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A GUIDE TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT FOR THOSE FAMILIAR WITH THE UNIFORM COMMERCIAL CODE

*Elaine A. Welle**

Introduction

Economic development has become a priority for tribal leaders¹ in Indian Country.² Access to financing is a fundamental and necessary component of any economic development plan.³ Therefore, to encourage lending, many tribes are working to strengthen their legal infrastructure by adopting commercial codes, such as secured transactions laws.⁴

To facilitate these economic development efforts, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”)⁵

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1. Jack F. Williams, *Integrating American Indian Law into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557, 557 & n.2 (2001) (citing telephone interviews with tribal leaders).

2. “Indian Country” is statutorily defined to include reservation land, Indian communities, and Indian allotments. 18 U.S.C. § 1151 (2006). The term “Indian Country” is used to refer to “country within which Indian laws and customs and federal laws relating to Indians are generally applicable.” COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 183 (Nell Jessup Newton et al. eds., LexisNexis 2012) [hereinafter COHEN]. Jurisdiction over land that is Indian Country generally resides with the federal government and the Indian tribe that inhabits it, and not with the states. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 527 n.1 (1998).

3. Tim Berg, *Growing Indian Economies*, ARIZ. ATT’Y, Mar. 2006, at 30, 32, available at http://www.myazbar.org/AZAttorney/PDF_Articles/0306Tribal.pdf.

4. See, e.g., *Tribal Legal Code Project: Commercial Codes*, TRIBAL COURT CLEARINGHOUSE, http://www.tribal-institute.org/codes/part_seven.htm (last visited Apr. 12, 2013) (discussing the role of commercial codes in tribal economic development and providing a list of certain tribal governments that have enacted commercial codes).

5. Established over 100 years ago, the NCCUSL (also known as the Uniform Law Commission) is comprised of more than 300 lawyers, judges, and law professors appointed by state governments to research, draft, and promote enactment of uniform state laws. Since its inception, the NCCUSL has promulgated more than 200 acts, most notably the Uniform Commercial Code. See Press Release, Nat’l Conference of Comm’rs on Unif. State Laws,

promulgated the Model Tribal Secured Transactions Act (“MTA”).⁶ According to published reports, a number of tribes and nations have adopted the MTA.⁷ In addition, commentators report that other tribes and nations either have adopted or are expected to adopt the MTA.⁸

Efforts to enact tribal secured transactions codes were fueled, at least in part, by a commitment of the Department of the Interior’s Bureau of Indian Affairs (“BIA”) to fund tribal study, introduction, and enactment of commercial codes.⁹ Conference presentations, training programs, and the availability of support services, coupled with a detailed implementation guide (“MTA Implementation Guide”) providing extensive commentary,¹⁰ have sparked interest in the MTA.¹¹ As a result, reports indicate that a

Model Tribal Secured Transactions Act Now Complete (June 10, 2005) (on file with author) [hereinafter NCCUSL Press Release].

6. *Id.* See *infra* note 20 for a discussion of why the acronym “MTA” is used throughout this article to refer to the Model Tribal Secured Transactions Act.

7. Tribes and nations reported as adopting the MTA include the “Crow Nation, Chippewa–Cree Tribes of the Rocky Boys Reservation, Oglala Sioux Tribe of the Pine Ridge Reservation, Sac & Fox Tribes, Osage Nation, Eastern Shoshone & Northern Cheyenne Tribes of the Wind River Reservation, and Umatilla Tribe.” 10A WILLIAM HENNING, HAWKLAND UNIFORM COMMERCIAL CODE SERIES, MODEL TRIBAL SECURED TRANSACTIONS ACT, at v (Dec. 2008). The author confirmed enactment of and obtained copies of secured transactions codes based on the MTA for the Crow Tribe, Muscogee (Creek) Nation, Osage Nation, and Sac and Fox Nation. The author also obtained a copy of draft legislation for the Oglala Sioux Tribe. Copies of the tribal codes reviewed are on file with the author.

8. Other tribes or nations reported as adopting or expected to adopt the MTA include the “Forest County Potawatomi Community, Ho–Chuck Nation, Sokaogon Chippewa Community (Mole Lake), Lac Courte Oreilles Band of Lake Superior Chippewa, Oneida Nation, Seminole Tribe, Tulalip Tribes of the Tulalip Reservation, Lower Brule Sioux Tribe, and Crow Creek Sioux Tribe.” *Id.*

9. Those familiar with the program state that funds were awarded to tribes and nations as follows: “\$10,000 to study the act, \$10,000 to introduce it in its legislature, and \$10,000 to enact it.” *Id.* As of July 31, 2008, the Department of the Interior provided funding to at least ten tribes in six states to develop tribal secured transactions codes. Press Release, U.S. Dep’t of the Interior, Skibine Congratulates Oglala Sioux Tribe, State of South Dakota on Signing Joint Sovereign MOU for Tribe’s Secured Transactions Commercial Code, at 2 (Jul. 31, 2008), available at <http://www.bia.gov/idc/groups/public/documents/text/idc012852.pdf> [hereinafter U.S. Dep’t of Interior Press Release].

10. See generally NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT (2005), available at http://www.uniformlaws.org/shared/docs/mtsta/mtsta_implem_guide_jun05.pdf [hereinafter MTA IMPLEMENTATION GUIDE].

11. The NCCUSL is encouraging adoption of the MTA by making conference presentations, conducting tribal training programs, and providing assistance to tribal

number of tribes and nations have sought BIA funding with the intention of adopting the MTA and that many other tribes and nations have expressed interest in the act.¹² Given the over 560 federally recognized tribal entities,¹³ the perceived need for tribal secured transactions codes to spur economic development,¹⁴ the availability of funding for tribal code projects, and an organized effort to promote adoption of the MTA, the pace of MTA adoptions is expected to increase.

Tribal economic success stories indicate that commercial lenders are recognizing potential opportunities for asset-based lending in Indian Country.¹⁵ As a result, more lawyers are likely to encounter the MTA or variations of the MTA in practice as their clients pursue opportunities in these emerging markets.

According to the NCCUSL, the drafters of the MTA intended to create a uniform tribal secured transactions act consistent with the core principles of Article 9 of the Uniform Commercial Code (“UCC”).¹⁶ Like Article 9, the MTA provides rules regarding the creation, perfection, enforcement, and priority of security interests.¹⁷ Nevertheless, while modeled on Revised Article 9 (“RA9”),¹⁸ the MTA differs in many respects.¹⁹

governments. *See, e.g.*, NCCUSL Press Release, *supra* note 5; Registration Form, Minnesota Indian Bus. 2008 Conference and Showcase, Welch, Minn. (Oct. 28-29, 2008), *available at* http://www.umdced.com/untitled/mnibc_registration.pdf; Registration Form, 2009 Wisconsin Indian Bus. Conference, Green Bay, Wis. (Feb. 11-13, 2009), *available at* http://www.wdfr.org/_resources/indexed/site/yymm/semandevents/WIBCBrochure012809.pdf.

12. HENNING, *supra* note 7, at v; *see also* U.S. Dep’t of Interior Press Release, *supra* note 9.

13. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810, 60810 (Oct. 1, 2010).

14. *Contra* Aaron Drue Johnson, Comment, *Just Say No (To American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107 *passim* (2010-2011).

15. *See, e.g.*, Comptroller of the Currency Adm’r of Nat’l Banks, *Commercial Lending in Indian Country: Potential Opportunities in an Emerging Market*, U.S. DEP’T OF THE TREASURY 6 (Mar. 2006), <http://www.occ.gov/topics/community-affairs/publications/insights/insights-commercial-lending-indian-country.pdf>.

16. NCCUSL Press Release, *supra* note 5. *See infra* note 21 for a discussion of why the acronym “UCC” is used throughout this article to refer to the Uniform Commercial Code.

17. NCCUSL Press Release, *supra* note 5.

18. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11.

19. NCCUSL Press Release, *supra* note 5.

The purpose of this article is to assist those familiar with the UCC in understanding the similarities and differences between the MTA²⁰ and RA9 of the UCC.²¹ Part I of this article presents a general introduction to the various similarities and differences between the MTA and RA9.²² Part II addresses how to evaluate the changes between the two acts.²³ Part III provides an aid for lawyers in the form of a transactional checklist for attorneys who will be working with tribal codes based on the MTA.²⁴

Appendix A sets forth two cross-reference tables. The first table indicates the source or derivation of each MTA section.²⁵ The second table lists each RA9 section and the corresponding MTA section, if any.²⁶ The cross-reference tables are followed by a provision-by-provision comparison of the MTA with RA9 of the UCC and other pertinent UCC provisions.²⁷ Appendix

20. See generally NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, MODEL TRIBAL SECURED TRANSACTIONS ACT (2006), available at http://www.uniformlaws.org/shared/docs/mtsta/mtsta_mar06_final.pdf [hereinafter MTA]. The acronym MTA is used throughout this article to provide uniformity, afford consistency, and avoid confusion when referencing other sources that use the acronym MTA when referring to the Model Tribal Secured Transactions Act. Other sources repeatedly referenced in this article that use the acronym MTA include the Implementation Guide and Commentary to the Model Tribal Secured Transactions Act published by the NCCUSL, the organization that promulgated the MTA, and various other documents authored by those involved with the drafting of the MTA. See, e.g., MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11; NCCUSL Press Release, *supra* note 5.

21. The MTA is based, in large part, on Revised Article 9 of the UCC as set forth in the 2003 Official Text of the UCC. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11 & n.1. The 2003 Official Text of the UCC may be found in the UNIFORM COMMERCIAL CODE, OFFICIAL TEXT AND COMMENTS (2004 ed.) [hereinafter 2003 UCC OFFICIAL TEXT] (current through end of 2003). All references and citations to the various articles and provisions of the UCC hereinafter refer to the 2003 Official Text of the UCC, unless otherwise specified.

The acronym UCC is used throughout this article to provide uniformity, afford consistency, and avoid confusion when referencing other sources using the acronym UCC when referring to the Uniform Commercial Code. See, e.g., MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11.

22. See *infra* Part I.

23. See *infra* Part II.

24. See *infra* Part III.

25. See *infra* Appendix A, Table I.

26. See *infra* Appendix A, Table II.

27. See BLACKLINE COMPARISON, <http://www.air.net/bdoc.pdf> (last visited July 25, 2013) [hereinafter BLACKLINE]. All section number citations in this article designated BLACKLINE are to the MTA section number set forth in the blackline text.

A offers a reference tool to quickly and easily compare a provision of the MTA to its counterpart in the UCC and to visually highlight the similarities and differences between the two acts through the use of a blackline document.²⁸

For those familiar with the UCC, the blackline text will serve as a convenient reference to compare the two acts. Moreover, it will aid lawyers and tribal judges in identifying similarities between the MTA and the UCC to determine whether UCC materials, such as the comments to the UCC, case law, or commentator analysis, may perhaps provide guidance with respect to the interpretation or application of a specific MTA provision.²⁹ It will further help lawyers and tribal judges identify differences between the MTA and the UCC to determine when UCC materials are not relevant and where the provisions of the MTA are distinguishable from the UCC.

I. Overview of the Similarities and Differences Between Revised Article 9 of the UCC and the MTA

The NCCUSL Committee on Liaison with Native American Tribes (“Drafting Committee”) drafted the MTA.³⁰ The **MTA is modeled primarily on RA9 of the UCC**,³¹ a secured transaction code adopted in all fifty states.³² The MTA also includes provisions drawn from Articles

28. See *infra* Appendix A, Introduction, for a description of the various effects, such as underlining, strikethrough type, and italicized type, used to compare the MTA and RA9. For example, additions to RA9 are indicated with underlining. Deletions from RA9 are indicated with strikethrough type. Additions generally follow deletions. RA9 sections or subsections that have been moved to other locations in the MTA are indicated by italicizing the caption of the RA9 section or subsection. The location to which the provision has been moved is provided in editorial notations. Such editorial comments are set forth in bold, in italics, and designated as an “Editor’s Note.”

