JUSTIN MONSENEPWO

The Law Applicable to Security Interests in Intermediated Securities Under OHADA Law

Max-Planck-Institut für ausländisches und internationales Privatrecht

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To Laurie, Glory, Grace, and Hope

Preface

This book is the result of my doctoral research, accepted as a doctoral dissertation by the Faculty of Law of the Julius Maximilian University of Würzburg in January 2021. It aims at finding clear and efficient conflict of laws rules for the determination of the law governing proprietary rights in respect of security interests in intermediated securities under the law of the Organisation for the Harmonisation of Business Law in Africa (hereinafter referred to as OHADA). In the OHADA region, securities holding patterns have drastically changed in the last decades. Besides securities certificates that are held directly by an investor, there are an increasing number of securities that are held via an intermediary within a so-called "indirect holding system". These securities that are indirectly held with intermediaries (or intermediated securities) are often provided as collaterals. However, if the intermediated system has increased the breadth and the depth of the securities markets in the OHADA regions, it has also allowed different and divergent applicable laws to occur within a cross-border securities holding chain. Unfortunately, there is no common and adapted legal approach in the OHADA region as to the determination of the law governing proprietary issues affecting intermediated securities. Consequently, an investor will suffer a risk if the adjudicating forum selects an unexpected law by which the validity of the collateral interest in the intermediated securities is to be ascertained.

From a substantive law perspective, the current rules governing the constitution, the perfection, and the realisation of the pledge of intermediated securities are enshrined in Articles 146 et seq of the OHADA Uniform Act on Security Interests. Unlike the Geneva Securities Convention, the Financial Collateral Directive, and Article 8 of the Uniform Commercial Code, the scope of Articles 146 et seq of the Uniform Act on Security Interests does not encompass title transfer collateral agreements, including repurchase agreements. Under Article 149 of the Uniform Act, the pledged securities account must take the form of a special account open in the name of the account holder and maintained by the issuing legal entity or a financial intermediary.

From a private international law perspective, the *lex rei sitae* (or the *lex cartae sitae*) rule is currently applied in all OHADA Member States to determine the law applicable to security interests in intermediated securities. However, with the dematerialisation (*Entmaterialisierung*) of securities certifi-

cates, the root of title is no longer either a piece of paper or the company's register. Rather, it is an electronic book entry on the books of a central operator. Therefore, it is difficult to determine the "situs" of intermediated securities in an indirect holding system. In search for a more appropriate connecting factor, this book analyses the European PRIMA rule (Article 9(2) of the Settlement Finality Directive, Article 9 of the Finality Directive, and Article 24 of the Winding-up Directive), whereby the law applicable to book entry securities provided as collateral is the law of the jurisdiction where the relevant register, account, or centralised deposit system is located. However, the PRIMA rule leads to severe difficulties since there is no criterion able to determine beyond doubt the office of an intermediary which maintains a specific account or the location of a securities account. Indeed, a securities account is a legal relationship between two entities. Since (legal) relationships do not have a location, it is not possible to speak of the location of an "account" or even the location where the account is "maintained". In addition, in modern global trading, some or even all the functions pertaining to the maintenance and servicing of a securities account are undertaken from more than one office or even outsourced to third parties in different locations. Therefore, any attempt to "localize" the securities account or the place where it is maintained would give rise to more legal uncertainty. In light of these difficulties, this book analyses the rules of the Hague Securities Convention and submits that they offer more legal certainty and predictability compared to the *lex rei sitae* and the PRIMA rules, as Article 4 of the Hague Securities Convention focuses on the *relationship between an account holder and its intermediary* by looking to the law in force in the jurisdiction expressly chosen in the agreement between the investor and the intermediary to govern either the issues falling within the scope of the Convention or the account where the securities are held. In that regard, this book suggests several options, among which the most satisfactory is an accession by OHADA to the Convention.

There are many people whom I wish to thank for the completion of this work. First of all, I sincerely thank my supervisor (*Doktorvater*), Professor Dr. Christoph Teichmann, for his advice and guidance for my doctoral research and more generally for my life in Germany. I do count myself very fortunate to have worked under the supervision of such a tremendous mentor. I also extend my sincerest gratitude to Professor Dr. Eva-Maria Kieninger for her thoughtful and helpful comments on this work as the second examiner. During the entire period of my doctoral research, she was always ready to assist me and to share her invaluable time. I also wholeheartedly thank Professor Dr. Karl Kreuzer, Dr. Christophe Bernasconi, Professor Dr. Jean-Michel Kumbu, Professor Dr. Jan Neels, Prof. Dr. Marta Pertegás, and Dr. Karin Linhart for their excellent comments and orientations on different aspects of

my doctoral research. I also extend my sincere appreciation to the staff of the editorial services department at the Max Planck Institute for Comparative and International Private Law, as well as to the publisher, Mohr Siebeck, for their skillful and heart-felt assistance for this publication.

