CONTENTS

List of contributors page xiii
Preface xxi
Table of legislation xxiv
Table of international instruments xxxiii

PART I: The Geneva Securities Convention and the future EU legislation in comparison 1

1 The Geneva Securities Convention: objectives, history, and guiding principles 3
LUC THÉVENOZ
1.1 Money, securities and the intermediary holding system 3
1.2 New risks, new legal issues 6
1.3 The governing law issue 9
1.4 A brief history of the Geneva Securities Convention 12
1.5 Objectives and guiding principles of the Convention 16
1.6 The ongoing EU harmonisation process 19

2 Market needs as paradigm – breaking up the thinking on EU securities law 22
PHILIPP PAECH
2.1 Introduction 22
2.2 Mind the gap – between domestic thinking and legal reality 27
  2.2.1 Some notes on market practice 28
  2.2.2 Insular substantive law – an ideal world 30
  2.2.3 The financial market is not an island unto itself 35
  2.2.4 The problem driven beyond private international law 36
    2.2.4.1 PRIMA and tiered holding structures 36
    2.2.4.2 Incompatibility and domestic flaws 39
2.3 Risk, cost and the legislative mandate 41
  2.3.1 Difficulties in quantifying risk and cost 42
  2.3.2 Model for splitting excess cost 43
vi

CONTENTS

2.4 Functionality vs conceptuality – or the risk of perpetuating the problem 45
  2.4.1 Market needs as drivers of the legal concept of securities 46
  2.4.2 Property, intermediation and stretched expectations 48
  2.4.3 Sense and non-sense of the direct/indirect divide 50
  2.4.4 PRIMA and property 51
  2.4.5 Stripping sheep’s clothing and the 28th regime 53
    2.4.5.1 The remit of the functional approach 53
    2.4.5.2 Functionality, uniform law and the 28th regime 55
2.5 Conclusion 60

3 The proposed EU legislation on securities holding 65
   HABIB MOTANI
  3.1 Functional approach 66
  3.2 Regulatory context and scope of application 68
  3.3 Acquisitions and disposals 73
  3.4 Securities in books of intermediary to match securities held 75
  3.5 Variation by contract 77
    3.5.1 Rights conferred by securities 78
    3.5.2 Legal effectiveness and conditions 79
    3.5.3 Priority of interests 79
    3.5.4 Facilitating exercise of rights 80
    3.5.5 Exercise of rights by the account provider 81
  3.6 Risk allocation 81
  3.7 Insolvency 83
  3.8 Prohibition of cross-border discrimination 87
  3.9 Conclusion 89

4 Rights of the account holder relating to securities credited to its securities account 90
   PHILIPPE DUPONT
  4.1 Introduction 90
  4.2 Account holders and intermediaries 92
  4.3 Rights attached to the securities 94
    4.3.1 Nature of the rights 94
    4.3.2 Beneficiary 95
    4.3.3 Exercise of rights 96
    4.3.4 Obligations of intermediaries 97
    4.3.5 Relationship with corporate law 98
  4.4 Right to dispose of the securities 99
    4.4.1 Right 99
    4.4.2 Exercise restrictions 99
4.5 Right to hold securities other than through a securities account 100
  4.5.1 Principle 100
  4.5.2 Exception 101
4.6 Restrictions on the rights of the account holder 103
4.7 Conclusion 103

5 Rights of the investor 105
PIERRE-HENRI CONAC
5.1 Introduction 105
5.2 Determination of the ‘investor’: beyond the scope of the Convention and the EU legislation 108
  5.2.1 The lack of ‘investor’ determination by the Convention and the EU legislation 108
    5.2.1.1 The limited scope of the Convention and the EU legislation 109
    5.2.1.2 Determination of the ‘investor’ decided by national law 112
  5.2.2 Distinction between the ‘investor’ and the terms used in the Convention and the EU legislation 113
    5.2.2.1 Distinction between ‘investor’ and ‘account holder’ 113
    5.2.2.2 The ‘nominee’ 118
5.3 The exercise of rights of the ‘investor’ under the Convention and the EU legislation 121
  5.3.1 The rights of an investor as an ‘account holder’ 121
    5.3.1.1 Rights flowing downstream from the issuer to the account holder 122
    5.3.1.2 Rights exercised upstream by the account holder towards the issuer 125
  5.3.2 The rights of an investor through a ‘nominee’ 125
    5.3.2.1 The recognition of the nominee 126
    5.3.2.2 The possibility of conditions set up by national laws 131
5.4 Conclusion 132