29. The MTA Implementation Guide notes that “for UCC Article 9 sections carried over into the Act, the Official Comments to UCC Article 9 sections contain explanations and illustrations that help in understanding the application of the various sections and thus may be useful in understanding and interpreting corresponding sections in the Act.” MTA IMPLEMENTATION GUIDE, *supra* note 10, at 17.

30. NCCUSL Press Release, *supra* note 5.

31. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11.

32. *See id.* at 13.

1, 2, and 8 of the UCC.³³ The drafters stated that by basing the MTA on RA9 and other sections of the UCC their intent was to harmonize tribal and state commercial laws.³⁴

Over the years, the NCCUSL and The American Law Institute (“ALI”) have revised the UCC numerous times.³⁵ The **MTA is derived in large part from the 2003 Official Text of the UCC.**³⁶ The 2003 Official Text includes, in addition to other provisions, Article 1 (General Provisions) as revised in 2001; Article 2 (Sales) as amended in 2003; Article 8 (Investment Securities) as revised in 1994; and Revised Article 9 (Secured Transactions) as promulgated in 1998 and as subsequently amended and modified in 1999, 2000, and 2001.³⁷ All references and citations in this article to the UCC and its various provisions refer to the 2003 Official Text of the UCC, unless otherwise indicated.

The MTA follows the general approach and retains much of the terminology of RA9. Yet, while basic principles, general terminology, and certain procedures are similar,³⁸ significant differences exist between the MTA and RA9 of the UCC.³⁹ There are important substantive changes, including noteworthy additions, deletions, and modifications.⁴⁰ In addition, the Drafting Committee, at times, made both structural and formatting changes.⁴¹

33. *Id.* at 11.

34. *Id.*

35. *See, e.g.*, 2003 UCC OFFICIAL TEXT, *supra* note 21, at III-IV (noting various revisions and amendments to the code over the years). The UCC continues to change and evolve with further revisions and amendments. *UCC Article 9 Amendments (2010) Summary*, UNIFORMLAWS.ORG, [http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20\(2010\)](http://www.uniformlaws.org/ActSummary.aspx?title=UCC%20Article%209%20Amendments%20(2010)) (last visited May 15, 2013).

36. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11 & n.1.

37. 2003 UCC OFFICIAL TEXT, *supra* note 21, at III.

38. *See* MTA IMPLEMENTATION GUIDE, *supra* note 10, at 11; *see also* NCCUSL Press Release, *supra* note 5.

39. *See* HENNING, *supra* note 7, at vi (discussing omissions and simplification); *see also* MTA IMPLEMENTATION GUIDE, *supra* note 10, at 14-15 (explaining modifications required to meet tribal needs); NCCUSL Press Release, *supra* note 5 (noting differences necessary to accommodate “tribal business, legal, and cultural environments”).

40. *See* discussion *infra* Part I.A-E and Part I.G.

41. *See* discussion *infra* Part I.F and Part I.H.

Figure 1

**OVERVIEW OF
SIMILARITIES AND DIFFERENCES BETWEEN RA9 AND THE MTA**

- ▶ **MTA modeled primarily on Revised Article 9 of the UCC**
Derived in large part from 2003 Official Text of the UCC
- ▶ **Concepts and definitions imported to produce stand-alone act**
Examples: definitions and principles imported from UCC Articles 1, 2, and 8
- ▶ **Concepts deemed of limited or no applicability deleted**
Examples: no self-help repossession, concept of agricultural liens eliminated, certain collateral definitions deleted
- ▶ **Modifications made to simplify and reduce complexity**
Examples: new and revised terminology, deleted language, cross-references to other UCC articles replaced with references to “applicable law”
- ▶ **Other substantive changes**
Examples: choice-of-law rules governing perfection and priority revised, limitations placed on choice-of-law agreements, new section permitting recovery of attorney’s fees and costs in certain situations, some statutory sections replaced with regulations
- ▶ **Additions to address tribal environment**
Examples: provisions dealing with sovereign immunity, property not alienable under federal law, jurisdiction of act, tribal liens, tribal customs and traditions
- ▶ **Structural modifications**
Examples: moving and combining code sections
- ▶ **Revised statutory language**
Examples: editorial revisions intended to improve, modify, or alter RA9 language, changes that replace, delete, or modify RA9 terms
- ▶ **Formatting changes**
Examples: changes to subsection designations, punctuation, indentation, and format

For purposes of simplicity, brevity, and clarity, a few non-standard citation forms are used throughout this article. Footnote references to provisions found in the 2003 Official Text of the UCC⁴² are designated by the abbreviation “U.C.C.” followed by the section number.⁴³ Footnote references to sections of the MTA⁴⁴ are denoted by the abbreviation “MTA” followed by the section number.⁴⁵ Footnote references to code sections in the blackline document in Appendix A,⁴⁶ which compares the MTA to RA9, are designated as “**Blackline**” followed by the MTA section number.⁴⁷ Note, however, that footnote references to versions of the UCC, other than those found in the 2003 Official Text of the UCC, follow standard citation form citing to the *Uniform Laws Annotated*.⁴⁸

A. Concepts and Definitions Imported to Produce Stand-Alone Act

The drafters intended the MTA to be a stand-alone act in order to permit adoption of the MTA by tribes and nations that have not adopted other articles of the UCC.⁴⁹ RA9, however, references numerous definitions and concepts that appear in other UCC articles.⁵⁰ To address this issue, the Drafting Committee added concepts and definitions to the MTA found in other UCC articles that the committee deemed necessary to the operation of

42. See *supra* note 21.

43. In this article, the format for citations to code sections found in the 2003 UCC OFFICIAL TEXT, *supra* note 21, is U.C.C. § x-xxx. See, e.g., *infra* note 57.

44. See *supra* note 20.

45. In this article, the format for citations to statutory sections found in the MTA, *supra* note 20, is MTA § x-xxx. See, e.g., *infra* note 68.

46. See *supra* note 27.

47. In this article, the format for citations to the blackline document in Appendix A is BLACKLINE § x-xxx. All section number citations designated BLACKLINE are to the MTA section number set forth in the blackline document in Appendix A. See, e.g., *infra* note 80.

48. In this article, the format for citations to versions of the Uniform Commercial Code, other than those found in the 2003 UCC Official Text, follow standard citation form citing to the UNIFORM LAWS ANNOTATED (“U.L.A.”). See, e.g., *infra* note 143.

49. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 18; see also HENNING, *supra* note 7, at vi.

50. See, e.g., U.C.C. § 9-102(b) (incorporating by reference definitions found in other articles of the UCC); id. § 9-102(c) (incorporating definitions and general principles from Article 1 of the UCC).

the act.⁵¹ Consequently, the **drafters imported a number of provisions from other articles of the UCC into the MTA.**⁵²

For example, RA9 incorporates by reference over seventy terms defined in other UCC articles.⁵³ The Drafting Committee considered some of these definitions to be necessary to the operation of the MTA. As a result, a number of the **definitions** found in Article 1 are expressly set forth in the general definitions section of the MTA, including the definitions of “agreement,” “buyer in ordinary course of business,” “consumer,” “contract,” “organization,” “person,” “purchase,” and “security interest.”⁵⁴ Similarly, definitions drawn from other articles are set forth in the MTA as well, such as the definitions of “certificated security”⁵⁵ and “control” with respect to a certificated security.⁵⁶

In addition, RA9 incorporates by reference general principles found in Article 1 of the UCC.⁵⁷ The drafters imported many **general principles from Article 1**, including principles of construction and interpretation.⁵⁸ The Drafting Committee added entire code sections from Article 1 to the MTA, such as the severability provision⁵⁹ and the code section addressing course of performance, course of dealing, and usage of trade.⁶⁰ The drafters added

51. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 18; see also HENNING, *supra* note 7, at vi.

52. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 18 (providing an example); see also HENNING, *supra* note 7, at vi-vii (listing several illustrations).

53. See U.C.C. § 9-102(b) (incorporating by reference the definitions of thirty-five terms found in U.C.C. Articles 2, 2A, 3, 4, 5, and 8); *id.* § 9-102(c) (incorporating by reference the definitions of forty-three terms set forth in U.C.C. § 1-201(b)).

54. See BLACKLINE, *supra* note 27, § 9-106(a), along with accompanying Editor’s Notes and footnotes. Compare U.C.C. § 1-201(b), with MTA § 9-106(a).

55. See BLACKLINE, *supra* note 27, § 9-106(a)(10), along with accompanying Editor’s Note. Compare U.C.C. § 8-102(a)(4), with MTA § 9-106(a)(10).

56. See BLACKLINE, *supra* note 27, § 9-106(a)(22A), along with accompanying Editor’s Note and footnotes. Compare U.C.C. § 8-106(b), with MTA § 9-106(a)(22A).

57. U.C.C. § 9-102(c).

58. For example, the Drafting Committee imported code sections from Part 2 of Article 1, titled “General Definitions and Principles of Interpretation” and Part 3 of Article 1 titled, in part, “General Rules.” See 2003 UCC OFFICIAL TEXT, *supra* note 21, at 26. Compare, e.g., U.C.C. § 1-202, with MTA § 9-107 (defining notice and knowledge); compare U.C.C. § 1-203, with MTA § 9-109 (distinguishing a lease from a security interest); compare U.C.C. § 1-303, with MTA § 9-114 (addressing course of performance, course of dealing, and usage of trade).

59. See BLACKLINE, *supra* note 27, § 9-702, along with accompanying Editor’s Note and footnote. Compare U.C.C. § 1-105, with MTA § 9-702.

60. See BLACKLINE, *supra* note 27, § 9-114, along with accompanying Editor’s Note and footnote. Compare U.C.C. § 1-303, with MTA § 9-114.

other statutory sections from Article 1 as well, including the sections related to notice and knowledge,⁶¹ value,⁶² and distinguishing leases from security interests.⁶³

Nevertheless, the Drafting Committee did not import into the MTA all of the definitions and provisions set forth in Article 1 of the UCC⁶⁴ or in other UCC provisions incorporated by reference into RA9.⁶⁵ Nor did the drafters purge the MTA of all references to such terms.⁶⁶ Unfortunately, certain principles that the committee did not import into the MTA may be relevant to a transaction or case at issue.⁶⁷ If a definition or code section is not imported, parties may look to a new provision added to the MTA which states that the meaning of an **undefined term** is derived from the context, with due consideration for consistency with principles of commercial and contract law.⁶⁸ As one commentator noted, this provision “opens the door” for

61. See BLACKLINE, *supra* note 27, § 9-107, along with accompanying Editor’s Note and footnote. Compare U.C.C. § 1-202, with MTA § 9-107.

62. See BLACKLINE, *supra* note 27, § 9-108, along with accompanying Editor’s Note and footnote. Compare U.C.C. § 1-204, with MTA § 9-108.

63. See BLACKLINE, *supra* note 27, § 9-109, along with accompanying Editor’s Note and footnote. Compare U.C.C. § 1-203(a)-(c), with MTA § 9-109.

64. As previously stated, the Drafting Committee only imported definitions and concepts it deemed necessary to the operation of the MTA. See *supra* note 51 and accompanying text. A quick comparison of the table of contents for UCC Article 1 and the definitions set forth in U.C.C. § 1-201(b) to the table of contents of the MTA and the definitions set forth in MTA § 9-106(a) illustrates that the drafters did not import all code sections or definitions found in Article 1 into the MTA. Compare 2003 UCC OFFICIAL TEXT, *supra* note 21, at 26, and U.C.C. § 1-201(b), with MTA, *supra* note 20, Table of Contents, and MTA § 9-106(a). For example, based on electronic searches of key words, it appears that the drafters did not include in the MTA Article 1 code sections such as U.C.C. § 1-306 (addressing waiver or renunciation of claim or right after breach), or U.C.C. § 1-309 (providing the option to accelerate at will).

