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Non-intermediated Securities: A European View on the Draft UNCITRAL Model Law on Secured Transactions

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1. INTRODUCTION

The current ‘*acquis international*’ regarding securities consists of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (Hague Securities Convention; HSC)¹ and the UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention; GSC).² These Conventions both relate to intermediated securities and provide, respectively, conflict of laws and substantive law rules with regard to such securities. The current work by UNCITRAL on non-intermediated securities in the context of its Model Law on Secured Transactions (‘draft Model Law’) is a useful contribution in the quest for a consistent and compatible international legal framework for securities.³

This contribution focuses on the interaction of the rules envisaged by the draft Model Law for non-intermediated securities⁴ with those of the EU Financial Collateral Directive (FCD).⁵ The FCD is directly relevant to the draft Model Law in that it relates to securities, intermediated or otherwise. The FCD also addresses cash and credit claims, but the compatibility of the rules in the FCD and the draft Model Law regarding these assets will not be discussed here.⁶ It should be noted that the FCD was a major source of inspiration for the rules set out in Chapter V of the GSC under the heading ‘Special Provisions in Relation to Collateral Transactions’,⁷ so that much of what is said on the FCD hereafter is also reflected in Chapter V of the GSC.⁸

Section 2 outlines the two regimes for transactions involving securities in Europe and the single regime contemplated by the

* E-mail: t.keijser@jur.ru.nl. This article has its origin in and has benefited much from the panel discussion ‘How Can a Company Grant Security in Shares of Its Subsidiaries’ in the context of the UNCITRAL day of the New York State Bar Association’s International Section’s seasonal meeting in Vienna on 16 Oct. 2014. The author is also grateful for helpful comments on an earlier version of this article by Spyridon Bazinas (UNCITRAL), Michel Deschamps (McCarthy Tétrault, Canada), Francisco Garcimartín (Universidad Autónoma de Madrid, Spain) and Olga Tytor (European Commission). The author is solely responsible for its final content.

1 Adopted in 2002; concluded in 2006. See http://www.hcch.net/index_en.php?act=conventions.text&cid=72 (accessed 6 Nov. 2014). For an article-by-article analysis of the HSC, see Roy Goode, Hideki Kanda, Karl Kreuzer, with the assistance of Christophe Bernasconi, *Hague Securities Convention: Explanatory Report* (Martinus Nijhoff 2005).

2 Adopted in 2009. See <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf> (accessed 6 Nov. 2014). For an article-by-article analysis of the GSC, see Hideki Kanda, Charles Mooney, Luc Thévenoz, Stéphane Béraud, assisted by Thomas Keijser, *Official Commentary on the UNIDROIT Convention on Substantive Rules for Intermediated Securities* (Oxford U. Press 2012). For information on UNIDROIT’s related capital markets projects on close-out netting and securities trading in emerging markets, see, respectively, <http://www.unidroit.org/instruments/capital-markets/netting> and <http://www.unidroit.org/work-in-progress-studies/current-studies/emerging-markets> (accessed 6 Nov. 2014).

3 Securities, whether intermediated or non-intermediated, are excluded from the 2007 UNCITRAL Legislative Guide on Secured Transactions; see Recommendation 4(c). For the discussion on this recommendation, see the sources mentioned in UNIDROIT 2010 – S78B/CEM/1/Doc. 3, Appendix F, n. 8. The draft Model Law only excludes intermediated securities; see Arts 1(3)(d) and 2(q). On the desirability of harmonizing the rules on non-intermediated securities, see papers on *A Supplement to the Guide covering certain types of securities not covered by the UNIDROIT Convention on Substantive Rules for Intermediated Securities* by Michel Deschamps, José Angelo Estrella Faria, Richard Kohn, & Ed Smith, presented at the UNCITRAL Third International Colloquium on Secured Transactions, 1–3 March 2010, Vienna, <http://www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html> (accessed 6 Nov. 2014); Michel Deschamps, *The Best Rules for Non-Intermediated Securities in Transnational Securities Law* 1–25 (Thomas Keijser ed., Oxford U. Press 2014).