6 Transfer of intermediated securities 135
LUC THÉVENOZ
6.1 Introduction 135
6.2 Methods for acquisition and disposition 138
  6.2.1 Debits and credits 138
  6.2.2 Choice among other methods 141
  6.2.3 Designating entry (or earmarking) 142
  6.2.4 Control agreement 143
6.2.5 Agreement with and for the benefit of the relevant intermediary 144
6.3 Rights and interests transferred 145
6.4 Effectiveness 147
6.5 Innocent acquisition 150
6.6 Priority 153
6.7 Harmonisation and the non-Convention law 157

7 The truth about shortfall of intermediated securities — perspectives under the Geneva Securities Convention, United States law, and the future EU legislation 160

CHARLES W. MOONEY, JR.
7.1 Introduction 160
7.2 Causes of shortfall: the good, the bad, and the ugly 162
7.3 Shortfall under the Geneva Securities Convention, US law (as the non-Convention law), and the draft European principles 163
7.3.1 Past as prologue 163
7.3.2 The Convention approach 164
7.3.3 The US approach: application of the Convention with US law as the non-Convention law 165
7.3.3.1 Protection of account holders from shortfall under US law 165
7.3.3.2 Compliance with US law as compliance with the Convention 182
7.3.3.3 Epilogue: US law on banks and voting rights 186
7.3.4 The draft European legislation approach 188
7.4 Conclusion 190

8 The concept of integrity in securities holding systems 193

HUBERT DE VAUPLANE AND JEAN-PIERRE YON
8.1 Introduction 193
8.2 What is integrity? 195
8.2.1 Integrity is based on arithmetic equality . . . 196
8.2.2 . . . and an exclusive right 197
8.2.3 . . . but is not a universal concept 198
8.2.4 Integrity according to the Geneva Securities Convention 199
8.2.5 Integrity in European law 200
8.2.6 What purpose does integrity serve? 202
8.2.7 (Over-)abundance of securities 203
8.3 How to implement this integrity? 204
8.3.1 Segregation of assets 204
8.3.1.1 French law 204
CONTENTS

8.3.1.2 Convention 206
8.3.1.3 Position of the Legal Certainty Group (LCG) 207

8.3.2 The principle of double entry accounting or ‘no credit without debit’ 209
8.3.2.1 Key features 209
8.3.2.2 Convention 209
8.3.2.3 Position of the Legal Certainty Group 210

8.4 Conclusion 212

PART II: Impact on securities laws of selected European jurisdictions 215

9 Intermediated securities under Belgian law: assessing the impact of the Geneva Securities Convention on the regulatory environment 217

MICHEL TISON AND LIENJTE VAN DEN STEEN

9.1 Introduction 217

9.2 The legal framework for intermediated securities in Belgian law 217
9.2.1 Fragmented regimes but harmonised in substance 217
9.2.2 The nature of investors’ rights on securities held in an account with an intermediary 221
9.2.3 Lower-tier level: transactions with dematerialised or immobilised securities 222
9.2.3.1 Transfer of securities 222
9.2.3.2 Incidents in the transaction chain 222
9.2.4 Upper-tier level: protection of client securities 224
9.2.4.1 Segregation of accounts and prohibition of upper-tier attachment 224
9.2.4.2 Client protection against insolvency of the financial intermediary or the CSD 225
9.2.5 Investors’ rights vis-à-vis the issuer 228

