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THE NEW SCOPE OF APPLICATION OF HAGUE CONVENTION FROM 2006 AS AN EXAMPLE OF ADAPTATION TO THE REQUIREMENTS OF FINANCIAL SYSTEM RESILIANCE AND TECHNOLOGICAL CHANGES

Abstract

This article is an attempt to answer the question about the future and possible wider use of the Hague Convention on the law applicable to certain rights relating to titles held with an intermediary, signed in 2006.

The validity of the hypothesis included in this article results from both technological and legal development aspects. Within the scope of technological development, it should be noted that the exponential progress in this area could have contributed to changing the way of our life certain forms of activity are functioning on the financial market. Within the scope of legal development, it is worth noting that in recent years new forms of products have appeared on the financial market, such as crypto-assets, in relation to which the issue of determining the applicable law has not been clearly specified by the legislator. The above-mentioned issues are additionally overlapped with collateral aspects related to the legal security of transactions and the credibility

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of financial intermediaries in the era of warfare in Ukraine and the multi-faceted threats to state security associated with it.

The methodology used by the author is related to the functional approach of the historical-descriptive and dogmatic method, and the conclusions drawn indicate significant potential for applying the provisions of the Hague Convention mutatis mutandis to the contemporary financial market. In the Author's opinion, the Hague Convention may be an example of adaptation to the new requirements of the financial system's resilience and economic and technological changes, by referring to existing legal acts rather than creating new regulations, the effect of which is the phenomenon of regulatory inflation.

Key words: financial market, Hague Convention; applicable law, crypto-assets, contractual obligation

JEL Classification: K34, K22

1. Introduction

The modern financial market is a place marked both by technological development and legal innovation. The scale of this development made that it is now a different legal environment than almost 20 years before – when Hague Convention on the law applicable to certain rights relating to titles held with an intermediary was signed. This Convention at the time of signature was considered as modern act of international law, that took into consideration the rising importance of the intermediaries in the global economy. Today, according to some part of the doctrine [Lemonnier 2016: 103], we have even a new legal specialization called financial market law, marked not only by an important role of soft-law norms [Ofiarski 2016: 39], but especially by the cross border nature of the important part of transactions [Mariański 2023: 283]. The cross-border aspect is making the financial market hard to be regulated on national level as most of the legal relations in this field are connected to more than one legal area [Mariański 2020: 305].

The development of digitalization changed not only our way of life but also the principles of legal systems in various aspects [Hoffmanová 2024: 57]. One of such a changes ca be the intermediation on the financial market and in consequence the growing role of intermediaries within financial instrument trade. The specificity of international asset transactions, for which the equivalent of the location was the account entry, meant that

the involvement of intermediary entities turned out to be necessary in the proper functioning of modern economy.

In the meantime the new phenomenon related for example to cryptoassets market appeared that made market participants aware of the fact that the classical institution of issuer may not be any longer indispensable for a valid market transaction [Mariański 2017: 37].

In this respect the present article is an attempt to answer the question about the future and possible wider use of the Hague Convention on the law applicable to certain rights relating to titles held with an intermediary. In order to answer this question the author is going to analyses first the historical background of this act, present the main rules introduced in the Convention in order to finally present its new possible application especially in the field of cryptoassets market. In other words the author would like to answer the question whether the Hague Securities Convention (further as HSC) has sufficiently technologically neutral regulations that its provisions could be applied today to the types of transactions that were not taken into account at the time when the Convention was prepared.

The methodology used by the author is related to the functional approach of the historical-descriptive and dogmatic method. But as the financial market law is a specific legal environment it should be noted that the concept of legal methods is ambiguous and raises significant interpretational doubts related to the specificity of the subject of interest of given legal science [Stelmach, Brożek 2006: 32]. It should be noted that within legal sciences, like in the present text, dogmatic methods prevail, related to logical-linguistic analysis and interpretation of legal texts using interpretative directives [Zieliński 2006: 48].

