NOTES

THE HAGUE SECURITIES CONVENTION:
AN OPPORTUNITY TO TAKE THE UCC GLOBAL

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ABSTRACT

The United States is in a unique position to benefit from ratification of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, commonly known as the Hague Securities Convention. The primary purpose of the Convention is to remedy the severe lack of legal certainty with respect to cross-border transactions in intermediated securities that results from the complex, cross-border holding structures utilized in the indirect holding system. By harmonizing the disparate approaches to choice of law for intermediated securities that currently exist in different legal systems around the world, the Convention would allow parties to easily determine the applicable law in any given transaction, thereby reducing legal risks and costs and increasing the efficiency and stability of international financial markets. Moreover, because the Convention’s choice of law rules are so similar to those of the UCC, the United States would reap benefits beyond those resulting from greater legal certainty. In particular, the United States could implement the Convention as a self-executing treaty without significantly interfering with the UCC choice of law regime adopted by the states, effectively providing a single choice of law regime for both domestic and cross-border intermediated securities transactions. U.S. practitioners and market participants would also be able to adapt to the Convention easily, giving them a competitive advantage over others if the Convention becomes widely adopted. In light of these benefits, the United States has an opportunity to take the UCC global by ratifying the Convention and encouraging others to follow.

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I. INTRODUCTION

Having gone from an idea to a completed text in only two and a half years, the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention" or "Convention")¹ is something of an anomaly in the field

¹ Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, July 5, 2006, 46 I.L.M. 649 [hereinafter Hague Securities Convention]. The Convention will not come into force until the third ratification is deposited. Hague Securities Convention, art. 19. To date, only Mauritius and Switzerland have ratified the Convention, and
of international law. Rarely, if ever, has such a highly technical multilateral convention been concluded so quickly.

The swift completion of the Convention is even more impressive considering that such diverse participants from different legal systems—including representatives from thirty-three countries, eight intergovernmental organizations, and nine non-governmental organizations—were able to agree to a text without the need for a single vote.

Indeed, the pace of the process was a warranted response to an ever-increasing dilemma. Since the Wall Street paperwork crisis in the late 1960s, securities have been held indirectly through depository institutions and other intermediaries rather than directly by interest holders themselves. The combination of this indirect holding system and the globalization of investment and finance has resulted in increasingly frequent cross-border securities transactions involving interest holders and intermediaries in multiple national jurisdictions. Thus, the problem arose of having to determine which jurisdiction’s law applies to such transactions. That is exactly the problem that the United States has signed, but not yet ratified it. Status Table 36: Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, Hague Conference on Private Int’l Law (last updated Oct. 27, 2012), http://www.hcch.net/index_en.php?act=conventions.status&cid=72. The President submitted the Convention to the Senate for its advice and consent on May 17, 2012, after which the Convention was referred to the Committee on Foreign Relations. PRESIDENT OF THE UNITED STATES, MESSAGE TRANSMITTING THE CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY, S. TREATY DOC. NO. 112-6 (2012).

2. For additional background on innovative substantive features of the Convention, see CHANGMIN CHUN, CROSS-BORDER TRANSACTIONS OF INTERMEDIATED SECURITIES: A COMPARATIVE ANALYSIS IN SUBSTANTIVE LAW AND PRIVATE INTERNATIONAL LAW (2012).


5. RON GOODE ET AL., EXPLANATORY REPORT ON THE HAGUE CONVENTION ON THE LAW APPLICABLE TO CERTAIN RIGHTS IN RESPECT OF SECURITIES HELD WITH AN INTERMEDIARY 8 (2005) [hereinafter EXPLANATORY REPORT].

6. See infra Part II.

7. See infra Part II(A).

8. Various different parties can hold an interest in securities, such as investors, collateral takers, and securities intermediaries.

Convention is designed to address. The way in which the Hague Securities Convention resolves the choice of law dilemma with regard to intermediated securities is a boon for the United States.\textsuperscript{10} Although state law governs choice of law with regard to securities in the United States, the law in this area is uniform thanks to the Uniform Commercial Code (UCC).\textsuperscript{11} The choice of law provisions of the UCC are strikingly similar to those of the Convention.\textsuperscript{12} Thus, not only would the Convention require minimal adjustment for U.S. lawyers if implemented as a self-executing treaty in the United States,\textsuperscript{13} but it could also in effect help take the UCC global. If the Convention became widely adopted, U.S. lawyers and market participants would thereby gain greater legal certainty in cross-border intermediated securities transactions without having to adapt to a new legal framework.\textsuperscript{14}

To further illuminate how the Convention works and how it can benefit the United States, this Note begins by discussing in Part II the inadequacies of the old direct holding system and the choice of law problems created by the modern indirect holding system for intermediated securities. Part III then examines the most significant provisions of the Convention, including those dealing with its scope of application and its primary and fallback choice of law rules. Part IV compares those

\textsuperscript{10} This Note does not address the reasons why the Convention adopts its particular approach to choice of law for securities held with an intermediary. For a detailed discussion of the motivations for the Convention’s approach, see Explanatory Report, supra note 5. See also Thévenoz, supra note 3. This Note also does not analyze the positive and negative effects of the Convention approach. For a critical analysis of the Convention approach, see Russell A. Hakes, \textit{UCC Article 8: Will the Indirect Holding of Securities Survive the Light of Day}, 35 \textit{Loy. L. A. L. Rev.} 661, 706-08 (2002) (discussing the positive and negative aspects of UCC § 8-110, which takes a similar approach to choice of law for intermediated securities as that of the Convention).


\textsuperscript{12} See infra Part IV.

\textsuperscript{13} Such adjustment on the part of U.S. lawyers would be necessary because, as a self-executing treaty, the Convention would override the UCC to the extent that it conflicts with the Convention. See \textit{U.S. Const.} art. VI, cl. 2 (establishing U.S. treaties as “the supreme law of the land”). See generally Gibbons v. Ogden, 22 U.S. 1 (1824).

\textsuperscript{14} See infra Part V.
provisions to the parallel provisions of the UCC, exploring the most important similarities between the Convention and the UCC, as well as some of the ways in which they differ. Finally, Part V highlights the potential benefits of adopting the Convention for the United States, including greater legal certainty regarding choice of law for intermediated securities and ease of implementation and adaptation that would provide U.S. lawyers and market participants with a competitive advantage over others.

II. THE CHOICE OF LAW DILEMMA FOR INTERMEDIATED SECURITIES

To understand the Hague Securities Convention, it helps to examine the developments in the financial industry that created the need for a choice of law convention. This Part therefore (A) describes the old direct holding system and the administrative problems it created, then (B) explains the modern indirect holding system and the choice of law dilemma that arises thereunder.

A. The Old System of Directly Held Securities

Until the 1970s, interests in securities were held in the direct holding system. In this system, interests in securities were evidenced by physical possession of documentation (“bearer securities”), such as stock certificates, or by entries in the securities issuer’s books (“registered securities”). These methods of holding interests in securities created a direct link between interest holders and their securities, as implied by the name, direct holding system.

Choice of law was fairly simple in the direct holding system. Courts utilized the lex situs principle, applying the law of the jurisdiction in which the securities are located at the relevant point in time.

The lex situs approach was apt for bearer securities because they could be treated as tangible property, the movement of which was easily

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15. As used in this Note, “interest in securities” is distinct from “security interest(s).” The former refers to all proprietary interests in securities; the latter refers more narrowly to proprietary interests in securities as a guarantee or collateral for performance of an obligation. In addition, both “interest in securities” and “security interest” must be distinguished from “security entitlement,” which is used in the UCC to refer to intermediated securities. See infra Part IV(A)(1).


