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# Receivables Financing to Mexican Borrowers: Perfection of Article 9 Security Interests in Cross- Border Accounts

Todd C. Nelson

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# RECEIVABLES FINANCING TO MEXICAN BORROWERS: PERFECTION OF ARTICLE 9 SECURITY INTERESTS IN CROSS-BORDER ACCOUNTS

TODD C. NELSON\*

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## I. INTRODUCTION

Near the end of 1994 one U.S. dollar bought about \$3.3 New Pesos (NP).<sup>1</sup> Within just a few weeks, the exchange rate plummeted to \$6.5 NP to the dollar<sup>2</sup> and since then has gradually declined to more than 9 NP: 1 (USD) as of the date of publication of this article. For U.S. consumers, this suddenly made Mexican products very inexpensive. Not surprisingly, the cheap peso, combined with a robust U.S. economy, has led to a significant increase in the flow of Mexican goods into U.S. markets.<sup>3</sup>

The market's correction of the peso's value has benefited not only U.S. consumers but also the beleaguered Mexican labor force.<sup>4</sup> By providing employment opportunities in an otherwise bleak job market, the export sector almost single-handedly kept the Mexican economy from falling flat on its backside.<sup>5</sup> This trend promises to continue as the Mexican government pulls the economy up by the bootstraps of export-led growth.<sup>6</sup>

One question is whether enough capital will be available to keep Mexican goods moving across the border. In particular, commercial credit will be needed to finance the establishment and growth of manufacturers and producers of export items.<sup>7</sup> Unfortunately, commercial credit is not easy to come by in Mexico, especially at affordable interest rates.<sup>8</sup> And it is the middle-market borrowers (small to medium-sized companies) that are especially hard hit.<sup>9</sup> Because such enterprises depend heavily on secured lines of credit for their capital needs, they are the first to feel the effects of a tight credit market (e.g., more stringent qualification requirements, lower loan limits, and higher interest rates).<sup>10</sup>

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1. Craig Torres & Paul B. Carroll, *Mexico Puts Economic Steps on Hold Until Fallout From Peso's Plunge Settles*, WALL ST. J., Dec. 27, 1994, at A3.

2. Tim Carrington & Dianne Solis, *Peso's Decline to New Low Rattles Other Markets; Congress Still Cautious*, WALL ST. J., Jan. 31, 1995, at A3.

3. Robert MacDonald, *Is Mexico Back?*, BUS. MEX., Mar. 1997, available in LEXIS, Nsamer Library, CURNWS File.

4. *Id.*

5. *Id.*

6. *Id.*

7. Boris Kozolchyk, *What to Do About Mexico's Antiquated Secured Financing Law*, 12 ARIZ. J. INT'L & COMP. L. 523, 523 (1995).

8. *Id.* at 523-24.

9. *Id.* at 524.

10. *Id.*

Many U.S. lenders (including banks, finance companies, and trade creditors) could help fill the void. Loans to Mexican enterprises should be especially attractive when the proceeds will be used to finance the production of goods destined for U.S. markets. The dollar-based revenues generated by Mexican exporters can be used to service dollar-denominated loans. Obviously, the availability of dollar revenues eliminates the kind of exchange rate risk that burned many U.S. creditors in the wake of the 1994 peso devaluation.

As would be true with most domestic borrowers, however, a U.S. lender's willingness to extend commercial credit to small and mid-sized Mexican exporters is likely to hinge on the availability of adequate security. Unfortunately, given the problems associated with creating, perfecting, and enforcing security interests under Mexican law, very few U.S. lenders are willing to secure loans with tangible assets located in Mexico (e.g., inventory and equipment).<sup>11</sup> In most cases the only acceptable collateral will be the dollar-denominated accounts receivable generated from the export sales to U.S. purchasers (the "account debtors").

Unlike tangible collateral, accounts receivable are just a step away from cash, making them particularly attractive as collateral. Moreover, since the account debtors are located in the United States, the U.S. lender and Mexican borrower/exporter will almost certainly choose Article 9 of the Uniform Commercial Code (U.C.C.) to govern the creation, perfection, and enforcement of the security interest in the accounts.<sup>12</sup> Article 9 works quite well between the U.S. lender and the Mexican borrower, especially with respect to enforcement. Should a Mexican borrower default, the U.S. creditor may simply collect the receivables directly from the U.S. account debtors and apply the proceeds to the outstanding loan balance without first having to engage in time-consuming and costly litigation.<sup>13</sup>

Unfortunately, significant differences between U.S. and Mexican secured financing laws create serious (and unnecessary) obstacles to the use of cross-border receivables as loan collateral.

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11. The American Chamber of Commerce in Mexico, *Increasing Access to Credit for Small and Medium-Sized Mexican Companies Through Asset-Based Lending* 1 (Mar. 22, 1996) (unpublished manuscript, on file with author).

12. See generally U.C.C. § 9-105 (1994).

13. See *id.* § 9-502.

Canadian law, by comparison, is now quite similar to U.S. law.<sup>14</sup> Most common law provinces have enacted a version of Canada's Personal Property Security Act which closely resembles U.C.C. Article 9.<sup>15</sup> These issues were recently addressed by Quebec as well in connection with sweeping revisions to its Civil Code.<sup>16</sup> Such harmonization efforts are not particularly surprising given the significant economic integration that already exists between Canada and the United States.

In fact, the convergence of commercial law is a necessary and natural corollary to economic integration. Without the protection of high tariff walls, Mexican businesses will be competing head-on with their northern neighbors, an already difficult task compounded by the lack of affordable credit. Moreover, the availability of competitively priced credit is, at least in part, a function of the legal system (most notably, adequate secured financing legislation, reliable filing offices, and a predictable and efficient judicial enforcement system).<sup>17</sup> Clearly, the time has come for Mexico to facilitate cross-border accounts receivable financing by harmonizing its secured financing laws and filing systems with those of the United States and Canada.<sup>18</sup>

## II. CONFLICTS REGARDING SECURITY INTERESTS IN CROSS-BORDER ACCOUNTS

### A. *Choice-of-Law Issues*

Whenever a secured transaction touches more than one jurisdiction, questions may arise with respect to, among other things: i) the steps needed to create the security interest; ii) the method of perfection; iii) the rights of third parties; iv) the foreclosure process; and v) the right to pursue deficiency claims.<sup>19</sup> Within the United States, inconsistencies in the treatment of

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14. See generally Ronald C.C. Cumming, *Harmonization of the Secured Financing Laws of the Nafta Partners*, 39 ST. LOUIS U. L.J. 809 (1995).

