

IDAHO CODE
TITLE 28. COMMERCIAL TRANSACTIONS
CHAPTER 9. SECURED TRANSACTIONS
Part 1. General Provisions

Current through the 2001 Cumulative Supplement (1st
Regular Session of the 56th Legislature)

28-9-109 Scope.

(a) Except as otherwise provided in subsections (c) and (d), this chapter applies to:

- (1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
- (2) An agricultural lien;
- (3) A sale of accounts, chattel paper, payment intangibles or promissory notes;
- (4) A consignment;
- (5) A security interest arising under section 28-2-401, 28-2-505, 28-2-711(3) or 28-12-508(5), as provided in section 28-9-110; and
- (6) A security interest arising under section 28-4-210 or 28-5-120.

(b) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.

(c) This chapter does not apply to the extent that:

- (1) A statute, regulation, or treaty of the United States preempts this chapter;
- (2) Another statute of this state expressly governs the creation, perfection, priority or enforcement of a security interest created by this state or a governmental unit of this state;
- (3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority or enforcement of a security interest created by the state, country or governmental unit; or
- (4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under section 28-5-114.

(d) This chapter does not apply to:

- (1) A landlord's lien, other than an agricultural lien;
- (2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but section 28-9-333 applies with respect to priority of the lien;
- (3) An assignment of a claim for wages, salary or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health care provider of a health care insurance receivable and any subsequent assignment of the right to payment, but sections 28-9-315 and 28-9-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or set-off, but:

(A) section 28-9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) section 28-9-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) liens on real property in sections 28-9-203 and 28-9-308;

(B) fixtures in section 28-9-334;

(C) fixture filings in sections 28-9-501, 28-9-502, 28-9-512, 28-9-516 and 28-9-519; and

(D) security agreements covering personal and real property in section 28-9- 604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but sections 28-9-315 and 28-9-322 apply with respect to proceeds and priorities in proceeds;

(13)(A) A claim or right to receive compensation for injuries or sickness as described in (i) 26 U.S.C. section 104(a)(1) and (ii) on and after the effective date of this chapter, in 26 U.S.C. section 104(a)(2), as those sections may be amended from time to time. Notwithstanding the foregoing, this chapter (other than sections 28-9-406(d) and 28-9-408(a) and (c), Idaho Code, in the case of transfers made on and after the effective date of this chapter) shall apply to such compensation as described in 26 U.S.C. section 104(a)(2) if the sale, pledge, assignment or other transfer of rights to receive such compensation under a **structured settlement** is approved by the final order of a court pursuant to, and otherwise complies with, the requirements of paragraph (B) of this subsection.

(B)(i) Definitions. For purposes of this subsection:

1. "annuity issuer" means an insurer that has issued a contract to fund periodic payments under a **structured settlement**;

2. "dependents" include a payee's spouse and minor children and all other persons for whom the payee is legally obligated to provide support, including alimony;

3. "discounted present value" means the present value of future payments determined by discounting such payments to the present using the most recently published applicable federal rate for determining the present value of an annuity, as issued by the United States internal revenue service;

4. "gross advance amount" means the sum payable to the payee or for the payee's account as consideration for a transfer of **structured settlement** payment rights before any reductions for transfer expenses or other deductions to be made from such consideration;

5. "independent professional advice" means advice of an attorney, certified public accountant, actuary or other licensed professional adviser;

6. "interested parties" means, with respect to any **structured settlement**, the payee, any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the **structured settlement** obligor, and any other party that has continuing rights or obligations under such **structured settlement**;

7. "net advance amount" means the gross advance amount less the aggregate amount of the actual and estimated transfer expenses required to be disclosed under paragraph (B)(ii)5. of this subsection;

8. "payee" means an individual who is receiving tax free payments under a **structured settlement** and proposes to make a transfer of payment rights thereunder;

9. "periodic payments" includes both recurring payments and scheduled future lump sum payments;

10. "qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of 26 U.S.C. section 130, as amended from time to time;

11. "settled claim" means the original tort claim resolved by a **structured settlement**;

12. "**structured settlement**" means an arrangement for periodic payment of damages for personal injuries or sickness established by settlement or judgment in resolution of a tort claim;

13. "**structured settlement** agreement" means the agreement, judgment, stipulation, or release embodying the terms of a **structured settlement**;

14. "**structured settlement** obligor" means, with respect to any **structured settlement**, the party that has the continuing obligation to make periodic payments to the payee under a **structured settlement** agreement or a qualified assignment agreement;

