Colloquium on “The Law of Securities Trading in Emerging Markets: Lessons Learnt from the Financial Crisis and Long-term Trends” – Rome, 6 and 7 September 2010-09-13

Closing remarks by Professor Berardino LIBONATI, President of UNIDROIT

Distinguished delegates and speakers,
Ladies and Gentlemen,

It is a privilege for me to address you at the closing of this important Colloquium.

The subjects you have discussed have figured among my preferred topics of research in my forty years of academic life as a scholar and professor of commercial law. From my first book on holding and investment trusts in 1959, to the course on commercial law which I published last year, I have kept on coming back to the fascinating and somehow perplexing notions and legal concepts that explain and govern the creation and transmission of wealth in the form of negotiable instruments and investment securities.

Over time, my professional experience as a practising lawyer, arbitrator and member of the board of various corporations and financial institutions have given me invaluable practical insight to my theoretical understanding of capital markets, bankers, traders, regulators and their behaviour or misbehaviour.

Yet, as a scholar and professor, I have never ceased to approach this area of the law with the respect due to its intricacy, which has exhausted the energies of many gifted lawyers. Ten years ago, I expressed that feeling in a book on negotiable and financial instruments by making mine Clotaldo’s words in the first act of Calderón’s *Life is a Dream:*

> “*What a labyrinthine thicket*
> *Is all this, where reason gives*
> *Not a thread whereby to issue?*

So I must confess to my personal hesitation, years later, when chairing the session of the UNIDROIT Governing Council during which it was agreed to set up a Study Group on private law aspects of transactions on transnational and connected capital markets. Being at that time Vice-President of the largest Italian bank, I was only too aware of the pressing need for legal clarity felt by an increasingly globalised industry. At the same time, I could not but feel misgivings at the magnitude of the task ahead of us, in such an extraordinarily complex area of the law, paradoxically characterised by rapid technological and market development and a cumbersome heritage of ancient legal concepts.

Indeed, many aspects of the law of negotiable instruments, of which most legal concepts were extrapolated to govern contemporary financial instruments, have their origins in mediaeval times, several centuries before the major continental codifications.

Financial instruments still share with bills of exchange and promissory notes the basic function of being instruments for the mobilisation of wealth, and are thus *"main levers of Capitalism"*, to borrow the words of the Marxist school.

However, the complex structure of financial markets, and the rapid technological developments that have led us from immobilisation to dematerialisation of financial instruments, raised a number of new questions for which special rules were needed. While the general affinity of purpose still made the law of negotiable instruments in some respects a useful source of inspiration to deal with lacunae of the law on financial instruments, it was clear that rules typically developed for the documentary forms of negotiable instruments capable of physical possession were not easily applicable to financial assets circulating in large quantities and changing owners several times a day through book entries in electronic registries.

Each legal system had over time proceeded to develop its own framework for the creation and circulation of dematerialised financial instruments. Most had done so by adapting traditional concepts, some by creating new legal categories to deal with the phenomenon of intermediation in securities markets. The result at the international level, as we know, was a fascinating but hardly coherent mosaic of legal theories and concepts governing the rights of investors and their relation to intermediaries and issuers of securities.

The Geneva Convention represents a major contribution by UNIDROIT to enhancing cross-border legal certainty in securities trading. Some of the Convention's provisions may appear foreign to lawyers from some legal systems. By focusing on the functional equivalence rather than the harmonisation of legal concepts, the drafters of the Geneva Convention have created a legal framework that permits the interoperability of widely diverging systems.

We all know that the Geneva Convention governs only some of the private law issues related to the holding, transfer and collateralisation of securities held through intermediaries and that it leaves room for domestic adaptation in a number of important matters.

An unfortunate twist of fate caused the first session of the diplomatic Conference, in September 2008, to coincide with the most dramatic moment of the financial crisis. The need to prepare an official commentary to the Convention and the resulting pause in the negotiations gave ample time to examine whether UNIDROIT could have gone further and introduced into the Geneva Convention rules that would have prevented systemic risks and the collapse of financial institutions in the future.

It is understandable that regulators and lawyers, traumatised by the worse financial crisis since the Great Depression, should seek every possible opportunity to reassure themselves of the soundness of their recent work and investigate the weaknesses of the existing system.

We should not lose sight of the fact, however, that private law was not at the heart of the financial crisis, and that there is little that rules of private law could have done to prevent it. It is therefore with the same confidence in the wealth of knowledge and experience brought to bear on their work by the drafters of the Convention that I venture to say that they have gone as far as they could and that with this text UNIDROIT has reached the limit of what a private law convention can realistically hope to do to enhance legal certainty in this complex area. Nothing will replace sound regulation, diligent financial markets oversight and robust enforcement mechanisms.

A perfect world is still a dream, and “even dreams themselves are dreams” as Sigismund says at the end of the second act of Calderon’s play.

That does not mean that the work done on the Geneva Convention may not be usefully supplemented by principles and recommendations in a number of related areas not directly covered by the convention. This, of course, was the main purpose of your deliberations these past two days.

I take note with great interest of the various suggestions that have been made concerning a possible future contribution by this Organisation to enhance the legal framework for securities trading in emerging markets.

Thinking back at the time when I used to visit this library as a law student, I now feel proud to preside over an institution that is respected not only for its age, but also for the vitality testified by its ground-breaking work. None of that would be possible, of course, without the invaluable contribution of the outstanding legal minds that participate in its work, and without the high spirit of compromise and cooperation shown by the Government delegates who negotiate its instruments.

I owe them all, and all participants in this Colloquium in particular, the expression of my deep gratitude and appreciation.

Thank you!