

2002

Book Review. Cross-Border Collateral: Legal Risk and the Conflict of Laws. Edited by Richard Potok.

Hannah Buxbaum

Indiana University Maurer School of Law, hbuxbaum@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Comparative and Foreign Law Commons](#), [Conflict of Laws Commons](#), and the [International Law Commons](#)

Recommended Citation

Buxbaum, Hannah, "Book Review. Cross-Border Collateral: Legal Risk and the Conflict of Laws. Edited by Richard Potok." (2002). *Articles by Maurer Faculty*. Paper 388.
<http://www.repository.law.indiana.edu/facpub/388>

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

rapidly changing area. The only other similar book in English is William G. Frenkel, *Doing Business in Russia* (1995), a looseleaf volume, which unfortunately has not been updated since 1998.

CROSS-BORDER COLLATERAL: LEGAL RISK AND THE CONFLICT OF LAWS. Edited by Richard Potok. Butterworths LexisNexis, 2002. Pp. 659.

*Reviewed by Hannah L. Buxbaum**

In May 2000, the Hague Conference on Private International Law took up the project of developing uniform choice-of-law rules to govern security interests in indirectly-held securities. The Conference presented its most recent preliminary draft in June 2002,¹ and it is expected that the text of the Convention will be submitted for adoption in mid-December 2002. As the use of fast-track procedures in connection with this project reflects, the need for uniformity in this area is indeed pressing. Cross-border collateral transactions in securities today create unacceptable risk and uncertainty for market participants. A borrower may offer as collateral a portfolio of investment securities issued by companies in a number of different jurisdictions and held not directly, by the borrower, but in book-entry accounts through a chain of intermediaries. A creditor considering such a loan must determine whose law governs the creation and perfection of a security interest in that portfolio, as well as the likely effects of debtor insolvency on any such interest. In most countries, the substantive and conflicts rules governing such transactions — developed at a time when securities were held directly by investors, in the form of paper certificates — have not been updated in a manner compatible with the modern settlement system. It is therefore difficult for market participants to determine with any certainty the law governing security interests in indirectly-held securities. The Convention is intended to establish a single choice-of-law rule facilitating that determination.

It seems fair to say that this project — perhaps given its rather technical subject matter, and its departure from the Conference's traditional areas of expertise, such as family law and jurisdictional law — has attracted less general attention than some others undertaken by the Conference. It is one of tremendous commercial importance, however, and presents complicated and fascinating questions of private international law. *Cross-Border Collateral*, edited by Richard Potok, legal expert to the Permanent Bureau of the Hague Conference on the project, is therefore a most valuable resource. In a

* Associate Professor of Law, Indiana University School of Law - Bloomington.

1. Preliminary Draft Convention on the Law Applicable to Certain Rights in Respect of Securities Held With an Intermediary (hereinafter "Convention"), available at www.hcch.net/e/workprog/securities.html.

thorough comparative study of the laws governing interests in securities in over twenty countries, the book exposes the theoretical and practical difficulties created by cross-border collateral transactions and makes a compelling case for the proposed reform. In analyzing various attempts to reconcile traditional conflicts rules with modern lending and settlement practice, it also makes a valuable contribution to the literature on the unification of commercial law more generally. The first section of the book is in this regard particularly important, as it provides a comprehensive and sensitive analysis of the conflict-of-laws issues presented in cross-border loan transactions.

Part I of the book includes an overview, authored by Sir Roy Goode, and a general introduction, based on a background report prepared by the Permanent Bureau at the outset of the Hague Conference project, that together describe both the modern securities settlement system and the application of traditional choice of law rules to transactions occurring within that system. When an investor holds securities directly, the law governing a transfer of those securities, or a pledge of the securities as collateral, can be determined using traditional conflicts rules. The investor's interest in such a case is a property interest, and *lex rei sitae* — looking to the location of the securities themselves — is the applicable conflicts rule. Today, however, most investors do not hold their securities directly. As the authors of the general introduction explain, securities clearance and settlement take place largely within an indirect holding system comprising multiple tiers of intermediaries, including national and international securities depositories (such as the Depository Trust Company and Euroclear) as well as various sub-custodians and intermediaries. Within this system, securities are generally held in pooled form; thus, an account-holder has the right not to redelivery of specific securities, but only to redelivery of equivalent securities drawn from the fungible securities within the pool.

These aspects of the clearance and settlement system undermine the basis for application of *lex rei sitae* to transfers or pledges of securities, and the opening part of *Cross-Border Collateral* explains why. First, they complicate the characterization of interests in securities. While a holder's interest in directly-held securities is a property right, a holder's interest in a pool of securities held with an intermediary may be more appropriately characterized as a contractual right, or as a co-ownership right shared with other holders of interests in the pool. Second, they complicate identification of the source of those rights. If a particular investor's securities holdings are reflected only on the books of a single intermediary, and not on the books of other intermediaries in the holding chain or on a register maintained by the issuer of those securities, then the investor's interest in those securities appears more as a claim against the immediate intermediary than as a derivative property right enforceable against the issuer. As a result of these gaps between traditional conflicts rules and the current settlement environment, attempts to determine

with certainty the law that would govern a security interest in indirectly-held securities are often frustrated.

