interest under the applicable law (Report, *supra*, n. 6 at para. 27). In such a case, the inquiry would revert to the generic question of enforceability of the property interest under that law, whether *inter partes* or as against third parties.

[28] UCC 9-203.

[29] PPSA ss. 5 and 7.

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peared in this context in the first version of Article 9, is used in the same distinctive fashion by Article 9 and the PPSA. Accordingly, its import is unproblematic in the context of disputes involving a Canadian PPSA jurisdiction and an American state.[30] Within those legal systems, perfection is understood to mean the satisfaction of the statutory requirements defining the circumstances in which the assertion of a security interest against claimants other than the debtor is justified. The allocation to a security interest of a statutorily defined ranking vis-à-vis the interests of competing third party claimants is a corollary of perfection. The primary means of perfecting a security interest under both systems is publication of the secured party's interest by way of registration (under the PPSA) or filing (under Article 9) in a searchable public registry or, with respect to tangible collateral, possession by the secured party. Registration or filing is the method employed in the vast majority of cases.[31]

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[30] The matter is more complicated when a PPSA choice of law rule points to a jurisdiction that does not share that terminology. In such a case, perfection should be understood to refer to the satisfaction of the legal requirements of that jurisdiction, if any, which must be fulfilled in order for the interest to be asserted as against competing third party claimants. This is specifically addressed by the following provision:

> 8(2). For the purposes of sections 5, 6 and 7, a security interest is perfected under the law of a jurisdiction when the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest, and the security interest has a status in relation to other secured parties, buyers, judgment creditors, or a trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

The correlative provision of the Ontario PPSA is worded slightly differently, in that it refers to compliance with the law of the relevant jurisdiction such that the security interest is "enforceable against the debtor and third parties." Ontario PPSA s. 8(2).

Like those of Article 9, the priority rules of the PPSA are addressed to the perfected or unperfected status of a security interest on the primary, though not exclusive, policy basis that an interest that has been publicized in appropriate fashion deserves a level of protection against competing claimants. Accordingly, the PPSA offers special protection to domestic interests that come into competition with a security interest with respect to which the PPSA choice of law rule would refer perfection to a legal system that does not provide for public registration or recording of the security interest or a notice relating to it. See PPSA s. 7(4).

[31] Under the PPSA, a security interest is perfected when it has attached and the steps required for perfection under a provision of the Act have been completed (s. 19). The requisite steps are, alternatively, registration of a financing statement in the manner prescribed (s. 25), possession of identified types of tangible collateral by the

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The phrase "the effect of perfection or non-perfection" refers to the consequences of the application of the legal rules directed to a security interest that is or is not perfected, as the case may be, at the relevant time. Under the PPSA and Article 9, those rules address the status of the secured party's right to appropriate the collateral or its value to satisfaction of the obligation secured relative to the rights of a third party who is also asserting a proprietary claim to that property. Although this question is often cast in terms of the "priority" of a security interest as against a competing interest or claimant, the PPSA choice of law language refers to "the effect of perfection or non-perfection." This is explained by the fact that certain of the provisions of the Act define the position of a competing party in terms that are not explicitly referable to the "priority" of the security interest relative to the interest of that party. For example, the Act provides that a buyer of goods sold in the ordinary course of business of the seller "takes free of" any perfected or unperfected security interest in the goods given by the seller, rather than that the interest of the buyer "has priority" over the security interest.[32] By way of comparison, the default rule applicable to competing security interests in the same collateral states that "priority" between conflicting perfected security interests in the same collateral is determined by the order of occurrence of certain identified events.[33]

Those familiar with the legislation understand that both forms of expression are referable to the same question: that is, the ranking of a security interest that is either perfected or unperfected, as the case may be, relative to a competing property interest in the collateral. Hence the phrase "the effect of perfection or non-perfection" is invariably taken to embrace issues defined in terms of "priority." Conversely, the word "priority" when used in reference to competing interests in collateral is generally intended to embrace all statutory rankings of competing interests and, for purposes of the remainder of this article, should be so understood. Nevertheless, the point was explicitly clarified by a 1994 amendment to Article 9's choice of law rules expanding the language

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secured party (s. 24(1)), or the existence of the specified circumstances in which the Act deems the interest to be perfected for a temporary period. Article 9 also recognizes perfection by "control" with respect to a security interest in certain forms of property. See *infra*, nn. 39 and 130.

[32] PPSA s. 30(2).

[33] PPSA s. 35(1).

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used in that context to "the effects of perfection or nonperfection, *and the priority of a security interest*."[34] The Uniform Law Conference of Canada has recommended amendment of the PPSAs to like effect.[35]

By way of conclusion on this point, it is worth emphasizing that, under the PPSA, the law that determines whether a security interest is perfected is also the law that determines the priority of that interest. Although this was also the case under earlier versions of Article 9, Revised Article 9 takes a different approach. This point is discussed further below.

(d) Special Provision When Choice of Law Results in Application of the Law of a Jurisdiction Lacking a Registration Requirement

As was indicated earlier, the concept of perfection and the corollary priority rules of both the PPSA and Article 9 are addressed to the perfected or unperfected status of a security interest on the primary policy basis that an interest that has been publicized in appropriate fashion deserves a defined level of protection against competing claimants. If a PPSA choice of law rule applied in the context of a dispute spanning a PPSA jurisdiction and an Article 9 jurisdiction points to Article 9 as the law governing perfection and priorities, the determination of whether the security interest is perfected in accordance with Article 9 will in most cases involve consideration of roughly the same factors as would determine that question under the PPSA. That is, the security interest will be perfected if the secured party has made an appropriate filing in the registry of the relevant state[36] or, in the case of tangible collateral, has taken possession.[37]

The PPSA, other than that of Ontario, offers special protection to domestic interests that come into competition with a security interest with respect to which the PPSA choice of law rule would refer perfection to a legal system that does not offer public registration of security interests. Section 7(4) of the PPSA provides, in effect, that a security

[34] See UCC 9-301 and Official Comment 2 [emphasis added]. The Comment notes that "priority", in this context, subsumes all of the rules in Part 3, including "cut off" or "take free" rules.

[35] Report, *supra*, n. 6 at para. 27.

[36] UCC 9-310(a).

[37] UCC 9-313(a).

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interest that may be regarded as perfected by the law of such a jurisdiction is nevertheless subordinated to specified domestic interests unless the security interest is perfected in accordance with the PPSA. This provision is designed to ensure that a domestic interest is not subordinated to a competing undisclosed interest that, although not discoverable by ordinary means, is regarded as "perfected" by the applicable law.

Assume, for example, that the chief executive office of a debtor company operating in Alberta is located in England. The debtor company purchases a delivery van from an Alberta automobile dealer, SP1, under a secured installment sales contract. English law does not provide for registration of a seller's interest under a contract of this kind. SP2, a general lender who has advanced financing to the debtor company for other purposes, asserts a security interest in goods held by the debtor in Alberta. In a priority competition, Section 7(2) of the Alberta PPSA would refer perfection of the security interest held by the vendor of the delivery van to the law of England, which is where the debtor is located under the terms of section 7(1). However, since English law does not provide for registration or recording of such an interest, the effect of section 7(4)(b) is that SP1's interest is subordinated to the interest of SP2, unless SP1's interest was perfected by registration in Alberta before SP2's interest arose.

While this provision is aimed primarily at foreign jurisdictions other than the United States, it has been suggested that it may, in some instances, apply when the PPSA choice of law rule refers perfection to the law of an American state.[38] This potential exists because the perfection rules of Article 9 are not in all respects the same as those of the PPSA. In particular, Article 9 recognizes perfection by "control" in certain contexts, and in others provides that a security interest is automatically perfected notwithstanding the absence of any form of public notification of the interest.

Under Revised Article 9, a security interest in investment property, deposit accounts, electronic chattel paper, electronic documents and letter-of-credit rights may be perfected by control, which does not entail

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[38] Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law* (Toronto: Irwin Law, 2005) at 146. I am indebted to the authors for permitting me to read the manuscript of their chapter on conflict of laws in advance of the publication of their book.

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registration or filing in a public registry.[39] In fact, with limited exceptions, control is the exclusive method of perfection for deposit accounts and letter-of-credit rights.[40] The PPSA does not presently recognize control as a method of perfection. If a Canadian court considering a priority dispute is led by the application of a PPSA choice of law rule to refer perfection of a security interest to the law of a U.S. state, should that court regard a security interest as "perfected" for purposes of its status as against a competing domestic interest if perfection was accomplished by control? Put differently, is the secured party who has established control required to perfect in accordance with the PPSA to avoid subordination to a competing domestic interest on application of section 7(4)? The policy issue is presented by the fact that a security interest perfected by control cannot be discovered by a third party by way of a registry search. The same question is raised, perhaps more cogently, by those provisions of Revised Article 9 under which a security interest is perfected automatically upon attachment.[41]

It may be argued that the policy of ensuring the disclosure or discoverability of a security interest through public registration dictates the conclusion that a domestic property interest should be protected when it is impossible to determine whether a competing security interest exists by resort to a registry, the location of which can be determined by application of the relevant choice of law rule.[42]

On the other hand, insofar as control is the relevant perfection device, the concept is comparable to perfection by possession of collateral, which is accepted by the PPSA as an alternative to registration or filing. Essentially, a secured party who has assumed control of collateral is in a position to prevent the debtor from dealing with it without the secured party's knowledge or consent.[43] On this view, where the PPSA choice of law rule selects Article 9 as the law governing perfection, reperfection in the PPSA jurisdiction in which a competing domestic interest arises should not be required with respect to a security interest

[39] UCC 9-314.

[40] UCC 9-312.

[41] UCC 9-309.

[42] This view is advanced by Cuming *et al.*, *supra,* n. 38.

[43] For example, a secured party has control of a deposit account, *inter alia*, if the secured party becomes the bank's customer with respect to the account. See UCC 9-104.

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perfected by control under Article 9. Although the security interest could not be discovered by the competing claimant through a registry search, the same is true of a security interest perfected by possession of the collateral in an Article 9 jurisdiction. Subsection 7(4) would not apply in the latter context.[44] There is, however, no obvious basis for extension of this reasoning to security interests that are recognized by Article 9 as perfected by virtue of the mere fact of attachment, unless that condition alone either offers notice to third parties of the existence of the security interest or enables the secured party to exercise a degree of control that would impede the debtor's dealing with the collateral.

(e) Enforcement: Procedural and Substantive Issues

In the context of Canada – U.S. transactions, it is the law governing validity, perfection and priority that is most significant to secured creditors, since that law differs in appreciable respects among jurisdictions, and those differences have considerable impact on transaction costs and risk assessment. Interjurisdictional differences in the law regulating rights of enforcement as against the collateral are likely to be of lesser consequence since, as a general rule, all jurisdictions accommodate enforcement through seizure and sale or retention of the property subject to a security interest to the extent necessary to satisfy the obligation secured. However, virtually all jurisdictions do impose some substantive limits on secured creditors' rights of realization, most often in relation to consumer goods, by way of exemptions legislation, "seize or sue" laws or other measures designed to protect vulnerable debtors.

Under the PPSA, substantive enforcement issues such as those just mentioned are referred to the proper law of the contract between the secured party and the debtor.[45] Under general conflict of law principles, the proper law can be chosen by the parties to a contract, regardless of whether their transaction is connected in any manner to the jurisdiction whose law is selected.[46] However, it is generally agreed that parties who

[44] The protection of the provision is available only when "the collateral is not in the possession of the secured party".

[45] PPSA s. 8(1)(c).

[46] See *Cardel Leasing Ltd. v. Maxmenko* (1991), 2 P.P.S.A.C. (2d) 302, 1991 CarswellOnt 633 (Ont. Gen. Div.); additional reasons at (1992), 1992 CarswellOnt 3577 (Ont. Gen. Div.), in which the court refused to give effect to a contractual choice of law provision that would have avoided the application of the "seize or sue"

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would otherwise be subject to the law of their shared jurisdiction cannot evade that jurisdiction's mandatory law by way of a contractual election. Where elements of the transaction are located in multiple jurisdictions, it is less clear whether a choice of law clause selecting the law of one of those jurisdictions can effectively avoid the substantive enforcement law of another. Although this question has yet to be authoritatively decided in relation to an issue arising under the PPSA, at least one case addressing the point in an analogous context supports the conclusion that a choice of law clause will not be given effect in such circumstances.[47]

The PPSA offers clear guidance with respect to procedural issues associated with *inter partes* enforcement. With respect to intangible collateral, the governing law is that of the forum.[48] With respect to collateral other than intangibles, the law of the jurisdiction in which the collateral is located when the rights are exercised governs.[49] However, in recognition of general conflict of law norms, the Uniform Law Conference of Canada has recommended that the PPSAs be amended to provide that the law of the forum where enforcement is pursued governs enforcement procedure for all forms of collateral.[50]

(f) Location of Collateral as Governing Criterion for Validity, Perfection and Priorities

Having considered the significant general features of the PPSA's approach to choice of law, we may turn to the actual rules determining the critical question of which law governs the validity of a security interest, its status as perfected or unperfected and its priority as against

provisions of British Columbia's *Sale of Goods on Condition Act*, R.S.B.C. 28, Eliz. 2, 1979, c. 373, by permitting an Ontario leasing company who had seized a leased vehicle to also sue on the contract for recovery of damages in Ontario.

[47] The point arose but was not definitively resolved in *Alves Worms Ltd. v. Ford Credit Canada Ltd.* (1995), 10 P.P.S.A.C. (2d) 25, 1995 CarswellOnt 1108 (Ont. Gen. Div.); reversed (1997), 1997 CarswellOnt 5864 (Ont. Div. Ct.). It has been suggested that U.S. courts will generally defer to a contractual choice of law provision, even if it would avoid substantive limits on enforcement otherwise applicable under the law of the forum. See William H. Lawrence, William H. Henning & R. Wilson Freyermuth, *Understanding Secured Transactions*, 3rd ed. (New York: LexisNexis, 2004) at 199.

[48] PPSA s. 8(1)(b).

[49] PPSA s. 8(1)(a).

[50] Report, *supra*, n. 6 at para. 22.