4 References to the draft Model Law in the text below are based on the documents submitted to the 26th session of Working Group VI, with numbers A/CN.9/WG.VI/WP.61 and Add.1-3, http://www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html (accessed 10 Nov. 2014). See also the documents of the 24th and 25th sessions of Working Group VI, available at the same website.

5 Directive 2002/47/EC on financial collateral arrangements [2002] OJ L168/43, as amended by Directive 2009/44/EC [2009] OJ L146/37 and Directive 2014/59/EU [2014] OJ L173/190.

6 Credit claims were added to the scope of the FCD in the context of its revision in 2009, *supra* n. 5.

7 Kanda et al., *supra* n. 2 V-1.

8 For a comparison of the FCD and Chapter V of the GSC, see Thomas Keijser, Maria Kyrkousi & Andreas Bakanos, *Financial Collateral: The Legal Framework of the European Union and UNIDROIT Compared*, 19 *Unif. L. Rev.* 429–458 (2014).

draft Model Law. Section 3 discusses the creation of a security interest⁹ *inter partes* and its effectiveness against third parties. Priority and protection of acquirers is the topic of section 4, while section 5 examines the enforcement of a security interest. Section 6 concerns conflict of laws rules.

2. TWO REGIMES IN EUROPE; ONE REGIME UNDER THE DRAFT MODEL LAW

The main objective of the FCD is to enhance liquidity in the financial markets. To that end, a range of customary (labelled by some as ‘archaic’) features that are characteristic of security interests and insolvency law are disapplied or relaxed.¹⁰ In a nutshell: Article 3 of the FCD disapplies formal requirements relating to the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral thereunder; Articles 4 and 7 simplify the mechanisms for enforcement by way of sale, appropriation or close-out netting; Article 5 envisages a ‘right of use’, i.e., a general right of disposal, for the collateral taker (which right is thus not limited to default situations); Article 6 prohibits the re-characterization of a title transfer as a security interest (and thus excludes application of ‘pledge principles’ to fiduciary transfers of title); while Article 8 disapplies certain insolvency provisions, notably those relating to the retroactive effect of the declaration of insolvency, while also envisaging the validity of acts after such a declaration has been made.

The key factor of ‘liquidity’ is also reflected in several provisions that determine the scope of the FCD. First, Article 2(1)(e) of the FCD only relates to financial instruments that are ‘negotiable’ or ‘normally dealt in’ on the capital market. Securities that are not tradable thus fall outside the FCD regime. The reasoning behind this exclusion is that non-tradable instruments cannot contribute to liquidity, such contribution being the main justification for deviating from customary rules of security and insolvency law.

Second, Article 1(4)(b) of the FCD contains the following possibility for Member States to opt out of its regime:

Member States may exclude from the scope of this Directive financial collateral consisting of the collateral provider’s own shares, shares in affiliated undertakings within the meaning of

seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts,¹¹ and shares in undertakings whose exclusive purpose is to own means of production that are essential for the collateral provider’s business or to own real property.

The main thrust of this provision is that a collateral provider’s own shares or those of undertakings whose financial wellbeing is closely related to that of the collateral provider can be excluded from the scope of the FCD. The underlying rationale is that such shares are likely to be of (very) limited value to a collateral taker when the collateral provider defaults, i.e., at the very moment when such value matters most. Upon the collateral provider’s default, the value of its shares and of those of related undertakings may fall substantially, while there may also no longer be a liquid market for such shares.¹²

Third, the liberal regime contemplated by the FCD gave rise to lively debate on the appropriate personal scope of the Directive prior to its adoption and during the implementation process. In its current form, the FCD applies where at least one of the parties to a collateral arrangement is a financial market participant, while Member States have the option of limiting the scope of the Directive to arrangements where both parties qualify as such (thus excluding non-financial enterprises in addition to natural persons).¹³ Following the financial crisis, there were again calls in the legal literature to apply the FCD to transactions between wholesale financial market participants only.¹⁴ The underlying policy issue is whether the special regime of the FCD, which is justified in that it is intended to promote liquidity, should also be applied in sectors of the economy where liquidity is not a major concern.

