

**THE CHALLENGE OF DETERMING PRIORITY OF
COLLATERAL INTERESTS IN SECURITIES HELD BY
NON-COMPANY INVESTORS—THE CASE OF ZAMBIA**

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ABSTRACT

Certainty and predictability as to the ranking of collateral interests in the same intermediated listed securities is one of the factors influencing the decision of the lender to advance loans to borrowers against a collateral interest in the borrower's securities. The study assesses the legal framework for the public distribution of securities so as to establish whether or not it makes adequate provision for perfection and ranking of competing collateral interests in the same securities held by non-company securities. The study employs the doctrinal approach to evaluating legal rules. The main findings of the study were that (a) non-company entities could hold and pledge or mortgage their securities, and that (b) even though non-company entities could hold and pledge their positions, the regulatory framework does not make provision for rules to govern perfection and priority of competing collateral interests in the same securities, (c) that although the Companies Act perfection and priority rules governing mortgaging and charging of company-held securities could, for all intent and purposes of the former, be extended to perfection and ranking of pledges, they could not competently be extended to non-company securities holders. The study makes recommendation for enactment of Personal Property Security legislation (PPSA) which makes express provision for rules to govern perfection and priority of competing collateral interests in non-company held securities. The study further recommends adoption and domestication of Geneva Securities Convention perfection and priority rules as a possible way of supplementing the PPSA.

KEY WORDS: Company, securities, collateral interest, perfection, priority

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1.0.INTRODUCTION

The object of this article is to examine the legal framework for the registration and perfection of collateral interests in listed securities to ensure predictability and certainty as to the priority of competing interests in securities held by non-company investors.²

This article is premised on the notion that certainty and predictability as to priority of competing collateral interests in a security is critical to the lender's decision to lend against a collateral interest in securities of a debtor. Consequently, an efficient legal framework should not only facilitate increased supply and demand for securities supplied to securities exchanges, transfer and pledge but also ensure that collateral takers know with reasonable certainty and predictability how their interests rank against competing interests. Thus, an efficient legal framework will make express provision for rules to govern priority among competing interests in the same collateral.

1.1.CHARACTERISTICS OF AN EFFICIENT LEGAL FRAMEWORK FOR CROSS-BORDER TRADE IN SECURITIES

This section is premised on the notion that an efficient legal framework for the public distribution of securities across international borders is key to the growth of cross-border trade in securities in the region. In this sense, an efficient legal system is one that:

- (i) facilitates increased supply of securities;³
- (ii) facilitates increased demand for the listed securities;⁴

² This article is built on a section in my PhD research work in law revolving around “Legal Aspects of Cross-border Trade in Securities in Eastern and Southern Africa”. The article examines constraints relating inadequate provisions for determining priority of competing collateral interests in securities.

³ It has been shown in my earlier article that the Zambian legal framework has not provided adequate incentives to increase the supply of securities to the Lusaka Stock Exchange and to stock markets across international borders. Appropriate measures have been proposed as a possible solution to this shortcoming—such as enlarging the definition of securities and increasing the number of listed issuers: Samamba, Lennox Trivedi, ‘Strategies for Increasing Liquidity for Eastern and Southern African Frontier Stock Markets,’ African Law Journal, Vol. 5, 2017.

⁴ It has also been established in my earlier article that there has been low participation of individual and institutional investors on the Lusaka Stock Exchange. Necessary proposals have been made as a possible solution to this shortcoming—such as providing incentives to local and foreign large, small and medium scale companies and giving equity-investment education to institutional investors such as pension schemes: Samamba, Lennox Trivedi, ‘Eastern and Southern African Frontier Stock Markets: A Case for their Attractiveness and Growth Potential,’ African Law Journal, Vol 3 of 2017. In this respect, in another earlier article, proposals have been made for increasing cross-border cross-listings as a means of increasing demand for LuSE-listed securities. In relation to this very aspect, in this sub-section, it is proposed that measures aimed at increasing participation of foreign-based intermediaries and central securities depositories be implemented as a tool for exposing LuSE-listed stocks to large

