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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF HARMONISED SUBSTANTIVE RULES ON TRANSACTIONS ON TRANSNATIONAL AND CONNECTED CAPITAL MARKETS

Restricted Study Group on Item 1 of the Project: Harmonised Substantive Rules regarding Securities Held with an Intermediary

Comments on the Preliminary Draft Convention

Addendum 1

Rome, September 2004

Table of Contents

Comments by Jack Wiener, Depository Trust & Clearing Corporation (DTCC) (on proxy issues, see also the report "Cross Border Proxy Voting")

I. Issues. If the proposed UNIDROIT convention were to address the following issues, in addition to other good issues such as the bankruptcy issues that are already under consideration, I believe that the convention would remove some troubling obstacles from cross-border clearance and settlement.

1. Applicable laws both permitting and relating to nominee holdings of securities should be clarified and harmonized.

Examples of this are in the areas of bankruptcy (there have been problems in casting bifurcated votes as a nominee in China); voting rights generally (there have been problems in Switzerland); and ownership and reporting (there have been issues in this regard in France).

2. Applicable laws should be harmonized to clarify that securities may be held outside of their domestic markets.

Examples of this are problems that formerly existed in both Peru and in South Korea. In both instances, after significant discussion the countries agreed to effect a change in their domestic law.

3. Applicable laws should be harmonized to clarify that securities accounts at CSDs may be held by entities other than the beneficial owners themselves.

This has been a problem in Malaysia. Unlike the other issues, which are old problems that reflect a tension between old laws and new realities, this is a new problem that was recently introduced by the government in Malaysia.

4. Laws should allow for the existence of a central counterparty by providing a sound legal basis for CCP netting.

Central counterparties dramatically reduce risk and costs. The legal basis for the netting arrangements required in such a system should be sound and transparent.

5. Laws should allow for dematerialized systems of holdings of securities.

Dematerialized systems of holding of securities, and to a large extent book-entry-only systems of holdings of securities, allow for much greater safety (individual certificates will not be lost), lesser cost (e.g., the costs to print certificates, ship them, and insure them), and speed of transfer than do fully certificated systems of holdings of securities.

6. Applicable withholding tax laws should be harmonized to simplify the process of cross-border withholding at source.

While DTC has entered into one-on-one agreements with foreign tax authorities to address this problem in certain jurisdictions, this would benefit from broad support. This recommendation directly yields tangible immediate monetary benefits to industry members .

7. Laws relating to the taxation of the transfer of securities, such as stamp duty taxes and stamp duty reserve taxes, should be reviewed with an eye as to whether they unnecessarily impede the efficiency of the capital markets and the raising of capital by issuers.

If this issue is to be discussed in other than solely domestic forums such as those of the UK and some of its former colonies, this would seem to be a forum that would be well situated to address the issue.

II. Proxy Issues.

The attached report commissioned by the International Corporate Governance Network highlights some problems in cross-border proxy voting. The study tracked the transmission of proxy materials and voting instructions between issuers from the US, UK, Germany, Japan, and Italy, and took note of problems where they arose. Among the problems that were noted in issuers from some of the countries were the length of time between receipt of proxy materials and the voting deadline, share-blocking, and voting on a show of hands.

If these and other identified problems could be addressed by the UNIDROIT convention, that would be a boon to cross-border securities holdings and transactions.

FEDERATION BANCAIRE FRANCAISE

AFTI

September 2004

Comments on Unidroit Convention on Substantive Rules regarding Securities Held with an Intermediary

In April 2004, Unidroit released its Draft Convention on Substantive Rules regarding Securities Held with an Intermediary ("the **Convention**").

This was followed by presentations in Frankfurt, Paris, London and New York.

Unidroit has asked securities professionals in these countries to comment on the draft.

This memorandum contains the preliminary observations of the French securities community on the Convention.

First of all, both the French Banking Federation (FBF) and the French Association of Securities Professionals (AFTI) wish to compliment Unidroit for it the remarkable work.

The document addresses many of the main concerns expressed in the second report of the Giovannini Group, the June 2003 Report by the European Financial Market Lawyers Group, and the Commission's April 2004 Communication to the Council and the European Parliament.

We would nevertheless like to raise a number of questions and concerns in relation to the Convention.

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1. Relationship between holders and issuers of securities

France has led the way in the dematerialisation of securities, which became mandatory in November 1984.

As a result, securities are held either in a securities account with the issuer, if the securities have been requested in registered form, or in a custody account with an authorised intermediary if requested in bearer form.

