

Permanent Editorial Board for the Uniform Commercial Code

**Report on Choice-of-Law Issues Under
2022 Uniform Commercial Code Amendments**

Draft for Public Comment

November 16, 2023

Comments on this draft must be submitted by no later than January 15, 2024.

The PEB is meeting on December 11, 2023; if feasible it would be appreciated that any substantive comments be submitted a few days ahead of that; substantive comments will continue to be considered if submitted through the date stated above.

Comments may be submitted by email to UCCIcomments@ali.org.

**This draft is subject to revisions based on comments received.
The PEB reserves the right to withdraw this proposed report.**

PREFACE TO PEB COMMENTARY

The Permanent Editorial Board for the Uniform Commercial Code (PEB) acts under the authority of the American Law Institute and the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The PEB has resolved to issue supplemental commentary on the Uniform Commercial Code (UCC) from time to time. The supplemental commentary of the PEB generally will be known as a *PEB Commentary*, to distinguish it from the Official Comments to the UCC. A *PEB Commentary* may be denominated a commentary, a report, or otherwise as determined by the PEB.

The Resolution states that:

The underlying purposes and policies of the *PEB Commentary* are those specified in Section 1-103(a). A *PEB Commentary* should come within one or more of the following specific purposes, which should be made apparent at the beginning of the Commentary: (1) to resolve an ambiguity in the UCC by restating more clearly what the PEB considers to be the legal rule; (2) to state a preferred resolution of an issue on which judicial opinion or scholarly writing diverges; (3) to elaborate on the application of the UCC where the statute and/or the Official Comment leaves doubt as to the inclusion or exclusion of, or application to, particular circumstances or transactions; (4) consistent with Section 1-103(a)(2), to apply the principles of the UCC to new or changed circumstances; (5) to clarify or elaborate upon the operation of the UCC as it relates to other statutes (such as the Bankruptcy Code and federal and state consumer protection statutes) and general principles of law and equity pursuant to Section 1-103(b); or (6) to otherwise improve the operation of the UCC.

For more information about the Permanent Editorial Board for the Uniform Commercial Code, visit www.ali.org or www.uniformlaws.org.

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Permanent Editorial Board for the Uniform Commercial Code – Report on Choice-of-Law Issues Under 2022 Uniform Commercial Code Amendments

1. Introduction

The 2022 Amendments to the Uniform Commercial Code (the “UCC”)¹ (the “Amendments”)² have been adopted in eleven United States jurisdictions and are now effective³ in seven of those jurisdictions.⁴ It is expected that the Amendments will become effective in additional jurisdictions over the next few years.

Parties to transactions typically look for certainty and predictability for their rights and obligations, both against the other parties to the

¹ All statutory references are to the UCC, unless otherwise indicated. All UCC citations in this Report are to the UCC as amended by the Amendments, unless otherwise indicated. When this Report refers to the “pre-Amendments” UCC or an article of UCC, it means the UCC or the referenced article before the effectiveness of the Amendments. All emphasis is added.

² Not all jurisdictions that have adopted the Amendments have adopted the official text of the Amendments as promulgated by the sponsoring organizations. This Report analyzes the questions discussed below on the basis that the jurisdictions that have adopted the Amendments have adopted the official text. Of course, those reviewing the matters addressed in this Report should review the text as enacted in the relevant states.

³ In addition to the effective date of the Amendments in a particular jurisdiction, the Amendments provide for transition rules, including an “adjustment date.” §§ A-301 *et seq.*

⁴ See Appendix A for a list of the United States jurisdictions that have adopted the Amendments through the date of this Report and the effective date of the Amendments in each of those jurisdictions. Updated adoption information may be obtained on the Uniform Law Commission website (www.uniformlaws.org).

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transaction and third parties.⁵ For example, a secured⁶ party in a transaction covered by Article 9 and a buyer or secured party in a transaction covered by Article 12 typically want to know that their rights are effective against the other party and third parties claiming a property interest in the collateral or property covered by Article 12. That determination critically requires an evaluation of which jurisdiction's substantive law governs those questions.⁷ This Report describes the choice-of-law analysis used to determine which jurisdiction's substantive law applies to these matters.

Because there will be a period during which the Amendments are in effect in some jurisdictions but not others, it is important to understand the choice-of-law rules that will determine the applicable law for transactions that would be governed differently under the Amendments than under Pre-Amendments law. In most cases, the applicable choice-of-law rules will be those in the UCC of the forum jurisdiction but, as explained in this Report, in some cases the relevant choice-of-law rule will be found elsewhere in the law of the forum jurisdiction. This report provides guidance on navigating the three sets of choice-of-law rules that may apply in whole or in part to a transaction:

- Common law⁸

⁵ See, e.g., § 1-203, Comment 2 (“This section begins where Section 1-201(b)(3) leaves off. It draws a sharper line between leases and security interests disguised as leases to create greater *certainty* in commercial transactions.”); § 9-318, Comment 8 (“...care must be taken to ensure that this does not impair the *certainty* and *predictability* of the priority rules.”).

⁶ A “secured party” will typically include a buyer of a right to payment. See notes 56 and 58.

⁷ See, e.g., § 8-110, Comment 3 (“... the policy of this section ... is to enable parties to determine, in advance and with *certainty*, what law will apply to transactions governed by this Article”).

⁸ The non-UCC rules are generally common law, court-developed rules. In some jurisdictions there are also statutes of general applicability to choice-of-law issues. References in this Report to “common law” choice-of-law rules include these statutes on choice of law.

- Pre-Amendment UCC
- UCC

2. Summary of this Report

As discussed in detail below, a court determining the substantive rights and obligations of the parties as between each other and as against third parties would make the choice-of-law determination as follows:

1. The *forum* court applies the *forum's* non-mandatory⁹ and mandatory¹⁰ choice-of-law rules.¹¹
2. As part of applying the *forum's* choice-of-law rules, the *forum* court applies the *forum's* law on characterizing the relevant property and the transaction.¹²
3. Using the characterization of the relevant property and transaction under the *forum's* law, the court applies the *forum's* choice-of-law rules to determine which jurisdiction's substantive law applies to the issue¹³ (the "substantive-law jurisdiction").¹⁴
4. As part of applying the substantive law of the *substantive-law jurisdiction*, the *forum* court applies the *substantive-law jurisdiction's* substantive law to characterize the relevant property and transaction.¹⁵
5. Using the characterization of the relevant property and transaction as determined under the *substantive-law jurisdiction's* law,

⁹ See § 4.

