Private Law and the Regulation of Securities Intermediaries : Perspectives under the Geneva Securities Convention and United States Law *

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I. – INTRODUCTION

The Geneva Securities Convention [1] (the "Convention") was adopted at the second session of a diplomatic Conference in Geneva (Switzerland) in October 2009. The Convention has not yet entered into force although it has already exerted considerable influence.[2] The Convention applies if "the applicable

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1 *UNIDROIT Convention on Substantive Rules for Intermediated Securities* (also to be known under its short title, the Geneva Securities Convention), available at <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm>. For background on the Convention, see Charles W. MOONEY, Jr. & Hideki KANDA, "Core Issues under the UNIDROIT (Geneva) Convention on Intermediated Securities: Views from the United States and Japan", Ch. 4 in *Intermediated Securities: Legal Problems and Practical Issues* (Louise Gullifer & Jennifer Payne (Eds.), 2010); Charles W. MOONEY, Jr., "Law and Systems for Intermediated Securities and the Relationship of Private Property Law to Securities Clearance and Settlement: US, Japan, and the UNIDROIT Draft Convention", IMES Discussion Paper Series 2008-E-7 (May 2008), available at <http://www.imes.boj.or.jp/english/publication/edps/fedps2008_index.html>. In connection with the Convention, I served as a member of the United States (U.S.) delegation at the four meetings of experts in Rome (May 2005, March 2006, November 2006, and May 2007) and at the 2008 and 2009 first and second sessions of the diplomatic Conference in Geneva. Also, I served as a member of the drafting committee (representing the U.S.) at each of the experts' meetings and at both sessions of the diplomatic Conference. However, the views expressed in this paper do not necessarily reflect the position of the United States or any other member of the United States delegation.

2 Both the process leading to the final text of the Convention and the text itself have had considerable influence on the European project relating to securities holdings and

conflict-of-laws rules designate the law in force in a Contracting State as the applicable law" [3] or if "the circumstances do not lead to the application of any law other than the law in force in a Contracting State." [4] The Convention deals with "intermediated securities",[5] which are "securities" [6] that are credited to a "securities account" [7] maintained with an "intermediary" [8] in the name of an "account holder" [9]. While the Convention does not contain a general exclusion of relationships with the issuers of securities, there are very few of its provisions that affect issuers.[10]

This article first identifies and explains the "regulatory dimension" of the Convention. It then explores the means by which the Convention provides for the interaction and reconciliation of its quite general terms with provisions of other law, including complex regulatory regimes affecting securities intermediaries. Finally, the article explains the application of the Convention in connection with two aspects of United States law: voting rights of account holders and the obligation of an intermediary to maintain sufficient securities.

dispositions. See European Commission, *Legislation on Legal Certainty of Securities Holding and Dispositions, Consultation Document of the Services of The Directorate-General Internal Market And Services* (2010) at 9, available at <http://ec.europa.eu/internal_market/consultations/docs/2010/securities/consultation_paper_en.pdf>

"The Geneva Securities Convention . . . provides for a global harmonised instrument regarding the substantive law (= content of the law) of holding and disposition of securities, covering the same scope as those parts of the present outline dealing this subject. Most EU Member States and the EU itself have participated in the negotiations of this Convention. Both the present approach and the Convention are compatible with each other."

See also LEGAL CERTAINTY GROUP, *Second Advice of the Legal Certainty Group (Solutions to Legal Barriers related to Post-Trading with the EU)* (August 2008). Recommendations made in the *Second Advice* were similar in substance to the draft Convention text that was submitted to the first session of the diplomatic Conference in September 2008.