Securities are registered under the name of their owner. When it introduced dematerialisation, the French system did not question the direct relationship between the holder of the securities and the issuer, which exists whether the securities are in registered or bearer form.

Under this fundamental principle, the securities holder has the power to exercise his rights directly vis-à-vis the issuer. These include his right to vote directly at shareholder meetings, the right to tender his securities in the event of a corporate action, and the right to dividends.

Other legal systems in continental Europe – notably Germany's – have the same feature. This point was stressed at the presentations in France and Germany.

The relationship between the holder and the issuer of securities forms the core of the French system.

We feel that the Convention centres on the relationship between the holder of the securities and his intermediary, and that this is true across the entire securities-holding chain. Meanwhile, the relationship between holders and issuers is largely ignored.

Despite being at the centre of our concerns, the holder/issuer relationship is touched on only briefly in Article 3(3)(b). In a formulation based around a direct relationship with the issuer, the holder would be the sole owner of the securities, with the intermediary acting merely as a depository. Recognising the intermediary as owner of the securities could also have tax-related ramifications for some systems.

Article 3(1)(a)(ii) of the Convention states that the account holder directs the intermediary in the exercise of voting rights. However, the holder should be able to exercise this right directly. The intermediary's role should be confined to supplying evidence of the holder's ownership to enable the holder to exercise his voting rights.

Failure to recognise this situation will necessitate a politically untimely reform of French corporate law, as well as modifications to IT systems. These adjustments could prove extremely burdensome.

Furthermore, Article 3(2)(b) states that the account agreement governs the intermediary's performance of its obligations, thus making no mention of the statutory or regulatory public policy rules. Article 4(2)(a) recognises a similar principle.

In addition, the Convention does not mention the concept of registered shares, which is still important to many securities issuers and holders in France.

Failure to take this peculiarity into account, despite the fact that registered securities are traded via intermediaries, would entail major amendments to French corporate law. Justification for this peculiarity stems, *inter alia*, from the allocation of double voting rights or preferred dividends.

2. Status of intermediaries

The Convention seems to emphasise the purely contractual nature of the relationship between the intermediary and the securities holder.

In a situation where full dematerialisation is mandatory, we believe that the role of the intermediary, which can be equated with that of a depository, has to form part of a legal and regulatory mechanism supervised by the regulatory authority. In France, this would be the Autorité des Marchés Financiers (**AMF**), which ensures that market participants comply with their regulatory and ethical obligations.

France's experience shows that a dematerialised system cannot function properly without supervision.

In its Communication, the European Commission also expressed concerns about compliance by market participants with regulatory and ethical requirements.

3. Public policy rules

Given the above, the Convention could usefully reiterate that the holder/intermediary relationship and the status of intermediaries are subject to public policy rules and to the binding provisions of the applicable law, even in an international setting.

4. Nature of rights

We noted that holders' rights are characterised as rights *in rem*. Thus, the scope of the Convention should exclude rights of a purely contractual nature.

However, Article 2, which will define the scope of the Convention, has yet to be drafted.

Both the FBF and AFTI are firmly attached to the notion that the rights of securities holders should be rights *in rem*.

5. Settlement finality

We have noted that intermediaries may not credit securities to a securities account or dispose of securities without first holding the corresponding inventory (Article 5).

Chapter VIII, which is still being drafted, is going to set out special provisions on settlement finality.

We believe that these two sets of provisions should complement each other closely.

Accordingly, we wish to emphasise the importance that we set by the link between the notion of finality, or delivery of securities, and settlement in central bank money under the supervision of the legally empowered entity, i.e. the central securities depository (CSD).

Of course, the notions of supervision and regulatory compliance – already brought up in the European Commission's Communication – are also encompassed within the context of finality.

We believe the chapter could usefully refer to CSDs, as well as to settlement systems and central counterparties.

6. Protection for holders in the event of insolvency

The Convention follows the spirit of the second Giovannini Report and the European Commission's Communication by including a mechanism to protect holders of securities in instances where a higher-tier intermediary holds insufficient securities and is subject to a collective proceeding.

We noted that where such shortfalls arise, the intermediary is required to take steps to address the situation resulting from the higher-tier intermediary's failure and to acquire the necessary additional securities.

The Convention stipulates, however, that the account agreement may include exceptions to this rule. For example, the intermediary may be obliged to hold the securities with the insolvent intermediary, or there may be no intermediary other than the higher-tier intermediary with which the securities may be held.

The explanatory notes indicate that these provisions raise policy issues that need to be discussed.

