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Protection of Investors on Intermediary's Insolvency: Systemic Observations on the Finnish Securities Accounts Act

Teemu Juutilainen[*] and Janne Kaisto[**]

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1 Introduction

Investing forms an integral part of the modern economy and financial system. The most significant types of investment include tradable shares in companies, bonds, and other objects that qualify as transferable securities under the Markets in Financial Instruments Directive II (MiFID II).[1] One typical feature of investing in securities is the existence of intermediaries between issuers and investors. For example, if you own securities in the shape of book entries in the Finnish book-entry system directly in your own name, you have an account maintained in a central securities depository (CSD).[2] At present, the only Finnish CSD is the company Euroclear Finland Oy.[3] The organisation and conduct of CSDs in Finland and other EU Member States is also regulated at the European level, particularly in the Central Securities Depository Regulation (CSDR).[4]

As the example above suggests, owning securities in the Finnish book-entry system involves at least one intermediary, that is, the CSD.[5] However, the CSD

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1 Parliament and Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L173/349. Under Art 4(1)(44), the term 'transferable securities' 'means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment'. The objects covered by this definition include, eg, 'shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares' and 'bonds or other forms of securitised debt, including depositary receipts in respect of such securities'. Additionally, the definition covers 'any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures'.

2 Under c 1, s 3 Book-Entry System and Settlement Activities Act (348/2017), book entries are shares, units of interest or other rights, other financial instruments or equivalent rights, or other securities incorporated in the book-entry system (references to legislation in the list of objects omitted). In turn, the book-entry system is an information system entity consisting of book-entry accounts and related lists referred to in the Book-Entry Accounts Act (827/1991). The provision also recognises foreign book-entry systems, defining them as systems of a European Economic Area Member State or a third country corresponding to the (domestic) book-entry system. Besides direct ownership, the Finnish book-entry system enables custodial nominee accounts under s 5a Book-Entry Accounts Act.

3 See, eg, Financial Supervisory Authority (FIN-FSA), 'Central Securities Depositories' (updated 27 March 2024) <www.finanssivalvonta.fi/en/financial-market-participants/capital-markets/central-securities-depositories/> accessed 10 July 2024. See also c 2, ss 1–2 Book-Entry System and Settlement Activities Act concerning the authorisation required for carrying out the activities of a CSD.

4 Parliament and Council Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L257/1.

5 In Finland, when securities are in book-entry form, book entries are their only representations. The CSDR requires book-entry form, but that does not exclude the existence of physical securities. Under Art 3(1) CSDR, 'any issuer established in the Union that issues or has issued transferable securities which are admitted to trading or traded on trading venues, shall arrange for such securities to be represented in book-entry form as immobilisation or subsequent to a direct issuance in dematerialised form'.

is not our main concern in this article.[6] Instead, we are interested in other intermediaries that may be present in investing in securities, such as the following. For practical reasons, it may be reasonable to invest through an intermediary who holds a CSD account instead of the investor. Furthermore, the intermediary acting as the investor's contracting party may cooperate with or otherwise rely on other intermediaries, possibly operating in different countries. Indeed, those intermediaries may be links in 'a "holding chain" of intermediaries between the top tier book-entry records and the end investor'.[7] Large numbers of investors involved may further complicate these layered structures.

Intermediaries that are of interest to us in this article typically hold securities under their factual control, which in many ways makes investors dependent on those intermediaries. Dependencies inevitably entail risks. Investors may lack expeditious access to securities that belong to them, while an intermediary's insolvency may give rise to particularly serious issues, including loss of securities. Unsurprisingly, protection of investors has received plenty of attention globally. One of the most interesting instruments in that respect is the Geneva Securities Convention.[8]

The Geneva Securities Convention has not entered into force because the requirements under its Article 42(1) remain unfulfilled.[9] This does not mean that the Convention has had no effect at all. Importantly for this article, the Convention has influenced the content of the Finnish Securities Accounts Act (750/2012), as is explicitly noted in the preparatory works of the Act.[10]

In this article, we study protection of investors in the event of an intermediary's insolvency, focusing on the Securities Accounts Act. To that end, we set three research questions. First, what is required under the Act's substantive rules for investors to enjoy insolvency protection in terms of securities? Second, does the Act provide substantive rules applicable to money, and if not, what substantive rules apply to money? Third, what procedural rules apply in case of factual unclarity about fulfilment of the requirements under the Act's substantive rules?

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[6] For a more internationally representative view of CSDs in investing in securities, see Louise Gullifer and Jennifer Payne, 'Introduction' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 8–14.

[7] Christopher Twemlow, 'Why are Securities Held in Intermediated Form?' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 86.

[8] UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted in Geneva on 9 October 2009.

[9] Under Art 42(1), entry into force occurs 'on the first day of the month following the expiration of six months after the date of the deposit of the third instrument of ratification, acceptance, approval or accession between the States that have deposited such instruments'. So far, only Bangladesh has signed the Convention. See UNIDROIT, 'Status of the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009)' <www.unidroit.org/instruments/capital-markets/geneva-convention/status/> accessed 10 July 2024.

[10] Government Proposal 32/2012, especially 63, 84, stating that the proposed Act corresponds to the Convention in its main features and largely concerns the same issues as the Convention. Another acknowledged source of influence is the EU Commission draft Directive on Legal Certainty of Securities Holding and Transactions, which has not become a reality.

We use the term 'insolvency protection' to denote outcomes where certain securities (or money) do not belong to an insolvent intermediary in such a way that would leave investors as mere non-preferential creditors. Investors who enjoy insolvency protection are entitled to securities (or money) before the intermediary's creditors on the basis of ownership or some other ground with a factually equivalent result. For simplicity, we limit our discussion to an intermediary's bankruptcy under the Finnish Bankruptcy Act (120/2004). This means leaving aside other types of insolvency proceedings as well as any special insolvency legislation that may be applicable depending on the type of intermediary.[11] Chapter 1, section 1(2) Bankruptcy Act states the nature of bankruptcy as collective liquidation-type insolvency proceedings. That is, bankruptcy covers all debtor liabilities, while assets belonging to the debtor are used in payment of claims in bankruptcy.[12]

The article proceeds in order of the research questions, as follows. Section 2 answers the first research question. Section 2.1 introduces the Securities Accounts Act, including its scope of application and key concepts. Section 2.2 explains the Bankruptcy Act's rules on property belonging to a bankruptcy estate, laying the foundation for an in-depth study of the Securities Accounts Act's main provisions on investors' insolvency protection. Section 2.3 examines under what circumstances securities are held on behalf of investors so that investors enjoy insolvency protection under those provisions. Section 2.4 systematises the provisions, discussing whether it is reasonable to conceptualise insolvency protection as being based on investors' ownership of securities. Section 3 answers the second research question. Section 3.1 reviews the limited sense in which the Securities Accounts Act acknowledges the existence of monetary assets. Section 3.2 compares the legal treatment of monetary assets to that of securities under the Securities Accounts Act. Section 4 answers the third research question, discussing the Securities Accounts Act's presumptive rule in favour of investors and its functioning in connection with general rules of civil procedure. Section 5 concludes the article.

2 Substantive Rules on Securities in the Securities Accounts Act

2.1 Preliminary Considerations

Section 1 Securities Accounts Act lays down the Act's scope of application. As stated in its section 1(1), the Act concerns securities accounts kept based on custody of securities in Finland, the legal consequences of entries made to these

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[11] See, however, s 11(3) Securities Accounts Act, stating that the provisions on bankruptcy in that section also apply, to the extent that they are relevant, in restructuring under the Restructuring of Enterprises Act (47/1993).

[12] See also c 1, s 5, explaining the concept of 'claims in bankruptcy'. As a starting point, a claim in bankruptcy 'means a debt owed by the debtor and based on a commitment or other legal basis that has arisen before the beginning of bankruptcy'. The quote is from an unofficial translation of the Bankruptcy Act by the Ministry of Justice and available, along with other translations of Finnish legislation, at 'Finlex Data Bank' <https://finlex.fi/en/> accessed 10 July 2024. We use these translations in this article selectively, insofar as they are available, accurate, and up-to-date.

accounts, custodian's obligations, and account holder protection in a custodian's insolvency proceedings. To be sure, the concept of security is of the essence. Under section 1(2), the Act's provisions on securities apply to securities in the meaning of the Securities Markets Act (746/2012). The definition provided in the Securities Markets Act corresponds to that of transferable security in Article 4(1) MiFID II, with minor national amendments. Under section 1(2) Securities Accounts Act, the concept of security also covers, where applicable, other financial instruments in the meaning of chapter 1, section 14 Investment Services Act (747/2012).[13]

The Securities Accounts Act introduces the term 'securities account', which is defined in section 2(1), as are the terms 'custody', 'custodian', and 'account right'. We start from the concept of custody because it forms an essential element of the other definitions. Under section 2(1), custody means an agreement-based holding of securities on behalf of a client, where the securities are identified in the agreement by their type and quantity. The preparatory works emphasise that, in custody in the meaning of the Act, a security is not identified in the custody agreement in a way that distinguishes it from other securities of the same type. In contrast, if a security is identified more precisely and defined as an object that is juridical-technically separate from other securities of the same type, such as a specific numbered (physical) share certificate, then the Securities Accounts Act does not apply. Instead, the general rules of property law apply and usually afford the client a stronger legal position than that of an account holder under the Act, because in this case the client's rights concern an individual object.[14]

The example mentioning a specific numbered share certificate is clear, but difficulties may arise when assessing whether a certain service is custody in the sense of the Securities Accounts Act. While this is an important question, we do not intend to discuss it further in this article. However, regarding separability from other objects of the same type, it is worth pointing out that under chapter 4, section 1 Book-Entry System and Settlement Activities Act (348/2017) book entries are not numbered. As a result, book entries of the same kind are indistinguishable from each other.

