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STOP ‘SLIMING’ YOUR LIQUID ASSETS: SECURITY OVER DEPOSIT ACCOUNTS — US PERSPECTIVES

ABSTRACT

This article discusses the role played by art 9 of the United States’ Uniform Commercial Code in the Global Financial Crisis, and outlines the method for taking security over deposit accounts held in US banks. It compares the process for taking such security in Australia with that used in the US, and places particular emphasis on the detailed provisions of the Uniform Commercial Code relating to attachment, collateral description, consumer exceptions, perfection by control, standard control agreements, priorities and proceeds. It is submitted that the set-up, workings and side effects of the Uniform Commercial Code art 9 regime will be instructive for practitioners in non-US jurisdictions, and may prompt useful questions and insights about their own rules and commercial conventions. Relevant portions of the American Bar Association’s Joint Taskforce on Deposit Account Control Agreements are discussed, and some comparative observations are made for those involved in international transactions.

What this means is that many of the concerns expressed on the Drafting Committee and out of the Drafting Committee about the potential to simply throw deposit accounts into a security agreement, file a financing statement covering everything and thereby, in effect, casting the slime of Article 9 over all of the liquid assets of the company is no longer there.¹

The new world is upon us. Repent. Revised Article 9 is the law in every state.²

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¹ Professor Mooney, 73rd Annual Meeting, The American Law Institute, Proceedings 1996, at 475.

² Ingrid Michelsen Hillinger, David Line Batty and Richard K Brown, ‘Deposit Accounts Under the New World Order’ (2002) 6 *North Carolina Banking Institute* 1.

I INTRODUCTION

In the 2011 film *Margin Call*, Zachary Quinto plays Peter Sullivan, a risk analyst responsible for bringing dire news to his superiors working in a Wall Street investment bank. Towards the end of the film, he openly worries about ordinary citizens going about their business: ‘[I]ook at these people. Wandering around with absolutely no idea what’s about to happen.’³

In various ways the Global Financial Crisis (‘GFC’), also known as the subprime mortgage crisis, took hold of public imagination during the 2007 recession and beyond. It is now a part of financial folklore. Originating in the US domestic housing market, it spread to many parts of the world and adversely affected Australia, although not to the extent that it did in other countries.

Any accurate description of the crisis as it unfolded in the Pacific Rim would likely include the Australian parliamentary debate about the guarantee of bank deposits, as well as the possible effects on ordinary Australians who stood to lose their life savings in the event of a global financial meltdown. The *Guarantee Scheme for Large Deposits and Wholesale Funding Appropriation Act 2008* (Cth) was passed during November of that year after only a few hours of Senate debate.⁴ The Act implemented a scheme designed to guarantee large deposits and wholesale funding of banks and followed on from an earlier Financial Claims Scheme designed to calm the markets and the nerves of harried investors. Many other countries took similar measures.⁵

If investors were nervous, banks were even more so. The potential for systemic collapse forced regulators to bring the entire securitisation process into sharp focus to determine where the system had ‘failed’. The candidates for blame included the borrowers themselves, loan originators and brokers, the loan servicers, the large rating agencies, investment banks, various regulatory bodies themselves, as well as the relevant accounting standards. All these (and more) built their financial house on the sand of ‘bankruptcy-remoteness’ and were caught in its collapse. One often-neglected source of this collapse is an obscure portion of the Uniform Commercial Code (‘UCC’)⁶ that provided the on-sale of income streams with legal certainty.

³ *Margin Call* (Directed by J.C. Chandor, Before the Door Pictures, 2011) <<http://www.imdb.com/title/tt1615147/quotes?item=qt1579719>>.

⁴ Laura Tingle, ‘Ahead of the Curve in Race to the Bottom’, *The Australian Financial Review* (Sydney), 28 November 2008, 75.

⁵ See the discussion in Andrew Campbell et al, ‘A New Standard for Deposit Insurance and Government Guarantees After the Crisis’ (2009) 17 *Journal of Financial Regulation and Compliance* 210–39. See generally Sebastian Schich and Byoung-Hwan Kim, ‘Guarantee Arrangements for Financial Promises: How Widely Should the Safety Net be Cast?’ [2011] 1 *OECD Journal: Financial Market Trends*. For a focus on the Australian situation see Christine Brown and Kevin Davis, ‘The Sub-Prime Crisis Down Under’ (Spring 2008) *Journal of Applied Finance* 18, 1.

⁶ The UCC is model legislation and must be implemented by a state to be considered law. For a review of recent amendments to UCC art 9 see David Frisch, ‘The Recent Amendments to UCC Article 9: Problems and Solutions’ (2011) 45 *University of*

Thus, one of the important nails holding the house together (until its collapse) was UCC §9-318(a), which provides that:

A debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold.

This section, when combined with other provisions, allowed the Special Purpose Vehicle (“SPV”) companies to claim ownership of an income stream and gave rise to the important fiction that the assets were ‘bankruptcy remote’, and so safe from the insolvency fallout if a loan originator should collapse. Revised Article 9 of the UCC (‘Article 9’) was critical in achieving this result. No less important now that we are (or believe ourselves to be) beyond the GFC, is the role of Article 9 in taking security over bank deposits in the ordinary course of lending. It is to this that we now turn.