- (iii) facilitates speedy outright transfer of title to securities, mortgaging and pledging of securities from the seller to the buyer across international borders at minimum transaction costs;
- (iv) also expedites efficient transfer of funds⁵ for purchased securities;
- (v) It should also expedite efficient allocation of contractual and proprietary rights and duties, and perfection of title or interests in the securities so acquired, at minimum transaction costs;⁶ and
- (vi) creates an enabling environment for cross-border trade in securities in the region.⁷

2.BACKGROUND TO THE PROBLEM

Whereas at general law non-company entities are capable of creating security interests in their tangible and intangible personal property in favour of their lenders, both company and securities laws have the effect of denying them this privilege or imposing some technical hurdle to enjoyment of the same.

markets in the jurisdiction of the external intermediaries and central securities depositories: See, Samamba, Lennox Trivedi, 'Legal Constraints on the Growth of Cross-border Cross-listings in the Region,' 2017

⁵ It has been shown in an earlier article that funds take quite a while to reach a cross-border seller in eastern and southern Africa. Since trades on securities exchanges are settled against finality of payment, those trades have to wait until funds come through with finality. This in effect delays settlement of cross-border trades, increases transaction costs for the parties and reduces liquidity of the underlying stock market. Proposals have been made for accelerating existing regionalefforts for integrating payment systems: See, Samamba, Lennox Trivedi, 'Un-Integrated Payment Systems as Constraint on Cross-border Trade In Securities in COMESA Region,' 2017.

⁶It has been proposed in this sub-section that immobilized and dematerialized securities—which are easily transferred or pledged by mere debiting and crediting of electronic securities accounts of the transferor/pledgor and crediting that of the transferee/pledgee without physically transferring the securities certificates and transfer instruments—be promoted on the LuSE. It has also been established in an earlier article that the doctrine of party autonomy allows parties to a cross-border securities transaction to choose the contract law that should govern various aspects of the contractual component of their cross-border securities transaction. It has also been shown that there is no such freedom with regard to choice of the property law to govern various proprietary aspects of a cross-border securities transaction—*lex situs* is the mandatory conflict of law for identifying the applicable property law. It has also been shown that due to new commercial practices such as issue of un-certificated securities and new features such as external intermediaries and central securities depositories, *lex situs* tends to points to more than one jurisdiction. Since there are no rules of private international law for determining which of the possible choices should govern to the exclusion of all others, the purchaser of securities across international borders is compelled to comply with requirements of each applicable jurisdiction, to be on the safe side. This, it has been noted, increases transaction costs for cross-border securities deals. To this extent, *lex situs* is said to be an inefficient legal rule and therefore a constraint on the growth of cross-border trade in securities in the region. Proposals have been made for adoption and implementation of the Hague Securities Convention 2006 as a possible solution to this shortcoming: Samamba, Lennox Trivedi, 'Proprietary Aspects of Cross-border Transfer and Pledging of Securities,' 2017

⁷ Proliferation of exchange controls, quantitative restrictions on cross-border investment of pension assets, non-criminalization of extra-territorial improper market practices and poor legal and institutional capacity of the Zambian Securities and Exchange Commission have been identified, in latter parts of this thesis, as inimical to an enabling environment for cross-border securities trade. Proposals have been made for complete removal of exchange controls, lifting of quantitative restrictions on cross-border investment of pension assets, extra-territorial criminalization of improper market practices, and increasing the legal and institutional capacity of the Zambian SEC.

In line with the proposition made above, Securities Acts and Listing Rules in Eastern and Southern Africa do make provision for the holding and pledging of securities by non-company holders. However, these pieces of legislation and rules do not corresponding provision for rules which should govern priority of competing interests in the same collateral. In the face of increasing participation of non-company entities in domestic and cross-border trade in securities, non-company entities are precluded from accessing finance from lenders by way of pledges or mortgages in securities whose collateral interests are without priority rules.