Under section 2(1) Securities Accounts Act, a custodian can be an enterprise in the meaning of chapter 2, section 1(1), 2(1) or 2(4) Investment Services Act, which provides custody as an associated or ancillary service permitted in the Act. Alternatively, a custodian can be the holder of a custodial nominee account in the meaning of section 5a Book-Entry Accounts Act (827/1991). In turn, a securities account is an account kept by a custodian, which indicates the account-holder client, the securities held on behalf of the account holder, and the rights and restrictions regarding the account holder's right. Finally, an account right is an account holder's right with respect to securities.

Under section 3(1), a custodian must keep client-specific securities accounts for the securities in its custody. Accounts must be kept in a reliable manner and in a way that enables ascertaining the exact time of each entry indicating rights. Under section 3(2), entries to an account must include identification information

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[13] The definition in c 1, s 14 Investment Services Act, which covers, eg, securities in the meaning of the Securities Markets Act, corresponds in essence to the definition of financial instrument in Art 4(1)(15) MiFID II (Annex I, Section C).

[14] Government Proposal 32/2012, 253–54.

for the account holder and other holders of rights, the type and quantity of securities in custody on behalf of the account holder, and certain rights and restrictions regarding the account holder's right.[15]

It is of utmost importance for account holders' insolvency protection that the securities they may be entitled to remain available. Under section 10(1), a custodian must ensure that it continuously holds the securities corresponding to the entries in the securities accounts, as agreed in more detail with account holders. Indeed, the exact requirements are defined in an agreement between the custodian and the account holder. For example, an agreement may allow a custodian to hold securities belonging to different clients as an unseparated whole, instead of holding them separately for each client.[16]

In practice, an unseparated whole often involves holding book entries on behalf of several securities account holders in a single custodial nominee account, controlled by the custodian. The Book-Entry Accounts Act only allows the use of custodial nominee accounts in certain situations. Under section 5a(1), book entries can be recorded in a special book-entry account controlled by the account holder, mandated by and on behalf of another person, where that person is a foreign individual, corporation or foundation.[17] In these cases, the account must contain information that identifies the (custodial nominee) account holder and states that the account is a custodial nominee account.[18]

The applicability of the Securities Accounts Act to securities accounts kept in Finland by a custodial nominee account holder with respect to book entries of its clients is expressly stated in section 5a(5) Book-Entry Accounts Act. The Securities Accounts Act is also meant to apply in situations where, for example, a Finnish investor invests in foreign securities through a custodian operating in Finland. In these situations, the custodian is typically entitled to securities held by another custodian, often a foreign one. While the 'holding chain' thus formed may involve several custodians, the Securities Accounts Act applies between a custodian operating in Finland and its clients, such as the Finnish investor of the example.[19]

A custodian's bankruptcy and other insolvency situations are addressed in section 11 of the Securities Accounts Act. Under section 11(1), the securities held by a custodian on behalf of its account holders do not belong to the custodian's bankruptcy estate, nor can they be attached due to the custodian's debt.

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15 Account rights can be the subject of various legal acts and transactions. They can, eg, be pledged as security for credit. See ss 4 and 6 Securities Accounts Act. However, these matters are not relevant for our research questions.

16 For illustrations of both main alternatives, see Government Proposal 32/2012, 264. A custodian may, eg, hold book entries in a single custodial nominee account on behalf of several clients, or book entries can be held in separate custodial nominee accounts, one account for each client.

17 As an exception, s 5a(4) allows recording certain book entries held on behalf of a Finnish citizen, corporation or foundation in a custodial nominee account held by a foreign CSD. The rationale of this provision is based on practices of markets in debt instruments. See Government Proposal 98/1995, 25.

18 The actors eligible as custodial nominee account holder are listed in s 5a(3).

19 Government Proposal 32/2012, 250–51.

Undoubtedly, section 11 contains the most important substantive rules of the Securities Accounts Act in terms of account holder protection in the custodian's insolvency proceedings. Next, we will take a closer look at client protection. First, we explain the main features of chapter 5 Bankruptcy Act, which contains rules on property belonging to bankruptcy estate. Understanding these general starting points is necessary for an in-depth study of section 11 Securities Accounts Act. Second, we examine under what circumstances securities are held on behalf of account holders so that account holders are entitled to protection under section 11. Third, we discuss whether it is reasonable to conceptualise protection under section 11 as being based on an account holder's ownership of securities. Answering this question requires systematising the substantive rules of section 11.

2.2 Property Belonging to Bankruptcy Estate under Chapter 5 Bankruptcy Act

Under the general rule in chapter 5, section 1(1) Bankruptcy Act, property that the debtor has at the beginning of bankruptcy and property that the debtor acquires before the conclusion of bankruptcy belong to the bankruptcy estate.[20] In Finland, the concept of property (in Finnish *omaisuus*, in Swedish *egendom*) is formed at the level of rights, meaning that property consists of patrimonial (civil law) rights, such as the right of ownership, rights of use of a thing, receivables, and intellectual property rights.[21] Accordingly, we must start by asking what rights belong to the debtor at the time when the debtor is declared bankrupt, for this is the beginning of bankruptcy under chapter 1, section 4 Bankruptcy Act. The preparatory works of the Bankruptcy Act state that the answer is determined by substantive civil law.[22] This leads us to the concept of acquisition, for ownership must have a legal basis, as do other forms of property. The concept of acquisition can be used in the context of ownership of (title to) physical objects,[23] but can also be used more widely, inclusive of all patrimonial rights. Put simply, the person with the latest acquisition can be defined as the owner of the object in question.[24]

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[20] As an exception, property acquired or income earned by a private individual after the beginning of bankruptcy does not belong to their bankruptcy estate.

[21] See Leena Kartio, *Esineoikeuden perusteet* (2nd edn, Kauppakaari 2001) 63, 114, 187; Janne Kaisto and Jarno Tepora, *Esineoikeus eurooppalaistuvassa Suomessa. Esineoikeuden oppikirja oikeustoimiopillisin ja prosessioikeudellisin lisäyksin* (Lakimiesliiton kustannus 2012) 175–77.

[22] Government Proposal 26/2003, 70, which also notes that the concept of property covers all rights of value, including, eg, receivables and intellectual property rights, as well as lease rights, rights of use, and rights of pledge. Moreover, documents and different kinds of registers and files are regarded as property, even if they have no exchange value.

[23] See, eg, c 1, s 1 Real Estate Code (540/1995), under which title to real estate is acquired by sale, trade (exchange), gift, or other conveyance, as provided in the Code. Separate provisions (other statutes) apply to acquisition of real estate by inheritance, will, distribution of matrimonial assets, expropriation, or otherwise not by conveyance.

[24] See, eg, Janne Kaisto, Teemu Juutilainen and Joona Kauranen, 'Non-Fungible Tokens, Tokenization, and Ownership' (2024) 54 Computer Law & Security Review 105996, 7.

Even a debtor who is not the person with the latest acquisition may sometimes be regarded as the owner in the context of bankruptcy. Consider, for example, section 22(1) Promissory Notes Act (622/1947), which applies to negotiable promissory notes (and other negotiable documents) and addresses a transferee's position in relation to a transferor's creditors. Under this provision, transfer of a negotiable promissory note is only binding on the transferor's creditors if the transferee has taken possession of the promissory note. This provision is one of the exceptions to the main rule that transfer of possession (or registration of title, where possible) is not needed for a transferee to enjoy protection against the transferor's creditors. The requirement of transfer of possession under section 22(1) would not be satisfied by the parties agreeing that the transferor continues in possession of the promissory note on behalf of the transferee.[25]

The above-mentioned result could be described as follows. A mere transfer (disposition) is not sufficient to end all the legal effects that ownership of an object typically entails. One remaining legal effect is that the object belongs to its owner in the sense that it may also belong to the owner's bankruptcy estate as the owner's property. In connection with transfer of ownership, we must ask what exactly is required for this element of the transferor's legal position to come to an end. For example, as a result of section 22(1) Promissory Notes Act, the object of transfer may still belong to the transferor from the point of view of the transferor's creditors, despite the transfer (disposition). In turn, it is reasonable to interpret chapter 5, section 1(1) Bankruptcy Act to mean that 'the property that the debtor has' includes property whose transfer has not become binding on the transferor's creditors under section 22(1) of the Promissory Notes Act.[26]

Chapter 5, section 1(1) Bankruptcy Act may lead one to think that, in the absence of specific rules to the contrary, an object only belongs to the debtor's bankruptcy estate if the debtor is the person with the latest acquisition. However, another chapter 5 provision may complicate matters, namely, section 6 on third-

[25] As a rule, *constitutum possessorium* does not suffice where transfer of possession is required for protection against creditors under Finnish law. See, eg, Kaisto and Tepora (n 21) 225–26. cf Promissory Notes Act, s 22(2), which contains a special rule for situations where a bank or other monetary institution sells or pledges a negotiable promissory note.

[26] See Kaisto and Tepora (n 21) 256, 582, noting that under s 22(1) Promissory Notes Act, a mere transfer does not end the transferor's 'personal credit competence' (*henkilöluottokompetenssi*). This term originates from a theory on the elements of an owner's legal position, presented by Simo Zitting, a leading figure of the Finnish 'analytic school' of legal scholarship. Zitting distinguished between three main elements, namely, owner's right of possession (meaning exclusive and protected freedom to use the object owned), owner's competence forms (including, eg, capability to transfer ownership and create limited property rights), and owner's dynamic protection (meaning protection against different kinds of third parties in situations involving exchange of patrimonial rights, actual or attempted). While most owner's competence forms refer to active competences in the sense of an owner's capability to achieve an intended result by way of a legal act or transaction, personal credit competence is a passive competence. This means that the object owned can, if need be, be attached to repay the owner's debt and belongs to the owner's bankruptcy estate. In Zitting's view, it is not appropriate to call a transferee the owner before the stage where the object transferred cannot be attached to repay the transferor's debt and does not belong to the transferor's bankruptcy estate, ie, before the transferee is dynamically protected against the transferor's creditors in attachment and bankruptcy proceedings. See Simo Zitting and Martti Rautiala, *Esineoikeuden oppikirja. Yleinen osa* (5th edn, Suomen Lakimiesliiton kustannus 1982) 208–11.

party property. Under chapter 5, section 6, property in the debtor's possession but belonging to a third party, and which can be separated from the debtor's property, does not belong to the bankruptcy estate.