This point highlights the fact that a CSD's activities must go hand in hand with a body of regulations and an adequate supervisory mechanism. The Commission also expressed its concerns on this point in its Communication.

We are deeply concerned at the thought that the Convention might waive such a fundamental principle.

We note that Article 8 states that, where the intermediary has become insolvent, the affected account-holders may give instructions for the transfer of their securities to another intermediary.

The Convention could perhaps indicate that claims arising in relation to a shortfall of securities will be enforced in proportion to the assets held by the insolvent intermediary under the supervision of the insolvency administrator. A reference to Article 7 would be useful in this regard.

7. Upper-tier attachments

We noted that Article 4(3) is intended to preclude upper-tier attachments.

However, we wonder if it might be worth clarifying this provision, which is sufficiently important to merit a separate article. Failing the inclusion of a separate article, Article 6 could deal with the issue of exemption from attachment.

For example, the Convention could specify that securities accounts opened with higher-tier intermediaries and notably with the central depository are exempt from attachment.

The Convention could thus usefully require the segregation of assets held by intermediaries, with only assets held for third parties, such as clients and mutual funds, being exempt from attachment.

Furthermore, the reference to Article 3(3)(b) could be problematic, inasmuch as the article in question also includes exemptions resulting from the terms of issuance or the law.

For this reason, it would be worth strengthening the exemption from attachment applicable to assets held by intermediaries on behalf of third parties.

8. Control

The concept of creating a security interest by delivery of control (see Article 11, Article 9(4) and Article 13(3)(b)(ii) and (iii))[1] raises problems in French law. This is true both from the standpoint of public policy, owing to the "pacte commissoire" or forfeiture clause, and from the standpoint of insolvency law, as a result of the "droit de rétention" or right of retention. The issue is compounded by the fact that France is exercising a partial opt-out from the Collateral Directive.

The notion of control would require changes to a number of insolvency law provisions to protect pledgees.

[1] We also have some doubts about the ranking established by paragraphs (ii) and (iii) of Article 13(3)(b).

Furthermore, credit institutions and investment service providers support extending the scope of the Collateral Directive. However, this could raise policy issues.

9. Protection for good faith acquirers

We noted the Chapter V provisions on protection for intermediaries acquiring securities in good faith. This chapter reflects the concerns expressed in the European Commission's Communication and the Giovannini Report.

However, we are concerned about two issues raised by this approach:

- The concept of "adverse claim" is difficult to translate into French law and poses a problem of clarity.

  It would therefore be useful to find another concept. We would prefer to return to the concept of good faith, which is essentially a common sense notion that translates into actions characterised by loyalty.

- An approach that bases protection for the intermediary, acquiring party or holder on notification of the adverse claim does offer protection for intermediaries.

  However, this approach corresponds to an extremely restrictive notion of good faith. It may raise policy issues with the public authorities.

10. Position of issuers of securities

This clause states that any law and any provision of the terms of issue of securities shall be modified to the extent required to make possible the effective exercise of rights set forth in the Convention.

We saw earlier that the mechanism set out in the Convention may necessitate major amendments to corporate law. Moreover, it strikes us as difficult to require changes to the terms of securities issues, which are by nature purely contractual.

11. Right of use

We noted that the Convention extends the scope of application for right of use beyond the provisions of the Collateral Directive. Please see our above comments on this matter.

We believe it would be useful to further clarify Article 22(5).

The Article could stipulate, for instance, that the securities claim and the secured obligation will be netted.

Furthermore, Article 22(5)(a) could usefully indicate that the value of obligations shall be determined in a commercially reasonable manner rather than estimated.

12. Allocation of shortfalls (Article 7(2))

Article 7(2) could be more precise in defining the rules for allocations to account holders in the event of a shortfall in securities.

Further, we feel that these rules should be based on the number of securities held with the intermediary, without mention of the corresponding amounts of securities held.

We believe the reference to "amounts" is ambiguous insofar as the text does not specify what amount is meant, e.g. nominal or market value, etc. (See on this point Articles 5 and 6.)

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In addition, some of the terms used in the Convention do not have precise equivalents in French.

We suggest that Unidroit could establish a working group to address these issues.

In conclusion, we would like to congratulate Unidroit once again on its efforts in preparing the Convention.

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Septembre 2004

Commentaire sur la Convention Unidroit sur les Règles de Droit Matériel Applicable aux Titres Détenus Auprès d'un Intermédiaire

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En avril 2004, Unidroit a communiqué un avant-projet de Convention concernant les Règles de Droit Matériel Applicable aux Titres Détenus Auprès d'un Intermédiaire (la « **Convention** »).