15. *Id.*

16. *Id.*

17. See generally Kozolchik, *supra* note 7, at 525-29.

18. This Article focuses on the intersection of U.C.C. Article 9 with Mexican secured transactions law. It is left to a Canadian lawyer to explore the legal implications of cross-border secured transactions involving Canada and Mexico.

19. JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 958 (3d. ed. 1988).

these legal issues created artificial barriers to interstate commerce that became increasingly disruptive as a result of the country's rapid economic growth following World War II.<sup>20</sup> Consequently, Article 9 was devised as a means of harmonizing the disparate state systems.<sup>21</sup> And because Article 9 has been adopted by all of the states, potential choice-of-law problems in interstate secured transactions have all but been eliminated.<sup>22</sup>

Unfortunately, it is a different story when a secured transaction spans international borders. As mentioned, in the type of export transaction this article contemplates, the account debtor(s) will reside in the United States and the account payee/borrower (e.g., an exporter) will be located in Mexico. Therefore, the account itself will have a substantial connection to both jurisdictions. As a result, theoretically the transaction could be governed by the secured financing laws of either country.

However, because it is usually the lender who calls the jurisdictional shots, a U.S. secured party and a Mexican borrower/account payee will probably agree that U.S. law shall apply, most likely Article 9 of the state in which the U.S. secured creditor is headquartered. As between the parties, this arrangement is not a problem. Questions arise, however, with the appearance of a third party claiming an interest, based on Mexican law, in the same account.

To illustrate these points, consider the following example. Assume that in order to secure a loan to a Mexican export company (MexCo), a Mexican bank (MexBank) takes a first-in-time lien in all of MexCo's assets. The collateral includes an open account payable to MexCo from a U.S. account debtor located in Texas who purchased goods on credit from MexCo. MexBank and MexCo create this lien pursuant to a Mexican federal stat-

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20. See generally E. Hunter Taylor, Jr., *Uniformity of Commercial Law and State-by-State Enactment: A Confluence of Contradictions*, 30 HASTINGS L.J. 337, 337-38 (1978).

21. *Id.* at 337.

22. Due to non-uniform amendments, the use of differing optional provisions or inconsistent judicial interpretations, differences in Article 9 do exist from state to state. In most cases, however, the parties will have chosen one state's version of Article 9 (usually the secured creditor's) which will govern all creation and enforcement issues. On the rare occasions when differences in perfection rules may pose a problem, it can usually be handled fairly easily by employing a multiple ("just-in-case") filing strategy. *Id.* at 341-42.

ute allowing for perfection by filing in the jurisdiction in which MexCo's assets are located. Assume further that the location of the assets is different from the jurisdiction in which MexCo's principal place of business is located and in which the company is incorporated.<sup>23</sup>

Subsequently, U.S. Capital, a finance company based in Miami, Florida, secures a loan to MexCo by taking a security interest in the same account pursuant to Florida Article 9 and perfects by notifying the Texas account debtor of U.S. Capital's interest.<sup>24</sup> Before making the loan, U.S. Capital conducted a lien search in the Mexican filing office for the jurisdiction in which MexCo is located and incorporated. Finally, MexCo goes belly up leaving U.S. Capital and MexBank to fight over the account.

In a priority fight between MexBank and U.S. Capital, who would prevail? Each transaction involved a valid choice-of-law selection and, apparently, the use of an appropriate perfection technique. Again, if MexCo were a U.S. entity and this transaction had taken place entirely within the United States, the problem would have been avoided because all versions of Article 9 require perfection by filing a financing statement in the state in which the borrower (MexCo) is located.<sup>25</sup> Priority would then be determined on the basis of the first lender to file a valid financing statement.<sup>26</sup>

In practice, the outcome may depend on the jurisdiction in which the priority dispute is litigated. For all intents and purposes, the validity and effect of a security interest in personal property will be governed by the law of the country (and jurisdiction within that country) in which the property is located.<sup>27</sup>

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23. Such a lien is possible pursuant to an "industrial mortgage" under Article 67 of the *Ley General de Instituciones de Crédito* discussed later in more detail. As will be explained, one problem is that the recording rules governing industrial mortgages presuppose the existence of exclusively tangible collateral by providing that the location of the collateral shall dictate the place of filing. An open account receivable is, however, an intangible asset and therefore cannot have a physical location as such. As a result, in the absence of a nationwide filing system, perfection rules regarding intangibles must be based on the location of the account payee/borrower (either its principal place of business or state of incorporation) so that searching parties will know where to look.

24. Under these facts, U.C.C. § 9-103(3)(c) (1994) permits perfection by account debtor notification. The implications of this provision will be discussed in greater detail.

25. U.C.C. §§ 1-105, 9-103 (1994). Ideally, MexBank's legal counsel would have anticipated this conflict by adopting a multiple perfection strategy of notifying the Texas account debtor and filing in Mexico.

26. See *id.* § 9-312(5).

27. Lynn M. LoPucki, *The Article 9 Filing System: Why the Debtor's State of Incorporation Matters*, 29 *Am. Bank & L.J.* 401 (1994).

This rule simply recognizes the fact that a security interest in favor of a foreign lender cannot be enforced unless the government of the country in which the property is located is willing to cooperate.<sup>28</sup> Even though an open account receivable is intangible personal property with no physical location, the same principle applies.<sup>29</sup> In the event of default, a security interest in an account will be worthless unless the account debtor can be compelled to pay the outstanding balance directly to the lienholder. Again, this is simply not possible unless the government/judicial system with jurisdiction over the account debtor is willing to recognize the foreign security interest and, if necessary, use whatever provisional remedies may be available to coerce payment (e.g., garnishment, attachment, etc.).

Under the facts of the hypothetical, U.S. Capital and MexBank are likely to find themselves standing before a Texas judge arguing in the context of an interpleader action filed by the account debtor after receiving conflicting payment demands. It is hard to predict what the Texas court might decide. And as is often true in priority disputes involving accounts, the outcome may mean the difference between full payment and a complete write-off. MexBank would point out that its lien is valid and properly perfected under Mexican law, and that it was first in time. U.S. Capital, on the other hand, would likely claim that the peculiarities of Mexico's filing rules and registry system make it virtually impossible for third parties to uncover a competing lien in intangible assets. The Mexican system thus creates a "secret lien" which the Texas court should refuse to recognize for strong public policy reasons. Needless to say, the possibility of such a scenario alone may be enough to dissuade U.S. Capital from entering into the transaction with MexCo in the first place.