The wording of chapter 5, section 6 is open to interpretation in several respects. To begin with, the concept of possession is broad and not limited to possession of physical objects. This is evident from the following passage of the preparatory works of the Bankruptcy Act:

> The proposed provision is in accordance with the current law and embodies the general principles of property law. If the property of the debtor and of the third party are mixed together, they have lost their individuality [become unidentifiable]. Mixing can occur in various ways. The third party's property may have been merged with [joined to, attached to] the debtor's property, and thus become part of the debtor's property, or the thing in question may be indistinguishable from the debtor's other property of the same type. The question of individuality [identifiability] may be practically relevant especially in terms of monetary assets. If the debtor has not kept the third party's assets on behalf of the third party separately from the debtor's other assets, the assets are generally not separable from the debtor's other assets. In some cases, for example, funds paid by a third party into the debtor's bank account may nevertheless be identifiable.[27]

The passage shows clearly that even funds in a bank account may constitute property in possession of the debtor but not belonging to the debtor's bankruptcy estate, and may be separable from the debtor's property. Additionally, the passage offers background to other noteworthy questions in the provision. Most importantly, should chapter 5, section 6 be interpreted to mean that, if the property in question cannot be separated, then it belongs to the bankruptcy estate? A substantive rule like that may seem surprising, considering that the provision starts with the notion that the property belongs to a third party.

In a closer look at the passage, the examples provided by the drafters turn out to be controversial. The drafters mention first that third-party property may have become part of the debtor's property through merging (joining, attaching). This may be intended as a reference to so-called acquisition by accession, where the owner of a physical object (main object) receives ownership of another object (secondary object) that has been merged with the main object. The exact requirements for acquisition by accession are unclear, but, besides the outright impossibility of separating the secondary object from the main object, expected significant damage to the main object should suffice.[28]

Where an acquisition by accession has occurred, the property so acquired is no longer property belonging to a third party.[29] Then again, the drafters may also have had in mind merging (joining, attaching) in another, less demanding sense. Indeed, merging may cause a secondary object to become a component of or accessory to the main object. As a rule, this relationship between the main object

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[27] Government Proposal 26/2003, 74 (our translation).

[28] Kartio (n 21) 112.

[29] The term 'acquisition by accession' notwithstanding, it is not always apt to say that the owner of the main object has become the owner of the secondary object. This is because, depending on the circumstances, the secondary object may no longer exist in such a form that it could be considered as a possible object of ownership.

and the secondary object entails that the secondary object is treated as part of the main object and 'shares its legal fate'. For example, if the main object belongs to a bankruptcy estate, then so do all objects considered to be its components or accessories.[30]

Here, we can observe some resemblance to the operation of section 22(1) Promissory Notes Act. Those objects that qualify as components or accessories under substantive private law (civil law) 'belong' to the debtor in the bankruptcy context in the sense that they also belong to the debtor's bankruptcy estate. If the operation of section 22(1) Promissory Notes Act defines the scope of the general rule in chapter 5, section 1 Bankruptcy Act, then the same could be true for the operation of the doctrine of components and accessories as well.[31]

The drafters' second example concerns objects 'indistinguishable from the debtor's other property of the same type'. This is more problematic. Like the drafters in the quoted passage, we focus our discussion on money. To begin with, if the debtor has not kept certain monetary assets separate from their own monetary assets, then a significant risk exists that all those assets are regarded as belonging to the debtor (the holder of the assets). For example, the Finnish Supreme Court stated in judgment KKO 2021:36 that under property law rules the immediate legal effect from commingling of account-based assets is that the assets transferred belong to the account holder, as the account holder's property.[32] More generally, Supreme Court case law suggests that the same starting point applies to funds in a bank account, other account-based assets, and physical cash. Accordingly, if assets belonging to a third party commingle with assets of an account holder or possessor of similar assets, then the (initially) third-party assets belong to the account holder or possessor. In other words, the account holder or possessor becomes the sole owner of the commingled whole at the time of commingling.[33]

The Supreme Court seems to have ignored the possibility that the commingled whole could be co-owned by the account holder or possessor together with the third party. The same can be said of the preparatory works of chapter 5, section 6 Bankruptcy Act, where only monetary assets are discussed in this connection. Of course, commingling may also occur with respect to

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30 See c 4, s 8 Enforcement Code (705/2007), under which attachment of a thing extends to its components and accessories.

31 cf Government Proposal 26/2003, 75, noting that a bankruptcy estate naturally does not have to hand over property to a third party if, eg, the third party, as transferee of the property in question, cannot invoke the transfer because they have not taken possession of the property before the beginning of the bankruptcy although the applicable provisions on a transferee's protection against the transferor's creditors require taking possession. While this forms part of the preparatory works of c 5, s 6 Bankruptcy Act, it is probably not meant as the drafters' statement that, eg, the situations meant in s 22(1) Promissory Notes Act should be systematised as involving property belonging to someone other than the debtor, but inseparable from the debtor's property, ie, be systematised as a situation meant in c 5, s 6.

32 Para 21 of the judgment. Here, 'account holder' refers to the holder of the account to which assets are transferred and in which commingling occurs as a result. See also KKO 2020:51 and KKO 2022:46, cf KKO 2020:64.

33 For more detailed discussion, see Teemu Juutilainen and Janne Kaisto, 'Co-ownership as a Solution to Commingling: A Finnish Perspective' (2024) 32 European Review of Private Law 109, 124–29, also pointing out that the case law is not entirely clear.

objects such as oil or identical footballs. In these cases, co-ownership of the commingled whole seems to offer a reasonable solution. As is usual in contemporary legal systems, co-ownership is an institution of Finnish private law, too.[34] In Finnish legal literature, commingling has traditionally been regarded as giving rise to co-ownership, at least under certain conditions.[35]

The drafters of chapter 5, section 6 Bankruptcy Act may also have considered situations where it is virtually impossible to locate monetary assets originating from a third party. For example, in the case of cash it may be very difficult to know with reasonable certainty that given notes and coins, found in a specific safe or other place, are actually the notes and coins that in principle belong to a third party. Moreover, the notes and coins may have commingled with other notes and coins. Even without such factual commingling, the third party may suffer loss due to practical reasons. We will return to this type of problem when discussing the Securities Accounts Act in section 4 below.

To sum up, property belonging to a bankruptcy estate is determined by substantive private law, which also includes special rules that are beneficial to creditors. In the context of insolvency, the owner is not invariably the person with the latest acquisition. Under chapter 5, section 6 Bankruptcy Act, property in the debtor's possession but belonging to a third party, and which can be separated from the debtor's property, does not belong to the bankruptcy estate. Based on the wording of the provision, it seems possible to argue that the property in question belongs to the bankruptcy estate if it cannot be separated from the debtor's property. From the perspective of substantive rules, though, grounds may exist to argue that in these situations the debtor is the owner, at least in the context of insolvency. Where that argument holds true, the situation does not involve property belonging to a third party required for application of chapter 5, section 6 Bankruptcy Act.

2.3 Significance and Interpretation of 'Held on Behalf of Account Holders'

Section 11(1) Securities Accounts Act provides a seemingly straightforward rule: securities held by the custodian on behalf of its account holders do not belong to the custodian's bankruptcy estate. But how should this condition of 'held on behalf of account holders' be understood?

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[34] See, eg, the Co-ownership Act (180/1958). Under s 1(1), the Act applies when two or more people together own, in shares, real estate, a movable object or other goods. Under s 1(2), the Act also partly applies to certain rights based on securities.

[35] See, eg, Julian Serlachius, *Sakrätten enligt gällande finsk rätt* (3rd edn, Söderström & C:o Förlagsaktiebolag 1916) 169; Ilmari Caselius, *Sopimukseen perustuvat irroittamisoikeudet. Varallisuusoikeudellinen tutkimus Suomen voimassaolevan oikeuden mukaan* (Ilmari Caselius 1934) 330–32; RA Wrede and Ilmari Caselius, *Esineoikeuden pääpiirteet Suomen oikeuden mukaan I* (2nd edn, Söderström & C:o 1946) 234. In today's perspective, commingling should result in co-ownership at least in cases where commingling has occurred in the hands of a third party. See Juutilainen and Kaisto (n 33) 115, 125–26, with further references. In the older literature, Yrjö J Hakulinen regarded possession of commingled objects jointly by the original owners or by a third party as a decisive factor for co-ownership. See YJ Hakulinen, *Perusteettoman edun palautus. Siviilioikeudellinen tutkimus* (YJ Hakulinen 1931) 280–81.

