UNIFORM LAW CONFERENCE OF CANADA

CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY

PRE-IMPLEMENTATION REPORT

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INTRODUCTION

[1] The subject of this report is the *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (the "Convention"). The Convention, also referred to as the *Hague Securities Convention*, was prepared under the auspices of the Hague Conference on Private International Law and was adopted during a diplomatic session held in The Hague in December 2002; it was signed by its first signatories, the United States of America and Switzerland on July 5, 2006. Its objective is to determine the law applicable to a number of issues relating to securities held with an intermediary, including the perfection of transfers or security interests relating to securities of that nature. The Convention is a conflict of laws instrument and does not propose substantive law rules. It must be noted that the Convention relates to private law matters and does not concern the regulation of trading in securities or the activities of securities intermediaries.

[2] The purpose of this report is to assist the Uniform Law Conference of Canada in its review of the advisability of implementing the Convention in Canada.

[3] The report is divided in four parts. Part I provides an overview of the Convention and its basic rules. Part II summarizes the law in effect in Canada on the issues covered by the Convention. Part III outlines the similarities and differences between the rules of the Convention and those which are applicable in Canada in order to identify the modifications to the laws of the Canadian provinces and territories that would be necessary for the implementation of the Convention. Part IV examines the advantages and disadvantages of certain declarations that Canada could make under the Convention in order to facilitate its implementation. The report concludes with brief observations on the impact that implementing the Convention would have on Canadian practices.

[4] As the objective of the Convention is to establish conflict of laws rules applicable to contractual or property rights, one must bear in mind that the legal framework governing in Canada the matters covered by the Convention is essentially found in the laws of the Canadian provinces and territories. The implementation of the Convention would therefore be needed to be achieved at the provincial and territorial level. However, federal implementing legislation would

also have to be considered in order to avoid uncertainties on the effectiveness of the Convention conflict rules in circumstances falling under the legislative authority of the Parliament of Canada (e.g. insolvency).

[5] The terminology used in the Convention is in various respects different from that used in the legislation of the Canadian provinces or territories. These differences will be noted where necessary.

[6] As explanatory report of the Convention (the "Explanatory Report") was prepared by Professor Sir Roy Goode (United Kingdom), Professor Hideki Kanda (Japan) and Professor Karl Kreuzer (Germany), with the assistance of Dr. Christophe Bernasconi (First Secretary of the Permanent Bureau of the Hague Conference). The Explanatory Report may be ordered from the Hague Conference.

[7] In this report, references to Articles without any other mention refer to Articles of the Convention and the term "security interest" is used as a generic term in the same manner as in the Convention.

– OVERVIEW OF THE CONVENTION

[8] This Part summarizes the contents of the Convention and is comprised of four sections:

– Section 1 sets out the key concepts of the Convention;

– Section 2 considers the scope of application of the Convention;

– Section 3 reviews the conflict of laws rules proposed by the Convention; and

– Section 4 deals with particular rules that may apply in a "Multi-unit State" such as Canada or the United States.

Key concepts and terminology

[9] An examination of the issues covered by the Convention rules first requires an understanding of four key concepts. These concepts emerge from Article 2(1) which states the objective of the Convention: to determine the law applicable to certain "issues in respect of securities held with an intermediary". The terms "securities" and "intermediary" as well as the expression "securities held with an intermediary" are defined in Article 1. Many of the practical issues in respect of which the applicable law needs to be determined arise in the context of a "disposition", which is also a defined term.

Securities

[10] Under Article 1(1)(a), the term "securities" means "any shares, bonds or other financial instruments or assets (other than cash), or any interest therein.". The definition applies to both equity interests (shares) and debt obligations (bonds). The reference to "other financial instruments or assets" demonstrates that the term securities is intended to be very broad and is not confined to shares and bonds in the traditional sense. As the expression "financial instruments or assets" is not defined, it must be construed as referring to any asset generally considered as financial. Thus, commercial paper[1], bankers' acceptances, options and foreign exchange forward contracts are within the scope of the Convention. It must be noted that the definition of securities does not require that they be of a type traded on securities exchanges or capital markets. As well, there is no requirement that the issuer of the securities be a corporation or other legal person or that the issuer be a "reporting issuer" as this term is understood in Canadian securities laws and regulations.

[11] Cash is excluded from the definition of securities. Accordingly, even if a cash credit balance in a securities account is economically a financial asset, such a credit balance is outside the scope of the Convention. The Explanatory Report (para. 1-2) notes, however, that a certificate of deposit issued by a bank and credited to a securities account should be treated as a financial instrument covered by the Convention.

Intermediary

[12] The term "intermediary" is defined as follows in Article 1(1)(c):

> "*c)* "intermediary" means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity;"

[13] This definition must be read in conjunction with the definition of "securities account" in Article 1(1)(b):

> "*b)* "securities account" means an account maintained by an intermediary to which securities may be credited or debited;"

[14] A broker, securities dealer or portfolio manager that maintains securities accounts for its customers is the typical intermediary but any other person that in the course of its business maintains securities accounts for others is also an intermediary (e.g. a bank or a trust company). For the avoidance of doubt, Article 1(4) specifies that a central securities depository is regarded as an intermediary (e.g., in Canada, CDS Clearing and Depository Services Inc., commonly known as "CDS").

Securities held with an intermediary

[15] This expression is the crucial concept of the Convention because it delineates its scope of application. Under Article 1(1)(f):

> "*f)* "securities held with an intermediary" means the rights of an account holder resulting from a credit of securities to a securities account;"

[16] It must be stressed that the above definition has a meaning that does not coincide with the literal meaning of the defined expression. The definition refers, not to the securities themselves, but rather to the rights resulting from a credit of securities to a securities account. This significant nuance originates from the intent of the drafters of the Convention to adopt a neutral approach on the characterization of the legal nature of securities credited to a securities account: is it an *in rem* right or interest in the securities credited to the account or a contractual right against the intermediary (or an hybrid *sui generis* right which is in part a proprietary interest and in part a contractual right)? Article 2(2) reflects the intent of the Convention to abstain from

taking a position on this question and to accommodate all these approaches (see the Explanatory Report, paras. Int-20, Int-24 and 4-2).