Ce projet de Convention a ensuite fait l'objet de présentations à Francfort, Paris, Londres et New York.

Les commentaires des acteurs des métiers du titre ont été sollicités dans ces divers pays.

L'objet de cette note est de formuler les observations préliminaires sur ce projet de Convention de la part des acteurs français.

A titre préliminaire, tant la FBF que l'AFTI transmettent à Unidroit leurs compliments pour le travail remarquable accompli dans le contexte de la mise au point de ce projet de Convention.

Celle-ci reflète, en effet, un grand nombre de préoccupations majeures formulées tant par le deuxième rapport Giovannini, que par les travaux du EFMLG (juin 2003) et par la Communication de la Commission au Conseil et au Parlement Européen d'avril 2004.

Toutefois, tant la FBF que l'AFTI désirent transmettre à Unidroit un certain nombre d'interrogations et de préoccupations que ce texte de Convention suscite.

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1. Le rapport des titulaires de titres avec l'émetteur

La France a été un précurseur en matière de dématérialisation de titres. En effet, cette dématérialisation obligatoire est rentrée en vigueur en novembre 1984.

Depuis cette date, les comptes d'instruments financiers sont donc tenus par l'émetteur si les titres sont demandés sous la forme nominative, par un intermédiaire habilité, teneur de compte conservateur, s'ils sont demandés sous la forme au porteur.

Ils sont inscrits au nom de leur propriétaire. En introduisant la dématérialisation, le dispositif français régissant celle-ci n'a pas remis en question les relations que le titulaire de titres entretient directement avec l'émetteur, que les titres revêtent la forme nominative ou la forme au porteur.

Ce principe fondamental confère au titulaire la faculté d'exercer ses droits directement à l'encontre de l'émetteur. Ces droits incluent notamment le droit d'exercer le droit de vote directement aux assemblées d'actionnaires, d'apporter ces titres dans le cadre d'opérations sur titres ou encore de percevoir les dividendes.

Cette caractéristique se retrouve dans d'autres droits continentaux et notamment en Allemagne. Ce point avait été soulevé avec insistance, au cours des présentations du projet de Convention tant en Allemagne qu'en France.

En France, la relation entre le titulaire de titres et l'émetteur reste au cœur du dispositif.

Il nous semble que le projet de Convention s'articule principalement autour de la relation existant entre le titulaire des titres et son intermédiaire, et ce tout au long de la chaîne de détention des titres. Il laisse largement sous silence les rapports titulaire / émetteur.

Ce n'est que d'une manière tout à fait accessoire que le rapport titulaire / émetteur est rappelé à l'Article 3(3)(b) alors que cette relation est au cœur de nos préoccupations. Dans une configuration articulée sur la relation directe avec l'émetteur, le titulaire de compte seul est propriétaire des titres dont l'intermédiaire est simplement dépositaire. Reconnaître à l'intermédiaire la qualité de propriétaire des titres pourrait avoir également des conséquences fiscales dans certains systèmes.

A l'Article 3(1)(a)(ii) de la Convention, il est rappelé que le titulaire donne des directives à l'intermédiaire en vue de l'exercice de son droit de vote alors que ce titulaire devrait pouvoir exercer directement ce droit. Le rôle de l'intermédiaire devrait se borner à fournir la preuve de la titularité de l'actionnaire de manière à permettre à celui-ci d'exercer ses droits en assemblée.

Ignorer cette réalité viendrait à imposer une réforme du droit des sociétés français politiquement inopportune. Elle impliquerait également la nécessité d'adapter les systèmes informatiques. Ces adaptations pourraient s'avérer être très onéreuses.

Par ailleurs, l'Article 3(2)(b) dispose que l'intermédiaire exerce ses responsabilités dans le contexte de la convention de compte ignorant ainsi les règles d'ordre public imposées par la loi ou le règlement. Un tel principe est également reconnu par l'Article 4(2)(a).

Finalement, le projet de Convention ignore la notion de titre nominatif auquel un grand nombre d'émetteurs et de titulaires restent attachés en France.

Ignorer cette particularité, alors que ces titres nominatifs sont négociés par le biais d'un intermédiaire, imposerait une modification importante du droit des sociétés français. Cette particularité est notamment justifiée par l'attribution de votes doubles ou de dividendes prioritaires.

2. Statut de l'intermédiaire

Le projet de Convention semble vouloir privilégier la nature purement contractuelle des relations entre l'intermédiaire et le titulaire de titres.