17. EXPLANATORY REPORT, supra note 5, at 8.

18. Meaning “[t]he law of the place where the property is situated.” BLACK’S LAW DICTIONARY (10th ed. 2014). Also termed lex loci rei sitae. Id.

19. EXPLANATORY REPORT, supra note 5, at 17.
traced thanks to their physical existence.\textsuperscript{20} The law applicable to a transaction in bearer securities was thus easily determined based on the jurisdiction in which the physical documents were located at the relevant point in time.\textsuperscript{21}

For registered securities, the choice of law analysis was slightly different because ownership in registered securities was represented not by a stand-alone document, but by an entry in the issuer’s books.\textsuperscript{22} Therefore, according to the \textit{lex situs} principle, the applicable law was either the law of the issuer’s jurisdiction, determined by place of incorporation or organization, or the jurisdiction of the transfer agent responsible for maintaining the issuer’s register.\textsuperscript{23} Either way, choice of law for registered securities was straightforward in the direct holding system.

Effecting a transaction in the direct holding system, however, was not so simple. Each transaction required numerous distinct, costly processes and various documents at each step because the securities being transacted were evidenced by pieces of paper that needed to change hands, or by book entries that needed to be updated.\textsuperscript{24} Thus, when the volume of transactions spiked in the late 1960s as large financial intermediaries and institutional investors began to dominate financial markets, securities broker-dealers were simply overwhelmed by paperwork.\textsuperscript{25} As a former Depository Trust Corporation Chairman explains,

\begin{quote}
Hundreds of thousands of transactions remained unsettled every day due to fails to deliver. And these fails . . . caused many millions of dollars in dividends to be issued and sent to the wrong parties each quarter, because the ownership could not be transferred, and registered on the corporate books in time to make the record date. The backlogs, delays, clerical errors, rejections and the re-processing steps that arose also led to hundreds of millions worth of physical certificates being lost or
\end{quote}

\begin{footnotes}
\item[21] Id. at 283-86.
\item[22] Id.
\item[23] \textit{Explanatory Report}, \textit{supra} note 5, at 17.
\end{footnotes}
stolen as they batted back and forth among the overworked and totally overburdened participants.\textsuperscript{26}

Clearly the direct holding system was unsustainable if financial markets were to function well. Hence, the indirect holding system was born.

B. New System, New Challenges: the Indirect Holding System

Beginning in the 1970s, financial market participants turned to the indirect holding system to alleviate the burdens and costs of conducting transactions in the direct holding system.\textsuperscript{27} The indirect holding system employs two distinct but related methods to simplify and streamline securities transactions: dematerialization and immobilization.\textsuperscript{28} These methods (1) effectively reduce securities transactions to a matter of mere data entry, but also (2) severely complicate the choice of law question with regard to cross-border intermediated securities.

1. Dematerialization, Immobilization, and the Tiered Holding Structure

As noted already, the indirect holding system simplifies securities transactions by employing dematerialization and immobilization. Dematerialization refers to the elimination of physical documents to represent interests in securities.\textsuperscript{29} Instead of using physical documents, interests are evidenced by accounting records.\textsuperscript{30} Physical delivery of securities is therefore no longer necessary in the indirect holding system; brokers simply maintain electronic records of credits and debits of securities to an account.

Immobilization, on the other hand, retains the use of physical documents to represent interests in securities.\textsuperscript{31} Rather than requiring

\begin{footnotes}
\footnote{26. Jaenike, \textit{supra} note 25.}
\footnote{27. Thévenoz, \textit{supra} note 3, at 385. Some interest holders today still hold securities through methods employed in the direct holding system—physical possession or entries in issuers’ books—but this is the exception rather than the rule. Rogers, \textit{supra} note 20, at 286.}
\footnote{28. \textit{CHN}, \textit{supra} note 2, at 2.}
\footnote{29. Group of 30, \textit{Global Clearing and Settlement: A Plan of Action} 133 (2003) (defining dematerialization as “the elimination of physical certificates or documents of title that represent ownership of securities so that securities exist only as accounting records.”).}
\footnote{30. \textit{Id.}}
\footnote{31. \textit{Id.} at 134 (defining immobilization as the “placement of certificated securities and financial instruments in a central securities depository to facilitate book-entry transfers.”). An issue of securities can also be evidenced in a single global document rather than multiple

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physical delivery for each transaction, however, the documents are stored in a single, secure location and never change hands. Instead, electronic entries in securities accounts substitute for physical delivery, as is the case with dematerialization.

Today, because of the widespread use of dematerialization and immobilization, securities are rarely held directly through physical possession or records of interests in issuers’ books. Securities are now typically held indirectly through accounts with intermediaries, such as banks or brokers, which themselves typically hold their securities through other intermediaries. At the end of this chain of intermediaries (however many there are) is a central securities depository (CSD), such as Clearstream, Euroclear, or the Depository Trust Company. In the indirect holding system, therefore, there are often multiple tiers of intermediaries standing between individual interest holders and their securities, let alone between unrelated parties in an intermediated securities transaction.

2. The Choice of Law Dilemma in the Indirect Holding System

The indirect holding system makes the choice of law determination much more complex. Critically, globalization has resulted in increasingly frequent cross-border transactions involving issuers, interest holders, and intermediaries in multiple jurisdictions. As a result, a simple buy order placed in one country, for example, can involve parties in numerous other countries depending on where the parties have chosen to locate their relevant operations. Which of those numerous countries’ law should apply to the transaction? Legal systems around the world struggle with and differ on the answer to this question.

documents. For example, a single global stock certificate can represent 10,000,000 shares in place of 10,000,000 individual certificates. See Thévenoz, supra note 3, at 386.

32. GROUP OF 30, supra note 29, at 134.

33. See Rogers, supra note 20, at 286.

34. Id.

35. Major CSDs, including the ones mentioned in the text above, are international, meaning that they serve as CSD for securities of issuers located in more than one country. Other, smaller CSDs are national, holding only securities of issuers located in one country.

36. See Chiu, supra note 2, at 1-2; Bernasconi, supra note 4, at 1.

37. Of course, federalist states such as the United States may also face this issue in domestic securities transactions.

The combination of the indirect holding system and globalization has rendered the traditional \emph{lex situs} approach obsolete.\textsuperscript{39} Physical documents and issuer registers representing interests in securities have largely disappeared, so any attempt to pinpoint their location is in vain. Where documents or registers do exist, it may be impossible to locate them through several tiers of intermediaries, or they may be located in multiple jurisdictions thanks to technological advances that facilitate international operations.\textsuperscript{40} Finally, even if it is possible to locate the source of an interest in securities, the time and expense of doing so can be great.\textsuperscript{41}

To illustrate, imagine a party (the “collateral taker”) that accepts as security for an obligation owed to it by another party (a loan, for example) a securities account containing 100 different securities of issuers located in twenty different countries. The collateral taker (an interest holder in this example) would have to determine which country’s law applies to each security in order to ascertain the legal requirements for perfection of its security interest.\textsuperscript{42} Under the \emph{lex situs} principle, the collateral taker would first have to determine if interests in each security are represented by physical documents or entries in issuer registers. Assuming that interests in, say, ninety of those securities are not so represented, the collateral taker would then have to attempt to follow the chains of intermediaries until reaching the relevant CSD holding each of those ninety securities, which may be difficult if intermediaries are uncooperative or are located in different countries. Such an endeavor would be costly and time consuming if there were only one or two intermediaries per security, let alone three or more. And all that effort is merely to determine the applicable law for each security, not the specific and varying legal requirements for

\textsuperscript{39}. See EXPLANATORY REPORT, supra note 5, at 18-19 (providing a more detailed account of the inadequacy of the \emph{lex situs} approach).