To summarize, a security interest created and perfected outside the country in which the property or account debtor is located will, as a practical matter, be valid only to the extent that the foreign country chooses to recognize it.<sup>30</sup> It follows, therefore, that in an international transaction, a secured party must adhere to the filing/perfection requirements of the country in

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*poration Should Be the Proper Place for Article 9 Filing: A Systems Analysis*, 79 MINN. L. REV. 577, 626 (1994).

28. *Id.*

29. *Id.*

30. *Id.*



which the tangible property or the account debtor is located unless that country, through its conflicts-of-law rules, has in some way yielded jurisdiction.<sup>31</sup> In fact, with respect to intangible personal property, this is exactly what Article 9 has done, apparently without much thought as to the practical implications.

*B. Perfection of Security Interests in Cross-Border Accounts: U.C.C. § 9-103(3)*

Perfection rules are designed (or at least they should be) such that, after taking certain prescribed steps, a lender can be sure its security interest will enjoy a given priority *vis-à-vis* most other creditors. In purely domestic transactions, Article 9's priority rules handle this function fairly well, especially with respect to accounts receivable.

The process is more or less the same throughout the United States.<sup>32</sup> After searching the records and satisfying itself that no unacceptable competing liens exist, a lender can perfect its security interest in open (non-documentary) accounts receivable simply by filing a one-page financing statement in the appropriate filing office—usually the Secretary of State's Office for the state in which the borrower is located.<sup>33</sup> As a result, as long as the lender's security interest remains in effect, it will take priority over most subsequent competing claims.<sup>34</sup>

The outcome is much less clear when the debtor is located in Mexico—or just about any other foreign jurisdiction for that matter. In many cases, the lender must comply with Mexico's complicated and confusing perfection rules which, for reasons discussed below, may fail to provide adequate protection. Consequently, many U.S. lenders are turning away otherwise acceptable credit risks simply because the Mexican legal system does not offer a statutory mechanism through which multiple interests in the same accounts can be clearly prioritized. As a result, Mexican borrowers are shut off from a much needed source

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31. *Id.*

32. Taylor, *supra* note 20, at 341.

33. U.C.C. § 9-401 (1994). Central filing is the general rule. In certain cases, local filing may be in order. For example, in some states security interests in farm accounts must be filed locally (usually in the county of the debtor's residence). In addition, under some circumstances, security interests in accounts are perfected automatically without any filing.

34. *See id.* § 9-312(5).

of capital, and U.S. lenders are missing out on a potentially lucrative credit market.

The choice-of-law rules governing the perfection of security interests in open accounts (along with general intangibles and mobile goods) are set out in subparagraphs (b) and (c) of U.C.C. § 9-103(3):

(b) The law (including conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor.<sup>35</sup>

To summarize, Article 9 begins with the premise that security interests in accounts receivable should be perfected in accordance with the laws of the jurisdiction in which the debtor is physically situated.<sup>36</sup> As mentioned, in most cases this means that perfection will be handled by filing a financing statement in the central registry of the debtor's home state.<sup>37</sup> This would be true even if the secured creditor resided in a different state and the account debtors were scattered throughout the country.<sup>38</sup>

Subparagraph (d) of U.C.C. § 9-103(3) goes on to explain how the debtor's location is established: "A debtor shall be deemed located at his place of business if he has one, at this chief executive office if he has more than one place of business, otherwise at his

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35. *Id.* § 9-103(3)(b), (c).

36. *Id.*

37. *Id.* § 9-401.

38. *Id.* § 9-103(3).

residence.”<sup>39</sup> Thus, a debtor can have only one “location” as that term is used by Article 9. In most cases it should be relatively easy for a creditor, or some other interested party, to determine where to search for competing liens and, by the same token, where to file the financing statement. Moreover, assuming the debtor is located in the United States or Canada, filing is the only authorized perfection method for open accounts.<sup>40</sup> A creditor could not, for example, perfect its security interest in a non-documentary account receivable by notifying the account debtor directly.

Unfortunately, these relatively straight-forward perfection rules get a bit complicated when the borrower/account payee is located in Mexico and the account debtors reside in the United States.<sup>41</sup> This might surprise U.S. lenders who tend to view such accounts as U.S. property.<sup>42</sup> In other words, if the account debtor is located in the United States and the account itself is payable in U.S. dollars, it follows that the perfection of a security interest in that account would be accomplished without having to worry about Mexican law.

While this assumption may seem logical enough, it is not the case under Article 9. If the borrower/account payee is located in Mexico, and if the collateral is in the form of open accounts receivable (even when all the account debtors are in the United States), the secured creditor is often faced with a series of questions and alternatives for which there is no easy answer.

As set forth in U.C.C. § 9-103(3)(c), if the borrower is located in Mexico, the first question is whether it is possible to perfect a security interest in the open accounts by filing or recording under the laws of Mexico.<sup>43</sup> Although the answer to this question is

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39. *Id.*

40. *See id.* §§ 9-401, 9-103(c).

41. LoPucki, *supra* note 27, at 629.

42. *Id.*

43. The terms filing, recording, and registration are used interchangeably in this Article. They all refer to the perfection of a security interest by depositing a written document of some kind with a government office in order to publicize the existence of that interest. A more interesting question concerns the content of the writing. Article 9 adopts a notice filing system which involves the use of a relatively simple financing statement containing basic information. In Mexico, by comparison, when perfection by filing is permitted, the law makes no provision for the registration of only a memorandum of the agreement. Instead, the entire security agreement (or its equivalent) must be submitted. *See generally* John M. Wilson-Molina, *Mexico's Current Secured Financing System: The Law, The Registries and The Need for Reform* (visited Mar. 10, 1996)

probably "no" (at least for most U.S. creditors), the idiosyncrasies of Mexican secured financing law make this a difficult question. The more significant problem, however, comes from the difficulty in predicting outcomes. As illustrated by the hypothetical, some unfortunate U.S. judge will probably have to make the call.

Assuming Mexican law does not permit perfection of a security interest in open accounts by filing or recording, the next question is whether the Mexican debtor/account payee has a "major executive office" located in a U.S. state.<sup>44</sup> If so, perfection will be governed by the laws of that state.<sup>45</sup>

Finally, U.C.C. § 9-103(3)(c) offers an alternative perfection method where i) the collateral is accounts or general intangibles for money due or to become due, and ii) the debtor (account payee) is located outside of the United States or Canada.<sup>46</sup> Under these circumstances, the secured party may perfect by notifying the account debtors directly. Using this alternative, a secured creditor could perfect its security interest simply by informing each of the U.S. account debtors that the Mexican borrower/account payee (e.g., an exporter) has granted an interest in the account to secure some credit arrangement.<sup>47</sup>

At first blush, Article 9's inclusion of the notification alternative seems helpful. It appears to allow a U.S. creditor to ignore the difficult questions concerning perfection methods under Mexican secured financing law and whether the Mexican debtor maintains a "major executive office" in the United States. According to U.C.C. § 9-103(3)(c), notification of the account debtors alone will constitute perfection.<sup>48</sup>

It is important to remember, however, that direct notification is an alternative, rather than an exclusive, perfection method. In practice, this means that before making the loan, a

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<<http://www.natlaw.com/pubs/spmxbk3.htm>>.