65. For instance, U.C.C. § 9-102(b) incorporates by reference over thirty definitions from UCC Articles 2, 2A, 3, 4, 5, and 8. The drafters did not import the definitions of most of these terms into the MTA. Compare U.C.C. § 9-102(b) (listing defined terms incorporated by reference from other UCC articles), with MTA § 9-106(a) (listing general definitions included in the MTA).

66. To illustrate, the Drafting Committee did not import from UCC Article 1 into the MTA the definitions of terms such as “holder,” “money,” “remedy,” or “right.” Compare U.C.C. § 1-201(b)(21), (24), (32), (34), with MTA § 9-106(a). Yet, such terms are found in the MTA. See, e.g., MTA § 9-106(a)(22B) (“holder”), § 9-106(a)(32)(B)(ii) (“money”), 9-404(b)(2) (“remedy”), and § 9-404(e) (“right”).

67. See *supra* note 64 for examples of UCC Article 1 code sections the drafters did not import into the MTA.

68. MTA § 9-106(b).

consideration of definitions found throughout the UCC.⁶⁹ However, it also “opens the door” for interpretative rulings by tribal courts.

B. Concepts Deemed of Limited or No Applicability Were Deleted

Concepts the drafters deemed of limited or no applicability to current tribal needs were deleted from the MTA.⁷⁰ As a result, a number of RA9 concepts, terms, and provisions were removed and no counterparts appear in the MTA.

For example, the MTA does not permit **self-help repossession**,⁷¹ an action allowed under RA9.⁷² Under the MTA, repossession must either be by judicial process or with the debtor’s consent.⁷³ Consent is effective only if given after default and provided in the manner specifically set forth in the statute.⁷⁴

The drafters also eliminated the defined term “agricultural lien” from the MTA⁷⁵ and deleted provisions related to the perfection and priority of agricultural liens.⁷⁶ The MTA, therefore, differs from RA9 in that the Drafting Committee removed the concept of **agricultural liens** from the MTA.⁷⁷ As a result, non-possessory statutory agricultural liens are not within the scope of the MTA.⁷⁸

69. HENNING, *supra* note 7, at vii.

70. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 17. According to the MTA Implementation Guide, the Drafting Committee “recognized that many provisions of Article 9 were unlikely to be appropriate or relevant in Indian Country, at least in the near future, and if included would add unneeded complexity to a tribal secured transactions law.” *Id.* at 14-15. In addition, another objective of the Drafting Committee was “to draft a shorter and less complex law that will facilitate the enactment process” *Id.* at 15; see also HENNING, *supra* note 7, at vi.

71. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 82; see also HENNING, *supra* note 7, at xi.

72. See U.C.C. § 9-609(a)-(b); see also 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, PRACTITIONER TREATISE SERIES § 34-8, at 443 (6th ed. 2010). To understand the differences between RA9 and the MTA with respect to remedies after default, see BLACKLINE, *supra* note 27, § 9-609. Compare U.C.C. § 9-609, with MTA § 9-609.

73. See MTA § 9-609(a).

74. See *id.* (requiring a personal statement, dated, signed, and in the debtor’s handwriting, with required descriptions, acknowledgements, and waivers).

75. See BLACKLINE, *supra* note 27, § 9-106. Compare U.C.C. § 9-102(a)(5), with MTA § 9-106(a).

76. See, e.g., BLACKLINE, *supra* note 27, §§ 9-302, 9-308, 9-310, 9-317.

77. See HENNING, *supra* note 7, at vi n.5.

78. Cf. U.C.C. § 9-101 cmt. 4a (stating RA9 brings non-possessory statutory liens within its scope).

In addition, the MTA contains fewer defined terms.⁷⁹ For instance, the Drafting Committee deleted **certain collateral definitions**, including the definitions of “**electronic chattel paper**,” “**deposit account**,” and “**letter-of-credit right**,”⁸⁰ together with provisions related to control and priority of such collateral.⁸¹ The drafters deleted **over thirty defined terms**,⁸² not including the elimination of **cross-references to definitions contained in other articles of the UCC**.⁸³ For example, the drafters removed the term “**supporting obligation**,”⁸⁴ which is used in RA9 to refer to certain suretyship obligations that support payment or performance, including some guarantees.⁸⁵ Consequently, loan documents may require revision to address these deletions.

Of course, the MTA is intended to serve only as a model act.⁸⁶ Any tribe or nation wishing to reinsert a concept, term, provision, or section from RA9 into the MTA is free to do so.⁸⁷ To that end, the drafters designated certain section numbers and sub-provisions as “reserved” to easily permit additions to and future expansion of the act.⁸⁸ Nevertheless, based on review of several tribal secured transactions codes, additions to the MTA generally appear limited to adding language to address tribal-specific matters rather than reinserting provisions from RA9.⁸⁹

79. While U.C.C. § 9-102(a) contains eighty expressly defined terms, MTA § 9-106(a) contains only sixty. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a), with MTA § 9-106(a).

80. See BLACKLINE, *supra* note 27, § 9-106(a).

81. See, e.g., *id.* §§ 9-104, 9-105, 9-107, 9-304, 9-306, 9-314, 9-318 to 9-319 (indicating the deletion of U.C.C. §§ 9-327, 9-329).

82. See *id.* § 9-106(a) (indicating the drafters struck over thirty defined terms found in U.C.C. § 9-102(a)).

83. See *id.* § 9-106(b)-(c). Compare U.C.C. § 9-102(b)-(c), with MTA § 9-106(b).

84. See, e.g., BLACKLINE, *supra* note 27, §§ 9-106(a), 9-202. Compare U.C.C. § 9-102(a)(77), with MTA § 9-106(a); compare U.C.C. § 9-203, with MTA § 9-202.

85. See U.C.C. §§ 9-101 cmt. 4, 9-102 cmt. 5f.

86. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 16.

87. See HENNING, *supra* note 7, at vi.

88. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 19; see, e.g., MTA §§ 9-105, 9-106(a)(4).

89. See *supra* note 7 for a list of tribal secured transactions codes based on the MTA reviewed by the author. Examples of additions to the model act that address tribal-specific matters include prohibitions against taking security interests in religious or ceremonial historical items, perfecting security interests in motor vehicles under tribal law, treatment of tribal liens, scrutiny afforded to arbitrations, filing procedure information, and appointment of special judges. However, it appears that the Muscogee (Creek) Nation amended its secured transactions code in 2009. See, e.g., MUSCOGEE (CREEK) NATION CODE ANN. tit. 33, §§ 9-106, 9-117 to 9-121 (2010) (indicating the date of addition or amendment in brackets).

Figure 2
PART 1 - GENERAL PROVISIONS
SIMILARITIES AND DIFFERENCES BETWEEN RA9 AND THE MTA
DEFINITIONS

RETAINED DEFINITIONS	RETAINED WITH MODIFICATION ⁹⁰
Accession	Account
As-extracted collateral	Account debtor
Certificate of title	Cash proceeds
Commercial tort claim	Chattel paper
Consignee	Collateral
Consignor	Consignment
Consumer goods	Consumer transaction ⁹¹
Continuation statement	Debtor
Equipment	Document
Financing statement	Farm products
Fixtures	Farming operation
Health-care-insurance receivable	Fixture filing
Inventory	General intangible
Lien creditor	Good faith ⁹²
Manufactured-home transaction	Goods
Payment intangible	Instrument
Promissory note	Manufactured home
Pursuant to commitment	Obligor
Record	Proceeds
Secondary obligor	Public-finance transaction
Security agreement	Registered organization ⁹³
Send	Secured party
Software	State
Termination statement	
Transmitting utility	

following the text of each code section), *available at* <http://www.muscogecreektribal.court.org/index.php/mcn-code-annotated>. At that time, the Nation's legislature reinserted into their code many of the concepts, terms, provisions, and code sections found in RA9 that had been deleted from the MTA. *Compare, e.g.*, U.C.C. § 9-102(a)(5), *with* MUSCOGEE tit. 33, § 9-106.A(5) (reinserting RA9 concept and term "agricultural lien"); *compare* U.C.C. § 9-102(a)(29), *with* MUSCOGEE tit. 33, § 9-106.A(29) (reinserting RA9 term "deposit account"); *compare* U.C.C. § 9-102(c), *with* MUSCOGEE tit. 33, § 9-106.C (reinserting provision addressing definitions found in other statutes); *compare* U.C.C. § 9-104, *with* MUSCOGEE tit. 33, § 9-117 (reinserting RA9 code section addressing control of a deposit account).

90. List includes modifications that consist of more than simply a change in internal formatting or numbering.

91. *See infra* Editor's Notes and footnote following BLACKLINE, *supra* note 27, § 9-106(a)(20).

92. Deleted from definitions code section, but revised definition embedded in MTA § 9-113.

93. Deleted from definitions code section, but revised definition set forth in MTA § 9-316(d).

Figure 3

**PART 1 - GENERAL PROVISIONS
SIMILARITIES AND DIFFERENCES BETWEEN RA9 AND THE MTA
DEFINITIONS**

DELETED⁹⁴ DEFINITIONS⁹⁵	NEW OR IMPORTED DEFINITIONS
Accounting	Agreement ⁺⁺
Agricultural lien	Buyer in ordinary course of business ⁺⁺
Authenticate	Certificated security ⁺⁺
Bank	Consumer ⁺⁺
Commodity account	Contract ⁺⁺
Commodity contract	Control ⁺⁺
Commodity customer	Investment account
Commodity intermediary	Investment intermediary
Communicate	Organization ⁺⁺
Consumer debtor	Person ⁺⁺
Consumer-goods transaction ⁹⁶	Purchase ⁺⁺
Consumer obligor	Purchaser ⁺⁺
Deposit account	Security ⁺⁺
Electronic chattel paper	Security interest ⁺⁺
Encumbrance	Sign ⁺⁺
File number	Tribal business day
Filing office	
Filing-office rule	
Governmental unit	
Investment property	
Jurisdiction of organization	
Letter-of-credit right	
Mortgage	
New debtor	
New value	
Noncash proceeds	
Original debtor	
Person related to ⁹⁷	
Proposal	
Supporting obligation	
Tangible chattel paper	

⁺⁺ Indicates definition imported from another UCC article, but often with modification.

94. The deletion of a definition does not mean that the Drafting Committee purged the word or phrase from the MTA. The term, if used, is simply not defined in the MTA. *See, e.g., supra* Part I.A. MTA § 9-106(b) addresses how users of the MTA should interpret such undefined terms. *See* MTA § 9-106(b).

95. List does not include definitions in other UCC articles incorporated by reference into RA9 that the Drafting Committee decided not to import into the MTA. *See* BLACKLINE, *supra* note 27, § 9-106(b). *Compare* U.C.C. § 9-102(b)-(c), *with* MTA § 9-106.

96. *See infra* Editor's Notes and footnote following BLACKLINE, *supra* note 27, § 9-106(a)(20).

97. Includes definitions with respect to an individual and with respect to an organization.

C. Modifications Made to Simplify and Reduce Complexity

Concepts the drafters deemed of limited applicability to tribes and nations were simplified to reduce the complexity of the act and make it easier to use.⁹⁸ Consequently, some terminology and certain provisions were significantly modified.⁹⁹

In an attempt to simplify provisions related to **investment property**, the drafters deleted certain terms defined in RA9 and replaced them with new terms or revised definitions,¹⁰⁰ resulting in the need to modify statutory sections that contained these terms. For example, the Drafting Committee deleted terms defined in RA9, such as “investment property,”¹⁰¹ “commodity account,”¹⁰² “commodity contract,”¹⁰³ “commodity customer,”¹⁰⁴ and “commodity intermediary;”¹⁰⁵ added new terms, such as “investment account”¹⁰⁶ and “investment intermediary;”¹⁰⁷ and revised the definition of UCC terms, such as “security.”¹⁰⁸ The deletions, additions, and revisions of these terms used throughout the code had a ripple effect that required the Drafting Committee to modify numerous statutory sections to reflect the changed terminology.¹⁰⁹ According to the drafters, the new broader

98. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 17; HENNING, *supra* note 7, at vi.