3 Conv. Art. 2(a).

4 Conv. Art. 2(b).

5 Conv. Art. 1(b).

6 Conv. Art. 1(a).

7 Conv. Art. 1(c).

8 Conv. Art. 1(d).

9 Conv. Art. 1(e).

10 See Conv. Arts. 29 ("Position of issuers of securities") and 30 ("Set-off").

II. – THE "REGULATORY DIMENSION" OF THE GENEVA SECURITIES CONVENTION: ACCOUNT HOLDER RIGHTS AND INTERMEDIARY DUTIES

The Convention is fundamentally a "private law" instrument. That is to say, its principal function is to order relationships among private parties (natural persons and legal entities). Consider two sets of Convention provisions. The first set consists of the Convention's rules on priorities among competing interests in intermediated securities and the innocent acquisition of intermediated securities.[11] Those rules govern the resolution of property interests, or real rights, as among conflicting claimants to intermediated securities. A second set of important Convention provisions addresses the relationship between intermediaries and account holders. This second set of rules primarily establishes the rights of account holders and the corresponding duties of intermediaries toward their account holders (although the rules also implicate property rights of account holders). Again, the function is primarily the governance of relationships among private parties.

The second set of Convention provisions may best be characterized as the Convention's "regulatory dimension." [12] During the meetings and negotiations leading to the final adoption of the Convention there was a clear sense that securities intermediaries should be, and generally are, subject to prudential regulation and supervision. This is reflected in two clauses of the Preamble to the Convention:

> "*RECOGNISING* that this Convention does not limit or otherwise affect the powers of Contracting States to regulate, supervise or oversee the holding and disposition of intermediated securities or any other matters expressly covered by the Convention, except in so far as such regulation, supervision or oversight would contravene the provisions of this Convention,
>
> *MINDFUL* of the importance of the role of intermediaries in the application of this Convention and the need of Contracting States to regulate, supervise or oversee their activities[.]" [13]

But the Convention does not mandate such regulation. It also stops short of restricting its scope to securities accounts maintained by intermediaries that

11 Conv. Arts. 19 & 20 (priority rules); 17 & 18 (innocent acquisition). These Convention provisions are discussed briefly below. (See text accompanying note 24 and following paragraph.)

12 As explained below, the first set of Convention rules also has a significant regulatory dimension. (See text accompanying note 24 and following paragraph.)

13 Conv. Preamble.

are regulated. Instead, in recognition that there are sound arguments both for and against such a restriction,[14] Article 5 of the Convention provides a declaration mechanism pursuant to which a Contracting State may limit the Convention's applicability to accounts maintained by regulated intermediaries or a central bank.[15]

The regulatory dimension of the Convention extends considerably beyond merely contemplating that intermediaries generally are and should be regulated under law other than the Convention. The Convention also contains substantive provisions that in many respects resemble regulatory provisions designed to protect account holders and constrain the conduct of intermediaries. It confers rights on account holders and imposes duties on intermediaries. While these rights and duties of course implicate the private relationship and interactions between two parties (account holder and intermediary), as noted above, this aspect of the Convention's regulatory dimension also addresses matters that are typically of particular interest in the regulation and supervision of intermediaries. In this sense the Convention also addresses matters that affect the interest of the larger community – the public interest – in establishing and maintaining financial markets that are safe and sound for investors.

Article 9(1) is a core provision of the Convention. It identifies the rights conferred on an account holder by a credit made to the account holder's securities account." Article 9(1) provides:

> "1. The credit of securities to a securities account confers on the account holder:
>
> (a) the right to receive and exercise any rights attached to the securities, including dividends, other distributions and voting rights:
>
> (i) if the account holder is not an intermediary or is an intermediary acting for its own account; and
>
> (ii) in any other case, if so provided by the non-Convention law;
>
> (b) the right to effect a disposition under Article 11 or grant an interest under Article 12;
>
> (c) the right, by instructions to the relevant intermediary, to cause the securities to be held otherwise than through a securities account, to the

14 See Official Commentary (O:C.), paras. 5-4 – 5-5 (discussing the advantages and disadvantages of one approach or the other).