¹⁰ See § 5.

¹¹ See notes 39 and 64.

¹² See note 65.

¹³ The substantive-law jurisdiction could be the forum.

¹⁴ See note 12.

¹⁵ See note 66.

the court applies the substantive law of the *substantive-law jurisdiction* to determine the substantive issue.¹⁶

The application of the choice-of-law rules in this manner may result in counterintuitive results, as shown in the examples provided below.¹⁷ For example, if the *forum* has not adopted the Amendments, the Amendments might still apply to a particular issue if the *forum's* choice-of-law rules direct the application for Article 9 perfection purposes of the law of Delaware (as the *substantive-law jurisdiction*), which has adopted the Amendments.¹⁸ As a result, following the steps listed above, the law of Delaware (*including the Amendments*) may apply (as applicable) to perfection, the effect of perfection or non perfection, and the priority of the security interest.

This Report identifies and explains the application of the choice-of-law rules that will determine which jurisdiction's substantive law will apply to several important issues covered by the 2022 Amendments. In order to help readers visualize the application of these rules, this Report also illustrates that application with summary tables¹⁹ and flowcharts.²⁰

¹⁶ See note 66.

¹⁷ See § 9.

¹⁸ See Appendix A.

¹⁹ See Appendix B.

²⁰ See Appendix C.

3. Summary of the principal changes in the 2022 Amendments²¹

3.1 Changes relating to controllable electronic records. The most extensive changes made by the 2022 Amendments relate to “controllable electronic records” (“CERs”):²²

- The Amendments provide for a new category of property, referred to as a “controllable electronic record”.
- An account or payment intangible evidenced by a CER is a “controllable account” or “controllable payment intangible” if the account debtor undertakes to pay the person in control of the CER.²³
- Section 12-105 defines “control.” A purchaser (including a secured party) obtains control of a controllable account or controllable payment intangible by obtaining control of the CER that “evidence[s]” the controllable account or controllable payment intangible.²⁴
- A purchaser of a CER, a controllable account or a controllable payment intangible generally “acquires all rights” in the CER,

²¹ This Report does not provide a comprehensive summary of the substantive changes the Amendments make to the UCC or of the relevant UCC choice-of-law rules. The Introductory Note to the Amendments provides a detailed summary of the Amendments and is available in materials on the Uniform Law Commission web page (www.uniformlaws.org). This Report does not discuss choice-of-law rules for electronic money (§ 9-102(a)(31A)) as the United States has not issued electronic money and only a small number of other countries have done so.

²² A CER is an electronic record that is controllable. § 12-102(a)(1). “Control” is defined in § 12-105. As stated in note 23, the definition of CER does not include a “controllable account” or a “controllable payment intangible” (each briefly discussed below).

²³ “Controllable account” and “controllable payment intangible” are defined in §§ 9-102(a)(27A) and (27B). The terms “account” and “payment intangible” are defined in the pre-Amendments Article 9. See §§ 9-102(a)(2) and (61). A controllable account and a controllable payment intangible are excluded from the definition of CER. § 12-102(a)(1).

²⁴ § 12-104(b).

controllable account, or controllable payment intangible²⁵ that “the transferor had or had power to transfer.”²⁶

- A purchaser of a CER, a controllable account, or a controllable payment intangible will *also* take the CER, controllable account, or controllable payment intangible “free of a claim of a property right” in that property if the purchaser purchases the asset and obtains control of the asset, for value, in good faith, and without notice of a claim of a property right in the asset.²⁷ That person is referred to as a “qualifying purchaser”.²⁸
- A secured party can perfect a security interest in a CER, controllable account, or controllable payment intangible by obtaining control of that asset;²⁹ and
- A security interest in the asset perfected by control is senior to a security interest in the asset not perfected by control.³⁰

²⁵ § 12-104(a).

²⁶ § 12-104(d). This is often referred to as the “shelter” principle. The Article 12 requirements for application of the shelter principle to a purchaser are significantly less demanding than the requirements for the application of qualifying purchaser status. *See generally* § 12-104, Comment 4.

²⁷ *See generally*, § 12-104. “Purchaser”, “value”, and “good faith” have the pre-Amendments meanings in §§ 1-201(b)(30), 3-303, and 1-201(b)(20).

²⁸ “Qualifying purchaser” is defined in § 12-102(a)(2).

²⁹ § 9-314(a). The secured party can also perfect the security interest by filing a financing statement. The secured party does not need to file a financing statement to perfect the security interest if the security interest is perfected by control. “Control” for purposes of Article 9 has the same meaning that it has in Article 12. § 9-107A.

³⁰ § 9-326A.

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3.2 *Changes other than those relating to CERs.* The Amendments include changes to every article of the UCC (except one).³¹ The following are some of the notable changes:

- The Amendments codify rules to determine the applicability of Article 2 and Article 2A to so-called “hybrid transactions” – transactions that involve both goods and other matters (such as services). The codification builds on the “predominant purpose” test developed in case law, but with some important differences.³²
- The definition of the term “conspicuous,” which is of particular importance for disclaimers of warranties under Articles 2 and 2A, has been revised to delete the statutory examples and applies a “totality of the circumstances” test.³³
- The definition of the term “sign” has been revised to incorporate the pre-Amendments definition of “authenticate”, so that “sign”, in addition to applying to a signature on a writing,³⁴ also applies to electronic and other types of non-paper signatures.³⁵
- The criteria for determining whether a promise or order is a “negotiable instrument” has been revised to provide expressly that neither a choice-of-law term nor a choice-of-forum term in the

³¹ The exception is Article 6, which remains in effect only in California and Maryland.

³² §§ 2-102(2) and 2A-102(a). If the sale-of-goods or lease-of-goods aspects of a transaction predominate, Article 2 or Article 2A applies. Even when the sale- or lease-of-goods aspects do not predominate, the portions of Article 2 or Article 2A that relate primarily to the goods and not to the transaction as a whole will still apply. §§ 2-102(2) and 2A-102. Conversely, when the sale- or lease-of-goods aspects do predominate, other law may apply to the non-goods aspects of the transaction when “appropriate.” §§ 2-102(2), Comments 4, 5, and 6, 2A-102, Comments 4, 6, 7, and 8.