\textsuperscript{41}. See Rogers, supra note 20, at 290-93 (illustrating vividly the difficulties of applying the \emph{lex situs} principle to intermediated securities); see also Bjerre & Rocks, supra note 9, at 110 (noting “[t]he persistent analytical uncertainties and heavy diligence costs that have burdened [cross-border intermediated securities] transactions.”).

\textsuperscript{42}. To illustrate the concept of perfection with an example definition, the Convention defines perfection as “completion of any steps necessary to render a disposition [including any grant of a security interest, whether possessory or non-possessory,] effective against persons who are not parties to that disposition.” Hague Securities Convention, supra note 1, at art. I(1)(i).
perfection. Now, imagine that the securities account is actively traded, such that applicable law is changing as frequently as securities are traded. Such a collateral taker could hardly be certain which law applies to govern perfection in respect of each security using a lex situs approach, at least not without expending substantial effort on a regular basis.

This choice of law dilemma is not merely academic. Choice of law is critical because countries have developed divergent substantive legal regimes under the indirect holding system. Ascertaining the applicable law is therefore crucial to understanding exactly what rights and obligations will arise from a particular securities transaction. However, as illustrated earlier, this can be a difficult task.

Legal risks and costs increase when parties have difficulty determining the applicable law. For one, parties may be discouraged by legal uncertainty from entering into beneficial securities transactions, including those that might otherwise be risk reducing or more efficient. Furthermore, when investors and lenders face legal uncertainty, they necessarily face greater risk; and when they face greater risk, the costs of capital and credit increase, and liquidity correspondingly decreases. Perhaps most importantly, the risks do not only affect individual transactions; they are systemic. Indeed, given the cross-border, tiered intermediary structure of today’s indirect holding system, the failure of large or numerous intermediaries “could threaten the very stability of the global financial system.”

III. THE HAGUE SECURITIES CONVENTION

The Hague Securities Convention seeks to bring greater legal certainty and predictability to the world of intermediated securities through

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43. Bjerre & Rocks, supra note 9, at 112; see generally Thévenoz, supra note 3, at 394-411 (providing an overview of different substantive legal regimes for indirectly held securities).

44. Bjerre & Rocks, supra note 9, at 112; see Thévenoz, supra note 3, at 394-411 (discussing legal risks in cross-border intermediated securities transactions).

45. Bernasconi, supra note 4, at 1-2; see generally Philipp Paech, Market Needs a Paradigm: Breaking Up the Thinking on EU Securities Law, 20-21 (London Sch. Econ. Law, Society and Economy Working Paper No. 11, 2012); www.lse.ac.uk/collections/law/wps/wps.htm (estimating the cross-border transactional costs imposed by various factors, including “cross-border legal and technical discrepancies”).

46. See Explanatory Report, supra note 5, at 4.

47. Id.

48. Id.

a harmonized international choice of law regime. The ultimate goal is to help parties avoid the risks and costs currently associated with cross-border securities transactions in the indirect holding system.\textsuperscript{50} Lowering risks and costs facilitates transactions in intermediated securities, which increases cross-border capital flows and puts capital to its most efficient uses.\textsuperscript{51} Ultimately, then, the Convention should help to improve the functioning and stability of international financial markets.\textsuperscript{52} To achieve this result, (A) the Convention dictates the law applicable to certain issues related to securities held with intermediaries through (B) the primary choice of law rule contained in Article 4 of the Convention, or, (C) if necessary, the fallback rules contained in Article 5.

A. Scope

Four aspects of the Convention combine to determine its scope: (1) the narrow focus on choice of law, (2) the definition of “securities held with an intermediary,” (3) the issues with regard to which the Convention applies, and (4) the requirement of “internationality.”

1. Choice of Law Only

The most basic but fundamental limitation on the scope of the Hague Securities Convention is that it is strictly a choice of law convention.\textsuperscript{53} The Convention does not affect any national substantive law or regulatory regime related to intermediated securities; it dictates only which jurisdiction’s law applies to a given transaction, not the contents of that law.\textsuperscript{54} In fact, national lawmakers and regulators are even free to determine what constitutes an acceptable choice of law despite the choice of law rules contained in the Convention.\textsuperscript{55} Thus, the Convention deals narrowly with choice of law and no more.

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50. Hague Securities Convention, supra note 1, at pmbl.; EXPLANATORY REPORT, supra note 5, at 21.
51. See infra Part V.A.4; see also Hague Securities Convention, supra note 1, at pmbl.
52. Id.
53. EXPLANATORY REPORT, supra note 5, at 17; see also Hague Securities Convention, supra note 1, at art. 2(1) (“This Convention determines the law applicable to . . .”). International efforts to harmonize the substantive law governing rights and duties with respect to securities held with an intermediary are primarily being taken through the UNIDROIT Securities Convention. Convention on Substantive Rules for Intermediated Securities, Oct. 9, 2009, http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf.
54. EXPLANATORY REPORT, supra note 5, at 21, 25.
2. “Securities Held with an Intermediary”

As is evident from its full title, the Convention applies to securities held with an intermediary.56 Naturally, then, the definitions of the terms “securities,” “intermediary” and “securities held with an intermediary” are central in analyzing the scope of the Convention.

These key terms are broadly defined to ensure that the Convention applies to a wide range of intermediary relationships. “Securities” is defined to include any financial asset or instrument, other than cash, as well as any interest therein.57 This definition covers items traditionally considered securities, such as stocks and bonds, as well as more obscure assets, such as futures contracts and other financial derivatives products, irrespective of whether they are immobilized or dematerialized.58 “Intermediary” includes any person or entity that maintains securities accounts for others “in the course of business or other regular activity” and is acting in that capacity.59 Finally, “securities held with an intermediary” refers to the rights and interests of an account holder that result from the credit of securities to the account maintained by the intermediary.60

Based on these definitions, the Convention may apply whenever a person or entity holds a financial asset or instrument in the regular and ordinary course of business in an account for the benefit of another so as to confer rights and interests in that asset or instrument upon the other.

3. Issues with Regard to Which the Convention Applies

In addition to the definitional provisions, Article 2(1) defines the scope of the Convention by listing specific issues related to intermediated securities that trigger the Convention choice of law rules. Article 2(1) is intentionally broad and generally worded to cover practically any proprietary issue (i.e., any issue relating to an interest in securities) with regard to securities held by an intermediary.61 The issues covered include: the legal nature and effects of rights resulting from a credit or

56. The Convention does not apply to directly held securities.
57. Hague Securities Convention, supra note 1, at art. 1(a).
58. EXPLANATORY REPORT, supra note 5, at 30.
59. Hague Securities Convention, supra note 1, at art. 1(c).
60. Id. at art. 1(f).
61. EXPLANATORY REPORT, supra note 5, at 45; see Hague Securities Convention, supra note 1, at art. 2.
disposition of securities, the requirements for perfection of a security interest, the relative priority of a security interest, the duties an intermediary owes to third parties that assert a competing interest in intermediated securities, the requirements for realization of a security interest, and whether a disposition extends to entitlement to distributions or other proceeds.