[17] In the securities transfer laws now in effect in the Canadian provinces and territories (see Part II below), the term that corresponds to the expression "securities held with an intermediary" is "security entitlement"; this term comes from Article 8 of the *Uniform Commercial Code* in effect in the United States.

Disposition

[18] Sales and secured transactions relating to securities frequently raise conflict of laws issues. The Convention uses a generic term to describe all transactions by which securities are transferred or made subject to a security interest:

> "*h)* "disposition" means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory;"

[19] By reason of this definition, the conflict of laws rules of the Convention on the legal nature, effects and perfection of a disposition will apply to any kind of transaction whereby ownership is transferred or another type of interest is granted. The definition also recognizes the distinction made in some legal systems between a transfer of title for security purposes and a security interest. The substantive law designated by the conflict of laws rules of the Convention will determine the legal characterization and effects of such a title transfer.

Scope of application of the Convention

[20] Article 2(1) enumerates the issues which are the subject of the conflict of laws rules of the Convention. Although the list is very broad, it must be borne in mind that the application of these rules is triggered only in respect of securities held with an intermediary. The determination of the law applicable to the rights of a "direct" holder of securities is outside the scope of the Convention. If a person is registered as holder of securities in the securities register of an issuer, regard must be had to other conflict of laws rules to ascertain the law applicable to that person's rights in these securities.

[21] Article 2(1) reads as follows:

"(1) This Convention determines the law applicable to the following issues in respect of securities held with an intermediary –

a) the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account;

b) the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary;

c) the requirements, if any, for perfection of a disposition of securities held with an intermediary;

d) whether a person's interest in securities held with an intermediary extinguishes or has priority over another person's interest;

e) the duties, if any, of an intermediary to a person other than the account holder who asserts in competition with the account holder or another person an interest in securities held with that intermediary;

f) the requirements, if any, for the realisation of an interest in securities held with an intermediary;

g) whether a disposition of securities held with an intermediary extends to entitlements to dividends, income, or other distributions, or to redemption, sale or other proceeds."

[22] The Explanatory Report states (para. 2-10) that "the list in Article 2(1) ensures that all practical issues that may arise in relation to transactions involving securities held with an intermediary are covered by the Convention ... If the issue concerns securities credited to a securities account, it will likely fall within the broad language of Article 2(1).".

[23] The most significant issues covered by Article 2(1) are the legal nature of securities held with an intermediary, perfection issues, priority issues and issues relating to the realisation of a security interest in securities. As noted above, these issues arise frequently in the area of secured transactions.

Legal nature and effects of an acquisition or a disposition

[24] As mentioned in the introduction to this report, the legal nature of the rights acquired by an account holder when securities are credited to that person's account may be characterized as a property right or a contractual right against the intermediary, or a *sui generis* right the attributes of which include proprietary and contractual features. There is a lack of consensus among the various legal systems (and even within some legal systems) as to the legal characterization of an

account holder's right. Recognizing that the issue may in certain circumstances have a practical importance, the Convention includes that issue in the list of matters falling under its scope of application.

[25] It is to be noted, however, that the law to which the Convention points for the legal characterization of the account holder's right would not necessarily be the law which determines whether the account holder may enforce rights against the issuer of the securities. Article 2(3)(c) excludes from the scope of the Convention the determination of the law applicable to the duties of an issuer to an account holder. Accordingly, even if the substantive law (as determined by the Convention) governing the nature of the account holder's right were to characterize this right as an ownership interest in the securities credited to the account, the Convention would not permit to conclude that this substantive law will apply to the question of whether an account holder may enforce its right against an issuer of the securities.

[26] The Explanatory Report (para. 2-20) mentions that the Convention conflict rules determine the law applicable to the question of whether an intermediary has the right to use or dispose of securities credited to the account of an account holder. This is an issue of practical importance since it is relatively frequent for an intermediary to use securities held for its customers as collateral to secure obligations of the intermediary to a third party (e.g., to a securities clearing organization).

Perfection issues

[27] Another important issue falling under the scope of the Convention relates to "the requirements, if any, for the perfection of a disposition of securities held with an intermediary" (Article 2(1)c)). It has been mentioned that Article 1(1)h) defines "disposition" as meaning "any transfer of title whether outright or by way of security and any grant of security interest, whether possessory or non-possessory;". The term "perfection" is also defined in Article 1(1) and means "completion of any steps necessary to render a disposition effective against persons who are not parties to that disposition;".

[28] Thus, the conflict of laws rules of the Convention will determine the law applicable to the effectiveness against third parties of a transfer of ownership of, or a security interest in, securities

credited to a securities account. The law so determined will govern the question of whether steps must be taken to render the disposition effective against third parties, such as a creditor of the person making the disposition or a transferee pursuant to another disposition. Article 8(1) makes clear that third parties also include an insolvency administrator in insolvency proceedings relating to the person who has made the disposition. Therefore, the effectiveness of a security interest against a trustee in the bankruptcy of the grantor will be governed by the law designated by the conflict rules of the Convention.

Priority issues

[29] In many legal systems (including in Canada), the fact that a disposition from one person to another is effective against third parties does not necessarily result in the other person having priority over a claim by a competing claimant. It was therefore necessary to include priority in the list of issues to which the conflicts of laws rules of the Convention apply. For example, a priority contest between two creditors holding each a security interest in securities credited to the same securities account will be resolved under the substantive law designated by the conflict rules of the Convention.

[30] Likewise, if a person asserts against an account holder (or its secured creditor) a proprietary interest or a claim in respect of securities credited to its securities account, the respective rights of the parties will be determined by the law designated by the Convention; an example would be a claim by a previous owner of securities claiming that these securities (or their proceeds) can be traced to the securities account of the account holder. This type of vertical priority dispute is also an issue covered by Article 2(1)(d).

Realisation of an interest issues

[31] The Convention conflict rules determine the law applicable to the "realisation of an interest in securities held with an intermediary". This includes the law applicable to the remedies available to a creditor holding a security interest in securities.