99. See HENNING, *supra* note 7, at vi (stating certain concepts “were simplified, sometimes drastically”).

100. See *id.* at viii.

101. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a)(49), with MTA § 9-106(a).

102. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a)(14), with MTA § 9-106(a).

103. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a)(15), with MTA § 9-106(a).

104. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a)(16), with MTA § 9-106(a).

105. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a)(17), with MTA § 9-106(a).

106. See BLACKLINE, *supra* note 27, § 9-106(a)(36). Compare MTA § 9-106(a)(36), with U.C.C. § 9-102(a).

107. See BLACKLINE, *supra* note 27, § 9-106(a)(36A). Compare MTA § 9-106(a)(36A), with U.C.C. § 9-102(a).

108. See BLACKLINE, *supra* note 27, § 9-106(a)(52), along with accompanying Editor’s Note and footnote. Compare U.C.C. § 9-102(b) (incorporating by reference the definition of “security” found in U.C.C. § 8-102), and U.C.C. § 8-102(a)(15) (the Article 8 definition of “security”), with MTA § 9-106(a)(52).

109. See, e.g., BLACKLINE, *supra* note 27, §§ 9-106(a)(2)(C)(iv), (a)(31), (a)(32)(B)(ii), (a)(34), 9-202(b)(3)(D), 9-202(c), 9-205(b)(4), 9-310(b)(8), 9-312(a), 9-314(a) (changing references from “investment property” to “investment account”).

definitions result in the MTA covering “virtually all useful forms of what revised Article 9 refers to as investment property.”¹¹⁰

As a consequence of these changes, any lender wishing to take a security interest in investment property must review the new definitions and associated modifications carefully, then revise its documents accordingly before attempting to take a security interest in investment property. The lender must confirm that the investment property intended to be taken as collateral is within the drafters’ definition of “virtually all useful forms” of investment property. Finally, the lender must assure itself that the amended provisions will provide sufficient protection of its interests.

Another illustration is the simplification of the code section relating to **distinguishing a lease from a security interest**. The lease versus security interest issue is one of the most frequently litigated issues under the UCC.¹¹¹ RA9 incorporates by reference the Article 1 section used to determine whether a transaction constitutes a lease governed by the rules set forth in Article 2A or a security interest governed by RA9.¹¹² While the Drafting Committee imported this code section from Article 1 into the MTA,¹¹³ the committee simplified the provision by deleting subsections¹¹⁴ that defined terms used in the economic analysis of the transaction, such as “nominal” and the test for “remaining economic life” and “reasonably predictable” fair market rent, value, and cost.¹¹⁵

Other RA9 provisions have been simplified as well. In another of many such examples, the Drafting Committee simplified the RA9 section addressing **sufficiency of collateral descriptions** by eliminating examples of reasonable identification.¹¹⁶ A quick review of the blackline comparison document in Appendix A will reveal the drafters’ numerous attempts to simplify and shorten the code by purging from the MTA entire provisions, detailed explanations, cross-references, and complex language found in

110. HENNING, *supra* note 7, at viii-ix n.14.

111. *See* WHITE & SUMMERS, *supra* note 72, § 30-3, at 17.

112. *See* U.C.C. §§ 9-102(c), 1-203. U.C.C. § 9-102(c) incorporates by reference Article 1, which includes U.C.C. § 1-203 (distinguishing a lease from a security interest). *See* U.C.C. §§ 9-102(c), 1-203.

113. *See* BLACKLINE, *supra* note 27, § 9-109, along with accompanying Editor’s Note and footnote.

114. *See* HENNING, *supra* note 7, at vii n.9.

115. Subsections (d) and (e) of U.C.C. § 1-203 deleted from MTA § 9-109. *See* BLACKLINE, *supra* note 27, § 9-109, along with accompanying Editor’s Note and footnote. *Compare* U.C.C. § 1-203, *with* MTA § 9-109.

116. The content of subsection (b) of U.C.C. § 9-108 was deleted from MTA § 9-116. *See* BLACKLINE, *supra* note 27, § 9-116. *Compare* U.C.C. § 9-108, *with* MTA § 9-116.

RA9.¹¹⁷ Again, lenders and their counsel must determine whether, given the deleted language, the MTA sufficiently protects the lenders' interests, particularly when the Drafting Committee expressly deleted such provisions while using RA9 as its template. If a risk exists, the lender may wish to consider adding language to its loan documents to address concerns.

Similarly, to reduce the length and lessen the complexities of the act, in lieu of adding detailed statutory language when certain cross-references to other UCC articles appear in RA9, the Drafting Committee often **simplified the statutory language, included references to "applicable law," or added other such descriptive language.**¹¹⁸ As previously discussed, many tribes and nations have not adopted other articles of the UCC.¹¹⁹ Unfortunately, numerous provisions in RA9 reference concepts, rules, and definitions that are set forth in other UCC articles.¹²⁰ A tribe or nation that has not adopted other articles of the UCC cannot draw upon the many UCC provisions cited throughout RA9. This situation forced the Drafting Committee to eliminate cross-references and revise the statutory language.

For example, rather than importing the detailed definition of "security" from UCC Article 8,¹²¹ the drafters of the MTA simply state that the term "'security' includes mutual fund shares that are not in an investment account."¹²² "Mutual fund shares" is not a defined term.¹²³ Thus, the MTA appears to leave the meaning of what constitutes a "security" to interpretation and other law.¹²⁴

In other cases, cross-references are deleted and replaced with a phrase like "other applicable law." For instance, the committee revised the definition of what constitutes a "secured party" by eliminating the cross-references to persons who hold security interests under sections of UCC Articles 2, 2A, 4, and 5, and replacing them with a reference to "other applicable law."¹²⁵ This

117. See generally BLACKLINE, *supra* note 27.

118. See, e.g., HENNING, *supra* note 7, at viii.

119. See generally *supra* Part I.A.

120. See, e.g., BLACKLINE, *supra* note 27, §§ 9-106(a)(51)(E), 9-202(c), 9-315(a), 9-317(g), along with accompanying Editor's Note and footnote, and 9-318(f), along with accompanying Editor's Note and footnote.

121. Through U.C.C. § 9-102(b), RA9 incorporates by reference the definition of "security" found in U.C.C. § 8-102(a)(15). See U.C.C. §§ 9-102(b), 8-102(a)(15).

122. MTA § 9-106(a)(52).

123. See *id.* § 9-106(a).

124. See HENNING, *supra* note 7, at viii n.14.

125. BLACKLINE, *supra* note 27, § 9-106(a)(51)(E). Compare U.C.C. § 9-102(a)(72)(F), with MTA § 9-106(a)(51)(E).

revision raises the question of what constitutes “other applicable law” in a situation where the tribe or nation has not adopted other articles of the UCC.

Likewise, rather than adding detailed statutory language, the drafters frequently eliminated cross-references, replacing them with a variety of descriptive phrases such as “under applicable law,” “under recognized sales and leases law,”¹²⁶ or “any applicable law dealing with entrustment of goods.”¹²⁷ Once again, to what laws do these phrases refer if the tribe or nation has not adopted laws similar to the UCC?

When a tribe or nation has not adopted other articles of the UCC, one may argue that the MTA instructs tribal courts to consider “principles of commercial and contract law operative in the United States.”¹²⁸ In the MTA’s general scope section, the Drafting Committee describes various commercial activities to which the MTA applies¹²⁹ and expressly includes a list of commercial activities governed by the UCC articles that RA9 cross-references.¹³⁰ The committee then added a subsection to the general scope provision with the subheading “Consistency in application,” which states that application of the MTA to such transactions “is to be derived from the context involved, with due consideration for consistency in application with uniform principles of commercial and contract law operative in the United States.”¹³¹ Consequently, a lender must assure itself that the revised code language, coupled with these new MTA sub-provisions, will protect its interests in the contemplated transaction. In addition, the lender must investigate whether the tribe or nation has adopted any laws that may be considered “applicable” and therefore override these provisions.

D. Other Substantive Changes

The MTA also differs significantly from RA9 in many other respects.¹³² A notable example is the change in the **choice-of-law rules governing**

126. See, e.g., BLACKLINE, *supra* note 27, § 9-202(c). Compare U.C.C. § 9-203(c), with MTA § 9-202(c).

127. See, e.g., BLACKLINE, *supra* note 27, § 9-315(a). Compare U.C.C. § 9-315(a), with MTA § 9-315(a).

128. MTA § 9-110(b).

129. *Id.* § 9-110(a); see BLACKLINE, *supra* note 27, § 9-110(a) (indicating language that has been added to the MTA). Compare U.C.C. § 9-109(a), with MTA 9-110(a).

130. Compare MTA § 9-110(a)(4) (describing various commercial activities to which the MTA applies), with 2003 UCC OFFICIAL TEXT, *supra* note 21, I (setting forth a list of the UCC articles and the topics covered).

131. MTA § 9-110(b); see BLACKLINE, *supra* note 27, § 9-110 (indicating language that has been added to the MTA). Compare U.C.C. § 9-109(a)-(b), with MTA 9-110(a)-(c).

132. See, e.g., HENNING, *supra* note 7, at x-xi (providing a list of illustrations).

perfection and priority. Depending on the type of collateral, RA9 looks to the law of the debtor's location¹³³ or the law where the collateral is located for the rules governing the perfection and priority of a security interest.¹³⁴ Under these provisions, law outside the state of enactment may govern perfection and priority issues. In contrast, the MTA states that it generally governs with respect to issues of perfection and priority if the security interest is created pursuant to the act or from the time a debtor or transferee of collateral becomes subject to the act.¹³⁵ As a result, for most collateral, the MTA, rather than another jurisdiction's laws, governs perfection and priority with respect to transactions within the jurisdiction of the tribe or nation.¹³⁶

Another difference between the MTA and RA9 is the **general choice-of-law rules**. RA9 incorporates by reference the choice-of-law rules from Article 1 of the 2003 Official Text of the UCC.¹³⁷ The Drafting Committee imported choice-of-law rules based on language in the prior version of Article 1 instead.¹³⁸ While a substantive change, the Drafting Committee intended to ensure that the MTA's choice-of-law rules are consistent with language adopted by the states.¹³⁹ The Article 1 choice-of-law rules set forth in the 2003 Official Text of the UCC permit parties to choose the jurisdiction whose laws will govern.¹⁴⁰ This provision proved controversial and faced strong opposition.¹⁴¹ As a result, no state adopted the revised provision. Rather, all states retained the prior rule under Article 1¹⁴² that permits parties to choose the jurisdiction whose laws will govern, provided there is a

133. U.C.C. § 9-307 sets forth the rules for determining the location of the debtor. *See id.* § 9-307 & cmt. 2.

134. *Id.* § 9-301.

135. *See* MTA § 9-301(1); *see also* HENNING, *supra* note 7, at x.

136. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 39-40. The MTA Implementation Guide notes that MTA § 9-301 must be read in conjunction with MTA § 9-110(a). *Id.* at 39. MTA § 9-110(a) sets forth the types of transactions to which the MTA applies, provided such transactions are within the jurisdiction of the tribe or nation. MTA § 9-110(a). However, the MTA Implementation Guide notes that the MTA does not attempt to define the jurisdiction of a tribe or nation. As the MTA Implementation Guide explains, "[j]urisdictional issues are left to other law." MTA IMPLEMENTATION GUIDE, *supra* note 10, at 31.

137. U.C.C. § 1-301 (noting parties' power to choose applicable law) is incorporated by reference into RA9 by means of U.C.C. § 9-102(c); *see* U.C.C. §§ 9-102(c), 1-301.