15. "**structured settlement** payment rights" means rights to receive periodic payments under a **structured settlement**, whether from the **structured settlement** obligor or the annuity issuer, where:

A. the payee is domiciled in, or the domicile or principal place of business of the **structured settlement** obligor or the annuity issuer is located in, this state; or

B. the **structured settlement** agreement was approved by a court in this state; or

C. the **structured settlement** agreement is expressly governed by the laws of this state;

16. "terms of the **structured settlement**" include, with respect to any **structured settlement**, the terms of the **structured settlement** agreement, the annuity contract, any qualified assignment agreement and any order or other approval of any court or other government authority that authorized or approved such **structured settlement**;

17. "transfer" means any sale, assignment, pledge, hypothecation or other alienation or encumbrance of **structured settlement** payment rights made by a payee for consideration; provided that the term "transfer" does not include the creation or perfection of a security interest in **structured settlement** payment rights under a blanket

security agreement entered into with an insured depository institution, in the absence of any action to redirect the **structured settlement** payments to such insured depository institution, or an agent or successor in interest thereof, or otherwise to enforce such blanket security interest against the **structured settlement** payment rights;

18. "transfer agreement" means the agreement providing for a transfer of **structured settlement** payment rights;

19. "transfer expenses" means all expenses of a transfer that are required under the transfer agreement to be paid by the payee or deducted from the gross advance amount, including, without limitation, court filing fees, attorney's fees, escrow fees, lien recordation fees, judgment and lien search fees, finder's fees, commissions, and other payments to a broker or other intermediary; "transfer expenses" do not include preexisting obligations of the payee payable for the payee's account from the proceeds of a transfer;

20. "transferee" means a party acquiring or proposing to acquire **structured settlement** payment rights through a transfer.

(ii) Required disclosures to payee. Not less than three (3) days prior to the date on which a payee signs a transfer agreement, the transferee shall provide to the payee a separate disclosure statement, in bold type no smaller than fourteen (14) points, setting forth:

1. the amounts and due dates of the **structured settlement** payments to be transferred;
2. the aggregate amount of such payments;
3. the discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred **structured settlement** payments under federal standards for valuing annuities," and the amount of the applicable federal rate used in calculating such discounted present value;
4. the gross advance amount;
5. an itemized listing of all applicable transfer expenses, other than attorney's fees and related disbursements payable in connection with the transferee's application for approval of the transfer, and the transferee's best estimate of the amount of any such fees and disbursements;
6. the net advance amount;
7. the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; and
8. a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee.

(iii) Approval of transfers of **structured settlement** payment rights.

1. No direct or indirect transfer of **structured settlement** payment rights shall be effective and no **structured settlement** obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of **structured settlement** payment rights unless the transfer has been approved in advance in a final court order based on express findings by such court that:

A. the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents;

B. the payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived such advice in writing; and

C. the transfer does not contravene any applicable statute or the order of any court or other government

authority.

(iv) Effects of transfer of **structured settlement** payment rights. Following a transfer of **structured settlement** payment rights under this subsection:

1. The **structured settlement** obligor and the annuity issuer shall, as to all parties except the transferee, be discharged and released from any and all liability for the transferred payments;

2. The transferee shall be liable to the **structured settlement** obligor and the annuity issuer:

A. if the transfer contravenes the terms of the **structured settlement**, for any taxes incurred by such parties as a consequence of the transfer; and

B. for any other liabilities or costs, including reasonable costs and attorney's fees, arising from compliance by such parties with the order of the court or arising as a consequence of the transferee's failure to comply with this subsection;

3. Neither the annuity issuer nor the **structured settlement** obligor may be required to divide any periodic payment between the payee and any transferee or assignee or between two (2) or more transferees or assignees; and

4. Any further transfer of **structured settlement** payment rights by the payee may be made only after compliance with all of the requirements of this subsection.

(v) Procedure for approval of transfers.

1. An application under this subsection for approval of a transfer of **structured settlement** payment rights shall be made by the transferee and may be brought in the county in which the payee resides, in the county in which the **structured settlement** obligor or the annuity issuer maintains its principal place of business, or in any court which approved the **structured settlement** agreement.