2.1.STATEMENT OF THE PROBLEM

Certainty and predictability as to the ranking of collateral interests in the same intermediated listed securities is one of the factors influencing the decision of the lender to advance loans to borrowers against a collateral interest in the borrower's securities. In light of this position and the background to the problem given above, the problem under investigation may be stated as follows:

“Has the legal framework for the public distribution of securities provided adequate incentives to spur growth of pledging and mortgaging of securities held by non-company holders?”

3.METHODOLOGY

This research falls into the qualitative research category. It focuses on answering specific questions relating to the problem under investigation by using both primary and secondary data. The research is underpinned by a doctrinal approach evaluating the legal framework for the registration and perfection of collateral interests in listed securities in Zambia. This method was used in analysing both primary and secondary data. Primary sources of data such as relevant legislation and case law touching on the subject/problem were used. Secondary sources such as journals and other written commentaries on primary sources were also used.

A checklist of documentary sources was used. The study employed non-probability sampling method in the selection of documents which were used in the analysis—purposive sampling.

Both primary and secondary sources of date were used as aids to drawing inferences, making deductions and comparisons.

The main objective of the study is to answer the question whether or not the legal framework for the public distribution of securities has provided adequate incentives for registration and perfection of listed securities held non-company holders so as to spur growth of pledging and mortgaging of non-company positions. The study also sets out to flesh out some shortcoming in the regulatory framework currently in force and make necessary proposals for reform as a possible solution to those shortcomings.

The research questions used were:

- a) Does the law and policy permit holding of securities by non-company entities?
- b) Does the law and policy allow pledging and mortgaging positions held by non-company entities?
- c) Does the law provide rules for determining priority of collateral interests in the same securities held by non-company entities?

4.RESULTS OF THE STUDY

The results of the study may be summarised in tabular form as follows:

QUESTION	ANSWER	
	International law & policy	National law & policy
1.Does law and policy permit holding of securities by non-company entities?	YES	YES
2.Does law and policy permit pledging and mortgaging of securities held by non-company entities?	YES	YES
3.Does the law contain rules governing perfection and priority of collateral interests in the same non-company securities?	YES	NO

5.DISCUSSION

5.1.LEGAL FRAMEWORK GOVERNING PERFECTION AND PRIORITY OF COMPETING COLLATERAL INTERESTS IN SECURITIES IN ZAMBIA

Part IX of the Zambia Securities Act 2016 regulates various aspects of the operation of Clearing and Settlement Agency (CSA) in Zambia. It governs the manner in which securities are deposited into CSAs, transferred and pledged.⁸ This Part does not, however, make provision for rules to govern priority among competing interest in the same securities.

Securities in an issuer are personal and transferable property of the holder thereof.⁹ Thus, the security holder can sell or pledge a security as collateral for a loan. Where the holder is a company, the holder may create a charge over its shares in favour of a lender.¹⁰ Such a charge is registrable with the Patents and Companies Registration Agency (PACRA).¹¹ Registrable charges enjoy priority in relation to each other in accordance with the times at which they were lodged with PACRA unless a contrary intention could be collected from the conduct of the party who should otherwise enjoy priority.¹²

A charge over shares includes a mortgage over such shares.¹³ However, Part IX of the Zambian Securities Act 2016 does not make reference to charges or mortgages over securities but pledges. In this regard, a question may be asked, ‘could a pledge of securities be treated as a charge so that the priority provisions under the companies Act should govern priority of pledges under the Securities Act?’ In an attempt to explain the legal character of a charge, Lord Atkin, in *National Provincial and Union Bank of England vsCharnley*.¹⁴ observed that:

“...Where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the

⁸See, sections 100, 101, 102, 103 and 107 of the Zambian Securities Act 2016

⁹See, section 57(1) of the Zambian Companies Act 1994. ‘Share’ includes ‘stock’ but does not include ‘equity share’: See, definition of ‘share’ and ‘equity share’ in section 2 of the Zambian Companies At 1994

¹⁰See, section 99(1)(j) of the Zambian Securities Act 2016

¹¹Ibid

¹²See, section 101(1)

¹³See, the definition of ‘charge’ in section 2 of the Companies Act 1994

¹⁴[1924] 1KB 431

present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession.”¹⁵

In light of the Atkinian characterization of a charge above, an argument is made that a ‘pledge’ is perfectly a ‘charge’ insofar as it makes property of the debtor available as security for payment of the debt and confer a right of sale on the lender. As such, priority of competing pledges, charges or mortgages of securities of securities held by companies may be determined by the Companies Act priority regime. Consequently, priority of pledges of securities held by companies is determined by the date on which they are lodged PACRA.

