

THE HAGUE SECURITIES CONVENTION

CONSULTATION DOCUMENT

MAI 2019

Introduction

[1] The subject of this consultation document is the *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (the “Convention” or “The Hague Securities Convention”). The Uniform Law Conference of Canada (the “ULCC”) is currently carrying out work to determine whether to recommend the adoption of the Convention by the provinces and territories and if so how.

[2] The objective of the Convention is to determine the law applicable to a number of issues relating to securities held with an intermediary, including the perfection of security interests relating to intermediated securities. The Convention provides conflict of laws rules, not substantive rules on the transfer of securities. In other words, the Convention aims to determine the law applicable to transfers of securities and the rights of interest holders in these securities and does not concern the regulation of trading in securities or the issuance of securities.

Current Canadian Legislative Framework

[3] The implementation of the Convention in Canadian law would impact existing legislation dealing with securities held through intermediaries and security interests on such securities. Since 2004, the ULCC has recommended the adoption of the *Uniform Securities Transfer Act* (“USTA”), which has a much broader scope than the Convention but covers a number of issues governed by the Convention. The objective of the USTA is to provide legal foundation for the market practices of indirect securities holding or holding through an intermediary. However, the USTA approved by the ULCC in 2004 was subject to a number of significant changes (including to the conflicts provisions) to create the final product, the *Securities Transfer Acts* adopted in all the provinces and territories (the Québec version is entitled *An Act Respecting the Transfer of Securities and the Establishment of Security Entitlements*). For this reason, the relevant provisions of the USTA are reproduced in the annex for reference purposes only and the consultation document refers to the provincial and territorial Securities Transfer Acts (such as “OSTA” for the *Ontario Securities Transfer Act*) as opposed to the uniform legislation adopted by the ULCC.

[4] In addition to the STAs, where conflict of laws rules with respect to indirect holding of securities are found, provincial and territorial *Personal Property and Security Acts* (“PPSAs”) provide conflict of laws rules on perfection of security interests over security entitlements. They recognize that security interests can attach to security entitlements.¹ PPSA legislation is relatively consistent across all Canadian common law jurisdictions. In Québec, provisions covering the same subject matters are found in the Civil Code.²

[5] This description of the Canadian legislative framework outlines the provisions which would be affected if the Convention were to be adopted by the provinces and territories. In implementing the Convention, the legislation could choose specifically to amend the relevant provisions or to give force of law to the Convention and give it precedence over existing rules. Both techniques are possible and in reviewing whether to implement the Convention one should consider whether proceeding in a manner or the other would have practical consequences that differ.

Choice of Law rules: a Comparison between the Convention and Canadian Law

[6] With very few exceptions³, the scope of application of the Hague Securities Convention is similar to the scope of Canadian conflict of laws rules. The following table illustrates the consistency between Canadian STAs, the Civil Code and PPSAs and the rules of the Convention with respect to the issues covered by the choice of law rules.

¹ For example: sections 2 and 7.1, and the definitions of “investment property”, “personal property” and “security interest”, Ontario PPSA, 1990 R.S.O. c. P-10.