2. Not less than twenty (20) days prior to the scheduled hearing on any application for approval of a transfer of **structured settlement** payment rights under paragraph (B)(iii) of this subsection, the transferee shall file with the court and serve on all interested parties a notice of the proposed transfer and the application for its authorization, including with such notice:

A. a copy of the transferee's application;

B. a copy of the transfer agreement;

C. a copy of the disclosure statement required under paragraph (B)(ii) of this subsection;

D. a listing of each of the payee's dependents, together with each dependent's age;

E. notification that any interested party is entitled to support, oppose or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

F. notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed (which shall be not less than fifteen (15) days after service of the transferee's notice) in order to be considered by the court.

(vi) General provisions-- construction.

1. The provisions of this subsection may not be waived by any payee.

2. Any transfer agreement entered into on or after the effective date of this subsection by a payee who

resides in this state shall provide that disputes under such transfer agreement, including any claim that the payee has breached the agreement, shall be determined in and under the laws of this state. No such transfer agreement shall authorize the transferee or any other party to confess judgment or consent to entry of judgment against the payee.

3. No transfer of **structured settlement** payment rights shall extend to any payments that are life-contingent unless, prior to the date on which the payee signs the transfer agreement, the transferee has established and has agreed to maintain procedures reasonably satisfactory to the annuity issuer and the **structured settlement** obligor for (i) periodically confirming the payee's survival, and (ii) giving the annuity issuer and the **structured settlement** obligor prompt written notice in the event of the payee's death.

4. No payee who proposes to make a transfer of **structured settlement** payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee or any assignee based on any failure of such transfer to satisfy the conditions of this subsection.

5. Nothing contained in this subsection shall be construed to authorize any transfer of **structured settlement** payment rights in contravention of any law or to imply that any transfer under a transfer agreement entered into prior to the effective date of this subsection is valid or invalid.

6. Compliance with the requirements set forth in paragraph (B)(ii) of this subsection and fulfillment of the conditions set forth in paragraph (B)(iii) of this subsection shall be solely the responsibility of the transferee in any transfer of **structured settlement** payment rights, and neither the **structured settlement** obligor nor the annuity issuer shall bear any responsibility for, or any liability arising from, noncompliance with such requirements or failure to fulfill such conditions.

(vii) Effective date. This subsection shall apply to any transfer of **structured settlement** payment rights under a transfer agreement entered into on or after the thirtieth day after the date of enactment of this subsection; provided however, that nothing contained herein shall imply that any transfer under a transfer agreement reached prior to such date is either effective or ineffective; or

(14) A claim or right to receive benefits under a special needs trust as described in 42 U.S.C. section 1396p(d)(4), as amended from time to time.

[I.C., § 28-9-109, as added by 2001, ch. 208, § 2, p. 704; am. 2001, ch. 299, § 1, p. 1078.]

Compiler's Notes. Former section 28-9-109 which comprised 1967, ch. 161, § 9- 109, p. 351; am. 1987, ch. 284, § 3, p. 596 was repealed by S.L. 2001, ch. 208, § 1.

DECISIONS UNDER PRIOR LAW

Analysis

Lease of real property.
Security interest.

Lease of Real Property.

A lease of real property is excluded from the scope of Title 28, Chapter 9 of the Idaho Code (Article 9 of the Uniform Commercial Code) by this section. Trustee Servs. Corp. v. East River Lumber Co. (In re Hodge Forest Indus., Inc.), 59 Bankr. 801 (Bankr. D. Idaho 1986).

Security Interest.

Where the evidence was clear that although a lease agreement did contain some attributes of an installment sales contract, there was no oral or written option to purchase the equipment, and title did not pass to the lessee at the end of the term, and since no other relevant evidence was presented demonstrating that the parties intended the transaction to be anything other than a lease, the trial court properly held that the lease agreement was not a security interest subject to Article 9 of the UCC. W.L. Scott, Inc. v. Madras Aerotech, Inc., 103 Idaho 736, 653 P.2d 791 (1982).

No magic words are necessary to create a security interest and the agreement itself need not even contain the term "security interest"; this is in keeping with the policy of the code that form should not prevail over substance and that, whenever possible, effect should be given to the parties' intent. Idaho Bank & Trust Co. v. Cargill, Inc., 105 Idaho 83, 665 P.2d 1093 (Ct. App. 1983).

Opinions of Attorney General. Personal property tax liens are entitled to first priority, even over antecedent encumbrances, including prior perfected purchase money security interests. OAG 85-1.

Collateral References. 6 Am. Jur. 2d, Attachment and Garnishment, § § 50, 52, 144.
15A Am. Jur. 2d, Commercial Code, § 11.
67 Am. Jur. 2d, Sales, § 442.