A Funds on Deposit

The sensitivity of funds on deposit is no less marked in situations where money is lent and a bank account is used as security for the loan. The relationship between banker and customer was set out admirably in *Foley v Hill* (1848) and is worth repeating in its entirety:

The money paid into the banker’s, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker’s money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach, of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.⁷

Richmond Law Review, 1009. These amendments deal, inter alia, with ‘(1) the required name of an individual on a financing statement; (2) the perfection of collateral following the debtor’s relocation to a new jurisdiction; and (3) collateral acquired by a new debtor.’ See Frisch at 1012, *supra*. According to a Uniform Law Commission release dated 22 May 2012, 26 US states have already enacted the 2010 Amendments to art 9; according to the ULC website ‘The 2010 Amendments are designed to go into effect simultaneously on July 1, 2013.’ See <<http://www.uniformlaws.org/NewsDetail.aspx?title=UCC%20Article%209%20Amendments%20Enacted%20in%2026%20States>>.

⁷ *Foley v Hill* (1848) 2 HLC 28 (citations omitted).

Given the contractual reality set out above, it is critical that depositors feel a level of confidence in their bank’s liquidity and ability to repay the debt owed to the customer. Government guarantees supply just such confidence.

A creditor in a loan arrangement secured against a deposit also feels better with such knowledge. Building such confidence might follow the following line of questions put by creditors and customers alike:

- (i) Am I safe in the event that the bank goes broke?
- (ii) Even if the bank does not go broke, am I properly secured as a matter of law so as to be able to proceed against the deposited money and win a judgment easily and quickly?

The second question is the focus of this article.

B Security Over Deposit Accounts: Australia and the US

Taking security over Australian bank accounts has recently changed following the introduction of the *Personal Property Securities Act* (‘PPSA’) scheme in 2009.⁸ Previous methods of taking security (via charge, flawed asset or set-off arrangement) continue to operate under the new system, with the additional need to register a security interest in some cases. The PPSA introduced many new concepts such as the purchase money security interest and left some feeling slightly worse-for-wear, for example, the famous *Romalpa* clause.⁹ To date, there has been only limited consideration of the origins of the provisions that relate to taking security over bank accounts.

This article explores some essential aspects of taking security over ‘Deposit Accounts’ under Revised Article 9 of the UCC. Taking a descriptive approach, it will define essential terms, survey the process of attachment and perfection by control (including control agreements), examine questions of priority and provide a brief discussion of deposit accounts as proceeds. It is submitted that the set-up, workings and side effects of the Article 9 regime will be instructive for practitioners in non-US jurisdictions, and may prompt useful questions and insights about their own rules and commercial conventions. Some comparative observations will be offered below.

⁸ *Personal Property Securities Act 2009* (Cth).

⁹ *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. This case settled the effectiveness as a security device of title retention clauses in contracts for the sale of goods. Their practical effects were sometimes called into question.

C Taking Security Prior to 1999

Before the 1999 revisions to Article 9, deposit accounts were effectively excluded from its coverage, at least as far as original collateral was concerned.¹⁰ This did not mean deposit accounts were not available at all as collateral, merely that there was no uniformity in approach.¹¹ In the search for uniformity, and for commercial certainty, the 1999 revisions finally brought deposit accounts firmly within the boundaries of Article 9.

There were many other changes made at that time, and the revisions were substantial. They included, inter alia, changes to the rules on the following issues: filing of financing statements, debtor location, collateral definitions, duties of secured parties and rules for collateral descriptions.¹² The drafters also reorganised and renumbered the statute. Not all changes went smoothly.¹³

The revisions also brought Article 9 into the electronic age. In addition, the modifications brought aspects of the securitisation business under Article 9 — with worldwide implications.¹⁴ While fascinating, these aspects of the revisions will not be discussed in this paper.¹⁵

¹⁰ See Official Comment 4. a. to § 9-101: ‘Scope of Article 9. This Article expands the scope of Article 9 in several respects. *Deposit accounts*. Section 9-109 includes within this Article’s scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 dealt with deposit accounts only as proceeds of other collateral.’ ‘Proceeds’ sitting in deposit accounts remain within the scope of the UCC. See below. Note: Official Comments are influential but not usually binding. The UCC is state law.

¹¹ Some states did place deposit accounts within reach of their various statutes, and common law approaches were also available. See Bruce A Markell, ‘From Property to Contract and Back — An Examination of Deposit Accounts and Revised Article 9’ (1999) 74 *Chicago-Kent Law Review* 963, 972–73. For an example of outdated common law approaches see *Ellefson v Centech Corp.* 606 N.W2d 324, 40 U.C.C. Rep. Serv. 2d (West) 1142 (Iowa 2000).

¹² See Official Comment 2 to § 9-101.

¹³ To cite one example involving the IRS, see Lynn M LoPucki, ‘The Sparring Tool Filing System Disaster’ (2007) 68 *Ohio State Law Journal* 281, outlining the difficulties that arose from a Sixth Circuit decision that a federal tax lien was valid despite the IRS’s failure to adhere to the name requirements of UCC Revised Article 9.

¹⁴ Steven L Schwarcz, ‘The Impact on Securitization of Revised UCC Article 9’ (1998–2000) 74 *Chicago-Kent Law Review* 947.

¹⁵ See further, Kenneth C Kettering, ‘Securitization and its Discontents: The Dynamics of Financial Product Development’ (2008) 29 *Cardozo Law Review* 1553–1728 arguing ‘The 1999 revision altered Article 9 in a number of ways favorable to the securitization industry, including by expanding the class of receivables outright sale of which is governed by Article 9, and by adding a provision that reinforces the industry’s conventional wisdom by suggesting, as strongly as state law can do so, that a receivable that is the subject of a true sale should be considered to be outside the

D Taking Security Over Bank Accounts in Australia

Various authors have offered comprehensive commentary on this aspect of the *PPSA*. Thus, only a brief survey is offered here.