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competing third party interests.[51] The first basis upon which that determination is made is the location of the property subject to the security interest when the interest attaches. The basic rule is found in section 5, as follows:

> 5(1) Subject to this Act, the validity, the perfection and the effect of perfection or non-perfection of:
>
> (a) a security interest in goods; and
>
> (b) a *possessory* security interest in chattel paper, a security, a negotiable document of title, an instrument or money [emphasis added],
>
> is governed by the law of the jurisdiction where the collateral is situated at the time the security interest attaches.

This rule contemplates perfection of a security interest in goods by compliance with the requirements of the law of their location when the security interest attaches, which inferentially may involve possession of the collateral by the secured party or publication of the security interest through a public registry. With respect to the other types of collateral identified, the rule applies only where the security interest in question is perfected by possession.[52] Accordingly, a court in a PPSA jurisdiction faced with a priority problem involving a security interest in goods located in an American state when the security interest attached will

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[51] This article does not address the special choice of law rules relating to security interests in minerals or in an account resulting from the sale of the minerals at the minehead. See PPSA s. 7(6).

[52] It is possible to assume possession of all of the identified types of collateral save one, since all have physical form. The exception is an uncertificated security; that is, a "security" that is not evidenced by a share certificate or equivalent document (see the definition of "security" in PPSA s. 1(1)(rr)). The PPSAs are not uniform in their treatment of securities of this kind. The Saskatchewan *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 2(5) provides that where collateral is a security the transfer of which may be effected by an entry in the records of a clearing agency, the secured party is deemed to have taken possession when the appropriate entries have been made. The location of an *uncertificated* security is defined by s. 5(2) as the location of the clearing agency. The New Brunswick *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 2(4) takes the same approach, except that the provision defining the location of a security does not differentiate between a certificated and an uncertificated security. The British Columbia *Personal Property Security Act*, R.S.B.C. 1996 c. 359, s. 5(2) identifies the location of a security, but does not address the question of how a secured party may take possession of an uncertificated security. The Alberta and Ontario PPSAs address neither the location of the security nor the means of taking possession of an uncertificated security. Presumably, the conclusion to be drawn is that in those jurisdictions, uncertificated securities simply do not fall within the scope of s. 5.

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look to Article 9 to determine whether the security interest is valid and perfected, and will resolve the priority issue through application of the relevant Article 9 priority rule.[53] A secured party who wishes to enjoy the benefits of perfection must therefore either take possession of the goods or file in accordance with the requirements of Article 9.

If both the goods and the debtor are located in the same state, it is clear that the security interest will be regarded as perfected by the filing of a financing statement in that state. However, if the debtor is located in a jurisdiction other than the state in which the goods are located, the implications of section 5(1) are less obvious. The question is the scope of the provision's reference to "the law of the jurisdiction where the collateral is situated." Does it indicate that the registry relevant to perfection is that of the state in which the goods are located, or that the relevant registry is that identified by that state's law as represented by Article 9?

Article 9 stipulates that, in general, the perfection of a security interest in any type of collateral is governed by the law of the jurisdiction in which the debtor is located.[54] A security interest is therefore perfected by filing only if the filing is made in that jurisdiction. Hence a filing in the state in which goods are located would not suffice under Article 9 to perfect a security interest in the goods if the debtor is located elsewhere. It seems anomalous to conclude that section 5 of the PPSA will treat a security interest in goods located in a U.S. state as perfected when a financing statement is filed in that state, if the law of that state would not recognize the filing as constituting perfection.[55]

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[53] Since the means by which a security interest in goods may be perfected under Article 9 parallel those provided for by the PPSA, the problem raised earlier in connection with methods of perfection unique to Article 9 does not arise in this context.

[54] UCC 9-301.

[55] The interpretive question raised here is complicated by the general view that the rules set out in UCC 9-301 are choice of law rules, although they may be viewed as the domestic law of the state insofar as they simply identify the registry in which a financing statement is to be filed in order to perfect any security interest, including one given by a debtor located within the state. The discussion of s. 7, *infra*, examines the implications of the doctrine of *renvoi*, which is quite clearly invoked in that context by the section's reference to "the law, *including the conflict of laws rules*" of the identified jurisdiction [emphasis added]. The fact that those words are omitted from s. 5 may be regarded as an indication that *renvoi* and transmission are excluded from the operation of this section.

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The flip side of the coin is the question of where a person considering the acquisition of an interest in non-mobile goods located in the United States should search to determine his or her potential priority position with respect to those goods. *Prima facie*, section 5 points to the registry of the state in which the goods are located. If, however, the debtor is located in a state other than that in which the goods are located, the relevant registry may be that of the debtor's location. Unfortunately, no interpretive authority exists on this point.

The issue raised is essentially that of *renvoi* – a subject discussed in some detail later on in connection with the section 7 choice of law rule referable to the location of the debtor. That *renvoi* has apparently not been explicitly considered in connection with section 5 may be attributable to the fact that *lex rei sitae* has for some considerable time been the dominant choice of law rule applicable to tangible personal property in the context of commercial transactions,[56] and was the rule adopted by Article 9 before the 2000 revision as well as by the PPSAs. Perfection and priority of a security interest in goods would have been determined by the law of their location, whether it be a PPSA jurisdiction or a U.S. state.

If collateral falling subject to section 5(1) were located in a PPSA jurisdiction when the security interest attached and subsequently removed to a U.S. jurisdiction, the PPSA would *prima facie* determine the priority outcome. However, an exception is made for goods intended for export. Section 6 provides that when the parties understand at the time of attachment that the goods will be kept in another jurisdiction and they are in fact removed to the intended jurisdiction within 30 days of attachment, the validity, the perfection and the effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction.[57] The secured party should therefore perfect its security

[56] Cuming *et al.*, *supra*, n. 38 at 119-120.

[57] Transportation of goods through another intended jurisdiction does not invoke the law of that jurisdiction. For convenience of reference, the section is reproduced in its entirety as follows:

> 6(1) Subject to section 7,
> (a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and
> (b) if the goods are removed to the other jurisdiction, for purposes other than

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interest by filing in accordance with the law of the destination state.[58]

(g) Change in Location of Collateral

The choice of law rule based on location of the property at the date of attachment of the security interest in question presumes that the property is located in a single jurisdiction, such that third parties who may acquire an interest in the property can rely on the registry of that jurisdiction to determine whether it is subject to a prior claim. Of course this is not always the case, since collateral is sometimes moved from one jurisdiction to another. Hence section 5(2) of the PPSA provides a corollary rule addressing the effect of a change in location of goods. Though this is not in itself a choice of law rule, its relevance to transactions involving this sort of interjurisdictional dimension is self-evident.

The rule applies to a security interest in goods subject to the location of the collateral rule in section 5(1), where the security interest is perfected in the jurisdiction in which the goods were located at the time of attachment but the goods are subsequently moved into the enacting jurisdiction. It provides a grace period of 60 days, or 15 days following the date upon which the secured party learns of the move. During that time the security interest "continues perfected" in the new jurisdiction for purposes of a priority competition arising in that jurisdiction where the competing interest is a security interest, or the interest of the debtor's trustee in bankruptcy or of enforcing judgment creditors.[59] This offers the secured party a limited opportunity to reperfect in that jurisdiction and thereby maintain the priority position established by perfection in

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transportation through the other jurisdiction, not later than 30 days after the security interest attaches, the validity, perfection and effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction.

[58] The observations made with respect to the interpretation of s. 5(2) are also pertinent here. The intent of s. 6 is apparently that the security interest be treated as if it were a domestic security interest given in that state. This suggests that the law governing perfection for purposes of s. 6 is all of the rules of Article 9 applicable to a domestic interest, which in some instances will stipulate that perfection is governed by the law of another state. Hence perfection would require registration in that state, regardless of the location of the goods.

[59] PPSA s. 5(2). The security interest is subordinate to the interest of a buyer or lessee who acquires an interest without knowledge of the security interest during the period of temporary perfection.

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the original jurisdiction. Implicitly, the security interest loses its perfected status as against an interest arising in the new jurisdiction if the secured party fails to reperfect within the requisite period of time.

The rule would, for example, apply to a security interest in goods taken and perfected by Secured Party 1 while the goods were located in a U.S. jurisdiction if the goods are subsequently moved into a PPSA jurisdiction, let us say Alberta. If Secured Party 1 reperfects in Alberta by registration in the Alberta registry before the expiration of 60 days (*e.g.*, on day 50 after the relocation), Secured Party 1's security interest will have priority over a security interest given by the debtor to Secured Party 2 after relocation of the goods, even if Secured Party 2 perfects that security interest by registering in Alberta before the date of Secured Party 1's Alberta registration (*e.g.*, on day 30 after the relocation). Because Secured Party 1's interest would be regarded as "continuously perfected" in Alberta, the date of Secured Party 1's registration in the appropriate U.S. jurisdiction would be the relevant date for purposes of the priority competition between Secured Party 1 and Secured Party 2.[60] If, however, Secured Party 1 were to register in Alberta after the 60-day period following relocation has expired (*e.g.*, on day 65), the date of Secured Party 1's registration in Alberta would be the relevant date. The rule therefore gives secured parties some degree of protection against the loss of their priority status due to an unauthorized relocation of their collateral, while reflecting the overriding concern for protection of third parties who will rely on the registry in the new jurisdiction.

Notably, this rule does not supplant the choice of law determining the *priority* of the security interest, which continues to be the law identified by section 5(1): namely, the law of the jurisdiction in which the goods were located when the security interest attached. Accordingly, if the priority issue arising in the scenario outlined above were litigated in Alberta, the court would apply the relevant Article 9 priority rule, which

[60] Note that the relevant jurisdiction for purposes of registration might not be the state in which the goods were located. As has been indicated, under Revised Article 9, a security interest in goods is generally perfected by the filing of a financing statement in the jurisdiction in which the debtor is located, rather than that in which the goods are located. See UCC 9-301. It would make little sense to suggest that s. 5(2) contemplates perfection by filing in the state in which the goods were situated when the security interest attached if, under the law of that state, the interest would not be perfected by such a registration on the ground that the debtor is located elsewhere.

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would presumably give priority to the first party to perfect by registration or filing. Secured Party 1 would have priority in the first variant of the hypothetical, while Secured Party 2 would have priority in the second.

There is no need for this rule to address a change in the location of non-goods collateral falling subject to the choice of law established by section 5(1), since the section applies only to a *possessory* security interest in property of that kind (chattel paper, a security, a negotiable document of title, an instrument or money). Because such an interest is by its nature perfected by the very fact of possession in any PPSA jurisdiction, the perfected status of the interest is not affected by a change in location.[61] Again, however, it is worth noting that while the security interest will be perfected under the law of the new jurisdiction into which the collateral is moved, the law governing priorities will continue to be the law of the jurisdiction in which it was located when the security interest attached.

(h) Location of the Debtor as Governing Criteria for Validity, Perfection and Priorities

Under the PPSA, the location of the debtor at the date of attachment determines the law governing perfection and priority of a security interest in property the jurisdictional situs of which is either not obvious or potentially inconstant. The relevant rule is as follows:

> 7(2) The validity, perfection and effect of perfection or non-perfection of:
> (a) a security interest in:
> (i) an intangible, or
> (ii) goods that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and
> (b) a non-possessory security interest in chattel paper, a security, a negotiable document of title, an instrument or money,
> must be governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located at the time the security interest attaches.
>
> The location of the debtor is defined by subsection (1) as:
>
> (a) the debtor's place of business, if the debtor has a place of business,
>
> (b) the debtor's chief executive office, if the debtor has more than one place of business, and
>
> (c) the debtor's principal residence, if the debtor has no place of business.

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[61] PPSA s. 24(1).

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If the security interest in question arises under a contract involving a debtor located in an American state, a court in a PPSA jurisdiction must apply Article 9 to determine whether the security interest is perfected, and to establish its priority status. The secured party should therefore perfect its security interest by filing in the state whose registry is identified by the relevant provision of Article 9.[62]

Notably, the PPSA does not locate an incorporated debtor in its jurisdiction of incorporation. Rather, it focuses on the most important or prominent locus of the debtor's operations from a functional point of view. If a debtor company has only one place of business, that locale is the location of the debtor, notwithstanding that the company's registered office may be in another jurisdiction. Similarly, the test determining the location of an incorporated debtor that carries on business in multiple locations is the "chief executive office," not the registered office or place of incorporation. This test applies equally to foreign and domestic debtors. If an American corporate debtor has its sole business facility or its chief executive office in a PPSA jurisdiction, a secured party should, therefore, register in that jurisdiction for purposes of potential litigation in Canada.

The provisions of sections 7(2)(a)(i) and 7(2)(b) are relatively straightforward. However, section 7(2)(a)(ii) merits more careful consideration. The policy supporting the application of a location-of-the-debtor test to intangibles and documentary collateral also applies to what are often referred to in abbreviated fashion as "mobile goods". Where collateral is of a type such that its location may not be constant or cannot be readily fixed, the location of the debtor provides a more stable reference point for determination of the governing law than does location of the collateral. The rationale generally supporting the location of the collateral test for goods, as represented by section 5, does not apply to goods that may be used in more than one jurisdiction or may frequently cross borders.

Section 7 therefore applies the location-of-the-debtor test to goods "of a kind that are normally used in more than one jurisdiction" if the goods are held by the debtor either as "equipment" or as "inventory"

[62] See UCC 9-301.

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held for purposes of lease.[63] The language used in connection with inventory captures both goods that have actually been leased by the debtor to another and goods held in anticipation of their lease by the debtor to others.[64]

The relevant case law confirms that this test is to be applied objectively. The question is not whether the goods in question in fact are or have been used in more than one jurisdiction. Rather, it is whether the goods are the type of goods that are often used in more than one jurisdiction.[65] Though motor vehicles used as equipment (*e.g.*, long-haul trucks) or held for lease by the debtor (*e.g.*, rental vehicles) are the most obvious type addressed by the provision, it is not so limited. The use of the location-of-the-debtor criterion in this context means that where a secured party takes a security interest in mobile goods owned by a debtor located in the United States, Article 9 will govern the issues of validity, perfection and priority in relation to those goods, even if they are in fact located or used exclusively in a Canadian jurisdiction.

