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This article reviews some selected developments in international commercial transactions, franchising, and distribution law during 2012.[1]

I. Franchising

Franchising continues to expand its contribution to the global economy and its role in the worldwide distribution of products and services.

A. Australia

With one of the more extensive franchise regulatory schemes overseen by one of the most powerful regulatory agencies, Australia once again proved to be fertile ground for legal issues. In *Rafferty v. Madgwicks*, the Federal Court of Australia (Full Court) issued a decision that was significant for franchisors in two respects.[2] First, the court held that an "Intellectual Property License" was actually a franchise because, despite the efforts of the "franchisor" to draft around it, the business arrangement included a "system or marketing

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1. For developments during 2011, see Arnold S. Rosenberg et al., *International Commercial Transactions, Franchising, and Distribution*, 46 INT'L LAW. 199 (2012). For developments during 2010, see Arnold S. Rosenberg et al., *International Commercial Transactions, Franchising, and Distribution*, 45 INT'L LAW. 191 (2011).
2. *Rafferty v Madgwicks* [2012] FCAFC 37, ¶¶ 6-7 (Austl.).

plan substantially determined, controlled or suggested by the franchisor."[3] Second, the court held that a Heads of Agreement, which outlined most, but admittedly not all of the terms of the intellectual property license, was, in effect, an agreement to enter a franchise arrangement and, therefore, subject to the pre-sale disclosure obligations applicable to the sale of franchises. The court awarded the franchisee AUD $1.7 million in damages and rejected claims by the franchisor that its solicitors had failed to properly advise them regarding the possible classification of the arrangement as a franchise and the resulting disclosure obligations.[4]

B. Canada

On October 1, 2012, Manitoba became the fifth Canadian province to regulate the offer and sale of franchises, following in the footsteps of Alberta, New Brunswick, Ontario, and Prince Edward Island.[5] As with the other regulating provinces, franchisors now must provide pre-sale disclosure documents to prospective franchisees. While certain Manitoba-specific disclosures and certifications are required, Manitoba's disclosure obligations generally track those disclosures required in the other regulating provinces.

In *Bertico v. Dunkin' Brands Canada, Ltd. (Allied Domecq Retailing International, Ltd.)*, the court ordered the Canadian franchisor of Dunkin' Donuts to pay CAD $16.4 million to twenty-one of its franchisees due to the franchisor's failure to protect and enhance the Dunkin' Donuts brand, particularly in the face of aggressive growth and competition from its largest Canadian competitor, Tim Hortons.[6] Relying on what was, in effect, a standard boilerplate contract recital, the court found that the franchisor had "assigned to itself the principal obligation of protecting and enhancing its brand" and that it had breached both that expressed contractual obligation as well as the obligations of good faith and loyalty that are implicit in franchise agreements.[7] In finding in favor of the franchisees, the court rejected the franchisor's argument that its franchisees were, as a group, deficient as operators and were, therefore, themselves responsible for the brand's loss of market position.

C. China

China took several steps in 2012 to tighten its regulations on franchising.[8] First, on April 1, 2012, the Ministry of Commerce's revised Measures for the Administration of Information Disclosure of Commercial Franchises (Revised Measures) became effective, replacing original measures that had been in place since April 2007.[9] The newly Revised Measures now define "affiliates" (for which certain pre-sale disclosures are required) spe-

3. *Id.* para. 107.
4. *Id.* para. 226.
5. David Gray, *Creating a Franchise Association*, MacDonald, Sager & Manis (2012), http://www.msmlaw.ca/index.php/component/easyblog/categories/listings/franchise-law?Itemid=101.
6. Bertico, Inc. v. Dunkin' Brands Canada, Ltd., [2012] R.J.Q. 1364, paras. 58-59 (Can. Que.).
7. *Id.* para. 58.
8. Kelly F. Xiang & Andrew P. Loewinger, *Chinese Ministry of Commerce Expands and Refines Franchise Regulatory Requirements*, Franchise Law Alert (Nixon Peabody LLP, New York, N.Y.), Apr. 11, 2012, *available at* http://lexnoir.org/2012/05/china-expansion-and-refinement-of-franchise-regulatory-requirements/.
9. Administrative Measures of Information Disclosure of Commercial Franchises (promulgated by the Ministry of Commerce, Feb. 23, 2012, effective Apr. 1, 2012) (Lawinfochina) (China).