Conversely, Article 2(3) explicitly prohibits application of the Convention to issues of purely contractual and personal rights and duties. Such issues include, for example, the contract price of securities, broker-dealer commissions and the rights and duties of an issuer. Thus, the law applicable to these issues is left to traditional choice of law principles.

4. “Internationality”

The final component of the scope of the Convention is the requirement of “internationality.” Internationality is articulated in a single sentence in Article 3, which states, “[t]his Convention applies in all cases involving a choice between the laws of different States.” As with the definitional provisions and Article 2(1) issues, this language is intentionally broad. The intended effect of Article 3 is that the Convention potentially applies to any situation involving intermediated securities that implicates two or more countries in any way. Even the slightest element of internationality in a particular case is sufficient to trigger application of the Convention. For example, even if all parties to a securities transaction are located in the same country, the fact that the issuer of the securities is located in another country is sufficient to constitute “internationality.” Internationality, therefore, will rarely impede application of the Convention given today’s globalized financial markets.

62. Hague Securities Convention, supra note 1, at arts. 2(1)(a), (b).
63. Id. at art. 2(1)(c).
64. Id. at art. 2(1)(d).
65. Id. at art. 2(1)(e).
66. Id. at art. 2(1)(f).
67. Id. at art. 2(1)(g).
68. Id. at art. 2(3).
69. Id. at art. 3.
70. EXPLANATORY REPORT, supra note 5, at 65.
71. Id.
72. Id.
B. The Primary Rule

For situations falling within the scope of the Convention, Article 4 lays out the primary rule used to determine the applicable law. The central tenet of Article 4 is that the applicable law is the law chosen and expressly stated by the parties (account holder and intermediary) in the securities account agreement.\(^73\) This may be the law chosen to govern the entire account agreement, or the law chosen to govern only the specific issues listed in Article 2(1).\(^74\) This rule rejects any attempt to physically locate securities, their issuer, or other components of a transaction that would otherwise occur under the *lex situs* approach.\(^75\) Instead, Article 4 embodies the principle of party autonomy, leaving it to the parties to determine the law that will govern certain issues related to securities held in the account.

The parties’ freedom to choose the applicable law is not unlimited, however. The parties’ choice will only be respected under the Convention if the intermediary has, at the time of the agreement, a “Qualifying Office” in the jurisdiction whose law is chosen.\(^76\) This requires that the intermediary have an office that is in some non-trivial way “engaged in a business or other regular activity of maintaining securities accounts,”\(^77\) regardless of whether the securities accounts maintained by that office include the account related to the particular account agreement in question.\(^78\) Such activity may include, for example, effecting or monitoring account entries or administering payments.\(^79\) Ancillary services or activities, such as bookkeeping, data processing or other general administrative functions, do not meet the requirement.\(^80\) Alternatively, the Qualifying Office requirement is also met where the intermediary’s office “is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts” in the

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73. Hague Securities Convention, *supra* note 1, at art. 4(1).
74. *Id.* Parties may not, however, designate different law to govern different subsets of Article 2(1) issues. *Id.* (requiring that the law chosen be “applicable to all such [article 2(1)] issues.”).
75. Notably, Article 6 explicitly requires that certain factors be disregarded in determining the applicable law under the Convention, including, for example, the issuer’s place of incorporation or principal place of business and the location of certificates representing an interest in securities. *Id.* at art. 6.
76. *Id.* at art. 4(1).
77. *Id.* at art. 4(1) (a) (iii).
78. EXPLANATORY REPORT, *supra* note 5, at 23.
79. *Id.*
chosen jurisdiction. 81

Overall, Article 4 leaves choice of law to the parties, but requires some meaningful link between the jurisdiction whose law is chosen and the intermediary’s maintenance of securities accounts.

C. Fallback Rules

The Hague Securities Convention also provides detailed fallback rules in the event that, for whatever reason, the applicable law cannot be determined according to Article 4. 82 These rules operate in a hierarchical structure, calling for analysis under each rule in sequence until the criteria specified in a particular rule are met to determine the applicable law.

In the event that the applicable law cannot be determined pursuant to Article 4, Article 5(1) comes into play. 83 This first fallback rule attempts to determine the applicable law based on an express and unambiguous statement in a written account agreement that the intermediary entered into the agreement through a particular office. 84 If the agreement contains such a statement, then the applicable law is the law of the jurisdiction in which that particular office is located. 85 As with Article 4, however, the office specified in the account agreement must satisfy the Qualifying Office requirement. 86

If the applicable law is not determined under Article 5(1), then Article 5(2) is triggered. 87 Article 5(2) attempts to determine the applicable law by locating the jurisdiction in which the intermediary is incorporated or otherwise organized. 88 This determination must be made by reference to one of two relevant points in time: either the time at which the written account agreement was entered into, or, if there is no such agreement, the time at which the relevant securities account was opened. 89

81. Id. at art. 4(1)(b).
82. For example, the parties’ choice of applicable law would not be effective under the primary rule of the Convention if the agreement purports to apply one jurisdiction’s law to some Article 2(1) issues, and another jurisdiction’s law to other Article 2(1) issues. See id. at art. 4(1); EXPLANATORY REPORT, supra note 5, at 23.
83. Hague Securities Convention, supra note 1, at art. 5(1).
84. Id.
85. Id.
86. Id.
87. Id.
88. Id. at art. 5(2).
89. Id.
Finally, if all else fails, Article 5(3) applies to determine the law applicable under the Convention. This rule of last resort turns to the law of the jurisdiction in which the intermediary has its principal place of business. Again, the relevant point in time for determining the intermediary’s principal place of business is either the time at which the written account agreement was entered into, or, if there is no such agreement, the time at which the relevant securities account was opened.

IV. Similarities Between the Convention and the UCC

The provisions of the Convention presented in Part III are very similar to the UCC choice of law provisions for intermediated securities, which are found in Article 8 (“Investment Securities”) and Article 9 (“Secured Transactions”). The Convention and the UCC are so similar, in fact, that some have criticized the Convention for favoring the U.S. legal system and U.S. market participants.

Needless to say, though, the Convention and the UCC are not identical. Differences do exist that, in certain circumstances, may lead to different choice of law determinations. One major reason that certain provisions of the Convention differ from the corresponding

90. Id. at art. 5(3).
91. Id. “Principal place of business” is defined as “the place from which the intermediary’s business is managed, that is, its head office or chief executive office.” EXPLANATORY REPORT, supra note 5, at 91.
92. Hague Securities Convention, supra note 1, at art. 5(3).
93. U.C.C. §§ 8-110(b), (e).
94. U.C.C. § 9-305(a)(3). §9-305(a)(3) looks to the rule found in § 8-110(e) to determine the applicable law for matters of perfection and priority of security interests in intermediated securities. Thus, although the UCC choice of law provisions comparable in scope to those of the Convention are technically found in two articles, Article 8 is the true workhorse. See U.C.C. §§ 9-305(a)(2)-(3).
95. Harry C. Sigman and Christophe Bernasconi, Myths about the Hague Convention debunked, INT’L FIN. L. REV. 31, 35 (2005), http://www.iflr.com/Article/1978141/Search/Results/Myths-about-the-Hague-Convention-debunked.html?PageId=201716&Keywords=sigman&OrderType=1&PeriodType=0&StartDay=1&StartMonth=1&StartYear=1999&EndDay=0&EndMonth=11&EndYear=2014&ScopeIndex=0 (challenging criticisms of the Convention from European politicians and commentators who say that “[t]he Convention is designed to work only with the substantive law of the US, and that “[t]he Convention is an attempt by US intermediaries to gain an advantage over European intermediaries.”).
96. It also bears mentioning that the UCC, unlike the Convention, is not strictly a choice of law regime. The UCC’s main goal, in fact, is to harmonize the substantive law of the many states and territories within the United States. UNIFORM LAW COMMISSION, ABOUT THE ULC (last visited Dec. 4, 2014), http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20
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UCC provisions is that the substantive law applicable to intermediated securities in the United States is uniform, whereas the Convention must accommodate varying national legal systems. However, this merely causes differences of detail rather than fundamental approach to choice of law for intermediated securities. As illustrated in this Part, the fundamental approach of each regime is indistinguishable because both the Convention and the UCC are informed by the same realities of the indirect holding system described earlier,97 which exist with the same force in the domestic and international contexts.