138. *See* HENNING, *supra* note 7, at vii & n.12.

139. *See id.*

140. U.C.C. § 1-301(c).

141. *See* WILLIAM H. LAWRENCE ET AL., UNDERSTANDING SECURED TRANSACTIONS § 9.01, at 204 (4th ed. 2007).

142. *See id.*; *see also* HENNING, *supra* note 7, at vii n.12.

reasonable relationship between the transaction and the chosen jurisdiction.¹⁴³ Consequently, the MTA provision, as revised, reflects the general choice-of-law rule adopted by the states.

Nevertheless, language that the Drafting Committee included in the MTA choice-of-law provision, with respect to situations where such agreements are ineffective, creates important exceptions that differ substantially from the choice-of-law rules set forth in the prior rules under Article 1 and the amendment to the rules in 2008.¹⁴⁴ The MTA states that agreements as to applicable law are ineffective in consumer transactions and to the extent that application of the law would be contrary to a fundamental policy of the tribe or nation.¹⁴⁵ As a result, a choice-of-law agreement in a consumer transaction would be ineffective if the MTA governs the transaction.¹⁴⁶ Similarly, in a non-consumer transaction, a tribal court may deem a choice-of-law agreement ineffective if application of the law of the other jurisdiction would differ from fundamental tribal policies.¹⁴⁷ These exceptions place significant limitations on choice-of-law agreements.

Like the UCC, under the MTA, parties may not contractually vary the choice-of-law rules relating to the perfection or priority of a security interest.¹⁴⁸ However, as previously discussed, the MTA rules relating to the laws that govern perfection and priority differ from RA9.¹⁴⁹ The MTA provides that it will generally govern issues related to perfection and priority if the security interest is created pursuant to the act or from the time a debtor

143. See U.C.C. § 1-105 & cmt. 1 (amended 1999), 1 U.L.A. 104-05 (2004) (replaced by U.C.C. § 1-301 in 2001 and later amended in 2008).

144. Blackline comparison of U.C.C. § 1-105, as amended in 1999, with MTA § 9-117, and blackline comparison of U.C.C. § 1-301, as amended in 2008, with MTA § 9-117, are set forth in footnotes accompanying the Editor's Note to MTA § 9-117. See BLACKLINE, *supra* note 27, § 9-117, along with accompanying Editor's Note and footnotes.

145. MTA § 9-117(b).

146. *Id.* § 9-117(b)(1).

147. *Id.* § 9-117(b)(3). It appears the Drafting Committee based MTA § 9-117(b)(3) on U.C.C. § 1-301(f), the version of the choice-of-law rule that, as noted above, was not adopted by the states and so amended by the NCUSL in 2008. Compare MTA § 9-117(b)(3), with U.C.C. § 1-301(f). The official comment to U.C.C. § 1-301(f) describes the exception as "narrow" and discusses at length the intended judicial constraints on application of the "fundamental policy doctrine." See U.C.C. § 1-301 cmt. 6. Nevertheless, the MTA Implementation Guide does not discuss this exception, note its apparent source, or cite to the comments to U.C.C. § 1-301. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 34. Consequently, how tribal courts will interpret the provision remains to be seen.

148. Compare MTA § 9-117(b)(2), with, e.g., U.C.C. § 1-105(2) (amended 1999), 1 U.L.A. 104-05 (2004), and U.C.C. § 1-301(c)(8) (amended 2008), 1 U.L.A. 26 (Supp. 2011).

149. See *supra* text accompanying notes 132-136.

or transferee of collateral becomes subject to the act.¹⁵⁰ For most collateral, the MTA does not look to the laws of another jurisdiction.¹⁵¹ Consequently, an agreement between the parties stating that another jurisdiction's laws will govern perfection or priority is ineffective.¹⁵²

The Drafting Committee also made a substantive change to Part 5 of RA9. Part 5, which relates to filings, was reduced from twenty-seven sections in RA9 to two sections in the MTA.¹⁵³ Additionally, rather than including all the filing provisions in the MTA, the MTA delegates to the filing office the regulatory authority to implement filing procedures.¹⁵⁴ As a result, **Part 5 of the MTA “is not complete in itself,”** and therefore **must be supplemented by regulations.**¹⁵⁵ To determine filing procedures and ascertain the required forms, one must look outside the statute to tribal regulations or other sources.¹⁵⁶

The blackline comparison document in Appendix A helps to identify some substantive changes. For example, the Drafting Committee modified the definition of the term “**consignment**” by raising the threshold requirement for the aggregate value of goods from \$1000 in RA9 to \$3000 in the MTA,¹⁵⁷ excluding more transactions from the reach of the MTA. The drafters also added a new code section to the MTA permitting the recovery of **costs and**

150. See MTA § 9-301(1); see also HENNING, *supra* note 7, at x.

151. See MTA § 9-301.

152. *Id.* § 9-117(b)(2).

153. See BLACKLINE, *supra* note 27, Part 5. Compare U.C.C. §§ 9-501 to 9-527, with MTA §§ 9-501 to 9-502.

154. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 76; HENNING, *supra* note 7, at x; see also MTA § 9-501(f).

155. See MTA IMPLEMENTATION GUIDE, *supra* note 10 at 74, 76. A commentator involved in the drafting process asserts that Part 5 of the MTA, when supplemented by the Model Rules prepared by the International Association of Corporate Administrators as adapted by the Drafting Committee for the MTA, provides “virtually the same regime as that created by Part 5” of RA9. HENNING, *supra* note 7, at x-xi. Nevertheless, the filing requirements for each tribal act ultimately depend on the type of filing system and procedures the tribe or nation adopts.

156. The MTA Implementation Guide proposes three filing system alternatives: (i) using a state filing system; (ii) the tribe administering its own filing system; or (iii) participating in a joint or collaborative filing system with other tribes or nations. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 93. Consequently, either tribal statutory provisions or filing regulations must direct users to the appropriate state, tribal, or joint filing system rules and requirements.

157. See BLACKLINE, *supra* note 27, § 9-106(a)(17)(B). Compare U.C.C. § 9-102(a)(20)(B), with MTA § 9-106(a)(17).

attorney's fees if a secured party's compliance with the act is placed at issue in an action.¹⁵⁸

The impact of other modifications is not always clear. For instance, the Drafting Committee purged entire code sections and sub-provisions.¹⁵⁹ Such actions leave one to wonder whether the omitted topics are addressed in other provisions or, alternatively, are of limited or no importance. Deleting entire code sections and subsections without explanation can strike fear into the hearts of practitioners concerned about potential substantive implications.

E. Additions to Address Tribal Environment

To address issues unique to a tribal environment, the Drafting Committee added some new provisions and language.¹⁶⁰ For example, the drafters included new statutory sections to deal with matters such as **sovereign immunity**,¹⁶¹ **property not alienable under federal law**,¹⁶² **administration of the act**,¹⁶³ and **authority to promulgate regulations**.¹⁶⁴ The drafters also recognized that modifications to RA9 were required to handle subjects like **jurisdiction**,¹⁶⁵ **tribal liens**,¹⁶⁶ and **tribal customs and traditions**.¹⁶⁷ In addition, the committee included new definitions, such as "**tribal business day**."¹⁶⁸ And finally, the committee determined that a number of RA9 provisions would benefit from express **references to a tribe, a nation, or tribal law**.¹⁶⁹

These provisions and references to tribal law raise the important question of whether the tribe or nation has other laws, statutes, or ordinances that

158. See BLACKLINE, *supra* note 27, § 9-629; see also MTA § 9-629.

159. For example, the Drafting Committee deleted U.C.C. § 2-202 (title to collateral immaterial). See BLACKLINE, *supra* note 27, §§ 9-201 to 9-202. The drafters also deleted U.C.C. § 9-205 (use or disposition of collateral) and U.C.C. § 9-206 (security interest arising in purchase or delivery of financial asset). See *id.* §§ 9-203 to 9-204. Deleted subsections are found in various provisions throughout the act. See, e.g., *id.* §§ 9-204, 9-313.

160. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 14.

161. See BLACKLINE, *supra* note 27, §§ 9-102, 9-117(a); see also MTA §§ 9-102, 9-117(a).

162. See BLACKLINE, *supra* note 27, § 9-104; see also MTA § 9-104.

163. See BLACKLINE, *supra* note 27, § 9-112; see also MTA § 9-112.

164. See BLACKLINE, *supra* note 27, §§ 9-112, 9-501(f); see also MTA §§ 9-112, 9-501(f).

165. See, e.g., BLACKLINE, *supra* note 27, § 9-110(a); see also, e.g., MTA § 9-110(a).

166. See BLACKLINE, *supra* note 27, § 9-111(c); see also MTA 9-111(c).

167. See BLACKLINE, *supra* note 27, § 9-114(c); see also MTA § 9-114(c).

168. See BLACKLINE, *supra* note 27, § 9-106(a)(60); see also MTA § 9-106(a)(60).

169. See, e.g., BLACKLINE, *supra* note 27, §§ 9-106(a)(2)(viii), 9-106(a)(45A)(C), 9-301, 9-313, 9-316.

would impact the operation of the MTA.¹⁷⁰ Therefore, it is imperative that a tribe or nation adopting the MTA reviews its tribal laws to ensure consistency with the MTA. As the MTA Implementation Guide notes, a tribe or nation may find it necessary to amend or repeal certain tribal laws or modify the MTA to create harmonization.¹⁷¹ And in certain situations, the inclusion of references to other tribal laws may be appropriate.¹⁷² The MTA Implementation Guide discusses a number of situations where conflict may arise, such as conflicting consumer credit laws, consumer protection laws, certificate of title laws, collection codes, or laws pertaining to tribal customs and traditions.¹⁷³

Ideally, a tribe adopting the MTA has performed a complete review and amended, repealed, or referenced conflicting laws; but there is no assurance that conflicts with other tribal laws do not exist. Therefore, possible conflicts remain a risk of doing business, unless the lender has assured itself there are no conflicts.

It is also worth noting that the MTA's scope provision states that it only applies to transactions within the **jurisdiction** of the tribe.¹⁷⁴ In the MTA Implementation Guide, the drafters make clear that the MTA does not attempt to define the jurisdiction of the tribe or nation.¹⁷⁵ In fact, the MTA Implementation Guide expressly states that “[j]urisdictional issues are left to other law.”¹⁷⁶

F. Structural Modifications

The Drafting Committee designated certain sections and subsections as “reserved”¹⁷⁷ so that the MTA's numbering system would generally correspond to RA9.¹⁷⁸ The committee stated that its intent was to make the MTA easier to use for those familiar with RA9.¹⁷⁹ The committee, therefore,

170. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 18.

171. See *id.*

172. See *id.* at 18-19.

173. See *id.*

174. See MTA § 9-110(a).

175. MTA IMPLEMENTATION GUIDE, *supra* note 10, at 31.

176. *Id.*; see COHEN, *supra* note 2, ch. 7 (discussing issues related to determining tribal civil jurisdiction).

177. See, e.g., MTA §§ 9-105, 9-106(a)(4).

178. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 19; see also HENNING, *supra* note 7, at vi.

179. See MTA IMPLEMENTATION GUIDE, *supra* note 10, at 16, 19.

retained the general organizational structure of RA9, including divisions designated by parts.¹⁸⁰

Contrary to its stated intent, however, the Drafting Committee made a number of changes to the MTA that resulted in the MTA's structural organization varying from RA9. Consequently, those familiar with the numerical sequencing of RA9 will find that the drafters of the MTA moved numerous provisions¹⁸¹ and made some sweeping structural changes.¹⁸² Therefore, at times, it can be difficult for one familiar with RA9 and UCC Article 1 to locate certain corresponding provisions in the MTA.