³³ § 1-201(b)(10).

³⁴ § 1-201(b)(43). The term is limited to a record in tangible form.

³⁵ § 1-201(b)(36). A negotiable instrument continues to require a signature on a tangible writing. §§ 1-201, Comment 37, 3-103(a)(12), 3-104(a).

promise or order prevents it from qualifying as a negotiable instrument.³⁶

- The definition of “chattel paper” has been revised to clarify the term’s application to some hybrid and electronic transactions.³⁷

4. Non-mandatory choice-of-law rules, which give parties some power to choose the applicable law for certain issues

To the extent that a transaction is governed by an Article of the UCC,³⁸ § 1-301(b) provides generally applicable choice-of-law rules. Section 1-301(a) allows the parties to the transaction to agree as to which jurisdiction’s law will govern “their” rights and duties, so long as the transaction bears a reasonable relation to the jurisdiction whose law is chosen. The Amendments do not change these rules.³⁹

The provisions of Article 1, including § 1-301, apply only to transactions “to the extent” that they are governed by another Article of the UCC.⁴⁰ Thus, to the extent that a transaction is not governed by another

³⁶ § 3-104(a)(3).

³⁷ § 9-102(a)(11). The definition has also been amended to clarify that the term “chattel paper” refers to the right to payment and not to the record that evidences the right.

³⁸ § 1-301, Comment 6 (“This section is subject to Section 1-102, which states the scope of Article 1. As that section indicates, the rules of Article 1, including this section, apply to a transaction *to the extent* that transaction is governed by one of the other Articles of the Uniform Commercial Code.”).

³⁹ In a matter governed by state law, federal courts generally apply the choice-of-law rules of the jurisdiction where the federal court sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

⁴⁰ See Note 42. *Restatement (Third)* § 7.10(e) (“Issues about a security interest in personal property covered by the *forum* state’s UCC are governed by the law determined under the UCC’s choice-of-law rules.”); see also § 7.10(d) (“Issues about a security interest in personal property not covered by the *forum* state’s UCC are governed by the law determined under the following rules ...”).

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article of the UCC, § 1-301 does not apply.⁴¹ Where § 1-301 does not apply, a court will, apply the forum jurisdiction's general (*i.e.*, non-UCC) choice-of-law rules to determine which law governs the transaction. In this regard, many United States jurisdictions generally apply the choice-of-law rules for contracts in *Restatement of Conflict of Laws (Second)* ("*Restatement*") (Am. L. Inst.), §§ 187-88.⁴² *Restatement* § 187 is similar to the rule in § 1-301(a) in that § 187 generally gives effect to the parties' agreement as to which jurisdiction's law will apply so long as there is a sufficient relationship between the transaction or the parties and the agreed jurisdiction.⁴³ Under the *Restatement* rule, a choice of law by the parties will not be given effect if the chosen law would violate a "fundamental policy" of the

⁴¹ As a result of the changes to the *scope* of Article 2 and Article 2A, the applicability of § 1-301 might differ between jurisdictions where the Amendments are effective and those where they are not.

⁴² The American Law Institute (the "ALI") is drafting the *Restatement of Conflict of Laws (Third)* (Am. L. Inst.) ("*Restatement (Third)*"). Once a Tentative Draft of a Restatement has been approved by both the Council and membership of the ALI, the Tentative Draft represents the most current statement of ALI's position on the subject and may be cited in opinions or briefs in accordance with ALI Bluebook rule 12.9.4 until the official text is published. The ALI Council and ALI membership have approved Tentative Drafts 1-4 of the *Restatement (Third)*. *Restatement (Third)* Tentative Drafts No. 3 (2022) and No. 4 (2023), are cited in this Report. The law of a particular relevant jurisdiction should be reviewed to determine if that jurisdiction follows the *Restatement* rule (in whole or in part) or another rule.

⁴³ The *Restatement* provides the parties with more autonomy in some cases. For example, under the *Restatement*, a party may establish a "reasonable basis" for the chosen law where text law is more "developed" on the particular issue. *Restatement* § 187, Comment *f*.

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jurisdiction whose law would govern in the absence of the parties' choice.⁴⁴ Section 1-301(a) is silent on this issue.⁴⁵

Some jurisdictions have statutes that override UCC § 1-301(a) and *Restatement* § 187 and, for transactions greater than a stated dollar amount, give effect to a choice-of-law agreement selecting the law of the forum jurisdiction even if the transaction and the parties do not bear any relationship to the forum.⁴⁶

If the parties do not make an agreement that is effective under § 1-301(a), § 1-301(b) provides that the forum jurisdiction's UCC applies so long as the transaction bears an "appropriate relation" to the forum jurisdiction. If there is not an "appropriate relation" to the forum jurisdiction, the applicable law is the law of an "appropriate" jurisdiction.⁴⁷ *Restatement* § 188 provides that the court should apply, with respect to a particular

⁴⁴ See *Restatement* § 187(2)(b). This Report does not address whether any contractual choice-of-law provision is unenforceable as a result of a "fundamental policy" of a jurisdiction. See also *Restatement (Third)* § 5.04 ("A court may decline to decide an issue under foreign law if the use of foreign law would offend a deep-rooted forum public policy.").

⁴⁵ The fundamental policy limitation may apply to transactions within the scope of the UCC rule by means of § 1-103(b).