15 Conv. Art. 5. Declarations made by a Contracting State under the Convention apply when that State's law is the applicable law. See Conv. Art. 3.

extent permitted by the applicable law, the terms of the securities and, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system;

(d) unless otherwise provided in this Convention, such other rights, including rights and interests in securities, as may be conferred by the non-Convention law." [16]

The Convention imposes duties on intermediaries that correspond to the account holder rights specified in Article 9(1). Article 10(1) requires an intermediary, with exceptions, to "take appropriate measures to enable its account holders to receive and exercise the rights specified in Article 9(1)." [17] In addition to these general obligations of an intermediary under Article 10(1), the Convention also imposes additional, more specific obligations on intermediaries. Article 23 deals with an intermediary's duty to act on instructions of its account holder.[18] Article 24(1) requires an intermediary to hold or have available securities and intermediated securities sufficient to cover securities credited to its account holders' accounts.[19] Under Article 25 an intermediary must allocate securities and intermediated securities to its account holders so as to comply with Article 24(1).[20]

Some duties of an intermediary under the Article 9(1)-10(1) package also are the subject of regulatory constraints and duties under the non-Convention law. Account holders' voting rights, which are mentioned explicitly in Article 9(1)(a), provide a good example. In the United States, complex rules applicable to securities broker-dealers regulate the delivery and collection of proxies from "ultimate" shareholders (*i.e.*, the beneficial owners) in the intermediated holding system.[21] In one important sense the United States

16 Conv. Art. 9(1). Art. 9(2) provides (implicitly) that the account holder may exercise these rights (subject to specified limitations) against the "relevant intermediary." Conv. Art. 9(2)(b), (c). The account holder's rights under Art. 9(1) "are effective against third parties." Conv. Art. 9(2)(a).

17 Conv. Art. 10(1). There are exceptions to the intermediary's obligations under Art. 10(1). An intermediary is not required to take any action that is not within its power or to establish a securities account with another intermediary. Conv. Art. 10(3).

18 Conv. Art. 23.

19 Conv. Art. 24(1).

20 Conv. Art. 25(1).

21 See Thomas L. HAZEN & Jerry W. MARKHAM, "Broker-Dealer Operations under Securities and Commodities Law", § 13.13 (updated 2010), , § 13.13 (updated 2010), available on Westlaw (discussing Securities and Exchange Commission ("SEC") Rule 14a-13[4], which requires issuers to obtain the number of beneficial owners from record holders of securities,

proxy voting system meshes well with the intermediary obligation under Article 10(1). While Article 9(1) identifies the account holders' voting rights, neither that provision nor Article 10(1) specify *how* an intermediary is to enable account holders to exercise such rights. This illustrates the beauty of the Convention's "functional" approach.[22]

Article 24(1) provides another example. Under that provision "[a]n intermediary must, for each description of securities, hold or have available securities and intermediated securities" sufficient to cover securities of each such description credited to the accounts of its account holders. Once again, as in the voting context, complex "customer protection" rules applicable to broker-dealers in the United States address the same concerns that Article 24(1) addresses – the availability of sufficient securities to cover account holder ("customer") claims to securities credited to securities accounts.[23]

The Convention's provisions on priorities of claims and innocent acquisition also have a regulatory dimension. Unlike the Convention's intermediary obligations (such as those concerning voting rights and maintaining sufficient securities), however, regulatory regimes for securities intermediaries usually do not contain similar rules. These matters generally are left strictly to the private law. But that is not to say that these private law rules do not have an important impact on the regulatory systems. The certainly do. As Professor Kanda and I have explained:

> "[T]he relevant [private law] legal regimes carry much more water than the regulation of private rights among economic actors – as important as those

SEC Rule 14b-1[5], which requires broker-dealers to solicit proxies from and deliver proxy materials to beneficial owners, and New York Stock Exchange Rules 451 and 452, which require members to forward proxy materials to beneficial owners). For a trenchant critique of various aspects of the corporate voting structure for intermediated securities in the United States, see Marcel KAHAN & Edward B. ROCK, "The Hanging Chads of Corporate Voting", 96 *Georgetown Law Journal* (2008), 1227.