cifically to include shareholders of the franchisor and increase the obligations of franchisees to protect the franchisor's trade secrets and confidential information. They also revised the information that must be included in the pre-sale disclosure document by: (i) reducing the relevant time period for disclosed bankruptcies from five to two years;[10] (ii) requiring disclosure of actual, rather than estimated, financial results experienced by franchisees in China;[11] and (iii) requiring disclosure of all major litigation and arbitration involving franchisees, without regard to the previous threshold of at least RMB 500,000 being disputed.[12]

Also in 2012, the Ministry of Commerce issued a Notice on the Strengthening of Commercial Franchise Records Management and the Annual Report (Notice).[13] This notice calls upon the country's local commercial government agencies to strengthen their management of franchising records by urging franchisors in their respective areas to register with the public securities authorities, as required by existing franchise regulations, and to submit annual reports of their activities.

D. Indonesia

In 2012, Indonesia transformed its franchise regulatory framework based on the belief that protecting local businesses will enable competition with international companies and benefit the domestic economy. The transformation was accomplished primarily through two new regulations promulgated by the Ministry of Trade.

On August 24, 2012, Regulation No. 53/M-DAG/PER/8/2012 (Reg. 53),[14] which replaced Ministry of Trade Decree No. 31/M-DAG/PER/8/2008 (Reg. 31),[15] became effective. Reg. 53, which is designed to protect local businesses and products, generally is viewed as an additional barrier to entry into the Indonesian market by foreign franchisors. Reg. 53 limits sub-franchising to the franchisor's affiliates, requires franchisors to engage small and medium-sized Indonesian enterprises as franchisees, and requires local sourcing of at least 80 percent of the franchise's raw materials, operating tools, and merchandise or services. The regulation also complicates registering the franchise with the Ministry of Trade by, among other things, requiring a description of the employment, inventory, and sourcing composition.

Additionally, in October, the Ministry of Trade issued a new regulation on franchised "modern stores" (defined as "a store with self service systems, selling various kinds of goods in retail that can be in the form of mini market, supermarket, department store,

10. *Id.* art. 5(1)(e).

11. *Id.* art. 5(8)(b).

12. *Id.* arts. 5(2)(c), (10).

13. *Notice on Further Improving the Administration of Commercial Franchising (translated)*, Hil Publications (Sept. 13, 2012), http://www.hil-publications.com/archives/1109.

14. Regulation Concerning Implementation of Franchise, Regulation No. 53/M-DAG/PER/8/2012 (Indon.).

15. Franchises in Indonesia are regulated under Indonesia Government Regulation No. 42 of 2007 (Reg. 42), which originally was issued pursuant to Reg. 31. But Reg. 42 remains in effect. *See* Makarim & Taira S., *Indonesia New Franchise Regulation Issued*, World Services Group (Nov. 2012), http://www.worldservices-group.com/publications.asp?action=article&artid=4920.

hypermarket, or wholesale"), when it promulgated Regulation No. 68/M-DAG/PER/10/2012 (Reg. 68).[16]

Reg. 53 (and, to a lesser extent, Reg. 68) will directly affect foreign franchisors and may well suppress, rather than stimulate, Indonesia's economic growth. Highlighted below are some notable reforms contained in Reg. 53 and Reg. 68.