⁴⁶ See, e.g., Cal. Civ. Code § 1646.5; Del. Stat. tit. 6, § 2708; Fla. Stat. § 685.101; 735 Ill. Comp. Stat. 105/5-5; N.Y. Gen. Oblig. Law § 5-1401(1). These statutes do not bind a court in another jurisdiction, which would apply its *own* choice-of-law rules. See note [•]. These statutes would apply to the UCC's non-mandatory choice-of-law rules, such as which jurisdiction's law governs the attachment of a security interest. These statutes do not apply to the UCC's *mandatory* choice-of-law rules, including those in §§ 9-301 – 9-307. Cal. Civ. Code § 1646.5; Del. Stat. tit. 6, § 2708(c); Fla. Stat. § 685.101(2)(d); 735 Ill. Comp. Stat. 105/5-5; N.Y. Gen. Oblig. Law § 5-1401(1). Some of the statutes referred to above exclude the consideration of fundamental or other public policy when applying the statute, see, e.g., *IRB–Brasil Resseguros, S.A.*, 982 N.E.2d 609 (N.Y. 2012); *Tosapratt, LLC v. Sunset Properties, Inc.*, 926 N.Y.S.2d 760 (App. Div. 2011), others do not, see, e.g., *Quanta Computer Inc. v. Japan Commc'ns Inc.*, 230 Cal. Rptr. 3d 334 (2018).

⁴⁷ § 1-301, Comments 2 and 3.

issue, the “local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties ...”.⁴⁸

5. Choice-of-law rules that mandate the law applicable to certain issues

As noted above, §§ 1-301(a)-(b) apply to govern the “rights and duties” only of the parties to the transaction.⁴⁹ As stated in § 1-301(c), subsections (a) and (b) do not apply to the extent that the mandatory provisions of §§ 9-301 – 9-307 “specif[y] the applicable law” with respect to a particular issue, such as the perfection, the effect of perfection or non-perfection, and priority of a security interest and matters covered by Article 12.⁵⁰

The mandatory provisions generally concern the rights of third parties. They do not cover matters such as the attachment of a security interest. The Amendments add to the list of mandatory choice-of-law provisions:

- The choice-of-law rules that the Amendments add to §§ 9-301 – 9-307;
- Sections 9-306A and 9-307B; and

⁴⁸ The *Restatement* provisions will often result in the application of the same law as would occur by application of § 1-301.

⁴⁹ § 1-301(a); PEB Commentary N° 24: Scope of Article 9 Choice-of-Law Rules Regarding Characterization of Transactions (August 2022) (“PEB Commentary”) and decisions cited in that Commentary (“The Code’s general choice-of-law rule in Article 1, now codified in Section 1-301 ... provides parties to a transaction substantial autonomy to choose the law governing *their* rights and duties with respect to that transaction.” (footnote omitted)). Similarly, the enforcement of a choice-of-law provision under *Restatement* § 187 would apply only to the rights and duties of the parties to the agreement. *Restatement* § 187(2) (“The law of the state chosen by the parties to govern *their* contractual rights and duties will be applied ...”).

⁵⁰ § 1-301(c). *See also* PEB Commentary (“... the UCC continues to state that the Article 1 rules apply except for matters addressed by the choice-of-law rules governing perfection, the effect of perfection or non-perfection, and priority.”)

- The choice-of-law rule in new Article 12, § 12-107.⁵¹

The Amendments do not make any other changes to § 1-301. The pre-Amendments text of §§ 9-301 – 9-307, together with the choice-of-law rules provided by the Amendments, provide a comprehensive set of mandatory choice-of-law rules that apply to third-party rights: the perfection, the effect of perfection, and priority of a security interest. The baseline rule is that the law applicable to the perfection of a security interest by the filing of a financing statement is the law of the debtor’s “location”.⁵²

6. Review of mandatory choice-of-law rules in the 2022 Amendments

Section 12-107 provides a mandatory choice-of-law rule for a “matter covered” by Article 12.⁵³ The choice-of-law rule is based on the “controllable electronic record’s jurisdiction.”⁵⁴ That term provides a “waterfall” of rules, which generally give effect to terms of the CER itself or to the rules of the system in which the CER is recorded that, in either case (i) provide for a particular jurisdiction to be the “CER’s jurisdiction” or (ii) govern the CER or the system generally. In the absence of such a term, the law of the District of Columbia applies. If the District of Columbia has not adopted the Amendments, then the law of the District of Columbia applies “as though” the District of Columbia had adopted the Amendments. Section 9-306B generally applies the Article 12 choice-of-law rule to the perfection, the

⁵¹ These new choice-of-law rules are discussed below. As discussed above, the principal substantive provisions of Article 12 are directed at the rights of third parties under Article 12’s “shelter” and “take free” rules.

⁵² § 9-301(1). The Amendments add exceptions to this baseline rule.

⁵³ One exception is that in some circumstances the CER’s jurisdiction does not provide the choice-of-law rule for certain matters involving the account debtor on a controllable account or controllable payment intangible. *See* § 12-107(b).

⁵⁴ § 12-107.

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effect of perfection or non-perfection, and the priority of a security interest in a CER, controllable payment intangible, and controllable account.⁵⁵

The application of the UCC's choice-of-law rules varies depending on the circumstances:

- A sale of a controllable account or a controllable payment intangible usually creates a “security interest” under Article 9.⁵⁶ When that is not the case, the pre-Amendments UCC does *not* apply to such a sale, and the pre-Amendments UCC does not have a choice-of-law rule that applies to the sale. As a result, a court in a jurisdiction where the Amendments are not yet effective would apply non-UCC choice-of-law rules to a transaction not covered by Article 9.⁵⁷
- A court in a jurisdiction where the Amendments are in effect would also apply the Article 12 choice-of-law rules to a sale of a CER, controllable account, or controllable payment intangible

⁵⁵ The only exceptions are that the law of the *debtor's* location applies to (i) the perfection of a security interest in a CER, a controllable account, and a controllable payment intangible by the filing of a financing statement, and (ii) the automatic perfection of a security interest in a controllable payment intangible upon the sale of the controllable payment intangible. § 9-306B(b). These exceptions do not apply to the effect of perfection or priority of a security interest perfected by the filing of a financing statement to perfect a security interest in a CER, controllable account, and controllable payment intangible. § 9-306B and Comment 2.

⁵⁶ § 9-109(a)(3). As observed in note 58, Article 9 does not apply to the sale of a CER but ordinarily would apply to the sale of a controllable account or controllable account payment intangible.