31 July 2022 *Justin Monsenepwo*

Foreword

The core purpose of the Organisation for the Harmonisation of Business Law in Africa (OHADA) is not only to promote economic development and integration but also to guarantee legal certainty for investors and companies in its Member States. Its instruments (mainly Uniform Acts) and institutions (such as the Common Court of Justice and Arbitration) have enabled OHADA to reach a remarkably high level of legal harmonisation. Moreover, pursuant to the Treaty on the Harmonisation of Business Law in Africa, the OHADA Member States have transferred relevant parts of their legislative and judicial sovereignty to OHADA, making it one of the few regional economic integration organisations besides the European Union that may join the Hague Conference on Private International Law (HCCH) as a Member. OHADA itself may also become party to HCCH Conventions in areas which fall within OHADA's competence.

Interestingly, in recent years the field of private international law has become increasingly prominent in the OHADA region. One need only look to the integration process in other parts of the world – such as within the European Union, the Association of Southeast Asian Nations (ASEAN), or the Southern Common Market (Mercosur) – to realise that there is a strong nexus between the facilitation of cross-border trade and the unification of private international law. This includes uniform rules on jurisdiction and choice of forum, the applicable law, recognition and enforcement of foreign judgments, and international cooperation. In 2013, the HCCH and OHADA concluded an agreement designed to enhance cooperation between the two organisations, increase the visibility of the work of the HCCH in the OHADA region, examine the possibility for HCCH instruments to be brought into effect in OHADA Member States, and for OHADA Member States to become Members of the HCCH. In addition, in 2019 OHADA launched the drafting of a Uniform Act on private international law. Against this background, the publication of this book on the law applicable to security interests in intermediated securities is not only timely but is also an important contribution to the development of private international law in Africa.

In recent decades, the OHADA region has witnessed a shift from securities being held directly by an investor to a system in which many securities are held via an intermediary. In that system, securities are held and transferred by

electronic book-entry debits and credits to securities accounts of primarily dematerialised or immobilised securities. However, neither OHADA nor its Member States have adapted their conflict of laws rules to the issues that are of crucial practical importance for holdings and dispositions of intermediated securities. To fill this gap, this book compares different solutions existing under national, regional, and international instruments. More specifically, it analyses the lex cartae sitae, the "look through approach", and the "place of the relevant intermediary approach" (PRIMA). It demonstrates that these rules are deficient because they attempt to determine the situs of either the securities or the securities account. The book suggests that OHADA would greatly benefit from the legal certainty and predictability afforded by the HCCH Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (HCCH 2006 Securities Convention). The HCCH 2006 Securities Convention does not attempt to formulate a conflict of laws rule based on the concept of situs. Rather, its primary rule is based on the relationship between an account holder and an intermediary. Supporting this approach, the book recommends that all OHADA Member States (or OHADA itself) become party to the HCCH 2006 Securities Convention.

This publication is essential reading for policy makers, academics, market participants, and legal practitioners in the OHADA region and beyond. I am convinced that its in-depth analysis of OHADA's substantive and conflict of laws rules will go a long way in filling the gap in this area and encouraging further development in the future.

On a personal note, I have had the pleasure of knowing the author, Mr Justin Monsenepwo, since his early involvement with the HCCH Permanent Bureau in 2015. Over the years, I have been delighted to see him develop such a close relationship with the HCCH, contributing to the joint effort to facilitate the increased participation of African States in the work of the organisation. This publication is yet another of Mr Monsenepwo's tangible contributions.

Dr. Christophe Bernasconi
Secretary General, HCCH

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Part III – Conflict of Laws Analysis

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Abbreviations

AEC	African Economic Community
ALI	American Law Institute
AMU	The Arab Maghreb Union
ARK.	Arkansas
AU	African Union
B.O.	Bulletin Officiel
BCL	Banque Centrale du Luxembourg
BGBl	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen
Bull. civ.	Bulletin civil
BW	Burgerlijk Wetboek
CAA	Caisse autonome d'amortissement
CAEMC	Central African Economic and Monetary Union
CCJA	Common Court of Justice and Arbitration
CJEU	Court of Justice of the European Union
CCP	Central counterparty
CFA	Communauté Financière Africaine (African Financial Community) – Coopération Financière en Afrique Centrale (Financial Cooperation in Central Africa)
CGE	Committee of Governmental Experts
Chinese PIL Act 2010	Law of the People's Republic of China on the Application of Laws to Foreign-Related Relations
CMF	Commission des Marchés Financiers (Financial and Capital Market Commission)
CNO	Commissions Nationales OHADA
Commission	Commission of the European Communities
Committee	Committee on Foreign Relations of the United States Senate
CSD	Central Securities Depository
COMESA	Common Market for East and Southern Africa
Ct.	Court
D.	Dalloz
DRS	Direct Registration System
ECB	European Central Bank
ECCAS	Economic Community of Central African States