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[63] The pertinent definitional provisions of s. 1(1) of the PPSA are as follows:
(y) "inventory" means goods
(i) that are held by a person for sale or lease, or that have been leased by that person,
(ii) that are to be furnished by a person or have been furnished by that person under a contract of service,
(iii) that are raw materials or work in progress, or
(iv) that are materials used or consumed in a business;
(i) "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes.
(p) "equipment" means goods that are held by a debtor other than as inventory or consumer goods.

[64] It is clear that the provision applies the qualifying phrase "leased or held for lease by a debtor to others" to "inventory", not to "equipment". Hence the relevant query with respect to goods held by a debtor as equipment is simply whether they are of a type normally used in more than one jurisdiction. See *Toronto Dominion Bank v. RNG Group Inc.* (2002), 38 C.B.R. (4th) 110, 2002 CarswellOnt 3178, 61 O.R. (3d) 567, 4 P.P.S.A.C. (3d) 182 (Ont. S.C.J. [Commercial List]).

[65] *Gimli Auto Ltd. v. Canada Campers Inc. (Trustee of)* (1998), 4 C.B.R. (4th) 254, 1998 CarswellAlta 441, (sub nom. *Gimli Auto Ltd. v. BDO Dunwoody Ltd.*) 160 D.L.R. (4th) 373, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 219 A.R. 166, (sub nom. *Gimli Auto Ltd. v. Canada Campers Inc. (Bankrupt)*) 179 W.A.C. 166, 62 Alta. L.R. (3d) 40, [1999] 1 W.W.R. 459, 13 P.P.S.A.C. (2d) 378 (Alta. C.A.).

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(i) *Renvoi* under the Location-of-the-Debtor Rule

In provinces and territories other than Ontario, the PPSA approach to choice of law based on the location of the debtor consciously accepts the doctrine known as *renvoi*. That is, the choice of law rule directs the deciding court to apply not only the local law of the jurisdiction identified on the basis of the location of the debtor, but also the conflict of laws rules of that jurisdiction.[66] If the application of those rules leads to referral of the issue back to the law of the original jurisdiction, the result is described as a *renvoi*. If it leads to referral of the issue on to the law of a third jurisdiction, the case is strictly speaking one of transmission, though it falls within the general rubric of *renvoi*.

The consequences of *renvoi*, as embraced by the non-Ontario PPSAs, are illustrated in the following scenarios:

> Assume that a priority issue involving mobile goods held as equipment is presented for decision to a court in Jurisdiction A, where they are located. Jurisdiction A is a PPSA province. The debtor corporation is incorporated in Jurisdiction B, but has its chief executive office in Jurisdiction C.
>
> (i) Assume that the law of Jurisdiction C includes a choice of law rule under which perfection and priority of a security interest in goods of all types are determined by the location of the goods – *i.e.*, Jurisdiction A.
>
> (ii) Alternatively, assume that the law of Jurisdiction C includes a choice of law rule under which perfection and priority are determined by the law of the debtor's location, which is defined by that law as its place of incorporation rather than the location of its chief executive office – *i.e.*, Jurisdiction B.

In the first scenario, the law of Jurisdiction A would apply to issues of perfection and priority, notwithstanding that Jurisdiction A's PPSA refers perfection and priority to the law of the location of the debtor, which is Jurisdiction C. Jurisdiction C's choice of law rule, which the PPSA explicitly states is to be applied, refers perfection and priority to the law of the jurisdiction in which the goods are located.

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[66] Note that section 7(2) of the non-Ontario PPSAs refers to "the law, including the conflict of laws rules," of the debtor's location.

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In the second scenario, the law of Jurisdiction B would apply, notwithstanding that the PPSA of Jurisdiction A regards the location of the debtor as being Jurisdiction C. This is so regardless of whether C's rule defining the location of the debtor as its place of incorporation is regarded as a principle of domestic law or a choice of law rule, since the PPSA of Jurisdiction A directs the local court to apply both the domestic law and the choice of law rules of Jurisdiction C.

The pertinent provision of the Ontario Act is worded differently from that of the other provinces and territories, and may therefore lead to a different result. That provision states that the validity, perfection and effect of perfection or non-perfection of a security interest in the identified types of collateral "shall be governed by the law of the jurisdiction where the debtor is located at the time the security interest attaches."[67] On its face, this wording is ambiguous in the context of its application to the law of a jurisdiction other than Ontario. As the leading British text on conflict of laws points out, when a rule directs that a case be determined in accordance with "the law of" a foreign jurisdiction, the expression usually means the domestic law of that jurisdiction, but sometimes means any system of law which the courts of that jurisdiction would hold applicable to the case, including its choice of law rules.[68]

At least one commentator suggests that the reference in section 7(1) of the Ontario PPSA to the law of the jurisdiction where the debtor is located must be interpreted to include the conflict of law rules of that jurisdiction.[69] On that approach, the application of the Ontario provision would lead to the same result as would application of the correlative provision of the non-Ontario Acts; that is, a *renvoi* may occur if the law of the jurisdiction identified by the choice of law rule would refer the matter back to the law of Ontario or to that of a third jurisdiction through the application of a criterion different from that determining the applicable law under the Ontario Act. This expansive interpretation is consistent with the unrestricted language of the provision, which is not by its terms confined to the domestic law of the jurisdiction in which the

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[67] Ontario PPSA s. 7(1).

[68] Lawrence Collins, ed., *Dicey and Morris On The Conflict of Laws*, 13th ed. (London: Sweet & Maxwell, 2000) at 66.

[69] Richard H. McLaren, *The 2004 Annotated Ontario Personal Property Security Act* (Toronto: Thomson Carswell, 2003) at 54. See also McLaren, *supra*, n. 23.

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debtor is located. By way of comparison, the corresponding choice of law provisions of Revised Article 9 refer to "the *local* law" of the jurisdiction identified.[70]

However, the legislative history of the Ontario PPSA suggests that the provision was designed to avoid *renvoi* (and transmission) by exclusion of the choice of law rules of the jurisdiction identified. The precursor to section 7, found in section 5(2) of the pre-1990 Act, explicitly included the conflict of law rules of the relevant foreign jurisdiction. It read as follows:

> 5(2) Where the chief place of business of a debtor is not in Ontario, the validity and perfection of a security interest and the possibility and effect of proper registration with regard to intangibles or with regard to goods of a type that are normally used in more than one jurisdiction, if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others, are governed by the law, *including the conflict of laws rules*, of the jurisdiction in which the chief place of business is located [emphasis added].

The 1990 version of the Act adopted the formulation that appears in section 7 of the non-Ontario PPSAs, with the notable omission of the phrase "including the conflict of law rules".

The view that the Ontario rule refers perfection and the effect of perfection or non-perfection of a security interest to the law of the jurisdiction in which the debtor is located, not including its choice of law rules, has been advanced by the PPSA Working Group of the Uniform Law Conference of Canada. The 2003 consultation paper disseminated electronically in connection with the formulation of the Group's recommendations regarding harmonization of provincial and territorial choice of law rules on security in movable property states:

> The granter location choice of law rule in the non-Ontario PPSAs currently brings into play not just the internal law but also the conflicts of laws rules of the jurisdiction in which the granter is located (renvoi).
>
> *The study committee has tentatively concluded that this feature of the non-Ontario Acts should be eliminated.*

In its subsequent report to the 2003 annual meeting of the Uniform Law Conference of Canada, the Working Group confirmed its recommendation for "[r]epeal of the reference to the choice of law rules of the applicable legal system (renvoi) in the choice of law rules for intangible

[70] See especially UCC 9-301.

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collateral and movable goods in the non-Ontario PPSAs."[71] The recommendations presented in the report were adopted by the Conference.

The determination of the jurisdiction whose law governs perfection of a security interest is of cardinal importance, since it carries with it the requirement that a secured party who wishes to perfect a security interest by registration use the registry system of that jurisdiction. The choice of law rules of the PPSA determine the critical question of where a registration should be made. If interpreted as embracing only the local law of the jurisdiction identified by location of the debtor, the result may be that in some circumstances, a security interest will be regarded by Ontario law as perfected by a registration in the jurisdiction in which the debtor is located notwithstanding that the law of that jurisdiction would not recognize the registration but rather would require registration in another jurisdiction.

This result may be illustrated by reference to the second formulation of the scenario discussed above. Assume that Jurisdiction A is Ontario, Jurisdiction B (which is where the debtor company was incorporated) is Delaware and Jurisdiction C (where the debtor's chief executive office is located) is Michigan. If the choice of law rule of Ontario refers only to the domestic law of the location of the debtor, namely Michigan, it is necessary to determine which of Article 9's provisions are domestic law and which are conflict of laws rules – a distinction that is not easily drawn. Under the law of Michigan as represented by Article 9, registration in the Michigan registry would *not* be recognized as perfecting a security interest given by the debtor. Rather, Michigan would regard the security interest as being perfected only by a registration in Delaware, which Michigan regards as the jurisdiction in which the debtor is located under the place of incorporation rule found in §9-307. Of particular importance in this connection is the fact that a person dealing with the debtor in Michigan is, following Michigan law, likely to search the registry of Delaware rather than that of Michigan in order to determine whether the debtor's property is subject to security interests that would have priority over an interest acquired by that person. Nevertheless, if §9-307 is a choice of law rule and section 7 of the Ontario PPSA is read as excluding the choice of law rules of the jurisdiction in which the

[71] Report, *supra*, n. 6 at para. 27.

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debtor is located, the security interest would be perfected for purposes of litigation in Ontario only by a filing in Michigan.

If, on the other hand, the choice of law rule of Ontario is read congruently with that of the non-Ontario PPSAs as referring to the law of the location of the debtor, *including* its choice of law rules, the result would be that both the law of Ontario and the law of Michigan would require registration in Delaware for purposes of perfection of a security interest given by the debtor. Ontario law would in effect incorporate by reference the rules that would be applied by a Michigan court on these facts. This approach identifies a single registration locale for purposes of perfection and avoids the need to resolve the perplexing question of where the line is to be drawn between the local or domestic law of a jurisdiction and its conflict of law rules.

There is little doubt that the Article 9 rule stipulating that perfection of a security interest is in general to be accomplished by filing in the registry of the jurisdiction in which the debtor is located is a choice of law rule, notwithstanding that it may apply in a purely domestic situation.[72] For example, if the debtor is located in Michigan the provision dictates filing in the Michigan registry. In this context a provision mandating application of the law of Michigan is perhaps incongruously described as a choice of law rule, since it merely dictates a domestic filing. Only when it dictates filing in another jurisdiction does it take on that complexion.

Even if the provision identifying the applicable law as that of the jurisdiction in which the debtor is located can be characterized as a choice of law rule, the question of whether the statutory definition of the debtor's location is a rule of domestic law or a choice of law provision may remain obscure. According to §9-307, an incorporated debtor is located in the jurisdiction in which it is incorporated. This stipulation might be analogized to the statutory criteria that identify a person as a citizen of the enacting jurisdiction for purposes of voting or entitlement to public services. Given that legislative provisions of the latter type are not regarded as choice of law provisions, it may seem anomalous to characterize §9-307 differently. On the other hand, rules defining the class of persons who are entitled to the benefits conferred by domestic

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[72] UCC 9-301.

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law may be differentiated from those that mandate the application, not of domestic law, but of a foreign law. Section §9-307, as applied in some circumstances, has that result. Moreover, it is located in the section of Article 9 headed "Subpart 1. Law Governing Perfection and Priority," and the Official Comment accompanying it states, "This section determines the location of the debtor for choice-of-law purposes, but not for other purposes."

To return once more to the hypothetical, if Ontario's section 7 identifies the law of Michigan as the law governing perfection on the basis of the location of the debtor's chief executive office, should an Ontario court take into account the fact that the law of Michigan applicable to perfection of a security interest says that the location of an incorporated debtor is the jurisdiction in which it was incorporated? If the Michigan rule is, as the foregoing analysis suggests, a choice of law rule, preclusion of *renvoi* means that it must be disregarded by the Ontario court. In the result, if a filing were made in Michigan, the security interest would be perfected for purposes of litigation in Ontario but unperfected for purposes of litigation in the United States.

Renvoi is generally regarded with disfavour in modern legal discourse. As a matter of principle, the potential that the law applicable to the determination of parties' rights may be decided by the operation of the conflicts rules of a foreign jurisdiction may be unsatisfactory. However, it has been authoritatively argued that, while the doctrine of *renvoi* is generally best avoided by limiting the scope of a conflict of law rule to the domestic law of the foreign jurisdiction referred to, there are some situations in which the object of the choice of law rule is better served by construing the reference to include the conflict rules of that law. That is so where the foreign law referred to by a domestic court on application of a choice of law rule would refer to a second foreign law, and the second foreign law would agree that it was applicable.[73] This rationale is equally persuasive where the foreign jurisdiction referred to by the domestic court would, under its choice of law rules, apply its own law. In both instances, the domestic law and the foreign law are in agreement as to the law applicable to the matter in issue.[74]

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[73] Collins, *supra*, n. 68 at 75.

[74] See also Erwin N. Griswold, "Renvoi Revisited" (1938) 51 Harvard Law Review 1165-1208, republished in Richard Fentiman, ed., *Conflict of Laws* (New York: New

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As we have just seen, interpretation of the Ontario rule such that it refers to the law of the location of the debtor, including the choice of law rules of that jurisdiction, has this positive result in the case of a debtor corporation incorporated in one U.S. state with its chief executive office in another. In our hypothetical, when Ontario law refers perfection of a security interest given by the debtor to the law of Michigan (location of debtor's chief executive office), which refers the matter to the law of Delaware (jurisdiction of incorporation), the result is that all three jurisdictions recognize perfection based on filing in the registry of Delaware, since all American jurisdictions define the location of a debtor incorporated in the United States as the place of incorporation.

Does the same result follow in a case involving a debtor company incorporated in Canada? In that instance, the outcome would be affected by Article 9's rule for locating foreign debtors, under which the location of a debtor corporation incorporated outside the United States is deemed to be that of its chief executive office.

Assume that the facts are those given above, except that the debtor, whose chief executive office is in Michigan, was incorporated in Ontario rather than in Delaware. The Ontario PPSA refers to the law of Michigan for purposes of determining whether a security interest given by the debtor is perfected. Michigan law would similarly refer perfection to that state, whether or not the "law of Michigan" is regarded as including that state's choice of law rules. Since the debtor is not a U.S. corporation, its location is determined under Article 9 by reference to its chief executive office rather than its place of incorporation.