* * *

[32] It is worth noting that the issues listed in Article 2(1) do not expressly include issues relating to the validity of an acquisition or a disposition of securities held with an intermediary.

To the extent that validity issues relate solely to the requirements for a transaction to be effective as between the parties to the transaction, the issues are left to conflict of laws rules other than those provided by the Convention. For legal systems in which the requirements for the validity of the transaction encompass those required for same to be effective against third parties, then these issues would be captured by Articles 2(1)(a) through 2(1)(d), which deal with the third-party effects of an acquisition or disposition.

The conflict of laws rules of the Convention

[33] The primary conflict rule of the Convention points to the law selected in the securities account agreement between the account holder and the intermediary as the law governing the agreement. This law in principle will govern all of the issues reviewed in section 0 above. There is however a requirement that the law so chosen by the parties be that of a State in which the intermediary has an office which meets certain criteria. If this requirement is not fulfilled, then three fall-back provisions apply; these provisions result essentially in the application of the law of the State of the location of the intermediary (that location being itself determined by a cascade of criteria).

The primary rule

[34] Article 4(1) sets out as follows the conflict rule that should generally apply (the “primary rule”):

“(1) The law applicable to all the issues specified in Article 2(1) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –

a) alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –

i) effects or monitors entries to securities accounts;

ii) administers payments or corporate actions relating to securities held with the intermediary; or

iii) is otherwise engaged in a business or other regular activity of maintaining securities accounts; or

b) is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State."

[35] The effect of the primary rule is that the law selected by the parties in the account agreement will apply to the issues falling under the scope of the Convention, provided that the law so selected be the law of a State in which the intermediary has an office that meets either of the criteria enumerated in paragraphs (a) and (b) quoted above (hereafter in this report, a "qualifying office").

[36] Although in principle the applicable law will be the law governing the account agreement, the parties to that agreement are also permitted to select for the issues within the scope of the Convention the law of another State. However, the choice of another law is effective for the purposes of the Convention only if it applies to all issues listed in Article 2(1). Cherry picking is not allowed.

[37] At first glance, the primary conflict rule of the Convention might appear to run against the traditional approach in private international law that the determination of the law applicable to property rights issues is outside the domain of party autonomy. For example, a court in Canada would not give effect to a clause in a security agreement providing that the perfection of the security interest of the creditor will be governed by the law of State X. Otherwise, competing security interests might be subject to different laws for their perfection or priority, with the result that no single law would be capable of resolving a priority dispute between creditors holding competing security interests.

[38] The Convention, however, does not lead to that result. One single law will apply to the dispute, namely the law governing the account agreement (or the other law selected in the account agreement to govern the Convention issues). Put differently, the law governing the perfection and the respective priorities of competing secured creditors will be the law governing the account agreement, and not the law that the parties to the security agreement might have attempted to select. The Convention primary rule is therefore in line with the objective of certainty that underlies sound conflict rules in the area of property interests.

[39] The view has also been expressed that the Convention rule fails to achieve another objective of sound property right conflict rules, namely that third parties should be able to

ascertain objectively the law applicable to a property interest in an asset. For example, an unsecured creditor of an account holder would be unable to discover the law applicable to a security interest in the securities account of the account holder and, consequently, whether a security interest in the related securities has been perfected. In response to that criticism, the drafters of the Convention appear to have made the policy decision that an unsecured creditor should make inquiries with the account holder before assuming that the securities account is free from charges. The approach of the Convention in this regard is similar to that followed by legal systems which provide that a security interest in an account receivable is governed by the law governing the contract under which the receivable arises.

The fall-back rules

[40] If the primary rule does not apply (either because the account agreement is silent on the applicable law or because the intermediary has no qualifying office in the State whose law has been chosen), then the applicable law is determined in accordance with the three fall-back rules contained in Article 5. In order to understand the operation of these rules, Article 5 must be reproduced in its entirety:

"(1) If the applicable law is not determined under Article 4, but it is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable to all the issues specified in Article 2(1) is the law in force in the State, or the territorial unit of a Multi-unit State, in which that office was then located, provided that such office then satisfied the condition specified in the second sentence of Article 4(1). In determining whether an account agreement expressly and unambiguously states that the relevant intermediary entered into the account agreement through a particular office, none of the following shall be considered –

a) a provision that notices or other documents shall or may be served on the relevant intermediary at that office;

b) a provision that legal proceedings shall or may be instituted against the relevant intermediary in a particular State or in a particular territorial unit of a Multi-unit State;

c) a provision that any statement or other document shall or may be provided by the relevant intermediary from that office;

d) a provision that any service shall or may be provided by the relevant intermediary from that office;

e) a provision that any operation or function shall or may be carried on or performed by the relevant intermediary at that office."

(2) If the applicable law is not determined under paragraph (1), that law is the law in force in the State, or the territorial unit of a Multi-unit State, under whose law the relevant intermediary is incorporated or otherwise organised at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened; if, however, the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

(3) If the applicable law is not determined under either paragraph (1) or paragraph (2), that law is the law in force in the State, or the territorial unit of a Multi-unit State, in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

[41] The above provisions are self-explanatory and, for the purposes of this report, require only one observation: the first fall-back rule refers to the location of the particular office through which the intermediary has entered into the account agreement, and not to the location of the intermediary's office maintaining the account or providing services to the account holder; moreover, the account agreement must clearly show that it has been entered into by the intermediary through that office. If it is not the case, the first fall-back rule will not apply. An example of the application of the first fall-back rule is the case where an account agreement is entered into in Canada by a foreign bank that executes the agreement by identifying itself in the agreement as "Bank XYZ, Calgary Branch". This is a common practice (and sometimes prescribed by law) when a bank incorporated in one country carries on business in another country through a branch that is regulated in the other country as if it were a separate entity.

Multi-unit States

[42] The Convention, like many other private law international instruments, sets out provisions on the manner in which it applies in a Multi-unit State, that is, "a State within which two or more territorial units of that State, or both the State and one of its territorial units, have their own rules of law in respect of any of the issues specified in Article 2(1);" (see Article 1(1)(m)). These provisions are contained in Article 12, which reads as follows:

"(1) If the account holder and the relevant intermediary have agreed on the law of a specified territorial unit of a Multi-unit State –

a) the references to "State" in the first sentence of Article 4(1) are to that territorial unit;

b) the references to "that State" in the second sentence of Article 4(1) are to the Multi-unit State itself.