ECOWAS	Economic Community of West African States
eds	editors
EEC	European Economic Community
EFMLG	European Financial Markets Lawyers Group
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
ERSUMA	Ecole Régionale Supérieure de la Magistrature
ESCB	European System of Central Banks
ESMA	European Securities and Markets Authority
et seq	et sequens
EU	European Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
FAST	Fast Automated Securities Transfer
Financial Collateral Directive	Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements
FCMC	Financial and Capital Market Commission (Commission des Marchés Financiers)
GEDIP	European Group of Private International Law
Geneva Securities Convention	UNIDROIT Convention of 9 October 2009 on Substantive Rules for Intermediated Securities
GMRA	Global Master Repurchase Agreement
GMSLA	Global Master Securities Lending Agreement
Hague Conference	Hague Conference on Private International Law
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts
Hague Securities Convention	Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary
HCCH	Hague Conference on Private International Law
Hrg	Hearing
ICMA	International Capital Market Association
ICSD	International central securities depository
Insolvency Regulation	Council Regulation (EC) n° 1346/2000 of 29 May 2000 on Insolvency Proceedings
Int'l Bus. LJ	International Business Law Journal
Interim Report	Interim Report of the Advisory Committee on Settlement of Market Transactions (Exposure Draft, 15 February 1991)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
ISDA	International Swaps and Derivatives Association
ISIN	International Securities Identification Number
ISO	International Organisation for Standardisation
J.O.	Journal Officiel
J.O.R.C.I.	Journal Officiel de la République de Côte d'Ivoire
JORDC	Journal Officiel de la République Démocratique du Congo
L	Législation

La	Louisiana
LGDJ	Librairie Générale de droit et de jurisprudence,
MEFISLA	Master Equity & Fixel Interest Stock Lending Agreement
Mexico City Convention	1994 Inter-American Convention on the Law Applicable to International Contracts
MiFID	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance
MTAC	Market Transaction Advisory Committee
MTFs	Multilateral Trading Facilities
MGESLA	Master Gilt Edged Stock Lending Agreement
n	note
n°	Number
NCCUSL	National Conference of Commissioners on Uniform State Laws
NJOZ	Neue Juristische Online-Zeitschrift
NJW	Neue Juristische Wochenschrift
NPS	New Platform System
NSCC	National Securities Clearing Corporation
NYSE	New York Stock Exchange
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires (Organisation for the Harmonisation of Business Law in Africa)
OHADA Treaty	Treaty on the Harmonisation of Business Law in Africa
OJ	Official Journal of the European Union
OSLA	Overseas Securities Lender's Agreement
P.U.F.	Presses universitaires de France
PAF	Presses Académiques Francophones
Preliminary Draft	Preliminary Draft of a Uniform Text on the Law of Obligations
PRIMA	Place of the relevant intermediary approach
RDW	Regional Discussion Workshops
Rec.	Recueil
RECs	Regional Economic Communities
REIO	Regional Economic Integration Organisation
RIW	Recht der internationalen Wirtschaft
Rome I Regulation	Regulation (EC) 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations
Rome II Regulation	Regulation (EC) n° 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations
Rules of Procedure of the CCJA	Rules of Procedure of the Common Court of Justice and Arbitration of 18 April 1996

s	section
S Ct	Supreme Court
SA	Société anonyme (public limited company)
SADC	Southern African Development Community
SARL	Société à responsabilité limitée
SAS	Société par actions simplifiée
SCA	Security financial collateral arrangements
SEA	Securities Exchange Act
SEC	Securities Exchange Commission
Settlement Finality Directive	Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems
Shareholders' Rights Directive	Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the Exercise of Certain Rights of Shareholders in Listed Companies
Special Commission	Special Commission on General Affairs and Policy of the Hague Conference on Private International Law
SPILA	Swiss Private International Law Act
ss	sections
SSS	Securities Settlement System
TFEU	Treaty on the Functioning of the European Union
TRADES	Treasury Reserve Automated Debt Entry System Regulations
UCC	Uniform Commercial Code
UCITS	Undertaking for collective investment in transferable securities
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Uniform Act on Commercial Companies	Uniform Act on the Law of Commercial Companies and Economic Interest Groups
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U.S.	United States of America
Vol.	Volume
WAEMU	West African Economic and Monetary Union
Winding-up Directive	Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the Reorganisation and Winding up of Credit Institutions
WM	Wertpapier-Mitteilungen. Zeitschrift für Wirtschafts- und Bankrecht
WpHG	Wertpapierhandelsgesetz

General Introduction

"It is now obvious that the evolution and growth [of the African continent] will be a function of how we manage to attract domestic and international investment into the region. An important aspect of such evolution would be a uniform and harmonised system of business laws, clearly formulated and transparently applied all over the region."[1]

Based on this apt rationale, fourteen central and western African states created, on 17 October 1993, the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (the Organisation for the Harmonisation of Business Law in Africa, hereinafter referred to as OHADA)[2] to develop simple, modern, and unified business law rules for the African continent. More than two decades after its creation, OHADA has seventeen Member States[3] and has adopted ten so-called Uniform Acts[4], which cover numerous business law

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[1] Nana Addo Dankwa Akufo-Addo, MP, Attorney General and Minister of Justice of Ghana, 31 July 2002 (*see* Boris Martor et al, *Business Law in Africa: OHADA and the Harmonisation Process* (Eversheds, London 2002) xxii).