Basically therefore, two regimes for non-intermediated securities are available to market participants in each European Member State: the harmonized regime contemplated by the FCD for securities that (potentially) enhance liquidity, and a non-harmonized, generally quite distinct regime, for which each Member State has its own rules. This contrasts with the draft Model Law, which purports to set out a single regime for all non-intermediated securities, whether liquidity-enhancing or not. This follows from the definition of ‘Securities’ in Article 2(hh) of the draft Model Law, which covers both securities that are ‘dealt in or traded on securities exchanges or financial markets’ (i.e., securities

9 In this article, ‘security interest’ is used as a generic term. Where the FCD prefers the term ‘security interest’, the draft Model Law generally uses ‘security right’.

10 The FCD relates to both collateral arrangements that are structured on the basis of a transfer and on a security interest. See the definitions of ‘financial collateral arrangement’, ‘title transfer financial collateral arrangement’, and ‘security financial collateral arrangement’ in Art. 2(1)(a)-(c) FCD.

11 OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

12 Denmark, Germany, Ireland and Sweden have made (partial) use of this opt-out. See European Commission, *Report from the Commission to the Council and the European Parliament: Evaluation report on the Financial Collateral Arrangements Directive (2002/47/EC)* (Brussels, 20 December 2006; COM(2006)833 final) 4.2.2.

13 For more detail, see Art. 1(2)-(3) FCD. On the implementation thereof in the Member States, see European Commission, *supra* n. 12, 4.2.1.

14 See, for example, Louise Gullifer, *What Should We Do about Financial Collateral?* 65 *Current Leg. Problems* 377–410 (2012), and other sources mentioned in Keijser, Kyrkousi & Bakanos, *supra* n. 8, II.

that are potentially liquidity-enhancing) and securities that are a 'medium for investment' (without necessarily enhancing liquidity).¹⁵

3. CREATION INTER PARTES AND EFFECTIVENESS AGAINST THIRD PARTIES

The draft Model Law distinguishes between the creation of a security right *inter partes* and the effectiveness of such a right against third parties. Chapter II of the draft Model Law on the creation of a security right does not contain asset-specific rules for non-intermediated securities. Therefore, as also mentioned in Article 25, the general rules of Article 5 of the draft Model Law apply to the creation of a security right in relation to such securities. Article 25 of the draft Model Law sets out specific rules on the basis of which a security right in (certificated or uncertificated) non-intermediated securities can be made effective against third parties.

The FCD does not distinguish between creation *inter partes* and effectiveness against third parties, but contains one provision concerning formal requirements relating to 'creation, validity, perfection, enforceability or admissibility in evidence'. Article 3 of the FCD on 'Formal requirements' provides:

1. Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act.
...
2. Paragraph 1 is without prejudice to the application of this Directive to financial collateral only once it has been provided and if that provision can be evidenced in writing and where the financial collateral arrangement can be evidenced in writing or in a legally equivalent manner.

The FCD thus does not permit 'formal acts' in the context of financial collateral arrangements. For book entry securities, this basically means that a book entry is sufficient and that no other act or formality may be required. Concerning 'financial instruments, other than book entry securities' (non-intermediated securities in draft Model Law language), recital (10) of the FCD clarifies that 'acts required under the law of a Member State as conditions for transferring or creating a security interest ..., such as endorsement in the case of instruments to order, or recording

on the issuer's register in the case of registered instruments, should not be considered as formal acts'. As a quid pro quo for the potential enhancement of market efficiency by abolishing formal acts, the FCD requires both some form of dispossession of the collateral provider as well as evidence of the provision of financial collateral in writing.¹⁶ The financial collateral arrangement should also be evidenced in writing or in another legally enforceable manner in order to fall within the scope of the FCD. As such, the FCD essentially strikes a balance between liquidity and the safety of the parties to the arrangement and third parties (notably in cases of fraud or theft).¹⁷