The notion of acting on behalf of another person is generally known in Finnish law. For example, 'indirect representation' is defined as a form of representation where the representative acts in their own name, but on behalf of the principal.[36] Consider a situation where person A wishes to buy a bicycle of a certain kind. To that end, A authorises person B to buy the kind of bicycle A wants, but to do so in B's own name. Let us presume that B buys a bicycle with the intention that the bicycle belongs to A, possibly paying the purchase price with funds received from A before the purchase. Even if the seller transfers ownership to B, under the rules of indirect representation it is A who becomes the owner.[37]

The rules on indirect representation are of interest here, too, because a custodian in the meaning of the Securities Accounts Act may also be tasked with acquiring securities on behalf of its clients, acting in its own name. If the securities in question appear as a physical document, they may fall within the scope of section 22 Promissory Notes Act.[38] Where section 22(1) applies, it is not entirely clear whether the principal is protected against the representative's creditors without transfer of possession under the general rules. The clearest case for an affirmative answer is where the purchase is paid for with funds received from the principal so that the object purchased can be regarded as a surrogate for those funds.[39] Yet the surrogate doctrine does not seem necessary to arrive at an affirmative answer. As a general proposition, indirect representation should result in protection against the representative's creditors without transfer of possession, in spite of section 22(1).

Where section 11 Securities Accounts Act applies, the custodian's intention seems to be an important factor in considering whether securities are being held on behalf of account holders, that is, the custodian's clients. Before any conclusions, though, we need a closer look at the legal requirements a custodian must fulfil in holding securities. As already noted in section 2.1 above, under section 10(1) of the Act, a custodian must ensure that it continuously holds the securities corresponding to the entries in the securities accounts, but the exact requirements depend on agreements with the account holders. Section 10(1) also requires that, before making an entry in a securities account indicating the type and quantity of securities held on behalf of the account holder, the custodian must hold those securities. Additionally, under section 10(2), securities are subject to provisions (elsewhere in legislation) on the custody and other handling

[36] Kaisto and Tepora (n 21) 551–53. See Ilkka Harju, 'Komissiokaupan laintasoinen siviilioikeudellinen sääntelytarve arvopaperimarkkinoilla' [2016] (3) Liikejuridiikka 60, 62–63, 76. Another question is whether it is reasonable to speak of representation if a person acts in their own name. Some authors have considered indirect representation as not strictly speaking constituting representation.

[37] See, eg, Kaisto and Tepora (n 21) 560–63. The representative does not have to transfer ownership to the principal because the representative is not regarded as the owner of the object, which already belongs to the principal.

[38] It should be noted that the significance of s 22 Promissory Notes Act is not limited to negotiable promissory notes. It applies, eg, to physical share certificates and certain related documents on the basis of special provisions in c 3, s 13 Limited Liability Companies Act (624/2006).

[39] Kaisto and Tepora (n 21) 562.

of client assets, while the same applies to other assets held by the custodian on behalf of account holders.

In practice, the most important provisions to which section 10(2) Securities Accounts Act refers are in chapter 9 Investment Services Act, which is also mentioned in the preparatory works of section 10(2).[40] Under chapter 9, section 1(1) Investment Services Act, an investment firm must arrange custody and handling of financial instruments and monetary assets of a client entrusted to the investment firm (client assets) in a reliable manner. Under chapter 9, section 1(2), in the custody and handling of client assets an investment firm must especially ensure that the assets of the investment firm are kept clearly separate from client assets. In addition, with the exception of credit institutions, an investment firm must prevent use of client assets on the investment firm's own account. Chapter 9, section 1(3) requires an investment firm to keep reliable records of client assets so that the client assets of each client are sufficiently distinguished from other clients' assets.

Although a service provider must keep its own assets separate from assets belonging to clients under chapter 9, section 1(2) Investment Services Act, joint custody of assets belonging to different clients is not prohibited. Under section 11 Securities Accounts Act, it is clear that account holders may be protected even if the securities held on their behalf are not kept separate from each other. For example, book entries in the Finnish book-entry system may be held in a custodial nominee account. Section 5a(2) Book-Entry Accounts Act states explicitly that it is allowed to record book entries held on behalf of one or more clients in a custodial nominee account.

Typically, a custodian intends to hold certain securities on behalf of a specific client, a group of specific clients, or clients in general. Taken literally, any of these intentions could suffice to exclude securities from the custodian's bankruptcy estate under section 11(1) Securities Accounts Act. A separate question is what happens to securities that do not belong to the bankruptcy estate. This is addressed in section 11(2), which starts with the notion that account holders are entitled to securities held on their behalf, as provided in chapter 5, section 6 Bankruptcy Act. If the number of securities held jointly on behalf of account holders is not sufficient to cover all those entitlements, then the securities of each type are distributed among the account holders in proportion to their entitlements to the securities of that type.[41] In other words, section 11(2) prescribes securities type-specific distribution of losses among the account holders.[42]

Securities held on behalf of a client should correspond to the entries made in that client's securities account. Yet this is not necessary for the protection provided in section 11 Securities Accounts Act. According to the preparatory works of section 11, 'account holder' means all the custodian's clients on whose behalf the custodian holds securities and would hence at least be obliged to keep securities accounts and to make appropriate entries in them. The preparatory works emphasise that the custodian's omissions or errors in keeping securities

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[40] Government Proposal 32/2012, 264.

[41] If necessary for carrying out the distribution, the securities must be converted into money and the money be distributed to the account holders instead of the securities.

[42] Government Proposal 32/2012, 266.

accounts, which may be random from the client's point of view, should not be given decisive legal significance in terms of client protection on the custodian's insolvency.[43]

These statements in the preparatory works could provide grounds for the interpretation that each client entitled to securities is entitled to securities held on behalf of clients. However, this seems somewhat problematic. To illustrate, consider a custodian with clients A, B and C. Based on agreement with A, the custodian holds securities of type X on behalf of A in a specific account meant only for A. The custodian also holds securities of the same type on behalf of B and C in a joint account meant only for B and C. Next, an employee of the custodian, acting without authorisation, sells the securities in the account kept for A and takes the proceeds. Soon afterwards, the custodian goes bankrupt. It appears reasonable to argue that no securities are now held on behalf of A, meaning that only B and C are entitled to the securities in the account kept for B and C.

The scenario gets more problematic if the second account is meant for the custodian's clients in general, not only for B and C. Based on the preparatory works, it looks like A could be entitled to the securities in that account.[44]

As a general principle, clients seem to be entitled to the protection provided in section 11 Securities Accounts Act even if the custodian is not following all the applicable rules and principles. This is true even for the requirement to keep securities belonging to the custodian separate from securities held on behalf of clients. The preparatory works state that even if this requirement of segregation is neglected, the custodian's own securities and securities belonging to clients can be separated from each other. This would be the case, for example, if the custodian's own securities and securities belonging to clients are held in the same custodial nominee account. So, commingling in this sense would not result in the account holders losing their entitlement to the securities belonging to them.[45]

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[43] ibid 264.

[44] Government Proposal 32/2012, 266, explains as follows. The securities type-specific distribution of losses applies where securities are held jointly on behalf of all clients of the custodian or a certain group of clients of the custodian. Here, 'held jointly' (or 'held in joint custody') refers to securities with respect to which no distinction has been drawn as to on whose behalf among those account holders the securities are held. These securities may be held in one or several custodial nominee accounts or similar accounts. In contrast, in the case of segregated custody, where certain securities are held on behalf of an identified account holder, that account holder alone is entitled to those securities on the custodian's insolvency. This is the case at least if the securities are kept clearly separate from securities held on behalf of the other account holders and the circumstances sufficiently show that the securities are held on behalf of the account holder in question. If certain securities are indistinguishable from securities held on behalf of other account holders and the quantity of the securities is insufficient to satisfy all account holders, then even an account holder who has agreed on segregated custody with the custodian may only be entitled to participate in distribution of losses in the same way as the other account holders. – In the first scenario presented in the main text, the securities held on behalf of B and C are in segregated custody, whereas in the second example they are held in joint custody.

[45] Government Proposal 32/2012, 265.

Where securities are held illegally in a custodial nominee account under section 5a Book-Entry Accounts Act,[46] this probably does not exclude application of section 11 Securities Accounts Act, provided that the securities are held on behalf of clients.[47] Similarly, clients should not suffer loss where the custodian uses an account not defined as a custodial nominee account. What matters is that the securities are held on behalf of clients in the sense of section 11 Securities Accounts Act.[48]

If we read section 11 in isolation, it seems as though securities held by a custodian do not belong to the custodian's bankruptcy estate only insofar as they are held on behalf of clients. However, this can be questioned in some cases. For example, consider a situation where a custodian sells negotiable promissory notes or other objects within the scope of section 22 Promissory Notes Act and remains in possession of the objects (documents) on behalf of the buyer. As discussed in section 2.2 above, this kind of transfer is not binding on the transferor's creditors under the main rule in section 22(1), since the transferee has not taken possession of the transferred objects. As a result, the transferred objects belong to the transferor's bankruptcy estate. However, what we have not yet discussed is the exception to the main rule in section 22(2). This provides that if a bank or other monetary institution sells or pledges a negotiable promissory note, then that sale or pledge is binding on the monetary institution's creditors even if the negotiable promissory note remains in the monetary institution for custody (safekeeping).

If the custodian in the example is a bank or other monetary institution, then section 22(1) Promissory Notes Act is not an issue because it does not apply to the situation. Yet grounds may exist to interpret section 11 Securities Accounts Act as also covering situations where the securities originate from the custodian. In that case, section 11 takes precedence over section 22(1) Promissory Notes Act, leading to a result favourable to the buyer.[49]

In sum, clients are effectively protected under section 11 Securities Accounts Act as far as securities 'held on behalf of account holders' are concerned. Then again, the Securities Accounts Act does not exclude application of certain provisions that exist for creditor protection, such as those in the Recovery of Assets to the Bankruptcy Estate Act (758/1991). This Act may be relevant, say, where a custodian notices a deficit of securities that the custodian is supposed to hold on behalf of clients. The preparatory works of section 10 Securities Accounts Act explicitly state that this kind of deficit must be filled immediately by acquiring the securities needed.[50] Whether the custodian buys those securities from an outsider or uses its own securities to fill the deficit, the custodian's actions may constitute a payment in the meaning of section 10 Recovery of

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[46] See s 2.1 above.