2. History and basic assumptions of HSC

The history of Hague Securities Convention was mostly related to the fact, that first at transnational level, an increase in the importance of intermediary entities was observed. In the international doctrine, two basic concepts have been developed in relation to the phenomenon of the intermediarysation of the global economy, that are so called *look through approach* (conflict of laws rule applied to the proprietary aspects of security transactions) [Brzeziński, Lasiński-Sulecki, Morawski 2023: 29] and so called *place of relevant*

intermediary account approach [Bernasconi, Potok 2003: 11]. The doctrine draws also attention to the fact that the increasing role of the intermediaries is both a chance as well as big challenge especially in the is the situation in which intermediary institutions make entries not directly, but through branches or third parties dependent on them [Glicz 2016: 1607].

The need to create uniform conflict of law's provisions adapted to the method of storing and transferring titles on the financial market was a kind of response to the above challenges. The lack of such rules would significantly hinder institutional regulation of the market in relation to intermediary entities, additionally generating legal uncertainty and increased exposure to credit and financial risk [Bernasconi, Sigman 2005: 213]. Thus, an international initiative arose to create a Convention on the law applicable to titles held by an intermediary, under the auspices of the Hague Conference, taking into account the developing financial markets and intermediation in this specific legal environment. It should be noted that in Global Clearing and Settlement Plan of Action created in 2003, the Group of Thirty (G30)[1] recommended that the Hague Convention should be ratified as quickly as possible by as many nations as possible. Also the Committee on Payment and Settlement Systems[2] and the Technical Committee of the International Organization of Securities Commissions[3] have also noted that the HSC Convention could be significant step in the proces of harmonisation the laws governing securities settlement systems (SSSs), the contracts between SSSs and direct system participants, and the contracts between direct system participants, other intervening intermediaries and their respective customers. Finally, after long works and debates, on 5 July 2006 the Convention on the law

[1] The Group of 30 is a private, nonprofit international body composed of academic economists, company chiefs, and representatives of national, regional, and central banks, that at least one a year discuss and publishes the opinions related to financial and economic issues in the worldwide perspective. See more https://www.group30.org/, accessed: March 26th, 2025.

[2] The Committee on Payment and Settlement Systems (CPSS) was till 2014 a committee made up of the central banks of G10 countries that monitored developments in payment, settlement, and clearing systems focused on building a strong market infrastructure. This Committee was renamed in 2014 and became the Committee on Payments and Market Infrastructures (CPMI). See more https://www.bis.org/cpmi/history.htm, accessed: March 26th, 2025.

[3] The International Organization of Securities Commissions (IOSCO) is the worldwide association of national securities regulatory commissions and is recognized as the global standard setter for financial markets regulation. IOSCO membership regulates more than 95% of the world's securities markets in more than 130 jurisdictions, see more on https://www.iosco.org/, accessed: March 26th, 2025.

applicable to certain rights relating to titles held with an intermediary was approved[4]. The Convention adopted a broad concept of the subject of trading on the financial market as its point of reference – because the term *titre* used in the official French-language initiation of this act[5], was considered to be its equivalent *of* the English-language term *securities*[6]. Due to the above, the authors of the Convention highlighted the widest possible potential application of the agreed regulations [Mariański 2020: 345].

Also the basic assumption in the preliminary work related to HSC Convention was that the security of dematerialized and supranational trading on the financial market and effective supervision over it depend on taking into account the fact that the place where a modern financial instrument is located is the appropriate deposit and settlement account [Van Loon 2001: 240]. That is why in the article 1 of the HSC Convention the authors decided to present the definition and interpretation of crucial concepts used in the text. First in art. 1 point 1 letter a) it was stated that "securities" means any shares, bonds or other financial instruments or financial assets (other than cash), or any interest therein, and in letter b) that "securities account" means an account maintained by an intermediary to which securities may be credited or debited. Also in art. 1 point 1 letter c) it was detailed that "intermediary" means 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. Such a broad scope of the above mentioned exemplary definitions, in combination with the provisions of the preamble and the comments to the text of the Convention, clearly indicates the widest possible potential application of HSC Convention, by using the expressions that are trying to be technologically neutral [Bernasconi, Sigman 2005: 213].

