

JUSTIN MONSENEPWO

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

*Max-Planck-Institut
für ausländisches und internationales
Privatrecht*

*Studien zum ausländischen
und internationalen Privatrecht*

493

Mohr Siebeck

Studien zum ausländischen und internationalen Privatrecht

493

Herausgegeben vom
Max-Planck-Institut für ausländisches
und internationales Privatrecht

Direktoren:

Holger Fleischer, Ralf Michaels und Reinhard Zimmermann



Justin Monsenepwo

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

Mohr Siebeck

Justin Monsenepwo, born 1988; 2020–21 Senior Research Fellow at the Max-Planck-Institute for Comparative and International Private Law, Hamburg; assistant professor at the Shanghai University for Political Science and Law, China; research assistant at Oxford University, GB; research assistant at the University of Johannesburg, South Africa.
orcid.org/0000-0003-4220-5023

Zugl.: Würzburg, Julius-Maximilians-Universität, Diss., 2021.

ISBN 978-3-16-161282-4 / eISBN 978-3-16-161283-1

DOI 10.1628/978-3-16-161283-1

ISSN 0720-1141 / eISSN 2568-7441

(Studien zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <http://dnb.dnb.de>.

© 2022 Mohr Siebeck Tübingen. www.mohrsiebeck.com

This book may not be reproduced, in whole or in part, in any form (beyond that permitted by copyright law) without the publisher's written permission. This applies particularly to reproductions, translations and storage and processing in electronic systems.

The book was printed on non-aging paper by Gulde Druck in Tübingen, and bound by Buchbinderei Nädele in Nehren.

Printed in Germany.

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

Summary of Contents

Preface.....	VII
Foreword	XI
Contents	XV
Tables and Figures	XXXI
Abbreviations	XXXIII

General Introduction	1
----------------------------	---

Part I – The Intermediary System in the OHADA Region

Chapter 1: The Organisation for the Harmonisation of Business Law in Africa.....	11
Chapter 2: Basic Structure and Functioning of the Indirect Holding System in the OHADA Region	43

Part II – Reports on National, Regional, and International Substantive Law Rules in Respect of Security Interests in Intermediated Securities

Chapter 1: The Pledge of Securities Accounts under the OHADA Uniform Act on Security Interests.....	65
Chapter 2: Security Interests in Intermediated Securities under the Geneva Securities Convention	97
Chapter 3: The EU Legislation on the Collateralisation of Intermediated Securities.....	123
Chapter 4: Collateralisation of Intermediated Securities under the Law in the United States	156

Part III – Conflict of Laws Analysis

Chapter 1: The <i>lex rei sitae</i> (<i>lex cartae sitae</i>) Rule in the OHADA Region	199
Chapter 2: The Place of the Relevant Intermediary Approach (PRIMA) under European Law	213
Chapter 3: Conflict of Laws Rules for Intermediated Securities under the Uniform Commercial Code	241
Chapter 4: The Hague Securities Convention	257
Chapter 5: Alternative Conflict of Laws Rules and Connecting Factors	332
Chapter 6: Comparison of the Operation of the Different Conflict of Laws Rules from an OHADA Perspective	351
 General Conclusion	 365

Appendix

A. Indicative List of the Travaux Préparatoires for the Financial Collateral Directive	371
B. Indicative List of the Travaux Préparatoires for Directive 2009/44/EC of 6 May 2009	373
C. Proposal of a Uniform Act on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary	374
 Bibliography	 391
Index	413

Contents

Preface.....	VII
Foreword	XI
Summary of Contents.....	XIII
Tables and Figures	XXXI
Abbreviations	XXXIII

General Introduction	1
----------------------------	---

Part I – The Intermediary System in the OHADA Region

<i>Chapter 1: The Organisation for the Harmonisation of Business Law in Africa</i>	11
A. Historical Perspective	11
B. Purpose of OHADA	16
I. Contribution to Regional Integration in Africa	16
II. Facilitating Investments and Improving the Economies of Its Members	17
III. Unification in lieu of Harmonisation	19
C. OHADA’s Institutional Framework	20
I. The Conference of Heads of State and Government.....	21
II. The Council of Ministers	21
1. Composition	21
2. Functioning.....	22
3. Duties	23
III. The Permanent Secretariat	23
1. Organisation	23
2. Duties	23
IV. The Common Court of Justice and Arbitration (CCJA)	24
1. Composition	24
2. Functions	25
3. Challenges faced by the CCJA and Trends in the CCJA’s Case Law	26

