

*Association of International Business Lawyers  
Luncheon, March 26, 2010*

## Swiss Federal Intermediated Securities Act (FISA)

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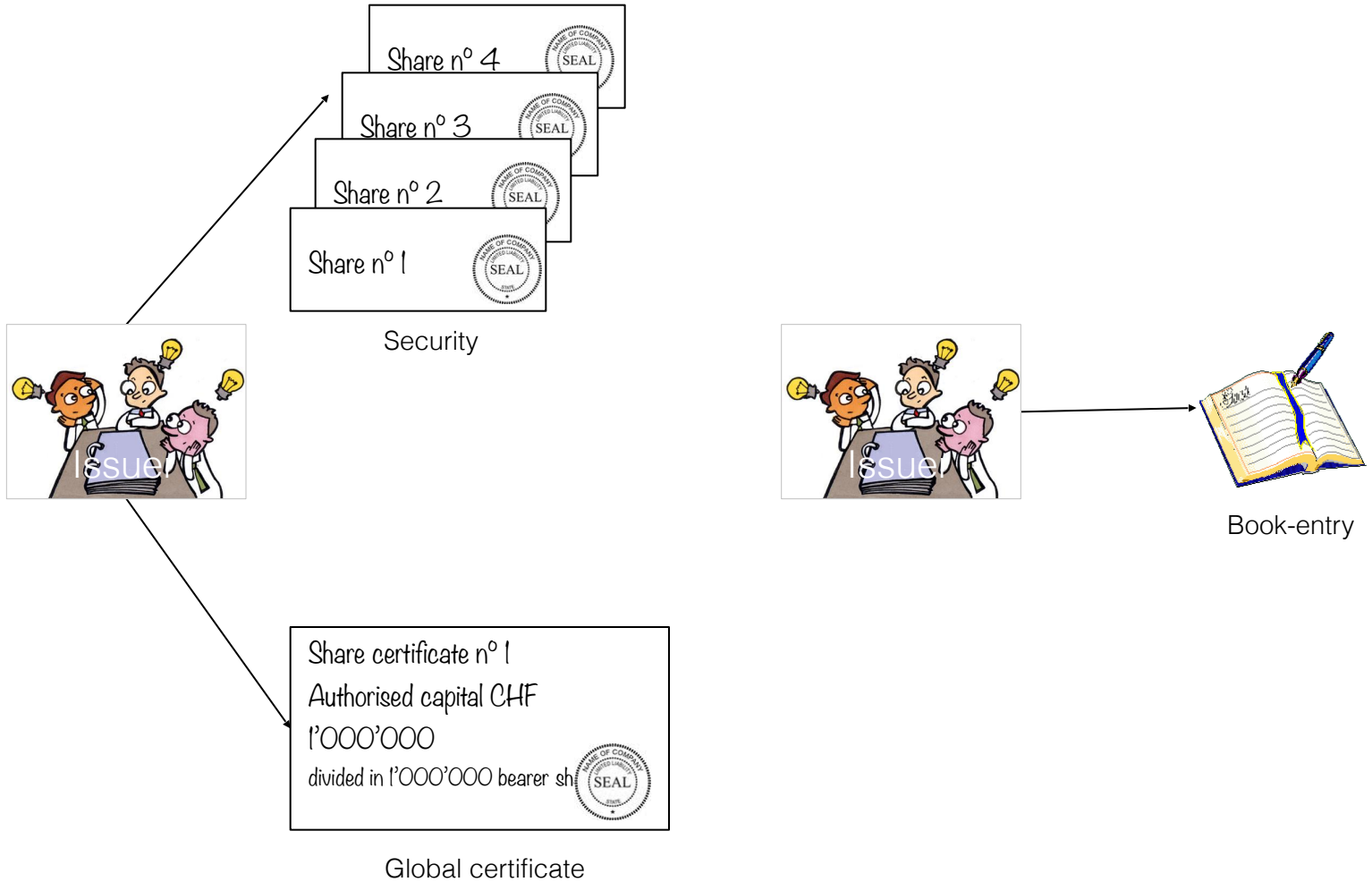
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