The most important objective of the Hague Convention, expressed directly in its preamble, was to ensure legal certainty in the area of intermediation on the dematerialized financial instruments market. The consequence of eliminating the above-mentioned risk related to cross-border operations [Potok 2002: 12] was the reduction of the legal end economic costs of making

[4] Full tekst on the webside https://www.hcch.net/en/instruments/conventions/full-text/?cid=72, accessed: March 26th, 2025.

[5] Fr. Convention du 5 juillet 2006 sur la loi applicable à certains droits sur des titres détenus auprès d'un intermédiaire.

[6] Eng. *Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.*

transnational transactions and facilitate the capital flow on a cross-border scale. That is why in the HSC Convention was applied the wider concept of contractual obligation[7] rather than the simple contract, that was especially related to the definition of the account agreement or disposition[8]. Also when in the HSC text the expression "writing" and "written" is used, it means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion.

The above basic assumptions of HSC Convention constitute a potentially very broad application of this act as an instrument supporting the institutional regulation of the financial market. The above statement results in particular from the scope of the Convention expressed in its Article 2 and from the universal nature expressed in its article 3, where it is written that HSC applies in all cases involving a choice between the laws of different States. What is also important, is that, according to art. 9, the HSC Convention applies whether or not the applicable law is the law of a Contracting State.

3. Main rules included in HSC Convention

The method of drafting the rules for determining the law applicable to intermediation in financial market transactions is regulated in the Convention in a very specific way. As indicated in numerous commentaries to the Convention, the provisions contained in both Article 4 and Article 5 should be analyzed together, as am interconnected global regulation [Goode, Kanda, Kreuzer 2017: 24].

The primary rule expressed in art 4 of HSC Convention states that, the law applicable to all the issues specified in this act 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. The law designated in accordance with this provision applies only if the relevant intermediary has, at the time of the agreement, an office in that State, which effects or monitors entries to securities accounts, administers payments or corporate actions

[7] Historically, the concept of contractual obligation comes from the German term *vertragliches Schuldverhältnis*.

[8] According to art. 1 point 1 letter h), "disposition" means any transfer of title whether outright or by way of security and any grant of a security interest, whether possessory or non-possessory.

relating to securities held with the intermediary, or is otherwise engaged in a business or other regular activity of maintaining securities accounts. The alternative method of identification of the intermediary institution refers to the fact of having an account number, bank code, or other specific means of identification as maintaining securities accounts in that State.

It should be noted that such a limitation to the law related to an intermediary institution meeting certain standards was not only intended to determine the appropriate national supervisory authority over these entities, but also to make its regulatory and supervisory activities more effective at this level [Mooney 2007: 645].

The already announced Article 5, which applies in the absence of a choice of law by the parties, refers to a series of successive connecting factors, creating the so-called cascade connecting factor, which is characteristic of contemporary international private law [Ziegler, Takacs 2012: 21]. First step, if the applicable law is expressly and unambiguously stated in a written account agreement that the relevant intermediary entered into the account agreement through a particular office, the law applicable is the law in force in the State in which that office was then located. According to second step, if the applicable law is not determined under first step, the applicable law is the law in force in the State, under whose law the relevant intermediary is incorporated or otherwise organised at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened[9]. The last third step, that is applicable if the previous options are not possible, is referring to the applicable law in force in the State, in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

[9] However, if the relevant intermediary is incorporated or otherwise organised under the law of a Multi-unit State and not that of one of its territorial units, the applicable law is the law in force in the territorial unit of that Multi-unit State in which the relevant intermediary has its place of business, or, if the relevant intermediary has more than one place of business, its principal place of business, at the time the written account agreement is entered into or, if there is no such agreement, at the time the securities account was opened.

It is also worth noting that in the art 6 of HSC Convention some possible factors were described as not possible to be taken into account. This factors are: the place where the issuer of the securities is incorporated or otherwise organised or has its statutory seat or registered office, central administration or place or principal place of business; the places where certificates representing or evidencing securities are located; the place where a register of holders of securities maintained by or on behalf of the issuer of the securities is located; or the place where any intermediary other than the relevant intermediary is located.