[2] Treaty on the Harmonisation in Africa of Business Law, signed in Port Louis on 17 October 1993, 4 J.O. OHADA n° 4, 1 November 1997, 1 et seq, available at <http://www.ohada.com/traite/10/treaty-on-the-harmonisation-of-business-law-in-africa.html> (accessed 4 January 2021). The OHADA Treaty was revised in Quebec on 17 October 2008 (available at <http://www.ohada.com/traite/937/treaty-on-the-harmonization-in-africa-of-business-law-signed-in-port-louis-on-17-october-1993-as-revised-in-quebec-on-17-october-2008.html> (accessed 4 January 2021)). Please note that OHADA is sometimes referred to in English academic publications as "OHBLA"; *see* for instance Kenfack Douajni, 'OHBLA Arbitration' (2000) 17(1) Journal of International Arbitration 127; Franco Ferrari, 'The Ohbla Draft Uniform Act on Contracts for the Carriage of Goods by Road' (2001) Revue de Droit des Affaires Internationales 898; Thierry Lauriol, 'Legal Aspects of Creating Security Interests over Mining Titles in the States Parties to the OHBLA' (2001) 19 Journal of Energy & Natural Resources Law 207; Franco Ferrari, 'International Sales Law in the Light of the OHBLA Uniform Act Relating to General Commercial Law and the 1980 Vienna Sales Convention' (2001) Revue de Droit des Affaires Internationales 599. However, this thesis will use the acronym "OHADA".

[3] As of January 2021, the Member States of OHADA are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of the Congo, Senegal, and Togo.

[4] For a definition and an in-depth analysis of this term, *see* part II, chapter 1, section D of this thesis.

areas such as company law, commercial law, bankruptcy, arbitration, mediation, security interests, accounting, the carriage of goods by road, and enforcement measures.

In recent decades, the pattern of securities holding in the OHADA region has significantly changed.[5] Indeed, following the rapid advance of information technology,[6] the liberalisation of capital movement, and the financial deregulation of a wide range of financial products and services in the global context, there has been a shift from a direct to an indirect holding system in which the interests of an investor in respect of the underlying securities are recorded in the books of an intermediary[7] (such as a bank or a securities firm). In turn, that

[5] Sandrine Kablan, *Système bancaire en Afrique de l'Ouest: Efficacité et rôle dans le développement financier* (L'Harmattan, Paris 2012) 11, 12, 49, 64. *See* also the preamble of the Cameroonian *Loi n° 99-15 portant création et organisation d'un marché financier* of 22 December 1999, which is available at <http://bibliotheque.pssfp.net/index.php/textes-et-lois/lois/613-loi-n-99-015-du-22-decembre-1999-portant-creation-et-organisation-dun-marche-financier/file> (accessed 4 January 2021). For a description of this evolution and of the *Entmaterialisierung* of securities at the global level, *see* Dorothee Einsele, *Wertpapierrecht als Schuldrecht: Funktionsverlust von Effektenurkunden im internationalen Rechtsverkehr* (Mohr Siebeck, Tübingen 1995) 7 et seq.

[6] *See* Joanna Benjamin, Madeleine Yates & Gerald Montagu, *The Law of Global Custody* (2nd edition, Butterworths, London 2002) 13 et seq; Hans Angermueller, 'Foreword' in Kathleen Tyson-Quah (ed), *Cross-Border Securities Repo*, *Lending and Collateralisation* (Sweet and Maxell, London 1997) for an overview of the effects of the shift from the Industrial Age to the Information Age on the global financial market.

[7] The term "intermediary" is often used under OHADA law: Articles 640(1), 642(1), 747(2), and 764 2°) of the Uniform Act on the Law of Commercial Companies and Economic Interest Groups (J.O. OHADA n° 2, 1 January 1997, 1 et seq, hereinafter referred to as Uniform Act on Commercial Companies), Articles 148(3), 149, 150(3), 151(2), 152, 153 2°), and 155 of the Uniform Act on Security Interests (*Acte uniforme portant organisation des sûretés*, J.O. OHADA n° 22, 15 February 2011). However, there is no definition of that term under OHADA law. Under the Cameroonian *Loi n° 99-15 portant création et organisation d'un marché financier* of 22 December 1999, financial intermediaries are investment service providers that can be either financial institutions or investment firms. In comparison, *see* the definition of that term under German law in § 2(1) of the WpHG, under US law in § 8-102(a)(15) of the UCC. *See* also Article 1(a) of the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (hereinafter referred to as the Hague Securities Convention), which defines the term "securities" as "any shares, bonds, or other financial instruments or financial assets (other than cash), or any interest therein". Under Article 1 of the UNIDROIT Convention on Substantive Rules for Intermediated Securities (hereinafter referred to as the Geneva Securities Convention), "securities" means "any shares, bonds, or other financial instruments or financial assets (other than cash) which are capable of being credited to a securities account and of being acquired and disposed of in accordance with the provisions of this Convention". Under European law, *see* Article 2(h) of the Directive 98/26/EC of 19 May 1998 on Settlement Finality in Payment and Securities Settlement Systems (hereinafter referred to as the Settlement Finality Directive) in connection with section B of the