⁵⁷ As between the parties to a transaction, a jurisdiction's general choice-of-law rules on agreements would address the enforceability of the parties' contractual choice-of-law agreement. *Restatement* § 187. As to third party rights, the principal subject of the Amendments to Articles 9 and 12, there is limited guidance in the *Restatement*. See generally *Restatement* §§ 244 – 254. Those sections apply primarily to “chattels”, which are defined in the *Restatement* as “tangible” movables. *Restatement* Chapter 9 (Property), Topic 3 (Movables).

when the transferee claims “shelter” rights or “qualifying purchaser” status.

Thus a sale of a controllable account or a controllable payment intangible that creates a “security interest” under Article 9 might be subject to *both* the Article 9 choice-of-law rules for issues covered by Article 9 and the Article 12 choice-of-law rules for matters covered by Article 12.⁵⁸

7. General notes on UCC choice-of-law provisions

7.1 No renvoi. When the parties to a transaction have agreed on the applicable law under § 1-301, absent an agreement to the contrary, the local (substantive) law of the applicable jurisdiction is applied and not its choice-of-law rules.⁵⁹ The UCC’s mandatory choice-of-law rules designate the application of the “local” law of the designated law.⁶⁰ Thus a court applying

⁵⁸ Article 9 would *not* apply to a sale of a CER because a CER is not an account (nor a controllable account), a payment intangible (nor a controllable payment intangible), chattel paper, nor a promissory note. §§ 9-109(a)(3), Article 12, Prefatory Note, ¶ 4.a, 12-101(a)(1). *See* note 56.

⁵⁹ The application of the choice-of-law rules of the chosen law is often referred to as “*renvoi*.” Courts rarely apply *renvoi*. *See, e.g.*, § 5-116, Comment 1 (“Although it would be possible for the parties to agree otherwise, the law normally chosen by agreement under subsection (a) and that provided in the absence of agreement under subsection (b) is the substantive law of a particular jurisdiction not including the choice of law principles of that jurisdiction.”); *see generally, Restatement* § 187(3) (“In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”); *Restatement (Third)* § 1.03(3) (“Law without further specification refers to a state’s in internal law.”); § 5.06(1) (“When the forum’s choice-of-law rules direct it to apply the law of some state, the forum applies the internal law of that state, except as stated in subsection (2).”).

⁶⁰ *See, e.g.*, § 9-301(1) (“... while a debtor is located in a jurisdiction, the *local* law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest with collateral.”).

the UCC's choice-of-law rules ordinarily does not apply the choice-of-law rules of the applicable jurisdiction.⁶¹

7.2 *Choice of forum.* The UCC generally does not address choice-of-forum terms.⁶² The enforceability of a choice-of-forum term would be addressed under other appropriate jurisdiction or federal law.⁶³

8. Characterization of property and the transaction

The applicable choice-of-law rules of the forum and the substantive rules of the substantive law jurisdiction may depend on the characterization of the relevant asset or transaction.

As to these issues:

- A court always applies the *forum's* choice-of-law rules.⁶⁴ When applying the *forum* jurisdiction's choice-of-law rules, the court

⁶¹ The Hague Securities Convention may apply to the choice-of-law issues for intermediate securities. See PEB Commentary 19; Hague Securities Convention (April 11, 2017).

⁶² Exceptions are (i) § 2A-106(2), which limits the effectiveness of a choice-of-forum clause in connection with a consumer lease, and (ii) pre-Amendments § 5-116(e) and post-Amendments § 5-116(f), which allow for a choice-of-forum clause in a letter of credit to have binding effect.

⁶³ See generally, *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*, 571 U.S. 49 (2013); *Stewart Organization, Inc. v. Ricoh Corporation*, 108 S.Ct. 2239 (1988), *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); and *Restatement* § 80. A choice-of-forum term will bind non-parties to the agreement only in limited, particular circumstances. See generally Coyle and Effron, "Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction," 97 *Norte Dame Law Rev.* 187 (2021). It may be that if the CER itself or the system on which the CER is maintained has a choice-of-forum term, that term would bind all persons dealing with the CER, viewing the use of the system as "assent" to the term. See generally § 8-110(d) (Issuer may specify "issuer's jurisdiction" as law governing certain matters, including some third-party rights, under Article 8). The PEB takes no position on whether such a provision would be enforceable.

⁶⁴ *Restatement* § 6(1) ("A court ... will follow a statutory directive of its own state on choice of law.") and Comment *a* ("The court must apply a local statutory provision directed to choose of law provided that it would be constitutional to do so. An example of

applies the meanings given to the terms used in the *forum* jurisdiction's choice-of-law rules under the *forum* jurisdiction's law.⁶⁵

- Once the applicable law is ascertained using the *forum*'s choice-of-law rules, the court applying a substantive rule of the *substantive-law jurisdiction* applies the characterizations determined under the applicable substantive law.⁶⁶

Characterization may be relevant in two contexts:

- The first relates to applying the choice-of-law rules of the *forum* jurisdiction to determine the applicable jurisdiction whose law applies to substantive issues, and

a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (§ 1-105(1)) and in other instances for the application of the law of a particular state (§§ 2-402, 4-102, 6-102, 8-106, 9-103.); *Restatement (Third)* § 5.02(b) (“A court, subject to constitutional limitations, will follow a local statute that identifies the law to be given priority.”); *Restatement (Third)* § 7.10(c) (“Issues about a security interest in personal property covered by the forum state’s UCC are governed by the law determined under the UCC’s choice-of-law rules.”).

⁶⁵ *Restatement* § 7(2) (“The classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8.”); *Restatement (Third)* § 5.05(1) (“The characterization of issues or claims is performed under the law of the forum, except as stated in § 5.06.”) and (2) (“The interpretation of conflict-of-laws concepts and terms are performed under the law of the forum, except as stated in § 5.06.”); *Heiman v. Bimbo Foods Bakeries Distribution Co.*, 902 F.3d 715 (7th Cir. 2018) (“The question ... is ... one of statutory interpretation.”).

⁶⁶ *Restatement* § 7(3) (“The classification and interpretation of local law concepts and terms are determined in accordance with the law that governs the issue involved.”); *Restatement (Third)* § 5.05(3) (“The interpretation of internal-law concepts and terms are performed in accordance with the law that governs the issue involved.”); PEB Commentary N° 24: Scope of Article 9 Choice-of-Law Rules Regarding Characterization of Transactions (August 2022) (and decisions cited); *In the Matter of First River Energy, L.L.C.*, 986 F.3d 914 (5th Cir. 2021) (applying meaning of “security interest” under law applicable under choice-of-law rule of forum), *In re SemCrude*, 864 F.3d 280 (3d Cir. 2017) (applying meaning of “security interest” under law applicable under choice-of-law rule of forum).