² Civil Code of Québec, Book 6 (sect. 2644 et seq.) and Book 10

³ Cash for example is excluded from the scope of the Convention

<u>Choice of Law rules: a Comparison between the Convention and Canadian Law</u>		
STA / PPSA	Convention	Comments
Acquisition of Security Entitlements		
The law of the securities intermediary's jurisdiction governs acquisition of a security entitlement from the securities intermediary. (45(1) a) OSTA and 3108.7(1) Civil Code.)	The law applicable to the legal nature and effects against the intermediary resulting from a credit to a securities account [is determined by application of the rules of the Convention]. (2(1) a) Convention)	- Formulation is different under the two texts, but the same issues are covered.
Rights and Duties Arising out of a Security Entitlement		
The law of the securities intermediary's jurisdiction governs the rights and duties of the securities intermediary and entitlement holder arising out of a security entitlement. (45(1) b) OSTA and 3108.7(2)-(4) Civil Code.)	The law applicable to: -the legal nature and effects against the intermediary and third parties of the rights resulting from a credit of securities to a securities account; -the legal nature and effects against the intermediary and third parties of a disposition of securities held with an intermediary; -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; [is determined by application of the rules of the Convention]. (Article 2(1) a), b) and g)	- The formulation under the STA is very broad and covers numerous items listed in the Convention.
Perfection of Security Interests in Investment Property		
The perfection, the effect of perfection or of nonperfection and the priority of a security interest in investment property shall be governed by the law of...[the law of the jurisdiction in which the debtor is located] or [the securities intermediary's jurisdiction].	The law applicable to - the requirements, if any, for perfection of a disposition of securities held with an intermediary; - whether a person's interest in securities held with an intermediary extinguishes or has	- The language dealing with the duties, if any, of an intermediary to a person other than the account holder found in the Convention is not used under Canadian law. However, the reference to the "effect of perfection" in the PPSA would cover the issues that are likely to arise in the circumstances, i.e.

(OPPSA 7.1(2) and (5) and 3108.8 Code Civil)	<p>priority over another person's interest;</p> <p>- 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;</p> <p>[is determined by application of the rules of the Convention].</p> <p>(Article 2(1) c), d) and e)</p>	<p>what the intermediary is required to do in relation to a valid security interest over securities entitlements.</p>
Realization of an Interest in Security Entitlements		
No specific rule	<p>The law applicable to the requirements, if any, for the realisation of an interest in securities held with an intermediary [is determined by application of the rules of the Convention].</p> <p>(Article 2(1) f)</p>	<p>- In relation to the requirements for the realization of an interest in securities, there is no specific rule in the PPSA or the Civil Code, but there is a general conflict rule that is relevant (8(1)b OPPSA). This rule states that substantive issues are governed by the proper law of the contract. With respect to procedural issues, the <i>lex fori</i> will usually apply.</p>

[7] With the exception of the enforcement of rights of a secured party on security entitlements, the scope of the choice of law rules under the Convention on the one hand and the STAs, PPSAs and the Civil Code on the other are very similar. The contents of the choice of law rules, however, are not identical. For instance, in relation to the perfection by registration of security interests over security entitlements, instead of referring to the law governing the account agreement, Canadian rules refer to the location of the grantor of the security interest. Additional information about the differences between Canadian rules and the Convention can be found in the Pre-Implementation Report on the Convention available on the ULCC website.⁴

⁴ Michel Deschamps, Pre-Implementation Report on the Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary, https://www.ulcc.ca/images/stories/2011_pdf_en/2011ulcc0002.pdf

[8] Keeping in mind this similarity in scope of application, the exercise now being conducted is to consider what changes to Canadian laws would give effect to the Convention.

Possible Recommended Measures

[9] The following measures have been identified as possible legislative changes to implement the Convention. The measures require legislative changes to the STAs⁵ and the PPSAs⁶ and the Québec the Civil Code⁷ with respect to sections dealing with the applicable law for securities intermediaries and security entitlements and the applicable law to the validity of security interests in investment property.

Application of the Amendments Only in Situations of Internationality – Articles 3 and 9 of the Convention

1- Ensure that measures 2 to 5 below apply to all situations (under the STA, the Civil Code and the PPSA, as the case may be) involving securities held with an intermediary relating in any manner to more than one State, such as in situations where there is a foreign account holder, a foreign party to a disposition of the securities, a foreign intermediary or a foreign issuer.⁸ This measure applies whether or not the foreign State is party to the Convention.

Futures Contracts – Definition of “securities” – Article 1 of the Convention

2- Ensure that “futures contracts” as defined in the STA are the subject of the choice of law rules relating to security entitlements and security intermediaries and those relating to priority, perfection and enforcement of security interests. (In Québec, ensure that “futures contracts” are the subject of the relevant choice of law rules).