Section 12(1) of the *PPSA* defines security interest broadly and somewhat echoes the UCC Article 1 definition. Side by side, they appear quite similar:

Section 12(1): A **security interest** means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property),

Article 1: UCC § 1-201(b)(35) ‘Security interest’ means an interest in personal property or fixtures which secures payment or performance of an obligation.

So far as deposit accounts are concerned, the other principal Australian sections include s 12(3A) and 12(4)(b) (specifying that a bank can take a charge over its own indebtedness), s 12(2)(1)¹⁶ (allowing a flawed asset arrangement to be a security interest), s 21(2)(c)(i) (allowing for perfection by control of an authorised deposit-taking institution (‘ADI’) account) and s 25 (stating that a secured party has control of an ADI for the purposes of s 21 if, and only if, the secured party is the ADI).¹⁷

II UCC PROVISIONS — DEFINING TERMS

A Definition of ‘Account’ Excludes ‘Deposit Account’

The definition of ‘Account’ under § 9-102(a)(2) of the UCC specifically excludes ‘Deposit Account’, which is separately defined in § 9-102(a)(29) as ‘a demand, time, savings, passbook, or similar account maintained with a bank.’¹⁸

Section 9-102(a)(29) also provides a number of exclusions by making clear that ‘[t]he term [Deposit Account] *does not include* investment property or accounts evidenced

seller’s bankruptcy estate. But the revisers followed the original drafters on the most critical point, by explicitly leaving it to the courts to determine the circumstances in which a purported sale should be recharacterized.’

¹⁶ Note this sub-section comes immediately after 12(2)(k) — the letter ‘l’ (*el*) should not be mistaken for the number ‘1’ (one).

¹⁷ Further detail offered in Andrew Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis, 2012) 2.32–2.33, 5.22–5.24.

¹⁸ According to § 9-102(a)(8), the term ‘Bank’ means ‘an organization that is engaged in the business of banking. The term includes savings banks, savings and loan associations, credit unions, and trust companies.’ Official Comment 9 to § 9-109 notes ‘The definition derives from the definitions of ‘bank’ in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is ‘engaged in the business of banking.’

by an instrument.’¹⁹ For example, this means that money market accounts, certificated and uncertificated securities (‘investment property’) and certificates of deposit (an ‘account evidenced by an instrument’) are wholly excluded from this definition. This is in keeping with the organisation of Article 9 whereby collateral must fit (or be ‘made to fit’) into one and only one of the available statutory collateral-types.²⁰ ‘Deposit Account’ is also specifically excluded from the definition of ‘General Intangible’ under § 9-102(a)(42) (a residual category).²¹

In the process of characterisation of collateral, care is always needed to avoid assumptions about the names that banks sometimes give to their financial products. For example, the mere labeling of an account as ‘money market’, where there is no actual investment in money-market securities, will not satisfy the requisite definition.²²

It is also noteworthy that the definition of ‘Deposit Account’ does not *explicitly* provide for security to be taken over such collateral under Article 9. There is, in fact, no UCC provision allowing for this. Instead, the drafters have relied on the circumstance that such property falls under the primary ‘scope’ provision found in UCC § 9-109:

9-109. SCOPE

(a) [General scope of article.]

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

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

¹⁹ Section 9-102(29). ‘Deposit account’ means ‘a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument.’ (emphasis added)

²⁰ There are two main residual categories: ‘Equipment’ in the case of goods (see § 9-102(a)(33)), and ‘General Intangibles’ in the case of non-goods (see §§ 9-102(a)(42), (61)).

²¹ ‘General intangible’ means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas or other minerals before extraction. The term includes payment intangibles and software. See § 9-102(a)(42).

²² See Lawrence, Henning and Freyermuth, *Understanding Secured Transactions* (LexisNexis, 5th ed, 2012) 58, 1.07[H], footnote 342.

6. a security interest arising under Section 4-210 or 5-118.²³

Perhaps as a precautionary measure, the drafters did provide an overt statement in Official Comment 16 to § 9-109 warranting that ‘deposit accounts may be taken as original collateral.’²⁴

This Official Comment also makes the following important points:

- it highlights the need for sufficient (reasonable) identification of the deposit accounts;
- it highlights the need for ‘control’ when considering banks other than the bank where the account is actually maintained; and
- it adverts to a raft of new rules that affect perfection, priority, rights of set-off, rights of transferees, enforcement, and the duties of both bank and secured party.

New students of Article 9 are sometimes surprised to learn that many relevant definitions are contained in other Articles of the Code. For example, ‘certificated security’ (§ 8-102), ‘contract for sale’ (§ 2-106), ‘customer’ (§ 4-104), ‘lease’ (§ 2A-103), ‘negotiable instrument’ (§ 3-104), ‘sale’ (§ 2-106) and ‘issuer’ (with respect to a security) (§ 8-201).²⁵ UCC art 1 also contains many important provisions that are relevant and applicable throughout the entire Code.

²³ The Official Comment to this section calls it a ‘Basic Scope Provision’ and notes that ‘Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a ‘security interest,’ the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.’

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

²⁵ See UCC § 9-102(b).

B *The Consumer Exception*

Section 9-109(d) provides 13 exceptions to the applicability of Article 9. The last of these excludes ‘an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.’

This is the sole exclusion for deposit accounts. A ‘consumer transaction’ is defined in § 9-102(a)(26) as:

a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.