[47] See Government Proposal 32/2012, 251.

[48] The preparatory works of section 11 address the issue where securities are held in accounts and it is unclear whether these are held for the clients or the custodian. Regardless of the answer, clients may be protected. Yet, the preparatory works do not specifically consider custodial nominee accounts under the Finnish book-entry system in this particular connection. See Government Proposal 32/2012, 265.

[49] See Government Proposal 32/2012, 251.

[50] ibid 264.

Assets to the Bankruptcy Estate Act.[51] At least in theory, this entails a risk that the deficit-filler securities are recovered to the custodian's bankruptcy estate.[52]

2.4 Do the Securities Belong to the Account Holders?

Under section 11(1) Securities Accounts Act, securities held by a custodian on behalf of its account holders do not belong to the custodian's bankruptcy estate. In turn, under section 11(2) the account holders are entitled to those securities as provided in chapter 5, section 6 Bankruptcy Act. These provisions seem to provide good grounds for arguing that securities belong to account holders, at least when considering the context of insolvency. After all, chapter 5, section 6 Bankruptcy Act addresses property belonging to someone other than the debtor.

That said, counter-arguments can still be presented. To begin with, the legal position of an account holder falls short of what is typical of ownership. Under section 4(1) Securities Accounts Act, an account holder has the right to: (1) receive payments (or other performance) based on the securities recorded in the account and exercise other rights based on those securities, (2) dispose of their right by way of transfer and by creating in it rights of pledge and other rights, (3) change the custodian or get the securities recorded in the account placed under their own control. In turn, section 5(1) Securities Accounts Act declares that the rights in the meaning of section 4(1) are rights against the custodian. The scope of the Act in the context of multi-tiered custody ('holding chain') is clear. For, under section 5(1), in indirect custody of securities, where the custodian has similar or corresponding rights against another custodian, the account holder only has rights against the account holder's own custodian.[53]

The above-mentioned provisions seem to be aimed at limiting clients' rights in terms of the securities held on their behalf. Let us approach the matter through an example to avoid hasty generalisations. Consider a situation where person A tasks person B with acquiring 10,000 securities of a certain type from a third party. The arrangement is made on terms that B holds the securities in a specific CSD account in B's own name, and that account must only be used for holding securities belonging to A. It is specifically emphasised that the securities in the account belong to A after the acquisition, while B must in all respects treat the securities as A's property, meaning that B is not allowed to dispose of the securities in any way. B makes the acquisition, but thereafter decides to sell the securities in the account to person C and appropriates the funds received from C as the purchase price. The sale occurs in such circumstances that C is aware of the arrangement between A and B, as well as of B's plan.

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[51] Although s 10 primarily concerns payment of ordinary monetary debts, it has been interpreted as covering a broad variety of payment arrangements. See Jarmo Tuomisto, *Takaisinsaanti* (4th edn, Alma Talent 2021) 163–94.

[52] Under s 10, payment of a debt later than three months before the cut-off date (date of bankruptcy petition, see s 2) is cancelled if the debt was paid by unusual means of payment or prematurely or in an amount that must be considered significant in relation to the assets of the estate. However, payment is not cancelled if it can be considered ordinary in view of the circumstances. If the payment was made to a person close to the debtor at least three months but later than two years before the cut-off date, the payment is cancelled accordingly, unless it is shown that the debtor was not insolvent and did not become insolvent due to the payment.

[53] See Government Proposal 32/2012, 259.

If we disregard the Securities Accounts Act for the sake of argument, A probably has rights against C. The securities in the example are book entries in the Finnish book-entry system, but the same would apply if they were physical documents.[54] Where the Securities Accounts Act applies, it seems, at least at first sight, that the outcome is different. The Act contains no provisions on transferring securities in custody without the legal competence to do so, while sections 4 and 5 may lead one to think that this lack of competence is an impossibility, since the custodian always has the competence to effect transfers. The preparatory works lend some support to this way of thinking.[55]

Alternatively, it could be argued that the custodian may lack the legal competence to transfer securities in custody, and that this may affect the transferee's legal position. Most importantly, under section 10(1) Securities Accounts Act, a custodian must ensure that it continuously holds the securities corresponding to the entries in the securities accounts. Now, if a buyer knows that a sale will result in a deficit of securities that the custodian is supposed to hold on behalf of its clients, it could be argued that this must be relevant when considering the legal positions of the clients and the buyer. In that light, it may seem questionable to limit a client's rights to those against the custodian, while no such limitation applies outside the scope of the Securities Accounts Act.

All in all, the law is currently unclear on this point. It should also be noted that it is not clear whether the Securities Accounts Act applies to the situation in the example above. As the discussion in section 2.1 above shows, this is not always easy to determine. While the securities in the example are not initially identified in the agreement between A and B so as to distinguish them from other securities of the same type, it is clear after the acquisition that the securities in B's account are intended to be owned by A. Even so, also considering the preparatory works, it seems reasonable to assume that the custody arrangement in the example falls within the scope of the Securities Accounts Act.[56] If this entails weaker protection against 'transfers in the lack of competence' as compared to that under the general rules of property law, we can ask whether that outcome was understood and sufficiently considered in drafting and enactment of the Act.

Let us return to insolvency. The wording of section 11(1) Securities Accounts Act does not exclude the possibility that the securities belong to the custodian. Section 11(1) only provides that securities held by the custodian on behalf of its account holders do not belong to the custodian's bankruptcy estate. In itself, the

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[54] This view is based on s 27 Book-Entry Accounts Act in the case of book entries and on s 14 Promissory Notes Act in the case of physical documents. Both provisions address situations where the transferor lacks the legal competence to transfer the object. Such transfers can be effective only if the transferee neither knew nor ought to have known of the lack of competence. In other words, the provisions require the transferee's well-founded good faith. If these provisions do not apply to A's benefit, then A might still be protected by certain general doctrines, such as that against collusive transactions. See, eg, Kartio (n 21) 57–58.

[55] See, eg, Government Proposal 32/2012, 257, noting that an account holder's right with respect to securities (account right) means a legal position somewhat different from traditional ownership or a directly comparable legal position. This right is explained as not a right with respect to an individual thing or a comparable object, and as a right only enforceable against the account holder's own custodian.

[56] ibid 253–54.

provision might be understood as an exception to the general starting point that property belonging to the debtor belongs to the debtor's bankruptcy estate. Similarly, the reference to chapter 5, section 6 Bankruptcy Act in section 11(2) Securities Accounts Act might be understood as not directly declaring that clients should be regarded as the owners of securities. Classifying the custodian as the owner is not our solution, though.

While not the only option, it seems reasonable to classify the account holders as owners of the securities, at least in the context of insolvency. This solution is the easiest to reconcile with chapter 5 Bankruptcy Act. To be sure, the issue is mainly theoretical. Whichever the classification, each individual legal question must be studied separately without attempting to deduce answers from the classification itself. For example, if a client goes bankrupt, what belongs to the client's bankruptcy estate is not securities held on the client's behalf, but the client's legal position under section 4 Securities Accounts Act, that is, the account right.[57]

The classification adopted here is not necessarily in contradiction with the preparatory works of the Securities Accounts Act. In the preparatory works for section 11, the drafters speak several times of securities belonging to account holders,[58] but on the whole they seem to have refrained from taking a strong position on the matter. Still, some clear starting points can be observed. For example, as regards joint custody of securities on behalf of different account holders, it is stated that the Co-ownership Act (180/1958) does not apply to the rights of the account holders.[59]

Importantly, the drafters simply state that the Co-ownership Act does not apply. It is yet another question whether the account holders should be theoretically classified as co-owners. For comparison, the German Safe Custody Act (or 'Securities Deposit Act') explicitly relies on the notion of co-ownership.[60] However, this solution has been criticised for uncertainties resulting from the traditional German co-ownership concept.[61]

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[57] ibid 259. The question of classification discussed here is not the same exercise as characterising the account right. See, eg, Heikki Marjosola, 'Suomen yleisen arvopaperioikeuden modernisointi – arvopaperitililain kynnyksellä' [2012] Lakimies 303, 322–26, describing the account right as a right resembling a property right, with elements from the law of obligations and features typical of fiduciary law.

[58] Government Proposal 32/2012, 265. cf ibid 257, where the account holder's legal position with respect to securities is distinguished from traditional ownership or a directly comparable legal position.

[59] ibid 251.

[60] Gesetz über die Verwahrung und Anschaffung von Wertpapieren (Depotgesetz – DepotG), Ausfertigungsdatum: 04.02.1937. See, in particular, ss 6, 8 and 9c.

[61] See, eg, Ulrich Segna, 'The Geneva Securities Convention, the Future European Legislation, and Their Impact on German Law' in Pierre-Henri Conac, Ulrich Segna and Luc Thévenoz (eds), *Intermediated Securities: The Impact of the Geneva Securities Convention and the Future European Legislation* (CUP 2013) 254–56. More generally on co-ownership as a model of holding intermediated securities, see Victoria Dixon, 'The Legal Nature of Intermediated Securities: An Insurmountable Obstacle to Legal Certainty?' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 56–57, 67–69.

If account holders are regarded as owners of securities in joint custody, it follows that they must be thought to own securities either individually or together. For a practical example, consider a custodial nominee account in the meaning of section 5a Book-Entry Accounts Act. As stated in chapter 4, section 1(1) Book-Entry System and Settlement Activities Act, book entries are not numbered. Hence, say, 10,000 Nokia shares in a book-entry account are indistinguishable from each other. Consider further a situation where an account held on behalf of persons A and B contains 10,000 shares, so that each of them is entitled to 5,000 shares. Is it plausible to think that A owns 5,000 of the shares and B owns 5,000 shares as well?