Dans un contexte entièrement et obligatoirement dématérialisé, il nous semble que l'on ne peut ignorer que le rôle de l'intermédiaire, qui s'assimile à celui de dépositaire, s'intègre dans un dispositif tant légal que réglementaire supervisé par l'autorité de régulation. En France, cette autorité est l'Autorité des Marchés Financiers (l'« **AMF** »), qui veille notamment au respect des contraintes réglementaires et déontologiques auxquelles sont assujettis les divers acteurs du marché.

L'expérience française a démontré qu'un système dématérialisé ne peut fonctionner sans encadrement.

L'assujettissement des acteurs du marché aux contraintes réglementaires et déontologiques figure notamment parmi les préoccupations formulées par la Communauté Européenne dans sa Communication précitée.

3. Règles d'ordre public

Dans la perspective des observations formulées ci-dessus, le projet de Convention pourrait opportunément rappeler que tant le rapport du titulaire de titres avec son intermédiaire que le statut de l'intermédiaire sont assujettis aux règles d'ordre public ainsi qu'aux disposition impératives de la loi applicable, même dans un contexte international.

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4. Nature des droits

Nous avons bien noté que les droits du titulaire sont caractérisés comme étant intégrés dans la catégorie des droits réels. C'est ainsi que le champ d'application du projet de Convention devrait exclure les droits de nature purement contractuelle.

Toutefois, l'Article 2, qui devrait définir ce champ d'application n'a pas encore fait l'objet d'une rédaction.

Il conviendrait de noter que, tant la FBF que l'AFTI, sont attachés à la nature réelle des droits des titulaires de titres.

5. Finalité

Nous avons bien noté que l'intermédiaire ne pourra ni inscrire des titres au compte du titulaire ni en disposer sans détenir au préalable le stock de titres correspondant (Article 5).

Par ailleurs, un Chapitre VIII, dont la rédaction est toujours en instance, devra prévoir des dispositions particulières concernant le caractère définitif et irrévocable du règlement livraison (*settlement finality*).

Nous pensons que les deux dispositions devraient s'articuler de manière précise.

Dans ce contexte, la FBF et l'AFTI tiennent à sensibiliser Unidroit à leur attachement au lien entre la notion de finalité ou de livraison des titres et leur règlement en monnaie de banque centrale sous le contrôle de l'entité détenant la source de droit, à savoir le dépositaire central.

Dans le contexte de finalité s'intègre bien entendu les notions de supervision et de respect de mesures réglementaires par ailleurs évoquées par la Communication de la Communauté Européenne susvisée.

Dans ce chapitre, il nous semblerait opportun de viser aussi bien le dépositaire central, que les systèmes de règlement livraison et les contreparties centrales.

6. Protection du titulaire en cas d'insolvabilité

Dans l'esprit du deuxième rapport Giovannini et de la Communication de la Commission Européenne susvisée, le projet de Convention prévoit un dispositif de protection en cas d'insuffisance de titres détenus par un intermédiaire à l'échelon supérieur lorsque celui-ci a été admis au bénéfice d'une procédure collective.

Nous avons bien noté que, dans le contexte d'une telle insuffisance, l'intermédiaire est tenu de faire son affaire de la défaillance de l'intermédiaire à l'échelon supérieur et de mettre en place le complément de titres.

Il est toutefois stipulé que la convention de compte peut prévoir des exceptions à cette règle lorsque celle-ci dispose que les titres ne peuvent être détenus qu'auprès de l'intermédiaire insolvable ou lorsque ces titres ne peuvent être détenus qu'auprès de celui-ci.

Une note explicative rappelle que ce point soulève des problèmes de politique générale qui devront faire l'objet de discussions.

Ce point met en évidence le fait que l'activité de dépositaire central ne peut être détachée d'un corpus réglementaire et d'un dispositif de supervision adéquat. Cette préoccupation est également exprimée dans la Communication de la Communauté Européenne susvisée.

Un dispositif conventionnel dérogatoire à un principe aussi fondamental suscite de notre part de vives préoccupations.

Dans l'Article 8, nous avons bien noté qu'en cas d'insolvabilité de l'intermédiaire, le titulaire de titres bénéficie d'un droit de revendication permettant de demander le virement des titres auprès d'un autre intermédiaire.

Nous nous interrogeons sur l'opportunité de faire préciser dans la Convention que cette revendication en cas d'insuffisance se fera au prorata des avoirs détenus par l'intermédiaire insolvable sous le contrôle de l'administrateur judiciaire. Un renvoi à l'Article 7 serait souhaitable à cet effet.