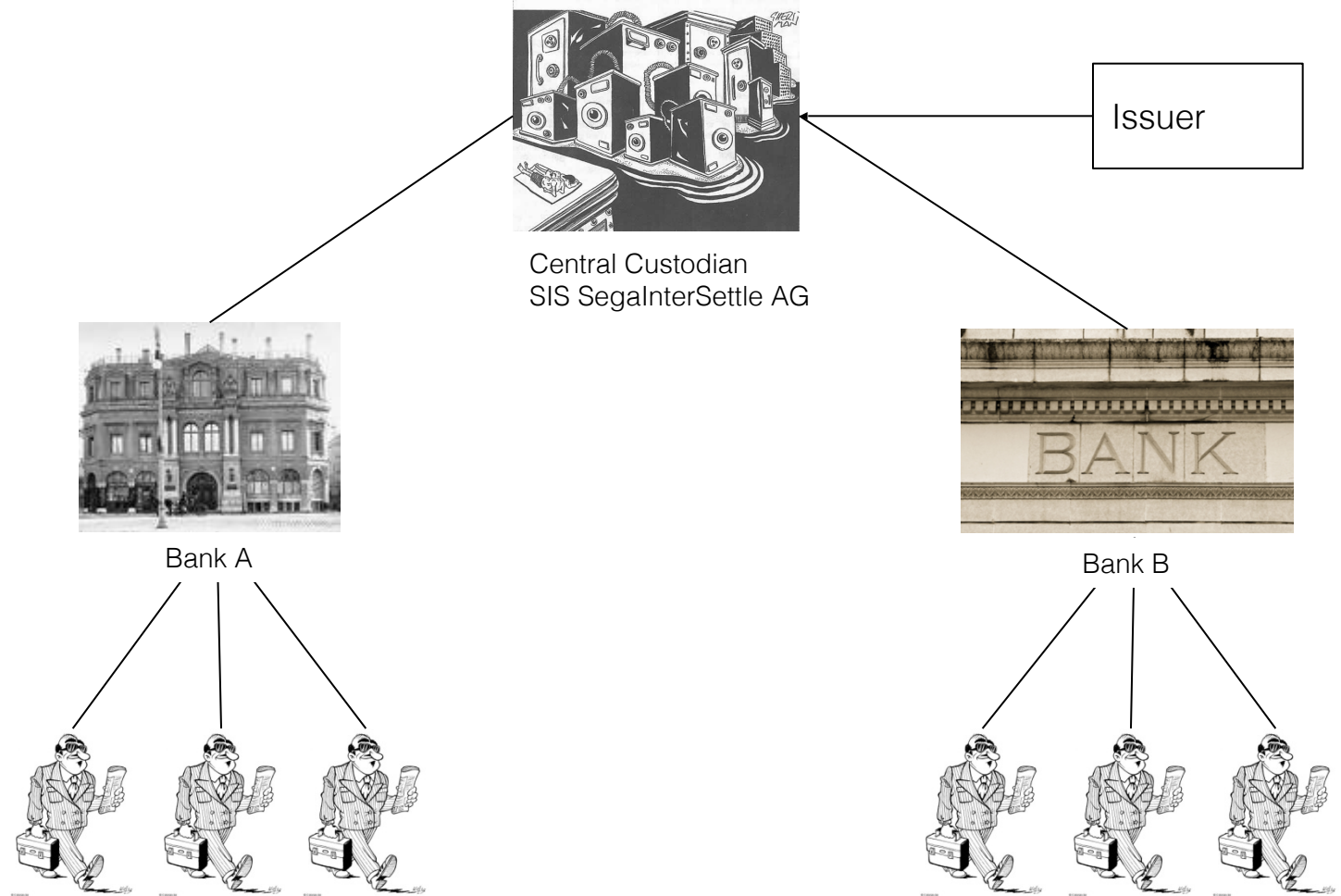
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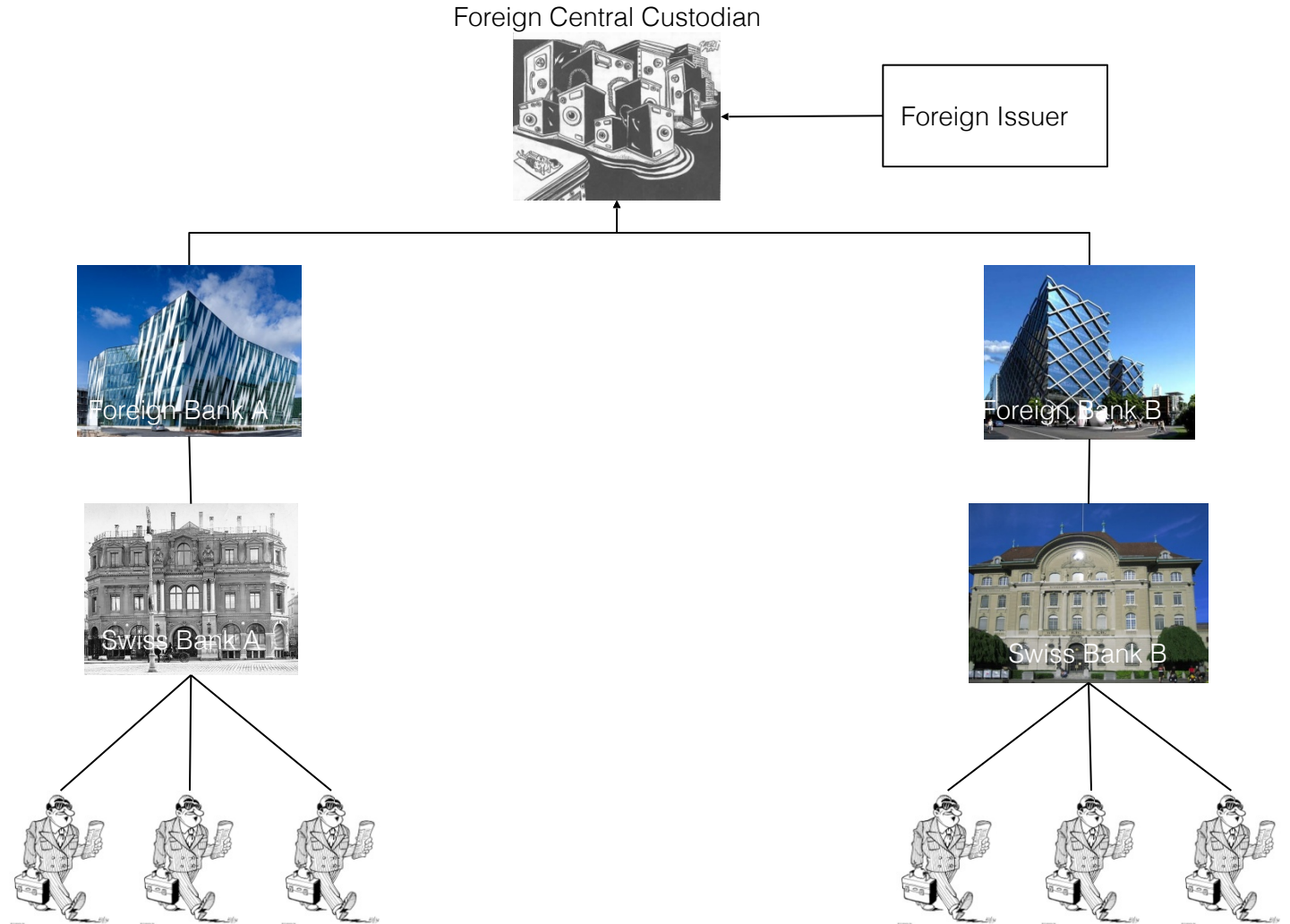
# 1. Introduction