intermediary has its interest recorded with another intermediary and so on up the chain until the intermediary is either recorded as the registered owner on the books of the issuer or the issuer's official record holder, or itself holds the certificates or other documents of title representing the securities.[8] In other words, the indirect holding system suggests the image of a series of Russian dolls, one inside the other, with the smallest doll containing the jewel. The dolls are unique and different from one another, but the value of all the dolls alike derives from the jewel. In this analogy, the jewels equate to the underlying securities, and each doll equates to a different party's interest in securities.[9]

Such intermediated securities are very often given as collateral in cross-border transactions to enable market participants and central counterparties to manage credit risk in the OHADA region.[10] The collateralisation of intermediated securities allows market actors to raise the funds needed for economic growth and risk management.[11] Indeed, besides cash, interests in securities are the most sought-after form of collateral asset in the financial markets within the OHADA region. As interests in securities are highly liquid and easily valued, they are used to collateralise vast financial exposures under bank-loan, swap, repossession, and securities lending arrangements. In addition, besides these private commercial arrangements, central banks use intermediated securities as collateral in their money market operations.[12] Conse-

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Annex to the Council Directive 93/22/EEC of 10 May 1993 on Investment Services in the Securities Field (OJ L 141, 11 June 1993, 27–46).

[8] Bradley Crawford, 'The Hague Prima Convention: Choice of Law to Govern Recognition of Dispositions of Book-Based Securities in Cross Border Transactions' (2003) 38 Canadian Business Law Journal 157, 157–158; Steven L. Schwarcz & Joanna Benjamin, 'Intermediary Risk in the Indirect Holding System for Securities' (2002) 12 Duke Journal of Comparative & International Law 309, 310; Christophe Bernasconi & Harry C. Sigman, 'The Hague Convention on Securities' (2006) 6 Anuario Espanol de Derecho Internacional Privado 1191, 1192.

[9] Joanna Benjamin, 'Cross-Border Electronic Transfers in the Securities Markets' (2001) The International Lawyer 31, 35.

[10] Sandrine Kablan (*supra* n 5) 41. This is also the case at the global level. *See* Richard Potok, 'Legal Certainty for Securities Held as Collateral' (1999) 18 International Financial Law Review 12, 12–13; Dorothee Einsele (*supra* n 5) 125–132; Joanna Benjamin, Madeleine Yates & Gerald Montagu (*supra* n 6) 39; Thomas J. Werlen, 'The Present and Future of the Use of Collateral in International Financial Transactions, with a Particular Focus on Switzerland' (2002) Rapports suisses présentés au XVI^{ème} Congrès international de droit comparé 2029.

[11] Ulrich Drobnig & Ole Böger, *Proprietary Security in Movable Assets* (Sellier European Law Publishers, München 2015) 205.

[12] *See* for instance the annual Margin Survey by the International Swaps and Derivatives Association (hereinafter referred to as ISDA; formerly the International Swap Dealers Association) and the European Repo Market Surveys, carried out at the request of the European Repo Council of the International Capital Market Association (hereinafter re-

quently, the functioning of entire financial markets in the OHADA region completely depends upon the existence of efficient means for providing security in the form of financial collateral.

However, in most jurisdictions in the OHADA region, the rules determining the law governing certain rights in respect of intermediated securities have not been updated to deal with the new conflict of laws problems created by these new forms of investment property.[13] *Faute de mieux*, courts in all the OHADA Member States apply the *lex rei sitae* (or *lex cartae sitae*)[14] rule to questions of title over securities as an extension of the choice of law rule for tangible movables.[15] This rule operates satisfactorily in a direct holding system in which the

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ferred to as ICMA). *See* also Gulenay Rusen, 'Financial Collateral Arrangements' (2007) 2 Journal of International Commercial Law and Technology 250, 250–251.

[13] *See* also Jürgen Basedow, 'The Effects of Globalization on Private International Law' in Jürgen Basedow & Toshiyuki Kono (eds), *Legal Aspects of Globalization: Conflict of Laws, Internet, Capital Markets and Insolvency in a Global Economy* (Kluwer Law International, The Hague 2000) 6, who foresaw the sharp rise in the number of legal conflicts bearing transborder elements as a consequence of globalisation and the increased interconnectedness of individuals, societies, and economies.