a) Challenges faced by the CCJA	26
b) Geographical Origins of the Appeals lodged before the CCJA	28
V. The Regional School for Magistrates.....	30
D. Instruments of OHADA	30
I. Uniform Acts.....	30
1. Object of the Uniform Acts.....	30
2. The Process of Adopting Uniform Acts	31
a) Drafting.....	31
b) Advisory Opinion of the CCJA	32
c) Final Adoption	32
d) Exclusion of Legislative Authorities	32
3. Effects of the Uniform Acts on National Law.....	33
a) Direct Applicability of the Uniform Acts	33
b) Interpretation of Article 10 by the CCJA	35
4. Current Uniform Acts.....	36
5. Uniform Acts “in the Pipeline”	37
II. Regulations.....	40
III. Chronological Table of the Uniform Acts and the Regulations	40
E. Summary and Evaluation	41
 <i>Chapter 2: Basic Structure and Functioning of the Indirect Holding System in the OHADA Region</i>	
43	
A. Development of Commercial Practices in the OHADA Region regarding the Holding of Securities.....	43
I. Traditional Direct Holding of Securities under OHADA Law	43
1. Presentation of the Traditional Direct Holding System under OHADA Law.....	43
2. Advantages and Disadvantages of the Direct Holding System.....	45
II. The Intermediated System under OHADA Law.....	46
1. Development in Commercial Practices	46
2. Regional and National Legislative Developments in Respect of the Law of Securities.....	49
a) Status Quaestionis under OHADA Law.....	49
(1) Revision of Uniform Acts at the OHADA Level.....	49
(2) Centralisation and Immobilisation of Securities.....	51
(3) Dematerialisation of Securities	52
b) The New Act on the Dematerialisation of Securities under the Law of Cameroon	52
(1) Presentation of the New Act on the Dematerialisation of Securities	52

(2) Modalities for the Dematerialisation of Securities53

B. Basic Structure of OHADA’s Indirect Holding System Compared to Existing Models of Intermediated Systems54

 I. Introduction54

 II. The Individual Ownership Model55

 III. The Co-Ownership Model56

 IV. The Trust Model.....57

 V. The Security Entitlement Model57

 VI. The Contractual Model.....58

 VII. Identifying the Investor: Transparent and Non-transparent Systems59

 1. Introduction59

 2. Transparent Systems in Which the Holdings are Held in an Account with the CSD60

 3. Transparent Systems in Which the Holdings of the Investor are Identified in an Intermediary Account with the CSD60

 4. Transparent Systems in Which an Investor’s Holdings are Held by an Intermediary in an Omnibus Account at the CSD 61

C. Summary and Evaluation.....62

Part II – Reports on National, Regional, and International Substantive Law Rules in Respect of Security Interests in Intermediated Securities

Chapter 1: The Pledge of Securities Accounts under the OHADA Uniform Act on Security Interests65

A. Introduction: Relevance of the 2010 Revision of the Uniform Act on Security Interests65

B. Scope of Application of Articles 146 et seq of the Uniform Act on Security Interests66

 I. Definition of the Pledge of Securities Accounts.....66

 1. Limited Material Scope66

 2. Pledges of “Securities Accounts” rather than of “Intermediated Securities”68

 II. Relationship between the Provisions of the Different Uniform Acts applying to the Pledge of Securities Accounts69

 1. Provisions applying to the Pledge of Securities.....69

 2. Prevalence of the Uniform Act on Security Interests.....69

C. How a Pledge of a Securities Account is Constituted.....72

I.	Requirement of a Declaration establishing the Pledge	72
1.	The Declaration establishing the Pledge	72
2.	Elements to Be Included in the Declaration establishing the Pledge.....	73
a)	Date of the Declaration.....	73
b)	Other Elements to Be Included in the Declaration.....	75
II.	The Requirement of a Prior Contract.....	77
D.	Basis of the Pledge	77
I.	The Contents of the Securities Account.....	77
1.	Intermediated Securities located in the Securities Account	77
a)	Financial Instruments recorded in the Pledged Securities Account	77
b)	Inalienable Securities	78
c)	Securities Whose Transfer is Subject to an Approval Clause	79
2.	Sums of Money located in the Pledged Securities Account.....	80
II.	Proof of the Content of the Pledged Securities Account	80
1.	Special Account Open in the Name of the Account Holder.....	80
2.	The Certificate of Pledge	81
E.	Evolution of the Pledged Securities Account	81
I.	Introduction.....	81
II.	Inclusion of Products and Benefits deriving from the Pledged Securities Account.....	82
III.	Substituted Securities	83
1.	“New” Securities	83
2.	Sums of Money resulting from the Sale of Securities located in the Pledged Account.....	84
F.	Right to Use the Intermediated Securities recorded in the Pledged Securities Account.....	85
I.	Right of Use	85
1.	Scope of the Right of Use under Article 151(1) First SENTENCE of the Uniform Act on Security Interests.....	85
2.	Absence of Provisions in Respect of the Replacement of the Used Collateral Securities.....	86
II.	Right of Retention	88
1.	Scope of the Right of Retention	88
2.	The Relationship between the Right of Retention and the Right of Use	89
G.	Realisation of the Pledge	90
I.	Introduction.....	90
II.	Formal Notice.....	90
III.	Enforcement	92
1.	Introduction.....	92