In summary of this part, it should be noted that the regulations proposed in the HSC Convention of 2006 are not contrary to current EU law and are compatible with the nature of the subject of trade on the financial market. The principles of choice of law proposed in the Convention, enriched with numerous restrictions, make the law so designated more rational, i.e. related to the place of keeping financial titles by the intermediary. Such a directed choice is conducive to increasing the level of legal certainty on dematerialized and supranational markets located in the intermediate storage system.

4. Potential new application areas

Before analysing the potential new applications of the Convention, it should be noted that at present only 3 countries have ratified this act. To be precise the HSC Convention was signed on 5.07.2006 by Switzerland and United States of America and on 28.04.2008 by Mauritius. The ratification process was finished in Switzerland and Mauritius in 2009, and in 2016 in the USA case. At the end the entry into force of the HSC Convention in all three above mentioned countries was completed in the same time and scheduled for 1.04.2017. From this date the number of contracting parties of the HSC Convention remain unchanged[10].

As for potential new application and use of the ways to determine the law applicable the author is going to analyse the acts that entered into force after year 2006, and concentrate the most on one act that was signed after the Convention entered into force.

[10] See https://www.hcch.net/en/instruments/conventions/status-table/?cid=72, accessed: March 26th, 2025.

The first act is Rome I Regulation from 2008 related to contractual obligations[11] and the second is the MiCA Regulation from 2023 related to cryptoassets[12].

As for the Rome I Regulation related to contractual obligations, the possible use of the provisions of HSC Convention is related to the fact that the main rule for determining the law applicable to all types of contracts is the freedom of choice made by the parties. In this respect, the parties, According to Article 3(1) of Rome I regulation, can select the law applicable to the whole or to only a part of the contract and when their choice is manifested they can make the reference to the law applicable to the intermediary institution like in the HSC Convention. Of course the parties can manifest their decision expressly or it be demonstrated by the terms of the contract or the circumstances of the case [Lerman-Balsaux 2022: 168]. In this case we can speak about the indirect influence of the conflict f laws solution proposed by the HSC Convention to the wider category of contractual obligations, where the intermediary institution appears.

As for the second act, i.e. MiCA Regulation, it should be noted that it represents the recent attempt of EU legislator to organize a certain niche of the market, by introducing the regulatory framework to the crypto-assets market, previously called virtual currencies or cryptoassets [Lee, L'heureux 2020: 423]. Apart from the terminological order, the MiCA regulations were intended to organize the crypto-assets trade in such a way as to ensure a certain minimum level of security and stability of the market and to protect its participants [Mazurkiewicz, Jelonek, Sobieski 2023: 67]. But in terms of the law applicable rules, the possible application of HSC Convention in case of MiCA regulation is different than in case of Rome I. Namely, as it was already subject of different studies [Mariański 2024: 49], the several articles of MiCA regulation are referring to the law applicable, but without précising how to determine such a law. This is the case of Article 59(7) of MiCA regulations, Article 65(1), Article 65(2), Article 75,and Articles 92 and 93. Also in this respect the Article 105 of the MiCA regulation states that a competent authority shall only take a measure related to regulatory

[11] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligation

[12] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937

requirements under applicable EU law to the crypto-asset or crypto-asset service, but without defining the way how to precise the term applicable law[13].

The possible application of HSC Convention to cryptoassets market requires a certain number of provisions that are related to the scope of the Convention and the way that cryptoassets are defined. First we should assume that the term securities covers also some other property rights being subject of trade on the financial market or measures of value other than money – and the cryptocurrencies were also considered in the past in that way [Zacharzewski 2014: 1132]. In the other hand we should remind that, the definition of cryptoassets from Article 3(1)(5) of MiCA is written in technologically neutral way and states that a *crypto-asset means a digital representation of a value or a right that is able to be transferred and stored electronically, using distributed ledger technology or similar technology (like a blockchain). The expression similar technology confirms that in fact cryptoassets may be considered as digital assets using cryptography for security reasons* [Tomczak 2022: 366]. *Also according to* art. 3. Point (4) of MiCA regulation, the DLT network mode means a device or process that is part of a network and that holds a complete or partial replica of records of all transactions on a distributed ledger. *In consequence* the relationship between the participants in a blockchain network can be characterized as having a contractual character within the meaning of Rome I regulations [Villata 2023: 334], and opens a possibility to have an intermediary institution as a part of this relationship. *However, we should pay attention to the fact that the category of crypto-assets is not* a homogeneous group, as it *consists of three different subcategories: asset-referenced tokens*, e-money tokens and utility tokens. Due to the above the different types and ways of intermediation may develop for every type of cryptoassets, and that is why we should avoid making a clear and certain general statement that HSC provisions will be applied. In the authors opinion, the HSC Convention provisions, may be applied as a subsidiary way in certain cases in the future, as today we cannot exclude such a possibility. This is particularly important in long term perspective, as the cryptoassets market is changing every day, and the technologically neutral regulation will not stop it from further development. As an exemplification of how