Official Comment

1. Source. Former Sections 9-102, 9-104.
2. Basic Scope Provision. Subsection (a)(1) derives from former Section 9- 102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a "security interest," the definition of that term in Section 1- 201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it.
3. Agricultural Liens. Subsection (a)(2) is new. It expands the scope of this Article to cover agricultural liens, as defined in Section 9-102.
4. Sales of Accounts, Chattel Paper, Payment Intangibles, Promissory Notes, and Other Receivables. Under subsection (a)(3), as under former Section 9-102, this Article applies to sales of accounts and chattel paper. This approach generally has been successful in avoiding difficult problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions the distinction is blurred.
Subsection (a)(3) expands the scope of this Article by including the sale of a "payment intangible" (defined in Section 9-102 as "a general intangible under which the account debtor's principal obligation is a monetary obligation") and a "promissory note" (also defined in Section 9-102). To a considerable extent, this Article affords these transactions treatment identical to that given sales of accounts and chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently from sales of other receivables. See, e.g., Sections 9-309 (automatic perfection upon attachment), 9-408 (effect of restrictions on assignment). By virtue of the expanded definition of "account" (defined in Section 9-102), this Article now covers sales of (and other security interests in) "health-care-insurance receivables" (also defined in Section 9-102). Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of "security interest" (Section 1-201(37)) delineates how a particular transaction is to be classified. That issue is left to the courts.
5. Transfer of Ownership in Sales of Receivables. A "sale" of an account, chattel paper, a promissory note, or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes the sale of an enforcement right. For example, a "[p]erson entitled to enforce" a negotiable promissory note (Section 3-301) may sell its ownership rights in the instrument. See Section 3-203, Comment 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203."). Also, the right under Section 3-309 to

enforce a lost, destroyed, or stolen negotiable promissory note may be sold to a purchaser who could enforce that right by causing the seller to provide the proof required under that section. This Article rejects decisions reaching a contrary result, e.g., Dennis Joslin Co. v. Robinson Broadcasting, 977 F. Supp. 491 (D.D.C. 1997).

Nothing in this section or any other provision of Article 9 prevents the transfer of full and complete ownership of an account, chattel paper, an instrument, or a payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of "security interest" in Section 1-201 provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This Article applies to both types of transactions. The principal effect of this coverage is to apply this Article's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this end, and its use has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

Following a debtor's outright sale and transfer of ownership of a receivable, the debtor-seller retains no legal or equitable rights in the receivable that has been sold. See Section 9-318(a). This is so whether or not the buyer's security interest is perfected. (A security interest arising from the sale of a promissory note or payment intangible is perfected upon attachment without further action. See Section 9-309.) However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under Section 9-317. This is so not because the seller of a receivable retains rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under this Article (they are). It is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so, as did former Sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller, under Section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

6. Consignments. Subsection (a)(4) is new. This Article applies to every "consignment." The term, defined in Section 9-102, includes many but not all "true" consignments (i.e., bailments for the purpose of sale). If a transaction is a "sale or return," as defined in revised Section 2-326, it is not a "consignment." In a "sale or return" transaction, the buyer becomes the owner of the goods, and the seller may obtain an enforceable security interest in the goods only by satisfying the requirements of Section 9-203.

Under common law, creditors of a bailee were unable to reach the interest of the bailor (in the case of a consignment, the consignor-owner). Like former Section 2-326 and former Article 9, this Article changes the common-law result; however, it does so in a different manner. For purposes of determining the rights and interests of third-party creditors of, and purchasers of the goods from, the consignee, but not for other purposes, such as remedies of the consignor, the consignee is deemed to acquire under this Article whatever rights and title the consignor had or had power to transfer. See Section 9-319. The interest of a consignor is defined to be a security interest under revised Section 1-201(37), more specifically, a purchase-money security interest in the consignee's inventory. See Section 9-103(d). Thus, the rules pertaining to lien creditors, buyers, and attachment, perfection, and priority of competing security interests apply to consigned goods. The relationship between the consignor and consignee is left to other law. Consignors also have no duties under Part 6. See Section 9-601(g).

Sometimes parties characterize transactions that secure an obligation (other than the bailee's obligation to returned bailed goods) as "consignments." These transactions are not "consignments" as contemplated by Section 9-109(a)(4). See Section 9-102. This Article applies also to these transactions, by virtue of Section 9-109(a)(1). They create a security interest within the meaning of the first sentence of Section 1-201(37).

This Article does not apply to bailments for sale that fall outside the definition of "consignment" in Section 9-102 and that do not create a security interest that secures an obligation.