The general aversion to *renvoi* may well be explained by the fact that in some contexts, incompatible conflicts rules can create a situation in which the foreign rule will create a reference back to the law of the forum, and no clear guidance is available to determine whether the court should accept the *renvoi* and apply the law of its own jurisdiction, or apply the law of the jurisdiction identified by its choice of law rule. The

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York University Press, 1996):

> The renvoi problem is indeed difficult.. . . Reconsideration seems to show, as English and American courts have found, that there are many situations where satisfactory solutions to puzzling problems can be worked out by looking to the "whole law" of a country designated by a local choice of law rule, and then reaching the same result which would be reached by the courts of that country.

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problem is exacerbated by the further question of whether the position of the foreign jurisdiction on the question of *renvoi* is to be taken into account. If it is, the result can be a perpetual circle in which the law of the forum refers the matter in issue to the law of the foreign jurisdiction, including its conflict of law rules, which refer the matter to the law of the forum, including its conflict of law rules, which refer to the law of the foreign jurisdiction, and so on *ad infinitum*.

In most cases, conflict of laws problems of this kind arise from the application of non-statutory legal principles, which have proven particularly problematic in the context of the law of wills.[75] However, the problem of uncertainty is marginal or non-existent when a statutory choice of law rule clearly demarcates the proper approach. In PPSA jurisdictions other than Ontario, the course to be taken by the deciding court is clear, since the choice of law rule explicitly encompasses the conflict of law rules of the identified jurisdiction and hence implicitly obliges the court to accept a *renvoi* and apply domestic law. When the foreign jurisdiction is a U.S. state, the question of whether the foreign law accepts the doctrine of *renvoi* does not arise, since the choice of law rules of Article 9 are explicitly limited to the local law of the jurisdiction identified.

The foregoing discussion suggests that both the natural meaning of the words used in the Ontario provision and the policy of achieving a consistent result as between jurisdictions support the view that the law to be applied to perfection of a security interest given by a debtor located in another jurisdiction is *all* the law of that jurisdiction. Notably, the wording of the Uniform Law Conference of Canada recommendation mentioned earlier suggests a contrary view.[76]

Whether the recommended approach is to be preferred over the approach currently represented by the non-Ontario Acts is debatable.[77] The latter approach brings certainty to the resolution of problems of this kind by clearly directing a domestic court to accept a *renvoi* created by operation of the conflict of law rules of a foreign jurisdiction in which a debtor is located. In addition, the interpretive difficulty of determining

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[75] See Collins, *supra*, n. 68 at 67.

[76] Report, *supra*, n. 6 at para. 27.

[77] The author was a member of the Working Group and did not oppose the recommendation.

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which principles of the foreign jurisdiction are principles of domestic law and which are choice of law rules is avoided. Finally, as was demonstrated above, this approach results in consistent outcomes as between PPSA and Article 9 jurisdictions in cross-border cases involving incorporated debtors.

(j) Change in the Location of the Debtor or Sale of Collateral Where Location-of-Debtor Rule Applies

When a choice of law for perfection of a security interest is based on the location of the debtor at the time the security interest attaches, a move by the debtor into another jurisdiction is problematic. Those who search the registry of the new jurisdiction for security interests in intangibles or moveable goods owned by the debtor will not discover a registration made in the jurisdiction in which the debtor was previously located. Accordingly, the PPSA contains a provision that, while not itself a choice of law rule, is an important adjunct to the location-of-the-debtor rule. The approach parallels that applied to relocation of goods where the law governing perfection and priority is based on the location of the collateral.

Section 7(3) provides that where a debtor relocates to another jurisdiction, a security interest perfected in accordance with the law of the location of the debtor at the time of attachment continues perfected in the enacting jurisdiction if it is perfected in the new jurisdiction not later than 60 days after the date of relocation or 15 days after the day on which the secured party has knowledge of the relocation, provided that perfection in the original jurisdiction has not terminated (*e.g.*, through expiry of the registration of a financing statement). If the security interest is not reperfected in the new jurisdiction within the requisite period of time, the perfected status acquired in the original jurisdiction is lost.

Notably, whether or not the security interest is reperfected in the debtor's new location as required by section 7(3), the priority rules of the original jurisdiction continue to apply. Hence if a debtor who was originally located in Alberta moves to Montana, a security interest perfected in Alberta will continue perfected for purposes of litigation in Alberta if the secured party files in accordance with Montana law within the required time period.[78] However, an Alberta court addressing a pri-

[78] Note that if the "person" is a corporation incorporated in Delaware that moves its

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ority competition involving the collateral will continue to apply the priority rules of the PPSA.

The Ontario PPSA rule governing change in a debtor's location departs significantly from the rule in effect in the other PPSA jurisdictions. The Ontario rule applies only when the debtor relocates from another jurisdiction to Ontario. In that instance, a security interest perfected under the law of the debtor's previous location continues perfected in Ontario if it is reperfected in Ontario within the stipulated grace period, which is the same as that employed by the non-Ontario Acts.[79] In the converse situation of a relocation by the debtor from Ontario to another jurisdiction, a security interest that attached and was perfected in Ontario while the debtor was located there continues perfected for purposes of litigation in Ontario, regardless of whether it is ever reperfected in the new jurisdiction, since the relocation rule does not apply.

Section 7(3) of the non-Ontario PPSAs also applies to a transfer of collateral by the debtor to a person located in another jurisdiction. When a security interest in intangibles or mobile goods is perfected in the jurisdiction in which the debtor is located and the debtor transfers an interest in the collateral to a person located in another jurisdiction, the security interest must be reperfected in the new jurisdiction within the relevant 60 or 15 day time period in order to maintain its perfected status for purposes of the law of the enacting jurisdiction. The Ontario PPSA is silent with respect to a transfer of collateral to a person located in a jurisdiction other than that of the debtor.

To pursue the illustration, if an Alberta debtor sells mobile goods to a person located in Montana, a security interest perfected in Alberta will continue perfected under Alberta law only if the secured party files in accordance with Montana law within the required grace period.[80] If the secured party fails to do so, for purposes of the application of Al-

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chief executive office from Alberta to Montana, the financing statement should presumably be filed in Delaware, since according to Montana law the debtor is located in its jurisdiction of incorporation (UCC 9-307). PPSA s. 7(3) stipulates that the security interest continues perfected in Alberta if it is perfected "in the other jurisdiction". This language should be interpreted as meaning that the action taken is such that the security interest is regarded as perfected in that jurisdiction, rather than that action to perfect (*i.e.*, by filing) is taken in that jurisdiction.

[79] Ontario PPSA s. 7(2).

[80] *Cf. supra*, n. 78.

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berta's priority rules (which still apply), the security interest will be treated as unperfected in a competition with a third party claimant litigated in Alberta.

The obvious disadvantage of this rule in the context of both relocation by the debtor and a sale of collateral is the extent to which secured parties are required to monitor their debtors' activities in order to preserve their priority position. The counterbalancing advantage, of course, is the protection offered third parties who deal with the debtor after relocation or with the transferee in the new jurisdiction. In both instances, third parties are likely to rely on the registry identified by the law of the new location in order to determine whether property of the type governed by the rule is encumbered.[81]

It is worth noting that the extent of the risk to which third parties are subjected in these situations depends upon the law of the jurisdiction in which a priority issue is litigated. Assume that a third party who takes a security interest in collateral from the debtor after the debtor's relocation from Ontario to Michigan perfects by filing in Michigan. If the dispute were litigated in Ontario that party's interest would be subordinate to a prior security interest created while the debtor was located in Ontario and perfected by registration in that province, even if the prior interest was not registered and hence not searchable in Michigan, since the Ontario PPSA does not require reperfection in the new jurisdiction. If the same dispute were to be decided by an Alberta court, the prior security interest would not be viewed as perfected unless a new filing was made in Michigan within the time period prescribed by section 7(3).[82] If litigation took place in a U.S. state, the priority status of the third party's security interest would depend upon whether the prior perfected status of the Ontario security interest would be recognized

[81] The rule is consistent in principle with the PPSA re-registration requirements applicable to a change in debtor name or a transfer of collateral to a third person located in the debtor's jurisdiction (see PPSA s. 51). As has been observed by Professors Cuming and Wood, the provision is "structurally complex", due to the fact that it is designed to "limit the loss of priority resulting from non-compliance with the section to interests held by persons who could reasonably be expected to be affected by the non-compliance." See Ronald C.C. Cuming & Roderick J. Wood, *Alberta Personal Property Security Act Handbook* (Toronto: Carswell, 1998) at 453 *et seq.*

[82] *Ibid.*, at 117-118.

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under the relevant provision of Article 9.[83] Hence choice of forum may be an important factor in the resolution of such a dispute.

The PPSA Working Group of the Uniform Law Conference of Canada reviewed the reperfection requirements of the Ontario and non-Ontario PPSAs in 2003 and advanced a recommendation for harmonization of their currently discordant approaches in the context of a transfer of collateral to a third party located in a jurisdiction other than that of the debtor. The proposed compromise solution is that the Acts be amended to require a secured party to reperfect in the new jurisdiction within a stipulated grace period that would commence only when the secured party acquires actual knowledge of the transfer.[84]

3. NOTABLE DEPARTURES: THE PPSA AND CHOICE OF LAW UNDER REVISED ARTICLE 9

Some of the differences between the PPSA and Article 9 were noted in the foregoing review of the PPSA choice of law rules. Although a full discussion of the Article 9 rules is beyond the scope of this article, the implications of some of the most fundamental points of divergence merit further consideration.

Before the adoption of Revised Article 9 in 2000, the Article 9 choice of law rules and those of the PPSA were largely consistent. However, the rules in Revised Article 9 depart in important respects from their statutory precursors and their Canadian counterparts. Among those differences, two in particular stand out: namely, the default choice of law rule based on the location of the debtor and the associated rules defining the location of a debtor that is an incorporated or otherwise registered organization. Other differences between the PPSA approach and that of Revised Article 9 which merit comment include the latter's bifurcation of perfection and priority with respect to non-possessory security interests in goods, its treatment of *renvoi*, certificate-of-title goods, deposit accounts and investment property, and the grace periods for the continuation of perfection applicable to relocation of the debtor or the collateral.

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[83] See in this connection UCC 9-316.

[84] Report, *supra*, n. 6 at para. 21. The Working Group did not advance a recommendation for harmonization of the rule applicable to relocation of the debtor by amendment of the Ontario PPSA to bring it into conformity with the other jurisdictions, on the view that such a recommendation was unlikely to be implemented.

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(a) Location of the Debtor as Primary Criterion for Choice of Law

(i) *Exportability of the Location-of-the-Debtor Rule*

One of the most significant changes introduced by Revised Article 9 was the adoption of a single choice of law rule to identify the law determining the perfection and priority of security interests in all types of collateral, subject to the exceptions specifically provided for in ancillary provisions. The rule stipulates that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a security interest in collateral."[85] This marks a radical shift from former Article 9, under which location of the debtor determined the law applicable to intangibles and mobile equipment but choice of law was otherwise generally determined by the location of the collateral. The earlier approach paralleled that taken by the PPSA, both then and now.

American commentators and others are generally enthusiastic about the move to an umbrella choice of law rule for perfection based on the location of the debtor. Where both debtor and collateral are located in the United States, the rule will often allow for a single filing, notwithstanding that the collateral may be located in several states or move across state borders. However, as the illustrative scenarios below demonstrate, it does require both U.S. and Canadian lenders to employ a different set of practices for cross-border transactions than those applied to purely domestic transactions. Moreover, Article 9's new approach has significantly diminished if not defeated any potential for harmonization of the Article 9 and PPSA choice of law rules, since it is unsuited for transplantation into Canadian regimes.

The primary obstacle to the adoption of an overarching location-of-the-debtor choice of law rule in PPSA jurisdictions is that it is not consistent with the basic premise of a system that uses serial number registration to protect third parties who may acquire an interest in certain types of high-value goods that are subject to an existing security interest. The goods in question are those defined as "serial numbered goods." Virtually all terrestrial motor vehicles, as well as aircraft, boats, trailers, mobile homes and outboard boat motors qualify as "serial numbered

[85] UCC 9-301(1).

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goods" in PPSA jurisdictions other than Ontario.[86] In Ontario the category is more limited. There, serial number registration is required only with respect to motor vehicles other than farm tractors, road building equipment, boats and aircraft.[87] The vast majority of the registrations in the personal property registries of all jurisdictions relate to serial numbered goods.

A security interest in serial numbered goods held by a debtor as consumer goods is perfected only if a financing statement that includes the serial number of the goods is registered in the personal property registry.[88] Although a security interest in serial numbered goods held by

[86] See the *Personal Property Security Regulation*, A.R. 95/2001, s. 1(1)(y).

[87] See R.R.O. 1990, Reg. 912, as am., s. 1, "motor vehicle". Note that the definitional requirement that a vehicle be self-propelled *de facto* excludes highway trailers from the serial number registration provisions.