2. Realisation by Selling the Intermediated Securities	93
3. Realisation by Appropriating the Intermediated Securities recorded in the Pledged Securities Account	94
H. Summary and Evaluation.....	94

Chapter 2: Security Interests in Intermediated Securities under the Geneva Securities Convention.....97

A. Presentation of the Geneva Securities Convention.....	97
I. The Geneva Securities Convention.....	97
II. Objectives and Guiding Principles of the Geneva Securities Convention	98
III. Current Status of the Geneva Securities Convention.....	101
B. Scope of Application of Chapter V of the Geneva Securities Convention	102
I. Introduction.....	102
II. Personal Scope	102
III. Material Scope.....	103
1. Types of Collateral	103
2. Relevant Obligations	104
C. Recognition of Title Transfer Collateral Agreements	105
I. History of the Provision in Article 32 of the Geneva Securities Convention.....	105
II. Analysis of Article 32 of the Geneva Securities Convention.....	105
D. Enforcement under Article 33 of the Geneva Securities Convention	106
I. History of Article 33 of the Geneva Securities Convention.....	106
II. Analysis of the Enforcement Provision in the Geneva Securities Convention.....	107
1. Overview of the Realisation Methods	107
2. Realisation by way of Sale of the Collateral Securities	108
3. Realisation by Appropriation.....	108
4. Close-Out Netting.....	108
5. Obstacles to the Realisation of the Collateral in Some Jurisdictions.....	109
E. Right to Use Collateral Securities under Article 34 of the Geneva Securities Convention.....	110
I. History of Article 34 of the Geneva Securities Convention.....	110
II. Analysis of Article 34 of the Geneva Securities Convention.....	111
1. Use of Collateral Securities	111
2. Replacement of the Used Collateral Securities.....	112
3. Protecting the Collateral Taker’s Rights	113
F. Top-Up or Substitution of Collateral.....	114

I.	General Overview and History of the Top-Up Rule in Article 36 of the Geneva Securities Convention	114
II.	Analysis of Top-Up Rule in Article 36 of the Geneva Securities Convention.....	114
1.	Rule Number 1: Top-Up	114
a)	Introduction.....	114
b)	The Situation provided in Article 36(1)(a)(i) of the Geneva Securities Convention.....	115
c)	The Situation provided in Article 36(1)(a)(ii) of the Geneva Securities Convention.....	116
d)	The Situation provided in Article 36(1)(a)(iii) of the Geneva Securities Convention.....	117
2.	Rule Number 2: Substitution.....	118
3.	Scope of Protection.....	118
III.	Certain Insolvency Provisions Disapplied	120
G.	Summary and Evaluation	122

Chapter 3: The EU Legislation on the Collateralisation of Intermediated Securities 123

A.	A Bird's Eye View of the EU Legislative Framework on Intermediated Securities	123
B.	The Collateralisation of Intermediated Securities under the Settlement Finality Directive.....	124
I.	History of the Settlement Finality Directive	124
II.	System and Participants.....	126
III.	Collateral Transaction	129
IV.	Insolvency Proceedings and Collateral Security	129
1.	Provisions regarding Insolvency Proceedings	129
2.	Collateral Security and Legal Certainty	130
C.	Collateral Agreements on Intermediated Securities under the Financial Collateral Directive.....	130
I.	Objectives of the Financial Collateral Directive	130
II.	History of the Financial Collateral Directive	131
1.	Preparatory Work	131
2.	Adoption and Implementation	133
3.	Amendments.....	136
III.	Scope of Application	137
1.	Personal Scope	137
a)	History of the Provision in Article 1(2) of the Financial Collateral Directive	137
b)	Description of the Personal Scope of Application of the Directive	137