Consumer transactions are thus left to the common law and other relevant statutes.²⁶

III ATTACHMENT OF SECURITY INTEREST

The provisions dealing with attachment (in particular, the seminal § 9-203) apply to all forms of collateral. A security interest attaches when ‘it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.’²⁷ Under § 9-203(b) enforceability against the debtor and third parties arises only when:

- (1) value has been given;
- (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; *and*
- (3) *one of* the following conditions is met:
 - (A) the debtor has *authenticated a security agreement* that provides a *description of the collateral* and, if the security interest covers timber to be cut, a description of the land concerned;

²⁶ See Jason M Ban, ‘Deposit Accounts: An Article 9 Security Interest’ (1998) 17 *Annual Review of Banking Law* 493, 497–9. On the issue as to why consumers get special treatment: ‘One possible explanation for not including consumer transactions secured by deposit accounts within the scope of Revised Article 9 is the possibility that depository institutions will routinely include provisions in their deposit agreements to take a security interest in all deposit accounts. Since Revised Article 9 provides great advantages to the depository institution as against competing security interests in such collateral, depository institutions may wish to take deposit accounts it holds as collateral for ‘all current and future obligations’ of the depositor to the depository, even if no such obligations exist or are contemplated at the time the account is opened. Alternatively, as suggested by the Revised Article 9 Deposit Account Task Force, the exception for consumer transactions may be a result of the drafters’ disfavor of deposit accounts as collateral, not a specific objection to such collateral being governed by Article 9.’ Ben Carpenter, ‘Security Interests in Deposit Accounts and Certificates of Deposit Under Revised UCC Article 9’ (2001) 55 *Consumer Finance Law Quarterly Report* 133, footnote 20.

²⁷ UCC § 9-203(a).

- (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor’s security agreement;
- (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor’s security agreement; *or*
- (D) *the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor’s security agreement.*²⁸

Leaving to one side the questions of value and rights in the collateral, the UCC imposes a clear choice upon anyone seeking to take security over a deposit account (‘attachment’): either obtain an authenticated security agreement (with proper description of the collateral), or obtain control of the deposit account pursuant to the debtor’s security agreement. For the purpose of this discussion, we shall label these two methods as ‘authenticate and describe’ and ‘taking control.’

It should be noted that the concept of ‘control’ can serve two functions with respect to deposit accounts. First, it can act as a substitute for an authenticated security agreement as an element of attachment (see below). Second, it can serve as the only means of perfection when taking a deposit account as original collateral (see Perfection by Control, below).²⁹

A Authenticate and Describe

Authentication of the security agreement by a debtor is a critical stage in attachment and requires compliance with § 9-102(a)(7).³⁰ This is a Statute of Frauds provision,³¹ but with an important exception for cases where, in the case of ‘deposit accounts’ the secured party has control ‘pursuant to the debtor’s security agreement.’ (See § 9-203(b) cited in full above). This will ‘dispense with the requirement of an authenticated security agreement and provide alternative evidentiary tests.’³²

²⁸ UCC § 9-203(b) (emphasis added).

²⁹ See Official Comment 2 to § 9-104. ‘Why ‘Control’ Matters. This section explains the concept of ‘control’ of a deposit account. ‘Control’ under this section may serve two functions. First, ‘control ... pursuant to the debtor’s agreement’ may substitute for an authenticated security agreement as an element of attachment. See § 9-203(b)(3)(D). Second, when a deposit account is taken as original collateral, the only method of perfection is obtaining control under this section. See § 9-312(b)(1).’

³⁰ UCC § 9-102(a)(7). ‘**Authenticate**’ means: (A) to sign; or (B) with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.

³¹ The Statute of Frauds requires that certain kinds of contract be written down.

³² Official Comment 3 to § 9-203. See also Official Comment 4 to § 9-203. ‘**Possession, Delivery, or Control Pursuant to Security Agreement.** The other alternatives in subsection (b)(3) dispense with the requirement of an authenticated security agreement

The reason for using the ‘authenticate and describe’ method of attachment over that of ‘taking control’ has to do with issues of proof and the avoidance of litigation. Ben Carpenter has noted that ‘[t]he security agreement must exist but may be created orally, or through implication, course of dealing, a change in terms notice, or any other method sufficient to create a binding contract.’³³

Such arrangements can take a party by surprise. A written and authenticated security agreement can help avoid this situation.

Description can be a problematic concept and care must be taken to comply with § 9-108(a), which states ‘a description of personal property ... is sufficient, whether or not it is specific, if it reasonably identifies what is described.’³⁴ This usually means a description along the lines of ‘all the debtor’s deposit accounts’ or ‘all debtor’s deposit accounts maintained with BigBank’ or ‘debtor’s deposit account #12345-04 maintained at BigBank.’³⁵

The enduring issue is to get the collateral type correct — (for example, do not confuse an ‘account’ with a ‘deposit account’ or do not rely on a claim over a ‘general intangible’) — and then to get the description correct so as to satisfy § 9-108. Super-generic descriptions are deemed insufficient.³⁶

and provide alternative evidentiary tests. Under paragraph (3)(B), the secured party’s possession substitutes for the debtor’s authentication under paragraph (3)(A) if the secured party’s possession is ‘pursuant to the debtor’s security agreement.’ That phrase refers to the debtor’s agreement to the secured party’s possession for the purpose of creating a security interest.

The phrase should not be confused with the phrase ‘debtor has authenticated a security agreement,’ used in paragraph (3)(A), which contemplates the debtor’s authentication of a record. In the unlikely event that possession is obtained without the debtor’s agreement, possession would not suffice as a substitute for an authenticated security agreement. However, once the security interest has become enforceable and has attached, it is not impaired by the fact that the secured party’s possession is maintained without the agreement of a subsequent debtor (eg, a transferee).