The acts allowed under the FCD for vesting a security interest in non-book entry securities (such as endorsement and recording on the issuer's register) are compatible with Articles 5 and 25 of the draft Model Law. However, there appears to be a discrepancy between the two instruments regarding evidential requirements: whereas the FCD always requires evidence of the financial collateral arrangement (whether in writing or in another legally enforceable manner) and the provision of financial collateral thereunder (in writing), under Article 5(3)-(4) of the draft Model Law a mere oral security agreement is sufficient, if accompanied by possession of the encumbered asset by the secured creditor. Ideally, the draft Model Law offers at least the same protection as the FCD in cases of fraud or theft.

4. PRIORITY AND PROTECTION OF ACQUIRERS

Article 61 of the draft Model Law contains a detailed set of rules designed to solve priority conflicts. The criteria for doing so are based in part on the method used for vesting a security right (in either certificated or uncertificated non-intermediated securities), and in part on temporal order. In addition, Article 61 contains a draft rule on the protection of a buyer or transferee, either on the basis of a knowledge standard or by deferring to protection rules under 'other law'.¹⁸

The priority rules of the draft Model Law do not conflict with the FCD, which contains no substantive law rules on solving priority conflicts. It should only be noted that the insolvency treatment of collateral arrangements in the FCD in effect creates a preferential position for the parties to such arrangements (and the collateral taker in particular) to the detriment of other creditors.¹⁹ The Model Law's draft rule on the protection of acquirers without 'knowledge' or on the basis of other law is also (despite differences in terminology) generally compatible with the FCD, which does

15 The definition of 'Securities' determines the content of the definitions of 'Certificated non-intermediated securities' (Art. 2(d)), 'Intermediated securities' (Art. 2(q)), 'Non-intermediated securities' (Art. 2(v)), and 'Uncertificated non-intermediated securities' (Art. 2(II)). Because the content of 'securities' is narrower under the draft Model Law than as defined in the GSC, the content of the notion 'intermediated securities' in the two instruments likewise does not fit one on one.

16 According to Art. 2(3) FCD, 'writing' includes recording by electronic means or by any other durable medium. The note to Working Group VI under Art. 2(d), Alternative B, of the draft Model Law only mentions electronic equivalents.

17 On formal requirements, dispossession, and evidence, see recitals (10) and (11) and Arts 1(5), 2(2) and 2(3) FCD.

18 See option A, para. 7(b) and option B, para. 6.

19 See especially Art. 8 FCD.

not contain a general rule on the issue, but only envisages protection of collateral takers after the commencement of insolvency proceedings if they are 'not aware, nor should have been aware' of such commencement.²⁰

5. ENFORCEMENT

Enforcement of security interests provides a clear example of the difficulty of reconciling the two principally different regimes in Europe with the single regime currently envisaged under the draft Model Law.

The special regime of the FCD is reflected in the detailed enforcement rules set out in Articles 4, 5(5), 6(2) and 7. Enforcement may take place by way of sale, appropriation or close-out netting. One of the most characteristic features of the FCD is that these enforcement mechanisms may not be subject to formalities that are commonly applied under otherwise applicable law, such as prior notice, approval by a court, public officer or other independent person, a public auction or other prescribed manner, or the elapsing of an additional time period (a so-called freeze period).²¹ Instead, Article 4(6) of the FCD allows national standards of commercially reasonable enforcement, but these are not mandatory and, where they are in place, the collateral provider can only question whether they were applied correctly post-enforcement.²² Essentially, customary considerations such as prior notice to facilitate redemption, *ex ante* checks to guarantee maximum proceeds, and a freeze period to give the insolvency administrator time to assess the insolvent estate thus yield to the rules of the FCD that are designed to enhance liquidity of the securities markets.