The alternative way of thinking is that A and B together own the entirety of 10,000 shares in the account, and each of them receives 5,000 shares when their co-ownership is ended by dividing the entirety. Since the shares in the account are indistinguishable from each other, this seems like a plausible theoretical starting point. The same starting point is also suitable for systematising the rule in section 11(2) Securities Accounts Act, which addresses the situation of insufficient securities. If an account contains 8,000 Nokia shares, then A and B, each of whom is entitled to 5,000 shares, own the 8,000 shares in a ratio of 1:1, meaning that each receives 4,000 shares when their co-ownership is ended.

3 Substantive Insolvency Rules on Money

3.1 Significance of the Securities Accounts Act

The concept of security in the Securities Accounts Act does not cover money, at least not in the sense of notes and coins (cash) constituting legal tender, or funds in a bank account. As explained in section 2.1 above, the Act applies, besides to securities in the strict sense, to other financial instruments in the meaning of chapter 1, section 14 Investment Services Act. Yet money does not constitute a financial instrument. Under Article 4(1)(44) MiFID II, 'transferable securities' means classes of securities negotiable on the capital market, 'with the exception of instruments of payment'.

The Securities Accounts Act contains no specific provisions on monetary assets. However, their existence is acknowledged in section 10(2), under which securities as well as other funds held by a custodian on behalf of account holders are subject to provisions (elsewhere in legislation) on the custody and other handling of client assets.

The provisions on the custodian's bankruptcy and other insolvency situations in section 11 Securities Accounts Act clearly do not apply to monetary assets (apart from the provision on converting securities into money, where necessary for distribution).[62] Any solutions for the insolvency protection of clients in terms of money must be based on other legal sources. That said, the provisions of the Securities Accounts Act may prove relevant where other provisions are applicable and leave room for interpretation. For money factually resembles securities in many respects, in terms of insolvent intermediaries. In addition, the custodian's obligations with respect to money may be practically the same as

[62] On these provisions, see s 2.3 above.

with respect to securities as objects of custody. For example, chapter 9, section 1 Investment Services Act covers both financial instruments and monetary assets, termed together as 'client assets'.

3.2 Rules on Money in Comparison with Rules on Securities

Under chapter 5, section 6 Bankruptcy Act, property in the debtor's possession but belonging to a third party, and which can be separated from the debtor's property, does not belong to the bankruptcy estate. As discussed in section 2.2 above, the provision covers monetary assets, among other things. As regards client assets in the shape of funds in a bank account, a business can keep them in a special account meant for one or more specific clients, or in a general account meant for all clients. Of course, any rules specific to the type of business concerned on the handling of client assets must be followed. Legislation usually only prohibits mixing assets belonging to the business with client assets, while keeping assets belonging to several clients in one and the same bank account may be permitted.[63]

It is common for businesses to agree with a bank that an account opened for the business is used as an account for client assets. However, it is also possible that a business uses an account for holding client assets without agreeing to that effect or even informing the bank, which may in some situations mean a failure to comply with an obligation set by law.[64] Where securities are concerned, our view is that the securities may belong to the client even if the upper-tier custodian (the custodian's custodian) is unaware of the purpose of the account or presumes the securities to belong to the custodian. We see good reasons for arguing the same with respect to monetary assets the custodian holds, and that is probably applicable as a general rule.[65]

It is often practically convenient to keep one and the same bank account for several clients. Therefore, businesses tend to prefer joint accounts. It is beyond doubt that clients may be protected against the business' creditors even if the clients' assets are held in a joint account. In this respect, the rule in Finland is the same as in Sweden, where the Funds Accounting Act directly addresses the issue.[66]

Under the third paragraph of the Funds Accounting Act, principals whose funds are kept in a bank account meant for the funds of several principals are protected against the creditors of the person keeping the funds, provided that the arrangement falls within the scope of the Act. The third paragraph has been described in Swedish legal literature as a rule on co-ownership, meaning that the

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[63] See, eg, Janne Kaisto and Eelis Paukku, 'Virtuaalivaluutat, niihin liittyvät palvelut ja asiakasvarojen säilyttäminen' [2022] (3) Liikejuridiikka 8, 9–10; Juutilainen and Kaisto (n 33) 129. Suffice it to refer to attorneys-at-law (advocates) as an example. Under s 5(3) Advocates Act (496/1958), an advocate must keep monetary and other assets belonging to clients separate from the advocate's own assets. The Finnish Bar Association guidelines allow keeping monetary assets belonging to clients in a general account for clients, but, as a rule, only for a short time, and require a separate designated account for a client in certain circumstances. Guideline B 06.1, 5 June 2009, last amended 9 June 2023.

[64] See Kaisto and Paukku (n 63) 19.

[65] See ibid.

[66] Lag (1944:181) om redovisningsmedel.

funds are co-owned by the principals.[67] Similarly, it seems plausible in Finland to start with the notion that the assets in a client account are co-owned by the clients, at least in the context of the business' insolvency.

Establishing the amount of money each client is entitled to requires, or is at least greatly facilitated by, adequate internal bookkeeping by the business. The same is true for locating monetary assets held on behalf of each client, where several accounts are involved. Legislation on specific types of business often addresses these issues by setting obligations to manage clients' affairs in such a way that unclear situations are avoided.[68]

Although internal bookkeeping by a business is important in practice and often also a legal obligation, the insolvency protection of clients does not necessarily depend on it. For example, consider a situation where client A transfers 10,000 euros to a client account of business B, having first agreed with B that B buys securities on behalf of A and pays the purchase price with money in the client account. B keeps a separate register of clients and their monetary assets, but goes bankrupt before making any entries in the register. Notwithstanding this omission, A is without doubt protected against B's creditors similarly to B's other clients. This result is in line with our findings with respect to securities in section 2.3 above. Generally speaking, treatment of monetary assets is unlikely to differ much from treatment of securities as far as the significance of internal bookkeeping under substantive rules is concerned.

As stated in section 2.3 above, clients may be entitled to securities even if securities owned by the custodian have commingled with securities held on behalf of investors. However, the same does not seem to apply to money. We argued in section 2.2 above, based on Finnish Supreme Court case law, that if the debtor has not kept certain monetary assets separate from their own assets, then a significant risk exists that all those assets are regarded as belonging to the debtor (the holder of the assets). Accordingly, if funds belonging to a business commingle with funds belonging to clients, the business may become the sole owner of the commingled whole of funds.

The above-mentioned risk regarding money is present at least in situations where a business has not informed the bank that the account is to be used as a client account, including where the business is a custodian holding both securities and money on behalf of its clients. It follows from section 11 Securities Accounts Act that the risk does not concern securities. While this inconsistent treatment of money on the one hand and securities on the other is problematic, it would be difficult to argue that the general rule on money – that based on

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[67] See, eg, Göran Millqvist, *Sakrättens grunder. En lärobok i sakrättens grundläggande frågeställningar avseende lös egendom* (9th edn, Norstedts Juridik 2021) 142. In Swedish legal literature, it is common to discuss the Funds Accounting Act rather straightforwardly from the perspective of the 'right to separate', which is also true more generally of the Swedish approach to insolvency situations. Still, the right to separate may have been thought to be primarily based on ownership. See, eg, Gösta Walin, *Separationsrätt* (P A Norstedt & Söners förlag 1975) 139. See also Torgny Håstad, *Sakrätt avseende lös egendom* (6th edn, Norstedts Juridik 2000) 144–77; Stefan Lindskog, 'Redovisningsmedel, sakrättslig identitet och några straffrättsliga randanmärkningar' in Lars Heuman, Madeleine Leijonhufvud and Annika Norée (eds), *Festskrift till Suzanne Wennberg* (Norstedts Juridik 2009).

[68] See, eg, c 9, s 1 Investment Services Act (747/2012); s 13 Bondholder Representatives Act (574/2017); s 59(1) Insurance Distribution Act (234/2018).

Finnish Supreme Court case law – should not apply in connection with securities accounts. After all, section 11 Securities Accounts Act does not apply to monetary assets. Another question is whether the general rule could be subject to some 'general' exceptions. For example, should commingled assets be regarded as belonging to the holder of the bank account (here, the custodian) with no regard whatsoever to the absolute value of the commingled assets, or the ratio of the values at the time of commingling?[69]

The presence of risk regarding money may be questioned in situations where the bank has designated the account as a client account, or has at least been informed of the intention to use it as a client account. No legislation directly addresses this situation, but it cannot be excluded that the Supreme Court could give some significance to the nature of the account. Then again, one may wonder why the 'naming' of an account should be that important. If the custodian is entitled to use the account similarly regardless of what the bank knows about the purpose of the account, then it could be argued that in the case of commingling all assets in the account belong to the custodian.[70]

It is difficult to predict future judgments of the Supreme Court, especially since its current path may lead to problematic outcomes in connection with securities accounts and investing in general. Consider a custodian holding monetary assets of one thousand clients in one account. Accidentally 1,000,000 euros belonging to the custodian commingle with 2,000,000 euros belonging to the clients. Before the commingling took place, the clients were co-owners of the 2,000,000 euros, and these were the only funds in the account. Based on the Supreme Court case law discussed above, the commingling may result in the custodian becoming sole owner of the 3,000,000 euros in the account. It is debatable whether the 'naming' of the account as a client account matters. If it does matter, it could be argued that the 3,000,000 euros are co-owned by the custodian and the clients.

Let us assume that it does not matter and that the 3,000,000 euros now belong to the custodian as the bank account holder. At first sight, this problem may seem easy to fix. Having noticed what has happened, the custodian could simply withdraw 1,000,000 euros from the account. However, we must keep in mind that the custodian became the sole owner of the commingled whole of funds as a result of the commingling. Therefore, the 1,000,000 euro withdrawal would not as such mean that the remaining 2,000,000 euros belong to the clients.