1. *The 80 Percent Local Sourcing Requirement*

Perhaps the most notable reform, the concept of local sourcing, first appeared in Gov't. Reg. 42, which required franchisors and franchisees to "prioritize . . . the use of domestic goods and/or services as long as they fulfill the stipulated quality standard."[17] But what was previously vague is now explicit in Reg. 53: an obligation that "[f]ranchisors and [f]ranchisees must use domestically produced goods and/or services for at least 80 [percent] of their raw materials, business equipment and sales."[18] Reg. 53 contains no guidance regarding how the 80 percent requirement will be calculated, which leaves a number of critical questions: What constitutes raw materials? Over what time frame is the 80 percent calculation based? Is the 80 percent calculated using "value" or number of items?

Regardless, local sourcing inevitably impacts franchise systems differently depending on the type of business. For example, a requirement to use 80 percent domestic goods and services would more severely and adversely affect a product distribution franchise than a service franchise. But no franchise business can take an optimistic view of this new requirement. For many, compliance with this rule will be impossible, unless significant loopholes are developed. As a result, loopholes are actively being sought. The regulation does, in theory, provide the following exemption to the local sourcing requirement: if given a recommendation by the Assessment Team, "the Minister [of Trade] may issue a permit to use domestically produced goods and/or services for less than 80 [percent] of the raw materials, business equipment or sales."[19] But Reg. 53 sets out no criteria for earning such a permit or any hard information about what constitutes an "Assessment Team."

The Ministry of Trade asserts that it is open to suggestions about how to calculate the 80 percent requirement and has indicated its willingness to grant exemptions where appropriate. It remains to be seen how these issues will be finally clarified.

2. *Cap on Company-Owned Store Outlets*

Reg. 68 restricts the number of franchisor-owned or master franchisee-owned modern store outlets to 150 and requires that at least 40 percent of the additional outlets be sub-franchised.[20] The cap may be exempted if the business has yet to achieve a profit as evi-

16. Regulation Concerning Franchise for Modern Store Business Type, Regulation No. 68/M-DAG/PER/10/2012, art. 1(4) (Indon.).

17. *See* Philip F. Zeidman et al., *Indonesia Issues New Franchise Regulation: A Starting Sign of What's to Come?*, DLA PIPER (Oct. 3, 2012), http://www.dlapiper.com/global/publications/Detail.aspx?pub=7470&RSS=true.

18. Regulation Concerning Implementation of Franchise, Regulation No. 53/M-DAG/PER/8/2012, Art 19(1) (Indon.).

19. *Id.* art. 19(2).

20. Regulation Concerning Franchise for Modern Store Business Type, Regulation No. 68/M-DAG/PER/10/2012, art. 4 (Indon.).

denced by a financial report audit or as determined by the Ministry of Trade, or if the franchisor cannot find local franchisees. Modern stores must supply domestic sales products that are at least 80 percent of the total and types of goods sold, although an exception exists through the issuance of a permit by the Ministry of Trade, which allows for modern stores to supply less than 80 percent of domestic sales products.[21]

Unlike Reg. 53, Reg. 68 provides a phase-in period of five years and, in order to meet that target, at least 20 percent of franchisor-owned or franchisee-owned outlets exceeding 150 should be transferred to franchisees annually (i.e., a phase-in of the phase-in).[22]

3. *The "Clean Break" Requirement*

Unlike prior law, which barred franchisors from appointing new franchisees after termination of the franchise agreement until settlement or six months following termination, Reg. 53 prevents a new appointment until a "settlement of the dispute (clean break) or a final and binding court ruling."[23] This requirement gives leverage to disgruntled former franchisees as the terminating franchisor cannot appoint a new franchisee until all disputes have been settled.

4. *Other Notable Features*

Reg. 53 contains other provisions relating to applicable laws, registration, reporting, and disclosure, which either mirror or expand existing law, including the following:

- Franchisors and franchisees must comply with laws related to their business activities, such as the rules and regulations on consumer protection, health, education, environment, spatial planning, employment, and intellectual property rights.[24]
- Franchisors must register their Offering Prospectus with the Trade Services Unit of the Directorate of Trade Development.[25]
- Franchisees engaging in business with foreign franchisors must register franchise agreements with the Trade Services Unit of the Ministry of Trade.[26]
- Franchisees engaging in business with foreign sub-franchisors, domestic franchisors, or domestic sub-franchisors must register franchise agreements with the local trade office.[27]
- Franchise applicants may be asked to give a presentation on their franchise business to the Assessment Team prior to the issuance of a franchise registration certificate (STPW).[28]
- A franchisor or franchisee that obtains a STPW must use the franchise logo. Another regulation is expected to expand upon the use of the franchise logo.[29]