Possession as contemplated by Section 9-313 is possession for purposes of subsection (b)(3)(B), even though it may not constitute possession ‘pursuant to the debtor’s agreement’ and consequently might not serve as a substitute for an authenticated security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a certificated security to the secured party under Section 8-301 pursuant to the debtor’s security agreement is sufficient as a substitute for an authenticated security agreement. Similarly, under subsection (b)(3)(D), control of investment property, a deposit account, electronic chattel paper, or a letter-of-credit right satisfies the evidentiary test if control is pursuant to the debtor’s security agreement.’

³³ Ben Carpenter, ‘Security Interests in Deposit Accounts and Certificates of Deposit Under Revised UCC Article 9’ (2001) 55 *Consumer Finance Law Quarterly Report* 133, 137.

³⁴ UCC § 9-108(a).

³⁵ I have borrowed these examples from Hillinger, Batty and Brown, above n 2, 20.

³⁶ UCC § 9-108(c). Eg, ‘all the debtor’s assets’ or ‘all the debtor’s personal property.’

B Taking Control

As indicated above, taking control will relieve the need for an ‘authenticated security agreement.’ Agreement will of course be necessary, but there is no need for authentication. As Bruce Markell has observed:

Thus attachment... [in relation to a deposit account] has no signed writing requirement. As a consequence, a security interest in favor of a bank in a deposit account can arise by implication as well as by express oral agreement — a fact that third party creditors will have to face each time they seek to garnish a deposit account.³⁷

Hence it is far better to reduce such things to writing.³⁸

IV PERFECTION BY CONTROL

The original concept of ‘control’ originates in Revised Article 8.³⁹ This concept was then taken up by the drafters of Article 9 in reference to ‘Deposit Accounts’, ‘Electronic Chattel Paper’, ‘Investment Property’ and ‘Letter-of-Credit-Rights’.⁴⁰ The Official Comments to § 9-104-107 are particularly instructive.

Section 9-104 is headed ‘Control of Deposit Account.’ Since control is the *only way* to perfect a security interest in a deposit account,⁴¹ filed financing statements will not achieve perfection. Nor will pre-filing.⁴² Similarly, ‘taking possession’ of the

³⁷ Markell, above n 12, 982 as cited by Hillinger et al *supra*.

³⁸ Hillinger, Batty and Brown, above n 2, 18.

³⁹ Adopted 1994. See generally Rogers, ‘Policy Perspectives on Revised UCC Article 8’ 43 *UCLA Law Review* 1431, 1477. ‘The rule of Section 9-115(5)(a), that a control security interest has priority over a non-control security interest, is the statutory expression of the fundamental structural principle that underlies the secured transactions rules of Revised Article 8/9. Stated in general terms, the principle is as follows: If A seeks an advance of value from B, offering as collateral securities that are held in such fashion that B has the power to have the securities sold off without further act by A, then B should be able to proceed without fear that A may have granted a conflicting interest to some other party. That basic principle provides a simple and clear basis for secured transactions rules covering the wide range of transactions in which investment securities are used as collateral for obligations.’

⁴⁰ UCC § 9-104 — Control of Deposit Account; § 9-105 — Control of Electronic Chattel Paper; § 9-106 — Control of Investment Property; § 9-107 — Control of Letter-of-Credit Right.

⁴¹ Filing is effective for proceeds. Note that filing is an allowed method of perfecting over chattel paper, negotiable documents, instruments, and investment property. See UCC § 9-312(a).

⁴² Pre-filing (‘precautionary filing’) refers to the practice of filing a UCC Form 1 prior to attachment as permitted under § 9-502(d): ‘A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.’ This practice

collateral is ineffective.⁴³ Only control can achieve this vital end.⁴⁴ Section 9-104 provides:

- (a) [Requirements for control.] A secured party has control of a deposit account if:
 - (1) the secured party is the bank with which the deposit account is maintained; [‘Method One’]
 - (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; [‘Method Two’] or
 - (3) the secured party becomes the bank’s customer with respect to the deposit account. [‘Method Three’]
- (b) A secured party that has satisfied subsection (a) has control, even if the debtor retains the right to direct the disposition of funds from the deposit account.

Contrary to common assumption, it is possible to have (and maintain) control over a deposit account even if the debtor ‘retains the right to direct the disposition of funds from the deposit account.’⁴⁵ The inter-party arrangements for control will, of course, often prevent such disposition by the debtor, but retention by the debtor of the right to dispose will not automatically destroy the secured party’s ‘control’.⁴⁶

The above three methods will be considered separately and — for reasons of clarity — slightly out of order.⁴⁷

A. *Method Two*

Shorthand designations for this method include ‘Perfection by Control Agreement’ or ‘Tripartite Agreement’. The agreement must make it clear that instructions will be complied with in the absence of *debtor consent* (that is; ‘debtor consent is no longer required’). This means the control agreement must be ‘condition-less,’ and yet Official Comment 3 does contemplate ‘Certificates of default’ being allowed, provided they do not breach the wording of the section. Ingrid Hillinger, David

is widespread. See Gelernt and Kalemka, ‘A ‘Precautionary’ UCC Filing Can Be a Lien-Saver’ (2004) 231 *New York Law Journal* 125. Should a prospective deal fall through, a party may seek a termination statement. See UCC § 9-513.

⁴³ ‘Control’ and ‘possession’ may conjure similar concepts, but these terms should not be conflated.

⁴⁴ See Official Comment 2 to UCC § 9-104, above n 29.

⁴⁵ UCC § 9-104(b).