(2) In applying this Convention –

a) the law in force in a territorial unit of a Multi-unit State includes both the law of that unit and, to the extent applicable in that unit, the law of the Multi-unit State itself;

b) if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue.

(3) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that if, under Article 5, the applicable law is that of the Multi-unit State or one of its territorial units, the internal choice of law rules in force in that Multi-unit State shall determine whether the substantive rules of law of that Multi-unit State or of a particular territorial unit of that Multi-unit State shall apply. A Multi-unit State that makes such a declaration shall communicate information concerning the content of those internal choice of law rules to the Permanent Bureau of the Hague Conference on Private International Law.

(4) A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective."

[43] This Article deals with three issues:

- the application of the primary conflict rule in the context of a Multi-unit State;
- the application of the qualifying office requirement in a Multi-unit State; and
- the potential application of *renvoi* within a Multi-unit State.

<u>Application of the primary rule</u>

[44] It flows from Article 12(1)a) that if in a Multi-unit State the issues within the scope of the Convention fall under the legislative authority of its territorial units (as in Canada), the primary conflict rule of the Convention will point to the law of a territorial unit of that State only if that

law has been designated as such in the account agreement. For example, in the Canadian context, the primary conflict rule will apply and point to Nova Scotia law if the parties to the account agreement have agreed that same be governed by the law of Nova Scotia. If they had instead designated “the law of Canada” as the law governing the agreement, the primary rule of the Convention obviously could not apply because the designation would not be sufficient to identify the applicable substantive law.

The qualifying office requirement

[45] Article 12(1)b) provides that the qualifying office requirement of the primary conflict rule of the Convention is met if the intermediary has an office anywhere in the Multi-unit State of which the law of one of its territorial units has been chosen. For example, if the parties to the account agreement have chosen Nova Scotia law as the law governing the account agreement, the primary conflict rule will apply to the extent the intermediary has an office in Canada; that office need not to be located in Nova Scotia.

[46] By way of exception, a State may however make a declaration under Article 12(4) to the effect that the qualifying office must be located in the territorial unit whose law has been designated in the account agreement (Nova Scotia, in the example). The result of such a declaration would be that the primary conflict rule of the Convention would not apply if, in the foregoing example, the intermediary had offices in Ontario and Québec, but not in Nova Scotia. In such a case, the fall-back conflict rules of Article 5 would be triggered and the applicable law would be the law of Ontario if the intermediary had been incorporated under the Ontario *Business Corporations Act*.

Renvoi

[47] Article 10 of the Convention excludes the doctrine of *renvoi*: the rules of Articles 4 and 5 of the Convention must be read as referring to the substantive law of the State whose law is determined to be the applicable law. Articles 12(2)b) and 12(3) quoted above provide for two exceptions to the exclusion of *renvoi* and allow for a limited application of the doctrine within a Multi-unit State.

[48] The first exception (Article 12(2)b)) may be illustrated by the following example: if, in a given fact pattern, the Convention conflict rules point to Québec law as the applicable law and the Québec conflict rules on the perfection of a security interest by registration refer in that fact pattern to Ontario, Ontario law will be the law governing perfection by registration.

[49] The second exception (Article 12(3)) applies only if the Multi-unit State concerned makes a declaration under that Article. The declaration would permit internal *renvoi* (that is, from one territorial unit for another). Consider a case where the relevant conflict of laws provision would be Article 5 (because the account agreement was silent on choice of law) and where Article 5 would point to the law of British Columbia. Suppose Canada is party to the Convention and has made a declaration under Article 12(3). The effect would be that *renvoi* would apply within Canada. For example, if the conflict of laws rules of British Columbia point to Alberta, then the applicable law will be that of Alberta.

[50] It must be stressed that Articles 12(2)b) and 12(3) are confined to internal *renvoi*. If, in the previous example, the conflict of laws rules of British Columbia were to designate California law as the applicable law, that designation would not be given effect; in such a case, the applicable law would remain that of British Columbia.

– THE LAW IN EFFECT IN CANADA

[51] This Part summarizes the law in effect in Canada relating to matters covered by the Convention.

[52] All provinces and territories (except for Prince Edward Island) have adopted since 2006 laws that contain both substantive law provisions and conflict of laws rules in the area of securities held with intermediaries. For ease of reference, these laws will be referred to as securities transfer legislation. As similar legislation is expected to be passed by Prince Edward Island, the summary in this Part will be based on the securities transfer legislation adopted so far in Canada (the “Canadian regimes”).

[53] In the common law provinces that have adopted securities transfer legislation, the legislation is essentially found in the *Securities Transfer Act* and the *Personal Property Security*

Act of the relevant province. The provisions of these statutes ("STAs" and "PPSAs"[2]) are virtually identical in all common law provinces with respect to securities transfer matters.

[54] The Québec securities transfer legislation is contained in the *Act respecting the transfer of securities and the establishment of security entitlements*[3] (the "Québec STA") and the Civil Code of Québec ("CCQ"). The Québec legislation is different in structure and on occasion in terminology but yields to results which are identical on all significant issues. Accordingly, for sake of convenience, this report will generally use the *Securities Transfer Act* of Ontario[4] ("OSTA") and the *Personal Property Security Act* of Ontario[5] ("OPPSA") for the review of the Canadian regimes. Differences with Québec law will be noted wherever appropriate.

[55] The first section of this Part will examine the terminology and concepts used in the Canadian regimes on matters similar to the issues dealt with in the Convention; the second and third sections will review the conflict of laws rules of the Canadian regimes on these issues.

<u>Terminology and concepts</u>

[56] "Security entitlement" is the term used in the STAs, the Québec STA, the PPSAs and the CCQ to describe the rights resulting from securities held with an intermediary. Subsection 1(1) of the OSTA defines the term as follows:

> " "security entitlement" means the right and property interest of an entitlement holder with respect to a financial asset that are specified in Part VI;"

[57] Part VI of the OSTA contains the legal framework applicable to security entitlements, including the rights arising from the credit of financial assets to a securities account. The corresponding provisions of the Québec STA are found in its Chapter IV. The term "entitlement holder"[6] corresponds to the Convention term "account holder".