The comparison of the Convention and the UCC below follows the presentation of the Convention itself in Part III: (A) scope, followed by (B) the primary rule, and (C) fallback rules.

A. Scope

The scope of the Convention and the UCC choice of law provisions is essentially the same despite differences in terminology. In delineating its scope of application, (1) the UCC refers to a “security entitlement”98 rather than “securities held with an intermediary,”99 and (2) also labels the issues to which the UCC choice of law provisions apply differently than the Convention. Nonetheless, the basic concepts reflected in each are the same.

1. “Security Entitlement”

The UCC uses the concept of a “security entitlement” to refer to intermediated securities.100 “Security entitlement” is defined as “the rights and property interest of an entitlement holder with respect to a financial asset.”101 A “financial asset” encompasses traditional bearer or registered securities, as well as any other interest that is “dealt in or traded on financial markets, or is recognized . . . as a medium for investment.”102 The term also includes any property that the entitlement holder and intermediary expressly agree is to be treated as a

97. See supra Part II(B)(2).
98. U.C.C. § 8-110(b).
99. See supra Part III(A)(2).
100. U.C.C. §§8-110(b).
101. Id. § 8-102(a) (17).
102. Id. § 8-102(a) (9) (incorporating the definition of security contained in §§8-102(15)).
An “entitlement holder” includes any person identified in an intermediary’s books as holding a security entitlement against that intermediary. An “intermediary,” in turn, is defined as any person that maintains securities accounts for others in the ordinary course of business and is acting in that capacity. Thus, the UCC may apply whenever a person, in the ordinary course of business, maintains a securities account for another that gives the other an interest in a certificated, registered or traded interest, or other investment medium.

The substance of the UCC’s “security entitlement” is analogous to the Convention’s “securities held with an intermediary.” First, recall that the Convention defines “securities” broadly to include any financial asset or instrument (except cash), or any interest therein. The definition of “financial asset” is equally broad, capturing both bearer and registered securities, as well as any interest transacted on financial markets or otherwise recognized as a medium for investment. Because the Convention, unlike the UCC, does not elaborate on what constitutes a financial asset or instrument beyond giving a nod to shares and bonds, the Convention could apply more broadly than the UCC. Conversely, the UCC might reach interests that the Convention cannot because the UCC allows parties to agree to treat an interest as a financial asset. It is nonetheless unlikely that an interest would not be captured by both the Convention and UCC, as most interests should fall comfortably within the broad definitions of “financial asset” and “securities.”

Moreover, the UCC definition of “intermediary” is basically the same as the Convention definition. Both definitions deploy the concept of maintaining securities accounts for others in the (ordinary) course of business. Furthermore, both require that the purported intermediary actually be “acting in that capacity,” as in actively maintaining

103. Id.
104. Id. § 8-102(a) (7).
105. Id. § 8-102(a) (14).
106. See supra Part III(A) (2).
107. U.C.C. § 8-102(a) (9).
108. Hague Securities Convention, supra note 1, at art. 1(1)(a).
109. U.C.C. § 8-102(a) (9).
110. Id. § 8-102(a) (14); Hague Securities Convention, supra note 1, at art. 1(c). There is no meaningful difference between the terms “course of business” (used in the Convention) and “ordinary course of business” (used in the UCC). See BLACK’S LAW DICTIONARY 137 (9th ed. 2009) (defining “course of business” as “[t]he normal routine in managing a trade or business. Also termed ordinary course of business.”).
securities accounts for others.\textsuperscript{111} The two diverge, however, where the Convention reaches those acting in the course of “other regular activity” in addition to those acting in the “course of business.”\textsuperscript{112} Although this does broaden the scope of the Convention compared to the UCC, it is more a reflection of practical necessity than divergent approach. To encompass all types of indirect holding system structures, the Convention must reach government entities that act as intermediaries for regulatory or other reasons, rather than in the “course of business.”\textsuperscript{113} Government intermediaries do not exist in the United States, so the UCC does not address them. Thus, the Convention and UCC definitions of “intermediary” are identical except to the extent the Convention must cover types of intermediaries that the UCC has no need to address.

Ultimately, the UCC term “security entitlement” and the Convention term “securities held with an intermediary” are comparable because each incorporates the respective defined terms above, which, as demonstrated, are themselves very similar. In addition, both “security entitlement” and “securities held with an intermediary” are defined to mean the rights and interests of a person in securities and other financial assets held with an intermediary.\textsuperscript{114} Thus, both the UCC and the Convention cover a wide swath of indirectly held securities and interests therein.

2. Issues with Regard to Which the UCC Choice of Law Rules Apply

The issues to which the UCC choice of law provisions apply are very similar to those outlined in the Hague Securities Convention.\textsuperscript{115} First, in section 8-110(b), the UCC lists the acquisition of a security entitlement,\textsuperscript{116} the rights and duties of an intermediary and entitlement holder arising out of a security entitlement,\textsuperscript{117} and the determination of whether a competing interest can be asserted against other interest

\begin{footnotesize}
\begin{enumerate}
\item U.C.C. § 8-102(a) (14); Hague Securities Convention, \textit{supra} note 1, at art. 1(c).
\item Hague Securities Convention, \textit{supra} note 1, at art. 1(c).
\item \textit{See Explanatory Report, supra note 5, at 33.}
\item U.C.C. § 8-102(a) (17); Hague Securities Convention, \textit{supra} note 1, at art. 1(f).
\item For a convenient chart comparing the relevant provisions of the UCC to those of the Convention, see PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, HAGUE SECURITIES CONVENTION’S EFFECT ON DETERMINING THE APPLICABLE LAW FOR INDIRECTLY HELD SECURITIES 5 (Apr. 29, 2013) (draft for public comment), https://www.law.gonzaga.edu/files/PEB-Commentary-on-Hague-Securities-Convention.pdf.
\item U.C.C. § 8-110(b) (1).
\item \textit{Id.} § 8-110(b) (2).
\end{enumerate}
\end{footnotesize}
holders. Together, these issues correspond to Article 2(1)(a) of the Convention, which deals with the legal nature and effects of rights against the intermediary and third parties arising from a credit of securities to an account. Section 8-110(b) also covers the duties an intermediary owes to third parties that assert a competing interest.

The same issue is covered by Article 2(1)(e) of the Convention.

Issues related to security interests in intermediated securities are listed mainly in section 9-305(a)(3) of the UCC. These issues include perfection, the effects of perfection or non-perfection, and priority of security interests. The Convention covers these same issues as follows: Article 2(1)(c) addresses perfection; Article 2(1)(b) addresses the legal nature and effects of rights against the intermediary and third parties, and thereby the effects of perfection or non-perfection; and Article 2(1)(d) addresses priority of security interests.