⁴⁶ ‘Although the arrangements giving rise to control may themselves prevent, or may enable the secured party at its discretion to prevent, the debtor from reaching the funds on deposit, subsection (b) makes clear that the debtor’s ability to reach the funds is not inconsistent with ‘control’: Official Comment 3 to § 9-104, para 4.

⁴⁷ This ordering is found in Julian B McDonnell and James P Nehf, Matthew Bender & Company Inc, *Secured Transactions Under the Uniform Commercial Code* (at 24 January 2013).

Batty and Richard Brown opine that requiring a certificate of default would not breach the section, ‘so long as the bank must follow the creditor’s instructions [and this is so] regardless of the certificate’s underlying truth or falsity.’⁴⁸

Section 9-342 makes it clear that a bank is not *required* to enter into a control agreement even if the customer requests (or directs) it to do so. A bank need not confirm the agreement’s existence to a third party unless the customer so requests.⁴⁹

Importantly, there is nothing requiring the bank to disclose the existence of such an agreement.⁵⁰ This raises the possibility of a secret lien.

B Method Three

In this case, the secured party (‘SP’) becomes the ‘name’ on the deposit account (that is their ‘customer’). While Revised Article 9 does not define ‘customer,’ the Official Comment refer to the definition in art 4-104:

(5) ‘Customer’ means a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank;

Joint account holders are not ruled out.⁵¹

C Method One

Section 9-104(a)(1): ‘Automatic Control.’ Here, perfection is automatic. The time of perfection will coincide with attachment.⁵² Again, this raises the spectre of a secret lien. The Official Comment acknowledges the danger by noting:

⁴⁸ Hillinger, Batty and Brown, above n 2, 22.

⁴⁹ UCC § 9-342. **Bank’s Right To Refuse To Enter Into Or Disclose Existence Of Control Agreement.** ‘This article does not require a bank to enter into an agreement of the kind described in Section 9-104(a)(2), even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.’ According to Official Comment 2 this provides protection for the bank: ‘This section protects banks from the need to enter into agreements against their will and from the need to respond to inquiries from persons other than their customers.’

⁵⁰ See McDonnell and Nehf, above n 47.

⁵¹ Official Comment 3 to § 9-104: ‘As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-104(a), 4-403(a).’

⁵² The critical time will be when value is given. ‘Value’ is defined in Article 1: ‘**Value.** Except as otherwise provided in Articles 3, 4 and 5 of the Uniform Commercial Code, a person gives value for rights if the person acquires them:
(1) In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection;

The effect of this provision is to afford the bank automatic perfection. No other form of public notice is necessary: all actual and potential creditors of the debtor are always on notice that the bank with which the debtor's deposit account is maintained may assert a claim against the deposit account.⁵³

Julian McDonnell and James Nehf consider this harmless. They observe that 'it is known that the depositary bank may have a common law right of set-off against an account, adding a "secret" security interest does no harm. That is the public justification for Revised § 9-104(a)(3).'⁵⁴

At this juncture, it is worth repeating Professor Mooney's quote provided at the beginning of this paper: control agreements are necessary for perfection and the mere filing of an all-encompassing (slimy) financing statement, while enough to attach, will not be enough to perfect an interest over a deposit account.⁵⁵

V CONTROL AGREEMENTS

The content of control agreements was the subject of a lengthy inquiry by the American Bar Association's Joint Taskforce on Deposit Account Control Agreements (joint with UCC, Commercial Finance, Consumer Financial Services and Banking Law) ('DACA').⁵⁶ The DACA Report dealt with some issues that had become 'problematic in practice'⁵⁷ — in particular the persistent 'battle of the forms' in which depositary banks tried to enforce favourable terms in the face of comparable

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- (2) As security for, or in total or partial satisfaction of, a preexisting claim;
 - (3) By accepting delivery under a preexisting contract for purchase; or
 - (4) In return for any consideration sufficient to support a simple contract.'

⁵³ Official Comment 3 to UCC § 9-104.

⁵⁴ See McDonnell and Nehf, above n 47.

⁵⁵ McDonnell and Nehf provide the following policy insights: 'Originally, the revisers had planned to permit permissive filing as to deposit accounts. But there was opposition from the bankruptcy forces to the whole concept of allowing an Article 9 security interest in the general bank accounts of the debtor. It was feared that if a floating lien could insist on a security in all of the debtor's bank accounts, it would leave even fewer resources for unsecured creditors or to support a reorganisation. By way of counter-attack, Professor Elizabeth Warren launched the 'carve-out' proposal under which a creditor levying on collateral would be given a priority claim to 20 percent of the value of the collateral even though the property was already subject to a perfected security interest. In an effort to buy a margin of peace, the Article 9 revisers decided to back off permissive filing for deposit accounts. Under the scheme adopted by the revisers, a secured creditor is not able to obtain a perfected interest in all of the debtor's bank accounts simply by filing a financing statement. It is required to establish control over each account to have an interest that will be effective in bankruptcy.' (citations omitted).

⁵⁶ Reports, Final Annotated DACA, Inserts and other information available online: <<http://apps.americanbar.org/dch/committee.cfm?com=CL710060>>.