Exclusion for Qualifying Office Requirement – Article 4(1) of the Convention

3- Ensure that the “securities intermediary’s jurisdiction” as it relates to any express provision in the securities account agreement or another agreement between the account holder and the intermediary is only effective if the relevant intermediary has, at the time of the agreement, an office in the State designated in the agreement.

⁵ 45 OSTA, 45 BCSTA, 45 ASTA, 45 SKSTA, 45 MSTA, 45 NBSTA, 45 NSSTA, 44 PEISTA, 46 NFLSTA, 45 NWTSTA, 45 YSTA, 45 NuSTA

⁶ 7.1 OPPSA,

⁷ 3108.7 and 3108.8

⁸ This means that with respect to conflict of laws rules among Canadian provinces (i.e. in the absence of internationality), the measures will not apply.

In Québec, ensure that references to the law specified in the juridical act governing a securities account is conditioned upon the security intermediary having an office in the state whose laws are designated (3108.7 Q.C.C.).

Perfection of Security Interests – Articles 2(1) c), 4 and 5 of the Convention

STAs, PPSAs and the Civil Code have conflict of laws rules for determining where security interests must be perfected. Perfection by registration is governed by the location of the debtor (e.g., its chief executive office). Perfection of a security interest in security entitlements can be effected through an agreement whereby the debtor (and the securities intermediary) agrees with the secured party to take instructions from the secured party without any further consent being required from the debtor. The debtor will often have the right to deal with the securities, but usually the secured party will want to have exclusive control in the event of a default. The law governing perfection by control on security entitlements is the “securities intermediary’s jurisdiction”, as determined by the STA. By perfecting their security interests by control rather than registration, secured parties’ security interests so perfected have priority over every other security interests in the same collateral. Under the Convention, such practices remain unaffected except with respect to the determination of the law applicable to perfection. In the common law provinces, it will be determined by the law of the “securities intermediary’s jurisdiction” and in Quebec in a manner consistent with 3108.7 as opposed to 3108.8 Q.C.C.

- 4- *Ensure the choice of law applicable to the perfection of security interests on security entitlements is the same as the one laid out in the STA with respect to other issues in the transfer of securities, that is, the law of the “securities intermediary’s jurisdiction”. In Quebec, ensure the choice of law rule applicable to the perfection of security interests on security entitlements is consistent with the law applicable to issues relating to the transfer of securities and the rights and entitlements of account holders.*

Application of the STA Conflict Rules to Enforcement Rights of Secured Parties – Article 2(1) f) of the Convention

As identified above, there is no express conflict of laws rule that covers enforcement rights of secured parties under Canadian law, but this issue is contemplated by the Convention.

- 5- *Ensure that the choice of law applicable to the enforcement of rights of a secured party on security entitlements is the same as the one laid out in the STA with respect to other issues in the transfer of securities. In Quebec, ensure the choice of law*

rule applicable to the enforcement of rights of a secured party is the same as the law applicable to issues relating to the transfer of securities and the rights and entitlements of account holders.

Choice of Law for Domestic Transactions – Article 12(3) of the Convention

If the choice of law rule pointing to the law applicable to the securities account agreement does not apply (e.g., the account agreement is silent on this matter), then the applicable law is determined by alternative connecting factors. The Convention's fall-back connecting factor is the place where the relevant intermediary is incorporated or organized (5(2) Convention). This rule is essentially a reference to the "chief executive office" of the securities intermediary, a rule also found in Canadian law. Canadian law, however, first refers to the place where an office of the securities intermediary maintains the securities account or issues account statements. The proposal is to maintain the specificity of Canadian law where the choice of law points to Canada, but to ensure that the Convention's fall-back rule is triggered in situations where a Canadian court applying Canadian conflict of laws rules determines that a foreign law applies.

6- Ensure that existing choice of law rules that determine which province or territory's law applies continue to apply in situations where the Convention points to the application of Canada's laws in relation to a matter covered by the Convention.