[88] In Alberta, some uncertainty has arisen in connection with the serial number registration requirement as a result of the decision in *Harder (Trustee of) v. Alberta Treasury Branches* (2004), [2005] 2 W.W.R. 517, 2004 CarswellAlta 473, (sub nom. *Harder (Bankrupt) v. Alberta (Treasury Branches)*) 356 A.R. 320, 36 Alta. L.R. (4th) 118, 8 C.B.R. (5th) 92, 6 P.P.S.A.C. (3d) 346, 2004 ABQB 285 (Alta. Q.B.), currently under appeal. In that case, the Court held that an error in registration of the serial number of collateral did not invalidate a registration for purposes of a priority competition between the secured party and the debtor's trustee in bankruptcy, notwithstanding that the registration was not revealed by a search of the registry using the correct serial number, on the ground that the debtor's trustee in bankruptcy knew of the existence of the security interest. This conclusion appears to run counter to the principle that the question of whether a registration is misleading is to be objectively determined and does not depend upon whether anyone was in fact misled. See PPSA s. 43(8) and see Cuming & Wood, *supra*, n. 81 at 402. In jurisdictions other than British Columbia and Ontario, the case law indicates that where serial number registration is required by the Act or the regulations, an effective registration must include both the serial number and the debtor's name. See *GMAC Leaseco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of)*, 227 D.L.R. (4th) 154, 2003 CarswellNB 161, 2003 CarswellNB 162, [2003] N.B.J. No. 140, 2003 NBCA 26, 42 C.B.R. (4th) 43, 4 P.P.S.A.C. (3d) 211, 257 N.B.R. (2d) 141, 674 A.P.R. 141 (N.S. C.A.). The courts have taken a contrary view in British Columbia and Ontario, concluding that in such cases a failure to properly register the debtor's name does not render the registration ineffective if the serial number is registered accurately. See respectively *Gold Key Pontiac Buick (1984) Ltd. v. 464750 B.C. Ltd. (Trustee of)*, 189 D.L.R. (4th) 668, 2000 CarswellBC 1441, [2000] B.C.J. No. 1460, 2000 BCCA 435, 77 B.C.L.R. (3d) 185, [2000] 7 W.W.R. 581, 19 C.B.R. (4th) 85, (sub nom. *Gold Key Pontiac Buick (1984) Ltd. v. 464750 B.C. Ltd. (Bankrupt)*) 140 B.C.A.C. 140, (sub nom. *Gold Key Pontiac Buick (1984) Ltd. v. 464750 B.C. Ltd. (Bankrupt)*) 229 W.A.C. 140, 2 P.P.S.A.C. (3d) 206 (B.C. C.A.), *Lambert, Re* (1994), 119 D.L.R. (4th) 93, 1994 CarswellOnt 300, [1994] O.J. No. 2151, 28 C.B.R. (3d)

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the debtor as equipment may be perfected in some jurisdictions by a registration under the debtor's name alone, an interest so registered may be subordinated to a security interest perfected by a registration that includes the serial number of the goods, or to the interest of a person who buys or leases the goods from the debtor.[89] Serial number registration is therefore the safest course of action in all circumstances other than those in which the goods are held as inventory.

The serial number registration requirement is designed to ensure that security interests in high-value durable goods, particularly those that are frequently used as collateral and are readily bought and sold as used goods, are discoverable by third parties. If collateral is sold or transferred after a security interest is created and perfected in circumstances such that the buyer or transferee does not take free of the interest, a person who thereafter contemplates purchasing the property, taking a security interest in it or pursuing judgment enforcement measures against it is unlikely to have access to the name of the original debtor for purposes of a registry search. Even where a third party deals with the original debtor, a reliable registry search using the debtor's name as the search criterion depends upon entry of the debtor's exact legal name, or a variant of the debtor's name that will disclose the registration. Since interests acquired after a security interest is perfected are generally subordinate or subject to the security interest, a system in which registrations and correlative registry searches are based on debtor name alone entails a significant risk of loss to third parties, who may be unable to retrieve the registration. In contrast, the serial number of goods used as collateral offers a readily available registration and search criterion, the use of which will generate registry search results that reliably disclose security interests that may affect third party rights. However, this is true only to the extent that the serial number is used to search the proper registry.

1, 7 P.P.S.A.C. (2d) 240, 20 O.R. (3d) 108, (sub nom. *Lambert (Bankrupt), Re*) 74 O.A.C. 321 (Ont. C.A.); additional reasons at (1995), 1995 CarswellOnt 4269, 22 O.R. (3d) 480 (Ont. C.A.); leave to appeal refused (1995), 33 C.B.R. (3d) 291n, 123 D.L.R. (4th) vii (note), 23 O.R. (3d) xvi (note), (sub nom. *Scott & Pichelli Ltd. v. General Motors Acceptance Corp. of Canada*) 191 N.R. 236 (note), (sub nom. *Scott & Pichelli Ltd. v. General Motors Acceptance Corp. of Canada*) 87 O.A.C. 400 (note) (S.C.C.).

[89] PPSA ss. 35(4), 30(6) & (7).

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In a system that relies heavily upon an objective criterion, such as serial number, that is intrinsically linked to the collateral, the location of the collateral is the obvious nexus with the registry. A person dealing with collateral of this kind will search the registry of the jurisdiction in which the collateral is situated. The location of a debtor who has previously granted a security interest in the collateral may be unknown. If the debtor has sold the goods to a buyer who moves them out of the jurisdiction in which the debtor is located, a registry search in the new jurisdiction, even if conducted using the serial number of the goods, will not disclose the registration against the debtor. Were perfection of a security interest to be determined by the location of the debtor rather than the location of the goods, a security interest given by the debtor in a case of this kind would be regarded as perfected and would potentially have priority over a subsequent buyer or secured party who neither knows of the existence of the interest nor has any realistic prospect of discovering it.

The pertinent PPSA choice of law rule states that the perfection and priority of a security interest in goods "is governed by the law of the jurisdiction where the collateral is situated *at the time the security interest attaches*."[90] Taken alone, this would not permit a searching party to rely on the registry in the province or territory in which the goods are located at any given time, since the goods may have been moved out of the jurisdiction in which they were situated at the date of attachment of the security interest. However, the companion rule in section 5(3) operates such that in the case of goods (other than so-called "mobile" goods subject to section 7) a buyer or secured party dealing with the goods in the new jurisdiction can rely on the registry of that jurisdiction.[91] A security interest perfected by registration in the original jurisdiction will remain perfected only if it is registered in the new jurisdiction. The relevant registry in effect follows the goods. This system operates chiefly to protect third parties dealing with motor vehicles held as consumer goods, which frequently change hands and location. A serial number search in the jurisdiction in which the goods are located will allow such a person to proceed in confidence that the vehicle will not be lost to an

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[90] PPSA s. 5(1) [emphasis added].

[91] See the discussion headed "Change in Location of Collateral", in part 2(g) of this article.

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undisclosed secured creditor when a previous owner defaults on his or her loan payments.[92]

Given that Article 9 has abandoned the location-of-the-goods choice of law rule, this discussion raises the question of how the American public is protected from loss of that kind. The answer lies in the certificate-of-title system with respect to motor vehicles and, in some jurisdictions, boats, mobile homes and other goods as well.

Almost all U.S. states employ physical certificates of title to record and authenticate not only the ownership of motor vehicles, but also any security interests to which they are subject. Under a certificate-of-title system, security interests are noted on the certificate of title issued by the state.[93] This system is integrated with Article 9 through section 9-311, which provides, in effect, that compliance with a certificate-of-title statute with respect to collateral other than inventory held for sale or lease is equivalent to filing a financing statement and, as such, constitutes perfection of a security interest in the subject vehicle. In addition, section 9-303 supplants the default choice of law rule in this context, stipulating that the perfection and priority of a security interest in goods covered by a certificate of title is governed by the local law of the jurisdiction issuing the certificate. The certificate of title itself will therefore both evidence extant security interests and identify the governing law, thereby protecting third parties dealing with collateral subject to the certificate.[94]

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[92] A person who takes a security interest in the new jurisdiction is assured of full protection only if it is established that the vehicle has been in that jurisdiction for at least 60 days. If the prior secured party registers in the new jurisdiction before that period has elapsed, the security interest is "continuously perfected" and will have priority over a subsequent secured party. However, a buyer or lessee for value is protected as soon as the vehicle is relocated to the new jurisdiction. See PPSA 5(3).

[93] Some states instead allow secured parties to file a notice of interest with the state department of motor vehicles. For a summary explanation of certificate of title systems in the context of secured financing, see Lawrence et al., *supra,* n. 47 at 208-11.

[94] It has been observed that the combined certificate-of-title and Article 9 systems do not operate satisfactorily in all respects, primarily because certificates of title cover certain types of goods in some states but not others. In addition, it is possible in some circumstances to have more than one extant certificate of title issued by more than one jurisdiction with respect to the same goods. See Lawrence et al., *ibid.*, and the Official Comment to UCC 9-303.

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The interface between certificate-of-title law and the reciprocal features of Article 9 permits the Americans to move away from a general location-of-collateral choice of law rule for perfection of security interests in favour of a default location-of-the-debtor rule. It is worth noting that Article 9 recognizes that provision must be made for circumstances in which collateral of a type that is not covered by certificate-of-title legislation is sold by a debtor to a buyer located in another jurisdiction, and inferentially moved to that jurisdiction. A third party contemplating dealing with such goods may be expected to search the registry of the new jurisdiction in which the buyer is located. Such a person is protected against loss of the goods to the holder of a security interest perfected in the state in which the debtor is located by provisions that are discussed below under the heading "Relocation of the Debtor or the Collateral". While the approach is similar to that represented by section 5(3) of the PPSA, it differs in a manner reflecting the fundamental conceptual difference in approach between the two systems. Although the circumstances in which it applies will often involve the relocation of collateral from one state to another, the Article 9 rule speaks to circumstances in which goods are transferred to a "new debtor," rather than to a new location. This preserves location-of-the-debtor as the governing criterion for perfection, while addressing the practical problem of a relocation of goods accompanying their transfer to a buyer, where the goods are subject to a security interest given in a previous jurisdiction.

The approach taken by Article 9 would be untenable under the PPSA. As has been explained, serial number registration creates a fundamental nexus between the location of goods subject to the serial number registration requirement and the registry determining the perfection of a security interest in those goods. If a general location-of-the-debtor choice of law rule for perfection were to be adopted in Canada, it would still be necessary to address the problems associated with relocation of serial number goods by way of a priority or cut-off rule framed in terms of the location of the collateral, if third parties in the new jurisdiction are to be protected. The result would be a conceptually and functionally bifurcated system under which the relevant criterion would initially be the location of the debtor, but would switch to the location of the collateral on the occurrence of certain events.

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The fact that a location-of-the-debtor choice of law rule is currently used under the PPSA for most types of serial numbered goods held as equipment does not weaken the force of this argument.[95] Since the debtor in such a case is invariably a business debtor, those who are likely to acquire an interest in the collateral may be expected to know, or be in a position to find out, where a registry search should be conducted and to determine the debtor's exact name. Thus a lender dealing with an incorporated debtor will look to the registry of the province in which the debtor's chief executive office is located to determine whether serial numbered equipment held by the debtor is subject to a prior perfected security interest. In this context, a rule requiring perfection in accordance with the law of the location of the debtor is not problematic, and corollary rules addressing relocation of the debtor or transfer of the collateral to a person located in a different jurisdiction may be framed accordingly.[96]

The foregoing analysis suggests that the default location-of-the-debtor choice of law rule adopted in Revised Article 9 would not be acceptable in the absence of certificate-of-title systems, which are foreign to Canadian jurisdictions. For that reason alone, the approach adopted by Revised Article 9 is unsuited to the PPSA.[97] There are, however, other reasons to reject the American approach in the Canadian context.

Although the PPSAs enjoy a substantial degree of uniformity, a few significant differences remain, particularly as between the Ontario and non-Ontario versions of the Act. Notable among these is the difference in the scope of the concept of "security interest" embodied in the two models. In jurisdictions other than Ontario, the interest of a lessor under a true lease and the interest of a consignor under a true consignment are characterized as security interests in circumstances falling within the definitions of "lease for a term of more than one year" and "commercial

95 Since most serial numbered goods are motor vehicles, they are also "goods that are of a kind that are normally used in more than one jurisdiction" within the meaning of s. 7(2)(a)(ii). Under that provision, perfection and priority are governed by the law of the jurisdiction where the debtor is located if the goods are equipment, or inventory held for lease by the debtor.

96 See PPSA s. 7(3).

97 There is no perceptible evidence of an interest in moving to a certificate-of-title system in any Canadian jurisdiction.

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consignment," respectively.[98] In those jurisdictions, the lessor or consignor must perfect the property interest so characterized in order to ensure its primacy over the interests of competing third parties dealing with the lessee/debtor or consignee/debtor. In Ontario, transactions of this kind do not create security interests, so perfection is not a relevant consideration. Were the choice of law for perfection based on the location of the debtor rather than the location of the collateral, a person who leases to an incorporated Ontario debtor office equipment located in the debtor's Alberta branch office would not be obliged to perfect their property interest by registration in the Alberta personal property registry in order to prevail against competing claimants dealing with the debtor in Alberta.[99] A location-of-the-debtor rule would refer perfection to the law of Ontario, which does not provide for perfection of interests of this kind and does not make them subject to the PPSA priority regime. In effect, lessors and consignors dealing with Ontario debtors operating in non-Ontario jurisdictions could subvert the application of the law of those jurisdictions, which would otherwise govern interests in property located within their geographic boundaries.[100] In comparison, problems associated with substantive differences among domestic jurisdictions are virtually non-existent in the United States, since Article 9 has been adopted by all states with few substantive variations.

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[98] PPSA ss. 1(1)(z) and 1(1)(h).

[99] Since office equipment is not mobile goods falling within the scope of s. 7, the location of the goods at the date of attachment of a security interest determines the law governing attachment, perfection and priority. See PPSA s. 5(1).

[100] The same result would follow in a situation involving a debtor whose chief executive office is located in an American state, at least with respect to a lease of goods. However, Article 9 applies to non-security consignments in roughly the same circumstances as do the non-Ontario PPSAs. See UCC 1-201(b)(37). Note that this problem exists under current law in connection with mobile goods held by an incorporated debtor as equipment. If the scenario posited involved the lease of a delivery vehicle to such a debtor, the Ontario PPSA would apply to the issues of perfection and priority. Since non-security leases do not fall within the scope of that Act, the lessor's interest would not be regarded as a security interest and the lessor would be protected without registration, potentially at the expense of third parties who might deal with the debtor on the basis of its apparent ownership of the vehicle. See the discussion headed "Characterization", in part 2(a) of this article.

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(ii) *Problems of Interface in Canada – U.S. Transactions*

Choice of law based on the location of tangible property, or the *lex situs* rule, is the dominant international conflict of laws norm. Thus while the Article 9 approach works well internally, it does not interface particularly well with the choice of law rules employed by other countries, including Canada. The following basic scenario illustrates the point:

> Secured Party advances a loan to DebtorCo, incorporated in Delaware. DebtorCo operates outlets in several Canadian provinces, including Alberta. To secure its loan, Secured Party takes a security interest in the packing equipment used by DebtorCo for purposes of its Alberta operation.