[58] Whereas the Convention refers to "securities" credited to a securities account, the STAs and the Québec STA use the term "financial asset" to describe the type of asset which may give rise to a security entitlement. The term is defined as follows in subsection 1(1) of the OSTA.[7]

> " "financial asset" means, except as otherwise provided in sections 10 to 16,
>
> (a) a security,

(b) an obligation of a person that,

(i) is, or is of a type, dealt in or traded on financial markets, or

(ii) is recognized in any other market or area in which it is issued or dealt in as a medium for investment,

(c) a share, participation or other interest in a person, or in property or an enterprise of a person, that,

(i) is, or is of a type, dealt in or traded on financial markets, or

(ii) is recognized in any other market or area in which it is issued or dealt in as a medium for investment,

(d) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Act, or

(e) a credit balance in a securities account, unless the securities intermediary has expressly agreed with the person for whom the account is maintained that the credit balance is not to be treated as a financial asset under this Act; ("actif financier")"

[59] Under the above definition, a financial asset includes a security. The term security is in turn defined in subsection 1(1) of the OSTA:[8]

" "security" means, except as otherwise provided in sections 10 to 16, an obligation of an issuer or a share, participation or other interest in an issuer or in property or an enterprise of an issuer,

(a) that is represented by a security certificate in bearer form or registered form, or the transfer of which may be registered on books maintained for that purpose by or on behalf of the issuer,

(b) that is one of a class or series, or by its terms is divisible into a class or series, of shares, participations, interests or obligations, and

(c) that,

(i) is, or is of a type, dealt in or traded on securities exchanges or securities markets, or

(ii) is a medium for investment and by its terms expressly provides that it is a security for the purposes of this Act; ("valeur mobilière")"

[60] It is worth noting that the definition of security in the STAs and the Québec STA is not as broad as under the Convention. Under the Canadian regimes, a security is only one of the various

classes of financial assets which can give rise to a security entitlement. Therefore, the term of the STAs and the Québec STA that corresponds better to the term "securities" in the Convention is "financial asset", and not "security".

Conflict issues covered by the Canadian regimes

[61] The issues that are the subject of the conflict of laws rules of the Canadian regimes are listed in the provisions of the STAs, the PPSAs and the CCQ setting out conflict rules.[9] The structure and terminology of these provisions are different from those of the Convention but most, if not all, of the Convention issues are in substance covered by the conflict rules of the Canadian regimes. For example, the Canadian conflict rules specifically deal with perfection and priority issues and, except for Québec, enforcement issues. The legal nature of a security entitlement is not however an issue mentioned in the Canadian conflict rules. The better view is nonetheless that these rules implicitly capture the issue.[10]

[62] It has been noted above that the Convention conflict rules are silent on the law applicable to the validity of a disposition (including by way of the grant of a security interest) of securities held with an intermediary. The conflict rules of the Canadian regimes cover the issue of the validity of a security interest and, to a certain extent, of another type of disposition.

The Canadian conflict rules

[63] The Canadian conflict rules in the *common law* provinces are found in the STAs and for, matters specific to secured transactions, in the PPSAs. In Québec, all conflict rules are found in the CCQ. As under the Convention, the Canadian regimes provide for a primary rule and fall-back rules; unlike the Convention, they contain exceptions to these rules.

The primary rule and the fall-back rules

[64] The STAs, the PPSAs and the CCQ all lead to a primary rule which is identical to that of the Convention (although the terminology is different). Section 45(1) of the OSTA states that "the law, other than the conflict of law rules, of the securities intermediary's jurisdiction governs [list of issues omitted]". On security interest matters, section 7.1 of the OPPSA provides as a general rule that the validity, perfection, the effect of perfection or of non perfection and the priority of a security interest in a security entitlement are governed by the law of the "securities

intermediary jurisdiction". As to the issue of validity of a security interest, the applicable law is that in effect at the time of the attachment of the security interest. For the other issues, the applicable law is that in effect at the time the relevant issue arises; article 3108.8 of the CCQ leads to the same result. For instance, the law applicable to the effectiveness of a security interest against the trustee in the bankruptcy of the grantor will be the law in effect at the time of the bankruptcy.

[65] The PPSAs contain special provisions on the impact of a change of the securities intermediary's jurisdiction to another jurisdiction, where a security interest has been perfected under the law of the initial jurisdiction:[11] the security interest then remains perfected under the law of the new jurisdiction for a certain grace period. The CCQ does not provide for a similar grace period, with the result that the perfection previously achieved is immediately lost upon the occurrence of the change. The Canadian regimes do not specifically deal with a change of the applicable jurisdiction where the issue does not relate to security interests matters.

[66] The key connecting factor of the OSTA and the OPPSA is therefore the securities intermediary jurisdiction. The expression is defined in subsection 45(2) of the OSTA:

"(2) In this section,

"securities intermediary's jurisdiction" means the jurisdiction determined in accordance with the following rules:

1. If an agreement between a securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the securities intermediary's jurisdiction for the purposes of the law of that jurisdiction, this Act or any provision of this Act, the jurisdiction expressly provided for is the securities intermediary's jurisdiction.

2. If paragraph 1 does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

3. If neither paragraph 1 nor 2 applies and an agreement between a securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

4. If none of the preceding paragraphs applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

5. If none of the preceding paragraphs applies, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located. 2006, c. 8, s. 45 (2)."

[67] Pursuant to the above provisions, the primary conflict rule of the OSTA and the OPPSA points to the law of the jurisdiction selected by the parties to the account agreement as being the law governing that agreement or, as the case may be, as being the law governing all issues covered by the conflict rules (for sake of simplicity, hereafter the "law of the account agreement"). As under the Convention, the absence of a choice of the applicable law by the parties to the account agreement will trigger the fall-back rules set out in subsection 45(2) of the OSTA quoted above.