[13] It should be also underlined that according to Article 112(2), the competent authorities shall cooperate in order to avoid duplication and overlaps when exercising their supervisory and investigative powers and when imposing administrative penalties in cross-border cases.

the changes on financial market may influence different institutions or technologies that are being used, we can remind that for example blockchain was initially proposed as a method of validating the ownership of Bitcoin, and was transformed evolutionary into some form of fast record-keeping technology.

The lack of precision in MiCA regulation regarding conflict of law rules made possible to think about subsidiary application of other acts related to private international law to fill the gaps. That is why the possible application of the rules given by HSC Convention may not be excluded, of course under certain conditions specified in the text. The author does not make any definitive statement but draws a possibility for a part of the intermediary cryptoasssets market.

5. Conclusion

The scale of the financial market development made that almost 20 years after the signature of HSC Convention we should not even be thinking about its future application. Financial market law is a specialisation within financial law that is dealing very often with challenges related to legal qualification of new technologies [Zalcewicz 2023: 23]. But the HSC Convention at the time of signature was not considered as modern act of international law because of the fact that it was referring to the emergency of the intermediaries in the global economy, but because of the way it approached these matters. Namely, the way of determining the law applicable to securities held with an intermediary was proposed in a technologically neutral mode.

That is why in the authors' opinion there is a possibility for future and broader use of the Hague Convention on the law applicable to certain rights relating to titles held with an intermediary. In this respect, it was not excluded to apply the rules given in HSC Convention for at least two new poles of exploitation, that were not taken into account at the time when this act was prepared. The fists was related to contractual obligations but only in the aspect when the parties may choose the law applicable to their relationship, and when this relationship has an intermediary aspect. The second new pole of exploitation is the cryptoassets market, as both the Hague Securities Convention and MiCA regulation have sufficiently technologically neutral provisions that can expand the scope of application of these both acts. The possible use of HSC Convention is also possible because despite the awareness

of the challenges specific to cross-border financial markets, this aspect was only mentioned in the MICA regulation without introduction of some specific rules in that area. Consequently, in the author's opinion it should be pointed out that the European legislator did not go beyond a certain regulatory minimum in relation to law applicable to cryptoassets, and opened consciously or unconsciously, the cross-border issues that can be partially filled, for example, by the HSC Convention.

To sum up, it seems that the HSC Convention from 2006, that entered into force only in three countries, but including USA that is a global and one of the most powerful economies, is sufficiently technologically neutral be applied today, despite the technological progress that took place in the meantime. The present article maybe also one of the element of the broader discussion referred to the question of the way that of adaptation to the new requirements of the financial system's resilience and economic and technological changes should be organized. Namely instead of creating new legal acts and feeding the regulatory inflation in this field, we can try to refer to already existing legal acts or even legal constructions. As an example we can refer to the case of virtual currencies, that in France were supposed to be governed by already existing regulations, while in Poland we were searching to qualify it as a new type of assets [Mariański 2025: 99].

The effect of regulatory inflation is a constant need to adapt to new challenges with creating new acts whose scope is juxtaposing, like on the example if Mica regulation, Rome I Regulation and HCC Convention. In this regard the discussion is far for being finished, as apart from crypto-assets, there are also other financial market instruments such as CBDC [Nieborak 2024: 189] artificial intelligence [Feret 2024: 44], that may require an in depth analysis in the conflict of laws perspective, understood as the perspective referred to the link of a given relationship to more than one legal system.

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