One might also consider harmonizing Canadian law with the Convention with respect to the choice of law rules as applied among the provinces and territories. This would simplify Canadian rules on conflict of laws by eliminating the reference to the law of the jurisdiction where the security intermediary maintains the securities account or issues account statements.

Conclusions and Questions

[10] The objective of this consultation paper is to seek the views of Canadian stakeholders on whether to recommend the implementation of the Hague Securities Convention in Canada. The paper, although not discussing all the issues surrounding the drafting of legislative amendments, proposes a framework for the implementation of the

Convention in Canadian law. Comments on the proposed measures would be useful as part of the assessment by the Working Group tasked with this review.

Comments can be forwarded to Dominique D’Allaire, Counsel, Constitutional, Administrative and International Law Section, Justice Canada (dominique.dallaire@justice.gc.ca)

ULCC Uniform Securities Transfer Act -2004

DIVISION 7 - APPLICATION AND CONFLICT OF LAWS

Applicable law re issuer

- 51(1) For the purposes of subsection (3), “issuer’s jurisdiction” means
- (a) if the issuer of a security is incorporated under a law of Canada, the province or territory in Canada in which the issuer has its registered or head office,
 - (b) in any other case, the jurisdiction under which the issuer of a security is incorporated or otherwise organized, or
 - (c) if the issuer of a security is permitted by the law of the jurisdiction under which the issuer is incorporated or otherwise organized to specify another jurisdiction for the purposes of subsection (3), that other jurisdiction specified by the issuer.
- (2) Despite subsection (1), if the issuer of the security is Her Majesty in right of Canada or in right of [the Province] or another province or territory in Canada, “issuer’s jurisdiction” means the jurisdiction specified by that issuer for the purposes of subsection (3).
- (3) Subject to subsection (4), the law, other than the rules governing the conflicts of laws, of the issuer’s jurisdiction governs
- (a) the validity of a security,
 - (b) the rights and duties of the issuer with respect to the registration of transfer;
 - (c) the effectiveness of the registration of transfer by the issuer;
 - (d) whether the issuer owes any duties to a person making an adverse claim to a security;
 - (e) whether an adverse claim can be asserted against a person
 - (i) to whom the transfer of a certificated security or uncertificated security is registered, or
 - (ii) who obtains control of an uncertificated security.
- (4) If the issuer of a security is incorporated under a law of Canada, the law governing the matter in paragraph (3)(a) is the law of Canada.
- (5) An issuer organized under the law of [the Province] may specify the law of another jurisdiction as the law governing the matters referred to in paragraphs (3)(b) to (e).

Applicable law re securities intermediary

- 52(1) For the purpose of this section, “securities intermediary’s jurisdiction” means the jurisdiction determined in accordance with the following:
- (a) 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 purposes of [the Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary,] this provision, this Division, this Part, this Act, or the law of that jurisdiction, that jurisdiction is the securities intermediary’s jurisdiction;
 - (b) if clause (a) 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;

(c) if neither clause (a) nor (b) 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;

(d) if none of the clauses (a), (b) or (c) apply, 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;

(e) if none of the clauses (a), (b), (c) or (d) apply, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

(2) In determining a securities intermediary's jurisdiction the following matters are not to be taken into account:

(a) the physical location of certificates representing financial assets;

(b) the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement;

(c) the location of facilities for data processing or other record keeping concerning the account.

(3) The law, other than the rules governing the conflict of laws, of the securities intermediary's jurisdiction governs

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

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

(c) whether the securities intermediary owes any duty to a person making an adverse claim to a security entitlement;

(d) whether an adverse claim may be asserted against a person who

- (i) acquires a security entitlement from the securities intermediary, or
- (ii) purchases a security entitlement, or interest in it, from an entitlement holder.

(4) [To the extent applicable, this section is subject to the provisions of the Act Respecting the Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary.]