Part 1 of the MTA, which contains the **general provisions**, provides a number of illustrations. To accommodate several new provisions unique to a tribal environment at the start of the code,¹⁸³ the Drafting Committee moved provisions found in the beginning of RA9 to other locations in Part 1 of the MTA. For example, definitions found in section 9-102 of RA9 are set forth in section 9-106 of the MTA.¹⁸⁴ The section defining purchase-money security interests found in section 9-103 of RA9 is set forth in section 9-115 of the MTA.¹⁸⁵

Other changes include dividing the scope provision found in section 9-109 of RA9 into two separate sections, section 9-110 of the MTA with the caption "General Scope" and section 9-111 of the MTA with the caption "Excluded Transactions."¹⁸⁶ The provision addressing sufficiency of description found

180. Compare the part heading designations in the table of contents for RA9 and the table of contents for the MTA. Compare 2003 UCC OFFICIAL TEXT, *supra* note 21, at 915-19, with MTA, *supra* note 20, Table of Contents.

181. For example, the definition of "registered organization" found in U.C.C. § 9-102(a)(70) is revised and set forth in MTA § 9-316(d). Compare U.C.C. § 9-102(a)(70), with MTA § 9-316(d). See the footnote accompanying the Editor's Note to MTA § 9-316(d) for a blackline comparison of MTA § 9-316(d) with U.C.C. § 9-102(a)(70). BLACKLINE, *supra* note 27, § 9-316, along with accompanying Editor's Note and footnotes.

182. As an illustration, the Drafting Committee reduced the twenty-three sections that comprise RA9 Subpart 3 of Part 3 dealing with priority to seven sections in the MTA. See BLACKLINE, *supra* note 27, Part 3, Subpart 3. Compare U.C.C. §§ 9-317 to 9-339, with MTA §§ 9-317 to 9-323.

183. See, e.g., MTA § 9-102 (sovereign immunity), § 9-103 (purpose of the act), and § 9-104 (property not alienable).

184. See BLACKLINE, *supra* note 27, § 9-106. Compare U.C.C. § 9-102, with MTA § 9-106.

185. See BLACKLINE, *supra* note 27, § 9-115. Compare U.C.C. § 9-103, with MTA § 9-115.

186. See BLACKLINE, *supra* note 27, §§ 9-110 to 9-111. Compare U.C.C. § 9-109, with MTA §§ 9-110 to 9-111.

in section 9-108 of RA9 is set forth in section 9-116 of the MTA.¹⁸⁷ These examples demonstrate it can sometimes be challenging for one to find a corresponding provision without a cross-reference table or some time and effort.

The drafters made even more dramatic structural changes to the third subpart of **Part 3** relating to **priority**. Specifically, the Drafting Committee revised the priority rules found in RA9 by combining concepts and provisions.¹⁸⁸ As a result, the MTA presents the priority rules in seven, rather than twenty-three, sections.¹⁸⁹

The Drafting Committee also radically altered the organization of **Part 4** concerning the **rights of third parties** by moving, combining, and reorganizing provisions.¹⁹⁰ According to a commentator involved in the drafting process, “[t]he provisions of this part are elegantly drafted and in many respects are clearer than those in the U.C.C. itself.”¹⁹¹ Regardless, such radical restructuring makes it much harder to compare the content of the MTA with RA9.¹⁹²

As previously discussed, **Part 5**, which addresses **filing**, was reduced from twenty-seven sections in RA9 to two sections in the MTA, requiring supplementation from other sources.¹⁹³ In addition, the committee deleted eight **transitional provisions** found in **Part 7** of RA9, and then added a provision concerning severability.¹⁹⁴ The Drafting Committee’s decision to significantly reorganize parts of RA9 by combining provisions and revising statutory language makes comparison of the two acts often a time-consuming and exasperating endeavor.

187. See BLACKLINE, *supra* note 27, § 9-116. Compare U.C.C. § 9-108, with MTA § 9-116.

188. See HENNING, *supra* note 7, at x.

189. See BLACKLINE *supra* note 27, Part 3, Subpart 3. Compare U.C.C. §§ 9-317 to 9-339, with MTA §§ 9-317 to 9-323.

190. See BLACKLINE *supra* note 27, Part 4. Compare U.C.C. §§ 9-401 to 9-409, with MTA §§ 9-401 to 9-404.

191. HENNING, *supra* note 7, at x.

192. See, e.g., BLACKLINE, *supra* note 27, §§ 9-403 to 9-404.

193. See *supra* notes 153-156 and accompanying text.

194. See BLACKLINE, *supra* note 27, Part 7. Compare U.C.C. §§ 9-701 to 9-709, with MTA §§ 9-701 to 9-702.

G. Revised Statutory Language

The Drafting Committee made other changes to the language found in RA9. For example, the drafters **replaced the RA9 term “authenticate” with the word “sign.”**¹⁹⁵ The definition of the term “sign” in the MTA is derived from the definition of “sign” in Article 2 of the UCC, but the wording has been revised.¹⁹⁶ This change resulted in numerous revisions throughout the act where the word “authenticate” had been used in RA9.¹⁹⁷ When working with the MTA, those familiar with pre-RA9 terminology must now adjust to using the term “sign” again, but the definition of the term is revised.

The impact of other changes to RA9’s language is less clear, particularly when the drafters **deleted and modified a series of related defined terms** used throughout the code. For example, the Drafting Committee purged the RA9 terms “consumer debtor,” “consumer obligor,” and “consumer transaction;” added the term “consumer;” and revised the term “consumer-goods transaction” and changed it to “consumer transaction.”¹⁹⁸ The changes to these defined terms raise the question: what is the substantive impact, if any? Also, given that these terms are used throughout the code, do the changes to these terms when employed in different code sections and various contexts result in any substantive impact?

The Drafting Committee also amended the wording in some circumstances. Many of these revisions appear to have no substantive impact. For instance, **in certain circumstances**, the Drafting Committee **modified part headings,**¹⁹⁹ **deleted subpart headings,**²⁰⁰ **altered**

195. The Drafting Committee deleted the defined term “authenticate” from RA9 and added the defined term “sign” to the MTA. See BLACKLINE, *supra* note 27, § 9-106(a). Compare U.C.C. § 9-102(a), with MTA § 9-106(a).

196. See HENNING, *supra* note 7, at vi n.6 (also noting that the drafters’ intent was to revise the MTA so that the use of terminology in the MTA would be consistent with future changes to other articles of the UCC then contemplated by the NCCUSL and the ALI). See BLACKLINE, *supra* note 27, § 9-106(a)(56), along with accompanying Editor’s Note and footnotes. Compare U.C.C. § 2-103(1)(p), with MTA § 9-106(a)(56).

197. See, e.g., BLACKLINE, *supra* note 27, §§ 9-202(b)(3)(A), 9-205(b), 9-312(e), 9-313(c), 9-319(f)(1), 9-608(a)(1)(C), 9-615(a).

198. See *id.* § 9-106(a).

199. For example, compare the heading for Part 2 of RA9 in the 2003 UCC OFFICIAL TEXT, *supra* note 21, titled “Effectiveness of Security Agreement; Attachment of Security Interest; Rights of Parties to Security Agreement” with the heading for Part 2 of the MTA, *supra* note 20, titled “Effectiveness, Attachment and Rights of Parties.”

200. For example, the Drafting Committee deleted the subpart headings in Part 1 and Part 2 of RA9 when drafting the MTA. Compare 2003 UCC OFFICIAL TEXT, *supra* note 21, at 915, with MTA, *supra* note 20, Table of Contents for pts. 1 & 2.

captions,²⁰¹ and revised statutory language the drafters apparently considered redundant²⁰² or determined could benefit from editing.²⁰³ Some of these revisions appear to inadvertently add grammatical or typographical errors.²⁰⁴ While many of these modifications seem to have no substantive impact, such changes raise issues and make comparison of the two acts more difficult.

H. Formatting Changes

Changes to the RA9 format also appear throughout the MTA. Many of these formatting changes, however, appear to have no substantive effect. For example, the Drafting Committee sometimes **changed subsection designations, punctuation, indentation, and formatting.**²⁰⁵ While the drafters' intent may have been to improve readability and facilitate ease of use, such changes make direct comparisons of sub-provisions more challenging.

201. The drafters of the MTA modified some section captions and some subsection headings as well. *Compare, e.g.*, U.C.C. § 9-102, *with* MTA § 9-106 (with the MTA adding the word “general” before the word “definitions” in the caption); *compare* U.C.C. § 9-103, *with* MTA § 9-115 (with the MTA deleting the phrases “Application of Payments; Burden of Establishing” in the caption, although the MTA retains both the application of payment and burden of proof sub-provisions); *compare* U.C.C. § 9-204, *with* MTA § 9-203 (with the MTA revising subsection headings); *compare* U.C.C. § 9-210, *with* MTA § 9-207 (with the MTA deleting subsection headings).

202. *See, e.g.*, BLACKLINE, *supra* note 27, §§ 9-106(a)(12), 9-106(a)(32).

203. *See, e.g., id.* §§ 9-115(e), 9-602.

204. *See, e.g., id.* § 9-106(a)(12)(B) (changing “evidence” to “evidences”); *id.* § 9-318(j) (reference to “security interested perfected” should be “security interest perfected”); *id.* § 9-601 (no subsection (c)); *id.* § 9-603 (incorrect cross-reference to § 9-603 should be to § 9-602 dealing with waiver and variance of rights and duties).

205. For example, the drafters revised the definition of the term “account” by adding new subsection designations (A), (B), and (C), deleting redundant terms, changing punctuation, and indenting the lists of items under (A), (B), and (C), thereby changing the format of the provision. *See* BLACKLINE, *supra* note 27, § 9-106(a)(2). *Compare* U.C.C. § 9-102(a)(2), *with* MTA § 9-106(a)(2).

II. Evaluating the Impact of Changes

Given the numerous additions, deletions, revisions, and modifications in structure and format, this article makes no attempt to address every change in the MTA from RA9. It provides only a general overview of differences between RA9 and the MTA to alert practitioners and tribal judges to certain significant alterations. Appendix A, which contains a blackline comparison of the two acts,²⁰⁶ is designed to assist those interested in identifying other changes that may impact a transaction or case at issue.

It is also worth noting that the contents of Article 9 adopted by state legislatures often varies, in at least some respects, from the versions of Article 9 promulgated by the NCCUSL and the ALI.²⁰⁷ Consequently, an attorney may find that a provision of Article 9 adopted by the state in which he or she practices varies from the 2003 Official Text of the UCC used as the model for the MTA. Similarly, a tribe may add, delete, or revise statutory language suggested by the drafters of the MTA. As a result, the enacted tribal code may differ, in some respects, from the MTA as promulgated by the NCCUSL.²⁰⁸ Such variations may have a substantive impact.²⁰⁹ No attempt has been made to identify state or tribal variations in this article.

So, how should an attorney proceed in identifying changes that may impact a transaction, particularly when some changes have a ripple effect impacting a number of statutory sections? Assume, for example, that a lender wishes to take a security interest in some form of investment property. Since the drafters of the MTA deleted the term “investment property” and replaced it with new terminology,²¹⁰ it is strongly suggested that the attorney involved in the transaction electronically search his or her state’s version of

206. See generally BLACKLINE, *supra* note 27.

207. See, e.g., LARY LAWRENCE, LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE, LOCAL CODE VARIATIONS (3d ed. 2010).

208. See, e.g., SAC & FOX NATION CODE OF LAWS tit. 27, § 9-106(a)(57) (adding definition for “Tribe” or “Nation”); *id.* § 9-106(a)(61) (adding definition for “Court” or “Tribal Court”) (2009), available at <http://sacandfoxnation-nsn.gov/government/judicial/code-of-laws/> (follow “Code of Laws” hyperlink; then follow “27 Article 9 – Secured Transactions” hyperlink). Compare MTA § 9-106(a), with SAC & FOX tit. 27, § 9-106(a).

