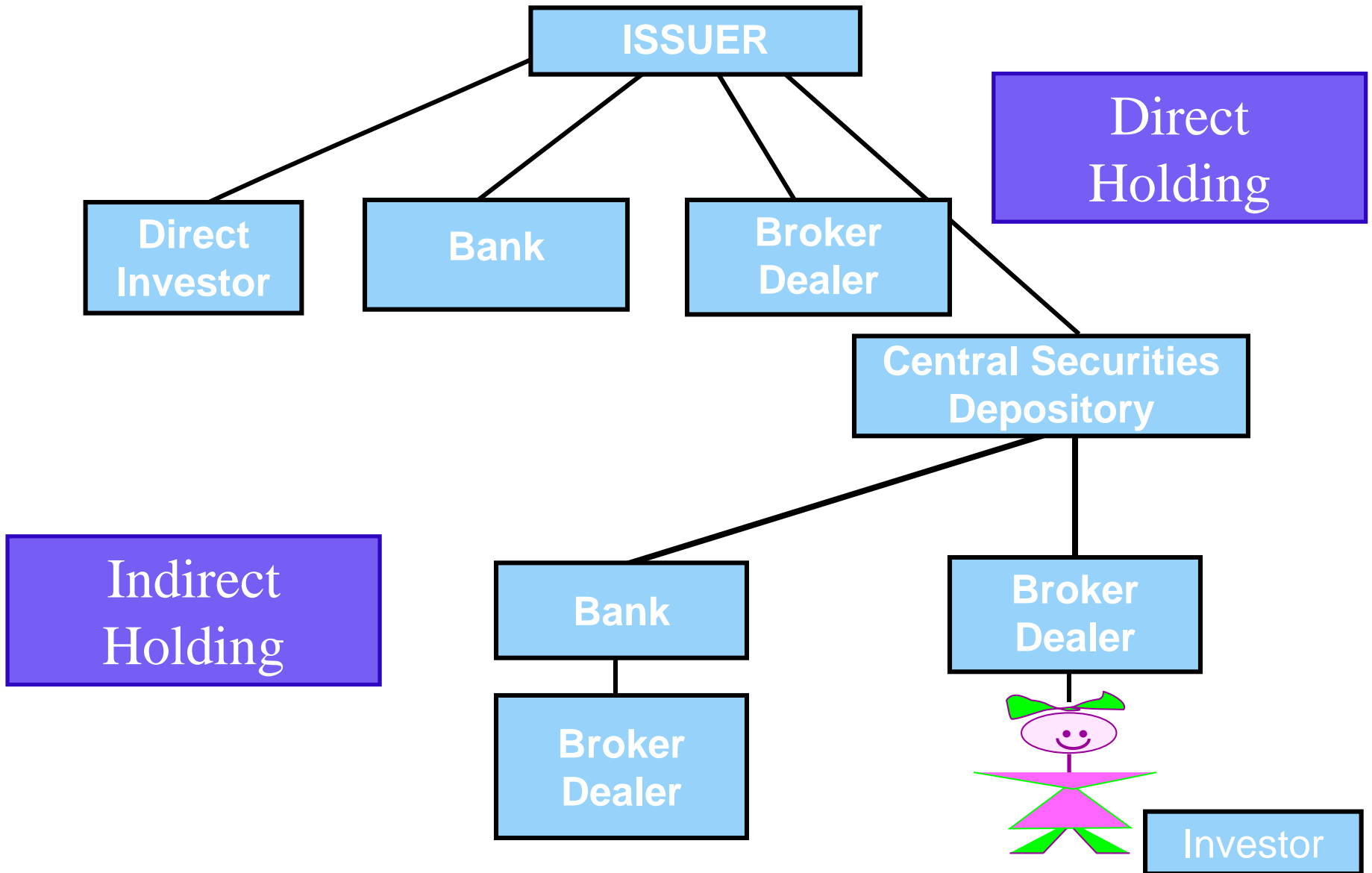


HAGUE SECURITIES CONVENTION BASICS

Conference on International Coordination of Secured Transactions

**Sandra M. Rocks
Cleary Gottlieb Steen & Hamilton LLP**

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Background

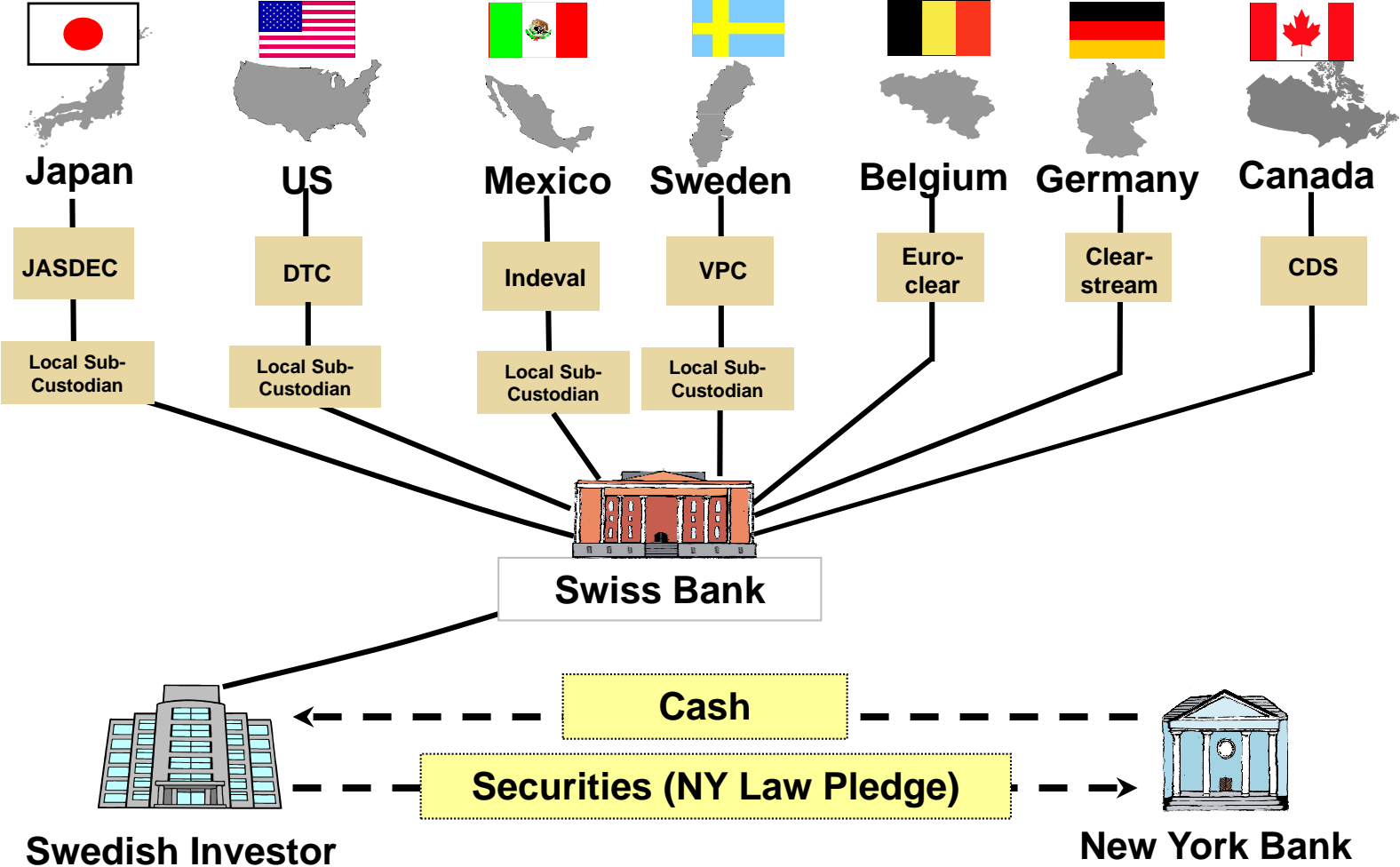
Experience under U.S. law applicable to the “indirect holding system” suggested certain critical areas required attention, including (among others):

- **Legal recognition of new holding patterns**
- **Clear and market-sensitive choice-of-law rules**

Conflicts Rules for the Indirect Holding System

- **UCC rules since 1994**
- **“Securities intermediary’s jurisdiction”**
 - **Governing law clause, § 8-110(e)(2)**
 - **Separate designation clause, § 8-110(e)(1)**
 - **Fallback rules, § 8-110(e)(3), (4), (5)**
- **Determines issues in §§ 8-110(b) and 9-305(a)(3)**
 - **Rights and duties of intermediary and entitlement holder**
 - **Perfection, effect of perfection and priority**
 - **Exception for perfection by filing, § 9-305(c)(1)**

Going Global



The Hague Securities Convention Background and Status

- **Promulgated in 2006 by the Hague Conference on Private International Law**
- **Signed by the U.S. in 2006**
- **U.S. Senate advice and consent given in September 2016**
- **Instrument of ratification was submitted to the Netherlands on December 15, 2016**
- **On the first business day after the three-month period following submission of the instrument of ratification by the third adopting country, the Convention will go into effect in the U.S. and other adopting countries – currently Mauritius and Switzerland**
 - Other countries expected to follow

➡ Convention will become effective in the U.S. on April 1, 2017 ←

The Hague Securities Convention Background and Status cont'd

- **The Convention is available on the website of the Hague Conference on Private International Law,
<https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>.**
- **Hague Securities Convention Explanatory Report by Roy Goode, Hideki Kanda and Karl Kreuzer, with the assistance of Christoph Bernasconi (2005)
<https://assets.hcch.net/upload/expl36en.pdf>**
- **Forthcoming PEB Commentary, including amendments to UCC Official Comments,
<https://www.ali.org/permanent-editorial-board-ucc/>**

The Hague Securities Convention Overview

The Hague Securities Convention provides ONLY CHOICE OF LAW RULES, not substantive law.