22 See MOONEY & KANDA, *Core Issues*, *supra* note 1, at 75:

"The functional approach offers a useful and effective method for harmonisation of private laws around the world. First, by definition, the approach does not require harmonisation of all relevant legal doctrine. . . . Secondly, harmonizing results is exactly what is needed to ensure less costly, safe, and certain cross-border securities transactions and the integrity of post-trade securities clearing and settlement . . . Thirdly, the functional approach, in the context of the Convention, for example, does not demand *identical* results under every applicable non-Convention law; it permits some deference to non-harmonisation – even as to result."

23 See HAZEN & MARKHAM, *supra* note 21, §§ 5.2 – 5.7 (discussing protection of customers' free credit balances, securities possession and control requirements, restrictions on hypothecation of customer securities, and segregation requirements).

rights may be. They are a crucial component of the infrastructure – the 'plumbing', if you will – of the financial markets. And they can play a significant role in reducing not only legal risks of market participants but *systemic risk* as well." [24]

The certainty and repose provided by these private law rules play an important role in the stability of financial markets and market participants, including securities intermediaries.

To summarize, the Convention supplements and complements prudential regulation and supervision of securities intermediaries in two principal respects. First, the Convention's substantive rules address directly certain aspects of the rights of account holders and duties of intermediaries that are (and traditionally have been) in the domain of national regulatory regimes. Part III of this article explains the Convention's approach to actual and potential conflicts between its substantive rules and those of the applicable non-Convention regulatory regime. Part III then considers the Convention's resolution of two examples of such a conflict: the obligation of intermediaries under Article 10(1) to enable account holders to exercise voting rights and the obligation of intermediaries under Article 24 to hold sufficient securities. These Convention obligations are considered under the assumption that the law of the United States is the non-Convention law. Second, the Convention enhances certainty in transactions involving intermediated securities, primarily through its priority and innocent acquisition provisions. These private law rules are important components of the infrastructure necessary for the appropriate regulation and supervision of financial markets and market participants, such as securities intermediaries, as well as for market structures such as clearing and settlement systems.

III. – THE "REGULATORY DIMENSION" OF THE GENEVA SECURITIES CONVENTION: ARTICLE 28 AND THE ROLE OF NON-CONVENTION LAW

Article 28 imposes an important, indeed essential, reconciliation of the duties imposed on intermediaries by the Convention with the applicable provisions of the non-Convention law, including the relevant regulatory regime. Article 28(1) provides:

"The obligations of an intermediary under this Convention, including the manner in which an intermediary complies with its obligations, may be specified by the non-Convention law and, to the extent permitted by the

24 See MOONEY & KANDA, *Core Issues*, *supra* note 1, at 76 (citations omitted).

non-Convention law, the account agreement or the uniform rules of a securities settlement system." [25]

Article 28(1) provides a safety-valve of sorts for the obligations imposed by the Convention on intermediaries. As the Official Commentary explains:

"Article 28(1) provides that the non-Convention law may specify the content of, and manner of compliance with, an intermediary's Convention obligations. This is consistent with the Convention's functional approach which identifies the results that an intermediary is to achieve but does not specify the details of how an intermediary is to accomplish those results." [26]

Consider Article 10, which requires an intermediary to take measures so as to enable its account holders to receive the rights and benefits associated with intermediated securities credited to its account holders' securities accounts.[27] Standing alone, Article 10 could be understood to impose an absolute obligation on an intermediary to ensure that its account holders receive those rights and benefits. Article 28(1), however, acknowledges that an intermediary's Convention obligations are moderated by non-Convention law.[28] Modern securities markets must afford participants and regulators sufficient flexibility to adapt the obligations of intermediaries to various circumstances. For example, it is not unusual for an intermediary to disclaim responsibility for risks attendant to holding through a foreign intermediary.