It is indisputable that companies are not the only holders of securities in companies and other styles of issuers. A question may be asked as to which priority rules would govern priority of pledges, charges and mortgages created over securities held by individuals, associations, cooperative societies and other bodies corporate?’ Of course pledges, charges and mortgages of other holders than companies are not registrable under the Companies Act since they are not charges over property of a company.¹⁶ Consequently, the priority of competing collateral interests in securities held by individuals cannot be determined by the Companies Act priority regime.

It can be seen from the foregoing that although the Companies Act priority regime serves as a fall-back lack of express provision for priority rules in the Securities Act 2016, it only does so in a narrow class of security holders—companies. An argument is made that such a negative feature is likely to hamper pledging of securities by non-company holders. Similarly, lenders are likely to be discouraged to take collateral interests whose priority is hard to determine. Since pledging of securities is a prominent feature of cross-border trade in securities, such cross-border trade in securities is likely to suffer.

¹⁵ Ibid, at pp. 449-450

¹⁶ See, section 99(1) of the Zambian Companies Act 1994

Despite the said inadequacy, under the *Zambian Personal Property Security Interest Bill of 2013*, securities held by non-company investors could be classified as ‘personal property’.¹⁷ By section 39 of the said Bill, priority among competing interests in the same collateral¹⁸ is determined as follows:

- a) a perfected security interest has priority over an unperfected interest;
- b) priority of perfected security interests is determined by the order of whichever of the following first occurs in relation to a particular security interest:
 - (i) registration of a financing agreement;
 - (ii) the secured creditor or another person on the secured creditor’s behalf, taking possession of collateral (except a security whose possession is taken by seizure or repossession);
 - (iii) secured creditor or another person on the creditor’s behalf, acquiring control of the collateral.
- (c). priority among un-perfected security interests in the same collateral is determined by the order of creation.¹⁹

Proposals are made for the enactment of the *Zambian Personal Security Interest Bill 2013* into law as a possible solution to the shortcomings identified above. Developed jurisdictions in the Commonwealth such as Australia, Canada and New Zealand have avoided such inadequacies in their laws by enacting *Personal Property Security Acts*.

In the absence of a *Personal Property Interest Security Act*, should common law priority rules be applied as a fall-back for pledges of securities held by holders other than companies?²⁰ An

¹⁷ ‘personal property’ is “any form of property other land and includes chattels, paper, goods, intangibles, investment securities, money and negotiable instruments. ‘Investment securities’ includes a warrant, option, share, right to participate or other interest in the issuer: See the definition of the phrases in section 3 of the *Zambian Personal Property Security Interest Bill 2013*. Further the recognition of ‘negotiable instruments’ as personal property claws in ‘dematerialized securities’ issued under the *Securities Act 2016* since such securities are negotiable instruments: See, section 82(4) of the *Zambian Securities Act 2016*. Furthermore, The Bill is designed to apply to security interests in ‘personal property’ as opposed to security interests created by companies under the *Companies Act 1994*: See, section 2(1)(4) of the *Personal Property Security Interest Bill 2013*.

¹⁸ ‘Collateral’ means ‘personal property whether tangible or intangible, that is subject to a security interest’: See, definition of the term in section 3 of the *Zambian Personal Property Security Interest Bill 2013*

¹⁹ See, section 39(a)(b)(c) of the *Zambian Personal Property Security Interest Bill 2013*. This provision is verbatim section 66(a)(b)(c) of the *New Zealand Personal Property Security Act 1999*. See, also section 54 of the *Australian Personal Property Act 2009*, and section 35.1 of the *Canadian Personal Property Act 1996*

²⁰ At common law, where the competing interests are both legal, the first in time (time of creation) prevails. Where one is legal and the other equitable, if the legal interest be first in time, it should prevail. If the equitable interest be first in time, a subsequent bona fide purchaser for value without notice of a legal interest should take priority—

Argument is made that the dependency of the common law priority rules on the time of creation of the security interest, without a public system of registration of such interests, is likely to breed more confusion and uncertainty.