209. See, e.g., SAC & FOX tit. 27, § 9-303a (adding a new code section to address security interests in motor vehicles); *id.* § 9-601(h) (adding a new subprovision stating that arbitration is generally subject to heightened scrutiny); *id.* 9-609(a) (adding language to the subsection empowering the court to immediately issue a restraining order, temporary injunction, writ, or other equitable order under specific circumstances). Compare MTA, Part 3, with SAC & FOX tit. 27, § 9-303a; MTA § 9-601, with SAC & FOX tit. 27, § 9-601(h); MTA § 9-609(a), with SAC & FOX tit. 27, § 9-609(a).

210. See discussion *supra* Part I.C.

Article 9 and identify all statutory sections that reference the term “investment property.” Then, the attorney should use the blackline comparison set forth in Appendix A of this article to review the changes made in the MTA. By noting how the MTA differs from Article 9, an attorney may determine what modifications must be made to form loan documents and uncover any other changes that may have an impact on the transaction at issue.

The attorney must also review the tribal version of the MTA to confirm that the tribe or nation has adopted the language set forth in the MTA and has not deleted or inserted any additional language related to the subject. It is strongly advised that those relying on this article identify changes from RA9, and review the enacted statutes closely to identify state variations from the UCC and tribal variations from the MTA.

III. Transactional Checklist

An attorney working with a tribal secured transactions code must first determine whether the tribal code is based on the MTA. The lawyer may compare the enacted tribal secured transactions code to the online version of the MTA found on the NCCUSL website.²¹¹ If the tribal code is based on the MTA, the attorney may wish to download the MTA Implementation Guide, a document that provides extensive commentary and interpretative guidance.²¹²

Like the UCC, the MTA references other laws, regulations, and information not contained in the act.²¹³ Therefore, a lender and its counsel should consider reviewing other relevant laws, regulations, and information that may impact interpretation of the act. Figure 4 sets forth a transactional checklist for attorneys who will be working with tribal secured transaction codes based on the MTA. A lender and its counsel should consider reviewing these materials before entering into a transaction under a tribal code based on the MTA.

211. *See supra* note 20.

212. *See supra* note 10.

213. *Compare, e.g.*, U.C.C. § 9-201(b)-(c), with MTA § 9-201(b)-(c) (both referencing consumer protection statutes and laws regulating lending practices.)

Figure 4

TRANSACTIONAL CHECKLIST

- ▶ **Obtain copy of enacted tribal secured transactions code**
- ▶ **Compare enacted code to MTA to determine whether tribal act is based on the MTA**²¹⁴
- ▶ **If enacted code is based on the MTA, download MTA Implementation Guide to consult for interpretative guidance**²¹⁵
- ▶ **Confirm that there are no restraints on alienation that may bar the creation or enforcement of a security interest in the collateral offered to secure the loan, such as:**
 - federal restrictions regarding sale, transfer, or encumbrance²¹⁶
 - local customs or traditions²¹⁷
- ▶ **Determine the tribal department or division charged with administration of the act under the enacted code**²¹⁸ **and acquire copies of any:**
 - filing regulations
 - any other regulations promulgated
 - any interpretative guidance issued
- ▶ **Ascertain whether the tribe or nation has enacted laws based on other articles of the Uniform Commercial Code,**²¹⁹ **if so locate copies.**

214. *See supra* note 20.

215. *See supra* note 10.

216. *See* MTA § 9-104.

217. *See* MTA § 9-114(c).

218. *See* MTA § 9-112; MTA IMPLEMENTATION GUIDE, *supra* note 10, at 32.

219. Throughout the MTA, there are numerous times that the Drafting Committee deleted specific citations to the UCC and replaced such citations with references to “other applicable law.” *See, e.g.,* BLACKLINE, *supra* note 27, § 9-202(c). If the tribe or nation has adopted other articles of the UCC, such laws then may be cross-referenced in the MTA through the descriptive language added to the MTA in place of the specific cross-references provided in RA9.

► **Investigate whether the tribe or nation has adopted any laws that may conflict with or override terms of the enacted secured transactions code, including laws relating to:**

- tribal liens²²⁰
- consumer protection²²¹
- regulating lending practices²²²

► **Determine whether the tribe or nation has adopted a certificate-of-title statute and obtain a copy, if relevant to the transaction.**²²³

► **Obtain a calendar that sets forth the days on which government offices of the tribe or nation are open for conducting ordinary business or a list of tribal holidays, since a number of provisions of the MTA require action within a fixed period of time based on tribal business days.**²²⁴

220. Even though by its terms the MTA does not apply to tribal liens, the MTA nevertheless governs priority disputes between secured creditors and certain possessory lienholders. *See* MTA §§ 9-111(c), 9-318(k). In addition, tribal law should govern priority disputes between secured creditors and lienholders in contexts other than possessory liens. *Cf.* 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE, PRACTITIONER TREATISE SERIES § 30-12, at 100-05 (6th ed. 2010).

221. *See* MTA § 9-201(b)-(c).

222. *See* MTA § 9-201(b)-(c).

223. *See* MTA §§ 9-303, 9-311.

224. *See* MTA § 9-106(a)(60) (defining the term “tribal business day”). *See, e.g.*, MTA §§ 9-205(b)-(c), 9-207(b), 9-610(b), 9-616(a), 9-620(c)(2).

APPENDIX A

VARIATIONS BETWEEN REVISED ARTICLE 9 OF THE
UNIFORM COMMERCIAL CODE AND THE MODEL TRIBAL
SECURED TRANSACTIONS ACT²²⁵

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Introduction

The Model Tribal Secured Transactions Act (MTA)²²⁸ is derived primarily from Revised Article 9 (RA9) as set forth in the 2003 Official

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226. Unless otherwise specified, the text of the Uniform Commercial Code reproduced in connection with this Appendix reflects the content of electronic documents dated March 8, 2006, provided by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to the author, which included: Revised Article 9 with 2001 amendments; Article 1 as revised in 2001; Article 2 as amended in 2003; and Article 8 as revised in 1994.

227. The text of the Model Tribal Secured Transactions Act reproduced in connection with this Appendix reflects the content of the electronic document dated March 2006 obtained online from the NCCUSL website at http://www.uniformlaws.org/shared/docs/mtsta/mtsta_mar06_final.doc.

228. See generally MODEL TRIBAL SECURED TRANSACTIONS ACT (2006), http://www.uniformlaws.org/shared/docs/mtsta/mtsta_mar06_final.pdf [hereinafter MTA].

Text²²⁹ of the Uniform Commercial Code (UCC).²³⁰ The 2003 Official Text includes, in addition to other provisions, Article 1 (General Provisions) as revised in 2001; Article 2 (Sales) as amended in 2003; Article 8 (Investment Securities) as revised in 1994; and Revised Article 9 (Secured Transactions) as promulgated in 1998 and as subsequently amended and modified in 1999, 2000, and 2001.²³¹ All references and citations in this Appendix to the Uniform Commercial Code and its various provisions refer to the 2003 Official Text of the UCC, unless otherwise specified.

The text of the UCC reproduced in connection with this Appendix reflects the content of electronic documents provided to the author by the National Conference of Commissioners on Uniform State Laws (NCCUSL).²³² The text is reproduced with the express permission of NCCUSL and The American Law Institute. The text of the MTA reproduced in connection with this Appendix reflects the content of an electronic document dated March 2006 obtained online from the NCCUSL website and is reproduced with the express permission of NCCUSL.²³³

Appendix A provides two cross-reference tables. The first table indicates the source or derivation of each MTA section.²³⁴ The second table lists each RA9 section and the corresponding MTA section, if any.²³⁵ The

229. The 2003 Official Text of the UCC may be found in the UNIFORM COMMERCIAL CODE, OFFICIAL TEXT AND COMMENTS (2004 ed.) (current through the end of 2003) [hereinafter 2003 UCC OFFICIAL TEXT]. The 2003 UCC OFFICIAL TEXT is available online at HeinOnline, a fee-based legal research database subscription service, at <http://heinonline.org> (under “Subscribed Libraries”, follow “American Law Institute Library” hyperlink; click on “III. CODIFICATIONS AND OTHER PROJECTS”; then click on “COMMERCIAL CODE”, the Uniform Commercial Code Official Texts and Comments are at the bottom of the results).

230. See IMPLEMENTATION GUIDE AND COMMENTARY TO THE MODEL TRIBAL SECURED TRANSACTIONS ACT 11 & n.1 (2005), http://www.uniformlaws.org/shared/docs/mtsta/mtsta_implemguide_jun05.pdf [hereinafter MTA IMPLEMENTATION GUIDE].

231. 2003 UCC OFFICIAL TEXT, *supra* note 229, at III.

232. See *supra* note 226 and accompanying text. It was represented to the author that the electronic documents provided by NCCUSL contained copies of the UCC articles set forth in the 2003 UCC OFFICIAL TEXT. The author later discovered that, with respect to at least one subprovision, the electronic documents differ from the published text. Compare UCC § 9-102(b) (containing a reference to “‘Issuer’ (with respect to documents of title) Section 7-102”), with BLACKLINE § 9-106(b) (containing no such reference). It is not known whether there are any undiscovered variations. No other variations have come to the author’s attention despite repeated use and comparisons by the author and her research assistants.

233. See *supra* note 227 and accompanying text.

234. See *infra* Appendix A, Table I.

235. See *infra* Appendix A, Table II.

cross-reference tables are followed by a provision-by-provision comparison of the MTA with RA9 of the UCC and other pertinent UCC provisions.²³⁶

The blackline comparison visually illustrates the differences that exist between RA9 of the UCC and the MTA. The blackline comparison enables users to identify variations between RA9 and the MTA due to additions, modifications, or omissions and to find RA9 provisions that have been moved to other locations in the MTA.²³⁷

In the blacklined text, additions to RA9 are indicated with underlining (e.g., underlining). Deletions from RA9 are indicated with strikethrough type (e.g., ~~strikethrough type~~). Additions generally follow deletions. RA9 sections or subsections that have been moved to other locations in the MTA are indicated by italicizing the caption of the RA9 section or subsection (e.g., *italicized*). The location to which the provision has been moved is provided in editorial notations. Such editorial comments are set forth in bold, in italics, and designated as an “Editor’s Note” (e.g., ***Editor’s Note***).

Editorial comments to assist the user in comparing the acts appear throughout the blacklined text. For example, editor’s comments direct a reader familiar with the numerical sequencing of RA9 to a definitional section found later in the MTA.²³⁸ The comments also provide information about provisions imported into the MTA from Articles 1, 2, and 8 of the UCC.²³⁹ In addition, associated footnotes set forth blacklined comparisons of the language in the MTA with text imported from other articles of the UCC.²⁴⁰

Given the extent of additions, modifications, and omissions,²⁴¹ editing and reformatting was required to make the content easily readable and to

236. See *infra* Appendix A, BLACKLINE COMPARISON [hereinafter BLACKLINE]. All section number citations in this Appendix designated BLACKLINE are to the MTA section number set forth in the blackline comparison.

237. It should be noted that the version of RA9 adopted by a state legislature often varies in at least some respects from RA9 as promulgated by The American Law Institute (ALI) and NCCUSL. See, e.g., LAWRENCE’S ANDERSON ON THE UNIFORM COMMERCIAL CODE, LOCAL CODE VARIATIONS (3d ed., 2010). No attempt has been made to identify state variations from RA9. In addition, the MTA adopted by tribes and nations also may vary from the MTA as promulgated by NCCUSL. Again, no attempt has been made to identify tribal variations from the MTA. Consequently, it is advised that users check for state and tribal variations as well.