If a priority competition involving this security interest were litigated in the United States, the law applicable to perfection would be the law of the debtor's location as determined by Article 9, namely, the law of Delaware. However, the priority of the security interest would be determined by the rules of the jurisdiction in which the collateral is located, which would be those of the Alberta PPSA.[101]

If the priority competition were litigated in Alberta, the relevant choice of law rule for perfection *and* priority would be the law of the location of the goods. Accordingly, to fully protect itself, the secured party must perfect is security interest in the registries of both Delaware and Alberta.

The difficulties presented by the lack of interface between Article 9 and the PPSAs are exacerbated when collateral moves across the Canada–U.S. border. Consider the following scenario by way of illustration:

> Assume that Secured Party 1 takes a security interest in packing equipment owned by DebtorCo, a company incorporated in Delaware but carrying on business in several jurisdictions including Montana, where the equipment is located. The equipment is subsequently moved to DebtorCo's Alberta business location, where a security interest is given by DebtorCo to Secured Party 2.

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[101] UCC 9-301.

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If the priority competition between Secured Party 1 and Secured Party 2 were litigated in Montana, perfection of both security interests would be determined by the law of Delaware, which is the location of the debtor as determined by Article 9. However, their relative priority would be determined by the law of the jurisdiction in which the goods are located, namely, by the Alberta PPSA.

Assuming that the goods are not mobile goods falling within section 7 of the PPSA, a Saskatchewan court before whom priority was litigated would be directed by the PPSA to determine perfection under the law of the jurisdiction in which the goods were located at the time the security interest in question attached. With respect to Secured Party 1's security interest, that would be the law of Montana. However, perfection under Montana law would be recognized in Alberta only if the security interest were reperfected in Alberta within 60 days of the arrival of the goods in the province (or within 15 days of Secured Party 1's acquiring knowledge of the removal). With respect to Secured Party 2's security interest, the governing law would be the law of Alberta.

The question of the law applicable to priority is problematic, since the PPSA would refer priority with respect to Secured Party 1's security interest to Montana, while the priority rules governing the interest of Secured Party 2 would be those of Alberta. This is the crux of the problem that a conflict of law regime is intended to overcome. If Alberta law were applied to the determination of priorities in this instance, there would be little point in a choice of law rule that purportedly recognizes the law of Montana as the law governing the Montana security interest. Choice of law rules recognize that the law of another jurisdiction should be applied even if the result is inconsistent with the result that would obtain under domestic law, unless there is a domestic rule that specifically precludes the application of the foreign law in the instance in question.

The Alberta PPSA recognizes that Montana law governs the Montana property interest in all respects, including priority, whether the collateral is in Montana or Alberta. This is reflected in section 5(1), which actively recognizes the effectiveness of Montana law, including the perfected status of the Montana security interest. Section 5(2) simply operates to *deny* the recognition of perfection in the circumstances defined. It affects the dispute only insofar as the perfected status of Secured

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Party 1's security interest will not be recognized in Alberta unless local perfection is achieved, but does not otherwise impinge on the applicability of Montana law. In the result, priority in this instance should be determined through the application of the Article 9 priority rules.

Article 9's location-of-the-debtor rule does not apply to possessory security interests in collateral.[102] As do the PPSAs, Article 9 provides that the perfection and priority of a possessory security interest in any type of collateral is governed by the law of the jurisdiction in which the collateral is located. However, the Article 9 rule differs from the PPSA rule in that the relevant law follows the collateral for so long as the secured party retains possession. For example, if the secured party initially perfected by possession in Montana but thereafter moved the collateral to Alberta while retaining possession, the law governing perfection and priority would change from that of Montana to that of Alberta.

In contrast, the PPSA provides that perfection and priority is determined by the relevant law at the date of attachment of the security interest. While this is inconsequential in terms of perfection, its implications may be significant in connection with priority. In the scenario posited, the result of applying of the PPSA choice of law rule would be that Article 9, as enacted in Montana, would continue to govern the priority of the security interest following removal of the collateral into Alberta.

(b) Location of Incorporated Debtor

The primacy of the location of the debtor as the determinant of choice of law under Revised Article 9 requires the definition of clear criteria establishing that location. Here too, Article 9 departs both from its predecessors and from the PPSAs with respect to the very significant question of the location of an incorporated debtor. The "chief executive office" test formerly applicable to a debtor having more than one place of business has been retained in connection with non-U.S. debtors and debtor organizations that are not a "registered organization". However,

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[102] UCC 9-301(2) provides:

> While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or non-perfection, and the priority of a possessory security interest in that collateral.

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corporations incorporated under the law of a U.S. state or under U.S. federal law are deemed to be located in the jurisdiction in which they were incorporated.[103]

As we have seen, the PPSAs employ a chief executive office test to determine the location of the debtor for purposes of the choice of law rule using that criterion. The advantages and disadvantages of a chief executive office test as compared with a place of incorporation test were reviewed by the Uniform Law Conference of Canada PPSA Working Group for purposes of a survey of legal opinion regarding the preferred approach.[104] They are outlined as follows:

> The CCQ [Civil Code of Quebec registered office/place of incorporation] and PPSA approaches each have their advantages and disadvantages. A legal enterprise's registered office is far easier to verify through a simple check of the corporate or other business organization records than the location of its chief executive office, an inherently fact-specific and occasionally ambiguous exercise. Moreover, a company's registered head office is less easily relocated and less prone to relocation than its administrative centre.
>
> However, a registered head office test for location raises concerns in the context of a business entity whose real centre of business is in one place but which is constituted under the law of some other place for tax or similar extraneous reasons. The law of the jurisdiction where the security granter conducts its real day-to-day business is more likely to be in the reasonable contemplation of other secured and unsecured creditors, and prospective buyers, who enter into business dealings with it. It is also the place where the principal insolvency proceedings involving that granter are most likely to be commenced. Accordingly, a chief executive office test would better ensure that the law governing the publicized status and third party effects of the security would coincide with the law governing the granter's insolvency. This in turn would eliminate the costs of having to plead and prove a foreign law in insolvency proceedings, and remove any potential for conflict between the priority rules of the applicable law and those of the insolvency forum.

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[103] In the case of a corporation incorporated under federal law, provision is made for the designation of the state in which the debtor is located, in default of which location is deemed to be the District of Columbia. See UCC 9-307(f). A debtor located in a jurisdiction whose law does not generally require notice in a filing or registration system is also located in the District of Columbia. Since this is not true of a Canadian debtor, whether or not incorporated, this qualification is irrelevant in the present context. See UCC 9-307(c) and (h).

[104] The issue is raised domestically by the fact that under the Quebec Civil Code, the choice of law reference is to the law of the jurisdiction in which the grantor of a security interest maintains its statutory seat (*i.e.*, its registered head office), while the common law jurisdictions refer to the chief executive office.

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> These third party concerns are more acute in the international context. Nationally, there is less potential for third party prejudice owing to the federal character of Canadian bankruptcy and insolvency law and the broadly harmonious character of Canadian corporations and secured transactions legal policy.[105]

Though the Working Group received limited response to the questionnaire accompanying its background paper, the response that was received uniformly endorsed the recommendation that the location of debtor enterprises constituted under federal or provincial/territorial law be determined according to a test akin to the registered office test in the Quebec Civil Code and in Revised Article 9. Similarly endorsed was the companion recommendation that the chief executive office test be retained for purposes of determining the location of debtor enterprises constituted under the law of a foreign country, including the United States. In effect, the recommendation would implement the criteria currently employed by Article 9 with respect to domestic and foreign debtors, respectively.

Under current law, Canadian and American secured financers dealing with incorporated debtors who have business operations in both Canada and the United States may be well advised to register in the jurisdiction in which the debtor was incorporated in addition to that in which it maintains its chief executive office, if they differ. If a priority issue involving a U.S. debtor incorporated in one jurisdiction but having its chief executive office in another is litigated in a U.S. court, the court will look to the registry in the place of incorporation to determine the perfected status of a security interest when the location of the debtor is the basis for the choice of law, as is generally the case.

If such a priority dispute were litigated in a PPSA jurisdiction with respect to collateral that is mobile goods or intangibles falling subject to the location-of-the-debtor choice of law rule in section 7, the approach would be less straightforward. In PPSA jurisdictions other than Ontario, the court will look to the law of the jurisdiction in which the debtor's chief executive office is located. If that jurisdiction is in Canada (other than in Quebec), its law will apply. If it is in the United States, the court will apply Article 9, including its choice of law rules, with the result that

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[105] "Background Paper 3: Facilitation of Cross-Border Secured Financing: Harmonizing Choice-Of-Law Rules on Security in Movable Property," online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/cls/ppsa-bp3.html>.

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perfection and priority will be governed by the law of the jurisdiction in which the debtor was incorporated.

If the issue were litigated in Ontario, the court's approach would depend upon whether the PPSA choice of law rule excludes *renvoi.*[106] If the rule is taken to preclude reference to the choice of law rules of the jurisdiction it identifies, the applicable law will be the law of the jurisdiction in which the debtor's chief executive office is located, whether that jurisdiction is in the United States or in Canada. The Ontario court would not accept a reference back to its own jurisdiction or the transmission to a third jurisdiction of the issues of perfection and priority.

In a priority competition involving a debtor incorporated in Canada, a U.S. court will look to the jurisdiction in which the debtor maintains its chief executive office, as will a Canadian court. A non-Ontario Canadian court will apply the conflict of law rules of that jurisdiction to determine the law applicable to perfection and priorities. However, that will not affect the result since, under both the PPSA and Article 9, a non-U.S. debtor is located at its chief executive office. Somewhat incongruously, while the Uniform Law Conference of Canada recommendations regarding location of the debtor would replicate the Article 9 rules determining that issue, their adoption would exacerbate the practical differences in a case of this kind, since the Canadian court would look to the registry in the jurisdiction in which the debtor was incorporated to determine perfection, while an American court would look to the locale of the chief executive office.

The following scenario demonstrates the application of the differing Article 9 and PPSA rules determining location of an incorporated debtor:

> Secured Party advances a loan to DebtorCo, which was incorporated in Delaware. DebtorCo's chief executive office is in Chicago, Illinois. DebtorCo operates retail stores in several Canadian provinces, including Alberta and Ontario. To secure its loan, Secured Party takes a security interest in account receivables generated by the sale of DebtorCo's inventory from its Alberta and Ontario stores.

[106] See the discussion headed "Renvoi *under the Location-of-the-Debtor Rule*", in part 2(i) of this article.

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If a priority competition involving this security interest were litigated in the United States, the law applicable to perfection and priority would be the law of the debtor's location as determined by Article 9, namely, the law of Delaware.

If the priority competition were litigated in Alberta, the choice of law for perfection and priority would similarly be the law of the debtor's location.[107] The debtor's location as determined by the PPSA would be its chief executive office, which is in Illinois. However, the reference to Illinois would include its choice of law rules, which would refer perfection to the debtor's location as determined by its place of incorporation. The applicable law would therefore be the law of Delaware. If the case were litigated in Ontario where *renvoi* is most likely not a feature of the choice of law rule, and assuming that the definition of the debtor's location is a choice of law rule, the matter would not proceed beyond Illinois, the location of the debtor's chief executive office. To fully protect itself the secured party must, therefore, perfect its security interest by filing in the registries of both Delaware and Illinois.

If the same scenario arose in connection with a debtor incorporated in Alberta with its chief executive office in Illinois, all potential Canadian and U.S. forums would apply the law of Illinois to the issues of perfection and priority. If the debtor's chief executive office were in Manitoba, the law of Manitoba would be applied.

(c) Bifurcation of Perfection and Priority

Under Revised Article 9, the law of the debtor's location governs *perfection* of a security interest in most types of collateral. However, the law of the location of the collateral governs the *priority* of a non-possessory security interest in negotiable documents, goods, instruments, money or tangible chattel paper.[108] This may be contrasted with the PPSA choice of law rules, all of which relate perfection and priority to the law of the same jurisdiction.

The bifurcation of perfection and priority is explicable and workable in the U.S. domestic context because the versions of Article 9 that have been adopted by all states are substantially uniform. It matters little

[107] PPSA s. 7(2).
[108] UCC 9-301(3).

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whether the applicable priority rules are those of the state whose law governs perfection or those of another state, since those rules are likely to be the same.[109] Though the priority rules of the provincial and territorial PPSAs are substantially the same, they are not identical in all respects. More notably, PPSA priority rules deviate from those of Article 9 in a number of cases. However, those differences may not be highly significant in the context of the limited types of collateral to which the bifurcated approach applies.

(d) Relocation of the Debtor or the Collateral

The application of both the location-of-the-debtor and location-of-collateral rules of Article 9 is temporally contemporaneous with geographic locale. Note that under the default rule, perfection and priority are determined by the law of the debtor's location *while the debtor is located in that jurisdiction.* We have just seen that in the context of certain documentary collateral, money and goods, this is subject to the qualification that the choice of law for determination of priorities is the law of the jurisdiction in which the collateral is located *while it is located in that jurisdiction.* Similarly, perfection and priority of a possessory security interest is determined by the law of the jurisdiction in which

[109] Notwithstanding the general consistency of the potentially relevant priority rules, the Official Comment offers by way of explanation for the bifurcated approach the observation that it may be inappropriate for the law of the location of the debtor to determine priorities with respect to certain competing interests arising in the state in which the collateral is located, where that location differs from the location of the debtor. The example given is that of a security interest in equipment in competition with an execution lien on goods arising under the law of the jurisdiction in which the equipment is located. Under 9-301(3), the outcome will be determined by the law of that jurisdiction. Lawrence, *et al.*, *supra,* n. 47 at 205, offer a further illustration demonstrating that in some states, an enforcing judgment creditor can only acquire priority over a security interest by seizing the subject property prior to perfection of the security interest, while under the nonuniform provisions in effect in California, a judgment creditor can establish priority by public filing. Accordingly, the application of the priority rule of another state to a judgment lien registered under California law in competition with a security interest in goods located in that state could lead to a different result than would California's domestic law. It is worth noting that most Canadian jurisdictions share this "nonuniform" approach to the priority of a writ of execution that has been registered in the Personal Property Registry of the province or territory in which judgment was issued. See, *e.g.*, *The Executions Act*, R.S.S. 1978, c. E-12, s. 2.2, and see Ronald C.C. Cuming, "When an Unsecured Creditor is a Secured Creditor" (2002) 66(1) Sask. L. Rev. 255.