21. *Id.* art. 7.
22. *Id.* art. 12.
23. *Id.* art. 8.
24. Regulation Concerning Implementation of Franchise, Regulation No. 53/M-DAG/PER/8/2012, art. 6 (Indon.).
25. *Id.* art. 1.
26. *Id.* art. 10.
27. *Id.*
28. *Id.* art. 15.
29. *Id.* art. 18.

- Franchisors and franchisees must submit annual business reports to the applicable national or local agencies.[30]

While it is difficult to predict precisely what impact these changes will have on franchising in Indonesia, it is expected that these changes will make it more challenging for foreign franchisors seeking entry into the Indonesian market. It also is expected that additional regulations will be promulgated to regulate franchising specifically in the restaurant industry and perhaps other industries. Despite the new requirements applicable to all franchises, as well as those specifically applicable to "modern stores," fundamental questions remain unanswered regarding enforcement. Comprehensive regulatory regimes are not necessarily effective enforcement systems.

E. Malaysia

The Malaysian Franchise Act 1988 (Act) was amended on September 20, 2012.[31] The amendments are expected to take effect in early 2013. Before the amendments, the Act already was among the most comprehensive franchise legislation outside of the United States. Now, Malaysian franchise legal compliance will become even more onerous. But while the amendment raises some issues, it also clarifies a number of points in the Act and provides a clearer roadmap for compliance.

The following are some highlights of the 2012 amendments to the Act:

1. *Broader Jurisdictional Scope*

Initially, the Act only applied to the sale of a franchise by a foreign franchisor if the franchise agreement was accepted in Malaysia. Now, however, the amended Act applies where "an offer to sell or buy a franchise . . . is made outside Malaysia and accepted within or outside Malaysia."[32] It remains unclear if the Act will retroactively impact foreign franchisors that already have entered the Malaysian market through "off-shore" structures; but, going forward, it is clear that the Act will apply to off-shore franchise transactions.

2. *New Registration Requirements*

a. Franchise Businesses

The 2012 amendments provide that a franchisor must register before it can "operate a franchise business."[33] A franchisee of a foreign franchisor is required to register before commencing the franchised business, while a franchisee of a local franchisor can wait to register until fourteen days after signing the franchise agreement.[34]

It is not clear what this change accomplishes because the Act already was triggered by offering to sell the franchise.[35] One possibility is to require the registration of existing franchise systems, which operate in Malaysia but are not actively "selling" the franchise

30. *Id.* arts. 30-31.
31. Franchise (Amendment) Act 2012, Act A1442 (2012) (Malay.).
32. *Id.* § 6.
33. *Id.* § 6.
34. *Id.* § 6B.
35. *Id.* §§ 3, 6.

(i.e., after a foreign franchisor has sold the rights to the entire country to an exclusive master franchisee).

b. Franchise Consultants and Legal Advisors

Under the 2012 amendments, "franchise consultants" must register along with franchise brokers. The term "franchise consultant" is defined very broadly as "a person who provides advice and consultancy services to another person on the registration of a franchise business and compliance of the related laws."[36] Because of this broad definition, it is unclear who constitutes a franchise consultant. But by its plain meaning it seems to refer to franchisors' and franchisees' legal advisors rather than business consultants. If that is the case, it would be the first such regulation in the field of franchising.

3. *Annual Reporting Deadlines*

One new provision eases compliance by giving franchisors six months from the end of each financial year to submit an annual report as opposed to the previous requirement of thirty days from the anniversary date of the franchisor's registration.[37] Failure to submit the required annual report for five years continuously could result in cancellation of the franchise's registration.