Firstly, the pledge or mortgage deed which carries the date of creation of the pledge or charge or mortgage is usually in the exclusive control of the party alleging priority of his interest. There is thus high likelihood of the interested party backdating the document so as to have priority over the other party's interest. As a possible solution to this shortcoming, it is proposed that a public system of registration of titles and interests in securities held by other holders than companies be established. Such a system traditionally establishes priority by time of lodgement. This is likely to reduce fraud and provide reliable evidence since the evidence of time of lodgement is in exclusive custody of a neutral entity which is not party to litigation—the registration agency.

A public system of registration of titles and interest in securities serves to achieve a number of purposes. Chief amongst them are:

- (i) to provide a reliable mechanism for determining priority among competing interests in the same collateral;
- (ii) to provide collateral takers with an opportunity to know with reasonable certainty and predictability the ranking of their security interests;
- (iii) to ensure that the title or interest of every security holder or pledgee is thoroughly investigated once and for all and placed on the public register. And a perusal thereof will give an intending purchaser all necessary information about previous dealings in the security;
- (iv) to ensure that the registration of the security holder's title or interest of a pledgee is an insurance against any adverse claims by others and is indispensable to the validity of all transactions relating to the security in question; and
- (v) to ensure that instruments are registered not merely as documents, executed between the parties, but by reference to the security itself.²¹
- (vi)

equity's darling. Otherwise, the equitable interest should prevail. Where both interests are equitable, the first in time should prevail.

²¹ For paragraphs (iii)-(v), see, Dr Patrick Matibini, 'The Bonafide Purchaser Rule—One Must Be Careful When Purchasing Land,' *Zambian Daily Mail*, 12th July, 2012, pp. 9-13

Secondly, the common law priority rules have been developed in relation to tangible movable property as opposed to intangible movables like securities—more so dematerialized securities. Given the fundamental difference between the manner in which interests in dematerialized securities and tangible movables are transferred and pledged, an argument is made that there is need to craft special priority rules for collateral interests in the former.²² The need for modern rules to govern priority of collateral interests in securities held by other holders than companies has been reflected in the provisions of most Personal Property Securities Interest Acts in various jurisdictions in the Commonwealth.

Proposal earlier made for the enactment of the Personal Property Security Act into law are hereby reinforced.²³ Such Act of Parliament would provide solutions to the inadequacies herein identified, by:

- (i) providing for a public registry for collateral interests in securities held by other holders than companies;²⁴ and
- (ii) providing for modern rules for determining priority among competing interests in the same collateral.

5.2.THE INTERNATIONAL REGIME GOVERNING PERFECTION AND PRIORITY OF COMPETING COLLATERAL INTERESTS IN SECURITIES

The need for uniform rules that comport with the reality of how investment securities are held, transferred and collateralised today (i.e., by electronic book-entries to securities accounts) has

²² Firstly, property in tangible movables is transferable by deed while property in dematerialized securities is transferable by electronic debiting and crediting of securities accounts. Secondly, a pledge of tangible movables is created by deed while that of dematerialized securities is created by electronic transfer of securities without written transfer instruments or certificates. Thirdly, tangible movable collateral has corporeal manifestation while dematerialized collateral is without corporeal manifestation. Fourthly, a pledgee of tangible movables can enjoy actual physical possession of the collateral while the pledgee of dematerialized collateral can only enjoy constructive possession. Fifthly, a pledgee of tangible movables can exercise control over the collateral by taking physical possession of documents of title while the pledgee of dematerialized collateral cannot since there are no certificates involved in dematerialized securities systems. The fundamental feature of a pledge is the transfer of possession. Given the fundamental difference in the manner of transfer of property and creation of pledges of tangible movables and dematerialized securities seem to justify the call for special priority rules for collateral interest in dematerialized securities.