[68] The concept of "securities intermediary jurisdiction" is not used in the CCQ. The relevant provisions of the CCQ lead however to the same result as under the STAs and the PPSAs of the Canadian *common law* regimes.

[69] Article 3108.7 of the CCQ provides in effect for the same primary rule and fall-back rules:

"**3108.7.** The law expressly specified in a juridical act governing a securities account maintained for an entitlement holder by a securities intermediary as the law applicable to that act governs the following matters, unless the act specifies another law as the law applicable to them:

(1) acquisition of a security entitlement from the securities intermediary;

(2) the rights and duties of the securities intermediary and the entitlement holder arising out of the security entitlement;

(3) whether the securities intermediary owes any duty to a person who has an adverse claim to a security entitlement; and

(4) whether an adverse claim may be asserted against a person who acquires a security entitlement from the securities intermediary or who acquires rights in a security entitlement from the entitlement holder.

If no law is specified in a juridical act governing a securities account, the applicable law is the law of the country in which the establishment expressly mentioned in such an act as being the place where the securities account is maintained is located or, if no establishment is expressly specified in such an act, the law of the country in which the establishment identified in an account statement as the establishment serving the entitlement holder's account is located. If no law may be determined on the basis of the account statement, the applicable law is the law of the country in which the decision-making centre of the securities intermediary is located."

[70] For matters specific to security interests in security entitlements, article 3108.8 of the CCQ provides for a general rule that validity, perfection and priority issues are governed by the law of the account agreement; in the absence of a choice of law for the account agreement, fall-back rules are applied in the same manner as under subsection 45(2) of the OSTA.

Exceptions to the primary rule and the fall-back rules

[71] With respect to security interest matters, both the PPSAs and the CCQ make exceptions to the law of the account agreement rule (or to the fall-back rules). Subsection 7.1(5) of the OPPSA and article 3108.8 of the CCQ refer to the law of the location of the grantor (i.e., the person who grants the security interest) on two issues:

– Perfection by registration;

– Whether a security interest in a security entitlement granted by an intermediary may be automatically perfected by attachment (i.e., by the mere fact that the security entitlement becomes validly subject to the security interest even if no other perfection requirement has been fulfilled).

[72] The following example shows the result achieved by these exceptions. Investor X has a securities account with intermediary Y and is empowered to grant a security interest in the financial assets credited to its securities account. The law of the account agreement is the law of New York and investor X is located in Ontario. In consideration for a loan made to it by bank Z, X grants to bank Z a security interest in the securities account. If bank Z wants to perfect its security interest by registration, then Ontario law (and not the law of the account agreement, that is, New York law) will determine whether perfection by registration is possible and, as the case may be, has been achieved.

[73] It must be noted that the PPSAs and the CCQ do not define the location of the grantor of a security interest in the same manner. Under the PPSAs, the grantor is located at its place of business, or at its chief executive office if it has more than one place of business; a grantor with no place of business is deemed to be located at the grantor's place of habitual residence (see subsection 7(3) of the OPPSA). The CCQ refers to the legal domicile of the grantor as the notion corresponding to the grantor's location (see articles 3105 and 3108.8 of the CCQ.). Pursuant to article 307 of the CCQ, the legal domicile of a corporation is its statutory head office (i.e., its registered office).

[74] Finally, both the PPSAs and the CCQ have not adopted the law of the account agreement for enforcement issues relating to security interests.

– COMPARISON BETWEEN THE CONVENTION AND THE CANADIAN RULES

[75] The Convention conflict rules and the Canadian conflict rules are conceptually similar. The scope of application of the conflict of laws rules of the Convention substantially covers the issues which are the subject of the Canadian rules. Save for two notable exceptions (see section 0 below), the Convention definition of "securities held with an intermediary" also encompasses the same financial assets as those that may give rise to a "security entitlement" under the Canadian rules.

[76] With respect to the conflict of laws rules themselves, the primary rule of both the Convention and the Canadian regimes generally points to the same applicable law (the law of the account agreement) for the acquisition, perfection and priority of an interest in securities held with an intermediary (or a security entitlement in Canadian parlance). The Convention and the Canadian regimes do not however point to the same law for the enforcement of a security interest (see section 0 below). The fall-back rules that govern where the law of the account agreement does not apply are also different under the Convention and the Canadian regimes (see section 0 below).

[77] This Part will describe the main differences between the Convention and the Canadian regimes and will outline the modifications to the Canadian regimes that would be necessary to eliminate these differences and to implement the Convention. The matters involved may be classified in seven categories:

– the types of financial assets covered by the Convention and the Canadian regimes;

– the requirement of the Convention that the intermediary must have a qualifying office for the primary rule (the law of the account agreement) to apply;

– the fall-back conflict of laws rules that are triggered when the primary rule does not apply;

– the exceptions in the Canadian regimes to the application of either the primary rule or the fall-back rules;

– the difference between the Convention and the Canadian regimes with respect to the law applicable to enforcement issues;

– the impact of an amendment to the account agreement that changes the law of the account agreement; and

– the transition between the "old" and "new" law.

Financial Assets covered

[78] Two differences must here be signalled. First, cash in a securities account is excluded from the scope of the Convention whereas the term financial asset in the Canadian regimes is defined as including a credit balance in a securities account (unless the parties have otherwise agreed). Second, a "futures contract" (which is a defined term in the STAs but not in the Québec STA) is not a financial asset under the STAs, while the term securities in the Convention is broad enough to include financial futures (as noted in the Explanatory Report, para. 1-2).

[79] With respect to cash in a securities account, the implementation of the Convention would not need to exclude cash from the scope of the conflict of laws rules of the Canadian regimes. As cash is not covered by the conflict rules of the Convention, nothing would prevent the Canadian regimes from continuing to treat cash in a securities account as a financial asset, and accordingly, to apply the same conflict rule as for other financial assets.

[80] The difference between the two regimes with respect to futures contracts is attenuated by the fact that both the PPSAs and the CCQ apply generally the same conflict rules to security interests in futures contracts. Harmonizing the Canadian regimes with the Convention would therefore be consistent with existing Canadian rules.