In addition to a thorough explanation of conflicts analysis in cross-border collateral transactions, Part I of the book includes a description of four basic fact patterns that illustrate the complexities of that analysis. Each pattern assumes a collateral provider with a portfolio of securities issued in different jurisdictions, and then presents a particular transaction involving that portfolio (for instance, one in which the collateral provider pledges its interests in the securities to a creditor; a second in which the collateral provider transfers its title in the securities). A number of specific questions relating to those patterns are also laid out, and the bulk of the book, contained in Part II, is devoted to a series of jurisdictional studies in which contributing authors examine the analysis of those questions under local law in twenty-four different countries.

Because the descriptions of the various laws are in this way standardized, the chapters reveal with great clarity the disparate treatment of interests in securities. Consider, for example, the preliminary question of how such interests are characterized. The authors of the chapter on Greek law note that the critical factor is not whether the securities are held directly or indirectly, but whether they are in certificated or dematerialized form. If the latter, they are "assimilated to contractual rights;" if the former, they are "assimilated to chattels." (p. 299) The chapter on Italian law, by contrast, suggests that courts there may characterize dematerialized securities as if they were negotiable instruments, and therefore as chattels. (p. 341) Under U.S. law, it is not the distinction between certificated and dematerialized form that is critical, but the distinction between directly and indirectly held securities: UCC Article 8 creates a *sui generis* characterization (the "security entitlement," understood as a package of personal and property rights against the intermediary) applicable to all indirectly-held securities. (p. 607)

Given these discrepant approaches to characterization, it is not surprising that the comparative study goes on to reveal discrepant approaches to choice-of-law analysis in this area. As the chapter studies reflect, some countries have modernized their domestic laws to incorporate conflicts rules specifically tailored to current settlement practice. In Germany, for instance, the law governing the perfection of a security interest in indirectly-held securities is that of the jurisdiction in which the account entry identifying the beneficiary was made. (p. 284) In the United States, similarly, the law governing perfection of such an interest is that of the jurisdiction in which the immediate intermediary is located. (pp. 608-09) In other countries, however, the choice of law analysis relies more on traditional conflicts rules. The chapter on Irish law, for instance, states that the perfection of an interest in securities is governed by the law of the jurisdiction in which the securities are located, and then goes on to express some uncertainty regarding the identification of that location. (pp. 323-24) The chapter on Taiwan, by contrast, notes that since interests held with intermediaries would most likely be charac-

terized as contractual rights, the law governing perfection of a security interest in those rights would be the governing law of the custody agreement under which those securities are held. (p. 595) As the volume's editor concludes in a nice understatement, the national reports thus "reveal a rather disparate picture."

Having established the need for a uniform approach, the book closes with a chapter on the Hague project itself. Potok and Christophe Bernasconi, First Secretary at the Permanent Bureau of the Hague Conference, in this section describe the goal of the Convention: global adoption of the so-called PRIMA ("place of the relevant intermediary approach") principle, under which the law of the place of the relevant intermediary would govern the creation, attachment and perfection of security interests in indirectly-held securities, and the establishment of explicit rules for determining where the relevant intermediary in a given transaction is indeed located. (p. 620) This section also describes how the scope of the Convention as proposed has been defined in order best to achieve that goal. One passage, for instance, discusses the need to respect the operation of domestic insolvency laws, whose application upon bankruptcy of a collateral provider might affect rights covered by the Convention, while protecting the interests of security holders. (p. 622) The volume thus concludes with a clear and careful description of the solution being proposed at the Hague Conference for the problems so well illuminated in the body of the book.

LAW AND JUSTICE IN A MULTISTATE WORLD. ESSAYS IN HONOR OF ARTHUR T. VON MEHREN. Edited by James A.R. Nafziger and Symeon C. Symeonides. Ardsley, New York: Transnational Publishers, Inc., 2002. Pp. 878.

*Reviewed by Mathias Reimann**

Legal scholars write for a variety of professional purposes.¹ They write (mainly books) to teach students, help practitioners, or present substantial research. They write (mainly law review articles) to critique current developments, suggest new directions, or explore particular topics. They write to contribute to symposia, law reform projects, or reference works. In all these instances, their main motivation is to present the substance of their work. Yet, every so often scholars are primarily inspired by a different purpose: they put pen to paper not so much to pursue their own scholarly agendas but to

* Hessel E. Yntema Professor of Law, University of Michigan. I need to disclose that I am among the contributors to the volume.

1. Obviously, there are other purposes as well many of which are egotistical, such as desire to learn, enjoyment of writing, professional advancement, fulfilling publication requirements, or simple vanity (seeing one's name and product in print).