2. Material Scope.....140

IV. Formal Requirements and Enforcement.....145

V. Right of Use148

 1. The Right of Use throughout the Elaboration Process of
 the Financial Collateral Directive148

 2. Description of the Right of Use under Article 5 of the
 Financial Collateral Directive149

VI. Recognition of Title Transfer Financial Collateral
 Arrangements150

VII. Recognition of Close-Out Netting Provisions151

VIII. Certain Insolvency Provisions Disapplied152

IX. Top-Up and Substitutions153

D. Summary and Evaluation.....155

*Chapter 4: Collateralisation of Intermediated Securities under the
Law in the United States156*

A. General Overview.....156

 I. Introduction.....156

 II. Historical Evolution157

 1. History of UCC Article 8.....157

 a) The 1962 Version of UCC Article 8.....157

 b) The 1977 Version of UCC Article 8.....158

 c) The 1994 Version of UCC Article 8.....167

 2. Brief History of UCC Article 9.....169

 a) Pre-Article 9 Law applying to Security in Personal
 Property.....169

 b) The 1962 Version of UCC Article 9170

 c) The Pre-1972 Official Text and the 1977 Amendments171

 d) The 1994 Amendments to UCC Article 9.....172

 e) The 1999 Official Text.....172

 B. Key Features of the Intermediated System in the US173

 I. Basic Structure of the Intermediated System in the US.....173

 II. Key Features of the US Indirect Holding System.....178

 III. Concept of Security Entitlements181

 1. Introduction181

 2. The Property Rights Aspect.....182

 a) Pro Rata Property Interests.....182

 b) Enforcement of Property Rights against Third Parties182

 3. Aspects of Personal Rights185

 C. Perfection of Security Interests in Investment Property188

 I. Introduction.....188

 II. Attachment and Perfection.....189

D. Priorities	195
E. Summary and Evaluation	196

Part III – Conflict of Laws Analysis

<i>Chapter 1: The lex rei sitae (lex cartae sitae) Rule in the OHADA Region</i>	199
A. General Overview of OHADA’s Private International Law.....	199
I. Lesser Importance of Conflict of Laws Issues in OHADA’s Legislative Agenda.....	199
II. Scarce Conflict of Laws Rules under OHADA Law	201
III. Lack of Conflict of Laws Provisions regarding Intermediated Securities at the OHADA Level.....	203
B. The Law Applicable to Security Interests in Intermediated Securities under the National Laws of the OHADA Member States.....	204
I. The lex rei sitae Rule under the Laws of the OHADA Member States.....	204
II. Rejection of the lex rei sitae Rule and the “Look-Through Approach”	208
C. Summary and Evaluation	212
 <i>Chapter 2: The Place of the Relevant Intermediary Approach (PRIMA) under European Law</i>	 213
A. Analysis of the EU PRIMA Rule	213
I. Contents of the EU PRIMA Rule.....	213
II. Illustrations of How PRIMA Operates.....	216
1. First Variation of the Fact Pattern: Collateral Provider and Collateral Taker Hold through the Same Intermediary and Collateral Is Provided by way of Pledge	216
2. Second Variation: Collateral Provider and Collateral Taker Hold through Different Intermediaries and Collateral Is Provided by way of Pledge	218
3. Third Variation: Collateral Taker and Collateral Provider Hold through Different Intermediaries and Collateral Is Provided by way of Title Transfer	221
4. Fourth Variation: Collateral Provider Holds through Collateral Taker as Intermediary and Collateral Provided by way of Pledge	223
B. Evaluation of the EU PRIMA Rule	225
I. Account “Located”, “Maintained”, “Held”, or “Situated”?	225

- II. Unclear Location of Securities Accounts under PRIMA226
- III. Uncertainty as to the Relevant Account under PRIMA229
- IV. Uncertainty as to How Many Laws Apply in the Holding Chain under PRIMA230
- V. Renvoi.....230
- VI. The Location of the Securities Account and European Discussions regarding the Hague Securities Convention.....231
- C. Summary and Evaluation.....239

Chapter 3: Conflict of Laws Rules for Intermediated Securities under the Uniform Commercial Code241