44. U.C.C. § 9-103(3)(c) (1994). Article 9 does not seem to provide any specific guidance as to the practical meaning of the term "major executive office".

45. *Id.*

46. *Id.*

47. Article 9 does not seem to provide any guidelines with respect to the precise method of direct notice. Presumably, the secured creditor must, at the very least, provide a copy of the financing statement. In practice, the notice would probably also include an explanatory letter. In addition, it is likely that all of the documents would be delivered by certified mail or perhaps even by a process server.

48. U.C.C. § 9-103(3)(c) (1994). This assumes, of course, that notification is both commercially feasible and acceptable to the Mexican debtor/account payee. As discussed later, this may not be true in many cases.

secured creditor (or at least a careful one) must look for competing interests in the same accounts. This would be true even if the creditor intended to perfect its security interest by notifying the U.S. account debtors directly.

As a result, a prudent U.S. lender cannot avoid the thorny issues raised by U.C.C. § 9-103(3)(c). First, the lender must determine whether Mexican law provides for perfection of security interests in open accounts by filing. If so, a lien search must be conducted in the appropriate filing office (or offices) in Mexico. If not, or if the answer is unclear, the creditor must determine whether the Mexican borrower maintains a facility somewhere in the United States that might be construed as a "major executive office—whatever that means. If so, a lien search must be conducted in the state in which that office is located. (If there are several such offices located in various states, prudence dictates that a lien search be conducted in each jurisdiction.) Finally, since account-debtor notification is always a possibility, the secured creditor must also contact each existing account debtor to find out whether such notice has been received.

### III. SECURITY INTERESTS IN OPEN ACCOUNTS RECEIVABLE UNDER MEXICAN LAW

#### A. *Comparison of U.S. and Mexican Secured Financing Legislation*

When analyzing perfection rules under Mexican law, U.S. lenders should understand from the outset that there is no Mexican equivalent to Article 9. In other words, Mexican law does not provide any kind of unitary mechanism governing consensual liens in personal property. In fact, Mexican law looks something like U.S. law prior to the adoption of Article 9. It is a mixed bag of title retention contracts, pledges, and chattel mortgages.<sup>49</sup>

In addition, Mexican secured financing law is designed to exert tighter control over who may and may not serve as a secured creditor. This is a significant departure from Article 9, which does not place restrictions on the individuals or entities that may qualify as a secured creditor. Anyone lending money

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49. Wilson-Molina, *supra* note 43.

on a secured basis—including banks, finance companies, credit unions, insurance companies, trade creditors, and private individuals—will be defined as a secured party and governed by Article 9.<sup>50</sup> In Mexico, by comparison, most security devices are reserved for the exclusive use of Mexican credit institutions.

Finally, commercial secured financing in Mexico is governed by federal law. U.S. secured transactions, on the other hand, are primarily a matter of local law in that each state has adopted its own version of Article 9.<sup>51</sup> While all versions closely resemble the model code, there are enough differences in statutory language and judicial interpretation to make generalizations and assumptions about U.S. secured financing law somewhat problematic. The Mexican system is made a little less complicated by the fact that most commercial secured financing law emanates from the federal government. As mentioned, however, the advantages of nationwide uniformity are more than offset by the use of several different federal codes establishing various kinds of personal property liens versus the use of a single, Article 9-style security interest.

More generally, it is also important to understand that accounts receivable financing has simply never caught on in Mexico. In fact, U.S. companies looking to do business in Mexico in the NAFTA era are often astounded by Mexico's failure to accommodate modern accounts receivable financing. Given the enormous popularity of such credit arrangements in the United States, this reaction is not particularly surprising. However, for historical, cultural, and economic reasons, Mexican lenders have yet to express much interest in accounts receivable financing—or asset-based lending in general for that matter. As a result, the legal devices and enforcement mechanisms needed to make it work on a practical level have yet to evolve. For example, it is not possible to create a blanket security interest that will attach automatically to all accounts receivable as they are generated.<sup>52</sup> As a rule, each account must be assigned separately after its creation. Consequently, the boiler-plate "after-acquired prop-

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50. U.C.C. § 9-102 (1994).

51. Taylor, *supra* note 20, at 337.

52. As discussed *infra* Part IV, it appears that the lien of an industrial mortgage will attach to open accounts receivable automatically as they are generated by the mortgagor. However, an industrial mortgage must encumber the borrower's entire asset base. For some reason, this device cannot be aimed at accounts receivable financing exclusively.

erty" language found in almost all U.S. security agreements would not hold up under Mexican law.

Another problem involves notice (i.e., perfection). Typically, each account debtor must be notified of the creditor's interest in the account in order to establish the claim *vis-à-vis* third parties. Unlike Article 9's perfection rules, it is not possible to provide notice of a security interest in open accounts simply by filing the equivalent of a financing statement in some public office. The inability to create a blanket lien, coupled with the need to perfect through individual notice, makes accounts receivable financing incredibly burdensome. As a result, in most cases it is simply not feasible to secure a loan with accounts receivable. (This would certainly be true in large-scale commercial credit transactions.)

In fact, as was once true in the United States, *factoraje* (factoring) is still the legal device most commonly used to convert future revenues (i.e., receivables) into immediate cash in Mexico. Factoring is nothing more than the sale and assignment of a receivable for a price set at some figure less than its face value. The factor then collects the full amount of the receivable directly from the account debtor. The difference between the amount paid and the face value represents the factor's finance charge.<sup>53</sup>

Factoring is governed by *Ley General de Organizaciones y Actividades Auxiliares de Crédito* (the General Law of Credit Organizations and Auxiliary Credit Activities, L.G.O.A.A.C.).<sup>54</sup> To begin, only authorized Mexican financial institutions may engage

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53. Although apparently rarely used, another device for converting accounts receivable to cash involves the *descuento en libros* (conveyance of book debts); a book debt is simply a non-documentary (or open) account receivable. As with factoring, this mechanism is available only to Mexican banks. For each obligation appearing on its books, the holder of the receivable (the account payee) may draft a bill of exchange in the amount of the debt which can then be conveyed to a bank at some bargained-for discount from the face value of the obligation. The bill of exchange simply orders the account debtor to pay the bank directly. Through this process, what was a non-documentary account is turned into a credit instrument in the form of a bill of exchange. Then, the bank can present the bill of exchange to the account debtor who may accept (acknowledge) the obligation to pay the bank directly when the debt matures. Alternatively, the bank could allow the account payee to collect the account as the bank's agent. In any event, the account debtor would be under no obligation to pay the bank unless it had accepted the bill of exchange upon presentment. LEY GENERAL DE TÍTULOS Y OPERACIONES DE CRÉDITO arts. 288-90 (Mex.) [hereinafter L.G.T.O.C.].

