

# 第二届中法金融论坛

## 2<sup>nd</sup> SINO-FRENCH FINANCIAL FORUM

### Globalisation and Financial Markets Challenge and Opportunities for Chinese and French Financial Industries

#### Risk Management Post-Markets Issues and Unidroit Convention: The Evolution of Securities Laws in China and France

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# Introduction

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- Twenty five years ago, France introduced mandatory and general dematerialization. This process is irreversible in the sense that book entries cannot be withdrawn from the intermediated system;
- From the very outset, the French dematerialization system introduced:
  - stringent accounting rules governing maintenance of securities accounts by intermediaries;
  - a supervisory and regulatory framework subjecting intermediaries to stringent controls;

All aiming at:

- protection of the integrity of the system;
- protection of investors.

# Introduction

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- The purpose of this presentation is to demonstrate by way of illustration how the French regulatory framework:
  - Is aiming at protecting investors' rights;
  - How investors' protection can preserve a direct relationship with the issuers while resorting to an intermediary.
  
- This presentation will further endeavour to:
  - Describe current statutory reforms under consideration aiming at improving coherence and lisibility of the current statutory framework;
  - Highlight a number of considerations regarding the proposed Unidroit convention.

# The French statutory and regulatory dematerialization framework (1)

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- The French statutory and regulatory dematerialization framework is based on the following instruments:
  - Commercial Code (CC) provisions → company law;
  - Monetary and Financial Code (MFC), including its statutory and regulatory component;
  - Rules of the *Autorité des Marchés Financiers* (AMF);
  - Rules of Euronext;
  - Rules of Clearnet (Clearing System);
  - Rules governing the CSD Euroclear France.

# The French statutory and regulatory dematerialization framework (2)

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## French Commercial Code and French MFC:

- According to Article L. 228-1 CC, securities, whatever their form, registered or bearer, are recorded in a securities account in the name of their owner.
- Such securities are recorded in an account maintained either with the issuer or the authorised intermediary (Art. L. 211-4 MFC).

# The French statutory and regulatory dematerialization framework (3)

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- Maintenance of securities accounts is a regulated industry. Only the following entities are allowed to maintain securities accounts (art. L. 542-1 MFC):
  - issuers;
  - credit institutions;
  - investment firms;
  - legal entities whose only or principal purpose is to maintain securities accounts (subject to licensing by the *Comité des Etablissements de Crédit et des Entreprises d'Investissement*);
  - within the limits of the AMF rules, the above institutions which are not established in France;
  - the Treasury, Banque de France, financial services of *La Poste*, *Caisse des Dépôts et Consignations*, Overseas Monetary Institutions (*Institut d'Emission d'Outre-Mer*).

# The French statutory and regulatory dematerialization framework (4)

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- The MFC establishes the principle of proprietary rights over book entry securities credited to a securities account held with an intermediary.
  - Article L 533-10 – MFC:
    - Investment services providers are required to protect **proprietary rights** of investors over financial instruments recorded on a securities account with that intermediary.
  - Protection of account holders in the framework of the insolvency of the intermediary:
    - Right to reclaim securities and transfer them to an account held with another intermediary (Art L. 211-6 MFC).

# The French statutory and regulatory dematerialization framework (5)

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## The French Financial Market Rules (AMF rules):

- In the framework of performance of their duties in the area of maintenance of securities accounts, qualifying persons are subject to the duties and control measures to which investment services providers are subject.
- The AMF is entrusted with such control (Art. L. 621-9 MFC), including compliance with professional duties to which custodians (*teneurs de comptes conservateurs*) are subject.
- Those duties are provided for in the AMF rules. i.e.:
  - compliance with money laundering regulations;
  - duties *vis-à-vis* clients;
  - obligation to maintain and ensure:
    - an appropriate level of human resources;
    - appropriate computer technology resources;
    - accounting services;
    - client protection; and
    - internal control.

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# The French statutory and regulatory dematerialization framework (6)

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- **Duties of the custodian *vis-à-vis* clients:**
  - compliance with accounting rules;
  - maintenance and preservation of the securities;
  - facilitating the exercise of rights related to the securities;
  - a custodian is prevented from:
    - using the securities recorded in its books;
    - transferring ownership without accountholders' consent;
  - redelivery of the securities, if need be;

# The French statutory and regulatory dematerialization framework (7)

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- **Segregation with the central depository of securities held:**
  - for the account of customers;
  - for the account of collective investment undertakings;
  - for own account;
  
- **Providing the accountholder with information related to:**
  - transactions related to securities which require instructions from the accountholder;
  - information required to file tax returns;
  - corporate events of a nature likely to affect rights of holders of securities;
  - performance of any transaction affecting securities and cash.

# The French statutory and regulatory dematerialization framework (8)

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- Ensuring that transfers only occur upon instruction from the accountholder or its representative.

The above rules are rules characterising a regular deposit and reflecting proprietary rights of a holder of dematerialised securities.