The Hague Securities Convention applies only to securities credited to a securities account held with an intermediary.

- **No applicability to rights or obligations of issuers**

The Hague Securities Convention Overview

- **Convention by its terms “applies in all cases involving a choice of law between the laws of different States” [State = nation]**
- **Examples: When any of the following are located in a different nation the choice-of-law rules of the Convention are likely to be implicated:**
 - **The account holder**
 - **An issuer of any of the securities**
 - **Any party to a transfer of securities**
 - **Any intermediary**
 - **Location of security certificates**
 - **Any adverse claimant**
- **Transacting parties should always consider the possibility that the Convention will apply**

The Hague Securities Convention Overview

Related Applicability Provisions

- **Article 9 of the Hague Convention makes clear that it applies whether or not the applicable law is that of a jurisdiction that has adopted the Convention**
- **Article 10 of the Hague Convention disapplies choice-of-law rules (renvoi) – akin to the UCC’s reference to “local law” of the securities intermediary’s jurisdiction.**

The Hague Securities Convention Overview

The Hague Securities Convention uses the terms:

- **“securities” -- any shares, bonds or other financial instruments or financial assets (other than cash) or any interest therein**
- **“securities held with an intermediary” -- the rights of an account holder resulting from a credit of securities to a securities account**
- **“intermediary” -- a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity.**

(Note that under the Hague Securities Convention the definition of intermediary includes a person that maintains securities accounts for itself – accommodates a title transfer arrangement common in the London market.)

The Hague Securities Convention

Scope

Article 2(1) of the Hague Convention lays out the issues as to which its choice-of-law rules determine applicable law

- **These issues involve**
 - **The nature of the rights acquired in securities held with an intermediary**
 - **The nature and effects against third parties of a disposition of, or the creation or transfer of an interest in, securities held with an intermediary (including perfection, priority and duties of an intermediary to third parties asserting an interest in securities held with that intermediary).**

The Hague Securities Convention

Article 4(1) Primary Rule

- **“The law applicable to all the issues specified in Article 2(1) (Scope) is the law in force in the State expressly agreed in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that another law is applicable to all such issues, that other law.”**
- **Very similar to choosing the “securities intermediary’s” jurisdiction” under UCC § 8-110(e)(1) and (2)**
 - **(e)(1): jurisdiction can differ from general governing law clause**
 - **(e)(2): general governing law clause itself chooses the jurisdiction**

(But note: Convention’s use of “in the account agreement” vs. UCC § 8-110 “an agreement . . . governing the securities account”)

STAND BY FOR IMPORTANT CONDITION

The Hague Securities Convention

Qualifying Office Test

The law designated in accordance with the primary rule applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which –

***a)* alone or together with other offices of the relevant intermediary or with other persons acting for the relevant intermediary in that or another State –**

***i)* effects or monitors entries to securities accounts**

***ii)* administers payments or corporate actions relating to securities held with the intermediary; or**

***iii)* is otherwise engaged in a business or other regular activity of maintaining securities accounts; or**

***b)* is identified by an account number, bank code, or other specific means of identification as maintaining securities accounts in that State**

The Hague Securities Convention Qualifying Office Test cont'd

The Uniform Commercial Code has no counterpart.

- **Qualifying Office Test – as applied in the U.S.**
 - **Test satisfied for a multi-unit country like the U.S. (Article 12(1))**
 - **The intermediary need only have an office in the country, not the particular unit whose law is chosen**
 - **e.g., if a securities intermediary has its sole office in Atlanta and the account agreement chooses the law of New York, the test is satisfied**

The Hague Securities Convention Fallback Rules

If the applicable law is not determined by the “primary rule”, a series of “fallback rules” – largely similar to UCC § 8-110(e)(3), (4) and (5) – come into play.

The Hague Securities Convention Application in Insolvency Proceeding

- **Convention law applies notwithstanding the opening of an insolvency proceeding, with respect to any event that occurred before the opening of the proceeding. Conv. Art. 8.**
 - Proceeding against any party
 - “insolvency proceeding” broadly defined as a “collective judicial or administrative proceeding” involving control by “court or other competent authority” for purpose of “reorganisation or liquidation”. Conv. art. 1(1)(k).
- **Relevant insolvency law is separately determined, and those substantive or procedural provisions are not affected by the Convention**
 - E.g. stay of enforcement
 - E.g. avoidance of preferential or fraudulent transfer

The Hague Securities Convention Transition Issues and Non-Issues

- **Convention applies immediately, even to pre-Convention deals**
 - **Convention Article 16(1)**
 - **Alternative would be lack of certainty**
- **Convention preserves pre-April 1 account agreement designations**
 - **Convention Article 16(3)**
- **Convention preserves UCC Article 9 place-of-filing rules for filings within the U.S.**
 - **Convention Article 12(2)(b)**