[14] *Lex rei sitae* is a latin phrase which means "the law where the property is situated". This rule can be traced back to the work of the *statutists*, in particular to Aldricus (late twelfth/early thirteenth century) and, more particularly, to Bartolus (thirteenth/fourteenth century). *Savigny* confirmed the principle later, in the nineteenth century (Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (Band 8, 1840) 169). Under that rule, the validity and the enforceability of the pledge is governed by the law of the place where the security is located (*see* part II, chapter 1 of this study). *See* also Thomas Rauscher, *Internationales Privatrecht: mit internationalem und europäischem Verfahrensrecht* (3rd edition, C.F. Müller GmbH, Heidelberg 2009) *s* 541; Eric Dirix, 'Belgium' in Harry C. Sigman & Eva-Maria Kieninger (eds), *Cross-Border Security over Tangibles* (Sellier, München 2007) 240; Bernard Audit & Louis d'Avout, *Droit international privé* (7th edition, Economica, Paris 2013) s 740; Alexander von Ziegler et al (eds), *Transfer of Ownership in International Trade* (2nd edition, Kluwer Law International B.V., Alphen aan den Rijn 2011) 121. Under German law, this rule has been codified since 1999 in Article 43(1) EGBGB (*Gesetz zum Internationalen Privatrecht für auûervertragliche Schuldverhältnisse und für Sachen* of 21 May 1999 (BGBl, 1999 I, 1026); however, this rule was already recognised before 1999 (BGH 20 March 1963 – VIII ZR 130/61, BGHZ 39, 173 (174); BGH 28 September 1994 – VI ZR 95/93, NJW 1995, 58 (59); BGH 9 May1996 – IX ZR 244/95, NJW 1996, 2233 (2234)). For details regarding the *lex rei sitae* rule under German law specifically, *see* Arnd Goldt, *Sachenrechtliche Fragen des grenzüberschreitenden Versendungskaufs aus international-privatrechtlicher Sicht* (Duncker & Humblot, Berlin 2002) 27, 58 et seq; Ingo Scholz, *Das Problem der autonomen Auslegung des EuGVÜ* (Mohr Siebeck, Tübingen 1998) 3; Cordula Thoms, *Einzelstatut bricht Gesamtstatut: zur Auslegung der „besonderen Vorschriften" in Art. 3 Abs. 3 EGBGB* (Mohr Siebeck, Tübingen 1996) 35–36.

[15] For instance, under the law of the Democratic Republic of the Congo, *see* Article 9 of the Decree of 4 May 1895; under the law of Gabon, *see* Article 44 of the Civil Code (*Journal Officiel de la République gabonaise*, September 1995); under the law of Burkina Faso, *see* Articles 1002 and 1003 of the *Loi du 13 du 16 novembre 1989 portant institution*

investor has a direct relationship with the issuer and ownership of the securities can be established by verifying the issuer's records (in case of registrable securities) or by ascertaining the availability of the certificate (in case of bearer securities). However, in the modern, indirect holding system, neither the location of certificates, nor the issuer's records, nor the jurisdiction of incorporation identify the investor as a member of the company or as the holder of the intermediated securities.[16] Therefore, the *lex rei sitae* rule is not a suitable connecting factor for issues in respect of intermediated securities. Since the conflict of laws rule applied in the OHADA region is not adapted to the indirect holding system, a collateral taker may incur a significant legal risk since the adjudicating forum may select an unexpected legal regime by which to judge the validity of the collateral interest in the intermediated securities. Yet safe and efficient markets require that those dealing with intermediated securities be able to determine, in advance and with certainty, which law will govern their interests in those securities in case there is a dispute.

Against this background, this thesis aims at finding clear and efficient conflict of laws rules for the determination of the law governing proprietary rights in respect of security interests in intermediated securities under OHADA law. To do so, this study adopts a three-part structure. The basic approach adopted by this study is to ensure that any conflict of laws rules suggested for the OHADA region will be in line with the substantive rules governing the indirect holding system in general and with security interests in intermediated securities in particular.[17] Therefore, in the first two parts this study sets out the structure of the indirect holding system in the OHADA region and the substantive rules on the collateralisation of intermediated securities. The delineation of the substantive rules related to security interests in intermediated securities in the second part, though brief, provides a foundation to inform the discussion of conflict of laws issues in respect of the collateralisation of intermediated securities under OHADA law, which is this study's *pièce de résistance*.

The first part explains the OHADA region's intermediated system. It first examines the history, mission, institutions, and instruments of OHADA (chap-

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et application d'un code des personnes et de la famille. See also Article 46(1) of the *Código Civil* under the law of Guinea Bissau. In comparison with commonwealth Africa, *see* Richard Frimpong Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, New York 2013) 255 et seq.

[16] Richard Potok, Guy Morton & Antoine Maffei, 'The Legal Regime of Securities: The Need for a New Deal in Securities Law' (2003) Business Law International 226, 227; Bradley Crawford (*supra* n 8) 161; James Steven Rogers, 'Conflict of Laws for Transactions in Securities Held Through Intermediaries' (2006) 39 Cornell International Law Journal 285, 286.