Finally, section 1-301(a) provides that the UCC choice of law provisions apply to the requirements for foreclosure of a security interest and a transferee’s entitlement to distributions or other proceeds. The Convention’s choice of law provisions also apply to these issues. Article 2(1)(f) deals with the realization of securities interests, which equates to the requirements for foreclosure mentioned in the UCC. Additionally, Article 2(1)(g) encompasses entitlement to distributions or other proceeds upon disposition of securities.

Despite the close parallels in the issues to which each choice of law regime applies, there is at least one notable way in which the UCC diverges—though not substantially—from the Convention. Under the

118. Id. § 8-110(b)(4).
119. Hague Securities Convention, supra note 1, at art. 2(1)(a).
120. U.C.C. §§8-110(b)(3).
121. Hague Securities Convention, supra note 1, at art. 2(1)(e).
123. U.C.C. § 9-305(a)(3).
124. Hague Securities Convention, supra note 1, at art. 2(1)(c).
125. Id. at art. 2(1)(b).
126. Id. at art. 2(1)(d).
127. U.C.C. §1-301(a).
128. Hague Securities Convention, supra note 1, at art. 2(1)(f).
129. Id. at art. 2(1)(g).
UCC, a security entitlement can be created even in the absence of an actual credit of securities to an account.\textsuperscript{130} This differs from the Convention because Article 2(1)(a) requires a “credit of securities to a securities account” before the Convention can determine the law governing rights against the intermediary and third parties.\textsuperscript{131} As a result, the UCC may apply more broadly than the Convention on issues related to the acquisition of securities, the rights and duties of an intermediary, and the determination of whether a competing interest can be asserted against other interest holders. In practice, however, a security entitlement is not normally created absent a credit of securities to an account.\textsuperscript{132} The possibility of a security entitlement absent an actual credit of securities, therefore, does not substantially expand the scope of the UCC vis-à-vis the Convention. Ultimately, both the UCC and the Convention apply to very similar sets of issues related to intermediated securities.

B. The Primary Rule

The UCC’s primary choice of law rule is also very similar to the Convention’s. Like the Convention, the UCC’s primary rule allows parties to choose the applicable law by expressly stating that choice in the account agreement.\textsuperscript{133} More specifically, the parties can designate the applicable law by expressly stating the intermediary’s jurisdiction for choice of law purposes (the intermediary’s jurisdiction being determinative of the applicable law pursuant to section 8-110(b)).\textsuperscript{134} Or, if the intermediary’s jurisdiction is not expressly provided, then the applicable law is the law that the parties choose to govern the account agreement.\textsuperscript{135} Thus, the fundamental approach of both the Conven-
tion and the UCC is identical because both eschew the traditional
lex
situs approach and let the parties to the securities account agreement
determine the applicable law.

However, there is an important difference between the primary rule
of the UCC and that of the Convention. Recall that for the parties’
choice of applicable law to be respected under the Convention, the
intermediary must have a Qualifying Office in the jurisdiction whose
law the parties choose. In contrast, the UCC does not so limit the
parties’ options. As a result, the law chosen by the parties is more likely
to be respected under the UCC than under the Convention.

In practice, however, the gap between the UCC and the Convention
that the Qualifying Office requirement creates is insubstantial. Parties
are partial to familiar jurisdictions when choosing the law that governs
their relationship, and familiar jurisdictions tend to be those in which
one or both of the parties regularly operate. As a result, it is likely
that the law chosen will be that of a jurisdiction in which the intermedi-
ary regularly maintains securities accounts, which would satisfy the
Qualifying Office requirement. Moreover, Article 4(1) clearly identi-
ifies certain activities that do or do not satisfy the Qualifying Office
requirement, making it easy for parties to ensure that the law they
elect will be respected under the Convention. The primary rules of the
UCC and the Convention are therefore comparable despite the Quali-
fying Office requirement.

C. Fallback Rules

The UCC also contains a set of fallback rules in case the applicable
law is not determined using the primary rule. These rules are similar to
the fallback rules of the Convention, especially insofar as they look to

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136. Similar to Article 6 of the Convention, the UCC expressly excludes consideration of
certain factors from the choice of law analysis, such as the physical location of certificates or the
issuer’s jurisdiction of organization. U.C.C. § 8-110(f).

137. See supra Part III(B).

138. See, e.g., LESTER NURICK, CHOICE-OF-LAW CLAUSES AND INTERNATIONAL CONTRACTS 56-58
(PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AT ITS ANNUAL MEETING, vol. 54,
Apr. 28-30, 1960) (discussing the basic inclination for a party to “choose his own law in preference
to other laws”).

139. See Hague Securities Convention, supra note 1, at art. 4(1) (establishing criteria for the
Qualifying Office requirement); supra Part III(B).

140. See Hague Securities Convention, supra note 1, at art. 4(1); supra Part III(B).
other indications in the parties’ agreement to determine the applicable law. Similar to the Convention, the UCC fallback rules operate in a hierarchy.

When choice of law is not resolved through the primary rule, the UCC first attempts to determine the applicable law based on an express statement in the account agreement that the account is maintained through a particular office of the intermediary.\(^{141}\) If the agreement contains such a statement, then the applicable law is the law of the jurisdiction in which that office is located.\(^ {142}\) This fallback rule is very similar to the corresponding fallback rule of the Convention, which determines the applicable law based on an express statement that the intermediary entered into the account agreement through a particular office.\(^ {143}\) The fundamental approach is also similar because both fallback rules examine the agreement for other indications from the parties to determine the applicable law. The only notable divergence is that the Qualifying Office requirement also applies to the first Convention fallback rule. However, as previously discussed, the divergence is not substantial.\(^ {144}\)

The next UCC fallback rule differs from that of the Convention. Under section 8-110(e)(4), the UCC turns to the office identified in an account statement as the intermediary’s office serving the relevant securities account.\(^ {145}\) If a serving office is identified in an account statement, then the applicable law is the law of the jurisdiction in which that office is located.\(^ {146}\) In contrast, the Convention does not consider account statements. Rather, the corresponding Convention fallback rule turns to the law of the intermediary’s jurisdiction of incorporation or other organization.\(^ {147}\) The UCC and the Convention, therefore, diverge on this middle fallback rule.

Symmetry between the UCC and the Convention returns, however, with the final fallback rule. As a last resort, the UCC determines the applicable law to be the law of the jurisdiction in which the intermediary’s “chief executive office” is located.\(^ {148}\) This mirrors the Convention.

\(^{141}\) U.C.C. § 8-110(e)(3).
\(^{142}\) Id.
\(^{143}\) Hague Securities Convention, supra note 1, at art. 5(1).
\(^{144}\) See supra Part IV(B).
\(^{145}\) U.C.C. § 8-110(e)(4).
\(^{146}\) Id.
\(^{147}\) Hague Securities Convention, supra note 1, at art. 5(2).
\(^{148}\) U.C.C. § 8-110(e)(5). The UCC does not define “chief executive office” except for the purposes of determining a debtor’s location. See id. § 9-307 cmt. 2 (defining “chief executive
fallback rule, which looks to the intermediary’s principal place of business, defined as the intermediary’s “head office or chief executive office.” The final fallback rules of the UCC and the Convention are, thus, very similar.

In general, the Convention and the UCC are similar enough that they will both lead to the same choice of law determination. This is primarily because they adopt the same fundamental approach: let the parties decide. When the Convention and the UCC do differ, the differences are insubstantial because they are more a matter of detail than of fundamental approach.