238. See *infra* Editor’s Note accompanying BLACKLINE § 9-102.

239. See, e.g., *infra* Editor’s Notes accompanying BLACKLINE §§ 9-106(a)(10), 9-106(a)(56), 9-107.

240. See, e.g., *infra* Editor’s Notes and accompanying footnotes to BLACKLINE §§ 9-103, 9-109.

241. See *infra* Appendix A, BLACKLINE COMPARISON.

provide a suitable reference guide. For example, some changes in spacing and formatting between the two acts are not noted. Some apparent typographical and formatting errors have been corrected in the comparison document. In other circumstances, obvious typographical errors remain uncorrected.²⁴² It also is worth noting that blacklining software did not generate a comprehensible reference guide due to the scope and extent of changes between the two acts. Extensive editing of any electronically generated comparison of provisions or subprovisions was required to create an accurate, easily readable, and usable blacklined comparison document. As a result, the blacklined comparison text is essentially a manually produced document, edited line-by-line and provision-by-provision, using the utmost care, with checking and rechecking by multiple parties. Of course, inadvertent minor deviations are inevitable with such a process given the length and breadth of the acts and the extensive use of electronic coding. Nevertheless, based on repeated use, the blacklined text has proven extremely accurate and helpful in identifying the similarities and differences between RA9 and the MTA.

242. See, e.g., BLACKLINE §§ 9-106(a)(12)(B) (changing “evidence” to “evidences”), 9-318(j) (reference to “security interested perfected” should be “security interest perfected”), 9-601 (no subsection (c)), 9-603 (incorrect cross-reference to section 9-603 should be to section 9-602 dealing with waiver and variance of rights and duties).

Appendix A: Figure 1

**TABLES INDICATING
SOURCES OR DERIVATIONS OF MTA SECTIONS AND
REVISED ARTICLE 9 AND CORRESPONDING MTA SECTIONS**

▶ **All UCC citations are to the 2003 Official Text of the UCC, unless otherwise specified**

- The 2003 Official Text includes:
 - Article 1 (General Provisions) as revised in 2001
 - Article 2 (Sales) as amended in 2003
 - Article 8 (Investment Securities) as revised in 1994
 - Article 9 (Secured Transactions) as promulgated in 1998 and as subsequently amended and modified in 1999, 2000, and 2001

▶ **All MTA citations are to the MTA 2005 Final Act as published on the NCCUSL website, which includes all technical amendments through March 2006**

▶ **The drafters of the MTA deleted, simplified, modified or revised extensively many sections of RA9**

- See blacklined text comparison to determine the extent of changes to a specific code section

▶ **Table Notations Key**

- (New) New provision added to the MTA where no comparable provision identified in RA9 or incorporated by reference into RA9
- (Reserved) MTA provision designated reserved for future use
- Blank No corresponding provision identified

**TABLES INDICATING
SOURCES OR DERIVATIONS OF MTA SECTIONS AND REVISED
ARTICLE 9 AND CORRESPONDING MTA SECTION**

**TABLE I
SOURCES OR DERIVATIONS OF MTA SECTIONS**

**MTA SECTIONS AND CORRESPONDING
REVISED ARTICLE 9 OR OTHER UCC SECTIONS²⁴³**

Note: The drafters of the MTA simplified, modified, or revised extensively many sections of RA9. See blacklined text comparison to determine the extent of changes to a specific code section. All UCC citations are to the 2003 Official Text of the UCC, unless otherwise specified.

**PART I
GENERAL PROVISIONS**

<u>MTA Section</u>	<u>Primary Sources: RA9 or Other UCC Sections</u>
9-101	9-101
9-102 (New)	
9-103	1-103
9-104 (New)	
9-105 (Reserved)	
9-106	9-102, 1-201, 8-102, 8-106, 9-106, 2-103
9-107	1-202
9-108	1-204
9-109	1-203
9-110	9-109, 9-110
9-111	9-109
9-112 (New)	
9-113	1-304, 1-201, 9-102
9-114	1-303
9-115	9-103
9-116	9-108
9-117	1-105 as amended in 1999, 1-301

243. See *supra* Appendix A, Figure 1, for table notation key and other relevant information relating to the sources and derivations table.

PART 2**EFFECTIVENESS, ATTACHMENT AND RIGHTS OF PARTIES**

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-201	9-201
9-202	9-203
9-203	9-204
9-204	9-207
9-205	9-208, 9-209
9-206 (Reserved)	
9-207	9-210

PART 3**PERFECTION AND PRIORITY****SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY**

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-301	9-301
9-302 (Reserved)	
9-303	9-303
9-304 (Reserved)	
9-305 (Reserved)	
9-306 (Reserved)	
9-307 (Reserved)	

SUBPART 2. PERFECTION

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-308	9-308
9-309	9-309
9-310	9-310
9-311	9-311
9-312	9-312
9-313	9-313
9-314	9-314
9-315	9-315
9-316	9-316, 9-307, 9-102

SUBPART 3. PRIORITY

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-317	9-317, 9-322
9-318	9-319, 9-320, 9-321, 9-330, 9-331, 9-323, 9-324, 9-332, 9-328, 9-333
9-319	9-334
9-320	9-335
9-321	9-336
9-322	9-337
9-323	9-339

**PART 4
RIGHTS OF THIRD PARTIES**

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-401	9-401
9-402	9-402
9-403	9-403, 9-404, 9-406, 9-405
9-404	9-406, 9-408

**PART 5
FILING**

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-501	9-501, 9-502, 9-516, 9-520, 9-517, 9-506, 9-338, 9-525, 9-526
9-502	9-502, 9-504, 9-108, 9-513, 9-514, 9-515, 9-512, 9-521, 9-503, 9-516, 9-505, 9-510, 9-509, 9-507, 9-508

**PART 6
DEFAULT**

SUBPART 1. DEFAULT AND ENFORCEMENT OF SECURITY INTERESTS

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-601	9-601
9-602	9-602
9-603	9-603

9-604	9-604
9-605	9-605
9-606 (Reserved)	
9-607	9-607
9-608	9-608
9-609	9-609
9-610	9-610
9-611	9-611
9-612	9-612
9-613	9-613, 9-614
9-614 (Reserved)	
9-615	9-615
9-616	9-616
9-617	9-617
9-618	9-618
9-619	9-619
9-620	9-620, 9-621, 9-622
9-621 (Reserved)	
9-622 (Reserved)	
9-623	9-623
9-624	9-624

SUBPART 2. NONCOMPLIANCE WITH [ACT]

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-625	9-625
9-626	9-626
9-627	9-627
9-628	9-628
9-629 (New)	

PART 7 MISCELLANEOUS PROVISIONS

<u>MTA Section</u>	<u>RA9 or Other UCC Sections</u>
9-701	9-701
9-702	1-105

TABLE II
REVISED ARTICLE 9 AND CORRESPONDING MTA SECTION²⁴⁴

Note: The drafters of the MTA simplified, modified, or revised extensively many sections of RA9. See the blacklined text comparison to determine the extent of changes to a specific code section. All UCC citations are to the 2003 Official Text of the UCC, unless otherwise specified.

PART 1
GENERAL PROVISIONS

SUBPART 1. SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS

<u>RA9 Section</u>	<u>MTA Section</u>
9-101	9-101
9-102	9-106, 9-113, 9-316
9-103	9-115
9-104	
9-105	
9-106	9-106(a)(22A), (22B), (22C)
9-107	
9-108	9-116, 9-502

SUBPART 2. APPLICABILITY OF ARTICLE

<u>RA9 Section</u>	<u>MTA Section</u>
9-109	9-110, 9-111
9-110	9-110

244. See *supra* Appendix A, Figure 1, for table notation key and other relevant information relating to the RA9 and corresponding MTA section table.

PART 2
EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF
SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT

SUBPART 1. EFFECTIVENESS AND ATTACHMENT

<u>RA9 Section</u>	<u>MTA Section</u>
9-201	9-201
9-202	
9-203	9-202
9-204	9-203
9-205	
9-206	

SUBPART 2. RIGHTS AND DUTIES

<u>RA9 Section</u>	<u>MTA Section</u>
9-207	9-204
9-208	9-205
9-209	9-205
9-210	9-207

PART 3
PERFECTION AND PRIORITY

SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY

<u>RA9 Section</u>	<u>MTA Section</u>
9-301	9-301
9-302	
9-303	9-303
9-304	
9-305	
9-306	
9-307	9-316

SUBPART 2. PERFECTION

<u>RA9 Section</u>	<u>MTA Section</u>
9-308	9-308
9-309	9-309
9-310	9-310

9-311	9-311
9-312	9-312
9-313	9-313
9-314	9-314
9-315	9-315
9-316	9-316

SUBPART 3. PRIORITY

<u>RA9 Section</u>	<u>MTA Section</u>
9-317	9-317
9-318	
9-319	9-318
9-320	9-318
9-321	9-318
9-322	9-317
9-323	9-318
9-324	9-318
9-325	
9-326	
9-327	
9-328	9-318
9-329	
9-330	9-318
9-331	9-318
9-332	9-318
9-333	9-318
9-334	9-319
9-335	9-320
9-336	9-321
9-337	9-322
9-338	9-501
9-339	9-323

SUBPART 4. RIGHTS OF BANKS

<u>RA9 Section</u>	<u>MTA Section</u>
9-340	
9-341	
9-342	

**PART 4
RIGHTS OF THIRD PARTIES**

<u>RA9 Section</u>	<u>MTA Section</u>
9-401	9-401
9-402	9-402
9-403	9-403
9-404	9-403
9-405	9-403
9-406	9-403, 9-404
9-407	
9-408	9-404
9-409	

**PART 5
FILING**

**SUBPART 1. FILING OFFICE; CONTENTS AND EFFECTIVENESS OF
FINANCING STATEMENT**

<u>RA9 Section</u>	<u>MTA Section</u>
9-501	9-501
9-502	9-501, 9-502
9-503	9-502
9-504	9-502
9-505	9-502
9-506	9-501
9-507	9-502
9-508	9-502
9-509	9-502
9-510	9-502
9-511	
9-512	9-502
9-513	9-502
9-514	9-502
9-515	9-502
9-516	9-501, 9-502
9-517	9-501
9-518	

SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE

<u>RA9 Section</u>	<u>MTA Section</u>
9-519	
9-520	9-501
9-521	9-502
9-522	
9-523	
9-524	
9-525	9-501
9-526	9-501
9-527	

**PART 6
DEFAULT**

SUBPART 1. DEFAULT AND ENFORCEMENT OF SECURITY INTEREST

<u>RA9 Section</u>	<u>MTA Section</u>
9-601	9-601
9-602	9-602
9-603	9-603
9-604	9-604
9-605	9-605
9-606	
9-607	9-607
9-608	9-608
9-609	9-609
9-610	9-610
9-611	9-611
9-612	9-612
9-613	9-613
9-614	9-613
9-615	9-615
9-616	9-616
9-617	9-617
9-618	9-618
9-619	9-619
9-620	9-620
9-621	9-620
9-622	9-620
9-623	9-623
9-624	9-624

SUBPART 2. NONCOMPLIANCE WITH ARTICLE**RA9 Section**

9-625

9-626

9-627

9-628

MTA Section

9-625

9-626

9-627

9-628

**PART 7
TRANSITION****RA9 Section**

9-701

9-702

9-703

9-704

9-705

9-706

9-707

9-708

9-709

MTA Section

9-701

BLACKLINE COMPARISON

COMPARING
THE MODEL TRIBAL SECURED TRANSACTIONS ACT
WITH REVISED ARTICLE 9 OF THE UNIFORM COMMERCIAL CODE

*See <http://www.ailr.net/bdoc.pdf>
for the text of the blackline comparison document*

BLACKLINE COMPARISON NOTATION KEY

- ▶ **Additions to RA9 are indicated with underlining**
(e.g., underlining)

- ▶ **Deletions from RA9 are indicated with strikethrough type**
(e.g., ~~strikethrough type~~)

- ▶ **RA9 sections or subsections that have been moved to other locations in the MTA are indicated by italicizing the caption of the RA9 section or subsection**
(e.g., *italicized*)

- ▶ **Editorial comments are set forth in bold, in italics, and designated as an “Editor’s Note”**
(e.g., *Editor’s Note*)