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the collateral is located *while it remains in that jurisdiction.* Consequently, the applicable law changes to that of the new jurisdiction in the event of relocation of the debtor or the collateral, as the case may be.

This is to be contrasted with the PPSA rules, which refer perfection and priority to the location of the debtor or the collateral *at the time of attachment of the security interest.* As we saw earlier, a change in location of the debtor or the collateral may require reperfection in the new jurisdiction for purposes of a potential priority conflict arising in that jurisdiction, but will not change the law applicable to priority. The grace periods for reperfection are either 60 days after the day the debtor or the collateral enters the new jurisdiction, or 15 days after the secured party acquires knowledge of the relocation.[110]

In the absence of a countervailing provision, the change in the law governing perfection triggered under Article 9 by a change in location of the debtor would mean that a security interest perfected by filing in the initial jurisdiction would become unperfected the moment the debtor relocates to another state. Although that result could be forestalled by an anticipatory filing in the new jurisdiction, the secured party will rarely know of the intended relocation in advance and may have difficulty discovering it after the fact. The necessary countervailing provision is found in section 9-316.[111] Clause (a) establishes that a security interest perfected pursuant to the law of the debtor's initial jurisdiction remains perfected in a jurisdiction to which the debtor relocates for a period of four months after the relocation or until such time as perfection would have ceased under the law of the original jurisdiction, whichever comes first.

A change in the location of the collateral will not, in most instances, automatically change the law applicable to perfection, since that law is determined by the location of the debtor. However, Article 9 extends the approach taken in connection with relocation of the debtor to a transfer of collateral to a "person that becomes a debtor" who is located in a jurisdiction other than that of the original debtor.[112] As a practical

[110] PPSA ss. 5(2), 7(3).

[111] The detailed rules governing change in governing law with respect to certificate-of-title goods, deposit accounts, letter-of-credit rights and investment property are not addressed here. See in that regard UCC 9-316 (d) through (g).

[112] The rule refers to "a transfer of collateral to a person that thereby becomes a debtor

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matter, the circumstances in which the provision will apply are likely to involve the movement of the collateral from the jurisdiction of the original debtor to that of the new debtor. Under this provision, a security interest given by the original debtor remains perfected for a full year after the transfer, explicitly becoming unperfected thereafter. Continued perfection in the new jurisdiction is conditioned only by the requirement that perfection under the law of the original jurisdiction has not ceased, for example, as a result of the expiry of the filing in that jurisdiction.

As we saw earlier in this article, the PPSA takes a similar approach to relocation of the debtor when choice of law is determined by the debtor's location rather than the location of goods.[113] If the debtor relocates or transfers an interest in the collateral to a person in another jurisdiction, section 7(3) gives absolute protection to a security interest given before the relocation or transfer for 60 days, provided the security interest is reperfected in the new jurisdiction within that period.[114] Notably, the period of continued perfection offered by the PPSA is a great deal shorter than is Article 9's, and is curtailed by the secured party's acquisition of knowledge of the relocation.[115]

The continued perfection rules of the PPSA differ more markedly from those of Article 9 in connection with a security interest in goods. Where choice of law for perfection is determined by the location of the goods at the date of attachment of the security interest, a security interest

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and is located in another jurisdiction." UCC 9-316(a)(3). To a reader acquainted with the PPSA, the notion of a person "becoming" a debtor is somewhat obscure. In this context, it encompasses Article 9's distinctive concept of "new debtor", which refers to a person who assumes obligations under a security agreement entered into by another person as, for example, in the case of a corporate reorganization resulting in the creation of a new legal entity. See UCC 9-102(a)(56) and 9-203(d). However, the Official Comment to UCC 9-316 points out that the application of the provision is not limited to transferees who are new debtors. This is explained by the fact that UCC 9-102(a)(28) defines "debtor" to include a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor.

113 See the discussion headed "Change in the Location of the Debtor or Sale of Collateral Where Location-of-Debtor Rule Applies", in part 2(j) of this article.

114 As in the case of relocation of non-mobile goods, s. 7 of the Ontario PPSA applies only when the debtor relocates to Ontario. In the other PPSA jurisdictions, the provision applies to any relocation, whether or not to the enacting jurisdiction.

115 Continued perfection lasts for only 15 days after the date such knowledge is acquired.

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perfected in the original jurisdiction remains perfected in a new jurisdiction into which the goods are moved for 60 days following the relocation *except* as against a person who buys or leases the goods in the new jurisdiction before the security interest is reperfected in that jurisdiction. In contrast, Article 9-316 would protect such a person only if the security interest is not reperfected at all within the relevant grace period. The point is illustrated by this hypothetical:

> Debtor, who is located in a U.S. state, gives a security interest in goods to Secured Party. The goods are sold to a person located in a state other than that in which the debtor is located. Six months after the initial sale, the goods are sold to a second buyer in the new jurisdiction. Two months later, Secured Party perfects by filing in the state in which the buyers are located.

Under Article 9, the secured party could assert its security interest against both the first and the second buyer, assuming the initial sale was not an authorized sale or a sale in the ordinary course of the seller's business. The fact that the filing occurred after the goods were purchased by the second buyer in the new jurisdiction does not affect the priority of the security interest. This is subject to the qualification that if the filing were to occur outside the one-year grace period, the security interest would lose its priority position because it would be deemed never to have been perfected in the new jurisdiction as against a purchaser for value. If the same facts were to occur in Canada, the security interest would not be treated as perfected as against those who bought the goods in the second jurisdiction, who would therefore have priority.

The continued perfection rules of the PPSA and Article 9 are designed to balance two competing interests. On the one hand, a creditor who holds a perfected security interest in collateral requires protection against a loss of perfection or priority triggered by conduct on the part of the debtor that is beyond the creditor's control and of which the creditor may have no knowledge. On the other, third parties who acquire property that is subject to a perfected security interest in circumstances in which that interest may not be disclosed or discovered require protection against the potential loss occasioned by its recognition. The PPSA rules tend to favour such third parties, while Article 9 attaches greater weight to the protection of secured creditors.

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For purposes of risk assessment and the design of policies for monitoring their debtors' affairs, American secured financers should be cognizant of the fact that the potential application of the PPSA to a priority competition involving either a Canadian debtor or non-mobile goods located in Canada leaves their interest considerably more vulnerable than it is in an equivalent situation governed by Article 9. On the other hand, Canadians who take security interests in the personal property of U.S. debtors or purchase such property in the United States must take into account the possibility that their interest, whether as secured party or buyer, may be subordinated to a security interest that does not appear in the registry of the state whose law is the governing law.[116]

The differences between the PPSA and Article 9 are of less consequence in connection with possessory security interests. Both regimes refer the issues of perfection and priority of a possessory security interest in collateral to the law of the jurisdiction in which the collateral is located.[117] Given the nature of this method of perfection, a change in location of the collateral does not result in a loss of perfection.[118] However, while the perfected status of a possessory security interest will be governed by the law of the jurisdiction in which the collateral is located under both systems, the PPSA departs from Article 9 in its choice of law for determination of the priority of such an interest. Under Article 9, the law governing priority also follows the collateral. Under the PPSA, priority is determined by the law of the jurisdiction in which the collateral was located at the time the security interest attached. Although this distinction is likely to be immaterial in most cases, it means that a Canadian court would apply the priority rules of Article 9 to collateral

[116] One of the fundamental policies underlying the PPSA is the protection of consumer and small business purchasers of high-value goods such as motor vehicles. The PPSA's continued perfection provisions are consistent with that policy.

[117] See PPSA s. 5(1), UCC 9-301(2).

[118] This is explicitly addressed in UCC 9-316(c). There is no explicit reference in the PPSA to continued perfection in the case of relocation of collateral subject to a possessory security interest. Note, however, that under UCC-9-316(c), the reference to a "possessory security interest" includes not only security interests perfected by the secured party's having taken physical possession of the collateral, but also security interests perfected by a method in which an *element* of perfection involves the secured party having taken possession. Examples given in the Official Comment to UCC 9-316 are those of perfection by taking delivery of a certificated security in registered form, and perfection by obtaining control over a certificated security.

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that has moved from a U.S. jurisdiction into a Canadian jurisdiction, and those of the PPSA to collateral that has moved from Canada into an American state.

(e) Certificate-of-Title Collateral

We have seen that Article 9's choice of law rule for certificate-of-title collateral represents an important exception to the default rule. Where collateral is covered by a certificate of title, the law governing perfection and priority is the law of the jurisdiction issuing the certificate.[119] Goods other than motor vehicles may be certificate-of-title goods under the laws of some states. However, for purposes of a comparison between the Article 9 system and that of the PPSA, it is helpful to limit the discussion to motor vehicles. That comparison requires further consideration of the relevant perfection provisions of Article 9.

Pursuant to section 9-311, perfection of a security interest in a motor vehicle is accomplished exclusively by compliance with the applicable certificate-of-title statute unless the collateral is held by the debtor as inventory for sale. In that instance, the secured party can perfect by filing a single financing statement under the debtor's name. However, the determination of *where* that filing should be made is not obvious. With respect to inventory, it appears that the certificate-of-title goods choice of law rule contained in section 9-303 does not apply.[120] That being the case, the applicable rules are those found in the general choice of law provisions of section 9-301, pursuant to which perfection is

[119] UCC 9-303.

[120] UCC 9-303(c) stipulates that the law of the jurisdiction under whose certificate of title goods are covered governs perfection and priority. Presumably some certificate-of-title-goods held as inventory may be covered by a certificate of title, a supposition that seems to be contemplated by the Official Comment to UCC 9-311. Although UCC 9-311(d) exempts security interests in certificate-of-title goods held as inventory for sale from the application of its perfection provisions, there is nothing explicitly exempting those security interests from the choice of law rule in 9-303(c). It would seem, then, that the law relevant to perfection and priority of a security interest taken by a single lender in various items of certificate-of-title inventory might differ according to the jurisdiction that has issued an extant certificate of title with respect to any such items. However, this conclusion is inconsistent with the Official Comment's assertion that "a secured party who finances an automobile dealer that is in the business of selling and leasing its inventory of automobiles can perfect a security interest in *all* the automobiles by filing a financing statement. . ." [emphasis added]. To the same effect see Lawrence *et al.*, *supra*, n. 47 at 210.

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governed by the law of the jurisdiction in which the debtor is located, while priorities are determined by the law of the jurisdiction in which the inventory is located.

On this analysis, Article 9 differentiates the choice of law rules applicable to security interests in motor vehicles depending upon whether the vehicles are held by a debtor as inventory or non-inventory. The correlative PPSA analysis is more involved. In virtually all cases, a motor vehicle will fall within the descriptor "goods that are of a kind that are normally used in more than one jurisdiction." Accordingly, with respect to a security interest in a motor vehicle held by the debtor either as equipment or as inventory leased or held for lease to others, the PPSA will refer perfection and priority to the location of the debtor.[121] With respect to a security interest in a motor vehicle held by the debtor as consumer goods or as inventory for *sale*, perfection and priority is governed by the location of the vehicle.[122]

The accompanying chart identifies the choice of law rule that would be applied to motor vehicles under Article 9 and the PPSA, respectively.

Category of Motor Vehicle	Perfection Priority	PPSA	Article 9
Consumer goods	perfection	location of vehicle	certificate of title
	priority	location of vehicle	certificate of title
Equipment used in U.S. state	perfection	location of debtor	certificate of title
	priority	location of debtor	certificate of title
Equipment used in Canadian province	perfection	location of debtor	location of debtor*
	priority	location of debtor	location of vehicle
Inventory for sale	perfection	location of vehicle	location of debtor
	priority	location of vehicle	location of vehicle
Inventory for lease	perfection	location of debtor	certificate of title
	priority	location of debtor	location of title

* This assumes that motor vehicles used in a Canadian province or territory are licensed under the law of that province or territory and are therefore not covered by a certificate of title. Accordingly, Article 9's default choice of law rule would apply.

121 PPSA s. 7(2).

122 PPSA s. 5(1).

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Needless to say, a secured creditor financing automobiles must take care to ensure that its security interest is perfected by registration or filing in the appropriate jurisdiction, or by compliance with the applicable certificate-of-title statute. A secured creditor financing a cross-border transaction involving inventory who wishes to ensure that its security interest will be protected in the event of litigation in either Canada or the United States should register or file for purposes of the former in the jurisdiction in which the vehicles are located and for purposes of the latter in the jurisdiction identified by Article 9 as the location of the debtor.

A range of scenarios raising the numerous possible permutations of the applicable rules can be conceived. However, the following serves for purposes of illustration:

> Secured Party advances a loan to DebtorCo, which is incorporated in Delaware. DebtorCo's chief executive office is in Chicago, Illinois. DebtorCo operates retail stores in several Canadian provinces, including Alberta. To secure its loan, Secured Party takes a security interest in the delivery vehicles used by DebtorCo for purposes of its Alberta operation. The vehicles are licensed in Alberta and are not covered by a certificate of title issued by a U.S. state.

If a priority competition involving this security interest was litigated in the United States, the law applicable to perfection and priority would be the law of the debtor's location as determined by Article 9, namely, the law of Delaware. However, the priority of the security interest would be determined by the law of the location of the collateral, which is the Alberta PPSA.[123] Although the vehicles would be certificate-of-title goods in the United States, the certificate-of-title rules do not apply in this instance because the vehicles are licensed and operated in Alberta, which does not have a certificate-of-title statute. Accordingly, Article 9's default choice of law rules would apply.

If the priority competition were litigated in Alberta, the relevant choice of law rule would be that applicable to mobile goods, since the collateral is "goods of a type that are normally used in more than one jurisdiction" and they are held by the debtor as equipment. Accordingly,

[123] UCC 9-301.