[17] For a similar approach, *see* Jens Haubold, 'RIMA – Kollisionsregel mit materiellrechtlichem Kern' (2005) 9 RIW 2005 656.

ter 1). Furthermore, it describes and examines the shift from a direct to an indirect holding system which has occurred in the OHADA region over the last few decades. Moreover, it analyses the basic structure and the key features of the indirect holding system which now exists in the OHADA region and compares it to that of other jurisdictions (chapter 2). The second part is broader in scope. Following a functional approach,[18] it compares and explores the national, regional, and international substantive law rules regarding the collateralisation of intermediated securities. More specifically, it examines how security interests in intermediated securities are taken, perfected, and realised under the OHADA Uniform Act on Security Interests and the Uniform Act on Commercial Companies (chapter 1); under Chapter V of the Geneva Securities Convention (chapter 2); under the Settlement Finality Directive[19] and the Financial Collateral Directive[20] in EU law (chapter 3); and under the Uniform Commercial Code in jurisdictions in the United States (chapter 4).

The third part, which is the focal point of this thesis, addresses the conflict of laws issues in respect of the law applicable to security interests in interme-

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[18] At the Paris Congress of 1900, *Lambert* and *Salleiles* defined comparative law as the discovery of concepts and principles common to all civilised legal systems (Édouard Lambert, 'Conception générale et definition de la science du droit comparé' (1905) Procès-verbaux des séances et documents, Congrès international de droit compare I 26). However, in the 1920s, this formalist, universalist approach to comparative law was gradually replaced by the functionalist approach, which was first introduced by Ernst Rabel (Zentaro Kitagawa, 'Development of Comparative Law in East Asia' in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, New York 2006) 34). In lieu of the rules themselves, this approach chooses as its starting point the concrete social problems that the rules then help to resolve. Since the second half of the twentieth century, the functionalist approach has become the prevailing theory and the mantra of contemporary comparative law (for instance, in Germany, *see* Hein Kötz, 'Comparative Law in Germany Today' (1999) 51 Revue internationale de droit comparé 753, 755 et seq; in the United States, *see* Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2003) 50 American Journal of Comparative Law 671, 679 et seq; John Reitz, 'How to do Comparative Law' (1998) 46 American Journal of Comparative Law 617, 620–623; in France, *see* Marc Ancel, 'Le problème de la comparabilité et la méthode fonctionnelle en droit comparé' in Ronald H. Graveson et al (eds), Festschrift für Imre Zajtay (Mohr Siebeck, Tübingen 1982) 1–6; in Italy, *see* Pier Giuseppe Monateri, 'Critique et différence: Le droit comparé en Italie' (1999) 51 Revue internationale de droit comparé 989, 991 f; for a more critical analysis of this approach, *see* Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann & Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, New York 2006) 339.

[19] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45–50).

[20] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27.6.2002, p. 43–50).

diated securities. First, it establishes that the traditional *lex rei sitae* rule, which is applied in all the OHADA Member States, is no longer suited to the intermediated system (chapter 1). In search of viable conflict of laws rules, this thesis further examines the place of the relevant intermediary approach[21] (hereinafter referred to as PRIMA) under European law (chapter 2), the choice of law provisions under the Uniform Commercial Code (chapter 3), and the Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary[22] (hereinafter referred to as the Hague Securities Convention). The third part also examines alternative conflict of laws rules and connecting factors such as the so-called "substantive law solution" or the law of the system and explores whether the applicable law can be the law the collateral taker and the collateral provider chose to govern the proprietary aspects of their collateral agreement (chapter 5). Lastly, chapter 6 compares the choice of law treatment of all the aforementioned conflict of

[21] Under the PRIMA rule, the law that is applicable to certain questions in respect of book-entry securities is determined by the place of the most relevant intermediary (or rather, by the place of the securities account). Under EU law, this rule is enshrined in Article 9(1) of the Settlement Finality Directive, Article 9(1) of the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on Financial Collateral Arrangements (OJ L 168, 27 June 2002, 43–50, hereinafter referred to as the Financial Collateral Directive), and Article 24 of the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the Reorganisation and Winding up of Credit Institutions (OJ L 125, 5 May 2001, 15–23, hereinafter referred to as the Winding-up Directive). This rule is further analysed in part II, chapter 2 of this thesis.

[22] The text of the Convention is available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72> (accessed 4 January 2021). The Hague Securities Convention was developed under the auspices of the Hague Conference on Private International Law (hereinafter referred to as the Hague Conference), which is an intergovernmental organisation which was created in 1955 by an agreement among its original sixteen member nations and which aims "to work for the progressive unification of the rules of private international law." For more details on the Hague Conference, *see* Hans Van Loon, 'Globalisation and the Hague Conference on Private International Law' (2000) 2 International Law Forum du droit international 230; Fernando Paulino Pereira, 'Les ponts entre la Conférence de La Haye de Droit International Privé et les instruments conclus dans le cadre de l'Union Européenne' in Joaquim Joan Forner i Delaygua, Cristina González Beilfuss & Ramón Viñas Farré (eds), *Entre Bruselas Y La Haya – Estudios sobre la unificación internacional y regional del Derecho internacional privado – Liber amicorum Alegría Borrás* (Marcial Pons, Ediciones Jurídicas y Sociales, Madrid 2013) 697; Andreas Bucher, 'La Conférence de la Haye sans Convention' in Joaquim Joan Forner i Delaygua, Cristina González Beilfuss & Ramón Viñas Farré (eds), *Entre Bruselas Y La Haya – Estudios sobre la unificación internacional y regional del Derecho internacional privado – Liber amicorum Alegría Borrás* (Marcial Pons, Ediciones Jurídicas y Sociales, Madrid 2013) 277 et seq; Christophe Bernasconi, 'Some Observations from the Hague Conference on Private International Law' (2007) 101 American Society of International Law Proceedings 350.