Article 24(1) also might be read to impose an absolute obligation on an intermediary to maintain sufficient securities for allocation to its account holders. But regulatory regimes in some jurisdictions permit, in some circumstances, mismatches in securities credited to an intermediary's account holders and securities held by the intermediary.[29]

25 Conv. Art. 28(1). The initial predecessor provision to Art. 28(1) was proposed by the United States delegation in the course of the drafting process. See UNIDROIT 2006, Study LXXVIII – Doc. 29 (January 2006). The result was Art. 18 of the draft Convention produced at the second meeting of the committee of governmental experts. See UNIDROIT 2006, Study LXXVIII – Doc. 42 (March 2006).

26 O.C. para. 28-11.

27 See discussion of this point at pp. 5-6 *supra*].

28 Art. 28(1) and Art. 28(2), discussed below, defer not only to the non-Convention law but also, where that law so permits, to the account agreement and the uniform rules of a securities settlement system. For convenience of expression the following discussion refers only to the non-Convention law but is intended also to include references to an account agreement and such system rules.

29 See, e.g., text at notes 39-47 (discussing United States law).

Article 28(2) complements and supplements Article 28(1). Article 28(2) provides:

> "If the substance of any such obligation is specified by the non-Convention law or, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system, compliance with it satisfies that obligation." [30]

A principal goal of paragraphs 1 and 2 of Article 28 is to protect an intermediary from the necessity of complying with two different rules or standards. In particular, Article 28(2) recognizes that intermediaries normally are regulated entities and it removes the spectre of double regulation – having to comply with two sets of rules that are generally aimed at the same result and which are substantially similar but differ in details. As the Official Commentary notes, Article 28(2) "relieves intermediaries from the prospect of being subjected to a double standard: a treaty standard and the standard provided or permitted under the non-Convention law." [31] When an intermediary is in compliance with its duties under the non-Convention law (including regulatory constraints), the analogous Convention rules defer to that law pursuant to Article 28(2).

Application of Article 28(2) requires a determination of the circumstances in which "the substance of any such [Convention] obligation is specified by any provision of the non-Convention law." Obviously, the non-Convention law may specify the substance of a Convention obligation even though that law *is not the same as the Convention obligation itself*. Otherwise Article 28(2) would be meaningless. Stated otherwise, if Article 28(2) were applicable only when a provision of the non-Convention law is substantively *identical* to a provision in the Convention that imposes an obligation on intermediaries, then Article 28(2) would accomplish nothing.

When, then, does Article 28(2) apply? Or, when does Article 28(2) *not* apply because a provision of the non-Convention law sufficiently deviates from the Convention standard so that it does not "specif[y]" the "substance" of a Convention obligation? In my view, a provision of the non-Convention law

30 Conv. Art. 28(2). Art. 28(2) follows closely a draft provision proposed by the United States delegation at the fourth session of the committee on governmental experts. See UNIDROIT 2007, Study LXXVIII – Doc. 91 (May 2007), proposing, *inter alia*, a new Art. 20(1*bis*):

"If the substance of an obligation of an intermediary under this Convention is the subject of any provision of the non-Convention law or, to the extent permitted by the non-Convention law, the account agreement or the uniform rules of a securities settlement system, compliance with that provision satisfies that obligation."

31 O.C. para. 28-12.

would specify the substance of a Convention obligation if it meets two criteria. First, the provision should require intermediary conduct or a result that is substantially similar to that required by the Convention obligation. Second, the provision should be aimed at a substantially similar purpose and function as the Convention obligation.[32] The discussion below illustrates the operation of Article 28(2) in the context of United States law concerning voting rights and shortfalls of securities.

Aside from the double-standard concern discussed above, why does the Convention provide such broad deference to non-Convention law concerning important aspects of the intermediary-account holder relationships? Why does the Convention not adopt a one-size-fits-all set of obligations that would override any conflicting rules under the non-Convention law? There is a straightforward answer to these questions. Adoption of harmonized rules on intermediary obligations and duties was not feasible.[33] The legal and regulatory regimes for intermediated securities vary substantially from State to State. Several States have overhauled and modernized their legal systems for intermediated securities in recent years and these States have little interest in abandoning their reforms for a harmonized international standard. On the other hand, there is considerable value in the Convention's "default" rules, especially for States without clear, specific laws addressing intermediary obligations.