²³ Since early 2013, the Bill has been dying a lingering death of neglect gathering dust somewhere on the shelves in the Zambian National Assembly building.

²⁴ Sections 18 and 19 of the Zambian Personal Property Security Interest Bill 2013 establish and spell out the functions of the Collateral Interest Registry

become critical.²⁵ Legal uncertainty as to the perfection, priority and other effects of domestic and cross-border transfers of such securities imposes significant costs on even routine transactions and operates as an important constraint on desirable reductions in credit and liquidity exposures.²⁶ Increased exposure to unsecured credit risk amplifies systemic risk and the potential proliferation of the number of insolvencies. To address these concerns, States from around the world have negotiated and adopted two international Conventions relating to intermediated securities.²⁷

5.2.1. THE GENEVA SECURITIES CONVENTION

Since the Hague Securities Convention is concerned with conflict of laws issue in cross-border transfer and pledging of securities, the appropriate Convention to consider for purposes of international substantive rules governing perfection and priority of competing collateral interests in intermediated securities, is the Geneva Securities Convention (hereinafter ‘the GSC’).²⁸ As Bernasconi and Keijser (2012) observe:

“Thus, while both Conventions deal with the same general subject matter—intermediated securities—they serve a different purpose and answer two distinct questions: while the Hague Securities Convention

²⁵ The total outstanding amount of domestic debt securities issued by governments, financial institutions and corporate issuers, for example, was 69,912.7 billion USD in December 2011, while the total outstanding amount of international debt securities by such issuers was 29,665.5 billion USD in March 2012. See BANK FOR INTERNATIONAL SETTLEMENTS, *BIS Quarterly Review: International Banking and Financial Market Developments* (June 2012), (p.) A 114-117 and A 124-125. See also WORLD FEDERATION OF EXCHANGES, *2011 WFE Market Highlights* (19 January 2012), available at <http://www.world-exchanges.org/files/file/stats%20and%20charts/2011%20WFE%20Market%20Highlights.pdf>: Christophe Bernasconi and Thomas Keijser, ‘The Hague and Geneva Securities Conventions: A Modern and Global Regime for Intermediated Securities,’ *Unif.L.Rev.* NS—Vol. XVII, 2012, fn 1, at 549

²⁶ Ibid

²⁷ The first of these Conventions was developed under the auspices of the Hague Conference on Private International Law (hereinafter: Hague Conference) and is entitled the *Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* (hereinafter: Hague Securities Convention, or HSC). The Hague Securities Convention is a pure *conflict of laws* Convention. As such, it applies in cross-border situations and establishes “road signs” that point to the State whose law governs the issue at stake (in other words, the HSC does not set out substantive rules relating to intermediated securities). The second Convention was developed under the auspices of the International Institute for the Unification of Private Law (hereinafter: UNIDROIT). It is entitled the *UNIDROIT Convention on Substantive Rules for Intermediated Securities* (hereinafter: Geneva Securities Convention, or GSC) and was adopted in Geneva on 9 October 2009. The Geneva Securities Convention harmonises a set of important *substantive law* issues (in other words, it does not set out conflict of laws rules relating to intermediated securities).

²⁸ The applicable conflict of laws rules designate the law in force in a Contracting State as the applicable law: Article 2(a) of the Geneva Securities Convention 2009

answers the basic question as to which law applies to a series of practically important questions relating to the holding, transfer and collateralisation of intermediated securities in a cross-border context, the Geneva Securities Convention sets out the actual content of the law governing the issues at stake. The two Conventions thus neither duplicate nor compete with each other. Quite to the contrary, the two Conventions are complementary to each other and both should be carefully assessed by relevant State officials and market participants”.²⁹