- A. Conflict of Laws Issues under UCC Article 8241
 - I. Introduction.....241
 - II. Issues governed by the Applicable Law.....241
 - 1. Issues governed by the Local Law of the Issuer’s Jurisdiction241
 - 2. Issues governed by the Local Law of the Securities Intermediary’s Jurisdiction243
 - III. Determination of the “Securities Intermediary’s Jurisdiction”243
 - 1. Introduction243
 - 2. Specification of the Securities Intermediary’s Jurisdiction by Agreement244
 - 3. Additional Default Rules for Determining the Securities Intermediary’s Jurisdiction244
 - 4. Exclusion of Certain Connecting Factors245
 - IV. Choice of Law Rules for Adverse Claim Issues245
 - V. Example illustrating the Provisions in UCC § 8-110.....245
 - VI. Application of General Choice of Law Rules246
- B. Choice of Law Provisions concerning Security Interests in Security Entitlements.....247
 - I. General Rules247
 - II. Exceptions.....247
 - III. Change in Law Governing Perfection249
- C. Entry into Force of the Hague Securities Convention in the United States249
 - I. Background and Applicability of the Hague Securities Convention249
 - 1. Signature and Ratification249
 - 2. Implementing Legislation250
 - II. Scope of Application of the Hague Securities Convention.....251
 - III. Comparison of Hague Securities Convention and UCC Choice of Law Rules253

D. Summary and Evaluation	255
<i>Chapter 4: The Hague Securities Convention</i>	257
A. History of the Negotiations leading to the Hague Securities Convention	257
B. Scope of Application of the Hague Securities Convention	262
I. Focus Solely on Choice of Law Questions.....	262
II. Issues to Which the Hague Securities Convention Applies	263
1. Article 2(1) of the Hague Securities Convention.....	263
a) The Nature of the List	263
b) Analysis of the Content of the List in Article 2(1) of the Hague Securities Convention.....	266
(1) Legal Nature and Effects of Rights resulting from a Credit of Securities to a Securities Account	266
(2) Legal Nature and Effects of a Disposition.....	268
(3) Perfection Requirements.....	270
(4) Priority Issues	271
(5) Duties of an Intermediary Against a Person Asserting a Competing Interest	271
(6) Realisation.....	272
(7) Entitlements to Dividends, Income, or Other Distributions, or to Redemption, Sale, or Other Proceeds	272
III. Limitations of the Scope of the Convention Solely to Intermediated Securities	272
1. Introduction	272
2. Proprietary Rights in Respect of Intermediary Securities	273
3. Contractual Claims	274
a) Introduction.....	274
b) Disposition of an Interest in Securities in case of Contractual Claims against the Intermediary	276
c) Exclusion of Purely Contractual or Otherwise Personal Rights between an Account Holder and its Intermediary Inter Se.....	276
4. Rights and Duties of an Issuer of Securities or of an Issuer's Registrar or Transfer Agent	277
5. Relationship between Article 2(1), (2), and (3) of the Hague Securities Convention.....	277
IV. Internationality	278
V. Temporal Scope of Application of the Hague Securities Convention	280
1. Entry into Force.....	280

a) Entry into Force on the International Plane (Article 19(1))	280
b) Entry into Force for a State and for a REIO.....	283
(1) For the States Bringing the Hague Securities Convention into Force (Article 19(1)).....	283
(2) For Subsequent States and REIOs (Regional Economic Integration Organizations) under Article 19(2)	283
2. Temporal Scope of Application and Pre-convention Account Agreements and Securities Accounts	284
a) Article 16(1).....	284
b) Article 16(2).....	284
(1) Guidelines as to the Application of Articles 16(3) and (4)	284
(2) Declaration Mechanism	285
c) Article 16(3).....	285
(1) Interpretative Rule	285
(2) Declaration Mechanism	285
d) Article 16(4).....	286
e) When the Applicable Law Is Not Determined using Article 16(3) or Article 16(4)	286
C. Applicable Law under the Hague Securities Convention	287
I. Introduction: Determining the Applicable Law.....	287
II. The Primary Rule in Article 4(1)	289
1. Operation.....	289
2. The “Law in Force” and the “Law of” a State	291
3. Requirement of an Express Choice	292
4. Form and Validity of the Choice of Law Clause	293
5. Validity of the Account Agreement	293
6. The Qualifying Office Requirement.....	294
a) The Debate between the Common Law and the Civil Law Approaches.....	294
b) The Conditions for a Qualifying Office	295
c) Definition of the Term “Office”	299
d) The Time Factor.....	299
e) The Qualifying Activity	300
7. Rejection of the Idea of a “Super-PRIMA”	300
8. Explanatory Rules for Transfers by an Account Holder in favour of its Intermediary	301
III. Fall-Back Rules under Article 5 of the Hague Securities Convention	302
1. Introduction	302
2. The First Fall-Back Rule: Article 5(1)	302