7. Security Interest in Obligation Secured by Non-Article 9 Transaction. Subsection (b) is unchanged in substance from former Section 9-102(3). The following example provides an illustration.

Example 1: O borrows \$10,000 from M and secures its repayment obligation, evidenced by a promissory note, by granting to M a mortgage on O's land. This Article does not apply to the creation of the real-property mortgage. However, if M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage. Also, X's security interest in the note gives X an attached security interest in the mortgage lien that secures the note and, if the security interest in the note is perfected, the security interest in the mortgage lien likewise is perfected. See Sections 9-203, 9-308.

It also follows from subsection (b) that an attempt to obtain or perfect a security interest in a secured obligation by

complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective. Finally, it is implicit from subsection (b) that one cannot obtain a security interest in a lien, such as a mortgage on real property, that is not also coupled with an equally effective security interest in the secured obligation. This Article rejects cases such as In re Maryville Savings & Loan Corp., 743 F.2d 413 (6th Cir. 1984), clarified on reconsideration, 760 F.2d 119 (1985).

8. Federal Preemption. Former Section 9-104(a) excluded from Article 9 "a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." Some (erroneously) read the former section to suggest that Article 9 sometimes deferred to federal law even when federal law did not preempt Article 9. Subsection (c)(1) recognizes explicitly that this Article defers to federal law only when and to the extent that it must-i.e., when federal law preempts it.

9. Governmental Debtors. Former Section 9-104(e) excluded transfers by governmental debtors. It has been revised and replaced by the exclusions in new paragraphs (2) and (3) of subsection (c). These paragraphs reflect the view that Article 9 should apply to security interests created by a State, foreign country, or a "governmental unit" (defined in Section 9-102) of either except to the extent that another statute governs the issue in question. Under paragraph (2), this Article defers to all statutes of the forum State. (A forum cannot determine whether it should consult the choice-of-law rules in the forum's UCC unless it first determines that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of another State or a foreign country only to the extent that those statutes contain rules applicable specifically to security interests created by the governmental unit in question.

Example 2: A New Jersey state commission creates a security interest in favor of a New York bank. The validity of the security interest is litigated in New York. The relevant security agreement provides that it is governed by New York law. To the extent that a New Jersey statute contains rules peculiar to creation of security interests by governmental units generally, to creation of security interests by state commissions, or to creation of security interests by this particular state commission, then that law will govern. On the other hand, to the extent that New Jersey law provides that security interests created by governmental units, state commissions, or this state commission are governed by the law generally applicable to secured transactions (i.e., New Jersey's Article 9), then New York's Article 9 will govern.

Example 3: An airline that is an instrumentality of a foreign country creates a security interest in favor of a New York bank. The analysis used in the previous example would apply here. That is, if the matter is litigated in New York, New York law would govern except to the extent that the foreign country enacted a statute applicable to security interests created by governmental units generally or by the airline specifically.

The fact that New York law applies does not necessarily mean that perfection is accomplished by filing in New York. Rather, it means that the court should apply New York's Article 9, including its choice-of-law provisions. Under New York's Section 9-301, perfection is governed by the law of the jurisdiction in which the debtor is located. Section 9-307 determines the debtor's location for choice-of-law purposes.

If a transaction does not bear an appropriate relation to the forum State, then that State's Article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

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

Conversely, Article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice-of-law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security interest granted by a foreign airline to a New York bank are litigated overseas, the court may be bound to apply the law of the debtor's jurisdiction and not New York's Article 9.

10. Certain Statutory and Common-Law Liens; Interests in Real Property. With few exceptions (nonconsensual agricultural liens being one), this Article applies only to consensual security interests in personal property. Following former Section 9-104(b) and (j), paragraphs (1) and (11) of subsection (d) exclude landlord's liens and leases and most other interests in or liens on real property. These exclusions generally reiterate the limitations on coverage (i.e., "by contract," "in personal property and fixtures") made explicit in subsection (a)(1). Similarly, most jurisdictions provide special liens to suppliers of many types of services and materials, either by statute or by common law. With the exception of agricultural liens, it is not necessary for this Article to provide general codification of this lien structure, which is determined in large part by local conditions and which is far removed from ordinary commercial financing. As under former Section 9-104(c), subsection (d)(2) excludes these suppliers'

liens (other than agricultural liens) from this Article. However, Section 9-333 provides a rule for determining priorities between certain possessory suppliers' liens and security interests covered by this Article.