If the custodian wants to ensure that the clients are protected on the basis of ownership, the custodian should transfer funds to each individual client's own bank account.[71] That is not a practical solution for several reasons, including the large number of clients. Yet current Finnish legislation does not seem to offer a more workable solution. In contrast, in Sweden, the Funds Accounting Act enables correcting the consequences of commingling within its scope of application.

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[69] See, eg, Risto Koulu, 'Tilimaksun saajan suojasta' (1991) XXVI Oikeustiede–Jurisprudentia 197, 242; Juutilainen and Kaisto (n 33) 128–29.

[70] See Kaisto and Paukku (n 63) 19.

[71] On the effectiveness of a payment against the payer's creditors and other third parties, see s 81 Payment Services Act (290/2010).

In essence, the Funds Accounting Act can be explained as containing provisions on the conditions under which a principal enjoys a 'right to separate' with respect to funds held on the principal's behalf by an intermediary who has an obligation to account for those funds. A right to separate protects the principal with respect to the funds against the intermediary's creditors. The first paragraph of the Act requires that the funds are set aside by the intermediary, for example in a separate bank account, and that this setting aside has occurred without delay. Setting aside can also have occurred later, provided that the intermediary was not insolvent at that time. The Act's requirements of setting aside the funds as a condition for a right to separate mean that the Act enables dealing with commingling. The second paragraph of the Act further relaxes the conditions, requiring only that the intermediary had the funds immediately available for setting aside and that setting aside was not delayed.[72] The third and final paragraph, on situations involving several principals, was briefly discussed above.

If the Swedish Funds Accounting Act was applicable, the custodian (intermediary) of our example could arrange the clients' (principals') insolvency protection without transferring funds to bank accounts controlled by individual clients.[73] Indeed, a client account in the custodian's name on behalf of the clients would suffice. The Finnish legal framework is different.[74] To start with cash, it would not suffice for insolvency protection that an intermediary sets aside certain notes and coins that the intermediary owns and possesses, with the intention that those notes and coins now belong to the intermediary's principal. Even if the intermediary informs the principal of the setting aside of notes and coins and of the purpose to make the principal the owner, the principal is not protected against the intermediary's creditors. This is because section 22(1) Promissory Notes Act applies to cash by way of analogy. For protection against the intermediary's creditors, the principal must take possession of the notes and coins.[75]

Similarly, if the holder of a bank account realises that funds in the account should belong to another person, and decides that from now on they belong to that person, the person is probably not protected against the account holder's creditors merely based on the account holder's intention. However, as regards securities, the outcome could be different, for it is possible that after the decision the securities are held on behalf of a client in the meaning of the Securities Accounts Act. As discussed in section 2.3 above, under section 11 Securities Accounts Act, the securities do not belong to the custodian's bankruptcy estate,

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[72] As such, the text of the Act is rather impenetrable and difficult to translate accurately. For introductions to the provisions and relevant case law, see, eg, Axel Adlercreutz and Patrik Lindskoug, *Finansieringsformers rättsliga reglering* (6th edn, Studentlitteratur 2020) 94–97; Millqvist (n 67) 132–42.

[73] The Act does not address situations where the funds are in an account controlled by the principal. See Walin (n 67) 110.

[74] In our view, outcomes similar to those of the Funds Accounting Act are unachievable under Finnish law in the absence of special legislation. Even so, it cannot be excluded that the Finnish Supreme Court could end up developing solutions that somehow resemble them.

[75] See, eg, Kaisto and Tepora (n 21) 369.

while the account holders (clients) are entitled to the securities, as provided in chapter 5, section 6 Bankruptcy Act.

In terms of factual outcomes, section 11 Securities Accounts Act resembles the Swedish Funds Accounting Act. As for differences, an obvious one is that section 11 does not apply to money. But that is not all. Importantly, section 11 only requires that the securities are held on behalf of account holders, whereas the Funds Accounting Act sets several conditions, often specified in case law.[76]

Returning to the issue of commingling, the legal treatment of money could be better aligned with that of securities under the Securities Accounts Act. As explained in section 2.3 above, the preparatory works of section 11 of the Act make it clear that clients may be protected even if the custodian has not kept securities belonging to the custodian separate from securities held on behalf of clients. This rule could be generalised to cover monetary assets. However, section 11 and its preparatory works seem to have had little influence on the recent case law of the Finnish Supreme Court. One way for the Supreme Court to resolve several problems with the current law would be to accept co-ownership as a result of commingling.[77]

4 Procedural Rules in the Securities Accounts Act

Securities held by a custodian on behalf of its account holders do not belong to the custodian's bankruptcy estate, nor can they be attached due to the custodian's debt. This substantive rule is found in the first sentence of section 11(1) Securities Accounts Act. In practice, though, it is not always easy to tell on whose behalf certain securities have been held. This highlights the importance of the second sentence of section 11(1), which contains the following presumptive rule: securities held by the custodian that correspond to the securities recorded in the securities accounts of its clients are regarded as being held on behalf of the account holders, unless proven otherwise.

From the legal-systemic perspective, the second sentence of section 11(1) can be classified as a procedural provision, and thus pertaining to the activities of courts of law. The courts most relevant to our topic are Finnish general courts, that is, district courts, courts of appeal, and the Supreme Court. The most important piece of legislation concerning general courts is the Judicial Procedure Code (4/1734), which, under chapter 1, section 1 applies to proceedings in general courts, unless otherwise provided in the Criminal Procedure Act (689/1997) or elsewhere in the law. General rules on evidence are found in chapter 17 Judicial Procedure Code. Evidence is also what the second sentence of section 11(1) Securities Accounts Act deals with.

Where a client thinks that certain securities are held on their behalf, the custodian's bankruptcy estate may see the situation differently. The client may

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[76] See, eg, NJA 2012 p 391 and NJA 1999 p 812, both with references to earlier judgments.

[77] See generally Juutilainen and Kaisto (n 33). Co-ownership has seldom been considered as a solution in Finnish case law. This is another difference compared to Sweden. For example, in judgment NJA 2009 p 500, the Swedish Supreme Court took into account that the right to separate could be based on co-ownership, although it held that, as a general rule, the right to separate ceases if fungible property is commingled with similar property belonging to the possessor.

then go to court, alone or together with other clients. As a general starting point, a person who believes that property belonging to them is being held by a bankruptcy estate must, in the case of disagreement, initiate a civil case against the bankruptcy estate.[78] Bringing an action against the bankruptcy estate may be necessary in disputes within our focus, considering that the Bankruptcy Act does not designate other procedures for resolving disputes. It does not seem possible that a question of a client's entitlement to securities could be considered in connection with processing the draft disbursement list.[79]

Under chapter 5, section 1(1) Judicial Procedure Code, a civil case is initiated by a written application for a summons, delivered to the office of the district court. Under chapter 5, section 2(1), an application for a summons must indicate, among other things, the claimant's specific claim and the circumstances on which the claim is based. For example, in the 'bicycle situation' presented at the beginning of section 2.3 above, person A could claim confirmation that the bicycle in possession of person B's bankruptcy estate belongs to A. For the circumstances on which the claim is based, it suffices to point out that B acquired the bicycle as A's indirect representative, with the intention that the bicycle belongs to A. This is an immediately relevant fact, based on which the court can conclude that the bicycle belongs to A. Another question is under what conditions the court can regard the circumstances presented by the claimant as true. In our example, A may refer, say, to communications manifesting the parties' intention, such as emails.[80] In fact, under chapter 5, section 2(1), an application for summons must already indicate, as far as possible, the evidence

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[78] See, eg, Risto Koulu, 'Konkurssipesän omaisuusselvittely' in Risto Koulu, Heidi Lindfors and Johanna Niemi, *Insolvenssioikeus* (4th edn, Alma Talent 2017) 275–76; Mikko Könkkölä and Tuula Linna, *Konkurssioikeus* (2nd edn, Alma Talent 2020) 845.

[79] A debtor is declared bankrupt by the court, which also, among other things, certifies the disbursement list under c 13 Bankruptcy Act. The disbursement list can be described as a list of claims lodged and claims to be taken into account without lodgement, with information on disputes initiated by the estate administrator. See Könkkölä and Linna (n 78) 476. Under c 13, s 4(1), it is also possible for a creditor to dispute the claim of another creditor or its ranking, as entered in the draft disbursement list, while the debtor, too, may dispute a claim. The question whether a client's entitlement in securities could be examined in connection with the draft disbursement list is not very significant from the procedural point of view, after all, except for initiation of the proceedings. This is because, under c 13, ss 11–12, the court that declared the debtor bankrupt must hear disputes and other disagreements related to lodgements. The hearing of a dispute that cannot be resolved on the basis of the available evidence will continue, where appropriate, in accordance with the provisions on civil procedure.

[80] Emails are indirectly relevant facts. Inferences can be drawn from them as to whether B acquired the bicycle as A's indirect representative, with the intention that the bicycle belongs to A. The division between directly relevant facts ('legal facts') and indirectly relevant facts ('evidentiary facts') is important, eg, for c 24, s 3(2) Judicial Procedure Code, under which, in a matter where settlement is permitted, the judgment may not be based on a circumstance not referred to by a party in support of their claim or denial. In this connection, circumstances mean legal facts, as distinguished from evidentiary facts. Similarly, under c 5, s 2(1), the circumstances on which the claim is based mean, above all, legal facts. On legal facts and evidentiary facts, and the importance of this distinction, see, eg, Jyrki Virolainen and Mikko Vuorenpää, 'Prosessioikeuden oikeuslähteet, normit ja peruskäsitteet' in Mikko Vuorenpää (ed), *Prosessioikeus* (6th edn, Alma Talent 2021) 109–10.

that the claimant intends to present in support of their action and what they intend to prove with each piece of evidence.