4. *Restrictions On Franchisees*

The Act, in addition to its registration and disclosure requirements, contains a number of provisions that touch upon franchisor-franchisee relationship issues. The amendment further imposes some obligations on franchisees, including broader confidentiality and non-compete obligations, a mandatory notice period for availing itself of the renewal rights under the Act, and a prohibition on termination by franchisees without good cause.[38] Although these changes generally are welcome, franchisors, especially foreign franchisors with comprehensive franchise agreements, typically do not need such protections as their agreements already contemplate such issues.

While the intent of the 2012 amendments to the Malaysian Franchise Act may be to clarify previous ambiguities and arm regulatory authorities with the tools necessary to command compliance, their immediate effect may be that foreign franchisors will become even less inclined to enter Malaysia until certain issues are clarified, including the issue of whether their legal advisors now need to register with the government.

F. United States

The Federal Trade Commission and the courts in the United States continue to be among the most active with respect to determining the rights and obligations of the parties to franchise contracts. Two developments deserve to be highlighted.

First, in March 2012, the Federal Trade Commission's regulation on the Disclosure Requirements and Prohibitions Concerning Business Opportunities became effective, re-

36. *Id.* § 4(b).
37. *Id.* § 12(1).
38. *Id.* §§ 10, 26-27, 29(3).

quiring sellers of business opportunities to furnish any prospective business opportunity purchaser with a document containing certain disclosures regarding the business opportunity seller and the business opportunity.[39] The regulation defines a business opportunity as an arrangement in which the business opportunity purchaser pays a fee to offer, sell, or distribute goods or services supplied by the business opportunity seller, its affiliates, or designees and where the business opportunity seller provides certain assistance, particularly in the form of securing outlets, accounts, or locations. The regulation provides certain important exemptions. For example, one is exempt if the business opportunity seller complies with the franchise disclosure obligations.[40] But the regulation has a fairly broad sweep and potentially could capture businesses that were otherwise exempt from the disclosure obligations under the Franchise Rule.[41]

Second, in *Federal Trade Commission v. Wyndham Worldwide Corporation*, the Federal Trade Commission (FTC) filed suit against several Wyndham organizations based on their alleged failure to maintain reasonable and appropriate data security for consumers' sensitive personal information.[42] The FTC alleges that this failure allowed hackers on three occasions to access the Wyndham computer networks and export hundreds of thousands of consumers' payment card account information to a domain in Russia, resulting in a fraud loss of more than US $10.6 million.[43] Of particular interest to franchisors is the allegation that Wyndham also is responsible for its franchisees' lack of security, as some of the hotels that were hacked were franchised hotels because the franchisees were required under their franchise agreements to use Wyndham's designated computer system. This case should be closely watched by franchisors not only for the substantive legal issues, but also for the fact that the FTC filed the lawsuit despite what Wyndham characterized as its full cooperation in the FTC's investigation.

G. Other Developments

Abu Dhabi is considering adopting legislation regarding franchising, which would be the first franchise regulatory legislation in the Middle East. The proposed legislation would impose registration requirements and substantive provisions blatantly targeted at promoting the local economy (e.g., franchisors must refrain "from dumping the domestic market through multi-licensing which doesn't logically fit with the need and capacity of the market"), while granting additional authority to the Abu Dhabi Department of Economic Development.[44] In its current draft form, franchisees currently operating in Abu Dhabi would have to register their franchise agreements within six months from the date of issuance of the resolution.

39. *See* Disclosure Rule, 16 C.F.R. pt. 437 (2012).

40. Exemptions, 16 C.F.R. § 436.8 (2012).

41. 16 C.F.R. pt. 436 (2012).

42. *See* Federal Trade Commission, *Federal Trade Commission v. Wyndham Worldwide Corporation*, Fed. Trade Commission, http://ftc.gov/os/caselist/1023142/index.shtm (last modified Oct. 16, 2012) (contains complaint and first amended complaint).