54. LEY GENERAL DE ORGANIZACIONES Y ACTIVIDADES AUXILIARES DE CRÉDITO [L.G.O.A.A.C.] art. 45 (Mex.).

in factoring.<sup>55</sup> Upon purchasing an account, the factor must inform the account debtor that the receivable has been transferred.<sup>56</sup> This notice must be provided through one of several different methods authorized expressly by the L.G.O.A.A.C.<sup>57</sup> An account debtor who has been notified properly must then make payments directly to the factor.<sup>58</sup> The notification date also establishes the factor's priority to the account.<sup>59</sup>

The Mexican system is significantly different from U.S. law, which brought factoring under the regulatory umbrella of Article 9. Specifically, the purchase of an open account under a factoring arrangement is treated as if it were a security interest which must be perfected by filing.<sup>60</sup>

### *B. Security Mechanisms Under Mexican Law*

To summarize, U.C.C. § 9-103(3)(c) requires that a U.S. lender who wants to perfect an Article 9 security interest in accounts receivable payable to a Mexican borrower must make an initial determination whether Mexican law "provides for perfection of the security interest by filing or recording."<sup>61</sup> In addition, prudent commercial practice dictates that this determination be made even if the U.S. lender intends to perfect its security interest by using the alternative account-debtor-notification method. Therefore, in order to determine whether Mexican law provides for the perfection of a security interest in open accounts by filing or recording, each of the security devices available under Mexican law that might be used to encumber non-documentary accounts must be considered in turn.

#### *1. Commercial Pledge: Ley General de Títulos y Operaciones de Crédito*

The provisions governing commercial pledges are contained in Articles 334 and 345 of *Ley General de Títulos y Operaciones de Crédito* (the General Law of Instruments and Operations of

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. U.C.C. § 9-102(1)(b) (1994).

61. *Id.* § 9-103(3)(c).



Credit, L.G.T.O.C.).<sup>62</sup> Specifically, Article 334 sets out a number of methods pursuant to which a commercial pledge is created and perfected.<sup>63</sup> Generally speaking, the options reflect differences in the nature of the collateral. In other words, the rules vary depending on whether the collateral takes the form of tangible personal property, negotiable instruments, documents, and so forth.<sup>64</sup>

In most cases, a pledge under the L.G.T.O.C. will be created by the pledgee's (the secured creditor's) actual, physical possession of the collateral. In this way, possession serves as the method of perfection by giving third parties clear notice of the secured creditor's interest in the asset(s). Obviously, perfection by possession is not an option when the collateral assumes an intangible form such as a non-documentary account receivable. To deal with the use of open accounts as loan collateral, subparagraph III provides that a pledge may be created (and perfected) by notifying the account debtor.<sup>65</sup> Moreover, account debtor notice is the exclusive method of perfection.<sup>66</sup> Therefore, with respect to U.C.C. § 9-103(3)(c), it is clear that the L.G.T.O.C.'s commercial pledge provisions do not provide for the perfection of a security interest in open accounts by filing or recording.

## 2. Commercial Pledge: *Ley General de Instituciones de Crédito*

Subparagraph VIII provides that a pledge in book debts (i.e., open accounts receivable) may be created in accordance with Article 70 of *Ley General de Instituciones de Crédito* (the General Law of Credit Institutions, L.I.C.).<sup>67</sup> According to this provision, a lender that qualifies as a Mexican credit institution may create and perfect a pledge of a borrower's non-documentary receivables

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62. L.G.T.O.C., *supra* note 53, art. 334, *et seq.*

63. *Id.*

64. *Id.*

65. See *id.* art. 334(III). The commercial pledge provisions do not seem to distinguish between the creation of the lien and its perfection. Unlike Article 9, it is not possible to create an unperfected security interest that will be enforceable between the secured creditor and the debtor but which may be defeated by subsequent competing interests. Instead, unless the pledgee has given notice to the account debtors, there simply is no lien on the accounts.

66. *Id.*

67. See *id.* art. 334(VIII).

simply by making a notation stating that the pledge exists.<sup>68</sup> The notation must be entered in a set of books maintained by the lender specifically for this purpose.<sup>69</sup> As with the commercial pledge, it is obvious that L.I.C. Article 70 does not provide for perfection by filing or recording as dictated by U.C.C. § 9-103(3)(c). In fact, as incredible as it may seem (at least to a U.S. lawyer), information concerning the existence of the pledge need not be made public at all; the creditor/pledgee is not even required to notify the account debtors that their accounts have been pledged.<sup>70</sup> If a competing claim is asserted to the account, the pledgee's priority will be established by the date the pledge was noted in the pledgee's very own books.<sup>71</sup>

Article 70 of the L.I.C. stands in sharp contrast to U.C.C. Article 9 which requires that all interests in accounts (including the claims of factors and assignees) be made public if they are to be enforceable against third parties.<sup>72</sup> The result under the L.I.C. is nothing less than the creation of a secret lien in accounts receivable. Consequently, it is hard to see how a creditor or factor who is considering taking an interest in or buying an open account belonging to a Mexican enterprise could independently verify whether that account had already been pledged to another financial institution.<sup>73</sup>

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68. LEY GENERAL DE INSTITUCIONES DE CRÉDITO art. 70 (Mex.) [hereinafter L.I.C.].

69. *Id.* In some respects a pledge under Article 70 of the L.I.C. is a major improvement over the other devices. Most importantly, the bank does not have to inform each account debtor that the receivable is being used to secure a debt. However, even this device does not permit the creation of a blanket security interest. Since each account must be pledged as it is generated in ad hoc fashion, it is impossible to create a floating pledge whose lien attaches automatically to all future-generated receivables.

70. *Id.*

71. *Id.*

72. U.C.C. § 9-302 (1994).

73. In fact, there appears to be some question whether a pledge under Article 70 of the L.I.C. would be enforceable against a third party who had subsequently taken an interest in the same account in good faith and had paid value. Moreover, apparently this type of pledge is rarely employed in practice; (perhaps as a result of questions concerning its enforceability). See generally Todd C. Nelson & Ronald C.C. Cuming, Harmonization of Secured Financing Laws of the NAFTA Partners: Focus on Mexico (1995) (unpublished manuscript on file with the National Law Center for Inter-American Free Trade, Tucson, Arizona).

