“The New International Legal Framework on Securities in relation with EU initiatives and UNIDROIT”
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The New International Legal Framework on Securities

in relation with EU Initiatives and UNIDROIT

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- International efforts towards harmonisation
- Conflict of law issues
- Unidroit
- EU Legal Certainty
- Dematerialisation in France
- Better regulation in the EU
International efforts towards harmonisation of substantive rules regarding dematerialised securities

- IOSCO-BIS (November 2001) – 19 recommendations for Securities Settlement Systems
  - Recommendations refer to:
    - The need for a sound legal framework for Securities Settlement Systems
    - The imperative of protecting customer securities against the intermediary’s insolvency
- G30 Plan of Actions (January 2001)
  - Pointed to:
    - The Hague Convention as a first step towards resolving legal uncertainty in respect of conflict of law issues
    - Substantive law issues which needed to be addressed
  - Insufficiencies in legal framework for clearing and settlement are among the serious obstacles towards integration of EU financial markets
  - The EU Collateral Directive has removed a number of obstacles
  - The absence of common framework for the treatment of ownership in securities remained
  - Therefore, there is a need for the EU Securities Account Certainty Project
Conflict of law issues

● EU Directives:
  ■ Collateral Directive
  ■ Finality Directive

  The place where the securities account is maintained.

● The Hague Securities Convention:

  The law agreed in the account agreement subject to certain conditions being met including:
  ■ that the intermediary has an office engaged in a business of monitoring securities accounts or of administering payments or corporate actions related to securities;
  ■ or has some other regular activities of maintaining securities accounts there.
UNIDROIT an international organisation

- with 59 member states

- representing the various legal systems throughout the world

is proposing to address those substantive law issues at the global level
Status: Preliminary Draft Convention on Substantive Rules regarding Intermediated Securities

- Study group convened in September 2002 – preparation of preliminary draft convention
- A meeting of governmental experts convened in May 2005 – new draft proposed
- A second meeting of governmental experts convened in March 2006
- A third meeting scheduled for November 2006
Approach:
- functional approach
- compatibility – ability to interconnect

Issues:
- upper tier attachment prohibition
- transfer through credits and debits to a securities account
- creation and realisation of collateral
- protection of good faith acquisition
- priorities
- loss allocations
- finality
- protection against insolvent intermediary
- duties of intermediary
EU Legal Certainty Project

- The Giovannini reports recommended lifting a number of barriers which were affecting the efficient operation of EU securities markets.

- On April 28, 2004, the EU Commission published a report on securities settlement advocating the creation of a Legal Certainty Group, the purpose of which was to analyse in the EU:
  - nature of rights of investors in respect of intermediated securities;
  - transfer of those rights;
  - finality of book entries of securities;
  - treatment of upper tier attachment;
  - protection of investors in case of insolvency of intermediaries;
  - rules regarding location of securities;
  - good faith acquisition by third parties.
The Legal Certainty Group:

- was designated in January 2005 – 35 experts from 25 member states;
- meets on several occasions;
- Members of the group answered a questionnaire related to issues in 25 member States.
Proposing recommendations to the EU Commissions the following core issues are considered:

- **Issue one:** scope;
- **Issue two:** legal effects of book entry;
- **Issue three:** corporate actions and voting rights;
- **Issue four:** recognition of status of derivative holdings;
- **Issue five:** transfer requirements;
- **Issue six:** moment of transfer;
- **Issue seven:** priority rules;
- **Issue eight:** issuer’s freedom to choose location of securities;
- **Issue nine:** protection from account provider’s insolvency.
French dematerialisation rules – Proposals for an update

- Mandatory dematerialisation of securities was introduced in France 20 years ago

- Core principles retained by French dematerialisation rules:
  - root of ownership in company law;
  - securities credited to a securities account are tradable by transfer from one securities account to the other;
  - maintenance of traditional principles: - bearer securities - registered securities
  - protection of investor within the framework of securities account-keeping as a regulated industry;
  - pledge over dematerialised securities through a pledge of the securities account;
  - protection of investors against insolvency of the intermediary.
The above principle makes the French securities dematerialisation system Unidroit compatible

- Property right – transfer by credit-debit
- Pledge over securities account
- Protection against the bankruptcy of the intermediary
- Upper-tier attachment
- Shortfalls

Paris Europlace proposals:

- Improve coherence and readability
- Improve legal certainty
  - Through strengthening of property right – credit of securities constitutes evidence of ownership
  - Protection of *bona fide* purchasers
  - Securities issued under foreign law – credited to a securities account benefit from the same legal effect as domestic securities so credited
EU Better regulation agenda

- White paper on Financial Services Policy (2005-2010): simplification, codification and clarification:
  - Carrying out of sectoral and cross-sectoral consistency checks
  - Ensure coherence of terminology and effect

- Paris Europlace suggested approach:
  - Methodology:
    - Paris Europlace welcomes the EU Transparency objective
    - Drafting:
      - simplification;
      - Lamfalussy process, a critical approach;
      - Material rules / conflict of law rules – clear distribution to be made
      - Priority on sector rules – less emphasis on general rules
      - Consultations - deadlines
  - Working language
  - Concepts: to be used so as to accommodate civil law and common law
Pavillon d’Armenonville

Tuesday 4 & Wednesday 5 July, 2006

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