⁵⁷ Joint Task Force on Deposit Account Control Agreements, 'Initial Report of the Joint Task Force on Deposit Account Control Agreements' (2006) 61 *The Business Lawyer* 745, 747.

demands from secured parties.⁵⁸ The depositary banks viewed their own position as paramount since they were, after all, doing ‘everyone’ a favour by making accommodations and exposing themselves to ‘potential liability to a third party that they would not otherwise have.’⁵⁹ Likewise, secured parties wanted ‘assurance of the priority of the security interest, as well as ongoing monitoring, enforcement and other rights; all without undue exposure to themselves.’⁶⁰

One consequence of such intense negotiation is deferral of the deal or — an arguably worse scenario — the continuation of negotiation after closing. The latter would lead to debtors being burdened by ‘impending events of default in their loan documents with secured parties unless the deposit account control agreements are finalised and executed by certain dates set forth in the post-closing arrangements.’⁶¹

The DACA Report made the following observations regarding the DACA as drafted (and made freely available):

- the DACA should be read in conjunction with the General Terms (incorporated by reference);
- the DACA is meant to be highly elastic, in accordance with the parties’ wishes and needs;
- the General Terms can be modified in the DACA;
- too much modification of the General Terms (in deference to the overall consensus reached) should be discouraged;
- Part A of the DACA incorporates the General Terms;
- Part B of the DACA contains the specific terms including identifying the Deposit Account (by account number) as well as providing certain default provisions; and
- Part C of the DACA refers to the Exhibit containing the Initial Instruction.

⁵⁸ Ibid. ‘Secured parties and depositary banks have developed their own forms of control agreements that largely focus on their own needs and concerns. On the one hand, secured parties generally seek in control agreements not only to achieve control for purposes of perfection but also to obtain assurance of the priority of the security interest, as well as ongoing monitoring, enforcement and other rights, all without undue exposure to themselves.’

⁵⁹ Ibid. ‘On the other hand, depositary banks view the control agreement structure largely as an administrative accommodation to their customers that exposes them to potential liability to a third party that they would not otherwise have. As a result, depositary banks desire that the control agreement provide them with appropriate exculpatory and indemnification protections against liability for operational and other risks.’

⁶⁰ Ibid.

⁶¹ Ibid.

The DACA assumes that the parties to the agreement ‘intend for the debtor to have access to the funds in the deposit account unless and until the secured party instructs the depository bank otherwise’⁶² (there is no standing instruction for a cash sweep at the start of the transaction). It is also assumed that the ‘demand deposit account is not associated with a postal lock box and is not linked to a related securities account in which the funds are invested.’⁶³ The DACA does not cover foreign deposit accounts. The Report discusses the DACA provisions in detail.

VI PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS

The UCC’s priority rules are designed to ‘determine the order in which competing creditors may satisfy their claims from particular assets belonging to their common debtor’s estate.’⁶⁴ Priority in deposit accounts is regulated under § 9-327. The baseline rule is that control trumps lack of control.⁶⁵ Critically, this sets up priority for the control-perfected party ahead of the party seeking to assert an interest in ‘identifiable cash proceeds under § 9-315.’⁶⁶ The Official Comment indicates how this provision would function in practice:

Secured parties for whom the deposit account is an integral part of the credit decision will, at a minimum, insist upon the right to immediate access to the deposit account upon the debtor’s default (ie, control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.⁶⁷

The next rule (§ 9-327(2)) covers a situation where there is more than one secured party making a claim over the deposit account. In such cases, interests will rank according to the order in which control is successfully acquired (that is, first in time prevails).⁶⁸ This situation would of course be very rare and contemplates more than one § 9-104(a)(2) control agreement.

⁶² Ibid 751.

⁶³ Ibid.

⁶⁴ Thomas H Jackson and Anthony T Kronman, ‘Secured Financing and Priorities Among Creditors’ (1979) 88 *Yale Law Journal* 1143, 1143–4. This article is also known for the following perceptive comments on PMSI priority: ‘... the analytic justification for many of Article 9’s most important priority rules remains obscure. This is especially true of the overriding priority enjoyed by purchase money lenders’: at 1144.

⁶⁵ UCC § 9-327(1).

⁶⁶ Official Comment 2 to UCC § 9-327.

⁶⁷ Official Comment 3 to UCC § 9-327.

⁶⁸ UCC § 9-327(2).

Section 9-327(3) goes on to describe two important exceptions:

- (i) a security interest ‘held by the bank with which the deposit account is maintained has priority over a conflicting security interest held by another secured party’;⁶⁹ and
- (ii) a security interest ‘perfected by control under 9-104(a)(3) has priority over a security interest held by the bank with which the deposit account is maintained.’⁷⁰

The first exception applies to give the bank priority, ‘regardless of whether the deposit account constitutes the competing secured party’s original collateral or its proceeds.’⁷¹ This rule saves banks the trouble of checking public records, or, for that matter, their own records, to see if another party might have a security interest.

The second exception gives priority to a control-perfected party provided they become the customer with respect to the account (this will trump the first exception).

The priority given by § 9-327 does not cover the situation where one is dealing with the proceeds *of* a deposit account.⁷²

VII DEPOSIT ACCOUNTS AS PROCEEDS

Disposition of proceeds is a diverse and challenging area so my comments will be confined to the specifics of deposit accounts.⁷³

If a secured party has a security interest in original collateral, they will also have a security interest in the proceeds of that collateral.⁷⁴ Proceeds must be identi-

⁶⁹ UCC § 9-327(3).

⁷⁰ UCC § 9-327(4).

⁷¹ Official Comment 4 to UCC § 9-327.

⁷² As to deposit accounts *as* proceeds see below. Official Comment 5 to § 9-327 notes ‘The priority afforded by this section does not extend to proceeds of a deposit account. Rather, § 9-322(c) through (e) and the provisions referred to in § 9-322(f) govern priorities in proceeds of a deposit account. Section 9-315(d) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see Section 9-332.’