7. Saisies à l'échelon supérieur

Nous avons bien noté que l'Article 4(3) du projet de Convention avait pour objet d'interdire les saisies à l'échelon supérieur.

Toutefois, nous nous interrogeons sur l'opportunité de clarifier cette disposition qui, compte tenu de son importance, mérite un article particulier et spécifique. A défaut d'article spécifique, le problème de l'insaisissabilité des avoirs pourrait être traité dans l'Article 6.

Il pourrait être envisagé, par exemple, de préciser que les comptes de titres ouverts dans les livres des intermédiaires supérieurs et notamment auprès du dépositaire central sont insaisissables.

Dans ce contexte, le texte de la Convention pourrait utilement imposer une ségrégation des avoirs dans les livres de l'intermédiaire, l'insaisissabilité de ceux-ci étant restreinte aux avoirs détenus pour le compte de tiers (clientèle et OPCVM).

D'autre part, nous constatons que la référence à l'Article 3(3)(b) peut poser problème dans la mesure où cet article lui-même prévoit des exceptions qui peuvent résulter soit du contrat d'émission soit de la loi.

D'où l'intérêt de renforcer le caractère insaisissable des avoirs inscrits pour compte de tiers dans les livres de l'intermédiaire.

8. Contrôle

Le concept de sûretés constituées sous forme de contrôle (voir Article 11, Article 9(4) et Article 13(3)(b)(ii) et (iii))[1] soulève des problèmes en droit français, tant du point de vue de l'ordre public (pacte commissoire) que du point de vue du droit de la faillite (droit de rétention) et ceci, dans un contexte où la France exerce partiellement le droit d'option (*opt out*) prévu par la directive sur les garanties financières.

La notion de contrôle nécessiterait une modification de certaines dispositions de droit de l'insolvabilité protectrice pour les créanciers gagistes.

Par ailleurs, l'extension du champ d'application de la directive garantie financière est soutenue par les établissements de crédit et les prestataires de services d'investissement. Toutefois, ceci pourrait soulever un problème politique.

9. Protection de l'acquéreur de bonne foi

Nous avons bien noté les dispositions du Chapitre V couvrant la protection de l'acquéreur de bonne foi. Ce chapitre reflète les préoccupations formulées tant par la Communication de la Communauté Européenne que par le rapport Giovannini.

Toutefois, l'approche adoptée suscite de notre part deux préoccupations :

- la notion d'« *adverse claim* » est difficilement traduisible en droit français et pose un problème de lisibilité.

  Il serait ainsi opportun de trouver un autre concept. Notre préférence serait de revenir au concept de bonne foi qui, pour l'essentiel, est une notion de bon sens traduisant un comportement caractérisé par la loyauté.

- Une approche qui fonde la protection de l'intermédiaire, d'un tiers acquéreur ou du titulaire sur la notification de cette revendication (*adverse claim*) est protectrice pour les intermédiaires.

  Cette approche correspond, toutefois, à une notion très restrictive de la bonne foi. Elle est susceptible de poser des problèmes politiques auprès des pouvoirs publics.

[1] On peut également s'interroger sur la pertinence de la priorité entre les paragraphes (ii) et (iii) de l'Article 13(3)(b)..

10. Situation des émetteurs de titres

Cette clause prévoit la modification de la loi ou du dispositif contractuel (contrat d'émission) concernant chaque émission, de manière à permettre, le cas échéant, que les dispositions de la Convention trouvent leur plein effet.

Nous avons vu plus haut que le dispositif envisagé pour le projet de Convention pourrait imposer des modifications législatives importantes du droit des sociétés. Par ailleurs, il nous semble difficile d'imposer une modification des conditions d'émission qui sont de nature purement contractuelles.

11. Droit d'utilisation

Nous avons bien noté que le champ d'application de ce droit est élargi par rapport à celui de la directive garantie financière. Nous renvoyons à nos commentaires précités sur ce sujet.

Il nous semble que la formulation de l'Article 22(5) pourrait utilement faire l'objet d'une clarification.

Il pourrait être stipulé que la compensation s'effectuera entre la créance de restitution de titres et l'obligation garantie.

Par ailleurs, l'Article 22(5)(a) pourrait utilement faire référence à une évaluation selon des pratiques commerciales d'usage (*commercial reasonable manner*) plutôt que de faire référence à une estimation.

12. Affectation de l'insuffisance de titres (Article 7(2))

Il nous semblerait opportun que l'Article 7(2) définisse de manière plus précise les règles d'affectation entre titulaires de titres en cas d'insuffisance de titres.