- The second relates to the application of the substantive law of the *substantive-law jurisdiction*.

The two contexts may have different results of the characterization process because the *forum* court's choice-of-law analysis necessarily applies the characterization given to property and transactions under the law of the *forum* jurisdiction, while applying the applicable law necessarily uses the characterization given to property or a transaction by the law of the applicable jurisdiction. These two applications of characterization rules may not come to the same results, especially when the Amendments are effective in some relevant jurisdictions but not others.

9. Examples of application of choice-of-law rules (i) under Article 9,⁶⁷ or (ii) under Article 12⁶⁸

The tables in Appendix B and flowcharts in Appendix C⁶⁹ provide examples applying the methodology described above to common fact patterns potentially involving the UCC's mandatory choice-of-law rules. The discussion assumes that:

- The property that is sold or in which a security interest is granted is a CER, controllable account, or controllable payment intangible under the Amendments;
- Each CER sufficiently states a controllable electronic record's jurisdiction.⁷⁰

⁶⁷ The Article 9 choice-of-law rule would apply to a security interest in a CER, controllable account, or controllable payment (including the sale of a controllable account and a controllable payment intangible, but not the sale of a CER).

⁶⁸ The Article 12 choice-of-law rule would apply to a sale of or creation of security interest in a CER, controllable account or controllable payment intangible.

⁶⁹ This Report does not provide a table or flowchart regarding other provisions of the amendments not subject to mandatory choice-of-law rules. *See* § 4.

⁷⁰ In the absence of such a provision, the residual rule of the application of District of Columbia law applies. § 12-107(c)(5) and (d).

Examples 1 – 4 consider choice-of-law rules applicable in the case of the perfection⁷¹ by control of a security interest in a CER.⁷² Examples 5 – 8 consider choice-of-law rules applicable in the case of a sale of a CER⁷³ to the application of matters covered by Article 12.⁷⁴ In the circumstance of a sale of a controllable account or controllable payment intangible (but not a sale of a CER), the same transaction might raise (i) perfection and related issues under Article 9 *and* (ii) shelter and qualifying purchaser issues under Article 12. The choice-of-law rules of each Article would have to be considered to determine the law applicable to a particular issue.

The examples are followed by a brief discussion of how the choice-of-law rules apply to the revised definition of “conspicuous”, the clarifications on the scopes of Articles 2 and 2A, the meaning of “sign,” and the revisions to the meanings of “negotiable instrument” and “chattel paper.”

To assist in the use of the tables and flowcharts, four of the examples in the tables are described here in detail:

- *Example 1 – Amendments are effective in the forum jurisdiction and the CER’s jurisdiction:*
 - The forum court applies the forum jurisdiction’s choice-of-law rules

⁷¹ A similar analysis would apply to the effect of perfection and priority of a security interest in a CER.

⁷² A similar analysis would apply to the meaning of “control” and the perfection of a security interest in a controllable account or controllable payment intangible by control by obtaining control of the CER that evidences the controllable account or controllable payment intangible.

⁷³ A similar analysis would apply to the meaning of “control,” the sale of a controllable account or controllable payment intangible, and the availability to the buyer of qualifying purchaser status by obtaining control of the CER that evidences the controllable account or controllable payment intangible and satisfying the additional requirements for qualifying purchaser status. § 12-104.

⁷⁴ As noted, the Article 12 choice-of-law rules apply only to a “matter covered” by Article 12. § 12-107(a). *See* note 53.

- Because the Amendments *are* effective in the forum, under the forum jurisdiction’s choice-of-law rules pursuant to the Amendments, the CER *is* characterized as a “CER”
- As the Amendments are effective in the forum, the court determines that the CER’s jurisdiction governs perfection, the effect of perfection, and the priority of a security interest perfected by control
- Under the law of the CER’s jurisdiction (where the Amendments *are effective*), the CER is characterized as a “CER” and the security interest may be perfected by control
- *Example 3* – Amendments are *not effective* in the forum jurisdiction and *are effective* in the debtor's location:
 - The forum court applies the forum jurisdiction’s choice-of-law rules
 - Because the Amendments *are not* effective in the forum, under the forum jurisdiction’s choice-of-law rules the CER is *not* characterized as a “CER”; instead it is characterized only as a “general intangible”
 - As the Amendments are *not effective* in the forum jurisdiction, the court determines that the debtor’s location governs perfection, the effect of perfection, and the priority of a security interest
 - Under the law of the debtor’s location (where the Amendments *are effective*), the CER is characterized as a “CER” and the security interest may be perfected by control
- *Example 5* – Amendments *are effective* in the forum jurisdiction and the CER’s jurisdiction:
 - The forum court applies the forum jurisdiction’s choice-of-law rules
 - Because the Amendments *are* effective in the forum jurisdiction, under the forum jurisdiction’s choice-of-law rules

pursuant to the Amendments, the CER *is* characterized as a “CER”

- As the Amendments are effective in the forum, the court determines that the CER’s jurisdiction governs matters covered by Article 12
- Under the law of the CER’s jurisdiction (where the Amendments *are effective*), the CER is characterized as a “CER” and the shelter and qualifying purchaser rules apply.
- *Example 7* – Amendments *are not effective* in the forum jurisdiction and *are effective* in the jurisdiction whose law governs under the forum’s general choice-of-law rules:
 - The forum court applies the forum jurisdiction’s choice-of-law rules
 - Because the Amendments *are not effective* in the forum jurisdiction, under the forum jurisdiction’s non-UCC choice-of-law rules, the CER *is* characterized as intangible property
 - As the Amendments *are not effective* in the forum jurisdiction, the court determines that the jurisdiction identified in the preceding bullet governs the issue.
 - Under the law of the jurisdiction identified in the second bullet (where the Amendments *are effective*), the CER is characterized as a “CER” and the shelter and qualifying purchaser rules apply

10. Application of choice-of-law rules to additional notable provisions of the Amendments

The revised definition of “conspicuous,” the meaning of “sign,” the permitted inclusion of a choice-of-law and choice-of-forum term in a negotiable instrument, and the meaning of chattel paper involve primarily the

rights and duties of the parties to the transaction.⁷⁵ The discussion of § 1-301 above will generally apply to those matters.⁷⁶

The amendments to the scope of Articles 2 and 2A and the meaning of chattel paper do raise some complex choice-of-law analysis. For example, consider a hybrid transaction between a seller and a buyer in different jurisdictions, where:

- One jurisdiction has enacted the Amendments while the other has not, and
- An issue in that transaction would be resolved differently under Article 2 than under the common law of contracts.