The qualifying office requirement

[81] This requirement is not part of the Canadian regimes, which allow the law of the account agreement to operate even if this law is that of jurisdiction in which the intermediary has no qualifying office. Imposing the qualifying office requirement should not be an unwarranted constraint, as the parties to the account agreement are unlikely to choose the law of a jurisdiction in which the intermediary has no qualifying office. It is true, however, that in sophisticated transactions, parties may want to select the law of a jurisdiction with which the intermediary has no real connection. This would not be permitted under the Convention.

The fall-back rules

[82] The fall-back rules of the Convention are simpler, as they essentially lead to the jurisdiction of the location of the intermediary. Modifications to that effect to the Canadian regimes would require the removal of the fall-back rule of the Canadian regimes that point to the jurisdiction in which the securities account is maintained or managed by the intermediary.

The exceptions to the rules of the Convention

[83] The Canadian regimes provide for exceptions to the primary and fall-back rules. These exceptions have been discussed in Part II (see section 0). They relate to the perfection of a security interest by registration and to the "automatic" perfection by attachment of a security interest granted by an intermediary. Instead of applying the law of the account agreement or the

fall-back rules, the Canadian regimes refer these issues to the law of the location of the grantor of the security interest. The implementation of the Convention would entail the removal of these exceptions, with the result that registration and "automatic" perfection issues would be governed by the same law as for all other issues.

[84] With respect to the perfection by registration exception, the Convention would however preserve that exception in cases where the latter leads to the law of a Canadian jurisdiction. Article 12(2)b) reads as follows:

> "*b)* if the law in force in a territorial unit of a Multi-unit State designates the law of another territorial unit of that State to govern perfection by public filing, recording or registration, the law of that other territorial unit governs that issue."

[85] As mentioned in section 0 of Part II, the conflict rules of the PPSAs and the CCQ refer to the law of the location of the grantor to determine if perfection of a security interest by registration is possible and has been achieved. Should the Convention be adopted in Canada, that reference would be given effect only if the grantor's jurisdiction is within Canada. If such jurisdiction were not in Canada, then the law of the account agreement (or the law applicable under the fall-back rules) would apply to perfection by registration. In the Canadian context, this result should not have practical consequences in most transactions. A Canadian lender relying on a security interest granted by a foreign borrower in a securities account maintained in Canada will not normally rely only on perfection by registration in a foreign jurisdiction. Moreover, such reliance under the existing Canadian rules would be possible only if the foreign jurisdiction allows for perfection by registration, such as a state of the United States.

[86] The elimination of the second exception (which points to the law of the grantor's location for automatic perfection by attachment of a security interest granted by an intermediary) would not have any impact if the primary rules or the fall-back rules of the Convention point to the law of a jurisdiction within Canada or the United States: in such a case, the substantive law of the relevant jurisdiction would recognize automatic perfection by attachment of the security interest.[12] Some other legal systems may also yield to the same result. Moreover, a lender prepared to advance significant funds to an intermediary in reliance of automatic perfection by attachment is likely to inquire about the law governing the account agreement and to ensure that the substantive rules of that law permit such mode of perfection. Thus, the elimination of the

exception would not remove the possibility of achieving automatic perfection by attachment; the consequence would rather be that the issue would be governed by the same conflict rule as for all other issues.

Enforcement issues

[87] The Convention refers the issues that relate to the enforcement of a security interest to the same conflict rule as for all other issues: the law of the account agreement or the law determined by the fall-back rules.

[88] The PPSAs provide for a different conflict rule. Subsection 8(1) of the OPPSA states that "substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.". The CCQ contains no specific conflict rule on enforcement issues but it is arguable that the general principles of the Québec conflict of laws rules would lead to the application of the law governing the validity of the security interest; another approach would apply the law governing priorities.

[89] As enforcement has significant consequences on the rights of third parties, subjecting enforcement to the same law as for all other issues covered by the conflict rules appears to be a sound solution. In addition, drawing a distinction between enforcement issues and priority issues in many instances is a difficult task. Adopting the Convention rule for enforcement issues would therefore lead to greater certainty and predictability; this would also fill a gap in the Québec conflict of laws regime.

Impact of a change of the applicable law

[90] Both the Convention and the Canadian regimes deal with the consequences of the law of the account agreement being changed from one jurisdiction to another. This may occur if the parties to the account agreement decide to amend the agreement by providing that the agreement will cease to be governed by the law of jurisdiction X and will become governed by the law of jurisdiction Y. What is then the impact of the change on the rights of a secured creditor whose security interest has been perfected under the law of jurisdiction X?

[91] Article 7 of the Convention sets out comprehensive (but complex) provisions on the effect of the applicable law being changed from one jurisdiction to another. These provisions apply to all issues covered by the conflict rules of the Convention. Essentially, they contemplate that the new applicable law will govern these issues, with however a number of significant exceptions: the law applicable prior to the change (the "old law") continues to govern "the existence … or perfection of an interest acquired or perfected under the old law as well as "priority as between parties whose interests arose before the change of law."; moreover, an interest effective against an insolvency administrator under the old law will remain so effective "in an insolvency proceeding opened after the change of law,". The combined effect of the "new law" rule and its exceptions is that the "new law" will govern priority as between a person whose interest arose under the "old law" and a person whose interest arose under the "new law".

[92] The provisions of the Canadian regimes on a change of the applicable law are far less comprehensive and only address the effects of such change in the area of secured transactions (see section 0 above). They favour a broader application of the new law.

[93] The implementation of the Convention would result in the adoption of more detailed and complex rules on impact of a change of law. The rules of the Convention may however be viewed as affording greater protection to persons who have acquired or perfected an interest under the law that was applicable before the change.

Transition provisions

[94] Transition issues always arise when a new law is enacted. As for the issue of a change of the applicable law, the Convention rules on transition (see Articles 15 and 16) are more detailed (and complex) than those of the Canadian regimes (see section 84 of the OPPSA and sections 173-175 of the Québec STA). This being said, the implementation of the Convention should not raise significant concerns in transition law matters, as the primary conflict of laws rule of the Convention is identical to that of the Canadian regimes. Transition law issues should therefore be rare and, in any event, should be easy to resolve due to the comprehensiveness of the Convention transition provisions.