a) “Written” Agreement	303
b) Express and Unambiguous Statement in the Account Agreement as to a Particular Office.....	303
3. The Second Fall-Back Rule: Article 5(2).....	304
4. The Third Fall-Back Rule: Article 5(3).....	305
5. The “Page 37 Problem”	305
a) Introduction.....	305
b) Transfers involving Two or More Intermediaries	306
c) The Unitary Solution.....	308
d) The Problem of “Double-Interests”	310
D. The Black List of Immaterial Factors.....	311
E. Protection of Rights on Change of the Applicable Law	312
I. Scope of the Provision.....	312
II. “Old” and “New” Law.....	313
III. Applicability of the “New” Law under Article 7(3)	313
IV. Exceptional Application of the “Old” Law under Article 7(4)	314
1. Scope.....	314
2. Issues governed by the “Old” Law under Article 7(4).....	315
V. Priority Issues: Article 7(5)	316
F. Insolvency	316
I. Scope of Article 8 of the Hague Securities Convention	316
1. Introduction	316
2. Insolvency Proceedings	317
II. Recognition of Interests Acquired prior to an Insolvency Proceeding.....	318
III. Effects in an Insolvency Proceeding of Previously Acquired Interests.....	319
G. Exclusion of Choice of Laws Rules (Renvoi)	320
H. Public Policy and Mandatory Rules	321
I. Public Policy Exception under Article 11(1) of the Hague Securities Convention.....	321
II. Mandatory Rules of the Forum.....	322
III. An Important Limitation under Article 11(3) of the Hague Securities Convention.....	323
I. Evaluation of the Hague Securities Convention.....	323
I. Protection of Third-Party Rights.....	323
1. Transparency	324
2. Abuse	325
II. Interaction with Substantive Law	326
1. Introduction	326
2. Interaction of the Hague Securities Convention with Company Law	326

3. Interaction of the Hague Securities Convention with Securities Law327

III. Relationship with Public Law329

IV. Diversity of Laws in the Securities Settlement System330

J. Summary330

Chapter 5: Alternative Conflict of Laws Rules and Connecting Factors332

A. The “Substantive Law Solution” to the Choice of Law Problem332

 I. Regional Unification of Substantive Law in Respect of the Collateralisation of Intermediated Securities under OHADA Law332

 II. Rejection of the Substantive Law Solution334

 1. Inefficiency of the Substantive Law Solution from a Purely Legal Perspective334

 2. Practical Difficulties resulting from the Substantive Law Solution334

B. The Law of the System338

 I. Introduction to the Rule of the Law of the System338

 II. Evaluation of the Law of the System Rule339

C. Choice of the Law Applicable to the Collateral Agreement340

 I. Towards Recognition of Party Autonomy in the Law of Property?340

 1. “In Dubio pro Libertate”: Choice of Law in Current European Developments340

 2. Looking for Models for a Reform of International Property Law345

 a) The Russian Civil Code345

 b) The Dutch Private International Law Act346

 II. Choice of Law in Collateral Agreements regarding Intermediated Securities348

 1. Party Autonomy in Collateral Agreements regarding Intermediated Securities348

 2. Legal Risks and Practical Difficulties349

D. Summary and Evaluation350

Chapter 6: Comparison of the Operation of the Different Conflict of Laws Rules from an OHADA Perspective351

A. Fact Pattern351

B. Variations and Solutions under the Different Choice of Law Rules352

 I. First Variation: Collateral Provider and Collateral Taker Hold through the Same Intermediary and Collateral Is Provided by way of Pledge352

1. Presentation of the Fact Pattern's Variation	352
2. Solutions under Different Conflict of Laws Rules	353
a) Solution under PRIMA.....	353
b) Solution under the Primary Rule of the Hague Securities Convention	354
c) Solution under the Law chosen in the Pledge Agreement.....	354
II. Second Variation: Collateral Provider and Collateral Taker Hold through Different Intermediaries and Collateral Is Provided by way of Pledge	355
1. A Variation on the Fact Pattern.....	355
2. Solution under Different Conflict of Laws Rules	357
a) Solution under PRIMA.....	357
b) Solution under the Primary Rule of the Hague Securities Convention	357
c) Solution under the Law chosen in the Pledge Agreement.....	357
III. Third Variation: Collateral Taker and Collateral Provider Hold through Different Intermediaries and Collateral Is Provided by way of Title Transfer	358
1. Another Variation on the Fact Pattern.....	358
2. Solutions under Different Conflict of Laws Rules	360
a) Solution under PRIMA.....	360
b) Solution under the Primary Rule of the Hague Securities Convention	360
IV. Fourth Variation: Collateral Provider Holds through Collateral Taker as Intermediary and Collateral Provided by way of Pledge	361
1. Another Variation on the Fact Pattern.....	361
2. Solution under Different Conflict of Laws Rules	361
a) Solution under PRIMA.....	361
b) Solution under the Primary Rule of the Hague Securities Convention	362
c) Solution under the Law chosen in the Pledge Agreement.....	363
C. Summary and Evaluation	363