### 3. Industrial Mortgage

Apart from the pledge lien under Article 70, the L.I.C. contains another provision that can be used to encumber open accounts receivable. As introduced in the earlier hypothetical, Article 67 of the L.I.C. provides for the creation of an "industrial mortgage" which certain commercial enterprises can use to obtain financing secured by all of their productive assets. The industrial mortgage is, without a doubt, the most flexible and modern security device available under Mexican law. In fact, it looks and operates in many respects like a blanket security interest under U.C.C. Article 9. Article 67 provides that:

Mortgages of a complete industrial, agricultural, animal husbandry or services unit in favor of a credit institution are to include the respective concession or authorization, when applicable, and also all material movable and immovable elements, considered as a unit, used in the operation of the corresponding enterprise. They may also include all moneys in the treasury of current operations, and all credits in favor of the enterprise as derived from its operations, without prejudice of the possibility of using them and replacing such credits in the normal course of business, and without the requirement of consent of the lender, unless the contrary has been covenanted.

A credit institution which is a mortgagee of a mortgage structured as referred to in this Article shall permit the operation of the mortgaged assets pursuant to the use corresponding to each; and when such assets are used for a public service concession, the institution will permit such alterations or modifications as may be necessary for the optimal rendering of such services. However, a credit institution may object to any sale or alienation of any part of such assets, and may also oppose any merger with another enterprise, if it judges that the security of its mortgage loan would be endangered thereby.

The mortgages referred to in this Article shall be recorded in the Public Registry of Property of the place or places of location of the assets.

The provisions of Article 214 of the L.G.T.O.C. shall be applicable as pertinent to the mortgages referred to in this Article.<sup>74</sup>

This provision says, in effect, that the lien of an industrial mortgage may encumber a commercial enterprise as a whole. The collateral may include both real and personal property along with sales proceeds in the form of cash and accounts receivable. Moreover, unless expressly forbidden by the mortgage agreement, the receivables may be collected and replaced in the normal course of business. In other words, it appears that a floating lien covering accounts receivable is possible.

The most common use for the industrial mortgage is in connection with start-up financing for a new venture.<sup>75</sup> In fact, given the enormous limitations of secured transactions law in Mexico, it would be very difficult to engage in project lending on a secured basis without an industrial mortgage. In the absence of a security device providing an all-encompassing lien, the transaction would have to be arranged almost on an asset-by-asset basis.<sup>76</sup>

With respect to U.C.C. § 9-103(3)(c), the industrial mortgage poses some interesting interpretative questions. On the one hand, it can be used to encumber open accounts, and the statute specifically provides that the mortgage lien is perfected by recording. On the other hand, this security device cannot be used to encumber accounts receivable alone. It appears instead to be an all-or-nothing proposition—i.e., the mortgage must cover the borrower's entire asset base. In addition, as with the pledge under Article 70 of the L.I.C., the industrial mortgage may be used only by Mexican credit institutions.<sup>77</sup> Consequently, in most transactions involving cross-border open accounts, Article 67 would not provide for the perfection of a security interest in the receivables by filing or recording within the meaning of U.C.C. § 9-103(3)(c).

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74. *Id.* at 76.

75. *Id.*

76. *Id.*

77. L.I.C., *supra* note 68, art. 67.

#### 4. Assignment of Accounts: *Cesión de Créditos*

Finally, the holder of a right to receive payment pursuant to an open account receivable could assign that right in full to another party.<sup>78</sup> Such conveyances are governed by the Civil Code which deals with the assignment of contract rights in general.<sup>79</sup>

As with the other mechanisms, the law of assignments creates some significant interpretive problems for U.S. accounts receivable financiers. As with the industrial mortgage under the L.I.C., the Civil Code expressly provides for a method of third party notice through filing. Specifically, a contract assignment is effective against third persons (i.e., the equivalent of perfection) from the time it is considered a *fecha cierta* (date certain).<sup>80</sup> Although a date certain may be established in a few different ways, only two are applicable with respect to the assignment of open accounts receivable.<sup>81</sup> If the assignment is made in a public instrument (i.e., a contract drawn and executed by a public notary), the day of its execution will be the date certain.<sup>82</sup> In the case of a private document, the date certain will be the day the assignment is filed in the public registry.<sup>83</sup>

Exactly which public registry is not clear. As discussed, under most legal systems the rules concerning the place of registration will be based on the location of either the collateral or the borrower. In the alternative, some kind of centralized (e.g., na-

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78. CÓDIGO CIVIL PARA EL DISTRITO FEDERAL art. 2030 (Mex.) [hereinafter C.C.D.F.].

79. The assignment of contract rights is a matter of state law in that each Mexican state has the power to enact its own version of the Civil Code. In practice, however, the various state codes tend to follow the Civil Code for the Federal District which will be cited for the purposes of this Article.

80. C.C.D.F., *supra* note 78, art. 2034.

81. It is interesting to note the disagreement between the Civil Code's assignment provisions and the L.G.O.A.C.'s rules with respect to factoring. Factoring, of course, is nothing more than the assignment of an account for value. If serving as a factor, the purchaser of the account must perfect its interest by notifying the account debtor. By comparison, as an assignee under the Civil Code, the account purchaser may perfect either by filing or by employing a public notary to draft and execute the assignment. There is really no reason for this inconsistent treatment. It simply reflects the problems of a non-uniform, cumulative approach to the adoption of secured financing law.

82. C.C.D.F., *supra* note 78, art. 2034. The use of a public notary appears to have the same drawbacks as the perfection of an accounts receivable pledge by notation in the lender's books pursuant to Article 70 of the L.I.C. In other words, a notary's involvement in the assignment does not, as a practical matter, help interested third parties uncover the existence of the prior conveyance.

83. *Id.*

tionwide) registry might be used. The first option is inapplicable when the collateral is a right to receive payment under a non-documentary account since it is intangible property without a physical *situs*. Therefore, registration must be based on the borrower/account assignor's location. But in that case, there should be rules to handle the possibility of multiple locations. For example, if the assignor is a corporation with branches in several jurisdictions, registration might be based on the principal place of business or on the state of incorporation. Unfortunately, however, neither the Civil Code nor any other legislation provides the first clue as to where the notice must be registered in order to be effective.<sup>84</sup> In fact, it is not clear that the place of registration has any legal significance whatsoever. Without such guidelines, it is difficult to see how third parties could realistically be expected to uncover prior assignments.