– THE DECLARATIONS

[95] A Contracting State may make declarations under the Convention to facilitate its implementation or for policy reasons. This Part comments on the advisability for Canada of making the declarations available under Articles 1(5), 12(3), 12(4), 16(2), 16(3) and 20.

Status of a system operator

[96] Article 1(5) reads as follows:

> "(5) In relation to securities which are credited to securities accounts maintained by a person in the capacity of operator of a system for the holding and transfer of such securities on records of the issuer or other records which constitute the primary record of entitlement to them as against the issuer, the Contracting State under whose law those securities are constituted may, at any time, make a declaration that the person which operates that system shall not be an intermediary for the purposes of this Convention."

[97] As the Convention is not intended to provide conflict rules applicable to directly-held securities, Article 1(5) allows a State to ensure that an operator of a system of the type described in this Article will not be treated as an intermediary. Transfer agents for issuers are excluded from the definition of intermediary (Article 1(3)) but the distinction between a transfer agent and a "system operator" is blurred where the accounts maintained by the operator are securities accounts. Whether there would be an advantage for Canada of making a declaration under Article 1(5) would need to be assessed after consultations with issuers and intermediaries. The Canadian regimes do not provide for a similar provision. The Explanatory Report (para. 1-37) notes that "Article 1(5) was drafted with the United Kingdom CREST system in mind, but may also be relevant for similar systems".

Internal *renvoi*

[98] Article 12(3) has been discussed in Part I (section 0). It preserves *renvoi* within Canada where the fall-back conflict rules of the Convention point to the law of a Canadian jurisdiction. Making a declaration under Article 12(3) would facilitate the implementation of the Convention in Canada, as the result of the declaration would be in line with the Canadian regime conflict

rules where they point to the grantor's location law. The definition of "location" would be preserved for internal conflict rule purposes.

Qualifying office

[99] Article 12(4) was discussed in Part I (section 0) and reads as follows:

> "(4) A Multi-unit State may, at any time, make a declaration that if, under Article 4, the applicable law is that of one of its territorial units, the law of that territorial unit applies only if the relevant intermediary has an office within that territorial unit which satisfies the condition specified in the second sentence of Article 4(1). Such a declaration shall have no effect on dispositions made before that declaration becomes effective."

[100] It does not appear desirable that a declaration be made by Canada to the effect that if the law of the account agreement, for example, points to New Brunswick, the intermediary should be required to have an office in that province for New Brunswick law to apply. Any office in Canada should be sufficient. As the Canadian regimes do not have a qualifying office requirement, not making the declaration under Article 12(4) would be consistent with the conflict rules currently in effect in Canada.

[101] Consumer protection legislation or regulatory requirements may impose limitations on the effectiveness of a choice by the parties to the account agreement of the law governing the agreement. The issue of the contractual validity of a choice of law provision in an account agreement is however outside the scope of the Convention and, accordingly, should not be a matter relevant to of the implementation of the Convention.

Transition provisions

[102] The Convention provides detailed and complex provisions on the impact of the enactment of the Convention on pre-existing interests. It has been noted above (section 0) that there would be little need to resort to these provisions given the similarities between the Convention and the Canadian regimes. A declaration under Articles 16(2) or 16(3) would add an additional layer of complexity to the application of the transitional provisions of the Convention making such a declaration does not appear to be advisable.

"Federal clause"

[103] Article 20 provides for the "federal clause" now commonly found in many private international law conventions:

> "(1) A Multi-unit State may, at the time of signature, ratification, acceptance, approval or accession, make a declaration that this Convention shall extend to all its territorial units or only to one or more of them.
>
> (2) Any such declaration shall state expressly the territorial units to which this Convention applies.
>
> (3) If a State makes no declaration under paragraph (1), this Convention extends to all territorial units of that State."

[104] Canada is likely to avail itself of Article 20 in order to facilitate the implementation of the Convention in a timely fashion in the provinces and territories that are willing to adopt the Convention rules.

CONCLUSION

[105] From a broad perspective, the Convention conflict rules are similar to the conflict rules of the Canadian regimes. Implementing the Convention should not result in significant changes in Canadian practices, except for tailored-made sophisticated transactions (e.g., a transaction where the law of the account agreement would not meet the qualifying office requirement of the Convention).

[106] The crucial question is whether the Convention rules are preferable to the existing rules of the Canadian regimes. Indeed, the question arises only in respect of the differences between the Convention and the existing Canadian regimes. A case may be made either for the elimination of these differences (i.e., adopting the Convention) or for preserving them (i.e., not adopting the Convention). In most scenarios, the question is likely to be moot; again, it is essentially in sophisticated transactions that these differences might be relevant in practice. Moreover, parties to such transactions are generally able to structure them in a way that suits their business goals.

[107] Another question relates to the advisability of requiring users to adjust to new terminology and different ways of expressing existing concepts. Practitioners, especially in the area of secured transactions, are unlikely to be enthusiastic about a move from the existing Canadian rules to the Convention rules if a similar move does not occur in other jurisdictions such as the United States.

(a) ______________________________

1 The expression refers to short-term notes or similar instruments issued by financial institutions or other entities to finance their activities.

2 These terms will be used to refer generally to the *Securities Transfer Acts* and the *Personal Property Security Acts* of the common law provinces and territories.

3 S.Q. 2008, c. 20.

4 S.O. 2006, c. 8.

5 R.S.O. 1990, c. P. 10.

6 See the definition in subsection 1(1) of the OSTA and in section 39 of the Québec STA.

7 The corresponding definition of the Québec STA is found in section 12.

8 The corresponding definition of the Québec STA is found in its section 10.

9 See section 45 of the OSTA, section 7.1 of the OSTA and articles 3108.7-3108.8 of the CCQ.

10 By reason of the conflict rule applicable to the “acquisition of a security entitlement”; see subsection 45(1) of the OSTA.

11 Subsection 7.1(7) of the OPPSA.

12 See section 19.2 of the OPPSA, article 2701.1 of the CCQ and section 9-309(10) of the *Uniform Commercial Code*.