V. POTENTIAL BENEFITS OF THE CONVENTION FOR THE UNITED STATES

The Hague Securities Convention offers considerable benefits for the United States. (A) First, ratification of the Convention would increase legal certainty in cross-border intermediated securities transactions, thereby lowering risks and costs and benefiting the economy. (B) Furthermore, the cost of obtaining these benefits would be minimal because implementing and adapting to the Convention choice of law regime would be easy, giving U.S. practitioners and market participants a competitive edge.

It is important to note, however, that these benefits are contingent on the Convention entering into force and being adopted by more countries. Nevertheless, while the Convention has not yet entered into force, it will enter into force if the United States (or any other country) becomes the third party to deposit its ratification. Moreover, other countries seem likely to ratify the Convention; it has numerous supporters around the world, including the Group of Thirty, the European Commission, and other governments.

office” as “the place from which the debtor manages the main part of its business operations or other affairs”.

149. Hague Securities Convention, supra note 1, at art. 5(1).
150. EXPLANATORY REPORT, supra note 5, at 91 (emphasis added).
151. See Hague Securities Convention, supra note 1, at art. 19(1). As noted previously, Mauritius and Switzerland have ratified the Convention; the United States has signed but not yet ratified it. See supra, note 1.
152. GROUP OF THIRTY, GLOBAL CLEARING AND SETTLEMENT: A PLAN OF ACTION 47 (2003), http://www.group30.org/rpt_12.shtml (recommending that “[f]inancial supervisors and legislators should ensure that the [Convention] is signed and ratified by their respective nations as soon as is reasonably possible”).
as well as practitioners and market participants.155

A. Benefits of Legal Certainty in Cross-Border Intermediated Securities Transactions

The Convention would increase legal certainty and predictability with regard to cross-border transactions in intermediated securities. Indeed, that is exactly what the Convention is designed to do.156 Such legal certainty and predictability would derive from (1) a harmonized international choice of law regime that is (2) consistently interpreted and applied, and would result in (3) decreased legal risks and costs in determining the applicable law and in (4) greater efficiency and stability in international financial markets.

1. A Harmonized Choice of Law Regime

As noted earlier, legal certainty for cross-border securities transactions is currently lacking in the indirect holding system.157 Because of tiered, cross-border holding structures, the choice of law determination with regard to intermediated securities can be complicated and difficult to resolve.158 More importantly, different countries have adopted different approaches to choice of law for intermediated securities.159 Such diversity makes it difficult, if not impossible, for parties in the United States and elsewhere to predict what law will apply to a cross-border intermediated securities transaction.160 Such difficulty, in turn, increases the legal risks and costs associated with cross-border


155. See Explanatory Report, supra note 5, at 3 (citing publications by numerous institutions, such as Euroclear and the International Swaps and Derivatives Association, and individual commentators calling for internationally uniform choice of law rules).


157. See supra Part II(B)(2).

158. Id.

159. Permanent Editorial Board for the Uniform Commercial Code, supra note 115, at 1 (noting “substantial difficulties in planning transactions and resolving disputes” as a result of diverse choice of law regimes); see generally Cross Border Collateral, supra note 38 (comparing the choice of law regimes for intermediated securities in twenty-five different jurisdictions).

160. See generally Cross Border Collateral, supra note 38 (comparing the choice of law regimes for intermediated securities in twenty-five different jurisdictions).
The Convention would help alleviate legal uncertainty by harmonizing countries’ choice of law regimes. An internationally harmonized choice of law regime would make the applicable law more predictable by eliminating the diversity of choice of law regimes that currently exists. Through harmonization, the Convention would thereby decrease the risk that unfamiliar or undesirable law would be imposed upon the parties to a transaction.

2. Consistent Interpretation and Application

In addition, the Convention is likely to be interpreted and applied consistently around the world, which helps to further ensure predictability and decrease legal risks and costs. Article 13 requires parties to interpret the Convention with regard “to its international character and to the need to promote uniformity in its application,” and Article 14 calls for regular conferences “to review the practical operation of this Convention.” The extensive and detailed Explanatory Report (consisting of over 150 pages of interpretive guidance) is also available to facilitate consistent interpretation and application. The Convention, thus, promises to create a truly harmonized choice of law regime for cross-border intermediated securities and ensure its ability to reduce legal risks and costs associated with cross-border intermediated securities transactions.

3. Decreased Legal Risks and Costs

The Convention would also decrease the legal risks and costs associated with determining the applicable law. Most crucially, interest holders would no longer need to worry about researching what country’s law might apply because the primary rule of the Convention allows the parties to the account agreement to decide the applicable law. Even if the parties do not expressly designate the applicable law, the Convention will normally designate a body of law familiar to one or both parties by looking for other links between the parties and the

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161. See supra Part II(B)(2).
162. See generally Cross Border Collateral, supra note 38 (comparing the choice of law regimes for intermediated securities in twenty-five different jurisdictions).
164. Id. at art. 14.
165. See supra Part III(B).
jurisdiction whose law should apply. Reliance on fallback choice of law rules, however, should normally be unnecessary because the Convention provides clear guidance to ensure the parties’ choice of applicable law will be respected. For example, the Convention specifies certain activities that do or do not satisfy the Qualifying Office requirement. Thus, “[w]ith just a sentence or two of good drafting and a few easily focused factual inquiries, transactional lawyers will be able to provide their clients with the protection of advantageous bodies of substantive law, reliably applied in any eventual forum of a State that is party to the Convention.”

To briefly illustrate these benefits, recall the earlier hypothetical involving a party taking a security interest in an actively traded securities account containing securities from issuers around the world. To determine the applicable law under the Convention, the hypothetical collateral taker would simply look at the relevant securities account agreement and be done. The collateral taker would not need to attempt to determine the law applicable for each of the different securities in the account. Similarly, active trading, which causes securities held in the account to change constantly, would not be a concern, so long as the governing law clause or clauses in the account agreement are unchanged. Instead, in a single step, the collateral taker could determine the applicable law for all the securities in the account.

4. Increased Efficiency and Financial Stability

Reduced legal risks and costs would not only benefit individual parties, but also financial markets and the economy as a whole by increasing the overall efficiency of financial markets. The Convention would facilitate efficiency in cross-border capital flows and transactions because such transactions would be less risky and less costly. Market participants face less legal risk when they are better able to identify the applicable law and determine the legal effects of a transac-

166. See supra Part. III(C).
167. See supra Part (II)(B) (especially the discussion of specific activities that satisfy the Qualifying Office requirement).
168. See supra text accompanying notes 76-86.
169. Bjerre & Rocks, supra note 9, at 112.
170. See supra text accompanying note 42.
171. See Hague Securities Convention, supra note 1, at art. 4(1).
172. EXPLANATORY REPORT, supra note 5, at 4.
With less legal risk, the price of a transaction decreases because there is no longer a need to compensate a party for taking that risk. Similarly, the reduced cost of determining the applicable law would facilitate cross-border transactions by making them less costly to execute. Therefore, the cost of capital and credit would decrease and the amount of capital and credit available (liquidity) would increase as lenders and investors face less risk of losing their money and lower transaction costs. By facilitating cross-border capital flows in this way, the Convention would help move financial resources to their most efficient uses. This is because financial resources are more easily reallocated to where they will produce the greatest returns when impediments to securities transactions—i.e., legal risks and costs—are reduced. Ultimately, by reducing legal risks and costs, the Convention would increase the efficiency of financial markets.

Greater legal certainty under the Convention would also facilitate domestic and international financial stability by helping to reduce systemic risk, preventing a financial hiccup from becoming a heart attack that threatens the domestic or global economy. The Convention would generate cheaper capital and credit—and more of it—by reduc-

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175. See supra Part V(A)(3).