9.3 The impact of the Geneva Securities Convention on Belgian law 229
9.3.1 Scope of the UNIDROIT intermediated securities regime 229
9.3.2 The nature of the investors’ rights on securities held in an account with an intermediary 230
9.3.3 Transfer of intermediated securities 231
9.3.4 Treatment of upper-tier attachment 233
9.3.5 Protection against insolvency of the financial intermediary 233
9.3.6 Investors’ rights vis-à-vis the issuer 235

9.4 Private international law rules in Belgium 235

9.5 Conclusion 237
10 The Geneva Securities Convention, the future European legislation, and their impact on French securities laws  

PHILIPPE LANGLET

10.1 Introduction  

10.2 Pro rata sharing of securities loss in case of bankruptcy of the account provider  

10.2.1 Under the future EU legislation and the Convention  

10.2.2 Under French law  

10.3 How could the uncertain definition of the owner of securities lead to an unfair result at the banks’ expense?  

10.3.1 Madoff clawback procedure  

10.3.2 The bundle of rights concept in the Convention and the future EU legislation is not compatible with French law  

10.4 Conclusion  

11 The Geneva Securities Convention, the future European legislation, and their impact on German law  

ULRICH SEGNA

11.1 Introduction  

11.2 The co-ownership concept and its main problems  

11.2.1 Main characteristics  

11.2.2 Main problems  

11.3 The impact of the Geneva Securities Convention  

11.3.1 Functional approach  

11.3.2 Rights of the account holder (Article 9)  

11.3.3 Transfer of intermediated securities (Article 11)  

11.4 European legislation on legal certainty of securities holding and dispositions  

11.4.1 Functional approach  

11.4.2 Rights of the account holder  

11.4.3 Methods for acquisition and disposition  

11.5 Conclusion  

12 The Geneva Securities Convention: a Spanish perspective  

FRANCISCO GARCIMARTÍN

12.1 Introduction  

12.2 Outline of the Spanish system
CONTENTS

12.2.1 Spanish securities held directly in the Spanish CSD or in a participant in the Spanish CSD 270
  12.2.1.1 Point of departure 270
  12.2.1.2 Architecture: CSD and its participants as central registry 273
  12.2.1.3 Consequences 274
  12.2.1.4 A system of direct proprietary rights 275
  12.2.1.5 Credits and debits 276
  12.2.1.6 Liability 278

12.3 The Convention: conceptual framework 279
  12.3.1 Contractual rights 279
  12.3.2 Proprietary rights 280
  12.3.3 Corporate rights 280

12.4 The Convention: selected issues 281
  12.4.1 General comment 281
  12.4.2 Acquisition of securities: credits 281
  12.4.3 Transfers of securities: debit, credit and title 283

13 The Geneva Securities Convention and the Swiss intermediated securities law reform 288

HANS KUHN

13.1 Introduction 288

13.2 History and policy objective of Switzerland’s securities law reform 289
  13.2.1 Key legal concepts under previous law 289
  13.2.2 History and policy objectives of FISA 291

13.3 Key concepts of FISA compared with the Convention 293
  13.3.1 Form, terminology and structure 293
  13.3.2 Intermediated securities 294
  13.3.3 Protection of the integrity of intermediated holding system 296
  13.3.4 Disposition of intermediated securities 297
    13.3.4.1 General 297
    13.3.4.2 Valid underlying contract? 298
    13.3.4.3 Methods for the disposition of intermediated securities 299
    13.3.4.4 Transferor’s power to dispose or transferee’s good faith 303
  13.3.5 Priorities 305
  13.3.6 Security interests in intermediated securities 306

13.4 FISA’s cross-border dimension 307

13.5 Conclusions 308
## CONTENTS

**Appendix** 317

UNIDROIT Convention on Substantive Rules for Intermediated Securities 319

EU Consultation Document ‘Legislation on Legal Certainty of Securities Holding and Dispositions’ 350

*Index* 395