# The French statutory and regulatory dematerialization framework (9)

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- Resources of the custodian:

- human resources;
- computer technology;

- Accounting:

- segregation rules;
- double accounting;
- rules regarding suspense accounts;
- rules regarding registered securities held through an intermediary.

# The French statutory and regulatory dematerialization framework (10)

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- Prohibition to use for its own account securities held for the account of customers;
- In case of insufficiency, obligation to borrow securities;
- Fees and expenses need to be separately disclosed;
- Rules regarding share dividends → disclosure to customer;
- transmittal to the issuer of requests to obtain information required by accountholders in respect of corporate action including attendance at shareholders' meetings.

# Current statutory reforms under consideration in respect of dematerialized securities (1)

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French Parliament has enacted legislation authorising the Government to enact by way of Ordinance modifications to the current statutory framework contemplated under the MFC in respect of dematerialized securities;

- The purpose of those changes is to make those provisions more accessible and to improve its lisibility;
- Those changes have been recommended by a a working group created under the auspices of Paris Europlace about two years ago;
- The Ordinance enacting those changes is expected to be published shortly.

# Current statutory reforms under consideration in respect of dematerialized securities (2)

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Main features of those modifications:

- Consolidation under one Title under the MFC of provisions regarding financial instruments currently dispersed under different titles of the MFC;
- Clarification of the terminology and concepts of financial instruments which are subdivided in financial securities (“*titres financiers*”) and financial contracts (“*contrats financiers*”);
- Clarification of the concept of securities account opened in the name of the holder of securities which **are the owners** of the securities credited to that account thereby creating a presumption of ownership resulting from that credit;
- Strengthening of ownership rights over securities credited to a securities account of the acquirer;
- Removing ambiguities created by the concepts of registered and bearer securities in a dematerialized system;
- Clarification of the concept of negotiability of securities;
- Introduction of a rule protecting the good faith acquirer of securities;
- Assimilation of financial instruments governed by a foreign law to the regime governing financial instruments governed by the MFC.

# Current statutory reforms under consideration in respect of dematerialized securities (2)

Removal of the concept of registered securities and bearer securities:

- Those concepts were a source of confusion in the context of a dematerialized system;
- The MFC retains the effect of those two concepts and provides that:
  - the securities account is maintained by the issuer where the law so requires or where the issuer so decides;
  - in other cases the securities account is maintained as the holder of the account may elect either by the issuer or by an intermediary.

## The French system is UNIDROIT compatible (1)

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The French dematerialized securities holding system is a direct holding system which is UNIDROIT compatible:

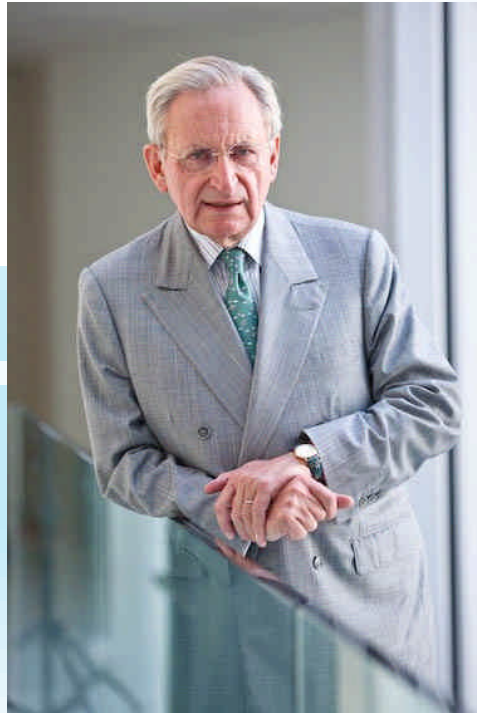
- A credit of securities to a securities account vests with the holder of the account a right of ownership entitling such owner to the attributes of ownership i.e. to dispose of those securities and to enjoy the fruits and benefits related thereto or otherwise to exercise the rights related to those securities;
- This applies where the accountholder is not an intermediary or otherwise where the intermediary is acting for own account i.e. where the accountholder is the investor at the end of the holding chain;
- The pledge over a securities account contemplated by the MFC is compatible with the designating entry approach;
- The protection of the *bona fide* acquirer is compatible with the innocent person protection;
- The priorities system adopted under the proposed UNIDROIT convention is compatible with French law assuming France would exercise its discretion contemplated under the proposed convention to exclude control agreements from the scope of its legislation;

## The French system is UNIDROIT compatible (2)

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- The prohibition of *upper-tier* attachment under the proposed Unidroit convention is compatible with the French system;
- The approach in respect of requirements of availability of sufficient securities is compatible with the French system but remains below the standards of the French system;
- The approach in respect of allocation of securities to accountholder rights and in respect of loss sharing in case of insolvency of the intermediary are also compatible with the French system but also remains below the standards of the French system;
- Collateral arrangements under the proposed Unidroit Convention are compatible with the French regime implementing the EU Collateral Directive.
- The French System recognises the holding of securities by an intermediary acting for others (“Intermédiaire inscrit”)

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