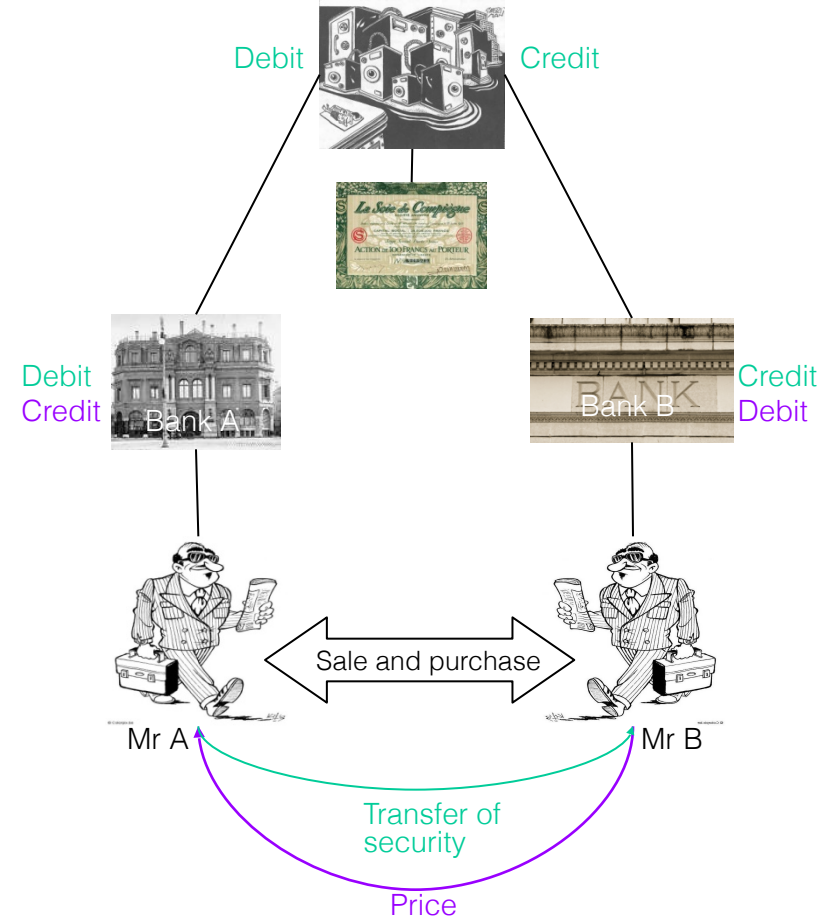
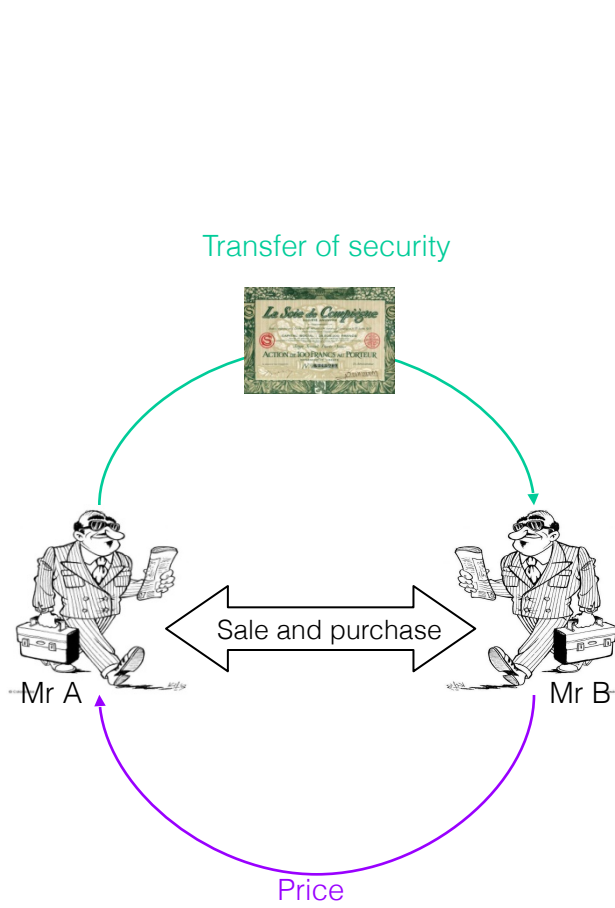
# 1. Introduction