11. Wage and Similar Claims. As under former Section 9-104(d), subsection (d)(3) excludes assignments of claims for wages and the like from this Article. These assignments present important social issues that other law addresses. The Federal Trade Commission has ruled that, with some exceptions, the taking of an assignment of wages or other earnings is an unfair act or practice under the Federal Trade Commission Act. See 16 C.F.R. Part 444. State statutes also may regulate such assignments.

12. Certain Sales and Assignments of Receivables; Judgments. In general this Article covers security interests in (including sales of) accounts, chattel paper, payment intangibles, and promissory notes. Paragraphs (4), (5), (6), and (7) of subsection (d) exclude from the Article certain sales and assignments of receivables that, by their nature, do not concern commercial financing transactions. These paragraphs add to the exclusions in former Section 9-104(f) analogous sales and assignments of payment intangibles and promissory notes. For similar reasons, subsection (d)(9) retains the exclusion of assignments of judgments under former Section 9-104(h) (other than judgments taken on a right to payment that itself was collateral under this Article).

13. Insurance. Subsection (d)(8) narrows somewhat the broad exclusion of interests in insurance policies under former Section 9-104(g). This Article now covers assignments by or to a health-care provider of "health-care-insurance receivables" (defined in Section 9-102).

14. Set-Off. Subsection (d)(10) adds two exceptions to the general exclusion of set-off rights from Article 9 under former Section 9-104(i). The first takes account of new Section 9-340, which regulates the effectiveness of a set-off against a deposit account that stands as collateral. The second recognizes Section 9-404, which affords the obligor on an account, chattel paper, or general intangible the right to raise claims and defenses against an assignee (secured party).

15. Tort Claims. Subsection (d)(12) narrows somewhat the broad exclusion of transfers of tort claims under former Section 9-104(k). This Article now applies to assignments of "commercial tort claims" (defined in Section 9-102) as well as to security interests in tort claims that constitute proceeds of other collateral (e.g., a right to payment for negligent destruction of the debtor's inventory). Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.

This Article contains two special rules governing creation of a security interest in tort claims. First, a description of collateral in a security agreement as "all tort claims" is insufficient to meet the requirement for attachment. See Section 9-108(e). Second, no security interest attaches under an after-acquired property clause to a tort claim. See Section 9-204(b). In addition, this Article does not determine whom the tortfeasor must pay to discharge its obligation. Inasmuch as a tortfeasor is not an "account debtor," the rules governing waiver of defenses and discharge of an obligation by an obligor (Sections 9-403, 9-404, 9-405, and 9-406) are inapplicable to tort-claim collateral.

16. Deposit Accounts. Except in consumer transactions, deposit accounts may be taken as original collateral under this Article. Under former Section 9-104(l), deposit accounts were excluded as original collateral, leaving security interests in deposit accounts to be governed by the common law. The common law is nonuniform, often difficult to discover and comprehend, and frequently costly to implement. As a consequence, debtors who wished to use deposit accounts as collateral sometimes were precluded from doing so as a practical matter. By excluding deposit accounts from the Article's scope as original collateral in consumer transactions, subsection (d)(13) leaves those transactions to law other than this Article. However, in both consumer and non-consumer transactions, sections 9-315 and 9-322 apply to deposit accounts as proceeds and with respect to priorities in proceeds.

This Article contains several safeguards to protect debtors against inadvertently encumbering deposit accounts and to reduce the likelihood that a secured party will realize a windfall from a debtor's deposit accounts. For example, because "deposit account" is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts. Rather, a security agreement must reasonably identify the deposit accounts that are the subject of a security interest, e.g., by using the term "deposit accounts." See Section 9-108. To perfect a security interest in a deposit account as original collateral, a secured party (other than the bank with which the deposit account is maintained) must obtain "control" of the account either by obtaining the bank's authenticated agreement or by becoming the bank's customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of these steps requires the debtor's consent.

This Article also contains new rules that determine which State's law governs perfection and priority of a security interest in a deposit account (Section 9-304), priority of conflicting security interests in and set-off rights against a deposit account (Sections 9-327, 9-340), the rights of transferees of funds from an encumbered deposit account (Section 9-332), the obligations of the bank (Section 9-341), enforcement of security interests in a deposit account (Section 9-607(c)), and the duty of a secured party to terminate control of a deposit account (Section 9-208(b)).

ID ST § 28-9-109
I.C. § 28-9-109

Page 11

I.C. § 28-9-109

ID ST § 28-9-109

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