In order to decide whether to apply Article 2 or the common law of contracts to resolve the dispute, a court will first have to decide what its choice-of-law rule is:

- The choice-of-law rules of §§ 1-301(a) and (b) are not always identical in result to those that follow under common law choice-of-law rules (even if it is assumed that all jurisdictions follow *Restatement* §§ 187 and 188).
- So, for a *forum* court to determine whether to apply its § 1-301 or its common law rules to determine which jurisdiction's law governs, the court will need *first* to determine whether the transaction would be within the scope of Article 2 under the *forum's* Article 2 (in which case the jurisdiction whose law is ultimately applicable would be determined by application of the forum jurisdiction's § 1-301) or, rather, whether the transaction would be outside the scope of Article 2 under *forum* law (in which case the jurisdiction

⁷⁵ Because transfers of negotiable instruments and chattel paper can have an effect on third-party rights, there may also be third-party effects. Where there are third-party effects addressed by the UCC, the UCC's mandatory choice-of-law rules will apply §§ 9-301 - 9-307.

⁷⁶ See § 4.

whose law is ultimately applicable would be determined by application of the *forum's* common law choice-of-law rules).

- Of course, that determination may depend on whether the *forum* jurisdiction has enacted the Amendments.

Once the *forum* court decides which of the forum's choice-of-law rules (§ 1-301 or common law) to apply, it will then have to apply the forum's choice-of-law rule to determine which jurisdiction's substantive law applies:

- The jurisdiction whose substantive law applies may be a jurisdiction that has enacted the Amendments, in which case the decision whether to apply Article 2 or the common law of that jurisdiction will be made under the new scope provisions, or
- A jurisdiction that has not enacted the Amendments, in which case the decision will be made under the old scope provision.

11. Conclusion

As a result of the different effective dates of the Amendments in different jurisdictions, the choice-of-law rules of the UCC and non-UCC choice-of-law rules will be important. This *Report* provides guidance on the application of those rules.

Appendix A - Status of adoptions

Jurisdiction	Effective date
<i>Indiana</i>	July 1, 2023
<i>Hawai'i</i>	July 11, 2023
<i>North Dakota</i>	August 1, 2023
<i>Colorado</i>	August 6, 2023
<i>Delaware</i>	August 18, 2023
<i>Nevada</i>	October 1, 2023
<i>New Hampshire</i>	October 7, 2023
<i>New Mexico</i>	January 1, 2024
<i>Washington State</i>	January 1, 2024
<i>California</i>	January 1, 2024
<i>Alabama</i>	July 1, 2024

Appendix B - Tables

The following tables⁷⁷ summarize the application in the stated circumstances of the choice-of-law rules discussed in this Report.

*Article 9*⁷⁸

Example number [1]	Law that applies to determine choice of law [2]	Are Amendments effective in the forum jurisdiction? [3]	Characterization of property for purposes of forum's choice of law ⁷⁹ [4]	Law governing whether perfection by control is available ⁸⁰ [5]	Are Amendments effective in the CER's jurisdiction? [6]	Are Amendments effective in jurisdiction determined by other choice-of-law rules? ⁸¹ [7]	Characterization of collateral for purposes of perfection and priority under Article 9 ⁸² [8]	Are perfection by control and non-temporal priority available? ⁸³ [9]
1	Forum	Yes	CER (and also general intangible)	CER's jurisdiction	Yes	Not applicable	CER (and also general intangible)	Yes
2	Forum	Yes	CER (and also general intangible)	CER's jurisdiction	No	Not applicable	General intangible (not CER)	No
3	Forum	No	General intangible (not CER)	Location of debtor	Not applicable	Yes (debtor's location)	CER (and also general intangible)	Yes

⁷⁷ The heading of each column in each table has a number in brackets, which is used for convenience of internal references in the tables and flowcharts. The tables refer to a "qualifying purchaser" as a "QP".

⁷⁸ Including a sale of or creation of a security interest in a CER, a controllable account or a controllable payment intangible. *See* notes 56 and 58.

⁷⁹ The would be determined under forum law, *see* column 3. *See* note 58.

⁸⁰ References to the "location" of the debtor refer to the location determined under § 9-307.

⁸¹ For Article 9 transactions, this would be the law of the debtor's location under Article 9, Part 3.

⁸² This applies the law identified in column 5. *See* note 66.

⁸³ For purposes of this table, this column addresses the availability of control as a perfection method under Article 9. This results from the application of the law identified in column 5. Where the answer in this column is "Yes," the CER's jurisdiction will also govern the effect of perfection or non-perfection and priority of a security interest perfected by the filing of a financing statement. The location of the debtor will govern perfection of a security interest by the filing of a financing statement.