General Conclusion365

Appendix

A. Indicative List of the Travaux Préparatoires for the
Financial Collateral Directive371

B. Indicative List of the Travaux Préparatoires for Directive
2009/44/EC of 6 May 2009373

C. Proposal of a Uniform Act on the Law Applicable to Certain
Rights in Respect of Securities held with an Intermediary374

Bibliography.....391

Index413

Tables and Figures

Table 1: Chronological Table of the Ratifications of the OHADA Treaty.....	15
Table 2: Geographical Origins of the Appeals Lodged before the CCJA	28
Table 3: Chronological Table of the Uniform Acts and the Regulations	40
Table 4: Provisions on Pledges of Securities Accounts under different Uniform Acts	71
Table 5: Qualifying Office Requirement.....	296
Figure 1: Non-intermediated Securities Holding – Physical Certificates.....	43
Figure 2: Intermediated Securities Holding Chain with Three Intermediaries	49
Figure 3: Global Dematerialisation of Securities in Cameroon under Act n° 2014/007.....	55
Figure 4: Individual Ownership Model	56
Figure 5: Co-ownership Model	56
Figure 6: Trust Model	57
Figure 7: Security Entitlement Model.....	58
Figure 8: Contractual Model	59
Figure 9: Transparent Systems in Which the Holdings are Held in an Account with the CSD	60
Figure 10: Transparent Systems in Which the Holdings of the Investor Are Identified in an Intermediary Account with the CSD	61
Figure 11: Transparent Systems in Which an Investor’s Holdings are Held by an Intermediary in an Omnibus Account at the CSD and the Account Information is Registered on a Regular Basis	62
Figure 12: Basic Structure of the US Intermediated System.....	179
Figure 13: Method of Obtaining Control of Certificated Securities.....	192
Figure 14: Methods of Obtaining Control of an Uncertificated Security.....	193
Figure 15: Methods of Obtaining Control of Security Entitlements	193
Figure 16: Priority of Security Interests in Investment Property.....	196
Figure 17: Look-Through Approach.....	211
Figure 18: First Variation	217
Figure 19: Second Variation	219
Figure 20: Second Variation (Continued)	220

Figure 21: Third Variation	222
Figure 22: Fourth Variation	224
Figure 23: Determination of the Applicable Law under the Hague Securities Convention.....	288
Figure 24: Qualifying Office Requirement	298
Figure 25: Transfers involving Two or More Relevant Intermediaries ³⁷⁹	306
Figure 26: The Problem of “Double Interests”	311
Figure 27: First Variation (Substantive Law Solution)	333
Figure 28: Cross-border Intermediated Securities Holding Chain spanning Four States.....	335
Figure 29: Second Variation (Substantive Law Solution).....	337
Figure 30: Look-Through Approach.....	349
Figure 31: First Variation: Collateral Provider and Collateral Taker Hold through the Same Intermediary and Collateral Is Provided by way of Pledge	353
Figure 32: Second Variation: Collateral Provider and Collateral Taker Hold through Different Intermediaries and Collateral Is Provided by way of Pledge	356
Figure 33: Third Variation: Collateral Taker and Collateral Provider Hold through Different Intermediaries and Collateral Is Provided by way of Title Transfer	359
Figure 34: Fourth Variation: Collateral Provider Holds through Collateral Taker as Intermediary and Collateral Is Provided by way of Pledge.....	362

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
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Entscheidungssammlung des Bundesgerichtshofs in Zivilsachen
Bull. civ.	Bulletin civil
BW	Bürgerlijk 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 Coun- cil of 15 May 2014 on markets in financial instruments and amend- ing 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 ob- ligations
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 Com- mercial 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 States³ and has adopted ten so-called Uniform Acts⁴, which cover numerous business law

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 intermediary⁷ (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-

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

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 außervertragliche 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 May 1996 – 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 Versandkaufs 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-

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 materiell-rechtlichem 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 Directive¹⁹ and the Financial Collateral Directive²⁰ 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-

¹⁸ At the Paris Congress of 1900, *Lambert and Salleilles* defined comparative law as the discovery of concepts and principles common to all civilised legal systems (Édouard Lambert, 'Conception générale et définition 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 approach²¹ (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 Intermediary²² (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 Alegria 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 Alegria 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

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.