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- Capital market evolution requires:
  - ↳ Immobilisation
  - ↳ Dematerialisation
- Applicable rules for the transfer of securities *or* for the creation of a security interest on securities:
  - ↳ Swiss Civil Code
  - ↳ Swiss Obligations Code

depending on the type of securities (paper security vs. book-entry security)

→ *the type of securities is rarely known*
- Swiss law did not follow such evolution and as a result:
  - ↳ extensive interpretation of its contractual, securities and *in rem* rules
  - ↳ legal uncertainty

# 1. Introduction

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- Creation of a new type of security → intermediated security
- All functional features of a security without being a chattel (*chose mobilière*)
- Enactment of the Federal Act on Intermediated Securities (FISA)
- Ratification of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary

## 2. Notion and creation of intermediated securities

*Intermediated securities are defined as:*

> Fungible claims  $\Rightarrow$  *bonds*

Or *against an issuer*

> Fungible membership rights  $\Rightarrow$  *shares*

↳ *that are credited to a securities account and of which the account holder can dispose according to the law*

## 2. Notion and creation of intermediated securities

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*Intermediated securities are created if:*

- Securities are deposited in collective custody with a custodian *or* a global certificate is deposited with a custodian
- Book-entry securities are registered in the main register maintained by a custodian

*Custodian*

Swiss regulated financial intermediary / foreign financial intermediary who maintain securities accounts (*in Switzerland*: banks, securities dealers, fund management companies, settlement houses, Swiss National Bank, Swiss Post)

## 2. Notion and creation of intermediated securities

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The intermediated security is a new legal instrument

☞ *All intermediated securities are treated the same*

A single legal regime is applicable to all securities held by an intermediary whatever the form of security chosen by the issuer

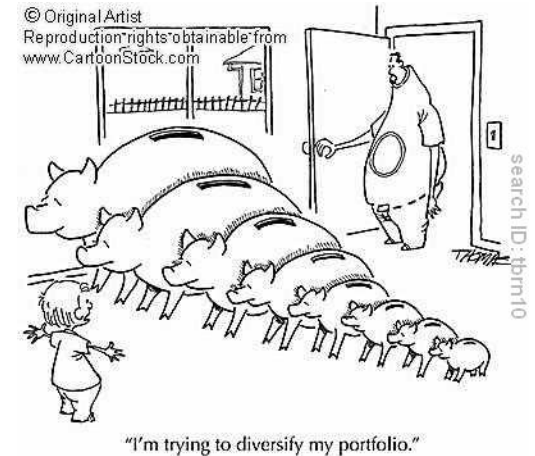
FISA governs the holding, the transfer and creation of a security interest on securities

*Disqualification* ☞ when securities are no longer credited to securities account

## 2. Notion and creation of intermediated securities

### Structure of portfolio

- Cash
- **Intermediated securities**
  - ↳ Shares, bonds, investment fund units, participation in a derivative
- Non-intermediated securities
- Other rights
  - ↳ Some derivatives and structured products, usually in the form of contracts (swaps, forex, etc.)



### 3. Other important issues

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- ✓ Transfer
- ✓ Instructions
- ✓ Sub-custody
- ✓ Seizure and attachment
- ✓ Custodian's bankruptcy
- ✓ Sub-custodian's bankruptcy
- ✓ Custodian's retention right
- ✓ Security interest on securities
- ✓ Realisation by secured creditor
- ✓ Custodian's liability

#### 4. Security interest on intermediated securities

- a. Security interest on securities/book-entry securities (outside FISA) and security interest on intermediated securities (in accordance with FISA)

Security interest on securities/book-entry securities:

- Various types, in accordance with the general rules on creation of security interests under the Code of Obligations and/or the Civil Code (transfer of ownership as security, pledge, irregular pledge)
- Applicable rules for the creation of a security interest depend on the nature of securities (bearer, registered or book-entry)

Security interest on intermediated securities:

- Various types, in accordance with FISA
- One “type” of intermediated securities, so the same rules for the creation of a security interest apply to all intermediated securities

## 4. Security interests on intermediated securities

### b. Methods of creating a security interest under FISA

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Three methods to create a security interest according to FISA:

- By transfer  
Securities are transferred to the account of the beneficiary  
(similar to a fiduciary transfer of ownership as security)
- By control agreement  
**New!**
- By security agreement in favour of the custodian  
Agreement between the securities account holder and the custodian to secure the custodian's claims

Custodian's retention right: secures only claims due in relation with the custody or the financing of intermediated securities

## 4. Security interests on intermediated securities

c. Three novelties




### *The control agreement*

*Irrevocable agreement* between the securities account holder (security interest provider) and the custodian in favour of a third party beneficiary (secured party)


The custodian agrees to carry out the secured party's instructions without having to obtain the prior consent or assistance (concours) of the security provider

Possible issues:

- No publicity : the intermediated securities remain on the securities account of the security provider without "public" indication of the security interest

 risk of good-faith acquisition by a third party and loss of the security interest

- Degree of control regarding the management of the intermediated securities (exclusive control by the secured party, shared control, intervention rights?)

 securities account To be contractually agreed between the secured party, the holder and the custodian

#### 4. Security interests on intermediated securities

c. Three novelties

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##### *The object of the security interest*

3 types of objects:

- specific securities
- all the securities on the securities account
- a part of the securities deposited on the account, up to a determined (pre-agreed) value **New!**

The possibility of having a security interest on an undetermined part of the securities deposited on the account (but up to a certain value) derogates from the *speciality principle*

Numerous issues not solved by FISA:

- which part of the securities in case of forced sale?
- right to dispose freely of the other part?
- what happens when the value of the securities decreases (under the security interest's value)?
- how to "share" the securities among various secured creditors?

#### 4. Security interests on intermediated securities

c. Three novelties



##### *Ranks between security interests*

Principle: priority in time

Two exceptions:

- if the custodian enters into a control agreement without indicating expressly to the secured party the existence of other security interests in favour of the custodian, the new security interest prevails.
- rights acquired under FISA prevail over rights acquired under non-FISA rules

Possible to modify the priority rules under an agreement ⇨ effects apply between the parties only

## 5. International issues

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- ☞ Need to adapt conflict of law rules that depend for securities and for book-entry securities on the type of security
  - > *lex rei sitae* (*lex chartae sitae*) and
  - > rules on the assignment of claims
  
- ☞ Introduction of a new Chapter 7a “*Intermediated Securities*” of the Swiss Private International Law Act (PILA) introducing a single regime applicable to all intermediated securities
  
- ☞ New regime to govern international matters relating to the holding, transfer and the creation of a security interest on intermediated securities
  
- ☞ Ratification of The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary

## 5. International issues

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New articles 108 *a to d* PILA on:

- definition of intermediated security
- jurisdiction of Swiss courts
- applicable law and
- recognition of foreign decisions

Incorporation of The Hague Convention as Swiss law since it had been ratified by Switzerland and Mauritius only (*entry into force needs 3 ratifying countries*)

## 5. International issues

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☞ Chapter 7a: articles 108 *a to d* PILA

Definition of *intermediated security* (art. 108 a)

☞ Reference to The Hague Convention's definition: rights of an account holder resulting from the credit of securities to a securities account with an intermediary

Definition more simple and broader than FISA's definition

Applicable law (art. 108 c)

☞ Determined as per articles 4 & following THC

The Hague Convention provides for a series of determining factors, the principal one being the law applicable to each account agreement

The law designated by The Hague Convention is valid in respect of one specific account relation and not of the entire chain of holdings



**Thank you!**