43. Amended Complaint at *2, Fed. Trade Comm'n v. Wyndham Worldwide Corp., No. CV 12-1365-PHX- PGR, (D.C. Ariz. Aug. 9, 2012).

44. Philip F. Zeidman, *How Long is the Long Run? Too Long for Information-Seekers*, Franchise Times (Jan. 2013), http://www.franchisetimes.com/January-2013/Up-to-Date/.

II. Personal Property Security

The ability of lenders to obtain and enforce security interests in the movable property of a business, including such assets as inventory, equipment, accounts receivable, and intellectual property, can be critical to the availability of financing for commercial transactions. Many countries have replaced antiquated laws on personal property security with new statutes influenced by Article 9 of the Uniform Commercial Code, the Canadian Personal Property Security Act, and model laws and legislative guides drafted by international organizations such as United Nations Commission on International Trade Law (UNCITRAL) and the Organization of American States (OAS). This trend continued during 2012.

A. Australia

In 2009, Australia enacted its Personal Property Security Act (PPSA), which replaced a host of state laws governing various types of secured transactions with a national statutory scheme.[45] The PPSA requires registration of security interests in a national Electronic Personal Property Security Register (PPS Register), which is administered by the Insolvency and Trustee Service Australia (ITSA), but its effective date was deferred while the PPS Register was implemented by the ITSA. Effective January 30, 2012, the PPS Register became fully functional and the PPSA came into full effect.[46]

B. Mexico

In August 2009, Mexico amended the Commerce Code by adding Article 32 bis 1 through 8, creating the *Registro Unico de Garantias* (Unified Registry of Guarantees) (RUG) (pronounced "roog").[47] This amendment was implemented in an amended Regulation on the Public Commerce Registry (RRPC) that was issued by President Calderon's executive decree in September 2010.[48] The RUG became available as of October 7, 2010.[49]

The purpose of the RUG was to create a centralized online filing system for almost all forms of security interests in movable property. But at this time, electronic registration in the RUG, run by the Secretary of the Economy, a federal agency, remains an alternative to recording the contract documents in the Public Commerce Registry, which is maintained by the state government. Searchers, therefore, cannot rely solely on a search of the RUG to determine whether prior liens exist on a debtor's assets. But some of the state registries make their records accessible online, outside of the RUG.

45. *Personal Property Security Act 2009* (Cth) (Austl.), *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/ppsa2009356/.

46. For a discussion of some of the major changes wrought by the PPSA, see Anthony Duggan, *Romalpa Agreements Post-PPSA*, 33 SYDNEY L. REV. 645 (2011).

47. Código de Comercio [CCo.] [Commercial Code], *as amended*, art. 32 bis 1-8, Diario Oficial de la Federación [DO], 17 de Abril de 2012 (Mex.).

48. Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Reglamento del Registro Público de Comercio [Decree by Amending and Supplementing Various Provisions of the Public Registry Regulations Trade], Diario Oficial de la Federación [DO], 23 de Septiembre de 2010 (Mex.).

49. Luis F. Moreno Trevino & Mauricio Sanders Huerta, *Mexican Movable Guarantees Sole Registry*, HAYNES & BOONE (Oct. 2, 2012), http://www.haynesboone.com/mexican-movable-gurantees-sole-registry/.

Although secured financing for businesses in Mexico is on the rise, registered security interests still coexist with certain types of unregistered purchase money security interests that are given priority in bankruptcy. In particular, accounts receivable factoring is effective without registration, though legislation was pending as of mid-2012 that would require registration.