Article 99(1) of the draft Model Law envisages the right to 'sell, collect or acquire the encumbered non-intermediated securities'.²³ It continues somewhat oddly in Article 99(2)(a) by stating that a

secured creditor enforcing its right in non-intermediated securities does not have to apply to a court or other authority.²⁴ A note to Working Group VI explains that this provision is intended to be consistent with both the 2007 UNCITRAL Legislative Guide on Secured Transactions (with general rules relating to secured transactions, but none relating to securities) and the FCD.²⁵ However, this provision applies the FCD rule designed for liquidity-enhancing assets to other assets without reflecting the key distinction in the FCD between liquidity-enhancing and other assets and therefore without proper justification. As such, the current text of the draft Model Law falls between two stools.²⁶

In addition, Article 99 of the Model Law is silent on the other elements disappplied under the FCD, notably prior notice, a public auction or other prescribed manner, and a freeze period. Presumably, as to prior notice and a public auction or other prescribed manner, the general rules of Chapter V of the draft Model Law apply (Articles 81–94), in particular – where court interference is excluded (see the preceding paragraph) – those relating to extra-judicial methods of exercising post-default rights (Article 83 in conjunction with Articles 88–91).²⁷ Article 90 of the draft Model Law in principle requires an advance notice, except if the encumbered asset is perishable, may decline in value rapidly, or is of a kind sold on a recognized market. This exception arguably coincides with the disapplication of the notice requirement under the FCD for liquidity-enhancing assets. Article 89 of the draft Model Law does not mention public auctions or other mechanisms for guaranteeing maximum proceeds *ex ante*, but rather leaves it up to the secured creditor to decide how the extrajudicial disposition will take place, subject to a standard of good faith and commercial reasonableness, which can only be tested post-enforcement (Article 4). Article 89 is in line with the liberal approach of the FCD, which approach the draft Model Law, however, applies irrespective of asset type in deviation of

20 Article 9(2)(c) FCD also contains a conflict of laws rule concerning 'good faith acquisition'.

21 See Arts 4(4) and 7(2) FCD. Some corrections were made to this liberal approach in the aftermath of the recent financial crisis. Article 118 of Directive 2014/59/EU, *supra* n. 5, envisages that certain restrictions on the enforcement of collateral arrangements (notably a temporary stay and the invalidation of *ipso facto* clauses) are allowed in the context of the recovery and resolution of credit institutions and investment firms. At the international level, this new approach is reflected in Basel Committee on Banking Supervision, *Report and Recommendations of the Cross-Border Bank Resolution Group* (March 2010) Recommendation 9, 40-2; Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (October 2011) s. 4 and Annex IV; UNIDROIT Principles on the Operation of Close-Out Netting Provisions, Principle 8. See also Thomas Keijser, Guy Morton & Marcel Peeters, *Financial Collateral: From Private to Regulatory Law Reform*, in *Transnational Securities Law* 2.71-6 (Thomas Keijser ed., Oxford U. Press 2014).

22 See Laura Franciosi, *Commercial Reasonableness in Financial Collateral Contracts: a Comparative Overview*, 17 Unif. L. Rev. 483–495 (2012); Michele Graziadei, *Financial Collateral Arrangements: Directive 2002/47/EC and the Many Faces of Reasonableness*, 17 Unif. L. Rev. 497–506 (2012).

23 This at least partially coincides with the options of sale, appropriation, and close-out netting of the FCD, but close-out netting is notably missing. Cf. Arts 81(2)(b) (sale or other disposition, lease or license), 81(2)(d) (acquisition), and Art. 81(2)(e) (collection or other enforcement), which options are applied throughout Ch. VII of the draft Model Law. It is unclear why Art. 99 is restricted to sale, acquisition, and collection and does not, for example, also refer to 'other disposition' or 'other enforcement'.

24 See the exception in Art. 99(2)(b) for assets registered in a registry system in accordance with Ch. IV of the draft Model Law.