The parties to a dispute often disagree on the factual circumstances of the case. This means that the rules on evidence may play a decisive role. Chapter 17, section 2(1) Judicial Procedure Code starts with the notion that in a civil case, a party must prove the circumstances on which their claim or objection is based. This is a main rule on the burden of proof. In turn, chapter 17, section 2(2) addresses the standard of proof required, as follows. A circumstance may be taken as grounds for judgment only on condition that a party has presented 'credible' evidence in this regard. This, too, is a mere starting point, for, under chapter 17, section 2(4), the provisions of sections 2(1) and 2(2) are complied with, unless otherwise provided by law regarding the burden of proof or the strength of evidence required, or unless the nature of the matter requires otherwise.

In the bicycle situation, A must be able to present 'credible' evidence that B acquired the bicycle as A's indirect representative, with the intention that the bicycle belongs to A. However, in cases pertaining to the Securities Accounts Act, regard must be had to the second sentence of section 11(1) of the Act, which takes precedence over the rules in chapter 17 Judicial Procedure Code. As noted above, according to the second sentence, the securities held by the custodian that correspond to the securities recorded in the securities accounts of its clients are regarded as being held on behalf of the account holders, unless proven otherwise. The preparatory works of this provision state explicitly that the extent to which securities held by the custodian belong to the custodian and benefit the custodian's creditors, and the extent to which they are held on behalf of clients and belong to clients, are evidentiary questions. The preparatory works justify the presumption on the burden of proof in the provision by the aims of facilitating assessment of evidence on the one hand and improving account holder protection on the other.[81]

In procedural law analyses, too, it must be taken into account that the Securities Accounts Act covers different kinds of custody arrangements. As noted in section 2 above, a custodian may hold certain securities on behalf of a specific client, a group of specific clients, or clients in general. One must ask, among other things, what claims clients can make in their own name in different situations, and what circumstances the court must take into account *ex officio* when considering an action before it. It is clear from the perspective of substantive rules that if the number of securities held jointly on behalf of the account holders is not sufficient to cover all entitlements, then the securities of each type are distributed among the account holders in proportion to their entitlements to the securities of that type, as provided in section 11(2) Securities Accounts Act. Although this is an instance of substantive rules, it is possible that the entitlements of other clients (insufficient number of securities to cover all entitlements) affect dealing with matters in court.

This article is not the place for a thorough review of procedural questions related to section 11 Securities Accounts Act. Focusing on main points, we can start by observing that a client (or group of clients) can claim in their action a court confirmation that certain securities, in part or in whole, belong to the

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[81] Government Proposal 32/2012, 265.

claimant. To support the action, the claimant must invoke those immediately relevant facts on the basis of which the securities can be regarded as held on behalf of the client (or group of clients). In this respect, it suffices that the custodian intended to hold the securities on behalf of the client (or group of clients).

From the evidentiary perspective, it is essential that the client (or group of clients) enjoys a strong position due to the presumption in the second sentence of section 11(1) Securities Accounts Act, provided that the securities in question 'correspond' to the securities recorded in the clients' securities accounts. How should this 'correspondence' be understood? The preparatory works explain as follows. Correspondence means that the securities held by the custodian and the securities recorded in the accounts kept by the custodian correspond to each other in terms of type and quantity. For example, if an account in the custodian's name contains more securities of a certain type than securities of the same type have been recorded in the accounts of the custodian's account holders, then this kind of surplus of securities in the custodian's account does not fall within the presumption, but is generally considered to be the custodian's own securities. The situation is similar if the account in the custodian's name contains, in addition to the securities belonging to clients according to the presumptive rule, securities of entirely different type.[82]

The paraphrased statements in the preparatory works suggest that securities can relatively easily be regarded as being held on behalf of account holders. To illustrate, consider a situation where person A, a custodian within the meaning of the Securities Accounts Act, has just one book-entry account in its name, and in that account 1,000,000 Nokia shares. A has five clients, all of whom have accepted joint custody, and each client's securities account shows 200,000 Nokia shares recorded. In court proceedings it can be considered that the securities are held on behalf of the clients, unless proven otherwise.

Because the second sentence of section 11(1) Securities Accounts Act is a presumption, it can be rebutted by sufficient evidence to the contrary. Considering chapter 17, section 2(2) Judicial Procedure Code, this probably requires meeting the standard of 'credible' evidence. However, that standard may be superseded on the basis of 'the nature of the matter' under chapter 17, section 2(4).

A bankruptcy estate objecting to the action may present any kind of evidence to prove that the securities in the focus of the action have not been held on behalf of the clients. Indeed, under chapter 17, section 1(1) Judicial Procedure Code, a party is entitled to present evidence that the party wants to be considered by the court investigating the matter, unless otherwise provided by law. Under chapter 17, section 1(2), the court must determine, having considered the evidence presented and other circumstances that have come up in the proceedings, what has been proven and what has not been proven in the matter. The court must thoroughly and objectively assess the probative value of the evidence and other circumstances by free consideration of evidence, unless otherwise provided by law.

Because of the case-specific nature of evidence, it is difficult to foresee situations in which it would be considered proven that certain securities have not

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[82] ibid.

been held on behalf of clients. The preparatory works of section 11 Securities Accounts Act offer the following clues. The drafters consider the presumptive rule relevant above all when the circumstances do not otherwise indicate whether the securities are held on the custodian's own behalf or on behalf of the account holders. For example, this is thought to be the case when the custodian's securities are in one or more accounts with no indication as to whether they are held on the clients' behalf or on the custodian's own behalf. In contrast, if the securities held by the custodian are, for instance, in two accounts in the custodian's name, one sufficiently identified as an account for client assets and the other sufficiently identified as the custodian's own account, then the presumption is rebutted for the securities in the latter account. As a result, the securities in the latter account benefit the custodian's creditors. A comparable situation arises where the securities are in a nominee custodial account controlled by the custodian and in an ordinary book-entry account in the custodian's name.[83]

To concretise this, we can return to the illustration where person A had one book-entry account with 1,000,000 Nokia shares in it. Let us modify the illustration so that A has a second account, designated as a custodial nominee account, with 500,000 Nokia shares in it. If the custodian's bankruptcy estate invokes the existence of the custodial nominee account before the court, this may be enough – following the preparatory works – to consider that the securities in the ordinary book-entry account in A's name are not regarded as being held on behalf of clients. However, this would only mean rebutting the presumption in the second sentence of section 11(1) Securities Accounts Act. It might be possible to prove, say, with emails and witnesses, that A had held the 1,000,000 Nokia shares in the ordinary book-entry account with the intention that the shares, in part or in whole, belong to its clients.

5 Conclusion

Where investing involves intermediaries, their insolvency risk requires attention. The provisions that most directly affect the legal positions of investors, intermediaries, and intermediaries' creditors are often found in national property and insolvency laws.[84] Divergences between legal systems in these areas are wide and deep-rooted, some of which can be traced back to conceptual and other basic doctrinal choices. In legal literature, legal systems that more or less

[83] ibid.

[84] See Commission, 'Action Plan on Building a Capital Markets Union' (Communication) COM (2015) 468 final, 23–24, discussing barriers to efficient cross-border clearing and settlement. 'Many of these barriers have their origins in divergent national property and insolvency laws, as well as national laws regarding securities holdings which differ considerably in terms of the legal nature of the asset. These differences can give rise to uncertainty as to who owns a security in the event of a default and whose rights take precedence in the event of insolvency.'

resemble each other are often grouped together. For example, Finnish law typically finds its place among the other Nordic countries.[85]

While broad-brush groupings are useful as a technique of presentation, they easily hide significant details. In this article, we have taken a close look at one significant detail of the relevant Finnish legal framework, namely, the Securities Accounts Act. This Geneva Securities Convention-influenced Act concerns securities accounts kept based on custody of securities in Finland, the legal consequences of entries made to these accounts, custodian's obligations, and – importantly – account holder protection in a custodian's insolvency proceedings. We have attempted to interpret and systematise the Act's central provisions in the context of related general rules of substantive and procedural law as well as legal doctrines. In this sense, our research results have been achieved through, and in themselves are, systemic observations.

The key condition for client (account holder) insolvency protection in a custodian's bankruptcy under the Securities Accounts Act is that the securities are held on behalf of the account holders. Joint custody of securities of different clients is permitted, and client entitlement to securities held on their behalf does not cease even if the custodian has neglected to keep those securities separate from its own securities, that is, even in the case of commingling of client's securities and the custodian's securities. All in all, the Act contains several solutions beneficial to clients. These include a presumptive rule of a procedural nature, addressing factual uncertainty as to whether certain securities held by a custodian are held on behalf of clients. However, treatment favourable to clients does not extend to monetary assets that a custodian may hold on behalf of its clients. The Act's provisions on insolvency protection do not apply to money. In the light of recent case law of the Finnish Supreme Court, commingling of monetary assets belonging to the custodian with those belonging to a client involves a significant risk that all those assets are regarded as belonging to the custodian. In addition, even outside of insolvency, Finnish law lacks practical ways to correct the situation if commingling has occurred. The inconsistent legal treatment of securities on the one hand and money on the other seems problematic.

The Securities Accounts Act aims to improve clients' insolvency protection in terms of custody of securities. To that end, it provides several workable solutions. Similar considerations could inform the future development of legal treatment of further types of situations involving intermediaries.

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[85] See, eg, Matthias Haentjens, 'European Harmonisation of Intermediated Securities Law: Dispossession and Segregation in Regulatory and Private Law' in Louise Gullifer and Jennifer Payne (eds), *Intermediation and Beyond* (Hart Publishing 2019) 271.