laws rules in different variations and fact patterns from an OHADA perspective. Overall, part III of this study intends to validate that any criterion for determining the governing law should not rely on the attribution of a "location" to an intermediary, a securities account, or an office where a securities account is maintained. Therefore, it rejects the *lex rei sitae* rule, the "look-through" approach,[23] and the PRIMA rule. Instead, it submits that the OHADA region should retain a connecting factor (or a system of connecting factors) which focuses on the *relationship between the account holder and the relevant intermediary* in respect of a particular securities account.

It is important to highlight that this study is confined to *collateral transactions* in respect of intermediated securities in the OHADA region. Therefore, it does not address other issues, such as the nature of the investor's interests in intermediated securities, methods of transfer, insolvency law, the creation and issue of the underlying securities, the rights and duties of the issuer as against the direct holders of such securities and third parties, or upper-tier attachment.[24] Furthermore, this study does not address questions in respect of the law applicable to *contractual* aspects of collateral transactions in intermediated securities. Indeed, a collateral transaction always has two components: the *contractual* element, which addresses the parties' obligations under the transaction, and the *proprietary* element, which deals with the transfer of rights in the property.[25] This study discusses only the identification of the appropriate law to govern the *proprietary* aspects of a collateral transaction in intermediated securities. More particular, it focuses on the law governing: (i) the creation, perfection, and enforcement of pledges of intermediated securities and (ii) issues of priority between competing security interests in intermediated securities.

Moreover, cross-border collateralisation of intermediated securities involves three questions of private international law: (i) Which court is competent to hear the case (a question of international direct jurisdiction? (ii) Which

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[23] The difficulty generated by the application of the *lex rei sitae* rule to the intermediary system is that it requires an approach that "looks through" the different tiers of intermediaries up to the level of the issuer or register (*see* part II, chapter 1, section B, subsection II of this thesis).

[24] This issue arises when a person with an interest lower in the chain of holdings seeks to attach or otherwise claim an interest in securities held at a higher level where there is no record of that person's entitlement (*see* Article 22 of the Geneva Securities Convention).

[25] Randall D. Guynn & Nancy J. Marchand, 'Transfer of Pledge of Securities held through Depositories' in Hans van Houtte (ed), *The Law of Cross-Border Securities Transactions* (London, Sweet & Maxwell 1999) 57. On the concept of *Wertpapierstatut* under German law, *see* RG 27.4.1895, JW 1895, 302 et seq; 10.3.1934, IPRspr 1934 n° 11; BGH 26.9.1989, BGHZ 108, 353, 356 = 1989 n° 59; OLG Düsseldorf 30.7.2003, NJOZ 2004, 1213, 1215 = IPRspr 2003 n° 53; Regierungsbegründung zu § 17a DepotG, BT-Drucks. 14/1539 of 17.9.1999, 15.

law governs the issue before the court (a question of governing law)? and (iii) What is the effect of a judgment rendered by the court (a question of recognition and enforcement of the judgment of a foreign court)?[26] However, this study discusses *only* the second issue, meaning the *conflict of laws* questions. It does not address questions regarding international jurisdiction or the recognition and enforcement of foreign judgments in respect of security interests in intermediated securities.[27]

[26] It is worth noting that in Article 3(1) of the *Introductory Act to BGB* (EGBGB) under German law, the term "private international law" (*internationales Privatrecht*) has a narrow meaning, referring to the law determining the law governing a case (*Sachverhalt*) containing a foreign element: "The applicable law is determined by the provision of this Chapter, if the facts of a case [*Sachverhalt*] are connected with a foreign country." *See* Jan Kropholler, *Internationales Privatrecht* (6th edition, Mohr Siebeck, Tübingen 2006) 103; Christoph Teichmann, 'The Law Applicable to the European Private International Company' in Hirte Heribert & Christoph Teichmann, *The European Private Company – Societas Privata Europaea (SPE)* (De Gruyter, 2013) 72.

[27] The limited scope of this study does not mean, however, that there is no legal uncertainty as to the determination of the law governing the contractual aspects of cross-border transactions in intermediated securities. Similarly, there are issues regarding international jurisdiction as well as recognition and the enforcement of foreign judgments in respect of cross-border transactions in intermediated securities in the OHADA region. For a discussion of these issues, *see* Justin Monsenepwo, 'Apport des instruments de la Conférence de La Haye au droit des affaires dans l'espace OHADA' (2016) 5 Schriftenreihe Junges Afrikazentrum 1, 12 et seq.

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