In any event, the pivotal issue concerns the relationship between this Civil Code provision and U.C.C. § 9-103(3)(c). The specific question is whether the Civil Code provides a procedure for perfecting a security interest by filing or recording. Again, the answer appears to be "no." It would seem that with respect to open accounts, the Civil Code is designed to accommodate complete assignments of all right, title, and interest in the receivable. Apparently, the provisions do not contemplate an assignment for security purposes which would create a more limited right in the account.<sup>85</sup>

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84. For a thorough discussion of the Mexican public registry system, see generally Wilson-Molina, *supra* note 43.

85. Although this Article deals specifically with the creation of Article 9 security interests in cross-border open accounts, a U.S. lender might require instead that the Mexican exporter/borrower execute a full assignment of its U.S. receivables. This option would be relatively more attractive if the transaction dealt with only a few large accounts. However, even if the U.S. lender/assignee plans to notify the account debtors of the assignment (and probably collect payment directly), the same issues with respect to lien searches and perfection will apply. One added twist is that U.C.C. § 9-302(1) (1994) provides that an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor will be deemed perfected automatically upon attachment without filing or notice. Consequently, if the assignment falls into this category, the U.S. lender will not have to take any further action to perfect. In practice, however, since an assignee can never really know in advance what a judge will decide constitutes a "significant part," it is usually advisable to perfect by filing or notice—or perhaps both.

## IV. PRACTICAL IMPLICATIONS

Faced with this gauntlet of uncertainties, it is hard to blame U.S. creditors for shying away from cross-border accounts receivable. First, as the hypothetical illustrates, before taking a security interest in an open account payable to a Mexican entity, a U.S. lender must make sure that there are no competing liens (or assignments) created pursuant to Mexican law. In resolving that issue, a U.S. creditor must consider the myriad of legal devices offered by Mexican law. In most cases, account debtor notice will be the required perfection method.<sup>86</sup> Therefore, the existence of the lien, assignment, or factoring agreement can be uncovered by talking to the account debtors directly. However, Mexican law also allows Mexican credit institutions to perfect a pledge lien covering open accounts by notation in the lender's books, and it permits an assignment of a non-documentary receivable if made before a public notary. (Such an assignment could also be perfected by filing, but the Civil Code does not say where to file.) As discussed, however, there are serious questions whether a U.S. judge would enforce an interest in an open account that was not adequately publicized (and discoverable) in Mexico.

Mexico's industrial mortgage creates some particularly difficult questions for U.S. creditors. The lien of an industrial mortgage in favor of a Mexican credit institution can be perfected by filing and, unlike the other security/assignment devices under Mexican law, it appears to encumber future accounts automatically as they are generated. However, the recording rules flow from real property concepts. Specifically, the mortgage must be recorded in the jurisdiction in which the collateral is located.<sup>87</sup> This works fine if the borrower's principal place of business and the collateral happen to be situated in the same filing jurisdiction. If they are not, a searching party interested specifically in competing claims to intangible assets, such as open accounts, might look only in the jurisdiction covering the borrower's principal place of business.

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86. This is because factoring, which requires account debtor notification, seems to be the dominant legal mechanism in Mexico for conveying an interest in accounts receivable to financial institutions.

87. L.I.C., *supra* note 68, art. 67.

Assuming the U.S. secured creditor can get past these problems, the perfection rules under U.C.C. § 9-103(3)(c) must also be considered. Since the borrower (the exporter/account payee) is located in Mexico, Article 9 asks whether Mexican law will allow the perfection of the security interest by filing or recording.<sup>88</sup> The answer appears to be "no" for a variety of reasons (e.g., the lender is not a Mexican credit institution and the transaction involves nothing more than a security interest in accounts receivable rather than a full assignment or an all-encompassing industrial lien.)

In practice, however, the fact that Mexican law might control the outcome creates all sorts of headaches for a U.S. lender. Referring to the earlier hypothetical, imagine for example that instead of the prior industrial mortgage in favor of MexBank, First Financial of New York (FFNY) had made the initial loan to MexCo and had taken an Article 9 security interest in the account receivable payable from the Texas account debtor. After carefully considering New York's U.C.C. § 9-103(3)(c), FFNY contacts Mexican counsel to find out whether Mexican law allows for the perfection of the security interest by filing or recording. Mexican counsel, not really understanding the issues, assures FFNY that such a security interest can be perfected simply by translating the financing statement into Spanish and filing it in the central state registry for the state in which MexCo is incorporated and physically located. Mexican counsel is then able to have the financing statement registered; perhaps the registrar accepts the document in ministerial fashion without review, or Mexican counsel offers the registrar a financial incentive. As a result, FFNY sees no need to notify the U.S. account debtor.<sup>89</sup>

U.S. Capital then takes its subsequent Article 9 security interest in the same account, but perfects by notifying the Texas account debtor, having concluded (correctly as it turns out) that this is the only available perfection alternative. MexCo goes out of business shortly thereafter without paying either U.S. Capital

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88. U.C.C. § 9-103(3)(c) (1994).

89. It is difficult to imagine that First Financial of New York's (FFNY) legal counsel would not insist upon notifying the account debtors as well in that U.C.C. § 9-103(3)(c) expressly permits notice as an alternative method of perfection. If so, perhaps this problem is more theoretical than real. On the other hand, it is conceivable that FFNY would comply with MexCo's wishes not to inform the account debtors of the assignment, especially if FFNY were convinced by its Mexican counsel that it could perfect safely enough simply by filing in Mexico.



or FFNY, both of whom then demand payment from the Texas account debtor.

Under this scenario, it is likely that some unfortunate Texas trial court judge will have to decide whether, under U.C.C. § 9-103(3)(c), Mexican law provides for the perfection of a security interest by filing or recording in the jurisdiction in which MexCo was located. FFNY would argue that perfection in Mexico is indeed possible. As proof, FFNY could enter into evidence a certified copy of the translated financing statement showing that it had in fact been registered. It would then be incumbent upon U.S. Capital to refute this evidence in some way. Again, what the judge might decide is anyone's guess.

Leaving these problems aside, if filing/recording under Mexican law is not an option, but the Mexican borrower/account payee has a major executive office in the United States, U.C.C. § 9-103(3)(c) provides that the security interest can be perfected by filing in the state in which that office is located.<sup>90</sup> In fact, foreign exporters often maintain distribution offices in the United States through which accounts are collected.<sup>91</sup> Unfortunately, they sometimes put an office in several different states. In that case, as a practical matter the secured creditor must file its financing statement in each of those states.