⁷³ Debates concerning calves conceived by cows and hog feed consumed by hogs will be ignored for present purposes. See, eg, *Citizens Sav Bank v. Miller* 515 NW 2d 7, (1994), holding that a calf is not ‘proceeds’ of the cow that bore it. See also *First NB of Brush v. Bostron* 39 Colo App 107, 564 P. 2d 964, 966 (1977), holding that hogs are not ‘proceeds’ of the animal feed they consume.

⁷⁴ UCC § 9-203(f). ‘[Proceeds and supporting obligations.] The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.’

fiable.⁷⁵ Section 9-315(c) provides ‘[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.’⁷⁶ This automatic perfection in proceeds lasts for 20 days (perfection is lost on the 21st day) unless the requirements of § 9-315(d) are met. Those requirements provide an extension for ‘identifiable cash proceeds’⁷⁷ which includes deposit accounts.⁷⁸ As always, it is possible to file a financing statement.

It is also theoretically possible to become the bank’s customer or obtain a control agreement in less than 20 days, but this is not recommended. Automatic perfection remains the safer path.

VIII COMPARATIVE OBSERVATIONS

Comparative lawyers rightly warn that ‘[i]t is not enough simply to compare words on the page.’⁷⁹ The following observations are made with an awareness that comparisons are necessarily difficult, often tangential and rarely complete.

⁷⁵ UCC § 9-315(a)(2). The process of identification can be intricate, involving rules of tracing. Arguably the most common form of tracing is known as the ‘lowest intermediate balance test’ — as to which see § 9-315(b)(2) which refers to ‘method[s] of tracing, including application of equitable principles, that is permitted under law other than this article with respect to commingled property of the type involved.’ The ‘lowest intermediate balance test’ has been summarized as follows: ‘Under the [rule], a court recreates the daily balances in the disputed account, noting when deposits were made and the sources of those deposits. It then applies the presumption that the debtor will spend his or her own money first, ‘leaving’ the secured party’s proceeds portion behind for the secured party. The secured party then gets the lowest balance of ‘pure’ proceeds during the relevant time.’ Markell, ‘Symposium: From Property to Contract and Back: An Examination of Deposit Accounts and Revised Article 9’ (1999) 74 *Chicago-Kent Law Review* 963, 971–72. Markell cites *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317, 325–27 (E.D. Mo. 1973) as a helpful case example.

⁷⁶ Recall, the only way to perfect a security interest in a deposit account is via control: UCC § 9-312(b).

⁷⁷ UCC § 9-315(d)(2).

⁷⁸ UCC § 9-102(a)(9). ‘Cash proceeds’ means proceeds that are money, checks, deposit accounts or the like. Official Comment 13 states ‘The definition of ‘cash proceeds’ is substantially the same as the corresponding definition in former § 9-306. The phrase ‘and the like’ covers property that is functionally equivalent to ‘money, checks, or deposit accounts,’ such as some money-market accounts that are securities or part of securities entitlements. Proceeds other than cash proceeds are noncash proceeds.’

Under UCC § 9-102 (a)(58) ‘Noncash proceeds’ means proceeds other than cash proceeds.

⁷⁹ Edward J Eberle, ‘The Method and Role of Comparative Law’ (2009) *Global Studies Law Review* 451, 452.

First, it would seem that quasi-security arrangements are treated the same in both jurisdictions and so will be swept into the scope of each regime. Deposit accounts are no exception. However, the history and underlying framework of the security arrangements will vary considerably. For example, sale and leaseback, retention of title, hire purchase, factoring and set off are known to both systems, but their histories are quite different, especially in light of the diversity of state laws in both countries. The floating charge is unknown in the US.⁸⁰

Second, registration of a Financing Statement is the default position for careful lenders in the US; the downside of failing to complete this step is too large compared to the relatively easy process for its accomplishment. It is submitted that this will become so in Australia, even if not strictly necessary in all cases involving ADIs.

Third, all *PPSA*-type registries in the US are state-based, usually under the auspices of the relevant Secretary of State. This makes registration a harder process since the rules can vary in small ways.

Fourth, state regulation of banks in the US, and at even more local levels (for example, city regulations) is a cause for complication. Australia is relatively simply regulated, which has associated advantages.

Fifth, the UCC was born out of the move towards legal realism of the 1930s. As Karl Llewellyn himself has noted, realism was always meant to be ‘a methodology.’⁸¹ This implies further changes in accordance with the realist creed as market conditions change and demand alterations in the law.

IX CONCLUSION

The new world of Revised Article 9 did much to clarify the process for taking security over deposit accounts. It will remain a source of thought-provoking commentary and case law for other personal property security systems based on the original ‘Lex Llewellyn.’⁸²

⁸⁰ Peter F Coogan, ‘Article 9 of the Uniform Commercial Code: Priorities Among Secured Creditors and the ‘Floating Lien’ (1959) 72 *Harvard Law Review* 838, 839.

⁸¹ Douglas Litowitz, *Perspectives on the Uniform Commercial Code* (Carolina Academic Press, 2nd ed, 2007) 46.

⁸² Original drafters of the UCC: ‘Article 1, General Provisions, Karl N. Llewellyn; Article 2, Sales, Karl N. Llewellyn; Article 3, Commercial Paper, William L. Prosser; Article 4, Bank Deposits and Collections, Fairfax Leary, Jr.; Article 5, Letters of Credit, Fredrich Kessler; Article 6, Bulk Sales, Charles Bunn; Article 7, Documents of Title, Louis B. Schwartz; Article 8, Investment Securities, Soia Mentschikoff; Article 9, Secured Transactions, Allison Dunham and Grant Gilmore.’ 12 *Tex. Prac., Texas Methods of Practice* § 24:1 (2013 ed).