5.2.1.1.PERFECTION OF INTERMEDIATED SECURITIES UNDER THE GENEVA SECURITIES CONVENTION 2009

Once securities are effectively debited from the electronic account of seller or pledgor of securities and credited to that of the buyer or pledgee, the acquired interest is deemed effectively perfected under the GSC.³⁰ Thus, no further step is necessary, or may be required by the non-Convention law or any other rule of law applicable in an insolvency proceeding, to render the acquisition of intermediated securities effective against third parties.³¹

5.2.1.2.DETERMINING PRIORITY OF COMPETING COLLATERAL INTERESTS IN INTERMEDIATED SECURITIES

The GSC does not make a distinction between company-held securities on the one hand and those held by other bodies corporate, natural persons and trusts, on the other hand. The priority rules of the GSC govern priority of competing perfected collateral interests in intermediated securities regardless of legal character or status of the holder.

Interests which have become effective against third parties by way of the debit and credit method rank among themselves according to the time the electronic disposition was made—the time the securities were debited from the pledgor’s or mortgagor’s account to the pledge or mortgage

²⁹ Christophe Bernasconi and Thomas Keijser, ‘The Hague and Geneva Securities Conventions: A Modern and Global Regime for Intermediated Securities,’ *Unif. L. Rev.*, NS—Vol. XVII, 2012, at 450

³⁰ See, Article 11(1) of the Geneva Securities Convention 2009

³¹ See, Article 11(2) of the Geneva Convention 2009

account maintained by the Central Securities Depository or Central Securities Agency whatever the label adopted by the relevant jurisdiction.

Interests which have become effective against third parties by other Conventional methods than the debit and credit method have priority over interests which have been perfected by other methods provided by non-Conventional laws.³² Interests perfected in other Conventional ways referred to above enjoy priority over each other according to the occurrence of the following events, namely:

- a) if the relevant intermediary is itself the holder of the interest and the interest is effective against third parties under Article 12(3)(a), when the agreement granting the interest is entered into;
- b) when a designating entry is made;
- c) when a control agreement is entered into or, if the relevant intermediary is not a party to the control agreement, when the relevant intermediary receives notice of it.

An argument is made that by recognizing other securities holders than companies as capable of creating collateral interests in their positions in favour of lenders the GSC—by providing comprehensive priority rules—is likely to incentivize creation of pledges, charges and mortgages of their securities. As a possible way of supplementing the *Zambian Personal Security Act*—once enacted—proposals are hereby made for the adoption and implementation of the GSC.

6. CONCLUSION

The general conclusion reached in this article is that the legal framework for the registration and perfection of collateral interests in Zambia has not provided adequate incentives for determining priority of competing interests in securities held by non-company investors.

In particular, it has been established that, besides governing priority of competing mortgage and charge interests in securities held by companies, the *Companies Act* priority regime could serve as a fall-back for determining priority of competing pledge interests in company-held securities. It has also been established that since other listable entities such as cooperative societies, councils, other local authorities and parastatals, trusts are not companies to hold it, in the face of the lacuna in the law, they are without a regime to govern priority of competing

³² See, Article 19(2) of the Geneva Securities Convention 2009

collateral interests in them. An argument is made prudent well-advised lenders are likely unlikely to advance loans to these entities against collateral interests in securities whose priority is hard to determine. An argument has been made that this shortcoming in the law is likely to discourage trade in interests in securities that could be made by way of pledges, mortgages and charges over securities held by non-company investors.

The article has also shown that developed jurisdictions like Australia, New Zealand and Canada have enacted Personal Property Security Acts which make provision for special rules governing priority of collateral interests in the same intermediated securities. On the international plane, the Geneva Securities Convention 2009 takes care of this aspect.

As a possible solution to this shortcoming, proposals are made for the enactment of the Zambian Personal Property Bill 2013 into law so that its priority regime for personal property could effectively govern priority of collateral interests in securities held by non-company entities as a fall-back. For the purpose of finding a permanent solution to this shortcoming in the law, proposals have been for crafting of special priority rules to govern determination of priority among competing collateral interests in non-company held securities. Further proposals have been made for adoption and domestication of the Geneva Securities Convention 2009 as a possible way of supplementing said special priority rules.