25 Note at Art. 99 of the draft Model Law.

26 The same is true of the notes to Working Group VI at Arts 63 and 64 of the draft Model Law in relation to the FCD's 'right of use'. It should also be noted that the right of use is currently being subjected to regulatory constraints. See (the sources mentioned in) Keijser, Kyrkousi & Bakanos, *supra* n. 8, V.3; for a comparable development in relation to enforcement, see n 21.

27 Ideally, the relationship between the terms 'judicial' and 'extra-judicial' (e.g., in Art. 83) and 'court or other authority' (e.g., in Arts 88, 89 and 99(2)(a)) and 'court order' (e.g., in Art. 99(2)(b)) should be clarified.

customary principles of security law in EU Member States. Freeze periods are not dealt with in the draft Model Law, because they belong to the realm of insolvency law.

Generally, it is undesirable to 'export' the special concepts of the FCD (and comparable legislation in jurisdictions outside Europe) to sectors of the economy in which liquidity plays no significant role. It would also be rather contradictory if the draft Model Law were to do so, while regulatory authorities, as a response to the recent financial crisis, are trying to curb the private law liberalization reflected in the FCD by introducing regulatory constraints.

6. APPLICABLE LAW

Article 115 of the draft Model Law contains detailed conflict of laws rules for both certificated and uncertificated non-intermediated securities in relation to effectiveness of security rights against the issuer, creation, third-party effectiveness, priority and enforcement:

Article 115. Law applicable to a security right in non-intermediated securities

1. The law applicable to the effectiveness of a security right in certificated non-intermediated securities as against the issuer is the law of the State under which the issuer is constituted.
2. The law applicable to the creation, third-party effectiveness and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located.
3. The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which enforcement takes place.
4. The law applicable to the effectiveness against the issuer, the creation, the effectiveness against third parties, the priority and the enforcement of a security right in uncertificated

non-intermediated securities is the law of the State under which the issuer is constituted.

Article 9 of the FCD also contains conflict of laws rules relating to a range of substantive law issues, including the legal nature and proprietary effects of book entry securities, perfection, effectiveness against third parties, priority, good faith acquisition and enforcement. Like the Hague Securities Convention, the rules of Article 9 of the FCD are, however, limited to book entry securities.²⁸ Article 9 refers to the 'relevant account' in the book entry system, in which intermediaries play a crucial role, as the relevant connecting factor;²⁹ such an account cannot be a connecting factor in the context of non-intermediated securities.

A sketch of two related European developments is nonetheless in order. First, Article 14 of the Rome I Regulation is currently under debate.³⁰ The current Article 14 provides conflict of laws rules in the event of a voluntary assignment or contractual subrogation of a claim. This provision mainly focuses on the relationship between the assignor and assignee, and on that between the assignee and the debtor, but not on the position of third parties.³¹ This latter aspect is therefore one of the main topics of a report commissioned by the European Commission.³² On the basis of the various options set out in this report, the Commission is now drafting a new text for Article 14. The (future) Rome I rules on claims are potentially relevant for securities that can be qualified as such. Ideally, compatibility with Article 115 of the draft Model Law should be ensured.

Second, the Insolvency Regulation³³ is currently being revised. The existing text of Article 2(g) determines 'the Member States in which assets are situated' for different types of assets, including tangible property, property and rights ownership of or entitlement to which must be registered in a public register, and claims, but not for securities specifically. Nonetheless, the Virgós/Schmit explanatory report at the time linked securities subject to registration to the State related to that registration, but the report did not provide the clarity required.³⁴ A proposed re-draft of

28 For a comparison of the Hague Securities Convention and Art. 9 of the FCD, see Francisco Garcimartin & Florence Guillaume, *Conflict of Laws Rules*, in *Transnational Securities Law* 285–312 (Thomas Keijser ed., Oxford U. Press 2014).

29 See the definitions of 'book entry securities collateral' and 'relevant account' in Art. 2(1)(g)-(h) FCD.

30 Current version: Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

31 Third-party effects could be deduced from the ambiguous language in recital (38) of the Rome I Regulation ('property aspects of an assignment, as between assignor and assignee'). See, however, the unequivocal text of Art. 27(2) (requiring a report on the 'effectiveness of an assignment ... against third parties' in view of a possible amendment).