Par ailleurs, il nous semble que ces règles devraient être fondées sur le nombre de titres détenus auprès de l'intermédiaire sans référence aux montants correspondants (*amounts*).

La référence au montant nous semble source d'ambiguïté dans la mesure où il n'est pas précisé de quel montant il s'agit (valeur nominale, cours de bourse, etc.) (voir à ce propos les Articles 5 et 6).

Par ailleurs, nous avons bien noté que certains termes trouvent parfois difficilement leur concept équivalent en langue française.

Dans ce contexte nous nous permettons d'évoquer l'opportunité de la constitution d'un groupe de travail au sein d'Unidroit dont la mission serait de lisser ces difficultés.

Tant la FBF que l'AFTI désirent à nouveau rendre hommage aux efforts d'Unidroit en vue de la mise au point de la Convention.

Comments

of the Association of German Banks,
the French Banking Federation
and the French Association of Securities Professionals

on the

UNIDROIT Draft Convention on substantive rules regarding securities held with an intermediary

16 September 2004

In April 2004 UNIDROIT released its Draft Convention on Substantive Rules regarding Securities held with an Intermediary, and has requested market professionals for comments and input.

We, the Association of German Banks (BdB), the French Banking Federation (FBF) and the French Association of Securities Professionals (AFTI) welcome this initiative and would like to compliment UNIDROIT for its remarkable work and to thank it for the invitation to comment.

Each association has also provided the UNIDROIT group with some detailed preliminary remarks.

Though strongly supporting the idea of creating common rules in the field of indirectly held securities we would like to stress some major concerns of the German and French securities communities about the Convention.

I. Key principles

We welcome the functional, result-based approach followed by UNIDROIT and are well aware that legal harmonization inevitably involves changes to the national legal regimes involved. Nevertheless, we believe it is important for the following key principles to be observed.

1. The UNIDROIT Convention should be a pragmatic project that needs to be compatible with Continental Europe civil law principles. The criteria to assess the draft Convention should include the current level of safety achieved, the impact on investors and the implications for the industry.

2. The UNIDROIT Convention should take into account the legal and operational certainty achieved in Europe by providing finality of settlement, in central bank money where possible.

3. We require UNIDROIT not only to focus on the relations between the investor and the intermediary but to also include the relations between the investor and the issuer in the scope of the project. We believe that direct relations between the investor and the issuer should be maintained.

4. Protection of the investors should be maintained at a level comparable to the one provided by the *right in rem*-concept.

II. Elements that need clarification

1. Concept of control:
   The concept of control seems to be applicable only in the context of securities entitlement. How does this proposal fit in the Continental Europe civil law environment?

2. Adverse Claim:

The French and German communities have difficulty understanding that concept. What would be the nature of the claim? We believe the concept of "good faith" would better represent the European common understanding.

3. Scope:
   The impact and practical consequences of the UNIDROIT convention are impossible to assess precisely until the scope (article 2) has been clearly defined. We urge the working group to finalize the scope before any agreement on the various article of the Convention is proposed.

III. Methodology

Given the importance and complexity of this project we suggest that before the Convention can be finalized UNIDROIT should:

- clarify the various points and provide the industry with a clear interpretation of the different articles (objective of the articles, situation addressed…),
- allow sufficient time to the industry to perform a detailed impact analysis of the Convention for each national jurisdiction,
- adapt the Convention in order to take into account the result of the various impact studies. As stated in the key principles, we believe UNIDROIT has to propose a Convention that is compatible with the fundamental principles of the different national legislations involved.

IV. Conclusion

1. To conclude, we would like to reiterate that given the numerous uncertainties and possible interpretations of the different articles and given the potential important impact of the proposed Convention on national laws and on the industry, we strongly recommend UNIDROIT to take the appropriate time to clarify the Convention and assess the impacts of its proposal.

2. We would like to thank UNIDROIT again for the opportunity to comment on the draft Convention and we want to reassure it of the commitment of the German and French securities communities to continue contributing in a constructive manner to this ambitious project.