Finally, without a major executive office, the U.S. lender must perfect by account debtor notification, assuming that is feasible.<sup>92</sup> It may not be. The secured transaction may involve hundreds or even thousands of relatively small accounts that are continually generated and paid off in the normal course of business. Even when the accounts are few, the Mexican account payee/borrower may not want its customers to know that their accounts are serving as collateral for a loan. This is particularly true in the United States where, whether justified or not, notice from a supplier's creditor is often perceived as the first hint of financial trouble. As a result, any such notice may cause the U.S. customers to start thinking about replacing the Mexican exporter with other suppliers so as not to be caught short should

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90. U.C.C. § 9-103(3)(c) (1994).

91. If the distribution office is formed as a legally distinct U.S. subsidiary of the Mexican exporter, it may be possible to domesticate the entire secured transaction thereby avoiding all of these issues. Not surprisingly, this is exactly what many U.S. lenders require.

92. U.C.C. § 9-103(3)(c) (1994).

the exporter go out of business. In summary, perfection by account debtor notification is an option only with transactions involving relatively few (and probably large) accounts, and when the Mexican account payee is amenable.

It is also important to remember that U.C.C. § 9-103(3)(c) makes account debtor notification an optional rather than an exclusive perfection method. Instead of making life easier for secured creditors (as the drafters no doubt intended), this provision actually puts more stress on the system. For example, if the Mexican exporter/borrower maintains a major executive office in a U.S. state, the creditor could perfect by filing in that state. However, a diligent creditor must still verify that there are no competing security interests in favor of some other lender who chose to perfect by notifying the account debtors directly.

## V. CONCLUSIONS

In view of the foregoing, it is not surprising that Article 9's conflicts-of-law rules have been widely criticized.<sup>93</sup> First, they force U.S. creditors to deal with a foreign filing system without regard to the efficacy of that system. Clearly, another country's registry should not be recognized unless and until an initial determination has been made as to its integrity and functionality. Second, by providing alternative methods of perfection, U.C.C. § 9-103(3)(c) puts more pressure on searching parties. Since a security interest is deemed to be perfected i) by filing in the foreign system (if possible), ii) by filing in the state in which the debtor's major executive office is located (if there is one), or iii) by notifying the account debtor (if feasible),<sup>94</sup> a searching party must explore all of these possibilities in order to determine whether an interest in a given account already exists.

In recognition of these shortcomings, the International Secured Transactions Task Force has recently proposed the replacement of U.C.C. § 9-103(3)(c) with a revised § 9-307. As currently designed, if the debtor/account payee is located in a foreign country which requires public notice of a security interest, perfection must be carried out by filing in accordance with

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93. See generally William H. Hagendorn, *Perfection of Interests in Accounts and General Intangibles of Foreign Corporation*, 5 INT'L L. PRACTICUM: INT'L L. & PRAC. SEM., N.Y. ST. B.A. 21, 21 (1992).

94. U.C.C. § 9-103 (1994).

that country's laws.<sup>95</sup> If, on the other hand, perfection by public registration is not required, the Article 9 security interest must be perfected by filing in the District of Columbia.<sup>96</sup>

Proposed § 9-307 appears to solve many of the current problems involving security interests in cross-border accounts receivable that are payable to a Mexican-based debtor. Because existing Mexican law does not seem to permit the perfection of an Article 9 security interest by public registration, the D.C. registry will be the appropriate filing office when the loan involves a debtor located in Mexico. Proposed § 9-307 eliminates the unworkable "major executive office" language and makes public filing the exclusive method of perfection by doing away with the alternative account-debtor-notification option.

Unfortunately, revising Article 9 alone will not solve all the problems. Even if the revised § 9-307 is enacted, the possibility for conflict will remain. For example, before making a loan to a Mexican debtor/account payee, a U.S. secured party must determine whether the open accounts payable from U.S. account debtors i) are subject to an industrial mortgage, in which case the mortgage instrument should have been recorded, or ii) have been factored to a Mexican credit institution, in which case the account debtors should have been notified of the conveyance. As previously discussed, however, it may be difficult to make such a determination as a practical matter.<sup>97</sup>

Ultimately, these problems can be addressed only through legislative changes designed to achieve greater harmony among the NAFTA partners. Beginning with the ideal, Mexico should junk its plethora of legal mechanisms in favor of a single security

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95. Draft Revision of Uniform Commercial Code Article 9—Secured Transactions; Sales of Accounts and Chattel Paper, prepared for the National Conference of Commissioners on Uniform State Laws (Jul. 25 - Aug. 1, 1997).

96. *Id.*

97. In addition, proposed § 9-307 seems to ignore important questions relating to the efficacy and integrity of the foreign filing system. Apparently, as long as the foreign jurisdiction requires public notice by filing, § 9-307 will accept that country's filing infrastructure and regulations without exception. In practice, however, the availability of a filing system alone does not necessarily mean a security interest will be adequately publicized. For example, the rules concerning where to file may be unclear. Filings may not be properly and accurately indexed. There may be unacceptably long gaps between the time a document is submitted and the appearance of the debtor's name in the index. The rules may not contemplate a change in the debtor's name or location. Finally, an injured party may have little or no recourse against a foreign filing office for any damages caused by errors and omissions.

device which, with respect to non-documentary accounts, would be perfected by public registration. In addition, an assignee of open accounts (including a factor) should be treated as a secured party for the purpose of perfection and should be required to publicly register its interest. If, for whatever reason, Mexico cannot let go of its existing law, at the very least each code should be amended to make the use of a uniform registry system the exclusive method for publicizing all liens in and assignments of accounts receivable. (Admittedly, such changes would effectively repeal Article 70 of the L.I.C.). In either case, Mexico should enact filing rules to manage intangible collateral. If a nationwide filing system is not feasible for technical or political reasons, registration should be based on the borrower's state of incorporation or principal place of business.<sup>98</sup> Finally, rules will be needed to handle changes in circumstance (such as the borrower moving to a different state or a name change) that necessitate a new registration.

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98. The new registry should also adopt a notice filing approach by requiring only a memorandum of the transaction (i.e., the equivalent of a U.C.C.-1 financing statement) as opposed to the current practice of filing the entire security agreement. In addition, filing fees should be kept at a reasonable level. Unlike the U.S. and Canadian practice of charging a relatively nominal flat fee, Mexican registries establish filing fees as a percentage of the size of the debt. (In at least a few jurisdictions, the fee is capped at some maximum amount.) With large transactions, registration costs can easily run into the hundreds, and even thousands, of dollars. *See generally* Wilson-Molina, *supra* note 43.