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Example number [1]	Law that applies to determine choice of law [2]	Are Amendments effective in the forum jurisdiction? [3]	Characterization of property for purposes of forum's choice of law ⁷⁹ [4]	Law governing whether perfection by control is available ⁸⁰ [5]	Are Amendments effective in the CER's jurisdiction? [6]	Are Amendments effective in jurisdiction determined by other choice-of-law rules? ⁸¹ [7]	Characterization of collateral for purposes of perfection and priority under Article 9 ⁸² [8]	Are perfection by control and non-temporal priority available? ⁸³ [9]
4	Forum	No	General intangible (not CER)	Location of debtor	Not applicable	No (debtor's location)	General intangible (not CER)	No

*Article 12*⁸⁴

Example number [1]	Law that applies to determine choice of law [2]	Are Amendments effective in the forum jurisdiction? [3]	Characterization of property for purposes of forum's choice of law ⁸⁵ [4]	Law governing whether shelter and QP status is available [5]	Are Amendments effective in the CER's jurisdiction? [6]	Are Amendments effective in jurisdiction determined by other choice-of-law rules? ⁸⁶ [7]	Characterization of collateral for purposes of availability of shelter and QP status under Article 12 ⁸⁷ [8]	Are shelter and QP status available? ⁸⁸ [9]
5	Forum	Yes	CER	CER's jurisdiction	Yes	Not applicable	CER	Yes
6	Forum	Yes	CER	CER's jurisdiction	No	Not applicable	Intangible property	No
7	Forum	No	Intangible property	Jurisdiction identified in column 7	Not applicable	Yes (jurisdiction applicable under forum's non-UCC choice of law rules)	CER	Yes
8	Forum	No	Intangible property	Jurisdiction identified in column 7	Not applicable	No (jurisdiction applicable under forum's non-UCC choice of law rules)	Intangible property	No

⁸⁴ The table refers to a "qualifying purchaser" as a "QP".

⁸⁵ This would be determined under forum law, *see* column 2. *See* § 8.

⁸⁶ For Article 12 transactions, this would be the jurisdiction whose law is applicable under the forum's non-UCC choice-of-law rules.

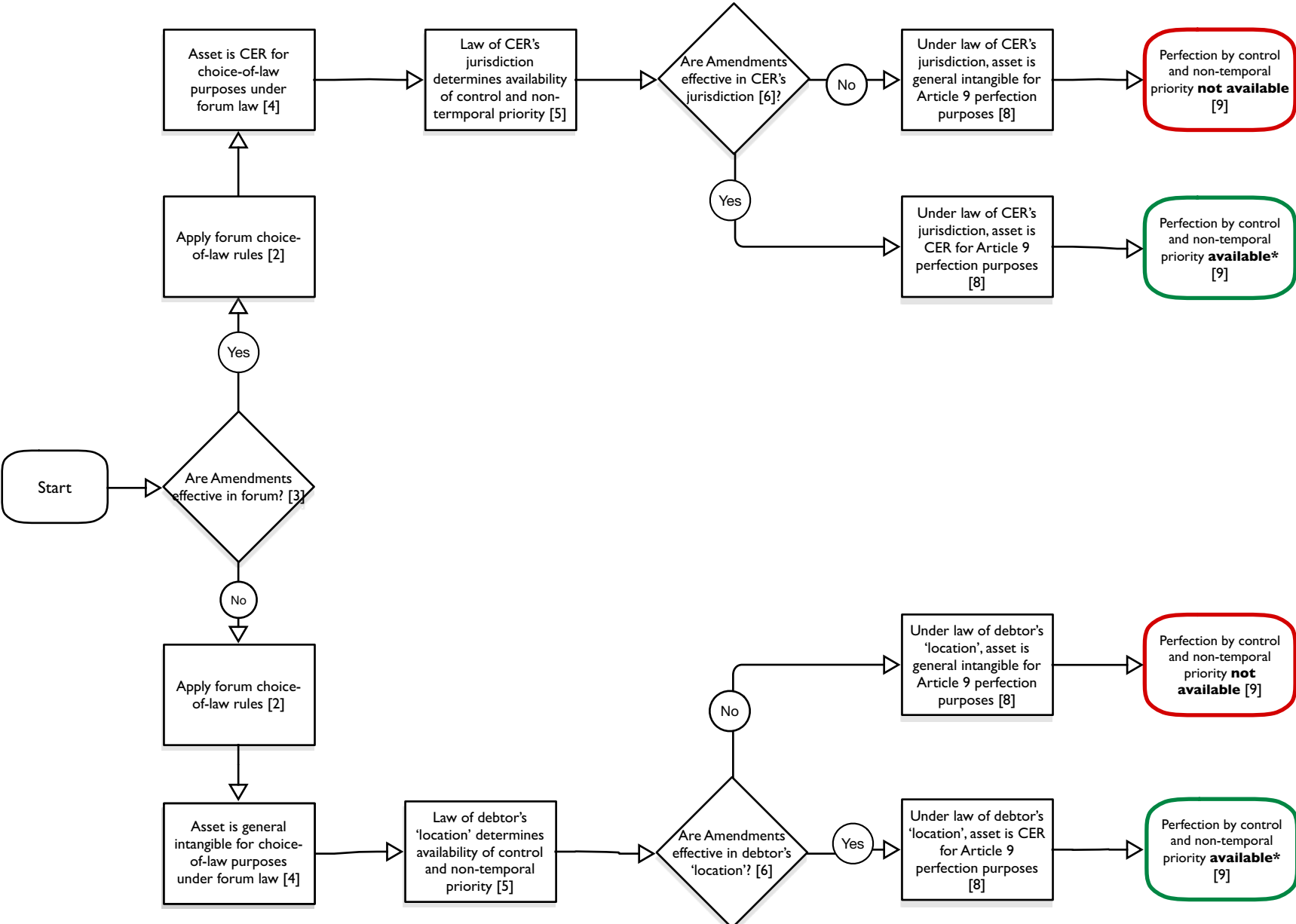
⁸⁷ This applies the law identified in column 6 or 7. *See* note 66.

⁸⁸ For purposes of this table, this column addresses the availability of shelter and QP status under Article 12. This results from the application of the law identified in column 6 or 7.

Appendix C - Flowcharts⁸⁹

⁸⁹ Each symbol in each flowchart has a number in brackets at the end of the text. That number refers to the column in the related table that addresses the corresponding point. The flowcharts may not be visible on some electronic services. They may be seen on the American Law Institute web site: www.ALI.org → “Projects” → “All Projects” → “Uniform Commercial Code” → “Permanent Editorial Board”. [The flowcharts are currently in separate files. They are available with this Report and will be embedded in this Report when it is completed.]

2022 UCC Amendments – Article 9 mandatory choice-of-law rules during enactment period



*This law applicable to this issue will also govern the effect of perfection or non-perfection and priority of a security interest perfected by the filing of a financing statement. The location of the debtor will govern perfection of a security interest by the filing of a financing statement.

2022 UCC Amendments – Article 12 mandatory choice-of-law rules during enactment period