Philipp Paech (UNIDROIT)

Von: CV - Corsiglia [corsiglia@cajval.sba.com.ar]
Gesendet: Dienstag, 14. September 2004 23:21
An: 'ph.paech@unidroit.org'; 'jelonche@ciudad.com.ar'
Betreff: RV: Unidroit

UNIDROIT.
opuestas de cambio

>
> Dear Sirs,
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>
> Following the UNIDROIT seminar, that took place in Buenos Aires on
> July 7 and 8,2004, we organized a working group with the purpose of
> further discussing the draft Convention with regards to its
> compatibility with the Argentinean legal and market environment.
>
> After several meetings, we elaborated some brief comments regarding
> various aspects of the draft, which we hope will contribute to the
> development of UNIDROIT´s project.
>
> Please note that the suggestions and comments expressed by the
> participants of this working group do not constitute the views of the
> institutions they work for, but independent views of market
> experts/professionals
>
> The participants of the working group that attended the seminar in
> Buenos Aires are:
>
>
> Lic. Luis María Corsiglia
> Chairman
> Caja De Valores S.A.
>
> Dr. Guillermo A. Fretes
> Lawyer
> Fretes & Arieu Abogados - Legal Councelors for Caja De Valores S.A.
>
> Dr. Efraín Carvajal
> Head of Legal Department
> Caja De Valores S.A.
>
> Dra. Melina Bobbio
> International Area
> Caja De Valores S.A.
>
>
> My best regards,
>
> <<UNIDROIT- Comments>>
>

Convention on substantive rules regarding securities held with an intermediary
(Preliminary discussion draft)

Notes on specific articles

ARTICLE 3.1 (d)

We understand convenient to have a more straight and clear reading of the article still running the risk of being redundant trying to be more clear regarding the possibility of the beneficial owner to hold the securities directly (physically or book entry). For that reason we propose this article and paragraph to read as follows (changes are marked in bold) : *"the right, by instructions to the intermediary, to withdraw the securities so as to be held **directly** by the account holder otherwise than with an intermediary…"*

ARTICLE 3.2 (b)

We think convenient to expressly include the applicable law as ruling the relations between the parties. Though it may be seen as redundant, the fact that the reference to applicable law is made in other parts of the convention as ruling those relations together with the account agreement, we feel more comfortable making the express reference also in this paragraph. Consequently we propose the wording of this article to read (changes marked in bold): *"the manner of performance of the obligations of the intermediary in providing such assistance and the extent of the liability of the intermediary for any failure to perform those obligations are governed by the account agreement **and the applicable law.**"*

ARTICLE 5.1

We suggest this article to read as follows: *"Subject to the following provisions of this article, an intermediary must* ***acquire and at all times hold*** *sufficient securities in respect of the account holder's rights"*.
We chose this alternative because we understand it would be more convenient in order to avoid inconveniences arising out of the lack of securities in those markets with low liquidity.

ARTICLE 5.5

After having analyzed this article along with its correspondent explanatory note, we suggest that the words within square brackets, which state *"...in circumstances where the intermediary..."*are excluded from this article. We arrived to this conclusion on the ground that it would be a very restrictive rule and contrary to the changing dynamics of the markets.

ARTICLE 9.4 AND ARTICLE 11

Argentinean law does not contemplate the concept of "control" as to the extent this project allocates to it. It is not possible under Argentina's law that the person who has an interest on the securities but who is not the owner of the securities (i.e. the creditor with a chattel mortgage on the securities) to have the "control" in the sense of the right to dispose of the securities or the account over which a security interest is created. Our system is structured on a segregation of intermediaries and beneficial owners accounts basis, what produces that registration of guarantees has the sole effect of blocking securities in the beneficial owner's account. But the security does not fall under the free disposition of the security interest beneficiary.

ARTICLE 18 (a) and (b)

Even though we understand this is a healthy rule, actually Caja de Valores is subject to such a rule in its local operation, there are certain difficulties that we foresee and provoke some concern on us, regarding the operation of links with other international intermediaries that Caja has currently in place, the fact that some of them are not subject to this rule and the uncertainty if the countries were those intermediaries are domiciled shall join or shall not join the convention. For that reason and to cover that concern we strongly suggest that the following last paragraph shall be included in this Article:

"This Article 18 shall not apply in cases in which the higher-tier intermediary, where an intermediary holds securities in respect of an account holder of the intermediary, has its domicile in a jurisdiction which is not a Contracting State."

ARTICLES 21 and 22

As previously stated in our comments to articles 9.4 and 11, the right to disposition of the collateral by the "collateral taker" and the other cases mentioned therein, are in contradiction with our legislation. Our law only contemplates the possibility (except certain particular cases) of executing the collateral as per a warrant issued by a competent authority, and not as per the instruction of the collateral taker and never gives the "collateral taker" the right to use the collateral.
However, this would not cause any inconvenience since such incompatibility can be avoided through the provision stated in article 23.