32 British Institute of International and Comparative Law, *Study on the Question of Effectiveness of an Assignment or Subrogation of a Claim against Third Parties and the Priority of the Assigned or Subrogated Claim over a Right of Another Person: Final Report* (undated), http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf (accessed 6 Nov. 2014).

33 Current version: Council Regulation (EC) No. 1346/2000 on insolvency proceedings [2000] OJ L160/1.

34 Miguel Virgós & Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (Brussels, 3 May 1996), http://globalinsolvency.com/sites/globalinsolvency.com/files/insolvency_report.pdf (accessed 6 Nov. 2014). More precisely, in connection with the protection of *bona fide* purchasers of securities subject to registration, p. 19 refers to 'the law of the State of registration', while p. 47 deems securities to be located 'in the State under the authority of which the register is kept'. On the treatment of different types of securities under the Insolvency Regulation, see Miguel Virgós & Francisco Garcimartin, *European Insolvency Regulation: Law and Practice* 311, 313 (Kluwer L. Intl. 2004). Michael Veder, *Cross-Border Insolvency Proceedings and Security Rights* 117–118, n. 81 (Kluwer Leg. Publishers 2004), identifies four possible approaches under the Insolvency Regulation in relation to registered shares. Burkhard Hess, Paul Oberhammer, Thomas Pfeiffer *et al.*, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings* (2012), http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf (accessed 6 Nov. 2014), note problems in connection with 'company shares (in private companies)' and 'financial instruments deposited with financial intermediaries' (p. 265; Annex II to the evaluation, with the underlying concerns of Austria, Slovenia, and Portugal, could not be accessed at http://ec.europa.eu/justice/civil/document/index_en.htm on 6 Nov. 2014), but conclude that 'the decision about the localisation of ... shares can be left to the courts' (p. 280).

renumbered Article 2(f) therefore specifies the location of registered shares in companies (in the Member State where the company having issued the shares has its registered office) and of book entry securities (in the Member State where the register or account in which the relevant entries are made is maintained).³⁵ However, the location of other types of securities, notably certificates, remains unspecified.³⁶ In addition, it should be noted that these location rules are not conflict of laws rules (they are relevant, for example, for Article 5 of the Insolvency Regulation). Nonetheless, the (future) location rules in the Insolvency Regulation should ideally be coordinated with the conflict of laws rules in the draft Model Law: this is particularly relevant for the rules in these instruments relating to uncertificated registered shares (the connection in the Insolvency Regulation with the location of the issuer's registered office does not necessarily tally with the reference in Article 115(4) of the draft Model Law to the law under which the issuer is constituted) and certificates (the rules of the Insolvency Regulation for tangible property refer solely to the physical location of the certificates, whereas Article

115(1)-(3) of the draft Model Law, depending on the issue at stake, refers to the law of the State under which the issuer is constituted, in which the certificate is located, or in which enforcement takes place).

7. CONCLUDING QUERY

A major challenge for the drafters of the UNCITRAL Model Law on Secured Transactions would seem to be the coordination with EU legislation that is relevant to securities. In particular, the current text of the draft Model law does not reflect the fundamental distinction made in the EU Financial Collateral Directive between transactions involving securities that enhance liquidity in the financial markets and other types of securities, resulting in distinct legal regimes in the European Union. Will the Model Law apply a 'one size fits all' approach to non-intermediated securities, or follow suit and envisage a 'default' regime as well as a special regime for securities transactions that enhance liquidity?

³⁵ See the proposed amendment of the Insolvency Regulation of 12 Dec. 2012 (COM(2012) 744 final; 2012/0360 (COD)), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012PC0744&from=en> (accessed 6 Nov. 2014).

³⁶ Virgós & Garcimartín, *supra* n. 34, 313 explain when the location rules relating to tangible property apply to certificates (or 'negotiable instruments').

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