It would be a great and disingenuous distortion to characterize the operation of Article 28(2) as "permitting violations" of the Convention's otherwise absolute obligations imposed on intermediaries. That provision is simply the Convention's means of tempering and reconciling those obligations with the applicable law and regulations. Were it not for the approach of Article 28(2), I believe that those intermediary obligations would be quite different – and laden with qualifications and exceptions. Certainly, the United States would not have supported any such absolute obligations. Or, perhaps more

32 These are essentially the criteria that Professor Kanda and I speculated might be included as a part of the Official Commentary. See MOONEY & KANDA, *Core Issues*, *supra* note 1, at 90-91, n. 108:

"Discussions during the final session [of the diplomatic conference] suggest that the discussion in the Draft Official Commentary should be expanded to explain that such a provision would specify the substance of a Convention obligation only if the provision (i) requires intermediary conduct or a result that is substantially similar to that required by the Convention obligation and (ii) is aimed at a substantially similar purpose and function as the Convention obligation. Properly interpreted and applied, Art 28(2) would not permit the non-Convention law, account agreement, or uniform rule to expose account holders to materially greater risks."

33 See *Id.* at 91.

likely and as suggested above, it might have proved impossible to reach any agreement on harmonized standards for intermediary conduct.

Consider now the application of Article 28(2) in two specific contexts. As discussed above, under the Convention an intermediary must enable its account holders to exercise voting rights.[34] An intermediary also must have available sufficient securities and intermediated securities of each description sufficient to cover securities of that description credited to its account holders' accounts.[35]

United States law does not impose on a securities broker-dealer an absolute obligation to ensure that its account holders can vote securities credited to the account holders' accounts. As already mentioned, somewhat complex rules apply.[36] However, a broker-dealer's compliance with those rules will not necessarily and in all cases empower every account holder to vote. For example, an account holder's contact information may change or proxy materials might be lost in the mails. No system is likely to be perfect. But so long as the broker-dealer complies with the relevant rules, the application of Article 28(2) would result in the broker-dealer's compliance with Article 10(1) in respect of account holder voting rights.

The otherwise absolute nature of an intermediary's obligation under Article 24(1) also may be ameliorated by Article 28(2). Assume that the non-Convention law generally requires an intermediary to have available sufficient securities for allocation to its account holders' accounts, but that it also contains some exceptions to the strict results specified in Article 24.[37] Compliance with the non-Convention law would qualify as compliance with Article 24 pursuant to Article 28(2) – provided that the non-Convention law meets the standards discussed above, *i.e.*, that it generally provides account holders with reasonable protection against the risks that a shortfall could present. The purpose of Article 24 is the protection of account holders against the economic risks of a shortfall.[38]

United States law generally is consistent with the non-Convention law just described. A securities intermediary generally is obligated to maintain

34 See Conv. Arts. 9(1), 10(1) – see discussion at p. 6 *supra*.

35 See Conv. Art. 24(1) – see discussion at p. 7 *supra*.

36 See discussion at p. 6 *supra*.

37 O.C. Example 28-2.

38 See O.C. para. 24-10 ("Paragraph 1 states the main rule, *i.e.*, the obligation of an intermediary to hold or have available *for the benefit of its account holders* securities or intermediated securities that correspond to the credits it has made to the securities accounts of its account holders . . .") (emphasis added).

sufficient financial assets to cover its entitlement holders' security entitlements.[39] However, the regime applicable to registered broker-dealers consists primarily of regulations issued by the Securities and Exchange Commission (hereinafter: "SEC") under the *Securities Exchange Act* of 1934.[40] As noted in the *Uniform Commercial Code* ("UCC") [41] Official Comments:

> "5. This section [8-504] necessarily states the duty of a securities intermediary to obtain and maintain financial assets only at the very general and abstract level. For the most part, these matters are specified in great detail by regulatory law. Broker-dealers registered under the federal securities laws are subject to detailed regulation concerning the safeguarding of customer securities. See 17 C.F.R. § 240.15c3-3. Section 8-509(a) provides explicitly that if a securities intermediary complies with such regulatory law, its compliance also constitutes compliance with Section 8-504. In certain circumstances, these rules permit a firm to be in a position where it temporarily lacks a sufficient quantity of financial assets to satisfy all customer claims. For example, if another firm has failed to make a delivery to the firm in settlement of a trade, the firm is permitted a certain period of time to clear up the problem before it is obligated to obtain the necessary securities from some other source."[42]

Shortfalls routinely occur in the normal operation of the back offices of broker-dealers in the United States.[43] But that does not necessarily mean that account holders are inappropriately put at risk. Under the *Securities Investor Protection Act* [44] scheme under United States law, an account holder is protected not only by the broker-dealer having securities of the particular description credited to its account but also by securities of *other* descriptions credited to the accounts of other account holders.[45] The rigid, matched-book

39 UCC § 8-504(a).

40 See generally Egon GUTTMAN, *Modern Securities Transfers § 4.10* (3d ed. (2010).

41 The UCC is a "uniform law" promulgated in a joint venture between the National Conference of Commissioners on Uniform State Laws and The American Law Institute. Actually, it is not a "law" at all, but simply a model promulgated with the expectation that the various states of the United States will enact it. Like any uniform law, it must be adopted by a state before it becomes law. UCC Art. 8, Investment Securities, has been adopted by every state in substantially uniform form.

42 UCC § 8-504, Comment 5.

43 See MOONEY, *Law and Systems*, *supra* note 1, at 113-15, 118-19.

44 15 U.S.C. §§ 78aaa–111.

45 For a brief description of this system, see MOONEY & KANDA, *Core Issues*, *supra* note 1, at 124-25.

approach of Article 24(1) is one approach to protecting account holders, but it is not the only one. While a detailed analysis of the SEC's customer protection rules is beyond the scope of this article,[46] it is sufficient to note here that compliance with those rules would constitute compliance with Article 24 by virtue of Article 28(2).[47]

IV. – CONCLUSION

The adoption of the Geneva Securities Convention was a remarkable achievement. Whether or not it becomes widely accepted and enters into force, it has already had a positive influence on the direction of law reform. I expect that influence to continue. Reaching such an international consensus on a set of priority rules and a standard for innocent acquisition of intermediated securities would have been regarded as an impossibility only a few years ago.

Harmonization of law, especially regulatory law, in the financial markets is a difficult task. Market structures and traditions vary widely. It is not surprising that strict harmonization of the obligations of securities intermediaries was unattainable. But, as explained above, the approach taken in Article 28 of the Convention provides a path forward. It is a sensible, practical, and innovative accommodation of the applicable law and regulations.

46 In another forthcoming paper I deal more extensively with shortfalls in the United States intermediated holding system and the operation of the SEC's customer protection rules and the insolvency distributional rules for broker-dealers regulated by the SEC. Charles W. MOONEY, Jr., "The Truth About Shortfall of Intermediated Securities: Perspectives under the Geneva Securities Convention, United States Law, and the Prospective European Directive" (forthcoming, 2011).

47 *Id.* One should take care not to confound the operation of Art. 28(2) with that of Art. 24(3). The latter provides:

"If at any time the requirements of paragraph 1 [of Art. 24] are not complied with, the intermediary must within the time permitted by the non-Convention law take such action as is necessary to ensure compliance with those requirements."

Art. 24(3) addresses the timing of curing *noncompliance* with Art. 24(1). Art. 28(2), however, provides that compliance with the non-Convention law constitutes *compliance* with Art. 24(1) even in the face of a shortfall that otherwise would constitute noncompliance.