C. United States

1. *2010 Amendments*

As of November 2012, twenty-nine states and Puerto Rico have enacted the 2010 amendments to Article 9 of the Uniform Commercial Code (UCC), which will become effective in 2013.[50] The most notable amendment concerns the sufficiency of the name of an individual debtor, as shown on a UCC financing statement filed with the state Secretary of State's office. Sufficiency of the name is particularly important because each state organizes the UCC filing systems according to the name of the debtor. Misspellings or omissions of the debtor's name can render the filing insufficient and, therefore, can cause the secured party's security interest to be unperfected and ineffective against third parties.[51]

UCC Article 9 presented two options to the states considering enactment of the amendments. Alternative A, the "only if" option, considers a financing statement sufficient only if the name on the financing statement matches the name on the debtor's driver's license.[52] As such, the "only if" option is less tolerant of errors committed by existing lenders. Under Alternative B, the "Safe Harbor" option, the name on the driver's license always is sufficient (thus, a safe harbor);[53] however, any name by which the debtor is generally known in the community, even a nickname, also might be sufficient depending on non-UCC law. Due to the possibility of various sufficient names, the "Safe Harbor" option poses challenges to prospective lenders searching the UCC filing system. To date, only a small number of the twenty-nine states that enacted the 2010 amendments have chosen the "Safe Harbor" option.[54]

2. *Registration of Security Interests in Non-U.S. Jurisdictions*

In most cases, to perfect a nonpossessory security interest in personal (movable) property under UCC Article 9, the creditor must file a financing statement with the government of the jurisdiction in which the debtor is located.[55] In the case of a U.S. corporation, this means the state of incorporation,[56] with respect to non-U.S. organizations with multi-

50. *Amendments to UCC Article 9 Legislative Status*, Corp. Serv. Company (Feb. 22, 2013), http://csctransactionwatch.com/wp-content/uploads/2012/09/Status_Chart_02222013.pdf.

51. UCC § 9-506(b) (2010).

52. *UCC Article 9 Amendments (2010) Summary*, Uniform L. Commission, http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20 (2010) (last visited Feb. 27, 2013).

53. *Id.*

54. *Amendments to UCC Article 9 Legislative Status*, *supra* note 50.

55. U.C.C. § 9-301(1). For most types of collateral, where the debtor is located in a state of the United States, the filing office is the office of the Secretary of State for that state.

56. *Id.* § 9-307(f).

ple locations, the place where its chief executive office is located.[57] If the debtor is located in a non-U.S. jurisdiction that has no filing system for personal property security, U.C.C. § 9-307(c) provides that the financing statement must be filed with the Secretary of State of the District of Columbia, in Washington, D.C.[58]

Many countries have filing or registration systems for personal property security interests, but either permit registration of security interests only in limited types of collateral or limit registration to a narrow set of users, such as domestic banks. But many countries that permit registration also accord priority to unregistered forms of personal property security. Moreover, some countries restrict access to search the information stored in the system to "interested parties" or "relevant persons," which may be limited to existing lienholders, or may be whoever local registry officials consider to be a "relevant person."[59]

If the debtor is located in a non-U.S. jurisdiction that does have a registration system, § 9-307(c) provides that a secured party has to register in their own non-U.S. jurisdiction if they pass a two-part test: (i) registration in the non-U.S. jurisdiction would be "generally required" to achieve priority over a "lien creditor" (an insolvency administrator or trustee, or a levying judgment creditor), and (ii) information in the system is "generally available."[60] Otherwise, it must file in the District of Columbia to perfect its interest.

In 2012, the Arizona Court of Appeals handed down the first reported appellate decision construing § 9-307(c). In *Dayka & Hackett v. Del Monte Fresh Produce*, in a contest between two secured creditors over an insolvent Mexican table grapes producer, the court considered whether Mexico's laws on registration of security interests in personal property satisfied the § 9-307(c) test.[61] It held that, with respect to those laws in existence in 2007 and 2008, they did not, and therefore afforded priority to a secured creditor, Daykaa & Hackett, who had perfected by filing in the District of Columbia over the other, Del Monte, which had utilized the Mexican registration system.