Index

- accession
 - to the Geneva Securities Convention 101
 - to the Hague Securities Convention 281
- account agreement
 - form 284, 293
 - governing law 242, 289
- account holder
 - definition 53
 - instruction 100, 186–187
 - rights
 - set-off 124, 151
 - ultimate account holder 327
- African Financial Community 11
- acquisition and disposition *see* disposition
- allocation of securities 233
- applicable law
 - change of 249, 312–313
 - conflict of laws 199
 - innocent acquisition 161, 169, 185
 - upper-tier attachment 176, 179, 271
- authorization of disposition *see* disposition

- bearer securities 205, 208, 267
- book entry 51, 100, 157

- cash collateral 83, 139, 141
- central bank 85, 129, 137
- central securities depository 48
- centralisation of securities 51
- chain of intermediaries (transfer through) 301, 308, 311
- characterisation 150, 265–266
- choice of law 199
- close-out netting *see* netting
- collateral agreement
 - applicable law 213, 242, 335
 - collateral provider 7, 86, 112
 - collateral taker 5, 88, 221
 - definition 109, 113, 120
 - enforcement 145, 182
 - equivalent collateral 106, 111, 149
 - invalidity 121, 124, 150
 - relevant obligations 104, 107, 114
 - reversal 121, 188
 - right of use 85, 110, 148
 - substitution 83, 153
- collateral provider *see* collateral agreement
- collateral taker *see* collateral agreement
- Common Court of Justice and Arbitration 24–26
- competing interests 74, 89, 270–271
- conflict of laws 199
- contractual rights 58, 277
- Council of Ministers 21

- declaration by Contracting State 102
- dematerialisation 51–53
- direct holding 43–46, 206, 241
- disposition 187, 268, 276

- enforcement 92, 106, 183

- fall-back rule *see* Hague Securities Convention 304
- fraud of law 144, 170, 270
- fungible account 56, 209, 366, *see also* pooling of securities

- Geneva Securities Convention 97
- global (jumbo) certificate 99, 181
- global note 51, 209, *see also* global (jumbo) certificate
- governing law *see* applicable law 8, 199, 208

- Hague Conference on Private International Law 7, 257
- Hague Securities Convention
- Article 2(1) issues 264, 273, 287
 - entry into force 282–287
 - factors to be disregarded 255, 279, 314
 - fall-back rules 304–305
 - history 268–263
 - internationality 280–282
 - primary rule 291
 - *renvoi* 322
 - scope 137
 - state or REIO 285
 - Super-PRIMA (rejection) 302
- harmonisation 14, 19–20
- immobilisation of security certificates 51
- innocent acquisition 161, 169, 185
- insolvency proceedings 152, 184
- intermediary
- account holder 80, 278, 303
 - custodian 91, 228, 327
 - definition 2
 - instruction to 86, 187, 191
 - relevant intermediary 7, 213–215
- intermediated holding system 46
- intermediated securities 2–4, 47, 54
- investor 2–5, 18, 55
- lex concursus* 317, 319, 338
- lex rei sitae* 199
- look-through approach 208
- loss sharing 45
- mandatory rules 323, 341
- netting 105, 108, 151
- OHADA 1, 11
- omnibus account 61, 218
- ordre public* 321, 323
- outright transfer of title 124, 148, 268
- perfection 188, 250, 271
- Place of the Relevant Intermediary Approach (PRIMA) 8, 213–240
- pledge (of securities account) 66, 215, 218
- pooling of securities 56, *see also* fungible account
- priority 272, 318
- private international law *see* conflict of laws 9, 199
- qualifying office requirement 296
- realisation 90, 107, 273
- renvoi* 230, 322
- repo 99, 142, 151
- repurchase agreement 99
- right to use 85, 109
- securities clearing system 340
- securities collateral agreement *see* collateral agreement 67
- securities settlement system 48, 130, 332
- security interests 65, 170, 188
- sphere of application
- Financial Collateral Directive 137
 - Geneva Securities Convention 102
 - Hague Securities Convention 263
 - Settlement Finality Directive 127
- substantive law approach 335
- Super-PRIMA (rejection) 302, *see also* Hague Securities Convention
- top-up 114, 153
- transfer of title by way of security 124, 148, 268
- transparent system 60
- unification 19
- Uniform Act
- bankruptcy 30
 - company law 30, 51
 - interaction with national law 33
 - security interests 65
- Uniform Commercial Code 156, 241
- upper-tier attachment 160, 176, 309, *see also* attachment
- zero hour rule 129, 139