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the law applicable to perfection *and* priority of the security interest would be the law of the debtor's location as determined by the PPSA; namely, the law of Illinois, *including* the conflict of law rules of that state as represented by Article 9. Perfection and priority would therefore be determined by the law of Delaware.[124]

The secured party will be protected in this situation by registration in Delaware for purposes of litigation in either country. Although in a domestic context achievement of the strongest possible priority status under the PPSA would require inclusion of the serial number of the vehicles in the financing statement, serial number registration is not required and presumably not accommodated by state registries. Accordingly, filing by debtor name would suffice, even for purposes of litigation in Alberta. Perversely, Alberta's priority rules will apply in U.S. litigation, but not in litigation in Alberta.

If the vehicles were held by the debtor as inventory, a U.S. court would apply the law of Delaware to the issue of perfection and the Alberta PPSA to that of priorities. However, an Alberta court would apply the law of the location of the vehicles to both issues – that is, the Alberta PPSA. In this instance, the secured party should perfect in the registries of Delaware and Alberta.

(f) Deposit Accounts

One of the most significant differences between Article 9 and the PPSA is their respective treatment of deposit accounts used as collateral. Deposit accounts were entirely excluded from former versions of Article 9, except to the limited extent that a secured party could trace proceeds of collateral into such an account.[125] Under the PPSA, deposit accounts fall within the generic category of "account"[126] and are thus subject to the rules generally applicable to that form of collateral, with one or two

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[124] Note that if the PPSA jurisdiction involved were Ontario, the law relevant to perfection and priority would be that of Illinois, assuming that the corresponding Ontario provision does not incorporate *renvoi* and that the Article 9 definition of location of the debtor is a choice of law rule.

[125] The exclusion continues to apply to consumer transactions. See UCC 9-109(d)(13).

[126] PPSA s. 1(1)(b) provides that "account" means a monetary obligation not evidenced by chattel paper, an instrument or a security, whether or not it has been earned by performance.

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minor exceptions.[127] The category of collateral constituting an "account" in Article 9 is much more limited and does not include deposit accounts.[128] A deposit account falls within the separate category of "payment intangible," which is in turn a subset of the broader category of collateral described as "general intangible."[129]

A full review of the relatively complex Article 9 rules relevant to deposit accounts is beyond the scope of this paper. However, an appreciation of the significance of the choice of law rule applied to such accounts by Article 9 requires a basic understanding of its provisions governing perfection of a security interest in that form of property. Revised Article 9 applies to deposit accounts the concept of "control," which was initially introduced into the Uniform Commercial Code in connection with investment property.[130] A security interest in a deposit account may be perfected only by control, except when the account is proceeds.[131] If the secured party is the depositary institution, its security interest is deemed to be perfected by control. No positive action to assert control is required. Other secured parties may establish control either by becoming the customer with respect to the account or by entering into a tripartite agreement with the debtor and the bank stipulating that the bank will follow the secured party's instructions without the further consent of the debtor.[132] In contrast, control is not currently recognized as a perfection device under the PPSA with respect to any form of property, and a security interest in an account can be perfected only by registration of a financing statement.

Deposit accounts fall within the general PPSA choice of law rule applicable to intangibles. Under that rule, the validity, perfection and priority of a security interest in a deposit account are governed by the

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[127] See *e.g.*, Saskatchewan PPSA, *supra*, n. 52 at s. 34(7), under which a different priority rule applies to proceeds of inventory in the form of a deposit account than is otherwise the case.

[128] UCC 9-102(a)(2).

[129] UCC 9-102(a)(61) and 9-102(a)(42). A payment intangible is a general intangible under which the account debtor's principal obligation is a monetary obligation.

[130] The PPSAs do not currently recognize control as a form of perfection for investment property. However, that concept is adopted in the PPSA amendments that would accompany adoption of the *Uniform Securities Transfer Act* in Canadian jurisdictions. See *infra*, nn. 136 and 137.

[131] UCC 9-312(b).

[132] UCC 9-104.

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law, including the conflict of law rules, of the jurisdiction where the debtor is located when the security interest attaches.[133] However, Article 9 departs from its usual location-of-the-debtor choice of law rule in this instance and focuses instead on the location of the depositary bank. The relevant rule provides that the local law of a bank's jurisdiction governs the perfection and priority of a security interest in a deposit account maintained with that bank. In turn, the jurisdiction of the bank can be established by agreement between the bank and the debtor. In the absence of agreement, the bank's jurisdiction is that of the branch at which the account is maintained, as indicated by the account statement or, if jurisdiction cannot be established on that basis, the jurisdiction in which the chief executive office of the bank is located.[134]

This makes for a rather complicated state of affairs. Consider this scenario:

> Secured Party dealing with an Alberta retail store owned by a U.S. company takes a security interest in property of the debtor, including a deposit account maintained at a local branch of a Canadian bank. The debtor company was incorporated in Delaware, but its chief executive office is in Chicago. Secured Party attempts to perfect by filing in the jurisdiction in which the debtor is located in compliance with the PPSA choice of law rule referring perfection and priority to the law of the debtor's location.

For purposes of the PPSA, the debtor is located at its chief executive office in Chicago. However, the reference by the non-Ontario PPSAs to the law of Illinois includes the conflicts rules of Illinois, which are those of Article 9. Under Article 9, perfection and priority of a security interest in a deposit account is determined by the law of the jurisdiction of the depositary bank. If the debtor in our scenario (which, being a U.S. company, is acquainted with Article 9) has included in its account agreement with the Canadian bank a provision identifying a U.S. state, let us say New York, as the bank's jurisdiction for this purpose, the governing law will be Article 9 as enacted by that state. Since under that law a security interest in a bank account can only be perfected by control, Secured Party's security interest will be unperfected, assuming that it

[133] PPSA s. 7(2)(a)(i).

[134] UCC 9-304.

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has simply filed and has not established control. This result would follow regardless of whether the priority dispute was litigated in Alberta or in the United States.

If the scenario involved a retail store located in Ontario and the priority issue in question was litigated in that province, the result would be the same, though for slightly different reasons. The Ontario PPSA choice of law rule would, like that of the Alberta Act, lead to the law of Illinois, where the debtor is deemed to be located under the PPSA definition. Though the Ontario Act may preclude a further reference to the law of New York (the bank's jurisdiction), that fact would be immaterial, since the relevant part of Article 9 as enacted by Illinois is the same as New York's Article 9. Hence perfection of the security interest could only be accomplished by control.

The analysis is more difficult if the facts are such that the Article 9 rules for determining the location of the depositary bank lead to the law of a PPSA jurisdiction. This could occur if the deposit agreement between the debtor and the depositary bank does not include a choice of law clause, in which case the bank's jurisdiction will likely be that of the branch at which the deposit account is maintained (Alberta or Ontario, as the case may be), since that branch will be identified on the account statement. If not, it will be the jurisdiction in which the chief executive office of the bank is located, which is also likely to be a PPSA jurisdiction.

If Alberta is identified as the location of the depositary bank on either approach and assuming litigation occurs in Alberta, the analysis would be as follows: The Alberta PPSA refers perfection to the law of the location of the debtor, which under the PPSA definition of location is Illinois, including the choice of law rules of that state. That law, as contained in Article 9, refers perfection to the local law of the depositary bank, and defines the location of the depositary bank as Alberta. The Alberta PPSA recognizes only the registration of a financing statement as constituting perfection of a security interest in a deposit account. But where is the financing statement to be registered? Since the reference from Michigan to Alberta was limited to the *local* law of Alberta, one might conclude that the registration is to be made in the Alberta Personal Property Registry. However, this would be anomalous, since the Alberta PPSA stipulates that a security interest in a deposit account is to be

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perfected by registration of a financing statement not where the depositary bank is located but where the debtor is located, which in this instance, is Illinois. In fact, the PPSA simply does not recognize the location of a depositary bank as a relevant criterion for purposes of perfection. But the conclusion that the relevant jurisdiction is Illinois would require perfection by registration in a jurisdiction that does not recognize perfection by filing for this type of collateral.

If the location of the depositary bank in this scenario were Ontario rather than Alberta, the PPSA choice of law for perfection would presumably refer exclusively to the domestic law of the debtor's location. Assuming that the Article 9 provision referring perfection to the local law of the depositary bank is a choice of law rule, it would not be taken into consideration. Thus there would be no reference back to Ontario law, with the result that the applicable rule for perfection would be the same as that applied in the circumstance considered at the outset: that is, where the depositary bank was located in a U.S. state. Under the law of Illinois, like that of any other U.S. state, perfection must be established by control.

The foregoing analyses must also be applied to the question of priority, since the PPSA refers both perfection *and* priority to the law of the debtor's jurisdiction.

(g) Investment Property

As with deposit accounts, Article 9, in combination with Article 8 of the Uniform Commercial Code, applies to securities and other forms of investment property a regime that differs significantly from that of the PPSA. Its scope encompasses not only traditional types of securities, but also the unique form of property comprising a "security entitlement."[135] Though a security interest in these forms of property can be

[135] The Official Comment to Uniform Commercial Code Revised Article 8-102(a)(17) describes a "security entitlement", in part, as follows:

> "Security entitlement" means the rights and property interest of a person who holds securities or other financial assets through a securities intermediary. A security entitlement is both a package of personal rights against the securities intermediary and an interest in the property held by the securities intermediary. A security entitlement is not, however, a specific property interest in any financial asset held by the securities intermediary or by the [clearing agency] through which the securities intermediary holds the financial asset.

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perfected by filing, the most potent form of perfection is control, which is established in a manner analogous to that applicable to bank accounts.

The PPSAs neither recognize a security entitlement as a type of collateral nor accept control as a form of perfection. However, this is very likely to change in the near future. A *Uniform Securities Transfer Act* has been proposed for adoption by the Canadian Securities' Administrators Uniform Securities Transfer Act Task Force, and approved by the Uniform Law Conference of Canada at its 2004 annual meeting.[136] The Act is patterned on Article 8 of the Uniform Commercial Code, and would be accompanied by amendments to the PPSAs that would reflect the substance of Article 9's provisions relating to investment property.[137] In light of these developments, a full discussion of the current differences between the PPSAs and Article 9 is unwarranted. However, they will be summarized briefly.

Under the PPSA, the law governing validity, perfection and priority of a non-possessory security interest in a security is that of the jurisdiction where the debtor is located when the security interest attaches, including its conflict of law rules.[138] In the case of a possessory security interest, those matters are governed by the law of the jurisdiction where the collateral is situated when the security interest attaches.[139] Although an uncertificated security is not strictly capable of "possession," the PPSA of some jurisdictions stipulates that where collateral is a security the transfer of which may be effected by an entry in the records of a clearing agency, a secured party is deemed to have taken possession of the security when the appropriate entries have been made in the records of the clearing agency.[140] The location of an uncertificated security is

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136 The draft Act with commentary is available online: Ontario Securities Commission <http://www.osc.gov.on.ca/MarketRegulation/SpecialProjects/usta/usta_20041112_task-force.pdf>.

137 The requisite amendments have been prepared by the PPSA Working Group of the Uniform Law Conference of Canada, in consultation with the Canadian Securities' Administrators Task Force. An initial draft of the amendments appears in Report, *supra*, n. 6.

138 PPSA s. 7(2)(b).

139 PPSA s. 5(1).

140 See *supra*, n. 52. As suggested, the Ontario and Alberta Acts do not appear to accommodate a possessory security interest in an uncertificated security. In those jurisdictions the choice of rule generally applicable to non-possessory security interests will therefore govern with respect to that form of collateral.

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the location at which the records of the clearing agency are kept.[141] Unlike the choice of law rule governing a non-possessory security interest, the PPSA choice of law rule applicable to a possessory security interest in securities does not adopt the conflict of laws rules of the relevant jurisdiction.

It is apparent that under the current PPSA provisions dealing with securities, including the choice of law rules, the substantial differences between Article 9 and the PPSA may create difficult problems of application in transactions spanning the Canada–U.S. border. Fortunately, these will be resolved by the anticipated enactment of the *Uniform Securities Transfer Act* and accompanying PPSA amendments.

4. CONCLUSION

While Article 9 and the Canadian PPSAs share much in the way of both concept and detail, they diverge in important respects. Of particular significance are differences in their approach to perfection of security interests in certain types of collateral, only a few of which have been mentioned in this article. Differences in the relevant priority rules, which are also significant in some respects, have not been considered. Those differences in themselves would complicate the resolution of disputes involving competing legal interests in a situation involving a secured financing transaction spanning the Canada–U.S. border. That complexity is much exacerbated by the fact that the choice of law rules of Article 9 will very often identify a different governing law than will those of the PPSA.

From the point of view of secured parties and others dealing with property subject to a security interest, the consequences are twofold. First, risk assessment may require consideration of the application of more than one system of law, including an assessment of the uncertain outcome likely to follow when choice of law rules lead to the potential application of both systems of law in contradictory fashion within a single dispute. Secondly, and of great practical significance, is the consequence of the choice of forum in which to litigate priority issues that may arise in this context. As the discussion and the scenarios presented above demonstrate, litigation in an American state may lead to very

[141] PPSA s. 5(2).

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different results than would litigation of the same case in a Canadian province or territory.

Regrettably, the changes in choice of law adopted by Revised Article 9 have heightened rather than diminished the difficulties arising from the differences between Canadian and United States law. Moreover, since the innovation represented by selection of the location of the debtor as the overarching choice of law rule is unworkable in Canada, there is no prospect for amelioration of those difficulties through parallel amendment of the PPSAs. This is an unfortunate state of affairs, since the reality of the increasingly integrated economies accompanying international trade demand more, rather than less, harmonization of the legal environment within which transactions crossing national borders occur. Nevertheless, the increased transaction costs and the costs flowing from the heightened legal risk created by the Article 9 – PPSA divergence are apparently here to stay.

ADDENDUM:

At the time this article went to print, Bill 41 was before the Ontario Legislature. The bill includes important amendments to the choice of law provisions of the Ontario *Personal Property Security Act*. Notable amendments bearing upon the subject of this article include provisions

(a) specifying explicitly that references to the law of a jurisdiction mean the internal law of that jurisdiction but not its conflict of law rules, and

(b) redefining the location of the debtor such that the law identified by section 7 is the law of the jurisdiction in which a corporate debtor maintains its registered office, rather than the law of the jurisdiction in which its chief executive office is situated. In addition, consultations following the introduction of Bill 41 have produced the recommendation that a parallel definitional provision be included for debtors incorporated in the United States.

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