The decision is significant because the court chose a "comprehensive" approach to § 9-307(c) over a "collateral-specific" approach. Del Monte argued that, "a jurisdiction's registration system should be examined with regard to the specific collateral at issue, rather than for nonpossessory secured interests as a whole."[62] But the court disagreed. Noting that Comment 3 to § 9-307(c) seems to adopt a comprehensive approach, the court observed:

> Policy implications also favor interpreting [§9-307(c)] as requiring the jurisdiction's system to satisfy the test generally. One risk of a comprehensive test is that, if a jurisdiction's system satisfies [§9-307(c)] generally but leaves a void for a particular type of collateral, a lender could find it impossible to perfect a security interest in that type of collateral because it would be required to file in that jurisdiction. However, a comprehensive approach 'has the advantage of clarity and might reduce transaction costs,' and a collateral-specific approach would require secured parties 'to retain for-

57. *Id.* § 9-307(b).

58. *Id.* § 9-307(c).

59. *See* Arnold S. Rosenberg, *Where to File Against Non-U.S. Debtors: Applying UCC § 9-307(c) [Rev] to Foreign Filing, Recording, and Registration Systems*, 39 UCC L. J. 109, 174 (2006).

60. U.C.C. § 9-307(c).

61. Dayka & Hackett, LLC v. Del Monte Fresh Produce N.A., 269 P.3d 709 (Ariz. Ct. App. 2012).

62. *Id.* at 713-14.

> eign counsel in almost all cases to ascertain foreign law on the subject.'. . . [U]nder a collateral-specific approach a debtor could be 'located' in more than one jurisdiction and, 'in a single transaction, a secured party might have to file in the limited-purpose registry to perfect as to some security interests or collateral, while having to file in the District of Columbia to perfect as to others.'[63]

While a comprehensive approach has the benefit of clarity in many cases, it also leaves significant gray areas. For example, how and by what standards does one determine whether a country's laws on registration of personal property security satisfy the § 9-307(c) test according to a comprehensive approach, if a country requires registration of various security interests in many, but not all, types of collateral for priority over lien creditors?

Also, a non-U.S. court is not likely to apply UCC choice of law rules in determining whether a security interest was properly perfected, and in any secured transaction involving a non-U.S. debtor, there is always the risk of insolvency proceedings being commenced in a non-U.S. jurisdiction. If the collateral is material to the secured party's decision to extend credit, and the transaction is of a magnitude that the secured party considers significant, it is important to consult foreign legal counsel.

D. Other Developments

Currently, bills to reform secured transactions laws were pending in Colombia, Azerbaijan, and Ghana.

In Colombia, a law drafted with the assistance of the International Finance Corporation (IFC), an affiliate of the World Bank, and influenced by the UNCITRAL Legislative Guide on Secured Transactions Law and the OAS Inter-American Model Law on Secured Transactions, was introduced in Congress and expected to be enacted by the end of 2012.[64] Similarly, in Azerbaijan, a bill to reform secured transactions laws, supported by the IFC, was introduced.[65]

Ghana enacted a new statutory scheme for secured transactions in 2008, and as of mid-2012, revisions were pending that would conform that scheme to the UNCITRAL Legislative Guide on Secured Transactions Law.[66]

A new secured transactions law in the Republic of Palau was enacted in 2011, and a registry was in the process of being implemented as of mid-2012.[67]

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63. *Id.* at 714 (citations omitted).

64. Proyecto De Ley No. 200 de 2012 Senado "Por La Cual Se Promueve El Acceso Al Credito Y Se Dictan Normas Sobre Garantias Mobiliarias" [Senate Bill No. 200, 2012, "Promoting Access to Credit and Establishing Rules on Security Interests"], *available at* http://www.senado.gov.co/az-legislativo/proyectos-de-ley?start=20%5C (last visited Feb. 27, 2013).

65. *Secured Transactions and Collateral Registries Program*, INT'L FIN. CORP. (July 2011), http://www1.ifc.org/wps/wcm/connect/9151d9804c8cd75c8b13cff81ee631cc/General+STCR+presentation.pdf?MOD=AJPERES.

66. *Id.*

67. The Secured Transactions Act, No. 8-42 (2012) (Palau), *available at* http://www.ropfic.org/pdf/laws/RRPL%208-42%20Secured%20Transactions%20Act.pdf.