176. Bjerre & Rocks, *supra* note 9, at 110; see also Anjan Thakor, *International Financial Markets: A Diverse System Is the Key to Commerce 35-36 (2015) (on file with the Ctr. for Capital Markets Competitiveness) (2015), http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/021881_SourcesofCapital_fin.pdf (addressing the converse situation in which “the legal system is less efficient, [and] the rights of creditors are less protected and less strong, which then induces banks to possibly curtail the supply of credit or charge more for it.”).

177. See Hague Securities Convention, *supra* note 1, pmbl.

178. See Roy Cordato, *Free Markets and Highest Valued Use*, *The Freeman* (May 1, 2000), http://fee.org/freeman/detail/free-markets-and-highest-valued-use (“If in a market setting, person A and person B each bid for resource X, that resource will go to the person whose bid is the highest. If A is the high bidder, it is then assumed that he valued the resource more than B and that this implies his use of the resource will be more ‘productive’ than B’s. ‘Productive’ here means that A’s use of the resource will lead to the production of those goods and services that will fetch the highest price and therefore that consumers will value most. Hence, free markets will channel resources to their highest valued use. When this process is interfered with, either through intervention in the exchange process or through direct government allocation of resources, the result is ‘misallocation’; resources are diverted to lesser valued uses or at least to uses whose value is not as high as it otherwise could be.”)
ing legal risks and costs associated with cross-border intermediated securities transactions. This would help avoid or alleviate crises because distressed firms would have better access to financing to help them continue operations rather than collapse for lack of financing.179

The Convention would also help reduce the systemic risk that results from the tiered intermediary holding structure.180 In a tiered holding structure, the failure of even just one significant intermediary can cause other intermediaries in the chain and institutions whose assets are held by intermediaries in that chain to fail as well.181 When market participants can easily determine the applicable law and, therefore, their risk exposure in the event of such an intermediary’s failure, they can better prepare for and adjust to such risk.182 As such the Convention would foster stability in financial markets.

B. Unique Benefits for the United States

The United States is in a unique position to reap benefits from the Convention beyond those generated by increased legal certainty. There are two main reasons for this: (1) adapting to and implementing the Convention would be easy because of the similarities between the Convention and the UCC, and (2) U.S. lawyers and market participants would have a competitive edge because of the similarities.

1. An Easy Transition

The similarities between the Convention and the UCC choice of law rules would ease adaptation to and implementation of the Convention. As demonstrated in Part IV, the two choice of law regimes are highly similar in most respects. Where they do differ, the variation is normally insubstantial183 and “generally manageable with sound transactional planning.”184 U.S. practitioners and market participants, therefore, would need to make only minor adjustments to adapt to the Conven-

179. See Bjerre & Rocks, supra note 9, at 110; EXPLANATORY REPORT, supra note 5, at 4. The global financial crisis of 2008 is a prime example of how lack of access to financing can exacerbate economic declines. See Sarah H. Wright, Explaining the Credit Crunch, THE NATIONAL BUREAU OF ECONOMIC RESEARCH (last visited Apr. 17, 2015), http://www.nber.org/digest/mar09/w14612.html.

180. See supra Part II(B)(1) (explaining the tiered intermediary holding structure).


182. See EXPLANATORY REPORT, supra note 5, at 16-17.

183. See supra Part IV.

184. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, supra note 115, at 1.
Based largely on these similarities—and on the practical needs of practitioners and market participants—there is substantial support within the United States for ratifying the Convention as a self-executing treaty. Most notably, the Uniform Law Commission (ULC) supports the Senate’s advice and consent to the Convention as a self-executing treaty, without any implementing federal or uniform state legislation. In fact, the ULC has already drafted amendments to the Official Comments to the UCC sections that would be affected by the Convention. The American Bar Association also supports U.S. ratification of the Convention as a self-executing treaty. To be sure, such strong domestic support for ratifying the Convention as a self-executing treaty reflects the fact that, thanks to the parallels between the Convention and the UCC choice of law regimes, adapting to the Convention upon ratification would be unproblematic.

Such strong support for the Convention also likely reflects the fact that there are fewer federalism concerns than are normally generated when a treaty threatens to preempt state law. For one, the similarities between the Convention and the UCC limit the perception that the Federal Government is stepping on state governments’ toes. Furthermore, the Convention would preempt only the few parts of the UCC that conflict with the Convention, and only in instances that involve some element of internationality; otherwise, the UCC choice of law rules would continue in full force and effect. States are also still free under the Convention to regulate acceptable choices of law. Finally,

185. See generally id. (providing an overview of the differences between the Convention and the UCC and their effects, and proposing amendments to the Official Comments to sections of the UCC affected by the Convention).

186. See, e.g., AMERICAN BAR ASSOCIATION, REPORT ON THE HAGUE SECURITIES CONVENTION 3 (August 2003) (“The Convention will contribute to the urgent practical need in the large and growing global financial markets for greater legal certainty . . . .”).


188. PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, supra note 115, at app. B.

189. AMERICAN BAR ASSOCIATION, supra note 186.

190. See U.S. CONST. art. VI, cl. 2 (establishing U.S. treaties as “the supreme law of the land”); supra Part IV (comparing the main provisions of the UCC to those of the Convention).


192. See Bernasconi & Keijser, supra note 55, at 554-55 (“Thus, supervisory authorities are, in the exercise of their authority, free to prohibit intermediaries from choosing any governing law

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federal law has long reigned supreme in securities law and the Federal Government clearly has the authority to promulgate a choice of law regime for cross-border intermediated securities.\footnote{193} As a result, ratifying the Hague Securities Convention and implementing it as a self-executing treaty in the United States would make for an easy transition.

2. A Competitive Edge

In addition to the ability to make a clean transition to the Convention choice of law regime, U.S. practitioners and market participants would likely have a competitive advantage over others if the Convention becomes widely adopted. One reason for this advantage is that not only would both the domestic and international choice of law regimes be harmonized within themselves, but they would also be harmonized with each other due to the similarities between the Convention and the UCC. This sort of “super harmonization” would further augment the benefits of legal certainty and increase transactional efficiency.

Another cause of the competitive advantage would be that U.S. practitioners and market participants are already familiar with the Convention’s approach to choice of law from working under the UCC. Because the Convention is so similar to the UCC, there is little adjustment necessary for U.S. parties to be able to accommodate any changes occasioned by the implementation of the Convention. And even where changes are necessary, U.S. parties would be able to adapt to the Convention more quickly than others, and thereby be first to exploit the benefits made generally available through increased legal certainty.

In sum, U.S. practitioners and market participants would have a competitive advantage under the Convention because of its similarity to the UCC choice of law regime.

VI. Conclusion

The United States stands to benefit from ratification of the Hague Securities Convention. Widespread adoption of the Convention would increase legal certainty by helping to resolve the choice of law dilemma

for cross-border intermediated securities that currently burdens parties in the indirect holding system. Increased legal certainty, in turn, would reduce legal risks and costs associated with cross-border transactions in intermediated securities, making financial markets more stable and efficient. In addition, the Convention presents an opportunity to, in effect, take the UCC global and thereby reap extra benefits for the United States. The similarities between the Convention and the UCC would not only ease adaptation to and implementation of the Convention, but also would generate competitive advantages for U.S. practitioners and market participants. In light of these benefits, it is time for the United States to ratify the Hague Securities Convention and to encourage other countries to do so as well.